Volume 9, Number 2 *2005*

Allied Academies International Conference

Las Vegas, Nevada
October 12-15, 2005

Academy of Legal, Ethical and Regulatory Issues

PROCEEDINGS

Volume 9, Number 2 *2005*

Table of Contents

THE ROLE OF POSITIVE DISCRIMINATION IN UK ANTI-DISCRIMINATION LAW

Tor Brodtkorb, American University of Sharjah
tbrodtkorb@aus.edu

ABSTRACT

This paper examines and evaluates the role of positive discrimination in United Kingdom and European Union anti-discrimination law, focusing on the labor law context. The goal of anti-discrimination law to promote equality, but the concept of equality can be divided into at least two types: formal equality and substantive equality. Formal equality requires that employment decisions be made without discrimination based on certain stereotypes or harmful assumptions. Substantive equality moves beyond this neutral process, requiring action to redress disadvantages suffered by some groups, action that sometimes amounts to positive discrimination. There are obvious tensions between these two concepts of equality. This paper will examine the justifications for each of these concepts of equality, evaluate the benefits and disadvantages associated with them, and explore the conflicts and contradictions between them.

With some exceptions, the formal equality model prevails in United Kingdom and European Community anti-discrimination law with respect to sex and race. For the most part, employers are required to ignore the sex and race of applicants and employees, rather than to take them into account in an attempt to redress disadvantages associated with them. This paper will argue that, especially in light of the recent decision of the House of Lords in Archibald v. Fife Council, 2004, disability anti-discrimination law tolerates and in some cases even requires a measure of positive discrimination. Recent decisions of the European Court of Justice also indicate a trend in European Community anti-discrimination law toward tolerating positive discrimination in favor of women to redress under-representation of women in the workforce. Finally, recent changes in European Community law indicate a growing recognition of the substantive conception of equality that could lead to increasing use of positive discrimination to redress inequality.

This paper will argue that the different treatment of disability discrimination within anti-discrimination law is justified because the problems faced by the disabled in the workplace are in many cases intrinsically linked to the disability in question. The recent changes in United Kingdom and European Union law that accept positive discrimination in the context of sex and race, however, are problematic, and risk reifying the systemic disadvantages experienced by women and racial minorities.

THE WORKER ADJUSTMENT RETRAINING AND NOTIFICATION (WARN) ACT: COMPLIANCE ISSUES AND PROBLEMS FOR EMPLOYERS

Gerald E. Calvasina, Southern Utah University
calvasina@suu.edu
Joyce M. Beggs, The University of North Carolina at Charlotte
jbeggs@email.uncc.edu
I. E. Jernigan, III, The University of North Carolina at Charlotte
ejernign@email.uncc.edu

ABSTRACT

The Worker Adjustment and Retraining Notification Act (WARN) provides that, with certain exceptions, employers of 100 or more workers must give at least 60 days advance notice of a plant closing or mass layoff to affected workers and to the appropriate local government officials. The purpose of the act is to provide protection to workers, their families, and communities, to facilitate workers and their families some transition to adjust to the prospective loss of employment, to seek and obtain alternative jobs, and if necessary, to enter skill training and or retraining that will allow these workers to successfully compete in the job market. While the act has received renewed attention in recent years, the act has also been described as "a Quagmire of Confusion" and a 2003 GAO study identified numerous concerns expressed by both employees and employers as to how the law is suppose to work. The purpose of this paper is to identify potential legal issues and problems that employers may encounter with respect to WARN Act compliance and what organizations can do to minimize their exposure and liability associated with the WARN Act.

INTRODUCTION

The Worker Adjustment and Retraining Notification Act (WARN) Act Pub. L. 100-379, 102 Stat. 890, was enacted on August 4, 1988(29 U.S.C. 2101 et seq.). The WARN Act provides that, with certain exceptions, employers of 100 or more workers must give at least 60 days advance notice of a plant closing or mass layoff to affected workers or their representatives, to the State dislocated worker unit (see 29 U.S.C. 1661(b)(2)), and to the appropriate local government(29 U.S.C. 2902 and 2903). The purpose of the act is

> to provide protection to workers, their families, and communities by requiring employers to provide 60 calendar days in advance of plant closings and mass layoff notice to facilitate workers and their families some transition to adjust to the prospective loss of employment, to seek and obtain alternative jobs and if necessary, to enter skill training and or retraining that will allow these workers to successfully compete in the job market. In addition, the act is intended to provide state dislocation units notice so that dislocated worker assistance can be promptly provided.

