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JOURNAL OF LEGAL, ETHICAL AND REGULATORY ISSUES

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LETTER FROM THE EDITORS

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We changed the name of the journal to better reflect our broader mission. Readers should note more clearly now that our mission goes beyond studies involving business law or the effect of legislation on businesses and organizations. We are also interested in articles involving ethics. We would like to publish more manuscripts dealing with the ethical environment, business ethics and the impact of ethics on organizations and businesses. In addition, we invite articles exploring the regulatory environment in which we all exist. These include manuscripts exploring accounting regulations, governmental regulations, international trade regulations, etc., and their effect on businesses and organizations. Of course, we continue to be interested in articles exploring issues in business law.

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LEGAL ISSUES

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RES IPSA LOQUITUR: POLITICAL AND ETHICAL RESPONSE TO LEGAL DEBATE

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ABSTRACT

Res ipsa loquitur. This Latin phrase pertains to one of the most unsettled and unsettling legal doctrines encountered within the business sector. Classified as a Special Negligence doctrine, it allows for an inference of negligence based upon circumstantial factors alone. The essay which follows situates res ipsa within the context of the type of cases most likely to invoke its application. And in order to understand why the doctrine has been incorporated within the American legal system, there is a review of res ipsa's Nineteenth Century British roots. Four state's courts (Michigan, Ohio, Kentucky and Tennessee) are selected, and some seventy of their judicial cases are examined, to identify exactly how res ipsa has been interpreted and perpetuated. What emerges are serious inconsistency and uncertainty. Several major issues repeatedly surface and necessitate a much lacking legal analysis. But these same issues are also significant in that they reflect an underlying political and ethical philosophy which mirrors how the United States views itself as a participatory democracy. This may well account for the fact that res ipsa survives despite its otherwise record of weak definition, frequent rejection by higher courts and regular criticism by judges and scholars. Today's challenge is to present res ipsa to the academic community in such a way as to invite research into what contributes res ipsa's flaws, and into how these same flaws may be balanced by evidence of res ipsa's political potential.

INTRODUCTION

The Problem

Among the most problematic legal doctrines for today's business community is that referred to as res ipsa loquitur, a phrase literally rendered as, "the thing speaks for itself." Black's Law Dictionary offers a succinct definition of res ipsa as "a rule of evidence whereby (the) negligence

of (an) alleged wrongdoer may be inferred from (the) mere fact that (an) accident happened." Because of the occurrence of such an accident, what is 'spoken' is an array of circumstantial factors. And it is on the basis of a legal analysis of those factors in their relationship to plaintiff and defendant, that staggering judgments may be pronounced against such organizations as health care facilities, the transportation industry (especially related to aviation), pharmaceutical companies and manufacturing firms.

But res ipsa, classified as a Special Negligence Doctrine, is rife with difficulties. The authors of Business Law Today (2000, 116-117), Miller and Jentz, typify scholars who recognize that res ipsa is called upon "when negligence is very difficult or impossible to prove." In those instances, negligence is inferred "simply because" an event took place which is of the kind "that would not occur in the absence of negligence."

Even this cursory introduction to res ipsa immediately raises significant questions. Despite res ipsa being applied "only in rare cases" (Allison and Prentice, 1994, 447), why is it applied at all? Matthew R. Johnson, advocating that res ipsa may actually assist in proving strict liability in tort cases involving manufacturing defects (1997, 1202), emphasizes that among the entire American states only Michigan, Pennsylvania and South Carolina officially reject res ipsa. Still, Michigan uses the doctrine minus that recognition. Pennsylvania allows for an analogous doctrine, and South Carolina permits that negligence may be proven inferentially. Res ipsa is de facto entrenched. However, mere existence is no guarantor of legitimacy. There are more than a few legal thinkers who concur with another Latin version, one which reads: Res ipsa loquitur, sed quid in infernos dicet?" ("The thing speaks for itself, but what the hell does it say?") See page 231 of Prosser, Wade and Schwatz's Torts, 2000.

What does res ipsa actually say? That circumstantial evidence may be assigned exceptional legal value, possibly beyond what it usually merits in other contexts. Or that reason exercised as deduction may operate without factual reinforcement. Or that a defendant may incur serious liability without a scintilla of indication that they acted wrongly (e.g. in violation of any form of duty of care). Or that a plaintiff may acquire a handsome financial judgment "simply because" they were party to an accident.

The process of res ipsa logic almost seems to consist of these steps. There was an accident. Plaintiff was a victim. Plaintiff was not responsible. Defendant was also present somehow. Defendant must be responsible. Defendant must pay. Over simplified? Perhaps, as shall be determined. But it is a logic which begs numerous issues, among them, reliability, consistency and fundamental fairness.

Essay's Intent

This essay proposes to examine the origins of the res ipsa doctrine, its adoption by United States' courts and its manner of evolution within the American judicial system. As might be

expected, there is a protracted debate throughout the legal community about whether or not res ipsa should be retained. Certain parameters of that debate need to be identified. Matthew Johnson, already cited as pro-res ipsa, is countered by a lengthy list of opponents. As early as seven decades ago, C. J. Bond voiced his dissent to res ipsa in Potomac Edison v. Johnson, 160 Md. 33; 152 A. 633 (1930). His view is persuasive for many. Res ipsa "adds nothing to the law, has no meaning …. and brings confusion to our legal discussions. It does not represent a doctrine, is not a legal maxim, and is not a rule."

Given res ipsa's durability despite intense controversy, a second purpose of this essay is to consider alternative political rationale to explain why most legislatures have not formally discarded res ipsa. Could it be; for example, that law makers at least implicitly apprehend that res ipsa may continue to embody premises and ideas that are intrinsic to our nation's primary convictions about democracy ? However contradictory or impractical res ipsa's portrayal, the possibility must be considered that res ipsa reflects some positive measure of the tenacity and instincts of America's political identity.

Methodology

The core elements of res ipsa will be identified in terms of the first known cases to have employed the phrase with reference to negligence. Interestingly, these cases derive from the English courts of the Nineteenth Century. Via Wigmore (1905), res ipsa made its U.S. debut and has stayed as an actor on the judicial stage. How such a transition impacted res ipsa will be addressed.

What follows is an overview of select cases spanning several decades, intending to show how res ipsa has been applied in the state courts of Michigan, Ohio, Kentucky and Tennessee. On another level, these states comprise the federal Sixth Circuit. The focus; however, is primarily upon the decisions rendered by these four states' proper courts. There is a common opinion that the federal alignment of states into circuits stems from an understanding that they inherently share a range of social, cultural and historical commonalties. Presumably accurate, these states should then enable a manageable negotiation of essentially comparable data. Adequate investigation of the remaining forty-six states would be as voluminous a task as it is unnecessary. These states were chosen because they involve societies that are highly industrialized, unionized, urbanized and commercialized (Michigan, Ohio), another that rates as moderate according to this same scale (Tennessee) and one which is arguably less similar in its economic base (Kentucky). Purported similarities combine with dissimilarity. The Sixth Circuit yields a microcosm of what might be expected were this study to be extended across the country.

This compendium of representative judicial decisions will then permit the legal debate to be assessed according to a series of political and ethical implications.

RES IPSA: CURRENT SETTING AND HISTORICAL ROOTS

Contexts

Res ipsa's very abstract and rather obscure tenor can be concretized somewhat by referring to various examples which illustrate when the doctrine may be invoked.

Think of a hospital. John, a patient, has had surgery. He now suffers from a serious infection due to a small sponge which was left in his body during the operation. But who failed to extract the sponge? Any member of the surgical team might be culpable, but there are neither evidence nor witnesses to narrow the search beyond that general admission. The team's doctors, nurses, etc., may be sued on the strength of res ipsa.
Now imagine that Jerry enters an elevator in a company's office building. Suddenly, the elevator unexpectedly stops between floors and Jerry is hurled to the floor. He dislocates a shoulder and is bruised about the face. Who is responsible? The maintenance staff? The group which sub-contracts to regularly inspect and repair the elevator? This remains unknown. Under res ipsa, Jerry may sue the company in charge of the office complex.
An airplane crashes. A thorough investigation ensues. There is no evidence that the pilot erred or that the plane malfunctioned or that there were defective instruments or that there was sabotage. Who or what is to blame? Zero answer. But any survivors or families of the deceased may sue the airline owing to the provisions of res ipsa.
Shirley passes near a scaffold which has been erected to lift materials to the top floor of a construction project. She obeys the signs which instruct her to keep a safe distance from the scaffold itself. But, as she walks she is struck by a falling hammer, and receives injury to her spine. There are no witnesses. No person was on the scaffold at the time. Res ipsa allows Shirley to file suit against the company directing the construction venture.

In the above examples it is impossible to establish with certainty who, if anyone, is responsible for the tragedies. There is no factual evidence. There are no individuals who may offer testimony. Yet, the victims, as plaintiffs, may potentially recover from the respective defendants. Has a defendant no possibility to argue against the tenuous though formidable assailant which is res ipsa? A clarification of the origins and core elements of res ipsa is beneficial.

English Legal Parentage: The Phrase - The Principle

Phrases such as "res loquitur ipsa" and "res ipsa dixit" are prevalent among ancient writers, notably Cicero. And according to Winfield and Jolowicz as cited by Zanifa McDowell (2000, footnote 13), a forerunner of the principle of res ipsa is seen in the 1809 case of Christie v. Griggs

(discussed anon.). However, it took another fifty-four years before the Latin phrase first appeared, in another English case, Byrne v. Boadle, 2 H & C 722; 159 Eng. Rep. 299 (1863).

Byrne deserves further attention. The plaintiff asserted hat he was walking in a public street. As he passed the defendant's shop a barrel of flour fell from a window. Plaintiff was knocked down and sustained serious injury. In the legal proceedings which followed, the plaintiff obtained a rule nisi. Charles Russell argued; first that there was no evidence to connect either the defendant or his servants with the event and second, there was no evidence for the jury to assess negligence. "There was not even evidence that the barrel was being lowered by a jigger-hoist as alleged in the declaration."

Chief Baron Pollock, with concurring opinions of Barons Bromwell, Channell and Pigott, stated that:

(1).	There is a presumption that the defendant's servants were involved in removing the defendant's flour, unless the defendant could prove the contrary.
(2).	It is apparent that the barrel was in the defendant's custody and that the defendant is responsible "for the acts of his servants who had the control of it."
(3).	There are cases, comparable to this one, where the courts have declared "that the mere fact of the accident having occurred is evidence of negligence" (e.g. cases of railway collisions).
(4).	Since "a barrel could not role out of a warehouse without some negligence," requiring a plaintiff to call witnesses from the warehouse to prove that negligence "seems preposterous."
(5).	The fact of the barrel falling is prima facie evidence of negligence.
(6).	The injured plaintiff need not show that the barrel could not fall without negligence.
(7).	It is up to the defendant to prove "any facts inconsistent with negligence."

Pollock's resolute position can and should be challenged. For example, he refused to consider the possibility that a person other than the defendant's servants may have moved the flour barrel. Nor is it automatic that the happening of an accident equates with negligence. If a modern car encounters dark ice on a wintry road (a road under the supervision of a municipal commission) and goes out of control, does this mean that there is negligence? Not necessarily. And should one conclude that Boadle's barrel moved solely due to negligence? Might the force of activity in the building, unknown to the defendant or his servants, have caused the barrel to shift? Why must the scale of presumption invariably tilt against the defendant without evidence disposed toward that slant? Moreover, for Pollock, having custody of the barrel was synonymous with having absolute control of it. One might then inquire whether it is reasonable to argue whether control is always

absolute. Is it more realistic to suggest that that control which equals custody admits of degree? If so, then the defendant's custody of the barrel and his having control of it may allow for an elasticity greater than Pollock recognizes. How could the defendant prove, for example, that a strong and uncommon gust of wind may have caused the barrel to escape the grasp of its ordinarily vigilant keepers? Such would be impossible to prove. Again, the thinking of Pollock is that the plaintiff is not bound to prove anything. But the defendant must prove those facts which contradict the likelihood of negligence. In short, Byrne results in an insistence that such a case "should be allowed to reach the jury on the issue of negligence by proving the circumstances of the accident itself, because they bespeak negligence even without a more specific showing of the chain of events (J. Glannon, 1995, 101)."

Glannon asserts that res ipsa is "really not a separate principle, but rather a special form of circumstantial evidence." As with circumstantial evidence in general, res ipsa, he says, is tantamount to the realization "that facts can sometimes be inferred from other facts (idem)." In light of Byrne, alternative inferences can also be drawn from those same facts, despite Pollock's adamancy to the contrary. Nor must one agree with Glannon `a la Pollock that facts are inferred from other facts. An inference is exactly that, a tentative statement predicated upon fact. Inference is not a statement equivalent to fact itself.

Res ipsa's judicial genesis is fraught with dubium and uncertainty. Still, the rule of Byrne soon after surfaces in a decision by Chief Justice Earle, that of Scott v. London & St. Katherine Docks Co., 3 H & C 596; 159 Eng. Rep. 665 (1865). It is this case which sets the two criteria required for what becomes traditional res ipsa application; criteria which extend into the contemporary era. Scott establishes that:

(1).	The accident's cause is "shown to be under the management of the defendant or his servants."
(2).	"The accident is such as in the ordinary course of things does not happen if those who have the management use proper care."

Aaron R. Parker notes that the original application of res ipsa meant that, "under the circumstances of unusual accidents, the injury was more likely than not the defendant's fault (2000, 703)." What is lacking from the judicial sources of that period is express definition of what constitutes an unusual accident. Is the status of unusual governed by frequency? Or could there be other contenders for the appellate of unusual? The English courts are silent. Nor do they help us to comprehend the exactitude of 'proper care'. For example, does proper care correspond to our oft heard notion of 'duty of care'? Admittedly, by 1865 there is a lineage of English cases which discusses proper care within relationships of privity. But is that same version of proper care realistically applied to both privity and non-privity situations, and which are all further described

as unusual? A primary question - left unanswered - is whether the unusual nature of an accident may actually mean that it can occur despite the best efforts of a defendant to exercise proper care? In other words, is proper care to be viewed similarly in each and every context? Scott implies an affirmative response, a response which is at least arguable.

Since no latitude was permitted in determining how proper care by a defendant could be adjusted in the instance of an unusual accident, a subsequent case is hardly surprising. In Wakelin v. London & S.W. Ry. Co., 12 A. C. 41-46 (1886), the defendant's train hit and killed the plaintiff's deceased. There was an unobstructed view of the track, and no specific evidence that the defendant had committed any negligent act or omission. A jury found in favor of the plaintiff. However, a very perceptive Lord Halsbury explained why that verdict was overturned by the House of Lords. The facts demonstrate, he said, that the man died due to contact with the train. But "is there anything to shew that the train ran over the man rather than that the man ran against the train (cited by Epstein, 1990, 249)?" Lord Halsbury identifies a problem in the move to expand the res ipsa doctrine, persuasively demonstrating that the circumstances of an accident, even an unusual accident, change radically where another no less reasonable perspective on that accident is introduced. Judicial discomfort with res ipsa is here to stay. Despite Lord Halsbury's critique, A. R. Parker correctly observes that res ipsa did expand and embraced cases where passengers were injured at the hands of a carrier (supra).

Prosser, Wade and Schwartz's Torts (ibid., 232) relates an 1870 development which strongly, and adversely, influenced the English evolution of res ipsa. Again in the domain of carriers, it is said that res ipsa "became entangled and confused with an older and quite different rule." The case of Christie v. Griggs, 2 Camp. 79; 170 Eng. Rep. 1088 (1809) is cited to convey how Sir James Mansfield stated that a carrier bears a burden to prove that any injury was not caused by its negligence. Commentators and subsequent legal decisions explained this by referring to the carrier's special responsibility on account of "its contract to transport the passenger safely." It is said that the principles of res ipsa and that of the carrier's burden of proof "became ultimately merged in cases of injuries to passengers under the name of res ipsa." The net result is a prolonged blur. No explanation seems forthcoming to justify why such an intermingling transpired, or why the matter was not corrected by later legal authority.

Res Ipsa Crosses an Ocean

Initial Dynamics

Epstein (ibid., 249) seems to credit the first edition (1905) of Wigmore on Evidence (sec. 2509) for introducing America to the basic conditions for applying res ipsa. No reason, possibly beyond an appeal to common law, upholds why the U.S. legal system was expected to approve and adopt usage of res ipsa (Johnson, ibid., 1201). But in the wake of Wigmore, the traditional

conditions for res ipsa assumed a standard form which is associated with Prosser & Keeton (Epstein, supra at 250). Hence, the conditions normally read:

(1).	"The event must be of a kind which ordinarily does not occur in the absence of someone's negligence."
(2).	The event must be caused by an agency and instrumentality within the exclusive control of the defendant.
(3).	"The event must not have been due to any voluntary action or contribution on the part of the plaintiff."

Affinities with res ipsa's English predecessors are discernible. For example, in the words "ordinarily does not occur," there are echoes of the 1865 language, "in the ordinary course of things does not happen." And the cause as tied to the "agency and instrumentality …. of the defendant," is reminiscent of Earle's "under the management of the defendant or his servants." But there are also subtle differences. Prosser's "in the absence of someone's negligence" is close, but not exactly what Pollock (1863) had in mind when connecting a "duty …. to put (the barrel) in the right place" and "prima facie responsibility." Nor is Prosser's version identical with Earle's (1865) "use (of) proper care" by management. Some scholars may well contend that such duty and proper care phraseology is rendered by Prosser as "exclusive control of the defendant." As suggested previously, this author disagrees, believing that proper care stems from such exclusive control, and that care and control are not synonymous.

Harry R. Cheeseman (1998, 87) reflects those American thinkers who stress that with res ipsa "the burden switches to the defendants to prove they were not negligent." This mirrors Pollock's demand that those duty-bound must state and prove any "facts to rebut the presumption of negligence." Pollock, it should be said, rather anticipates the post-1870 confusion of principles addressed by Schwartz et al. (ibid., 232).

Prosser's third requirement is not found in all jurisdictions. As may be expected, such an inconsistency becomes problematic. One need only recall the case of Giles v. New Haven, 228 Conn. 441; 636 A. 2d 1335 (1994). Here res ipsa did apply despite the plaintiff's conduct having contributed to their own injuries. The jury utilized comparative negligence theory to assess plaintiff's conduct. Glannon (ibid. 105) claims that this third is really not a separate requirement, but merely another device by which a plaintiff can establish that an accident was the result of negligence properly attributable to the defendant. The debate goes on.

The Uniformity Dilemma

Obviously, there are significant elements of departure, however subtle, in the transition of res ipsa from England to the United States. And there is a noticeable lack of uniformity, as with Prosser's third condition, stated in the preceding paragraph. But it is this very lack of uniformity which fuels the legal dilemma. For example, some jurisdictions will permit res ipsa to be used in products liability cases, and with what consequences? In Jogmin v. Simonds Abrasive Co., 61 Wis. 2d 60; 211 N.W. 2d 810 (1973), the Wisconsin Supreme Court introduced a modified version of res ipsa, deciding that causes of injury are excluded, except for a cause tied to an original product defect. This implies that state courts enjoy unrestricted liberty to produce their own version of res ipsa as deemed appropriate for a unique situation. Here one must inquire about the process in which a state court, final instance included, makes or remakes law. Isn't a state court's competence to generate tort law through judges (common law) expected to comport with the mindset of its legislature (statutory law)? To what extent did the Wisconsin Supreme Court act in accord with the outlook of the Wisconsin legislature? To what extent is that court empowered to guide only by its own inherent light? Was it truly necessary and prudent for that court to produce a modified version of res ipsa? There are, then, understandable issues of judicial discretion, and of the wisdom of assuming a course of action wherein the want of an immediate and expedient solution may surpass the want of critical discussion about the long range implications and impact of that solution.

Legal debate surrounding res ipsa, already mired throughout the doctrine's historical evolution, inevitably escalates as legal scholars counsel res ipsa's expansion. It is Matthew Johnson's conviction that res ipsa predates strict liability laws by a century, "but the doctrine's inferential premise is equally well suited to the negligence and strict liability fields (ibid., 1254). The Wisconsin Supreme Court decidedly concurs. This and other courts, as well as legislatures, might endorse his view that res ipsa and strict liability in tort for defective products "may appear to be distinct legal constructs, yet both spring from the same doctrinal foundation in that they assist plaintiffs in establishing liability when direct proof is beyond their reach (ibid., 1197)." Caution. Is that "same doctrinal foundation" reducible to the assistance it enables for said category of plaintiffs? If so, then res ipsa should be broadened still further, so as to incorporate every plaintiff in every context who is troubled by a deficit of direct proof. How much more content is there in that "same doctrinal foundation?"

Johnson's essay, while informative and provocative, rather skirts this crucial point. But it is this very point which is found in the 1995 draft of the Restatement (Third) of Torts. There it is said that "strict liability….performs a function similar to the concept of res ipsa….allowing deserving plaintiffs to succeed notwithstanding …. insuperable problems of proof. (supra at footnote 5)." As with Johnson, the drafters are content with res ipsa's functional convenience. Whether that function complies with other dimensions of res ipsa's doctrinal foundation remains unknown. Dread the thought that the drafters may believe that res ipsa is minus other bases of doctrinal foundation.

Or is it simply enough that plaintiffs are deserving, deserving meaning that they are bereft of easier access to proof? This author holds that justice necessitates that each plaintiff be granted their opportunity to seek legal recourse. Justice does not promise a precise judicial outcome. This rendition of 'deserving' tends in the direction of wanting to compensate for possible threats to a desired result. Why would drafters have opted for so arbitrary and non-objective a descriptive as 'deserving'?

Restatement (Second) of Torts: Res Ipsa's Problems Compound

Section 328D of the Restatement (Second) of Torts (1965) presents a view of res ipsa which is more expansive than that stated by Prosser & Keeton. Similarly, both texts preserve the notion that res ipsa allows for an inference of negligence. Both refer to an event which does not normally occur in the absence of negligence. And both emphasize that conduct of the plaintiff may not be a cause of the event. The Restatement adds; however, that the conduct of third persons should also be eliminated as a causative factor. The Restatement further includes that the negligence "is within the scope of the defendant's duty to the plaintiff." One cannot help but recall the 1865 statements by Chief Baron Pollock who so strongly accentuated the duty aspect. With the Restatement, duty returns and with it all of the argument, the variable precedent and the diverse scholarly and judicial interpretation which 'duty' has hitherto acquired.

The Restatement continues by acknowledging that it is the role of the court to determine whether the inference of negligence "may be reasonably drawn, or …. necessarily drawn" by the jury. Apparently, this indicates that res ipsa's application is on a case by case basis. But the distinction between reasonably and necessarily invites a needed articulation of appropriate criteria. Finally, the jury may consider whether or not to apply res ipsa "in any case where different conclusions may be reasonably reached (Epstein, ibid. 250)." Lord Halsbury (1886) would surely be amused. Remember that he disqualified res ipsa owing to an alternative conclusion. One wonders how a jury accepts the reasonableness of 'different conclusions'. What is suggested is that res ipsa may be applicable regardless of any rationale about inaccessibility of proof, defendant's control and such like. Different conclusions could obliterate these facets of traditional res ipsa and yet not obliterate use of the doctrine itself. How is a jury to be expected to comprehend inference according to res ipsa? Or is it enough that any inference having to do with negligence now suffices? The Restatement inclines to muddle already troubled legal waters. What is awkward is that states incorporated the Restatement either in its entirety or in part, and revised or augmented the Restatement as per their needs. As for res ipsa, these numerous metamorphoses are variants on a doctrine which is increasingly separated from anything that could be called its fundamentally original nature. Indeed, do some of these state byproducts, although labeled as res ipsa, still qualify as res ipsa? And if so, how and why?

Much commentary has been expressed concerning the general position of the Restatement (Second). Johnson, for example, observes (ibid. 1247) that the Restatement no longer speaks in terms of the defendant's exclusive control. The plaintiff establishes, instead, that the probable cause of the accident was "one which the defendant was under a duty to the plaintiff to anticipate or guard against." Johnson also points out that the net result of the Restatement was that by 1997 three tests of res ipsa were in place throughout the United States: the traditional test, a modified traditional test and the Restatement (Second) of Tort's test (idem, 1246). Previous remarks about 'modified' not withstanding, it is easy to imagine that quandary which is generated by the Restatement's rather lenient bid that a plaintiff now needs only "to exclude other possible causes of the injury in order to make it more probable that the defendant's conduct caused the harm (idem, Footnote 195). "More probable," though rather more compatible with the civil standard of 'preponderance', seems more fluid than the kind of near certainty associated with inference as portrayed by traditional res ipsa. Consequently, the matter is now one of more or less probability, an analysis that is in search of some reliable measure to at least ascertain when a defendant has crossed a yet to be defined legal threshold. When is a defendant's conduct more probably liable for negligence? Again, with apologies to the preponderance standard, can there be defendant conduct which is just short of rising to the degree of "more probable;" or is there a sufficiency of less probability that absolves of culpability? Presumably, as with preponderance, the trier of fact balances the probability scale. If that is true, "more probable" is a bit hazy.

Nor is the fate of res ipsa ably assisted by the logic of those who promote "common experience" as the index for when it is viable to invoke the inference of negligence. The Missouri case of Crump v. McNaught P.T.Y. Ltd., 743 S.W. 2d 532 (MO. Ct. App. 1987), states that "if common experience suggests an event would not occur absent a defect, then a defect can be inferred." Regardless that the context is product liability, the common experience lens of res ipsa prompts question, at least theoretically. How is common experience defined? Are there criteria to establish when common experience does or does not exist? How common must that experience be? There is definitely a potential for inquiry. And it is not irrefutably resolved by reference to that knowledge which is said to be common to the community. Courts do habitually take judicial notice of facts which everyone knows, and which stem from the community's past experience. But are common knowledge and common experience interchangeable? The Restatement implies that they are. Consider. A community may never have experienced a cyclone, but there is common knowledge that the community hopes to avoid a cyclone's visit. Returning to the defect case, how common is the community's experience of product defect? If it is so common, then a jury of reasonable persons would hardly benefit from the efforts of a defendant to introduce evidence or expert testimony.

A Restatement, while not a species of law per se, serves as an influential guide for many judges and states. Indeed, as indicated previously, the Restatement, especially the Second, has entered the statutory life of numerous states to a greater or lesser extent. As with other

Restatements, this publication of the American Law Institute proposes an orderly presentation of the general law. From the perspective of res ipsa, the Restatement may be read for what it discloses about why res ipsa disposes itself to ever increasing controversy.

Summation: Doctrinal Integrity - State Courts' Rights and Identity

It is a well established fact that state courts and state legislatures are entitled to express the uniqueness of the populations which they serve, and the sovereignty which their history, culture and aspirations confer. Even the obligations of federalism do not extinguish the rights and identity of individual states. Think of any legal doctrine and it has been subject to the crucible of state adaptation. An example which comes to mind is contract law. If one was to research the legal repertoire of every state, the interpretations, modifications, applications, extensions, etc., would exhibit countless differences. An overall comparison would reveal inconsistencies, contradictions, rejections, inclusions, exclusions, and so on and so on. But the basic elements of contract remain. Wherever, the elements for validity of contract law pertain to offer, acceptance and consideration. Tenets such as "meeting of the minds" or requisite mental capacity may be construed broadly, but at the day's end these tenets are recognizable despite changes in their legal apparel. Can the same be said of res ipsa?

The preceding pages argue that a negative answer must be offered to this question. The components of res ipsa have been so altered or dispensed that res ipsa can be applied if one or more is missing. Sometimes, for the majority of courts, res ipsa creates nothing more than a permissible inference. For other courts, the procedural effect amounts to a presumption, which leads to a directed verdict if the defendant provides no evidence by way of rebuttal. Still, only sometimes does res ipsa impose a burden of proof upon the defendant. Sometimes the defendant has exclusive control. Sometimes not. Sometimes the plaintiff must be declared free from contributing to the accident. Sometimes not. Sometimes res ipsa demands a duty of care. Sometimes not. Sometimes alternative reasonable conclusions bar res ipsa. Sometimes not. What is left as res ipsa's core?

From the onset of res ipsa's legal engagement, it has been plagued by imprecision and suspicion about the credibility of its doctrinal contents. Certain scholars may contend that the very inference of negligence itself, as a means to approach a jury, is a factor which does endure. But the persistence of even this concept is debated. As noted above, are we working with an inference or with a presumption? And can negligence be inferred where specific negligence is otherwise claimed? Unlike the constitutive features of contract law and their legitimate adjustment by states, res ipsa is void of what it must entail. For all practical purposes, res ipsa can mean whatever a court or legislature chooses for it to mean. This is not just a matter of state and judicial appropriation of a legal doctrine, it is an ongoing redefinition of that doctrine's essence. Inherent doctrinal integrity is not being accommodated or challenged; it is being denied. There is absolutely nothing about res ipsa, save the name, which is spared from concession and compromise.

THE SIXTH CIRCUIT

The Sixth Circuit, as a microcosm of res ipsa's judicial determinations, furnishes state cases spanning more than eighty years. How has res ipsa fared throughout this period?

Michigan

It will be recalled from a prior section that Michigan has not formally adopted the res ipsa doctrine. However, Michigan courts have, at times, actively embraced its principles and concepts.

One of the first modern cases to refer to res ipsa is the 1952 Supreme Court decision, Pattinson v. Coca-Cola Bottling Company of Port Huron, 333 Mich. 253; 52 N.W. 2d 688. The case pertains to a 1947 occurrence when a plaintiff waitress' hand was injured when a bottle exploded due to excessive internal pressure. The trial court ruled in favor of plaintiff, Mildred Pattinson. The Supreme Court upheld that verdict. In affirming the lower court decision, the Supreme Court summarized Michigan's legal stance. What is pertinent is that the Pattinson decision asserts:

(1).	that neither the state of Michigan nor the court have adopted the res ipsa rule;
(2).	that the happening of an accident alone is not evidence of negligence; but
(3).	that negligence may be based upon circumstantial evidence or "within the field of legitimate inferences from established facts."

The courts cited some twelve cases as precedent for its decision. In the 1957 case of Higdon v. Carlebach, 348 Mich. 363; 83 N.W. 2d 296, the Supreme Court reversed and remanded a prior decision for defendant dentists. The case related to the slip of a separator disk on a dental drill which struck plaintiff's tongue. Throughout the process she is said not to have moved her tongue or head. In this instance:

(1).	The Supreme Court was divided about whether the rule of res ipsa should be applied or not.
(2).	The Justices claimed that it was accurate to state that Michigan courts "apply res ipsa loquitur as we primarily deny doing so," a truth "which has been perfectly obvious" for more than a decade.
(3).	When the Michigan court says that res ipsa does not prevail in this state, this simply means that "the happening of an accident is not itself evidence of negligence."

(4).	But "negligence may be established through circumstantial evidence" and this is actually "the true doctrine of res ipsa loquitur."

In 1958, Supreme Court Justice, J. Voelker, affirmed a lower court decision favoring plaintiff, C. J. Weisenberg, in his suit against the village of Beulah, a municipal corporation. The case, 352 Mich. 72; 89 N.W. 2d 490, dealt with damages caused in 1952 by water to Mr. Weisenberg's closed summer cottage. Justice Voelker, aware of Pattinson and Higdon, and aware that Michigan rejects res ipsa while applying it, proceeds "to attempt some clarification of our position with respect to this so-called 'doctrine' or 'principle'." Justice Voelker is clearly uncomfortable with the conciliatory interpretation of res ipsa proposed in Higdon, and with any idea that res ipsa can be simultaneously rejected and utilized. His belief:

(1).	The term res ipsa has no fixed meaning, but leads to "current chaos."
(2).	Res ipsa's meaning varies from jurisdiction to jurisdiction and is inconsistently applied within a single jurisdiction.
(3).	Res ipsa is "a simple statement of the logical effect of evidence in the light of ordinary experience." Nothing more; nothing less.
(4).	Dean Prosser is correct in saying that res ipsa "is used in different senses, to denote evidence of different strengths; it means inference, it means presumption, it means no one thing - in short it means nothing."
(5).	"The Latin tag should be consigned to the legal dustbin." This same view is reflected by Justice Smith in his minority opinion in Indiana Lumbermens Mutual Ins. Co. v. Matthew Stores, Inc., 349 Mich. 441; 84 N. W. 2d 755 (1957). Like Justice Voelker a year later, Justice Smith insists that "it is time to attempt some clarification" of Michigan's position with respect to res ipsa. By 1959, Justice Voelker was able to conclude, however, that by "whatever euphemisms we may choose to call it, we suspect that res ipsa loquitur is here to stay." See Mitcham v. Detroit, 355 Mich. 182; 94 N.W. 2d 388 (1959).

Subsequent Michigan cases continue to focus upon particular aspects of res ipsa thinking. For example, a 1966 case, Haase v. DePree, 3 Mich. App. 337; 142 N.W. 2d 486, refused to apply res ipsa to the alleged negligent performance of a thoracic artogram, although the plaintiff's arm was amputated. The reason? Since this procedure was "not a matter of common knowledge among laymen". No jury could conclude that such an injury resulted only from negligence. Also in 1966, the Supreme Court reversed and remanded for a new trial the case of Gadde v. Marilyn Consolidated Gas Company, 377 Mich. 117; 139 N.W. 2d 722. Justice Adams remarks upon the "endless dispute" stirred by res ipsa, and insists that problems in negligence cases should be

resolved, not by reference to res ipsa, but by application of the general law of negligence in accord with prior Supreme Court decisions. Formal adoption of res ipsa "would add nothing to the jurisprudence of this State nor to the attainment of justice." Justice Adams does; however, indicate some additional historical facts. For example, well prior to Wigmore (1905), in the 1884 case of Alpern v. Cheerhill, 53 Mich. 607, Justice Cooley commented that negligence may be inferred from circumstances and that such an inference "would be irresistible" although "there be no positive proof that the defendant has been guilty of any neglect of duty." By 1919, Justice Fellows, in Burghardt v. Detroit United Railway, 206 Mich. 545, spoke against judicial use of res ipsa, believing it to mean that the mere occurrence of an accident could be sufficient evidence of negligence to send the case to jury. As later seen, the problem is one of res ipsa's definition and interpretation.

Like Gadde, the 1967 case of Powers v. Huizing, 9 Mich. App. 437; 157 N.W. 2d 432, determined that the evidence was sufficient to sustain a finding of causative negligence without having to refer to res ipsa. The case involved a suit filed by the customers of a toboggan run against operators due to injuries incurred while enjoying the facilities. Judge Burns, of the 1969 Michigan Court of Appeals, cites Gadde's four conditions for the substantive application of res ipsa. The case is that of Rohdy v. James Decker Munson Hospital, 17 Mich. App. 561; N.W. 2d 67. It is of interest that Judge Burns says that the plaintiffs did not meet these conditions, but does not refute the suitability of plaintiffs' recourse to the doctrine. The fourth condition, infrequently enumerated, is that "evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff." The reference to actual evidence may be why Judge Burns does not directly refer to 'inference of negligence' or 'circumstantial evidence'. This certainly contrasts with Snider v. Bob Thibodeau Ford, Inc., 42 Mich. App. 708; 202 N.W. 2d 898 (1972). Here it is said that res ipsa's "underlying principle, allowing reasonable inferences to be drawn from circumstantial evidence," does apply. But Rohdy's same four conditions reappear in Waati v. Marquette General Hospital, Inc., 122 Mich. App. 44; 248 N.W. 2d 526 (1982).

We see in Wilson v. Stilwill, 92 Mich. App.227; 248 N.W. 2d 773 (1979); affd. (1981) 411 Mich. 57; 309 N.W. 2d 898, that plaintiff introduced no expert testimony to show that defendant hospital's medical treatment was either negligent or in violation of accepted standards of professional conduct. Wilson approves the continued viability of the requirement that there have been no contribution on the part of the plaintiff (condition 3). This is a bit surprising in that the Michigan Supreme Court had already adopted (1979) the doctrine of comparative negligence, thus rendering this third condition irrelevant. See Placek v. Sterling Heights, 405 Mich. 638; 275 N.W. 2d 511 (1979). Wilson also reiterates that res ipsa's "rebuttable presumption arises that defendant was negligent" upon proof that the cause of injury was in defendant's exclusive control (condition 2), and that the injury "was one that ordinarily does not occur in the absence of negligence (condition 1)." Wilson's reference to proof heralds the view that it is the trier of fact who is required to weigh such proofs, so as to evaluate whether res ipsa's inference of negligence "is avoided or explained away by the defendant." Estate of Neal v. Friendship Manor Nursing Home, 113 Mich.

App. 759; 318 N.W. 2d 594 (1982). The influence of the Restatement (Second) of Torts is conspicuous.

The opinion of Justice Boyle, writing in the 1987 consolidated cases of Jones and Dziurlikowski, is that basically res ipsa has maneuvered itself into Michigan legal life, despite lack of formal recognition. "We, therefore, acknowledge the Michigan version of res ipsa which entitles a plaintiff to a permissible inference of negligence from circumstantial evidence." Significantly, this is a case which went to prior trial on the merits of res ipsa theory. The Supreme Court affirmed the decision of the Court of Appeals in Dziurlikowski, with remand for a new trial. Besides an attitude of tolerance for res ipsa, Justice Boyle asserts that the "rule of res ipsa is limited in medical malpractice cases," such as the case in this instance. There is no presumption of negligence; for example, from the doctors' failure in diagnosing or treating a patient. Nor is there any presumption where the remedy is ineffective, where other physicians may have had better results or where the patient suffers from post-treatment aggravation. Favorable outcomes are never guaranteed. Dziurlikowski v. Morely, Et Al., 428 Mich. 132; 405 N.W. 2d 863 (1987).

Res ipsa's de facto existence is barely questioned throughout the 1990s. In the case of an injury related to the purported duty of a landlord to install a shower head which would prevent the flow of water exceeding 110 degrees, the Appeals Court rejected res ipsa's application. "The incident was not caused by circumstances within the exclusive control of the defendants." Presumably, if otherwise, res ipsa would have been appropriate. Hasselbach v. T G Canton, Inc., 209 Mich. App. 475; 531 N. W. 2d 715 (1994). The same is said in a 1995 case where plaintiffs failed to show that the cause of a gas leak was within defendant petroleum company's exclusive control. Cloverleaf Car Company v. Phillips Petroleum Company, 213 Mich. App. 186; 540 N.W. 2d 297 (1995). Res ipsa itself is not challenged. Nor is its credibility disclaimed by Justice Weaver in a case where it is said that plaintiff failed to establish a prima facie case under res ipsa theory. Plaintiff Wischmeyer sought judgment against St. Mary's Medical Center. Justice Weaver cites the 'three conditions' which a plaintiff must prove when raising res ipsa in the medical malpractice context. Wischmeyer v. George P. Schanz, Et Al., 449 Mich. 469; 536 N.W. 2d 760 (1995).

Another plaintiff was informed, also by the Supreme Court, that his res ipsa contentions were "within the primary jurisdiction of the Michigan Public Service Commission." He was definitely not discouraged from bringing res ipsa to the Commission's attention, quite the opposite. Rinaldo's Constr. Corp. v. Michigan Bell Tel. Co., 454 Mich. 65; 559 N.W. 2d 647 (1997). Finally, a plaintiff was told by the Supreme Court that the purpose of res ipsa operates when one is unable to actually prove that an act of a defendant was negligent. But the doctrine may not deal with gross negligence or wanton and willful misconduct. Maiden v. Rozwood, 461 Mich. 1206; 597 N.W. 2d 817 (1999). Not the slightest doubt was conveyed about res ipsa's normal purpose or availability. Still, in 2001, the Case Notes accompanying Chapter 257 of the Motor Vehicle Code could state that the "presumption of negligence raised by (the) former section" did not imply adoption of res

ipsa, "which is not recognized in Michigan." MCLS, section 257.402 (2001). Recognition, especially in consideration of recent Michigan cases, is a rather elastic term.

In summary, it must be said that Michigan has habitually danced to a res ipsa tune, in step with the doctrine's traditional elements, in step with the Restatement (Second)'s prescriptions. The relationship continues, as one of embrace-rejection, and is symptomatic of res ipsa's underlying definitional dilemma.

Ohio

Ohio cases, possibly because that state formally accepts res ipsa, show little judicial angst and tension over whether, when and how res ipsa may be invoked. The following Ohio cases are oriented towards explicit res ipsa issues.

As early as 1944 the Ohio Supreme Court declared that it was the province of the jury to weigh evidence and decide persuasiveness. Therefore, a court could not refuse to instruct a jury on res ipsa simply because a defendant's evidence convincingly rebuts the res ipsa inference. Fink v. New York Cent. RR. Co., 28 Ohio Op 550; 56 N.E. 2d 456 (1944). In 2001, the Ohio Appeals Court reversed a trial court's ruling because "without proper instruction, the jury was forced to speculate." Res ipsa elements would not normally "be within the knowledge of a lay jury." Walton, Et Al. v. Able Drywall Company, 2001 Ohio App. LEXIS 5154.

A theme which is regularly commented upon by Ohio judges is the situation of two equally efficient and probable causes of an injury, one of which may even be mute as to the negligence of the defendant. Res ipsa does not apply. Supportive judicial reasoning traces a lineage of some eighty years. Loomis v. Toledo Railways & Light Co., 107 Ohio St. 161 (1923). The trier of fact must be able to find one of the probable causes to be more likely than the other. Proctor & Gamble Co. v. Grupar, 160 Ohio St. 489 (1954). This view is also reflected in Gephart V. Rike-Kumler Co., 145 N.E. 2d 197 (1956 App.); Schafer v. Wells, 171 Ohio St. 506 (1961); in Huggins v. John Morrell & Co., 176 Ohio St. 171 (1964) and in Degin v. Mann and Oliver, 2001 Ohio App. LEXIS 2302.

At least since 1927, the Ohio Supreme Court has consistently declared that res ipsa is not a substantive rule of law, as if enabling an independent ground for recovery. Res ipsa is solely an evidentiary rule. A jury is not required, but permitted, to draw an inference of negligence when the premises for that inference have been demonstrated. Glowacki v. North Western Ohio Ry. & Power Co., 116 Ohio St. 451 (1927); Morgen v. Children's Hospital, 18 Ohio St. 3d 185; 480 N.E. 2d 464 (1985) and Becker v. Lake City Mem. Hosp., 53 Ohio St. 3d 202, 560 N.E. 2d 165 (1990). Consequently, it is not imperative to specifically plead res ipsa in order to invoke it. Scovanner v. Toelke, 119 Ohio St. 256 (1928). Neither do specific allegations of negligence in a complaint foreclose reliance upon res ipsa, Fink, supra at p.7 and Oberlin V. Friedman, 5 Ohio St. 2d 1 (1965). Moreover, the application of res ipsa need not alter a plaintiff's claim, but merely grants

plaintiff an opportunity to prove his/her case through circumstantial evidence. Jennings Buick, Inc. v. Cincinnati, 63 Ohio St. 2d 167; 406 N.E. 2d 1385 (1980).