The act is enforced entirely through the federal courts. Employees, their representatives, or units of local government can bring civil actions in federal district courts against employers, and employers who violate the act may be liable for back pay and benefits to each aggrieved employee. The penalty is calculated for each working day that notice was not provided, up to a maximum of 60 days. Employer liability may be reduced by any wages the employer pays over the notice period and by any voluntary and unconditional payment not required by a legal obligation. Employers who fail to provide notice required to a unit of local government may be subject to a civil penalty not to exceed $500 for each day of violation. If the employer provides the appropriate payments to eligible employees within three weeks after the closing, the penalty may be avoided. The court may at its discretion, allow the prevailing party a reasonable attorney's fee as part of the costs in any suit (Employment and Training Administration, 2003). The U.S. Department of Labor (DOL) is also responsible for providing assistance in understanding the regulations and providing educational materials to facilitate employers' and employees' understanding of the act. Employers cannot be required by the WARN Act to refrain from closing a plant, relocating operations, or implementing layoffs. An employer can only be required to give a 60-day advance notice or provide back pay and benefits to the affected employees for each day that the employer failed to give notice, up to the required 60 days. The law at section 5(b) specifically states, "a Federal court shall not have authority to enjoin a plant closing or mass lay-off" (Pub. L. 100-379, 102 Stat. 890). There is no injunctive relief available under the Act.

The purpose of this paper is to identify potential legal issues and problems that employers may encounter with respect to WARN Act compliance and what organizations can do to minimize their exposure and liability associated with the WARN Act.

BACKGROUND

The enactment of the WARN Act was a result of sustained public pressure dating back to the early 1970s, and was fueled in large part by the ever increasing use by American companies of downsizing (Klapholz, 2000). Numerous studies of the 1970s and 1980s time period identified "profound effects on communities, individuals, and states" associated with the use of downsizing.

> In addition to sometimes lengthy unemployment and reduced income, displaced workers often experienced a multitude of physical and emotional problems. These negative effects on public health, and the financial burdens imposed on states as a result of increasing unemployment levels, were exacerbated because "very few employers disclosed their decision to significantly reduce or cease operations in advance, thus leaving workers and communities without an opportunity to adjust and plan for the impending dislocation"(Klapholz, 2000, p. 2).

Initial legislation asking firms to notify employees that planned to relocate operations outside of the United States first appeared in the Trade Act of 1974. Title II, Section 283 of P.L 93-618 of the Act "asked firms that planned to move operations outside the United States to provide at least 60 days' advance notice to employees likely to be adversely affected by their actions as well as to the Secretaries of labor and Commerce" (Levine, 2004, 2). The WARN Act (P.L. 100-379) became law in 1988 without President Regan's signature and became effective in 1989. The law "generated fairly little interest" over the next decade, due in large part to the sustained economic expansion that occurred over the period (Levine, 2004, 2).

Renewed interest in the issues associated with mass layoffs resurfaced in 1998 when firms announced their intention to displace 677,795 employees (Levine, 2005).

> the statutes primary focus is directed at helping workers who will suffer what the U.S. Department of Labor calls extended mass layoffs. An extended mass layoff is defined as one lasting longer than 30 days and involving at least 50 workers (Levine, 2005). The leading reason identified for extended mass layoffs is seasonal work (end of winter or summer recreational activities for example) and internal company reorganization (bankruptcy, business ownership change, financial difficulty, and reorganization) (Levine, 2005). Offshore and domestic movement of work, currently one of the more popular topics associated with job loss in the popular press, "has been found to account for a small share of layoffs that last more than 30 days and involve at least 50 workers" (Levine, 2005, p. 10).

LEGAL ISSUES FOR EMPLOYERS

"Warning! WARN Act a Quagmire of Confusion" (Crews, 2004).

Since its passage, the WARN Act has presented employers and employees with numerous problems. Problems associated with the act for employers include how it is suppose to work, who to warn, and when to warn (Crews, 2004). In recent years, an additional problem for employers with multi-state operations has been the number of individual states that have enacted similar legislation. State legislation, while similar in basic form and intent, often includes additional and sometimes more stringent provisions than the federal statute.

In 2003 the General Accounting Office, the audit, evaluation and investigative arm of Congress, conducted a detailed review of the WARN Act. After interviewing interested parties and reviewing relevant court cases, the GAO concluded

> "that certain definitions and requirements of WARN are difficult to apply when employers and employees assess the applicability of WARN to their circumstances. In particular, employers, employee representatives, and others reported it problematic to apply the statute's provisions when calculating the layoff threshold (i.e., whether the requisite number of employees have been laid off within prescribed time frames) that triggers WARN requirements. In addition, the courts have applied the statute's provisions in varying ways, resulting in decisions that do not always clarify employer responsibilities and employee rights under the law (GAO, 2003).