In 1953, an Ohio Appeals Court granted a new trial in the case of a plaintiff who had pleaded, only in general terms, that a beauticians' company treated her in a negligent fashion. She did not allege or prove any specific act of negligence, nor explain how her injury happened. She demonstrated; however, that problematic devices were under defendant's exclusive control, and that her injury was such that would not have ordinarily occurred if defendant had exercised due care. Morrison v. Steppe's Beauticians, Inc., 94 Ohio App. 1; 115 N.E. 2d 868 (1953). Morrison tends to buttress the Ohio courts' conviction that res ipsa cases must be adjudicated on a case by case basis. That stance is consistently upheld. For example, it is primary to Jennings, supra (1980). This very influential decision reversed a judgment of the Court of Appeals owing to the plausibility that corrosion, not negligence, was likely responsible for damage caused by a break in a city's water main. Jennings is a reminder of res ipsa language that appears in this Ohio case, but which is absent, either elsewhere in the Sixth Circuit or throughout the country. Citing Loomis, supra, res ipsa is referred to as being a maxim, not as a doctrine or principle. And in Jennings res ipsa is said to be "merely a method" for proving defendant's negligence. That method rests solidly upon the shoulders of two conclusions: the exclusivity of defendant's control, and an injury being under circumstances not likely to have happened if ordinary care had been observed, Both prerequisites are set forth in Hake v. Wiedemann Brewing Co., 23 Ohio St. 2d 65 (1970). It is significant that Jennings reiterated that the criterion of "exclusive management and control is necessary only insofar as it supplies the logical basis for the inference" of negligence.

Because of the defendant's exclusive control "of the environment," the defendant has an exclusivity as to knowledge of the facts of the episode. This means that res ipsa properly shifts a burden of proof of negligence to the defendant. Kemper v. Builder's Square, Inc., 109 Ohio App. 3d 127 (1996). Kemper is among Ohio's only cases to offer a rationale for the burden shift. Note how control is subtly enlarged to include "the environment." Dimensions or limitations of what comprises said environment await clarification. Recall, too, that the Restatement (Second) does not require that a defendant must have any exclusive control over the instrumentality. Hake's two conditions are incorporated in Gayheart v. Dayton Power & Light Company, 98 Ohio App. 3d 220; 648 N.E. 2d 72 (1994). Gayheart cites Hake for its instruction about whether there is sufficient evidence to warrant a jury instruction. This "is a question of law" within the purview, first of the trial court, and "subject to review upon appeal." Hake, its reasoning and conditions habitually surface in subsequent cases. Jeffers v. Olexo, 43 Ohio St. 3d 140; 539 N.E. 2d 614 (1989). In 2001, the Ohio Appeals Court discounted res ipsa because "the record contains evidence …. that the incident could have occurred even with the exercise of ordinary care." McRoberts, Et Al. v. The Dayton Power & Light Co., 143 Ohio App. 3d 304; 757 N.E. 2d 1230 (2001).

Ohio cases exhibit an approach to res ipsa which is more coherent and consistent than in Michigan. And certain themes predominate (e.g. jury instructions, equal causes, exclusivity of

control). But Ohio's response to these themes is still not such that res ipsa acquires a firm and profound foundation.

Kentucky

Kentucky's legal cases concerning res ipsa repeat several of the major trends already presented for Michigan and Ohio. There are variations; however, which are vital. In summary, Kentucky's cases emphasize:

(1).	"The doctrine of res ipsa loquitur assumes, at least prima facie, the existence of negligence from the mere occurrence and injury." This was asserted by such relatively early cases as Loebig's Guardian v. Coca-Cola Bottling Company, 259 Ky. 124; 81 S.W. 2d 910 (1935). The proposition of "mere occurrence" has certainly been vigorously contested throughout Michigan's and Ohio's legal history. For Kentucky's Judge Stites, though, this is a matter of settled interpretation.
(2).	Res ipsa, called both a doctrine and a principle, is said by Judge Stites to apply "only to cases where the existence of negligence is a more reasonable deduction from the circumstances." Logically, the words "more reasonable" imply that other reasonable deductions could be advanced for a jury, and that plaintiff and defendant will be engaged in the customary dialectic of argument and counter-argument. The jury will decide persuasiveness. This is familiar from the discussion of Michigan and Ohio court proceedings.
(3).	Res ipsa should not be allowed to prevail where proof of the occurrence itself "rests in conjecture alone." This is compatible with the issue of causation as treated in later Michigan and Ohio decisions. Judge Stites relied in his day upon prior Kentucky precedent. Coca-Cola Bottling Works v. Shelton, 214 Ky. 118; 282 S.W. 778 (1926) and Stone v. Van Noy Railroad News Company, 53 Ky 240; 154 S.W. 1092 (1913). Collectively, the cases of Loebig, Coca-Cola and Stone show that where res ipsa is applicable, the care exercised by the defendant should be expected to "measure proportionate to the duty imposed."
(4).	The situation can arise where accident victims may not remember an occurrence. Thus, an accident can remain unexplained. This differs from "conjecture alone," and permits use of res ipsa since motor vehicle accidents, for example, do not occur in the ordinary course of events. But res ipsa never supplies evidence of willful or wanton negligence. Carter v. Driver, 316 S.W. 2d 378 (Ky. 1958)) and Stewart v. Martin, 349 S.W. 2d 702 (Ky. 1961)). This seems not to be a major concern for Michigan or Ohio.
(5).	Kentucky often invokes res ipsa in medical malpractice cases, In that context, Kentucky holds, for example, that negligence can be inferred even in the absence of expert testimony. Butts v. Watts, 290 S.W. 2d 777 (Ky. 1956)); Neal v. Wilmoth, 342 S.W. 2d (Ky. 1961); Meiman v. Rehabilitation Center, 444 S.W. 2d 78 (Ky. 1969) and Laws v. Harter, 534 S.W. 2d 449 (Ky. 1976). As with Ohio especially, Kentucky endorses

	Prosser and Keeton on Torts, Section 39 (5th. ed. 1984). Here, the common experience of ordinary laymen can determine the absence of "proper skill and care;" while for more complex medical matters, medical experts may provide the basis to apply res ipsa. Perkins v. Housladen, 828 S.W. 2d 652 (Ky. 1992). It is also possible that any necessary expert testimony may be "found in the admissions by the defendant doctor." Jarboe v. Harting, 397 S.W. 2d 775 (Ky. 1965).
(6).	Michigan cases expressed overt frustration over res ipsa's poorly defined identity, content and status. Kentucky cases are rather more implicit. But there is a definite hint that Justice Leibson feels some disgruntlement when he speaks about Kentucky's reliance upon the Restatement (Second). He believes that the Restatement's provisions are meant for "dispelling the mystery" of the res ipsa doctrine. Perkins, supra. Unlike many of the Michigan and Ohio judges who cite the Restatement, Justice Leibson prefers to directly include those 'comment' paragraphs relevant to the Restatement's passages. For example, he points to Comment b (in which a jury may infer both negligence and causation); Comment d (referring to the reliability of past experience to lead reasonable persons towards general knowledge, and which may be also supplied by evidence of the parties and expert testimony); Comment f (negligence as "more probably than not" that of the defendant) and Comment k (defendants will probably have superior knowledge of case facts because of superior opportunity to obtain it). The content of each of these same Comments is integrated throughout numerous Michigan and Ohio cases, but with far less specific attention than granted by Justice Leibson.
(7).	Kentucky recognizes that the traditional and Restatement versions are simply attempts to determine judicially and with more exactitude when a plaintiff may invoke the "common experience" argument. For Kentucky courts, common experience can be employed to infer product defect, for example, but is never available outside the realm of negligence. Kentucky has indeed "hinted at the potential availability of res ipsa in strict products liability claims (Johnson, supra at 1235)." See Embs v. Pepsi-Cola Bottling Co., 528 S.W. 2d 703 (Ky. Ct. App. 1975).

Tennessee

The most significant discussion of res ipsa in the Tennessee courts seems to relate to medical malpractice cases. The date, 1999, denotes a significant shift in the doctrine's application. Prior to that year, Tennessee courts were emphatic in their curtailment of res ipsa. A 1937 case, Meadows v. Patterson, 21 Tenn. App. 283; 109 S.W. 2d 417, ruled res ipsa to be inadmissible. It is of interest to read the requirement that the injury' s cause must be "shown to have been under the control and management of the defendant," language identical with cases later decided in both Ohio and Kentucky. But medical malpractice cases are generally excluded from Tennessee courts, says Judge Oscar Yarnell, since a physician does not insure a recovery, and because medical results are naturally uncertain. However, res ipsa is said to apply where an injured person is both

unconscious and under a doctor's exclusive and immediate control. The aspects of "exclusive control" and of an injury "which ordinarily doesn't occur in the absence of negligence" are eventually codified in Part 3 (c) of the Tennessee Code Annotated (T.C.A.), Section 29-26-115 (1980). Coyle v. Prieto, 822 S.W. 2d 596; 1991 Tenn. App. LEXIS 225. By 1991, phraseology referring to defendant's "control and management" is still widely visible, accompanied by the stated expectation that the defendant has not violated any duty of care. But also by 1991 it continues to be claimed that res ipsa should not be applied to medical malpractice actions since such actions "normally involve technical knowledge unfamiliar to the layperson." Jones v. Golden, Et Al., 1991 Tenn. App. LEXIS 900. Res ipsa is appropriate only when the alleged negligence is "common knowledge to the world." Tucker v. Metro Government of Nashville, 686 S.W. 2d 87 (Tenn. App. 1984).

Where medical devices (e.g. a plastic patella component) are alleged to be defective, yet within the scope of a doctor's duty of care, res ipsa should not be invoked. The doctrine is never a substitute for proof of defect. Browder v. Pettigrew, 541 S.W. 2d 402 (Tenn. 1976). The negligence of a defendant or their agent must be established. Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405; 158 S.W. 2d 721 (1942); Fulton v. Pfizer Hospital Products Group, Inc., 872 S.W. 2d 908 (1993).

Seavers v. Methodist Medical Center of Oak Ridge, 9 S.W. 3d 86 (1999), signals change as regards res ipsa and the Tennessee Supreme Court. Formerly, as stated, res ipsa meant that the jury had a "common knowledge or understanding" that an event producing plaintiff's injury did not normally happen save for someone's negligence. Summit Hill Assoc. v. Knoxville Util. Bd., 667 S.W. 2d 91 (Tenn. Ct. App. 1983) and Oliver v. Union Transfer Co., 17 Tenn. App. 694 (1934). The "common knowledge" standard was crucial to medical malpractice cases. Murphy v. Schwartz, 739 S.W. 2d 777 (Tenn. Ct. App. 1986). Res ipsa was prohibited where expert testimony was needed to assist the trier of fact. Drewry v. County of Obion, 619 S.W. 2d 397 (Tenn. Ct. App. 1981). With Seavers, the Supreme Court recognized that many states, including Michigan and Ohio, join expert testimony and res ipsa in medical malpractice cases. This is also the view of the Restatement (Second). Henceforth, Tennessee would now permit a similar usage of experts to establish a prima facie case of negligence under res ipsa. Successive cases fully utilize the Seavers' shift. Maine v. Willmont Health System, 2000 Tenn. App. LEXIS 252.

In non-medical cases, the Tennessee courts firmly uphold that res ipsa is inapplicable where causes other than defendant negligence may account for a plaintiff's injury. Brown v. University Nursing Home, Inc., 496 S.W. 2d 503 (1972); Psillos, Et Al. v. Home Depot, 2001 Tenn. App. LEXIS 552; Jones, Et. Al. v. Metro Elevator Co., 2001 Tenn. App. LEXIS 962. No jury should have to speculate or to make a "leap of faith" in order to find a defendant liable. Ogle v. Winn-Dixie, 919 S.W. 2d 45 (Tenn. Ct. App. 1995). The "balance of probabilities" must enable the jury to avoid that very feat. Underwood v. HCA Health Services, Inc., 892 S.W. 2d 423 (Tenn. App. 1994). Nor is res ipsa applicable where an injury could have happened in the ordinary course

of things. Armes v. Hulett, 843 S.W. 2d 427 (Tenn. Ct. App. 1992); Rasmussen v. Mrot, Inc. and Royster, 1997 Tenn. App. LEXIS 277. As with Kentucky, Tennessee declares that res ipsa does not establish willful and wanton negligence. Schenk v. Gwaltney, 309 S.W. 2d 424 (Tenn. App. 1957). Tennessee also rejects the extension of res ipsa into the strict products liability field, believing that defects must be shown affirmatively or specifically (Johnson, ibid. 1232-1233).

The Tennessee courts are visibly indebted to the courts of other jurisdictions, among them Michigan and Ohio. Occasionally, they parallel courts of Kentucky. And the Restatement (Second) is a dominant influence, as with the other members of the Sixth Circuit constituency. Tennessee seeks a conventional and moderate approach; but it is an approach which conveys as little originality as it does a willingness to grapple with res ipsa's overarching concerns and problematic.

POLITICAL AND ETHICAL IMPLICATIONS

At the onset of this essay a crucial question was raised. Why does res ipsa survive despite the overwhelming data in favor of its abandonment? Neither the historical development of res ipsa, nor its migration to America, nor its residency in the state courts of the Sixth Circuit, nor its incarnation within Restatements, satisfy the need for a logical response to the issue of defending res ipsa's presence at law.

It is this author's view that res ipsa may; however, embody some of those political beliefs and ethical values which hallmark American democracy. On even a collectively subconscious level, it is at least plausible that res ipsa incorporates indispensable dimensions of this country's progress in political self-understanding. Several examples illustrate:

A.	Res ipsa is predicated upon a notion of rationalism. Where evidence is absent, it is sheer mental processing which proposes to interpret how what remains should be assessed. Isn't this the very thinking - quite literally - which is rooted in those Enlightenment and social contract theorists (e.g. Rousseau, Locke, Montesquieu, etc.) who sewed the intellectual seeds which would later be harvested in the infant republic's foundational documents (Declaration of Independence, the Constitution)? David McKay, in his Essentials of American Government, (2000, ch.3), elaborates. He quotes famed Nineteenth Century English Prime Minister, W. E. Gladstone. Reflecting upon the American Constitution, Gladstone heralded it as "the most wonderful work ever struck off….by the brain and purposes of man." Rationalism all the way.
B.	McKay, (idem, 10-15), observes that the U.S. has experienced a lengthy history of steadily expanding emphasis upon individual rights. This is seen in the Bill of Rights (1790), in the Constitutional Amendments granting full citizenship to African-Americans, in the acceptance of women's suffrage, in the Civil Rights movement of the 1960s and until today. Labor relations could add more than an additional chapter to any tome describing American ethics about environmental security, wage equity, participation of

	the disabled, etc.. Res ipsa is devoted to the plaintiff as victim, injured in consequence to a violation of defendant's obligations of care and safeguard. Regardless of the status of the plaintiff, their personhood is center of a drive towards guaranteeing their share of justice and their entitlement to compensatory benefits.
C.	Leonard Freedman's Power and Politics, (2000, 168-183), details abuses of power associated with every level and organ of government. Indeed, he describes extensively the importance of the 'balance of power' structure (pp.13-28, 271-274) to achieve the checks and balances system devised by the nation's founders. Responsibility and accountability are central to civic engagement. Res ipsa similarly accentuates the kind of duty which holds a defendant accountable for their own and their agents' actions while exercising exclusive control and management of potentially injurious resources.
D.	Recalling prior discussion about the inherent capacity of the Wisconsin Supreme Court to modify res ipsa, and about the wisdom of the Tennessee Supreme Court (Seavers, 1999) in permitting experts to testify in res ipsa's medical malpractice cases, one recognizes the ongoing role of the judiciary both to respond to political trends and to influence those same trends. R. J. Barilleaux in, American Government in Action, (1996, 323), observes that "no matter what political judicial philosophy holds sway, or whether it is the old or new litigation at issue, the American judiciary remains an important….element of the political system."
E.	William J. Brennan, Jr., while a Justice of the Supreme Court, argued that that court should flexibly interpret the Constitution. He adhered to the notion that judicial decisions must be attuned to constantly changing popular ideas and ideals (1996, 470f). Brennan theorized that legal doctrine is ever malleable, primarily because its surrounding culture refuses to be static. Some scholars may contend that it is this very dynamic which explains res ipsa's relentless flux of irregular application, variant interpretations and unsettled definition. Such is analogous to the genre of 'loose constructionism'.
F.	This essay's res ipsa discussion may lead a minority of other scholars to conclude that res ipsa, at least in its traditional expression, always involves an inference of negligence. They believe that there is something enduring at the core of the res ipsa doctrine. That critical trait, together with its pertinence for a proceduralism associated with purely circumstantial factors, seems to be perennial. Similarity with strict constructionism is apparent. Valid counter-arguments momentarily aside, one can still explore how what is claimed to persist in res ipsa parallels the modern constancy of certain political norms and values (e.g. the right not to self-incriminate, rights of due process, equal protection, etc.). And while the U.S. Supreme Court has overruled itself some 200 times in two centuries, respect for precedent, for freedom to dissent and for the rule of law itself, does not diminish. (Ross, 1996, 219).
G.	Americans have long been wary of granting government - and any form of governmental authority - too much power. Authors Bosso, Portz and Tolley (2000, 23-24) identify this fear as a "core value of American political culture." However, ethicists wisely ponder what the extent and nature of political power should be. Judicial authority is not exempt from comparable scrutiny. It is noteworthy that res ipsa permits judges to decide whether or not a case may go to jury, and the instructions to be imparted to that jury, but it is the

	function of the jury to reckon a defendant's ultimate liability. As with so many other areas of legal procedure, with res ipsa there is a distinct separation of competencies and of power assignment. Twelve regular and reasonable citizens are invested with power as real as the legal professional, the presiding judge. Res ipsa superbly symbolizes the notion of power distribution.
H.	It has long been stated by political ethicists that laws and public policy enshrine a morality, even if they do not explicitly acknowledge their moral substructure. Edwin M. Coulter (1997, 112) analyzes this phenomenon and concludes that it pervades America's political and legal landscape. Res ipsa, too, reflects moral content. For example, a pivotal emphasis is upon the undesirability of negligence, and that generally understood to be the consequence of a duty of care violation, a duty imbued with moral content. Indeed, res ipsa's recurring discussion about issues of expert testimony and of common knowledge represents an attempt to arrive at basic justice in allowing plaintiffs and defendants to fairly and adequately argue their respective positions.
I.	Coulter (idem, 113) confronts the attitude of politicians and attorneys who perceive their roles as equivalent to playing a competitive game. He reaffirms that the original intent of our legal formalities and rules has been to seek what is true. Res ipsa can lend itself all too readily to the contest mentality. But res ipsa also denotes that from pre-1863 England until 2002, its objective has been to communicate that circumstantial facts (res) "speak for themselves (ipsa)." It is presumed that those facts voice their own truth. There is no need for clever manipulation under the guise of lawyerly dedication to client.
J.	John J. Harrigan writes that "at heart, democracy is a messy process, filled with ambiguities (1996, 375)." Americans, he states, have developed a rather remarkable tolerance for those tensions, contradictions, ambivalence and uncertainties which have, at times, delayed our political progress, but which have never extinguished that progress. That being said, res ipsa is assuredly something of a "messy process" which, because its 'ambiguities' are tolerated, must therefore assure that progress will positively unfold.

CONCLUSION

Res ipsa loquitur. The facts do speak for themselves, but never so simply. And therein lies the challenge. For scholarship is most intensified when the apparent simplicity of 'facts speaking' elicits a call to venture into the barely charted complexity and mystery which that 'speak' announces.

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EMPLOYMENT DISCRIMINATION LITIGATION AND THE VALUE OF THE FIRM

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ABSTRACT

This paper examines the stock market reactions to announcements regarding employment discrimination. The study finds that there are no statistically significant excess returns associated with settlement announcements and decision announcements. Announcements of new lawsuits, however, are accompanied by a weak and barely significant negative excess return. These findings are contrary to earlier reported findings of strongly negative excess returns for all three types of announcements. The paper suggests that the different results arise from changes in the discriminatory behavior of the firms over the study period. Additionally, the paper finds that despite provisions for punitive damages in The Civil Rights Act of 1991, excess returns associated with announcements regarding employment discrimination lawsuits subsequent to the change in the law are not significantly lower than those prior to the law.

INTRODUCTION

This paper examines the extent to which employment discrimination litigation affects the stock price and returns of publicly traded companies. Research examining discrimination litigation announcements through the mid 1980's have shown that employment discrimination lawsuits are associated with significantly negative stock returns. This study however, shows that more recently, the impact of such announcements have attenuated. This study shows that during the period 1980 through 1995 that announcements of settlements or decisions regarding such lawsuits are accompanied by returns insignificantly different from zero. Announcements of new lawsuits are accompanied with weak but significantly negative excess returns. The paper suggest, reasons for the disparate findings between this study and earlier findings.

Announcements of discrimination lawsuits involving seven or eight figure claims make impressive headlines. However, do these lawsuits have a meaningful impact on the value of the company? Surely, large settlements have a clear influence on shareholder wealth. Take for example, the high profile settlements at Shoney's and Texaco. In 1993 Shoney's agreed to distribute $105 Million in damages and back pay to approximately 10,000 African Americans who either

worked for Shoney's or were denied employment over a seven year period. This was in addition to a $30 million agreement in 1989 to recruit more minorities, employ more black vendors, and help blacks acquire franchises. In addition, Shoney's agreed to commit itself to a "top-to-bottom" transformation of its EEO policies. Texaco held the headlines in 1996 with the now famous tape of Texaco executives referring to minority employees with racial epithets. Texaco, confronted with adverse publicity on many fronts including threats of a boycott by major civil rights groups, agreed to a $176 million settlement in January of 1997. Since the shareholder bears the costs of these awards, such lawsuits can be expected to have a substantial impact on the affected companies' stock prices.

These examples demonstrate that the cost of employment discrimination lawsuits can be substantial. Damage awards get the headlines, but there are additional costs to firms faced with these types of problems. These include legal fees and loss of customers and business arising from the bad publicity (Cox & Blake, 1991). Also, firms that violate anti-discrimination and harassment regulations may have difficulty attracting and retaining talented employees (Johnston, 1991). Additionally, firms with discriminatory practices tend to have higher operating cost due to high absenteeism, turnover, and job dissatisfaction (Swartz, 1981). These collateral costs may be suffered by firms even if the lawsuit ultimately is unsuccessful or results in minimal awards.

LITERATURE REVIEW

Previous research present mixed results regarding the effect of announcement of discrimination related lawsuits. Hersch (1991) examined excess returns for 260 announcements over the period from 1964 through 1986, a period encompassing 23 years. Dividing the sample into subsamples for lawsuit announcements, decision announcements, and settlement announcements, Hersch found significant negative excess returns associated with all three types of announcements. Wright, Ferris, Hiller, and Kroll (1995) examined excess returns associated with 35 announcements of major settlements by firms found to be guilty of discrimination over the period 1986 through 1992. The researchers reported that there were significantly negative returns associated with these announced settlements. However, although significant and negative, the absolute value of returns was not large. On average the excess return on day zero was -.0037, which on a $50 stock would be a decline of only $.185. Despite this somewhat weak reaction, Wright, et. al. conclude that firms that have "high quality" affirmative action programs "contribute to sustaining a competitive advantage and are valued in the marketplace" (1995, p. 283).

In a discussion of event study methodology, McWilliams and Siegel (1997) replicated the Wright et. al. study and found that when 11 of the 35 announcements with confounding effects are removed, the excess returns are statistically insignificant. It should be observed however, that after removing the events with confounding events during the event day and the previous day, almost one

third of an already small sample is removed. The smaller the sample, the less powerful will be the hypothesis test. When a small sample is reduced even further, the possibility of a type 2 error (failure to reject a false hypothesis) becomes greater. Does the larger sample (Wright et. al., 1995) make a type 1 error (rejection of a true null hypothesis) because of the events with confounding information that are included, or does the McWilliams and Siegel study make a type 2 error because of those same events are excluded? This issue is not addressed by McWilliams and Siegel (1997).[1]

What then is the market impact of announcements of discrimination litigation? Are they significantly negative as shown by Hersch or insignificantly different from zero as determined by McWilliams and Siegel? What can explain the differences in findings between these two studies? These issues are addressed in this study.

METHODOLOGY

Sample

The sample of announcements was drawn as follows: The Wall Street Journal file period 1979 through September 1995 for a variety of keywords related to employment discrimination.[2] Each of the citations was examined and 390 citations were determined to be related to the study. The Wall Street Journal Article was obtained for each of the 390 citations. The articles were read and 202 of the events were eliminated for the following reasons: 31 citations were duplicates of previous announcements, 32 citations involved firms that were not publicly traded, 21 citations involved international firms not traded in the United States, 48 firms did not have data available in the CRSP file during the period of the announcement, 65 of the citations were for articles related to discrimination but not announcing an event regarding a specific firm, and 5 of the citations involved lawsuits against government agencies. This left a total of 188 announcements that were included in the study. From each Wall Street Journal article, the following information was compiled:

1.	Whether the announcement involved a new suit, a decision, or a settlement.
2.	The type of claim (hiring, termination, harassment, promotion, or other);
3.	If the firm was involved in previous lawsuits involving discrimination;
4.	Covered class (race, sex, sexual harassment, age, natural origin, pregnancy);
5.	Characteristics of charging party (class action, individual, government agency, etc.).

The day the news article appeared in the Wall Street Journal was designated as the announcement day (in the discussion to follow, the announcement day will be referred to as day t=0; the day before the announcement day is day t=-1; the day after the announcement day is day t=1, etc.). In at least some cases, it is likely that the event was announced on the day before it appears in the Wall Street Journal. If the announcement was made after the market closed on the day before the WSJ announcement, then the date of the WSJ article will be the day that the impact will be observed in the stock price. If however, the announcement was made prior to the market close on the previous day, then the market impact will be observed on day t=-1 rather than day t=0. Accordingly, for some of the announcements, the impact of the announcement is likely to occur on day t=-1 and for others the impact will be on day t=0. Therefore, these two days are of special interest in the study.

Calculation of Excess Returns

Daily stock returns were drawn from the Chicago Center for Research in Security Prices (CRSP) daily returns file for the 188 firms in the sample for the period (-230,30).[3] The excess returns were calculated using the procedure popularized by Brown and Warner (1985) and explained in McWilliams and Siegel (1997). The period (-230, -31) was designated as the estimation period. The following model was estimated for the estimation period.

$$R_{it} = \alpha_i + \beta_i R_{mt} \quad (1)$$

Where R_{it} is the observed return for stock i on day t; Rmt is the return on the CRSP value weighted market index for day t; and α_i and β_i are the coefficients of the regression. The excess returns were calculated as follows:

$$ER_{it} = R_{it} - (\alpha_i + \beta_i R_{mt}) \quad (2)$$

The cross sectional average excess returns (AER_ts) represent the portfolio returns for the sample under examination and were

calculated as follows:

$$AER_t = (1/N) \sum_{i=1}^{N} ER_{it} \quad (3)$$

Where N is the number of firms in the cross-sectional grouping.

The test statistic was generated using standardized excess returns (SER) as follows:

$SER_{it} = ER_{it} / S_{it}$

Where :
$$S_{it} = \sigma_i \left(1 + \frac{1}{200} + \frac{\left(R_{mt} - \overline{R}_m\right)^2}{\sum_{s=-230}^{-31} (R_{ms} - \overline{R}_m)^2} \right)^{\frac{1}{2}} \quad (4)$$

The term σ_i is the estimated standard deviation of the residual from the market model regression (1), R_m is the average return on the CRSP market index during the estimation period, and R_{mt} is the return on the market index at time t. The computation of the z statistic for the AER at time t is:[4]

$$Z_t = \frac{1}{\sqrt{N}} \sum_{i=1}^{N} SER_{it} \quad (5) \quad (5)$$

The cumulative average excess return (CAER) is calculated as shown:

$$CAER(t_1, t_2) = \frac{1}{\left(t_2 - t_1 + 1\right)\right)} \sum_{t=t1}^{t2} AER_t \quad (6)$$

Finally, the test statistic for the CAER was calculated as follows:

$$Z = \frac{1}{\sqrt{N\left(t_1 - t_2 + 1\right)}} \sum_{i=1}^{N} \sum_{t=t_1}^{t_2} SER_{it} \quad (7)$$

RESULTS

As in Hersch (1991), we have divided the sample into three subsamples for lawsuit announcements, settlement announcements, and decision announcements. Table 1 presents the number of announcements by category and some information regarding the range of dollar amounts involved. Table 2 presents the distribution of announcements over the time period studied.

TABLE 1
Summary Statistics for Announcements of New Lawsuits, Settlements and Decisions

	Suit	Settlement	Decision
Panel A: Dollar Amount of Announcement			
Number of Announcements (total)	49	65	74
Number Reporting Dollar Amount	7	50	27
Mean Dollar Amount (X1000)	$ 19,000	$ 8,840	$10,328
Maximum	$100,000	$66,000	$89,000
75% Quartile	$ 11,000	$10,000	$ 7,000
50% Quartile	$ 8,000	$ 3,000	$ 1,300
25% Quartile	$ 2,500	$ 937	$ 130
Lowest	$ 2,000	$ 20	$ 9
Panel B: Number of Lawsuits by type of plaintiff			
Public Plaintiff			
EEOC	18	23	20
Justice Department	1	2	0
Department of Labor	1	7	4
State Agencies	1	0	1
Other	10	9	13
Private Plaintiff			
Class Action	8	19	9
Individual	10	8	24
Unions	3	1	0
Civil Rights Groups	1	0	5
Panel C: Number of Lawsuits by type of claim			
Hiring	13	27	14
Termination	18	12	21
Sexual Harassment	8	3	7
Promotion	15	24	21
Other	13	13	30

TABLE 2
Number of Announcements by Year

Year	Suit	Settlement	Decision	Total
1979	1	5	3	9
1980	5	9	8	22
1981	3	3	5	11
1982	1	2	2	5
1983	2	1	2	5
1984	3	2	11	16
1985	2	2	1	5
1986	5	5	5	15
1987	2	2	4	8
1988	1	3	3	7
1989	5	6	3	14
1990	2	1	6	9
1991	3	10	9	22
1992	5	4	6	15
1993	3	5	2	10
1994	5	4	3	12
1995	1	1	1	3
Total	49	65	74	188

Average excess returns (AERs) for the period [-10,10] and a representative selection of cumulative average excess returns (CAERs) are presented in Table 3. In addition, the z statistics are provided for the null hypotheses that the AERs and CAERs are zero. The table shows that the AER was negative for the suit and settlement subsamples, but the decision subsample has a positive AER. However, none of the excess returns are significant for any of the subsamples for any of the days t=-1 through t=+1. Among the CAERs, only the CAER(0,1) for the new lawsuit announcement is significant with a z statistic of -1.723 which barely indicates significance for one sided tests at the . 5% level.[5] It appears that the settlement and decision announcements have no impact on the market price of the securities. While there is some evidence of a negative response to the new lawsuit announcement, it is small, weak, and barely significant at the 5% level of significance.

TABLE 3
Average Excess Returns Associated with Announcements of New Law Suites, Settlements, and Decisions

	Suit Announced n = 49		Settlement n = 65		Decision n=74	
event time	AER	z-stat	AER	z-stat	AER	z-stat
-10	.0614	.336	.1491	.955	.1340	1.268
-9	.0641	.205	.3600	1.824*	-.1938	-.779
-8	.1544	.196	.0102	-.178	.0839	.022
-7	.5100	1.636	.3748	1.020	.1283	.679
-6	.2182	.579	-.2717	-1.207	.0904	1.329
-5	.2353	.261	.1969	-.902	-.0259	-.722
-4	.1058	1.468	.0824	-.368	.2791	1.255
-3	.7847	.994	.1031	.534	.2698	1.237
-2	-.0285	.133	-.1097	-.432	-.1815	-1.183
-1	.1146	.602	-.0621	-.301	.2065	1.134
0	-.2875	-1.551	-.1348	-.305	.1537	.735
1	-.3366	-.885	-.2117	-1.552	-.0358	-.062
2	.6367	2.614**	.1425	-.126	.0554	.680
3	.1287	.663	-.2240	-.697	-.2491	-.698
4	-.2348	-.980	.0119	1.176	-.1492	-.726
5	-.0056	.167	-.3638	-1.467	.1286	-.096
6	.1918	1.013	-.0959	-.477	-.0853	-.622
7	.2626	1.156	.0001	.000	-.1060	-.120
8	-.0191	.004	.5338	2.440*	.1902	.857
9	-.0776	.000	-.1930	-.680	.0150	-.648
10	-.5440	-1.811*	0957	.239	.0004	-.230
CAER(0,1)	-.6240	-1.723*	-.3465	-1.313	.1179	.476
CAER(-1,0)	-.1729	-.671	-.1969	-.429	.3602	1.322
CAER(-1,1)	-.5094	-1.059	-.4086	-1.246	.3244	1.044
CAER(-5,0)	.9245	.778	.0757	-.725	.7017	1.003
CAER(-10,0)	.0193	1.465	.6982	.193	.9443	1.500
CAER(-5,5)	1.1113	1.051	-.5694	-1.339	.4516	.469
CAER(-10,10)	1.9346	1.484	.3939	-.110	.7085	.723

* Indicates significance at the .05 level (one-sided) ** Indicates significance at the .01 level (one-sided)

Since the hypothesis tests reported in Table 3 failed to reject the null hypothesis in most cases, we did additional tests to establish that the failure to reject the null hypotheses was not simply a result of a type II error in which the methodology used was not powerful enough to separate the null hypotheses from the alternate hypotheses. McWilliams and Siegel (1997) point out that event studies tend to be very sensitive to outliers especially in small sample event studies. They suggest examining the excess returns using non-parametric tests, since nonparametric tests are less influenced by outliers.

Table 4 presents the results of non parametric tests performed on each subsample. First, the ER_t=0 and CAER(-1,0) were calculated for each individual company in the subset. Panel A indicates how many of these are negative for the entire subsample. For the lawsuit subsample, 28 out of 49, or 57% of the excess returns were negative. We would normally expect to get 24.5 or 50% negative returns if there was no announcement effect in the returns. The sign test reports the p value for a test that the actual number of negative ERs, 28, is not significantly greater than the expected number, 24.5. The p value indicates that the difference is not significant. Similarly, for the Settlement and Decision subsamples, the number of negative ERs are not significantly different from the number of positive ERs. The Wilcoxan sign rank test was also performed and did not reject the null hypotheses for any of the subsamples. Thus, the nonparametric tests indicate that the announcements have had no statistically significant effect on the stock price.

We also calculated the standard deviation for each of the stocks associated with each event (equation 4) and then calculated a t statistic for each announcement. We reported the number of times that the null hypotheses were rejected in Panel B of Table 4. For the lawsuit subsample, the null hypotheses ER = 0 was rejected five times (using a 5% level of significance) in favor of the alternative hypotheses ER < 0 and twice in favor of the null hypotheses ER > 0. This indicates that the lawsuit had a significant negative impact on the stock of at most 5 of the companies announcing a lawsuit. Thus, the announcement effect, if there is one, does not influence very many securities.

Impact of the Civil Rights Act of 1991

On November 21, 1991, the Civil Rights Act of 1991 was signed by President Bush. Amendments contained in the law made significant changes in the Civil Rights Law of 1964. One of the changes was the provision for punitive damages for malicious or intentional discrimination. The generally accepted view was that this would "encourage an increase in litigation and remedies sought, particularly in sexual harassment complaints" (Robinson, Allen, Terpstra & Nasif, 1993). The amendments also strengthened the finality of consent decrees, expanded challenges to discriminatory seniority systems, and imposed tougher standards on employers in defending employment practices, particularly in mixed motive cases. In brief, an expected result of the amendments was to make such lawsuits more costly to employers.

TABLE 4
Additional Tests of the Stock Market Reaction to Announcements of New Law Suites, Settlements, and Decisions

Panel A			
	Suit	Settlement	Decision
Observations	49	65	74
Observations with ER < 0 (see footnote 1)	28	37	35
Sign test (p value) (see footnote 2)	.392	.321	.728
Wilcoxan Signed Rank Test(p value)	.429	.192	.679
Observations with CAER(-1,0) < 0	27	40	34
Sign test (p value)	.568	.082	.561
Wilcoxan Signed Rank Test (p value)	.795	.213	.599
Panel B			
Hypotheses tests on individual ERs (see footnote 3)			
ER < 0 (.05 level of significance)	5	2	3
ER < 0 (.01 level of significance)	2	1	0
ER > 0 (.05 level of significance)	2	2	4
ER > 0 (.01 level of significance)	1	1	3
Hypotheses tests on CAER(-1,0)			
CAER(-1,0)< 0 (.05 level of significance)	5	3	3
CAER(-1,0)< 0 (.01 level of significance)	1	1	0
CAER(-1,0)> 0 (.05 level of significance)	1	5	7
CAER(-1,0)> 0 (.05 level of significance)	0	4	3

[1] The number of observations in the subsample with a negative excess return.

[2] The sign test and the Wilcoxan rank test are for the hypothesis that the negative abnormal returns are equal to .5n; which is the expected number of negative returns if there is no dominant negative effect. The p statistic is the probability that the number of positive abnormal returns will be equal to or greater than .5n the number observed if the null hypothesis is true. To reject the null hypothesis at the .05 level of significance the p value must be below .05.

[3] z statistics were calculated for each individual observation. The number of observations for which the null hypothesis that AR = 0 is rejected is reported (all tests are one sided).

* Significant at the .05 level of significance (one sided).

TABLE 5
Average Excess Returns for Companies Announcing Lawsuits Before and After December 1991.

	1991 and Before	1992 and After
Number of Observations	35	14
AER(t=0)	-.00368	-.00087
(z-statistic)	(-1.287)	(-0.257)
CAER(0,1)	-.00810	-.00159
(z-statistic)	(-2.093)*	(0.086)
CAER(-1,1)	-.00572	-.00353
(z-statistic)	(-1.086)	(-0.265)
CAER(-1,0)	-.00129	-.00282
(z-statistic)	(-0.420)	(-0.592)
CAER(-5,0)	.01886	-.0148
(z-statistic)	(1.956)*	(-1.637)
CAER(-10,0)	.03001	-.00739
(z-statistic)	(2.158)*	(-0.672)
CAER(-5,5)	.01915	-.00889
(z-statistic)	(0.173)	(-0.486)
CAER(-10,10)	.02771	-.00157
(z-statistic)	(1.785)*	(-0.045)

Notes:
* Significant at 5% level (one sided test)
** Significant at 1% level (one sided test)

In order to test whether or not the lawsuits are more costly after the change in the law, the lawsuit announcements were divided into two subsamples: 1991 and before, and 1992 and after. The results are presented in Table 5. Interestingly, the results prior to 1992 present some indication that the announcements were accompanied by negative returns. The CAER(0,1) = -.81% which is significantly negative (Z=-2.093). It should be noted, however, that this negative effect seems to be very short lived. When the event window is widened to (-10, 10) the CAER(-10,10) becomes 2.7% which is significantly positive at the .05 level of significance. Thus, our conclusion is that

there is at best some evidence of a weak negative excess return around the time of the announcement prior to 1991.

When we examine the announcements made in 1992 and after, we find that the excess returns are negative, but the tests for significance indicate that the returns are not statistically different from zero. Hence, we conclude that lawsuits subsequent to 1991 are not more costly to employers as a result of the amendments in the Civil Rights Act of 1991. The evidence indicates that announcements of lawsuits in the years 1992 and later do not have a greater negative impact on securities prices than such announcements before 1992.

Class Action Lawsuits:

Examining the announcements involving class action lawsuits separately, Hersch (1991) found significantly negative excess returns on the announcement day for all three subsets - lawsuits, decisions, and settlements. We also examined a separate subsample of class action lawsuits and the results are presented in Table 6. None of the AERs or CAERs for the settlement or the decision subset is significantly different from zero. For the lawsuit subset, only the two day CAER ending on day 1 is significant. The CAER(0,1) = -1.2% with a z-statistic = -1.686 which is barely significant at the 5% level (one sided test). However, when the event window is widened by just one day, the CAER(-1,1) = -.1% with a z-statistic of -0.512 which is not significant. Thus as before, we found evidence of a weak and barely significant excess cumulative excess return over the period (0,1).

SUMMARY, DISCUSSION, AND CONCLUSIONS

Hersch (1991) found significant negative excess returns associated with all announcements of discrimination lawsuits and announcements of decisions and settlements associated with such lawsuits. Wright et. al (1995) found a weak but significant negative excess return associate with announcements of settlements by firms found to be guilty of discrimination. However, when McWilliams and Siegel (1997) replicated the Wright et. al. study after controlling for confounding events, they found that the excess returns were insignificantly different from zero.

Why are the Hersch and the McWilliams and Siegel results so different? The differences may arise from the different time periods studied. The two studies together span a period of 29 years. However, they overlap for only one year. The results indicate that during the 1960's and 1970's the market reacted negatively to such announcements, but this is no longer the case. If so then the excess returns observed by Hersch would not be representative of market response to such announcements now.

TABLE 6
Excess Returns for Announcements
Regarding Class Action Lawsuits

	Suit	Settlement	Decision
Number of Observations	8	19	9
ER(t=0)	-.00319	-.00604	.00790
(z-statistic)	(-0.113)	(0.186)	(1.510)
CAER(0,1)	-.01190	-0.1158	.00968
(z-statistic)	(-1.686)*	(-1.024)	(1.617)
CAER(-1,1)	-.00107	-.00991	.00829
(z-statistic)	(-0.512)	(-0.614)	(1.135)
CAER(-1,0)	.00765	-.00437	.00651
(z-statistic)	(0.980)	(0.404)	(0.840)
CAER(-5,0)	.00408	.00754	.00413
(z-statistic)	(0.674)	(-0.112)	(0.148)
CAER(-10,0)	.01500	.02195	-.00505
(z-statistic)	(0.775)	(0.614)	(0.187)
CAER(-5,5)	-.01214	.00252	-.00781
(z-statistic)	(-.647)	(-0.631)	(-0.155)
CAER(-10,10)	-.01386	.02477	-.01058
(z-statistic)	(-0.758)	(0.393)	(-0.135)

Notes:
* Significant at 5% level (one sided test)
** Significant at 1% level (one sided test)

This study examined 188 firms over the period from 1979 through 1995. The 16 year period spans the final eight years of the Hersch study and the entire period of the Wright et. al. study, and continues for three years after the Wright study. Using a variety of statistical procedures and examining individual announcement effects as well portfolio average effects, we found that there are no statistically significant excess returns associated with settlement announcements and decision announcements. With regard to the announcements of a new lawsuit, we found that there are weakly negative excess returns associated with the announcements. The tests for statistical

significance show that the CAER(0,1) is significant with a t statistic of -1.723. However, tests of slightly wider CAERs show that the results are no longer significantly negative. When we examined wider event windows we found that the CAER(-1,1) was statistically insignificant. When the event window is widened to 11 days the CAER[-5,5] is +1.1%. That is the CAER was positive! Thus, any effect is so weak that all but one of the numerous tests that we performed failed to reject the null hypotheses. Furthermore, the effect's impact cannot be detected when the event window is increased by only 1 day! Based upon this evidence, we conclude that the announcements of new lawsuits have very weak if any impact on stock price and returns.

Why do these announcements have so little impact on the price of a security? The anecdotal descriptions of large lawsuits and awards would lead observers to conclude that such lawsuits will have a substantial impact on stock value. Obviously, for example, the Shoney's settlement and the Texaco settlement mentioned in the introduction will have a negative impact on earnings for several years. Each category of announcement may have a different answer to this question and will be examined separately in an attempt to explain this result.

With regard to the initial lawsuit, there are three mitigating issues regarding the expected cost of the lawsuit to the company. First, the actual chance of a large settlement may be low. For example, Hersch (1991, 144) presents statistics that show that less than .5% of EEOC charges result in lawsuits. Further, a portion of the resulting lawsuits were lost by the EEOC.[6] If the probability of the firm's losing the lawsuit is less than one, then the expected cost of the lawsuit will be reduced accordingly. Second, the amount cited in the lawsuit may be higher than actual amount of the settlement. In our sample for example the average lawsuit claimed damages of $19 million, but the average settlement was only $8.8 million. Third, the actual payment by the firm often takes place after several years of litigation. This delay in paying the cash amount reduces the present value of cost to the firm at the time of the lawsuit announcement.