The GAO study found support for the assertion that the act has created confusion and difficulty in implementation for employers. The GAO noted that "employers provided more notices than there were WARN events in 2001 (5,349 notices, but there were only 1,974 plant closure and mass layoffs that appeared to meet the WARN criteria for advance notice)" (GAO, 2003, p. 11).

Under the WARN Act, a number of factors determine whether employers are required to provide notice. When calculating the timeframe to determine when WARN notice is required, WARN looks at the employment losses that occur over a 30-day period. For example, if an employer closes a plant which employs 50 workers and lays off 40 workers immediately, and then lays off the remaining 10 workers 25 days later, that is a covered plant closing. WARN also looks at the employment losses that occur over a 90-day period. An employer is required to give advance notice if it has a series of small terminations or layoffs, none of which individually would be covered under WARN but which add up to numbers that would require WARN notice. An employer is not required to give notice if it can show that the individual events occurred as a result of separate and distinct actions and causes and are not an attempt to evade WARN. The Preamble to the WARN Act regulations gives an example of 90-day aggregation. It suggests that an employer should look ahead and behind 90 days to determine whether separate but related events would trigger cover-age.

STATE LAWS

While in the 16 years since its enactment, many employers and human resource professionals have become aware of the federal version of the WARN Act, just as many may not be aware of the different version enacted by states. De Meuse and Dobrovolsky identified 17 jurisdictions (16 states and the Virgin Islands) in 2004 that had either enacted their own version of the WARN Act or had other relevant provision pertaining to mass layoffs and plant closings (De Meuse and Dobrovolsky, 2004). Since then Illinois has also enacted its own WARN Act (Girard, 2005). The first difference with most of the state statutes and the federal statute involves coverage. The federal WARN Act applies to employers with 100 or more full-time employees. Those states, and the Virgin Island, with their own WARN Act apply their statute to as few as 10 employees. The Virgin Island's act extends coverage to employers with 10 employees with five states dropping coverage down to employers with 50 or more employees. Michigan requires employers to provide notice to employees when 25 or more employees in a business establishment considering a closing or relocation of operations and the New Jersey code requires employers to provide notice of mass separations of 25 or more employees to the state unemployment agency and provide employees Form BC-10 instructions for claiming New Jersey unemployment benefits. Some states also require continuation of group health care coverage and others require severance pay.

SUMMARY AND CONCLUSIONS

With more and more companies looking to streamline their operations to maintain their competitive position, those companies looking to lay off large number of employees must become familiar with the requirements of both the federal and state WARN Act regulations. Employers must work closely with qualified legal counsel in determining whether their reduction in force falls within the WARN Act's parameters. Covered employers must also have a clear understanding of the notice requirements under the act. Notice to individual employees must be written in clear and specific language that employees can easily understand. Employers should also be aware, that selling a plant does not completely relieve them of the notice requirements if a plant closing or mass layoff occurs. The seller must give notice for a covered plant closing or mass layoff that occurs before the sale becomes effective and the buyer must give notice when the plant closing or mass layoff occurs after the sale becomes effective (ETA, 2003, p. 12). In terms of reducing exposure to litigation, employers may be wise to develop voluntary separation programs including severance pay. . Being aware of WARN Act requirements, obtaining qualified legal counsel, proper planning, and training of key decision makers are keys to compliance with the act. Penalties, in terms of damages, attorney fees, and damage to employees left behind can be severe if organizations do not stay abreast of WARN Act requirements.

REFERENCES

Crews, S. Kato, (2004). Warning! WARN Act a Quagmire of Confusion, Rothgerber, Johnson, & Lyons Newsletter, downloaded 3/3/2005 from http://www.rothgerber.com/newslettersarticles/le0040.asp .

De Meuse, Kenneth P. and Dobrovolsky, Evgeny, (2004). The Worker Adjustment and Retraining Notification Act: A Closer Look, Human Resource Planning, Vol. 27, Issue 4, pp. 19-23.

GAO, U.S. General Accounting Office, (2003). Revising the Act and Educational Materials Could Clarify Employer Responsibilities and Employee Rights, GAO-03-1003, downloaded, 7/19/2005 from, www.gao.gov .

Girard, Ellen M., (2005). New Illinois Law Expands Federal "WARN ACT" Notice Requirements, CBA Record (Chicago Bar Association - Young Lawyers Section), downloaded 6/28/05 from http://web.lexis-nexis.com/universe/printdoc .