With regard to the failure to find a negative excess return associated with a settlement or a decision announcement, there are several factors that could ameliorate the impact of these types of announcements as well. First, these announcements may have been anticipated. If so then any price adjustment would have already occurred prior to the announcement and would not have been detected by the event study methodology. Second, the awards often involve costs that are distributed over several years. Thus the present value of the costs would be reduced accordingly. Third, some of the required expenditures may benefit the firm in the future. For example, funds spent on training, and strengthening and improving the employment environment can have a return by improving the management of the company and providing a more productive work force. In other words there may be an investment nature to at least some of the funds in the award. Certainly, any cost to the firm of the settlement would be partially offset by the returns on this investment. Finally, a well crafted settlement and or decision may indicate that the firm is less likely to be involved in such litigation in the future. This certainly would be good news for the stock.

It is interesting to observe the difference between Hersch's findings and the findings in this paper. It appears that the impact of civil rights employment litigation on stock price is substantially weaker over the period 1980 through 1995 compared to the earlier period studied by Hersch. This may be an indication of the success of the civil rights legislation and litigation. This can be explained as follows. There are costs associated with changing management policies in order to avoid the cost of litigation associated with civil rights violations. In the time period after passage of Title VII of the 1964 Civil Rights Act and during the early litigation associated with the act, firms resisted changing management policies because of associated costs and because it involved changing an entrenched culture that permitted discriminatory policies. On the other hand, it became clear over time that there can also be substantial costs associated with failing to develop personnel policies that were tailored to the act. These costs were responsible for Hersch's findings of negative excess returns. In the early years following the passage of the act, there was substantial variation across industries and among firms within industries regarding compliance with the law. Additionally, the cost of noncompliance differed among firms. Those firms that were most likely to bear substantial costs associated with civil rights litigation were the firms that had the greatest incentive to change management policies to assure compliance with the act. In the early years, fewer firms were in compliance with the act, and so the number of and cost to the employers of successful litigation would be greater. Over time, many of these companies have changed their policies. Especially those companies most likely to suffer the highest cost penalties in a lost decision or settlement. It is the effort to reduce exposure to these lawsuits by the companies most vulnerable to high cost lawsuits that accounts for the weaker negative returns found in more recent years compared to the much stronger returns found in the earlier years.

ENDNOTES

[1] Rather than eliminate the announcement from the sample, a more correct approach would be to determine whether or not the confounding effect is somehow associated or correlated with the announcement being studied. For example, dividend announcements are associated with quarterly earnings announcements. If so, then the effect can be controlled using a variable (or a dummy variable) in the regression. If the confounding effect is random, then no controlling variable is needed, but the announcement should not be excluded from the sample. If random, then any error introduced by the confounding event will become a part of the error term. If random, the confounding effect is not distinguishable from the background noise against which the excess returns are contrasted.

[2] The search involved a series of complex searches for such topics as employment discrimination, sexual harassment, age discrimination, sex discrimination, hiring discrimination, pregnancy discrimination, etc. The objective of the Dialog search was to be as inclusive as possible.

[3] The designation t=230 indicates 230 days prior to day t=0. The period [-230,30] indicates the period from and including day t=230 through day t=30.

[4] Z statistics are calculated as in Mikkelson and Partch (1986).

[5] The significance of all results cited in this paper are based on one sided tests. The one sided criterion is used because the overall findings of the study indicate a failure to reject the null hypothesis. When the null hypothesis is not rejected, the possibility of a Type II error is a reasonable concern. According, the least severe criteria for significance is used in order to reduce the possibility of a Type II error.

[6] Hersch (1991, p. 144) reports for example that in 1981 the EEOC lost 38.5% of its lawsuits.

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ETHICAL ISSUES

ETHICAL ISSUES

THE FACTORS OF AGE AND SEX ON THE PERCEPTION OF ETHICS

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ABSTRACT

Ethical issues are of great interest to the nation's business schools, management professionals, men and women of business on the front lines of decision making, and the general public they serve. Are the nation's business schools adequately preparing students for the challenge of public trust?

Two (2) surveys were administered in the spring of 2000 to alumni and faculty of a mid-sized regional state university to evaluate the state of ethics in business and society and the perceived effectiveness of ethics preparation as an aspect of the education. The alumni were surveyed to determine the following: their perception of ethics in society and business, their experience in workplace decision-making, and their opinion regarding business ethics/social responsibility preparation as applied to the workplace. A separate survey was distributed to faculty members. The purpose of the survey was to determine the following: their perception of ethics in society and business, responses regarding the reasons for unethical behaviors in the workplace, and their opinion of the ethical decision-making ability of their students.

Both students and faculty believe they are living in a time of general ethical decline. Societal decline is believed to be greater than ethical decline in business. The faculty and alumni responses were cross-referenced demographically. In examining the demographic information, a pattern emerges from the data indicating that perceptions of ethical behavior are influenced by age and sex more than any other factors

INTRODUCTION

Business ethics has matured as an academic discipline during the last quarter of the Twentieth Century. Courses are taught in ninety percent (90%) of America's business schools utilizing more than twenty-five (25) textbooks, three (3) academic journals, and sixteen (16) research centers dedicated to business ethics (Stark, 1993). The American Assembly of Collegiate

Schools of Business (AACSB), the highly sought accreditation of business schools in colleges and universities across America, establishes the standards for management education. Business ethics as an academic field, integrated into the curriculum of the business colleges when the AACSB revised their requirements in the late seventies, includes "ethical and global issues" as the first listing under "Curriculum Content and Evaluation" (Horvath, 1995). Yet, contends Horvath, the wording implies a "macro orientation" to business ethics. A decade following inclusion of ethics in the curriculum, the effects of this approach were measured in a survey of business ethics educators, deans of colleges and universities associated with the AACSB. Evaluating the course curriculum with ethics content, seventy-four percent (74%) taught in the colleges of business, a major issue raised by the respondents was, "how to do it, and where to put it" according to Schoenfeldt.

Ethics in the business curriculum continues to be a concern, especially in light of the recurring breach of personal and societal ethics in every strata of society. By the late eighties, an emphasis on ethics had increased four (4) times in the classrooms of higher learning as evidenced by the submission of professional and academic journal articles (Schoenfeldt, 1991). In 1987, John S.R. Shad, former chair of the Securities and Exchange Commission, former vice-chair of the Securities and Exchange Commission, and former vice-chair of E.F. Hutton and Company, contributed $20 million to the Harvard Business School. The purpose of the gift was to establish a teaching program in ethics for MBA Students, "Business Leadership and Ethics," in response to insider trading scandals, which involved Harvard graduates, further highlighting the importance of ethics in the curriculum of business schools (Byrne, 1987). The Harvard Business School has generated a large volume of research and academic publications on the state of ethics in the academia and corporate America; yet, the state of ethics curriculum in the United States during the 1990's continued to be undernourished, (Weber, 1990). In the year 2001, the business schools of colleges and universities across America continue to examine the question, are students prepared for the decisions required in the real world of business?

This is a question as old as business itself. Historically, complaints and also actual attempts at ethical reform in business existed 2000 BC with the Code of Hamurabi in Mesopotamian. With the code, rulers attempted to legislate honest prices among the merchants by instituting wage and price controls (Donaldson, p.ix). Yet, in the technologically and intellectually advanced business world of the twenty-first century, seventy-five percent (75%) of major corporations in America continue to attempt the incorporation of ethics into their organizations (Stark, 1993). Managers are seeking direction with ethical situations that fall in gray areas and focus on conflicts of right versus right (Badaracco, 1993). The discipline of business ethics in the colleges of business has been ineffective in providing concrete help to manager, adequately preparing business students for the competitive commercial environment of professional management. New challenges face corporate leaders in employment, corporate structure, and training (Donaldson, 1996). Business ethics goes beyond the basic tenet of satisfying the investors through profit maximization to achieving human good through improved safety, better working conditions, increased levels of employment, and a

healthy, viable environment, in addition to investor satisfaction. Business ethics should be the practical, rather than the theoretical, application of ethics to the business world (Stark 1993).

On the horizon of the twenty-first century, real-world moral problems continue in the colleges of business and in the workplace. How can the future leaders of the business world learn to balance ethical demands with economic realities? The business community and the academic community are attempting to respond to the question.

Statement of the Problem

The general problem of the study is to evaluate the perception of ethics based on the factors of age and sex. The research paper will focus on three (3) major objectives:

1.	review the state of business ethics curriculum in the schools of business.
2.	evaluate the factor of age affecting perceptions of ethics.
3.	assess the factor of sex affecting perceptions of ethics.

Purpose of the Study

The purpose of the study is to examine the body of knowledge on business ethics and evaluate the results of two (2) surveys administered to faculty and alumni of a mid-sized regional state university. Specifically, the factors of age and sex will be examined to determine the effect each factor has on the design, delivery, implementation, and accountability of ethics curriculum in the colleges of business and in the workplace. Based on the conclusions, recommendations for optimal methods will be discussed.

Scope, Sources and Limitations

Relevant data for this report were obtained from a variety of secondary sources including, but not limited to, online databases, Internet publications, academic publications, educational publications, and library resources to provide a review of current academic literature, business ethic curriculum and training programs in the workplace. Business accreditation standards were obtained from the AACSB, the highly regarded accrediting entity for colleges of business in the United States (U.S.).

The primary data collected in this study came from two (2) questionnaires administered to the faculty and alumni of a mid-sized regional university. An alumni survey was mailed in the spring of 2000 to 1500 undergraduate and graduate students who graduated between the spring of

1996 and the fall of 1999. Of the 1500, 500 were returned as undeliverable due to incorrect addresses. Addresses were updated and 500 alumnus surveys were redelivered. Of the questionnaires mailed, 1200 were considered deliverable and of the deliverable questionnaires, 200 responded establishing a response rate of seventeen percent (17%). A faculty survey was distributed to 73 faculty members in the spring of 2000. Of the 73 distributed, 45 responded establishing a response rate of 62%.

Data regarding collegiate ethics competitions and ethics certification curriculum, innovative curriculum design, were obtained from telephone interviews with The Center for Ethics at Loyola University in Chicago (LUC).

Research Design

The primary data utilized in this study resulted from two (2) questionnaires composed of both closed-end and open-end questions. Respondents to the faculty questionnaire were asked twenty-two (22) questions and the alumni questionnaire included twenty-one (21) questions, both questionnaires focused on the perception of business ethics in the workplace. The alumni questionnaire was distributed to 1500 alumni graduating between 1996 and 1999. One-third of the questionnaires were returned due to incorrect database addresses. Address corrections were made where possible and a second mailing of approximately 500 questionnaires was sent to alumni resulting in approximately 200 responses, a 17% response rate. Faculty questionnaires were distributed to 73 faculty members with 45 responding, a response rate of 62%. Statistical techniques of analysis were utilized and the data were analyzed. The assessments of the results are incorporated in the study.

Relevant data for this report were obtained from a variety of secondary sources including, but not limited to, online databases, Internet publications, academic publications, and educational publications. Business accreditation standards were obtained from the AACSB, the highly regarded accrediting entity for colleges of business in America. Also, telephone interviews were conducted with Chris Field of the Loyola University Chicago (LUC), Center for Ethics and John Boatright, Director of the Business Ethics Certification Program for the College of Business Administration (COBA) at Loyola University Chicago.

LITERATURE REVIEW

Academic investigations, professional groups, and certifying organizations have responded to questions and concerns of ethical preparedness for business with the development of curriculum for education in the schools of business and training in the workplace. Research projects have been

conducted to evaluate ethics education and data have been analyzed to determine outcomes. The literature on ethics falls into five (5) general categories:

1.	Standards
2.	Definitions
3.	Corporate Social Responsibility
4.	Ethics in the Workplace
5.	Academic Curriculum

Standards

The American Assembly of Collegiate Schools of Business (AACSB) establishes the standards set in 1977 for the prestigious accreditation sought by colleges of business in the United States. Schoenfeldt, in a 1991, reported empirical studies evaluating the effectiveness of the standards set by AACSB on business ethics education when surveying deans of colleges and universities associated with the AACSB. According to the respondents, the standard set by the AACSB are minimum standards difficult to evaluate. Loeb, in 1991, evaluated ethics education in accounting including the American Accounting Association (AAA) development of educational material on accounting ethics, "Project on Professionalism and Ethics." According to Loeb's research, the AAA set higher standards with a process to evaluate outcomes of accounting ethics education.

Definitions

A great deal of literature is written that interprets ethics, but few define ethics. Once ethics is defined it becomes operational, which enables methods of evaluating outcome. Donaldson and Werhane, 1996, define ethics from a philosophical point of view presenting conceptual perspectives about ideological beliefs and stewardship of our resources. DeGeorge, 1986, utilizes a systematic approach to define the rules and values that define the human condition. His approach begins with a general understanding of philosophy, followed by the portion of philosophy known as ethics, which progresses to business ethics. Piper, Gentile, and Parks, 1993, combine definition with purpose in the ethical paradigm of values, beliefs, and attitudes; knowledge; and, skills. Through defining ethics, they charge society with the responsibility to: "Educate professional women and men who possess not only certain basic skills and knowledge, and a broad managerial perspective,

but also a heightened sense of the moral and social responsibility their education and future positions of power require."

Corporate Social Responsibility

The focus of corporate social responsibility is on the external impact of business activities on society at large. Andrew Dobson, 1995, in Green Political Thought presents the liberal, "world view" of social responsibility and the environment detailing the responsibility of the human race as an integral part of the earth and all its inhabitants. *Beyond Grey Pinstripes, Preparing MBAs for Social and Environmental Stewardship*, Samuelson, Gentile, Scully, 1999, presents initiatives for social innovation through business in a manner that will protect the Earth's environment for current and future generations.

Ethics in the Workplace

The evaluation of ethics in the workplace is primarily conceptual and addresses two categories: decision-making and ethical codes of conduct. Badaracco, 1992, presents research on business ethics in the workplace in which he writes about four (4) spheres of executive responsibility and moral commitment. The executive perspective is balanced by a view from the trenches, Badaracco, 1995, evaluating the effects of the ethical behavior of middle managers and executives on young managers. Boisjoly, 1993, describes the tragic results of the sum of unethical decision-making in the Challenger disaster. He refers to behavior patterns described as "exit, voice, and loyalty" as related to ethical decision-making under immense pressure. Andrews, 1989, in *Ethics in Practice*, examines the implementation of ethics in the workplace including decision-making, reward systems, and obstacles and solutions to ethical behavior. He takes a poignant examination at the use of reward systems to achieve corporate objectives frequently undermining accepted ethical norms. The majority of literature evaluates results, but McNamara, 1996, has compiled an outstanding resource guide to ethics management containing an ethics toolkit for managers that defines how to establish, teach, implement, and evaluate an ethical code of conduct in the workplace.

Academic Curriculum

There is a great body of literature regarding ethics education in the colleges of business in the United States. In general, ethics literature on academic setting is grouped into three (3) categories: design, application, and evaluation.

Designing a benchmark program, Piper, (1996), combines three (3) skills: leadership, ethics, and social responsibility. According to Piper, the skills are specific, integrated, modeled, practiced, and should be taught early in the educational curriculum. Gentile (1995) examines faculty attitudes

toward business ethics building a case for a curriculum that teaches balancing integrity and well being of the individual with integrity and well being of the organization. Parks, 1993, challenges others to develop a curriculum that "fosters ethical reflection and formation of moral courage." George, (1987) views the evaluation of business ethics from a historical perspective looking at the nation's business schools as the training ground for future leaders of industry and government that are ethically and morally responsible.

Martin (1991) conducted a study to determine the impact of ethical judgment on the students completing course in ethics. Wynd and Mager (1989) conducted research to determine significant differences in the ethical decision making of students before and after taking a course in business ethics. In Hosmer's (1985) evaluative writing regarding the design of curriculum, she examines the omission of ethics courses from the curriculum of colleges of business suggesting the faculty underestimates the complexity of ethical problems and the importance of ethical decisions in preparation for business management.

The application of ethics historically is detailed, *In What's the Matter with Business Ethics?* Andrew Stark, views the history of ethics and social responsibility from the perspective of achieving a balance between the extremes of diverse ethical norms and universal principles. He considers the challenge of defining ethics and the real problem of developing a "new" business ethics. The application of business ethics in the classroom is a most innovative approach to teaching business ethics, Loyola University Chicago, 2000. The Center of Ethics at Loyola University Chicago hosts an undergraduate competition modeled after the television program, The College Bowl, in which players from opposing teams exercise abilities in ethical analysis and judgment to solve ethical dilemmas. This innovative approach combines the research, writing, and evaluative processes into a practical application that truly teaches, models, practices, and integrates ethics. An application for the workplace with great potential is *The Complete Guide to Ethics Management: An Ethics Toolkit for Managers*, (McNamara, 1999), and a compilation of tools to use in a business environment, which enables sound decision-making among all levels of employees and provides foundational tools for ethics programs.

ALUMNI AND FACULTY PERCEPTION OF ETHICS

A survey of undergraduate and graduate alumni graduating from a mid-sized regional, state university from the spring of 1996 through the fall of 1999 was conducted in the spring of 2000. A separate survey of faculty from the same mid-sized regional, state university was conducted in the spring of 2000. The faculty and alumni were surveyed to determine their perception of ethics in society and business. In both surveys, the data indicated that alumni and faculty agree that as a society we are, "living in a time of general ethical decline." In consideration of the alumni and faculty response, this study examines the motivating reasons for unethical behavior in the workplace

from the perspective of the alumni and the faculty. Based on the data, conclusions are drawn and proposed recommendations are offered. Demographic information was gathered on both groups

Demographic Information

Alumni and Faculty

Alumni. The alumni questionnaire was mailed to approximately 1500 alumni graduating from a mid-sized regional, state university between spring 1996 and fall 1999. Of the 1500, 500 were returned as undeliverable due to incorrect addresses. A second mailing of 200 was resent with updated addresses. Based on the questionnaires considered deliverable, 1200 was determined as the number of alumni surveys distributed. Of the 1200 distributed, 200 responded, a response rate 17%. Based on responses of the 200 alumni to the questionnaire, the demographic breakdown is detailed as follows.

Faculty. Questionnaires were distributed to 73 faculty members of a mid-sized regional, state university. There were 45 responses, a 62% response rate. Based on responses of the 45 faculty members to the questionnaire, the demographic breakdown is detailed as follows.

Sex. Based on responses to the questionnaire by the alumni, the demographic breakdown is 102 Female, fifty-one percent (51%), and 98 Male, forty-nine percent (49%). Of the 45 faculty responding to the questionnaire, 69% were male and 31% were female.

Age The age categories indicated by alumni respondents were 1.5% under 25 years of age; 4%, 25 to 26 years of age; 47%, 27 to 30 years of age; 20%, 31 to 35 years of age; 5%, 36 to 40 years of age; and, 9% over 40 years of age. Of the alumni respondents, 67% were in the categories 27 to 30 and 31 to 35.

The age categories indicated by faculty respondents were 16% under 40 years of age, 9%, 41 to 45 years of age, 22%, 46 to 50 years of age, 22%, 51 to 55 years of age, 8%, 56 to 60 years of age, and 13% over 60 years of age. Forty-four percent of the faculty respondents were in the age categories 46 to 50 and 51 to 55.

Ethnicity. The alumni respondents indicated ethnicity as 86% white, non-Hispanic, 6% Asian or Pacific Islander, 5% Hispanic American, 2% African American, and 1% American Indian or Alaskan native, and .05% other.

The faculty respondents indicated ethnicity as 93% white (non-Hispanic), 2% American Indian or Alaskan native, 2% Asian or Pacific Islander, Ninety-three percent (93%) of the faculty respondents is categorized as White (non-Hispanic).

Primary Business Degree Completed. The educational breakdown of alumni respondents is 26% Accounting, 20% General Business Administration, 15% Marketing, 13% Management, 12% Finance, .05% Economics, .05% in all other majors, .03% International Business, 0% Human Resource Management, 0% Management Information Systems, and. During the time period Human

Resource Management (HRM) was an area of emphasis within the management curriculum, but neither HRM nor Management Information Systems were granted full degree status until fall of 1999 at SHSU.

The educational breakdown of faculty respondents is 24% Management, 20% Accounting, 16% in all other majors 11% Economics, 9% Marketing, 7% Finance, 4% Management Information Systems, 2% General Business Administration, 0% International Business, 0% Human Resource Management.

General Ethical Decline

A question asked of both the alumni and faculty was, "I believe I am living in a time of general ethical decline in business and in society." Based on the responses, the alumni indicate they believe they are living in a time of ethical decline in society as well as in business. Their responses indicate they believe ethical decline in society with a mean of 3.98 to be greater than ethical decline in business with a mean of 3.61. The faculty, based on the responses, believes they, too, are living in a time of ethical decline in society as well as in business. Their responses indicated they believe ethical decline in society with a mean of 4.09 to be greater than ethical decline in business with a mean of 3.64.

The alumni and the faculty were given separate questionnaires, under differing circumstances, each with a unique demographic composition. Yet, both groups agree to a similar extent that society and business are both experiencing ethical decline. The perception by alumni and faculty of the motivating reasons for ethical decline in the workplace is examined next.

Motivating Reason for Unethical Behaviors

The alumni and faculty were asked the same question on separate questionnaires, "What do you believe are the motivating reasons for unethical behaviors by managers?" There were eight (8) reasons listed and the respondents were instructed to "check all that apply." The eight (8) reasons are listed as follows:

Career Advancement (workplace design)Lack of Accountability (workplace design)
Financial Benefit (workplace design)
Company Policies Do Not Address Ethic (workplace design)
No Formal Ethics Training (curriculum design)
Corporate Culture (workplace design)

Upbringing Lacks Ethic Emphasis (family design)
Following Directives (family design)

Alumni by the Factor of Age. The factor of age is examined to determine how the alumni responded to the question, "motivating reasons for unethical behaviors by managers". Based on nine (9) reasons, the age category, 30 years of age or less was compared to the age category greater than 30 years of age to determine the perception of ethics based on age as listed below in Table 1.

TABLE 1
Alumni Responses to Motivating Reasons for Unethical Behaviors by MANAGERS Based on Age

Motivating Reasons for Unethical Behavior	All Alumni Respondents	By Age <=30	By Age >30
Career Advancement	74%	73%	76%
Lack of Accountability	79%	81%	76%
Financial Benefit	33%	29%	41%
Company Policies Do Not Address Ethics	56%	55%	58%
No Formal Ethics Training	64%	58%	77%
Corporate Culture	26%	26%	26%
Upbringing Lacks Ethics Emphasis	56%	49%	70%
Following Directives	31%	29%	35%
Other(please describe)	8%	8%	8%

No Formal Ethics Training, Lack of Accountability, and Career Advancement are the three top reasons indicated by both age categories. *No Formal Ethics Training* indicates a lack of ethics training as part of the academic curriculum design. *Lack of accountability* refers to workplace design, an indicator of a relational need for greater accountability in the workplace. *Career advancement* refers to the competitive nature of the workplace and the basic tenet of capitalism, profit maximization. Figure1, illustrated below, indicates the responses of alumni by the factor of age to motivating reasons for unethical behavior.

Faculty by the Factor of Age. The factor of age is examined to determine how the faculty responded to the question, "Motivating reasons for unethical behaviors by managers." Based on nine (9) reasons, the age category, 50 years of age or less was compared to the age category greater than 50 years of age to determine the perception of ethics based on age as listed below in Table 2.

Both faculty age groups indicated *Career Advancement* and *Lack of Accountability* as one of the top three reasons. The faculty 50 years of age of less also indicated *Company Policies Do Not Address Ethics*. The response might indicate a motivating indicator of career choices for faculty 50 years of age or less. This response might also indicate a preparation for writing and designing company policies for the workplace. The faculty greater than 50 years of age indicated *Up Bringing Lacks Ethical Emphasis* as the primary reason.

Figure 1: Motivating Reasons for Unethical Behaviors by Managers Comparing All Alumni Respondents by the Factor of Age

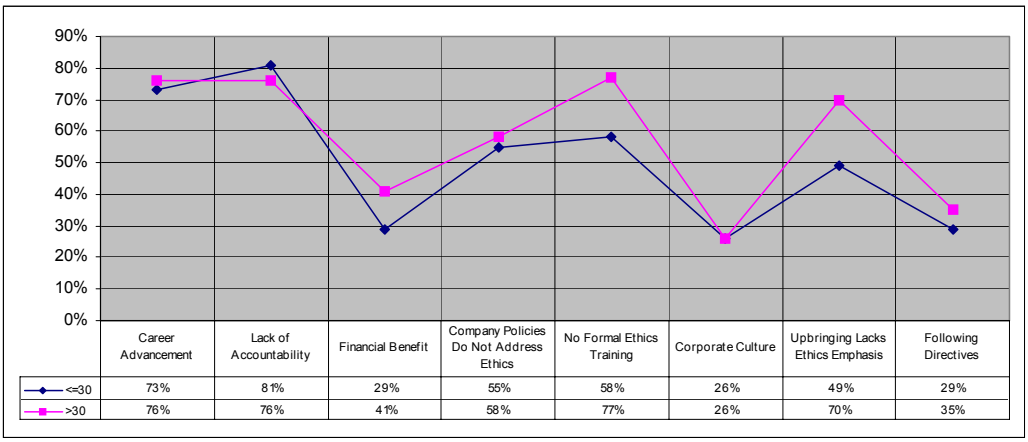
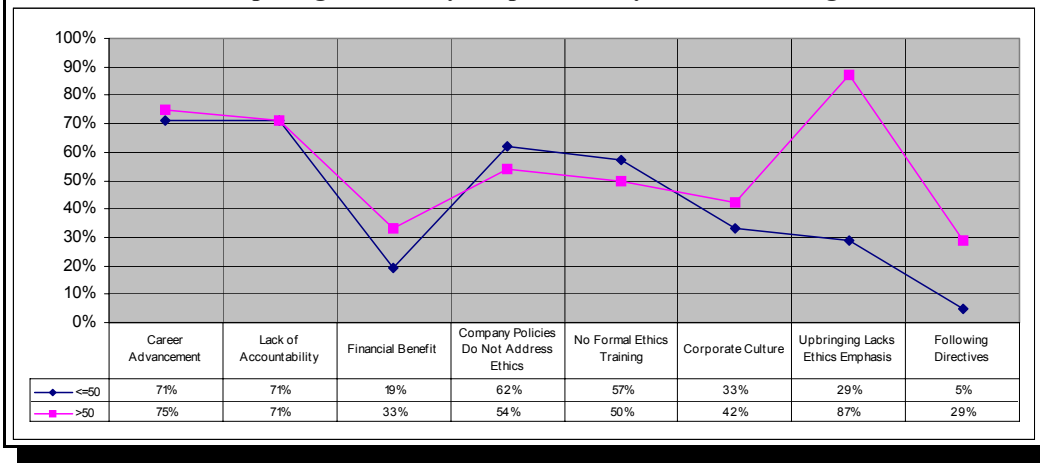


TABLE 2: Motivating Reasons for Unethical Behaviors by MANAGERS

Motivating Reasons for Unethical Behavior	All Alumni Respondents	By Age <=50	By Age >50
Career Advancement	72%	71%	75%
Lack of Accountability	70%	71%	71%
Financial Benefit	26%	19%	33%
Company Policies Do Not Address Ethics	54%	62%	54%
No Formal Ethics Training	52%	57%	50%
Corporate Culture	37%	33%	42%
Upbringing Lacks Ethics Emphasis	72%	29%	87%
Following Directives	26%	5%	29%
Other(please describe)	9%	0%	17%

The response gives the greatest variance in responses by age for Alumni and Faculty respondents and the most significant to this study. The response is significant to this study, as it seems to indicate that the faculty greater than 50 years of age consider ethics training the responsibility of the family rather than the educational institution. The motivating reasons for unethical behaviors by managers based on the factor of age are illustrated in Figure 2 The response seems to indicate that the faculty members consider formal ethics training the responsibility of family design rather than curriculum design.

Figure 2: Motivating Reasons for Unethical Behaviors By Managers Comparing All Faculty Respondents by the Factor of Age



Alumni by the Factor of Sex. The factor of sex is examined to determine how the alumni responded to the question, "Motivating reasons for unethical behaviors by managers." Based on nine (9) reasons the perception of ethics based on sex, male and female, is listed below in Table 3.

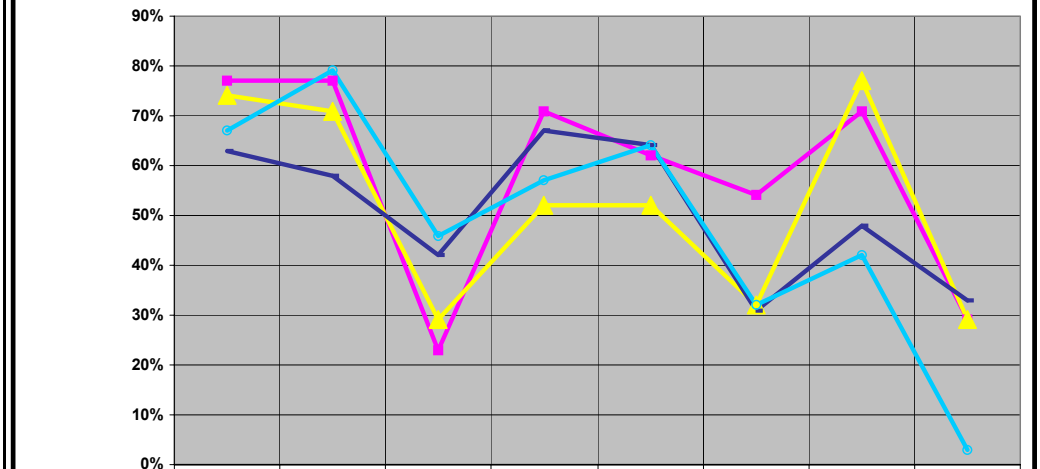
TABLE 3: Motivating Reasons for Unethical Behaviors by MANAGERS

Motivating Reasons for Unethical Behavior	All Alumni Respondents	By Sex Female	By Sex Men
Career Advancement	74%	63%	67%
Lack of Accountability	79%	58%	79%
Financial Benefit	33%	42%	46%
Company Policies Do Not Address Ethics	56%	67%	57%
No Formal Ethics Training	64%	64%	64%
Corporate Culture	26%	31%	32%

Upbringing Lacks Ethics Emphasis	56%	48%	42%
Following Directives	31%	33%	3%
Other(please describe)	8%	8%	3%

In comparing all male to female responses, the responses by sex represent the most interesting findings. Female faculty, male faculty, and male alumni considered *Lack of Accountability* a major reason for unethical behavior. Female faculty consider *Company Policies Do Not Address Ethics and Corporate Culture* secondary in importance. Both male and female faculty consider *Upbringing Lacks Ethics Emphasis* as an additional secondary factor for unethical behavior and one with the greatest variance compared to the alumni by the factor of sex. The responses to motivating reasons for unethical behavior by sex give insight into who should be designing curriculum for the classroom as well as the workplace. Illustrated below in Figure 3, the responses by the faculty and alumni are based on the factor of sex.

Figure 3: Motivating Reasons for Unethical Behaviors by Managers Comparing All Alumni and Faculty Respondents by the Factor of Sex



	Career Advancement	Lack of Accountability	Financial Benefit	Company Policies Do Not Address Ethics	No Formal Ethics Training	Corporate Culture	Upbringing Lacks Ethics Emphasis	Following Directives
Female Faculty	77%	77%	23%	71%	62%	54%	71%	29%
Male Faculty	74%	71%	29%	52%	52%	32%	77%	29%
Female Alumni	63%	58%	42%	67%	64%	31%	48%	33%
Male Alumni	67%	79%	46%	57%	64%	32%	42%	3%

Faculty by the Factor of Sex. The factor of sex is examined to determine how the faculty responded to the question, "Motivating reasons for unethical behaviors by managers." "The category of sex, male responses compared to female responses, as seen below in Table 4 was examined to determine the perception of ethics based on sex.

Both female and male faculty indicate by their response that *Career Advancement* and *Lack of Accountability* as major factors. *Career Advancement* indicates the pressure in the workplace to maximize profit at all cost. *Lack of Accountability* is a workplace design issue addressing the need for a relationship that holds another a person responsible for their actions. According to Parks (1995), young adults need leadership and environments that support leadership with a shift from imposed authority to chosen authority. The male faculty indicates the greatest response and variance by the response, *Up Bringing Lacks Ethics Training*. Once again, the response illustrates that male faculty do not consider ethics training a curriculum issue or the responsibility of classroom instruction. According to Piper (1995), "Cynicism must be replaced by a sense of purpose, worth, responsibility and accountability."

TABLE 4: Motivating Reasons for Unethical Behaviors by MANAGERS

Motivating Reasons for Unethical Behavior	All Alumni Respondents	By Sex Female	By Sex Men
Career Advancement	72%	77%	74%
Lack of Accountability	70%	77%	29%
Financial Benefit	26%	23%	29%
Company Policies Do Not Address Ethics	54%	71%	52%
No Formal Ethics Training	52%	62%	52%
Corporate Culture	37%	54%	32%
Upbringing Lacks Ethics Emphasis	72%	71%	77%
Following Directives	26%	29%	29%
Other(please describe)	9%	21%	6%

In comparing all male to female, the responses by sex represent the most interesting findings. Female faculty, male faculty, and male alumni considered *Lack of Accountability* a major reason for unethical behavior Female faculty considers *Company Policies Do Not Address Ethics and Corporate Culture* secondary in importance. Both male and female faculty consider *Upbringing Lacks Ethics Emphasis* as an additional secondary factor for unethical behavior and one with the greatest variance compared to the alumni by the factor of sex. The responses to motivating reasons for unethical behavior by sex give insight into who should be designing curriculum for the classroom as well as the workplace. Illustrated below in Figure 3, the responses by the faculty and alumni are based on the factor of sex.

DISCUSSION

In examining the concern of effectively teaching and training business ethics in the classroom and in the workplace, this article examined the factors of age and sex on the perception of ethics. Based on two (2) surveys administered to the alumni and faculty of a medium sized regional state university, the findings indicate that age and sex are factors in the perception of ethics. Specifically, it can be determined from the findings that the factors of age and sex affect the perception of ethical situations regarding the design and implementation of ethics in the colleges of business and in the workplace.

The Factor of Age

The response by the alumni based on age indicted that both alumni age groups, 30 years of age or less and greater than 30 years of age, consider the three top reasons for unethical behavior by managers to be, *No Formal Ethics Training, Lack of Accountability, and Career Advancement* are indicated by both age categories. The need for accountability in the workplace was a recurring theme. Many organizations such as Deloitte and Touche offer mentors, a vertical relationship; and buddies, a lateral relationship, that foster personal and corporate accountability. All respondents, regardless of age or sex, considered *Career Advancement* to be an issue. Is the competitive workplace environment at cross-purposes with ethical decision-making? How can students be prepared for the ethical decision making while under tremendous pressure? An application for ethical training is the Ethics Bowl, from Loyola University, Chicago, a hands-on experience similar to the College Bowl of the 1960's, which prepares student teams for intercollegiate competition giving them the opportunity to learn, practice, and think on their feet under pressure. This "hands-on" approach has great potential for the classroom and the workplace.

The response by faculty based on age indicated that both faculty age groups, 50 years of age or less and greater than 50 years of age, indicated *Career Advancement* and *Lack of Accountability* as one of the top three reasons. The faculty 50 years of age or less also indicated *Company Policies Do Not Address Ethics*. The response could indicate a motivating reason for choosing a career in academia among faculty 50 years of age or less. This response could also indicate that faculty 50 years of age or less might be uniquely prepared to design company policies for the workplace. The faculty greater than 50 years of age indicated *Up Bringing Lacks Ethical Emphasis* as the primary reason. The response gives the greatest variance in responses by age for Alumni and Faculty respondents and the most significant to this study. The response seems to indicate that faculty members consider formal ethics training the responsibility of family. The significance of the finding has multiple implications. First, faculty members greater than 50 years of age are at a time in their career when they have the responsibility of designing the curriculum. According to the literature on the subject, the curriculum is lacking in real-world application and meaning. The greatest

concern though is that those responsible for designing the curriculum and teaching it feel ethical training is not their responsibility. The curriculum should be written by those currently on the front lines in the workforce experiencing the pressure to make ethical decisions.

The Factor of Sex

Both female and male alumni responses indicate *Career Advancement* and *No Formal Ethics Training* as major factors. Female alumni consider *Corporate Culture* as the primary factor. Male alumni consider *Lack of Accountability* as the primary factor. The female alumni's primary response indicates a need in the workplace for formal boundaries through policy. The male alumni's primary response indicates a need in the workplace for informal boundaries through accountability.

Both female and male faculty indicate by their response that *Career Advancement* and *Lack of Accountability* as major factors. The male faculty indicates the greatest response and variance by the response, *Up Bringing Lacks Ethics Training*. The response seems to indicate that the male faculty does not consider ethics training a curriculum issue or the responsibility of classroom instruction.

The Factor of Sex. In comparing all male to female, the responses by sex represents the most interesting findings. Female faculty, male faculty, and male alumni considered *Lack of Accountability* a major reason for unethical behavior. Female faculty considers *Company Policies Do Not Address Ethics* and *Corporate Culture* secondary in importance. Both male and female faculty consider *Upbringing Lacks Ethics Emphasis* as an additional secondary factor for unethical behavior and one with the greatest variances compared to the alumni by the factor of sex. The responses to the motivating reasons for unethical behavior by sex give insight into who should be designing curriculum for the classroom as well as the workplace.

The alumni from both age groups indicated by their responses a need for more ethics education and training in the classroom and workplace. Teams composed of older more experienced individuals and younger individuals with fresh perspectives should design the curriculum for both the classroom and the workplace, designing curriculum that will meet the needs of the target audience, the students or the younger employee.

Both faculty age groups indicated by their responses that *Company Policies Do Not Address Ethics* as a major factor. This was the primary factor for females 50 years of age or less, which indicates this group might add a unique perspective to a team writing and designing company policies for the workplace. Additionally, females are considered to be more inherently ethical, (Arlow, 1991). The faculty greater than 50 years of age indicated *Up Bringing Lacks Ethical Emphasis* as the primary reason. The male faculty greater than 50 years of age had the most profound indicator with 87% indicating *Up Bringing Lacks Ethical Emphasis*. This finding supports the evidence indicating that the faculty members consider formal ethics training the responsibility of family rather than school. Curriculum is generally created and designed by the more experienced

faculty. The finding indicates curriculum might be more effective if designed by a team of experienced faculty, greater than 50 years of age, working in partnership with younger faculty members, 50 years of age or less. The teams might include students, interns, alumni and faculty combining proven knowledge, experience, and perceived need. As stated by Andrew Stark (1993), ethics is the responsibility of every person in society.

RECOMMENDATIONS

1.	Curriculum designed and written for the classroom and the workplace by cross-generational and cross-experiential teams. Utilize the new knowledge and experience of recent interns on the team.
2.	Company Ethics Policies and Training designed and written by younger female faculty members.
3.	A competitive program, such as The Ethics Bowl at Loyola, Chicago, should be developed and implemented reinforcing ethical decision making in the schools of business.
4.	Alternative recommendation: Curriculum for the classroom and the workplace designed and written by younger faculty members

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SIGNS OF TROUBLE IN THE PROFESSION: A LOOK AT THE ETHICAL PERCEPTIONS AND EXPERIENCES OF ACCOUNTING PRACTITIONERS (PRE-ENRON)

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ABSTRACT

The Enron and MicroStratagies debacles are among the latest in a string of headlines focusing on accounting firms and individual CPAs who have "crossed the line" by engaging in unethical, or at least what is widely perceived as highly questionable and ill-advised conduct. This study presents the perceptions of accounting practitioners regarding the extent of ethical misconduct in accounting as well as the pervasiveness of selected acts of questionable behavior. Respondents have also been surveyed regarding the likelihood of serious sanctions being imposed for selected types of misconduct as well as their direct personal experience with ethical issues. (Data for this study was gathered prior to the disclosure of the events surrounding Enron.)

The results provide evidence that accounting practitioners are largely comfortable with the ethical environment of the profession. Few perceive ethical misconduct as pervasive and most have a high opinion of the profession's concern about ethics. However the findings reported also provide evidence in contrast to the general sense of ethical well-being. Most of the misconducts listed in the study were perceived as occurring relatively infrequently. Yet, for many of these misbehaviors, a majority or close to a majority of the respondents had direct evidence of such behaviors occurring in practice.

INTRODUCTION

The reputation of the accounting profession demands a commitment to public accountability and ethical behavior as well as a sensitivity to moral issues. The conflicting roles of the professional accountant (attestor, advisor, watchdog) often create an environment in which questions of what is proper professional conduct and ethical behavior are confronted. In the past, terms such as "credibility gap," "expectations gap," and "a crisis of confidence" have been used to express society's

cynicism with the conduct and work of accounting professionals. As a result of Enron, MicroStrategies, and other similar situations, these phrases are making a comeback with many investors and others viewing accountants as divorced from the moral aspects of the business environment. To many, the phrase "accounting ethics" has become an oxymoron and the "bottom line" for both business and accounting firms has become the holy grail.

The impetus for the concern regarding the ethical and professional conduct of accountants comes from accounting's relationship with the "using" public. As James Castellano (2002), Chair of the AICPA Board of Directors, noted, "protecting the public interest is the centerpiece of [the accounting] profession's reputation" (p. 2). The overall objective of accounting and financial reporting is to provide users with relevant and reliable financial information on which to base their decisions (FASB, 1978). Thus, public assurance of professional integrity, of conduct more rigorous than required by law, and of enforcement of reporting and ethical standards has been of paramount importance in the successful achievement of this objective. Accounting, like all professions, is comprised of individuals; each of whom is a professional responsible for his/her own conduct, but whose actions reflect on the profession as a whole. The Enron and MicroStratagies debacles are among the latest in a string of headlines focusing on accounting firms and individual CPAs who have "crossed the line" by engaging in unethical, or at least what is widely perceived as highly questionable and ill-advised conduct. With each passing day seeming to have new headlines linking accounting and misconduct, the public is once again questioning the underlying ethics, independence, and moral judgment of the profession and its members.

Almost fifty years ago, ethicists warned that "unless practitioners of a profession both understand and can apply their profession's ethical standards in actual practice, public policy makers may take away any existing authority a profession may have to regulate itself" (Goode, 1957, 197-98; Greenwood, 1957, 50). Now, on the heals of Enron, comes the recommendation by Harvey Pitt, Chairman of the SEC, for the creation of a new Public Accountability Board that would assume responsibility for auditor and accountant discipline as well as quality control. In his January 2002 remarks to the 29th Annual Securities Regulation Institute, Pitt noted that "innocent investors have been betrayed by our system of disclosure and accounting. Most tragic are the investors who entrusted some portion of their life savings to a company that seemed to be profitable, placing their trust in the company, its auditors, research analysts, and our federally mandated disclosure system...." (Pitt, 2002, 1). He cited "an insufficiently strong and effective quality control and vigorous and transparent professional disciplinary procedure for accountants and accounting firms that engage in unethical or incompetent accounting and audit practices" as one of the many systemic problems in need of repair (Pitt, 2002, 2) and pledged SEC commitment to the "vigorous and robust pursuit of accounting misconduct" (Pitt, 2002, 4).