Klapholz, Meredith, (2000). Judicial Interpretation of the WARN Act: Exceptions and Their Implications in the Health Care Industry, University of Pennsylvania Journal of Labor & Employment Law, Fall, downloaded 6/28/2005, from http://web.lexis-nexis.com/universe/printdoc .

Levine, Linda, (2005). Unemployment Through Layoffs: What Are the Underlying Reasons?, downloaded 7/19/2005, from http://digitalcommons.ilr.conrnell.edu/key_workplace/188 , Congressional Research Service.

Levine, Linda, (2004). The Worker Adjustment and Retraining Notification Act (WARN), downloaded 7/19/2005 from http://digitalcommons.ilr.cornell.edu/key_workplace/201 , Congressional Research Service.

LOOTING WHILE THE STORE IS OPEN: STUDENT ATTITUDES ABOUT STEALING MUSIC

R. Nicholas Gerlich, West Texas A&M University
ngerlich@mail.wtamu.edu

ABSTRACT

In spite of lawsuits by the RIAA (Recording Industry Association of America) to counteract the number of songs illegally downloaded via the internet, the practice of P2P(person-to-person) file haring continues practically unabated. Although the sale of legal music downloads is up significantly through summer 2005, the number of music files on file sharing networks has continued to rise as well. A study of college students of all ages reveals that those in the traditional college age (18-24 years) hold widely different attitudes toward illegal music downloads than do their older peers. The views of the college-age group favor the illegal and unethical sharing of music files, at the expense of the industry and artists.

INTRODUCTION

Sales of recorded music on CD have plummeted in recent years. While unit sales were 722.9 million in 1995 and 942.5 million in 2000, they fell to 766.9 million in 2004 (1). During that same time, electronic music downloads (EMDs) soared. Although illegal downloads have flattened out somewhat in recent months, the number of online music files at file-sharing sites rose three-percent in the first one-half of 2005, from 870 million files to 900 million files (2).

The RIAA has pursued offenders with increasing regularity. On 31st August 2005, another 754 lawsuits were announced (3), on top of 753 suits filed on 2nd March 2005 (4). These are in addition to suits filed in previous years.

Over 300 legal music download sites now exist, including the likes of Napster, Rhapsody, iTunes, and Wal-Mart. Sales at these online vendors have grown dramatically since their inception. The majority of this trend is accounted for by Apple's iPod portable music device, which accounts for as much as two-thirds of all legal music downloads. By early 2005 Apple reported it had sold over 250 million songs through its iTunes service (5).

Music download sales in 2004 were triple what they were in 2003. Furthermore, there were 180 million single track downloads in the first six months of 2005, compared to 157 million in all of 2004, and only 57 million in the first six months of 2004 (2).

Still, a late-2004 CAIDA study shows that, while the industry is enjoying rising legal music download sales, illegal P2P file sharing has not declined (6). College students are assumed to be the primary group of offenders (7), as evidenced by the number of campuses targeted with lawsuits. But no distinction has been made by the RIAA regarding the age groups at these colleges. Are all college students as likely to engage in illegal music sharing and copying? Or is there a higher likelihood that one age group may engage in this activity more than another group?

The need thus exists to further study this phenomenon, determine current attitudes toward the practice, and identify who is most likely to participate in such illegal activities.

THE STUDY

A web survey that measured music downloading activity was developed and administered to online students at a medium-sized regional state university. The survey was announced to students in a variety of business courses including Consumer Behavior, E-Commerce, and Business Ethics. Participation was not mandatory, thus rendering this a volunteer sample. The online survey can be viewed at http://houseofapps.com/emd/index.html. A total of 254 usable surveys were collected in the fall 2004 semester.

A variety of demographic variables were measured, including gender, age, class standing, computer ownership, and internet usage. Respondents were then asked to rate their level of agreement/disagreement with 14 attitudinal statements that measured their views on both illegal and legal music downloading, industry pricing, music sharing, and the threat of being sued. For the purposes of this study, only the age-related demographic variable was tested and compared to responses to the attitudinal questions. With only online students being surveyed, an implicit assumption by the author is that the students will all have at least moderate computer skills, and could thus be considered potential users of either legal or illegal music download sites.

HYPOTHESES

Given that the RIAA has primarily targeted university network users in its lawsuits (7), it follows that the primary alleged offenders are typical college students. Thus, a survey of college students and their downloading habits is a valid audience.

The university at which this study was conducted has a median age of 27, with numerous returning students mixed among the traditional college-age students. This blended study body presented an attractive sample for determining if any age-related differences existed with regard to music downloading practices.

Since the RIAA has not distinguished between the age of college students at the campuses selected for legal scrutiny, we thus can make no a priori assumptions about age-related differences. Thus, for the purposes of this study, it is hypothesized there will be no significant differences in the mean scores between traditional college-age students and older returning students.