The demand for ethical conduct on the part of accountants is at its greatest and, as a result, practitioners are being forced to intensify their commitment to professional behavior. The purpose of this study is to provide further insight into issues of ethical and professional conduct in

accounting. The study presents the perceptions of accounting practitioners regarding the extent of ethical misconduct in accounting as well as the pervasiveness of selected acts of questionable behavior. Respondents were also surveyed regarding the likelihood of serious sanctions being imposed for selected types of misconduct as well as their direct personal experience with ethical issues. These perceptions, observations, and direct experiences should provide useful insight not only into the ethical environment faced by public accounting practitioners, but also behaviors and dilemmas faced by CPAs within their organizational environment. (Data for this study was gathered prior to the disclosure of the events surrounding Enron.)

The remainder of this paper is divided into four sections. The first section presents selected literature related to the issues of ethics in the accounting profession. The second section describes the methodology employed in this study, followed by a discussion of the results. In the final section, the conclusions and implications of the findings are presented.

SELECTED PRIOR STUDIES

The profession's increased concern regarding ethical issues has arisen primarily as a reaction to public outcries. The public's concern over a profession seen too often as failing to address moral issues, as exhibiting a perceived decline in ethical sensitivity, and as compromising the public trust has been the primary motivating factor behind ethics-based accounting research. The following paragraphs present selected studies inquiring into the ethics of members of the accounting profession.

The accounting profession has, in the past, been perceived as being more ethical than other professions (e.g., Williams, 1990; Touche Ross, 1988; CPAs are More Ethical..., 1987). However, in recent years and in particular in the last few months, accountants have made front page news via allegations of contributing to business failures and crises due to negligent or fraudulent financial reporting. In fact, Stanga and Turpin (1991) noted that the *Wall Street Journal Index* listed nearly 800 news articles related to fraudulent or illegal activities involving personnel with accounting or financial responsibilities.

In an early study of ethics in the public accounting profession, Loeb (1970, 176) noted "the possibility that some CPAs commit unethical acts simply because they do not realize that they are unethical." Swindle *et al.* (1987) surveyed AICPA members to assess the values important to CPAs, the degree of acceptance of ethically questionable behaviors, and CPAs' assessment of the acceptance of ethically questionable behaviors by other CPAs. Results indicated that CPAs place more importance on personal-oriented values (e.g., family security, self-respect, happiness) than on social-oriented values (e.g., world of beauty, national security, social recognition). Furthermore, the study found that CPAs believe themselves to be more ethical than their peers and are far less accepting of certain behaviors such as padding time reports and substandard work.

Ward *et al.* (1993), in a study of CPA perceptions regarding their own ethicality, investigated the proficiency of CPAs in recognizing and evaluating ethical and unethical situations as presented in six vignettes involving a variety of ethical dilemmas from questions of conflict of interest to questions of personal honor. Results reported that practitioners can distinguish between ethical and unethical behaviors with ethical and very unethical behaviors most easily identifiable. As was the case in prior studies, the respondent CPAs viewed themselves as more ethical than their peers. Furthermore, the findings indicated that, while certain behaviors may be technically acceptable, such behaviors were considered *personally* unacceptable to the respondents.

Examining the pervasiveness of unethical behavior as well as the pressure to act unethically among those working in management accounting, McCuddy *et al.* (1993) reported that management accountants experienced relatively infrequent pressure to act unethically. However, those experiencing pressure did so more from parties *inside* of their organization (i.e., supervisor/boss, other managers, co-workers, subordinates) rather than from those *outside* their organization (i.e., customers/clients, vendors/suppliers, governmental agencies, family members). In addition, management accountants working in the nonpublic accounting arena encountered significantly more *internal* pressures to act unethically while those employed in public accounting experienced significantly more *external* pressure to perform unethically with this pressure increasing as management level increased. Furthermore, researchers observed that pressure to behave unethically may be related more to attributes of the business itself than they are to attributes of the employees of those firms. This suggests that, if the pressures to engage in unethical behavior are to be lessened, change efforts should focus on the organization and its culture rather than on the individual members of the organization.

RESEARCH METHODOLOGY

To examine the perceptions and experiences of accounting practitioners regarding ethical misconduct in accounting, data were collected by surveying a random sample of 1,976 Certified Public Accountants across the United States who are members of the AICPA. (The AICPA provided the sample of CPAs included in this study.) Responses were received from 380 CPAs resulting in a response rate of 19.2 percent. Non-response bias was tested by comparing the early and the late responses. The results of this analysis indicated no significant differences between early and late responses and, thus, no evidence of material non-response bias. The survey instrument utilized was a modified version of a questionnaire developed and used by the American Association of University Professors and the American Philosophical Association in a national survey of ethics in the academic professions. Permission was obtained from these organizations for modification and use of the instrument.

The questionnaire elicited public accounting practitioners' perceptions of the overall ethical environment of the accounting profession, the effect of concerns over ethical conduct, the pervasiveness of selected acts of questionable behavior in accounting, and the likelihood of serious sanctions being imposed for selected types of misconduct. The respondents were also surveyed regarding their direct personal experience with ethical issues.

RESULTS

The following sections discuss the results of this study by major categories contained in the survey instrument.

Demographics

Table 1 presents selected demographic data for the respondents. Approximately 76 percent of the practitioner respondents were males and approximately 24 percent female. These proportions are consistent with the increased numbers of women entering the accounting profession in recent years. Nearly half of the respondents were under the age of 40 with over two-thirds having been in the profession for over ten years. The overwhelming majority of respondents were Caucasians with no professional certification other than that of CPA. Slightly over 70 percent of the respondents in this study worked for local CPA firms with 61.3 percent being either a sole proprietor or a partner. Approximately 39 percent earned less than $50,000 per year with approximately 32 percent earning over $80,000.

Overall Ethical Environment

The survey instrument first requested respondents to provide their view of the general ethical environment of the accounting profession. The responses reported in Table 2 revealed that accounting faculty and practitioners, by and large, do not view unethical conduct as occurring frequently with 46.3 percent perceiving little ethical misconduct by accountants. In fact, only a small percentage (4.5%) felt that there was a great deal of ethical misconduct by accountants today. It is interesting to note that nearly half of the practicing accountants believed that some level of misconduct did exist.

TABLE 1
Characteristics of Respondents
(n=380)

Characteristic		Characteristic	
Gender:		**Years in Profession:**	
Male	75.8%	Less than 5 Years	08.5%
Female	24.2	5 - 9 Years	20.9
		10 - 19 Years	38.2
		20 Years or More	32.4
Age:		**Salary Range:**	
Under 30	13.2%	Below $40,000	20.4%
30 - 39	35.2	$40,000 - $49,000	18.3
40 - 49	29.9	$50,000 - $59,000	11.7
50 and over	21.7	$60,000 - $69,000	10.6
		$70,000 - $79,000	07.1
		$80,000 and Over	31.9
Ethnic Origin:		**Level:**	
Caucasian	94.3%	Sole proprietor	22.4%
African/American	00.6	Partner	38.9
Asian	01.6	Manager	20.8
Native American	00.6	Senior	13.9
Hispanic	02.7	Staff	04.0
Other	00.2		
Certification:		**Firm Type:**	
CPA	99.5%	International/National	16.6%
CMA	00.5	Regional	11.3
CIA	00.8	Local	72.1
Other	04.2		

Less than 50 percent of the practitioners indicated that the level of ethical misconduct was about the same as that of a decade ago. In fact, slightly more that one-third of the CPAs felt that there was more misconduct today than ten years ago. While neither Enron nor MicroStrategies had come to light at the time this survey was administered, it is interesting to note that approximately 18 percent of the practitioners felt that ethical misconduct had actually decreased during the last 10 years.

When asked about the level of concern regarding ethical issues, approximately 75 percent of the practitioners reported an increase in such concerns in the last 10 years. The overwhelming majority of practitioners (77.6%) felt that accountants are more concerned about ethical issues than other professions which is consistent with prior research. Perhaps, however, this concern is being manifested in finding ways around professional ethics guidelines rather than in following them.

TABLE 2
Practitioners' Overview of Ethical Issues

Perception	
Overall ethical misconduct by accountants today:	
A great deal of misconduct	04.5%
Some misconduct	49.2
Very little misconduct	46.3
Overall ethical misconduct by accountants today versus a decade ago:	
More misconduct	35.5%
Less misconduct	17.6
No difference	46.9
Ethical concern of accountants today versus a decade ago:	
More concern	74.6%
Less concern	08.0
No difference	17.4
Accountants are more concerned about ethical issues that most other professions:	
Definitely	31.7%
Probably	45.9
Probably not	19.3
Definitely not	00.5
Do not know	02.6

Ethical Concerns: Potential Consequences

The next section of the survey instrument considered some potential consequences of the profession's concerns over ethical conduct. As Table 3 reveals, the majority of practitioners (76.4%) felt that concerns over ethical conduct encouraged a constructive dialogue of ethical issues. The CPA respondents were split regarding whether the profession's concern with ethical issues would result in the revelation of previously undisclosed ethical incidents as 43.6 percent thought it would. However, 50.8 percent of the practitioners indicated that the focus on ethics was not likely to reveal serious incidents of misconduct. Slightly over half of CPAs felt that ethical concerns fostered a "rush to judgment" attitude towards individuals accused of violating ethical standards. The CPA respondents expressed concern over potential adverse implications of such an ethical focus as 45.2 percent viewed the adoption of professional regulations that infringed accountant rights as likely.

TABLE 3
Likely Effect of Concerns Over Ethical Conduct

Likely Effects of Accountant's Concerns over Ethical Conduct	
Encourages constructive discussion of ethical issues:	
Very likely	26.3%
Somewhat likely	50.1
Not very likely	12.7
Not likely at all	06.1
Do not know	04.8
Reveals serious incidents previously undisclosed by accountants:	
Very likely	
Somewhat likely	08.2%
Not very likely	35.4
Not likely at all	35.1
Do not know	15.7
	05.6
Fosters "rush to judgment" attitude toward individuals accused of violating ethical standards:	
Very likely	18.2%
Somewhat likely	36.7
Not very likely	27.4
Not likely at all	10.2
Do not know	07.5
Leads to adoption of regulations that do not respect the rights of accountants:	
Very likely	17.9%
Somewhat likely	27.3
Not very likely	29.7
Not likely at all	20.6
Do not know	04.5

Ethical Misconduct: Specific Types

The survey instrument then asked for perceptions regarding the frequency of occurrence of each of several selected examples of specific ethical misconduct. In addition, the instrument inquired whether or not the respondent had personally observed or had direct evidence of each selected act. The results provide some interesting contrasts. As reported in Table 4, none of the selected

misbehaviors were perceived as being widespread by a majority of respondents. However, as can be seen, for several of the listed behaviors, over half of the respondents had encountered such misconduct in the workplace.

TABLE 4
Frequency of Occurrence of Selected Misconduct

Types of Misconduct	
Evaluating subordinates on the basis of personal rather than professional criteria:	
Widespread/Very widespread	34.1%
Not widespread	51.6
Do not know	14.3
Percentage of Respondents Observing or Having Direct Evidence of This Activity	*62.2*
Claiming credit for others work:	
Widespread/Very widespread	24.6%
Not widespread	60.6
Do not know	14.8
Percentage of Respondents Observing or Having Direct Evidence of This Activity	*45.4*
Falsifying reports:	
Widespread/Very Widespread	07.9%
Not widespread	81.0
Do not know	11.1
Percentage of Respondents Observing or Having Direct Evidence of This Activity	*23.0*
Sexually harassing subordinates:	
Widespread/Very widespread	08.8%
Not widespread	70.2
Do not know	20.8
Percentage of Respondents Observing or Having Direct Evidence of This Activity	*36.0*
Sexually harassing peers:	
Widespread/Very widespread	05.6%
Not widespread	70.4
Do not know	24.0
Percentage of Respondents Observing or Having Direct Evidence of This Activity	*20.1*
Using firm resources for inappropriate personal purposes:	
Widespread/Very widespread	32.5%
Not widespread	53.8
Do not know	13.7
Percentage of Respondents Observing or Having Direct Evidence of This Activity	*63.5*

TABLE 4
Frequency of Occurrence of Selected Misconduct

Discriminating against others on the basis of race, gender, national origin, or other personal characteristics:	
Widespread/Very widespread	24.9%
Not widespread	61.1
Do not know	14.0
Percentage of Respondents Observing or Having Direct Evidence of This Activity	*41.8*
Misusing expense/travel accounts:	
Widespread/Very widespread	23.0%
Not widespread	60.4
Do not know	16.6
Percentage of Respondents Observing or Having Direct Evidence of This Activity	*56.2*

The specific act viewed as occurring most frequently was that of evaluating subordinates on a personal rather than on a professional basis; an activity viewed as widespread/very widespread by 34.1 percent of the respondents. In addition, 32.5 percent of the CPAs indicated that the practice of using firm resources for inappropriate personal purposes was also widespread or very widespread. However, over 60 percent of the respondent CPAs had directly encountered at least one instance of each of these two activities. A similar pattern (with smaller percentages) where an activity is perceived, in general, as not occurring frequently, but is encountered more commonly by the individual CPA is repeated for most of the remaining misconducts listed.

For some misbehaviors such as falsifying reports and sexually harassing subordinates and peers, the results in this study are encouraging as, in general, less than 10 percent of the respondents indicated that such acts are widespread. A much larger percentage, however, had directly experienced or observed such acts, particularly the sexual harassment of subordinates (36.0%). However, for other behaviors, such as claiming credit for the work of others, discriminating against others because of personal characteristics, and misusing expense accounts, the results are somewhat disturbing. Even though the majority of respondents did not indicate that any of these three behaviors were widespread, the fact that approximately one out of four CPAs did is cause for concern. Furthermore, over 40 percent of the respondents had direct evidence of claiming credit for others' work and of discrimination in practice with approximately 56 percent having personally observed the misuse of expense accounts. These findings provide food for thought in this age of ethical conscience as individual accountants appear not to be as ethical as the profession thinks as a whole that it is.

Ethical Misconduct: Professional Consequences

The respondents were then queried regarding the professional consequences of being guilty of the selected behaviors (see Table 5). For most of the listed acts of misconduct, a majority of the practitioners felt that it was likely or very likely that serious sanctions would result for a majority of the misconducts listed. The single act considered by all respondents as most likely to provoke such sanctions was that of falsifying reports, an interesting result given the current crisis in the profession. Actions involving sexual harassment, discrimination, and the misuse of expense accounts were also seen as likely to result in serious sanctions. The evaluation of subordinates on personal rather than professional criteria was the behavior considered by respondents as least likely to cause serious sanctions. This result is consistent with the fact that practitioners felt that this was the behavior that was most widespread.

TABLE 5
Serious Sanctions in Respondent's Firm for Selected Misconduct

Types of Misconduct	
Evaluating subordinates on the basis of personal rather than professional criteria:	
Very likely	07.0%
Somewhat likely	27.2
Not very likely	46.4
Not likely at all	19.4
Claimed credit for work done by others:	
Very likely	17.6%
Somewhat likely	37.1
Not very likely	35.0
Not likely at all	10.3
Falsifying reports:	
Very likely	76.4%
Somewhat likely	17.4
Not very likely	03.8
Not likely at all	02.4
Sexually harassing subordinates:	
Very likely	54.1%
Somewhat likely	30.8
Not very likely	09.7
Not likely at all	05.4

TABLE 5
Serious Sanctions in Respondent's Firm for Selected Misconduct

Sexually harassing peers:	
Very likely	52.4%
Somewhat likely	32.0
Not very likely	10.2
Not likely at all	05.4
Using firm resources for inappropriate personal purposes:	
Very likely	28.5%
Somewhat likely	34.4
Not very likely	28.2
Not likely at all	08.9
Discriminating against others on the basis of race, gender, national origin, or other personal characteristics:	
Very likely	42.1%
Somewhat likely	37.5
Not very likely	13.7
Not likely at all	06.7
Misusing expense/travel accounts:	
Very likely	39.1%
Somewhat likely	38.9
Not very likely	16.1
Not likely at all	05.9

Unethical Conduct: Direct Experience

The final aspect of the survey instrument examined the respondents direct experience with unethical conduct. Practitioners were first asked if they had ever felt pressured to engage in unethical conduct. As Table 6 indicates, nearly 76 percent of the CPAs reported that they had *never* felt such pressure. This is encouraging until one realizes that one in four accountants *has* encountered pressure to act unethically. Approximately 22 percent of the practitioners who had experienced such pressure had encountered such a situation within the past year. A disproportionate share of the CPAs who were subject to such pressure had been at their firm less than five years (67.1% vs. 33.3% for the respondents as a whole).

TABLE 6
Direct Experience with Ethical Issues

Ethical Issues	
Accountants who have felt pressured by a colleague, a supervisor, or a Partner to engage in conduct that you consider unethical	23.9%
When did this incident occur? (For this and following items, if the respondent was pressured more than once, the answer is based on the most recent experience.)	
During the past 12 months	22.2%
During the past 1-3 years	22.2
More than 3 years ago	55.6
At the time of the incident, length of employment	
Less than 5 years	67.1%
5 years and over	32.9
How serious was the matter about which you felt pressured?	
Very serious	30.6%
Somewhat serious	47.1
Not very serious	22.3
Not serious at all	00.0
Did you question or protest the matter to the person who you felt was pressuring you?	
Yes	81.4%
No	18.6
Did you discuss what was being asked of you with a colleague or superior?	
Yes	70.6%
No	29.4
Did you eventually go along with what you were being asked to do?	
Yes	44.8%
No	55.2
Do you find yourself being more careful today than you might have previously been to avoid conduct that might appear unethical?	
Often	12.7%
Sometimes	33.9
Rarely	34.5
Never	18.9

The majority (77.7%) of practitioners who received such pressure tended to view the incident as serious. The overwhelming majority protested the matter in question to the person exerting the pressure (81.4%) and discussed the issue with a colleague or superior (70.6%). Interestingly, nearly half of the practitioners who were subject to pressure eventually went along with what they were being asked to do and, of those, 69.2 percent had been at their firm for less than five years. Furthermore, less than half (46.6%) were more careful to avoid unethical behaviors after being subject to such pressures. All of these findings seem to be born out by the circumstances surrounding the ongoing Enron case.

The respondents were also queried as to whether or not they had ever discussed the ethicality of a fellow accountant's behavior with a superior. As can be seen in Table 7, less than one in five CPAs had ever engaged in such a conversation. Of those who had, the overwhelming majority (81.8%) of these conversations had occurred more than one year before. It is encouraging to see that 43.5 percent were not reluctant to raise an ethical issue, but, at the same time, disheartening that 50 percent were reluctant to have such a conversation at all. These results are not surprising given the experience of whistle-blowers in today's business environment. Whistle-blowers are frequently ostracized, criticized, and, ultimately, fired or forced to resign for not following the party line. Furthermore, the majority (54.1%) of the respondents who had had such a discussion reported that the superior took no action regarding the situation. This, perhaps, could be interpreted to indicate that such behaviors are condoned by the upper levels of company management. Again, this could have been a factor in creating the professional climate which led to Enron and other such situations.

TABLE 7
Direct Experience with Raising Ethical Issues

Ethical Actions	
Accountants who have expressed concern to a superior at work that a fellow accountant may have violated, or in your view, did violate standards of professional ethics	17.5%
When did this discussion occur?	
During the past 12 months	18.2%
During the past 1-3 years	31.8
More than 3 years ago	50.0
Were you reluctant to raise the matter?	
Very reluctant	14.5%
Somewhat reluctant	35.5
Slightly reluctant	06.5
Not reluctant at all	43.5

TABLE 7
Direct Experience with Raising Ethical Issues

Outcome of Discussion.	
Superior listened, but took no action	54.1%
Superior looked into the matter and accountant resigned	11.5
Superior looked into the matter and issued a reprimand	29.5
Superior convened a formal Hearing	04.9

SUMMARY AND IMPLICATIONS

The results of this study provide evidence that accounting practitioners are largely comfortable with the ethical environment of the profession. Few perceive ethical misconduct as pervasive and most have a high opinion of the accounting profession's concern about ethics. Practitioners perceive that the frequency of selected unethical activities is low and that those guilty of such acts will face severe sanctions. When questioned about their direct experience with ethical issues, relatively few accountants reported having felt pressured to engage in unethical conduct.

However the findings reported in this study also provide evidence in contrast to the general sense of ethical well-being. For example, 23.9 percent of the CPAs, two-thirds of whom had been at their firm for less than five years, reported having felt pressure to engage in unethical conduct with nearly half likely to acquiesce to the pressure to act unethically. In addition, most of the misconducts listed in the study were perceived as occurring relatively infrequently. Yet, for many of these behaviors, a majority or close to a majority of the respondents had direct evidence of such behaviors occurring in practice.

According to James Castellano (2002), Chair of the AICPA Board of Directors, accounting has a "zero tolerance for individuals...who don't comply with the rules" (p. 2). The results reported here suggest that to perceive ethical attitudes and perceptions as being uniform across the accounting profession may be misleading and, in fact, lend some support to the argument that the accounting profession may not be as ethical as one would like. These findings, perhaps, partially explain how the profession has found itself sliding down the slippery slope of ethical misconduct which has resulted in the Enron and similar situations. Accountants, like people the world over, always want to believe that misconduct, ethical or otherwise, will not be tolerated in their profession, but, when faced with reality, admit that such behavior is occurring. Thus, it appears that the profession of accounting does not, in reality, subscribe to the zero-tolerance policy with the result being the recent major setbacks to accounting's professional reputation.

Again, it must be borne in mind that the recent surge in "alleged" ethical misconduct by accountants had not yet occurred at the time this survey was conducted. However, in hindsight the respondents' answers to the survey instrument appear to contain the seeds of the current ethical problems that are facing the accounting profession today.

ENDNOTES

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REGULATORY ISSUES

REGULATORY ISSUES

ENVIRONMENTAL HEALTH, POLLUTION AND INDUSTRIES: THE ASSOCIATION OF AUDIT PRIVILEGE AND IMMUNITY LAWS

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ABSTRACT

Research of major U.S. corporations indicate that a large number of companies' real environmental, health and safety costs are 300 to 400 percent higher than recorded in their plant accounting records. An investigation of environmental, health issues and compliance initiatives should be valuable to both impacted companies and the general public. Notably, in December 1995, the Environmental Protection Agency (EPA) issued a policy intended to motivate companies to take an active role in monitoring their own pollution abatement processes by encouraging these regulated entities to self-audit, disclose, and correct any discovered violations. States further passed environmental audit privilege laws that in essence protect the information contained in environmental audits of firms. There exists little empirical evidence to support constituents' beliefs about the effects of state environmental audit privilege on pollution levels, the economy and pollution-related health problems. The objective of this exploratory study was to investigate whether emission levels of five criteria air pollutants and specific sectors of State's economies are affected by the passage of state environmental audit privilege and immunity laws. The results indicate that most of the sample States increased emission of the pollutants after enacting audit statutes, particularly the pollutants Carbon Monoxide (CO), Nitrogen Oxide (NO_x) and Sulfur Dioxide (SO_2). The study also finds that after the enactment of environmental audit privilege and immunity laws, States' chemical and allied products industries significantly increased output, on average, as measured in real GSP dollars. The study findings indicate that more research is needed that incorporates non-financial variables in order to develop a more comprehensive profile of environmental regulatory costs.

INTRODUCTION

In 1986 the Environmental Protection Agency (EPA) issued a statement that encouraged firms (e.g., manufacturing companies, utility companies, chemical manufacturers) to conduct environmental audits. The final policy was issued in December 1995 (Federal Register, Vol. 60, No.

246, p. 66706). The EPA's objective was to have firms take an active role in monitoring their own pollution abatement processes by motivating these regulated entities to self-audit, disclose, and correct any discovered violations. This, the EPA believed, would be an efficient and effective way to fulfill its ultimate goal of limiting pollution and its inherent problems.

Environmental audits are voluntary audits done by firms to assess compliance with environmental laws. The audits also determine whether adequate processes for monitoring compliance with the existing environmental laws are in place. However, many firms were reluctant to conduct environmental audits because the information provided could be used as evidence in lawsuits initiated by the EPA and other citizen groups. To encourage firms to conduct environmental audits, States passed *environmental audit privilege laws* that in essence protect the information contained in environmental audits of firms. Information resulting from an audit-privileged status may not be disclosed in administrative, civil or criminal proceedings. States also enacted *immunity* legislation for environmental audits. This legislation provides limited immunity from fines and penalties, given that the company voluntarily discloses the audit results and corrects the violation. Since 1993, 15 States have enacted privilege and immunity legislation, five States have granted privilege and five States have adopted immunity legislation. Table 1 describes the legislation adopted by each of the twenty-five States.

Table 1
Voluntary State Environmental Audit Privilege and Immunity Legislation

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9
State	Statutory citation	Eff. Date	Privilege Civil	Privilege Criminal	pre-notification	Immunity Civil	Immunity Criminal	Sunset Date
Alaska	9.25.450	1997	Yes	No	Yes	Yes	No	No
Arkansas	8-1-301	1995	Yes	Yes	No	No	No	No
Colorado	13-25-126.5,	1994	Yes	Yes	No	Yes	Yes	Yes (1999)
	25-1-114/5							
Idaho	9-801	1994	Yes	Yes	No	Yes	Yes	Yes (1997)
Illinois	415-5/52.2	1995	Yes	Yes	No	No	No	No
Indiana	13-28-4-1	1994	Yes	Yes	No	No	No	No
Iowa	1109	1998	Yes	No	No	Yes	No	No
Kansas	60-3332	1995	Yes	Yes	No	Yes	Yes	No
Kentucky	224.01-040	1994	Yes	Yes	No	Yes	No	No
		1996*						
Michigan	324.1801	1996	Yes	No	Yes	Yes	No	No

Table 1
Voluntary State Environmental Audit Privilege and Immunity Legislation

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9
State	Statutory citation	Eff. Date	Privilege Civil	Privilege Criminal	pre-noti-fication	Immunity Civil	Immunity Criminal	Sunset Date
		1997*						
Minnesota	114C.20	1995	No	No	n/a	Yes	Yes	Yes (1999)
Montana	75-1-1201	1997	No	No	n/a	Yes	No	Yes (2001)
	80-1-301							
Nebraska	25-21, 254	1998	No	No	n/a	Yes	No	No
Mississippi	49-2-71	1995	Yes	Yes	No	No	No	No
Nevada	445C.010	1997	Yes	No	No	Yes	No	No
New Hampshire	147-E:1	1996	Yes	Yes	No	Yes	No	Yes (2002)
Ohio	3745.70	1997	Yes	No	No	Yes	No	Yes (2004)
		1998*						
Oregon	468.963	1993	Yes	Yes	No	No	No	No
Rhode Island	42-17.8-1	1997	No	No	n/a	Yes	Yes	No
South Carolina	48-57-10	1996	Yes	Yes	Yes	Yes	No	No
South Dakota	1-40-33	1996	No	No	n/a	Yes	Yes	No
Texas	4447cc	1995	Yes	No	Yes	Yes	No	No
		1997						
Utah	19-7-101	1995	Yes	No	No	Yes	No	No
		1996*						
		1997*						
Virginia	10.1-1198	1995	Yes	No	No	Yes	No	No
Wyoming	35-11-1105	1995	Yes	No	No	Yes	No	No
		1998*						

* Indicates amendment.
Source: National Conference of State Legislatures, 1998.

The proponents of audit privilege laws opine that granting such privilege helps States by encouraging business and new business, which improves the economy and the States' overall quality of life. The EPA, however, has expressed misgivings about state-granted audit privilege. Specifically, the EPA suggests that state laws hinder its efforts to enforce federal environmental

laws. In addition, many citizens' groups suggest that granting environmental audit privilege is the same thing as giving companies the license to pollute. Citizens' groups anticipate that the audit privilege and/or the granted immunity States will see an increase in pollution rather than a decrease once the laws take affect. These groups state that the benefits obtained from new industry and jobs and increased tax revenues will be neutralized by the health and other problems caused by increases in pollution created by the new firms exercising the freedom to pollute granted by the audit privilege and immunity policies (Cushman, 1996).

There exists little empirical evidence to support any of the three parties' beliefs about the effects of state environmental audit privilege on pollution levels and pollution-related health problems. This exploratory study therefore has the following objective -- to investigate whether state environmental audit privilege laws have an impact on pollution, specifically regulated air pollutants and specific sectors of a State's economy. This study is the first stage in the authors' research project that will eventually investigate the relationship between non-financial environmental variables and financial measures (e.g., state governments' debt cost and corporate debt cost) and environment audit laws and policies. Our subsequent studies will also compare these measures between the States with audit privilege laws/policies and the States without such audit legislature.

Environmental audits are group projects that employ the effort and expertise of firm engineers, accountants and independent parties (e.g., public accountants). Therefore, accounting regulatory bodies and the public accounting professionals, particularly auditing practitioners, should find the results of this study valuable in making related regulatory decisions. Moreover, the summary provided of the existing environmental audit issues and the possible relationship to public health and the economy should also prove useful.

The remainder of the paper is divided into the following sections. The first section discusses literature related to environmental regulation and health issues. The next sections present the research questions, a description of the research methodology and a discussion of the results. The final section concludes the paper by discussing the findings and areas for future research.

ENVIRONMENTAL STUDIES

Many companies and States have become more responsive to their stakeholders' concerns about potential effects/costs of environment infringements by providing financial and related non-financial information. As a possible outgrowth of this concern and the demands of regulatory agencies, several studies have investigated the cost of environmental regulatory policies. Joshi, Krishnan and Lave (2000) examined the ability of managerial accounting systems to identify, precisely, environmental regulation costs and related hidden costs. The measure used for the environmental regulatory was pollution abatement operating expenditures. Another study (Barbera & McConnell, 1990) investigated the impact of environmental regulation on productivity growth

rate. Regulation was measured as environmental capital stock. Other studies further investigated the value relevance of non-financial environmental indicators. Barth and McNichols (1994) investigated the relationship between Superfund sites, a non-financial measure, and share price. The results suggest that investors discount the value of equity based on their assessment of a potential Superfund liability of the company. Johnson, Magnan and Stinson (1998) documented the relationship between toxic chemicals and firm value and confirmed the previous findings of Barth and McNichols (1994). Recently, Hughes (2000) investigated the relationship between non-financial air pollutant emissions (sulfur dioxide) and firms' potential environmental liability. Hughes's study indicates that the non-financial pollution measure is value-relevant for certain utility companies.

Studies conducted by governmental agencies have stimulated environmental research and imparted valuable information for the accounting profession. For example, the National Conference of State Legislatures-NCSL (Morandi, 1998) evaluated the effects of state environmental audit privilege, immunity laws and policies. The NCSL survey of 988 manufacturing facilities provided the following conclusions.

♦	The existence of an environmental audit privilege and immunity law or an audit policy does not impact the level of audit activity of manufacturing companies.
♦	Audit laws and policies have not affected the changes made on the sampled companies audit program.
♦	There is an increased emphasis on pollution prevention in facility audits.
♦	The existence of an environmental audit privilege, immunity and/or policy does not influence the disclosure of violations for the facilities.
♦	The violations disclosed are often minor violations, which are corrected immediately and are granted immunity from fines or penalties (National Conference of State Legislatures (NCSL 1998, pp.17-19).

The existence of audit privilege and immunity legislation or State audit policy does not seem to have significantly influenced the implementation of audit programs or manufacturing companies' decisions to conduct environmental audits. However, the third finding implies that States may benefit from increased measures of pollution prevention because of environmental audit laws and policies. The findings that the disclosed violations are minor in nature paired with little noticeable impact on violation disclosures raises the possibility that major violations can continue unreported, until State inspection agencies or other parties discover such violations. Public health could be adversely affected during the interim. Notably, this study did not investigate the actual level and type of violations (e.g., level of air emissions) or compare specific violations with the violations disclosed by States without audit laws or policies.

Studies within other disciplines have focused on the health implications of environmental factors (e.g., air particles). Hileman's (1996) findings suggest that the presence of ultra fine particles in the air increase lung disease. Standard Metropolitan Statistical Areas (SMSA) data was used by

Gerking and Schulze (1992) to demonstrate a positive relationship between mortality rates and the level of gases such as carbon dioxide, sulfur dioxide and small particles. These studies and others (e.g., Dockery, Pope, Xu, Ware, Fay, Ferris & Speizer, 1993; Raloff, 1998) identified several non-financial variables that can be incorporated into accounting research.

RESEARCH QUESTIONS

Citizens' groups opine that there are benefits obtained from environmental audit privilege and immunity laws including industry growth, new jobs and increased tax revenues. Glassen (1995) suggests that audit privilege legislation is business friendly and thus States should expect increases in several measures of prosperity (e.g., increased income). Prior research suggests a strong correlation between pollution and health problems (Hileman, 1996; Gerking & Schulze, 1992). Many studies (e.g., Gerking & Schulze, 1992) specifically investigated air pollutants such as sulfur dioxide (SO_2) and nitrogen dioxide (NO_2). Prior research suggests (Dockery et al.,1993; Raloff 1998) that particulates (e.g., small particles < 2.5 microns, from power plant combustion) are the only air pollutants for which almost conclusive proof exists of the relationship between pollution and health problems. Based on this research, environmental audit privilege laws/policies could have a positive or negative impact on pollution-related health problems depending on whether companies act to increase or decrease air pollution. This leads to the following research questions explored in this study:

Question 1:	Is there a significant increase in the air pollutants of States after implementation of environmental audit privilege and immunity laws?
Question 2:	Is there a significant difference between air pollutant levels of States with environmental audit privilege and immunity laws and States without such laws or policies?
Question 3:	Is there a significant growth in the economy of States after the adoption of environmental audit privilege and immunity laws?

Findings of significant differences would suggest that States that have environmental audit and immunity privileges have regulated bodies that hide their polluting activities from the EPA, State environmental agencies and the public. Findings of significant differences will also support the critics' platform that companies wish not to disclose information and thus are granted license to do so because of the audit privilege and immunity laws that allow them to pollute without penalty. With respect to significant increases in economic growth, such findings suggest a plausible association between audit legislation and growth patterns of specific industry sectors. This outcome will further support constituents' belief that audit legislature encourages and promotes business.

However, the authors of this study reason that the increase in business occurs because firms with little interest in abating pollution will locate in States where they are protected from penalties from pollution law infringements.

RESEARCH METHODOLOGY

The sample was selected from States described in the U.S. Environmental Protection Agency (EPA) databases and the NCSL that had enacted either an environmental privilege law or immunity legislature. Ten States were selected that had enacted legislation as of 1995. Ten States without policies or audit laws were also selected.

Gross State Product (GSP), in real dollars, was obtained from the U.S. Department of Commerce's Bureau of Economic Analysis (BEA) database. Real GSP estimates are adjusted to account for price change effects. GSP represents the market value of the goods and services produced by the labor and property located in a State. Using the BEA database, two industry sectors' output for each State was selected: *chemicals and allied products and electric, gas, and sanitary services*. These industries were chosen because they have significant potential to pollute. They are also regulated with respect to pollution outputs and so would be amenable to accepting the protection that audit privilege and audit immunity provide. Emission levels for five of the six principal *criteria pollutants* were obtained from the EPA National Emission Trends Air Data (NET) database: carbon monoxide (CO); nitrogen oxides (NO_x); sulfur dioxide (SO_2); particulates (PM_{10}) and volatile organic controls (VOC). Criteria pollutants are those, which the EPA has set health-base standards. This study used criteria pollutant emission levels identified from major *point sources* such as electric utility plants, chemical plants, steel mills, oil refineries, and hazardous waste incinerators.

The investigation period included emission and GSP data before the 1995 enactment (1994, 1993, 1992) and emission levels after enactment (years 1996, 1997, and 1998). The States were selected for years 1993 - 1998 (excluding the enactment year, 1995) to ensure that companies within the selected States had addressed the environmental standards and participated in environmental audits. All data was analyzed using a non-parametric method, t-tests of independent samples.

RESULTS - CRITERIA POLLUTANTS

Analysis of the data indicates that, on average, the least transmitted air pollutant for all States combined before and after enactment of the audit privilege laws was PM10, 32,565 tons and 23,086 tons, respectively. The findings were similar for States without related audit legislature or policies in that PM10 was also the least emitted air pollutant. The aggregate mean of States with audit and immunity laws was also compared with the aggregate mean of those States without audit laws. The

statistical comparisons between States show no significant mean differences in the level of transmitted air pollutants.

Table 2
Increases and Decreases in Criteria Pollutants Before and After Adoption of Audit Privilege or Immunity

Criteria Pollutant	Increases	Decreases
Carbon Monoxide	Arkansas Minnesota Kansas Texas Idaho Illinois	Mississippi Virginia Utah Wyoming
Nitrogen Oxide	Mississippi Texas Virginia Kansas Minnesota Idaho Arkansas Illinois Utah	Wyoming
Sulfur Dioxide	Texas Kansas Minnesota Idaho Arkansas Wyoming	Mississippi Virginia Illinois Utah
Particulates	Texas Minnesota Idaho Wyoming	Mississippi Virginia Kansas Illinois Arkansas Utah
Volatile Organic Chemicals	Kansas Idaho Arkansas Wyoming	Mississippi Texas Virginia Illinois Utah

Each State's before and after enactment emission means were tested for significant mean differences. The test results are significant ($p = .090$, $t = -2.226$) for only one state (Kansas) and one air pollutant, sulfur dioxide (SO_2). This comparison indicates that, on average, Kansas emitted

significantly higher levels of sulfur dioxide after the enactment of legislature, notably 124,151 tons compared to 92,906 tons. This State had immunity privileges.

As reported in Table 2, most of the States increased, on average, air pollutant emissions after 1995, although the changes were not statistically significant. Seven States increased the level of emitted nitrogen oxides (NO_x), six and nine States, respectively, increased their output for both carbon monoxide (CO) and sulfur dioxide (SO_2); and three and four States, respectively, elevated their emission of particulates (PM_{10}) and volatile organic controls (VOC). Further analysis indicates that of the States with increased emission after 1995, only one State (Idaho), with immunity privileges for both civil and criminal penalties, continued to increase emissions, on average, for all five of the criteria pollutants. The findings of an increase in sulfur dioxide (SO_2) is surprising, given the fact that the primary focus of Title IV of the 1990 Clean Air Act was the substantial reduction of allowable sulfur dioxide (SO_2) emissions in order to mitigate the threat of acid rain. Of these States, none had significant (at the *p* level < .10) decreases of emitted air pollutants. Notably, no State with or without granted immunity privilege decreased emissions for all five air pollutants after adoption of audit legislature. These findings suggest that many companies within these States have not significantly decreased the emission levels as a function of the environmental audit privilege and immunity laws. These findings address, Question 1 and 2, and imply that some firms may be emitting more of certain pollutants because they are protected from high fines, criminal penalties and public disclosure of the environmental audit findings.

RESULTS-INDUSTRIES

A comparison of the mean differences for the two industries before and after enacting legislature was done by t-tests (See Table 3.). With respect to the chemical and allied products industry, (hereafter referred to as chemical industry), means of seven States differed significantly (p-levels ³ 0.05) before and after audit legislation. The analysis further reveals that each one of these State's chemical industry output increased after enactment of audit legislation. Although non-significant, two States' chemical industry output (Mississippi and Texas) also rose after legislation. Only one State's chemical production (Idaho) decreased significantly (p-value = .001).

The mean test results for the electric, gas and sanitary services (electric) indicate that four States' output significantly (p-levels ³ 0.05) increased after adoption of audit legislation. Of the five States with decreased output, after enactment of audit legislature, none of the mean comparisons were significant. Only one State's (Illinois) increased output was not significantly different after legislation.

Table 3
Mean t-test Results for Gross State Product Sectors Chemical and Allied Products Industry and Electric, Gas and Sanitary Services Industry ($Millions)

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
	Chemical and Allied Products			Electric, Gas and Sanitary		
State	Before	After		Before	After	
	Mean	Mean	t-statistic	Mean	Mean	t-statistic
Arkansas	521	812	-5.493***	2,296	2,116	1.786
Idaho	376.67	270	9.199***	804	965.33	-2.967**
Illinois	7,405.33	8,073.33	-2.752**	10,016	11,094	-2.030
Kansas	572.33	963.33	-8.066***	2,086.33	2,080	.159
Minnesota	895	1,142.67	-2.858**	2,540.67	2,735.33	-17.754***
Mississippi	894.33	957.67	.605	2,728.33	2,448	1.474
Texas	9,669.33	12,067.67	-1.656	19,356	20,363.33	-2.097
Utah	310.67	664	-3.012**	1,130,33	1,387.33	-4.575**
Virginia	3,318.637	3,823.67	-5.428***	4,880	4,693.67	1.390
Wyoming	205.33	534	-19.499***	865.33	986.67	-3.780**

*** significant to .001 level, ** significant to .05 level.

These results focus on Question 3 and provide evidence that the chemical industry, and to a lesser degree, the electric sector, are likely to increase economic output in States with environmental audit privilege and immunity laws. These findings tend to support various beliefs that audit legislature encourages business.

DISCUSSION AND CONCLUSIONS

This exploratory study developed a framework and motivation for investigating an association between health-hazardous *criteria pollutant* emissions and a States' environmental audit privilege and immunity laws. The study extends existing research by introducing a conceivable relationship between non-financial variables (*criteria air pollutants*) and environmental privilege audits and immunity legislation. The findings of the study also suggest that in addition to the hidden costs (or external costs) applicable to corporate entities, there are specific public health costs that can be investigated. The findings of this study imply that such costs could be a function of environmental audit privilege, immunity legislature and policies. The study found that of the ten

sampled States with audit privilege and immunity laws none decreased emissions of *all five pollutants* after passing the environmental audit legislature. The findings revealed that one state, with immunity privileges for both civil and criminal penalties, continued to increase emissions, on average, for all five of the criteria pollutants after enactment of audit legislature. Moreover, the results indicate most of the States increased emission of the pollutants after enacting audit statutes, particularly the pollutants Carbon Monoxide (CO), Nitrogen Oxides (NO_x) and Sulfur Dioxide (SO_2).

The study also noted that States' chemical and allied products industries significantly increased output, on average, as measured in real dollars, after the enactment of environmental audit privilege and immunity laws. Fewer States showed increases for the electric, gas and sanitary services industries. These results imply that these industries, particularly the chemical and allied products, may be locating in States that provide the optimal opportunity (i.e., the environmental audit legislation) to minimize environmental penalties and hide infringements.

The results indicate that further investigation is needed in this area, which can include theoretical development for an association between public health cost (pollution) and audit privilege laws. Notably, the results of our study and subsequent interpretation are constrained because of the level of our empirical methods (nonparametric), limited sample size and omission of unidentified variables that could have influenced the results.

Various regulating bodies and researchers have called for increased investigation and standardized reporting of non-financial information about the environment (*Risk Management*, 1994; Foster, 1997; Beets, et al., 1999). This increased demand coincides with the growth in societal concern for the environment and the effects on public health of environmentally hazardous activities generated by certain companies. Non-financial variables should continually be incorporated into empirical investigations. For example, studies could investigate the affects of audit laws and policies on other environmental matters, which include water discharges or hazardous waste storage and treatment. In addition, many costs are not identified as environment, health or safety costs by companies, therefore, they (often buried in overhead) can impact profitability. Initiatives such as enhanced costing systems that would enhance the identification and recording accuracy of such costs should prove valuable to many U.S. companies. Although these are but a few areas for future research many more questions will arise as additional studies are conducted and a more comprehensive profile of environmental regulatory costs is developed.

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