Specifically, we propose 14 hypotheses (as listed below in Table 1 with results), each stemming from a Likert-type statement in the survey.

RESULTS

Respondents were grouped according to their age, with Group 1 consisting of those students in the "traditional" college student bracket (18-24 years). All remaining students were grouped together as 25 and up. The mean scores of their responses to the 14 Likert-type questions were calculated and appear below in Table 1. Individual t-statistics and probability values were also calculated and appear in the Table.

The results show that, of 14 means compared, significant differences exist in 10. These differences reveal a major gap in the perceptions and ethics of traditional college-age students. For example, the younger group exhibit strong feelings that it is not wrong to burn CDs for their friends (H1) or download music illegally (H2). Furthermore, this same group feels very strongly that the RIAA should not prosecute people for making these illegal downloads (H3). In addition, the younger group is less likely to endorse the current prices of legal song downloads than their older peers (H4) Their indifference to the prices may indeed reflect their apathy toward paying for music at all.

Both groups demonstrated moderate disagreement with the current price of retail CDs (H5) the younger group showed a modest difference (albeit not significant) in opinion for why file haring sites emerged in the first place (i.e., the perceived value of CDs, as measured in H6). Both groups feel fairly strongly that the government (nor anyone else) will be able to stop the illegal copying and/or sharing of music any time soon (H7).

Traditional-age college students expressed indifference at the threat of being sued for illegal file sharing, while their older peers showed a moderate level of fear. This difference was significant at the p=0.05 level, and shows a healthy respect for the law that perhaps only age can bring (H8).

Younger college students feel that it is wrong for the industry to make a big deal out of downloading, as evidenced by the significant difference reported for H9, and is consistent with the results reported for H3. If anything, young college students feel that the industry may be a victim of itself and technology, because they view downloading and copying CDs to be so easy that it creates an irresistable temptation (H10). Unless the music label includes anti-copy features on CDs, copying and sharing are simple procedures on any computer. Even with anti-copy features, savvy users will know how to bypass such measures. Furthermore, younger students reported a high incidence of dorm- and house-mates engaging in these illegal activities (H11). The prevalence of these activities may thus be creating an environment in which students come to accept this unethical and illegal behavior as no different from speeding on the freeway when everyone else is doing it.

Both groups agree fairly strongly that if CD prices were not so high, there would be fewer illegal activities (H12), which is consistent with the findings for H5. The lure of saving $15-18 per CD copied, along with the relative indifference (or lack of fear) for being prosecuted for doing so, create a situation in which the rewards are too great and the threat of punishment too weak.

Both groups reported they feel it is OK to engage in the cultural gift-giving exercise of presenting a friend with a "mix CD" of their favorite tunes, although the younger group favors this practice significantly more so than their older peers (H13). The practice of making "mix" compilations dates back to when recordable cassettes first entered the market (35 years ago), and may be now such a part of our culture that few if any frown upon the practice.

Finally, younger students expressed a significantly higher level of displeasure with anti-copy features some labels put on their CDs. These either cause the student to work harder to make copies, or perhaps take it out on the artist by not listening to their music.

DISCUSSION

The results reported herein illustrate that traditional-age college students and their older-adult peers have very different views regarding the sharing and copying of music files. That 10 of 14 attitude statements produced significant differences in mean scores is testament to two distinctly different ethical codes governing these student groups.

Although legal music download sales continue to increase rapidly, more work must be done to determine if age differences exist among these customers. The fact that the number of online music files rose three percent in the first one-half of 2005 suggests that illegal downloading has not been stunted. The findings discussed above, coupled with 2005 trends, hint that the problem is not going away, and instead may be holding its own or even growing.

The RIAA may need to step up its prosecution of offenders, although it does risk negative publicity each times it does so. Still, the fact that young college students remain virtually fearless about being prosecuted and practically entitled to loot while the store is open suggest that much more needs to be done to stem the flow.

BIBLIOGRAPHY

1. http://www.infoplease.com/ipea/A0921839.html (accessed on 12 September 2005)

2. http://www.ifpi.org/site-content/press/20050721.html (accessed on 12 September 2005)

3. http://www.riaa.com/news/newsletter/083105.asp (accessed on 12 September 2005)

4. http://www.pcpro.co.uk/news/69951/riaa-fires-off-fresh-suits-against-filesharers.html (accessed 12 September 2005)

5. http://news.com.com/iTunes+hits+250+million+downloads/2110-1027_3-5547939.html (accessed 12 September 2005)

6. http://www.caida.org/outreach/papers/2004/p2p-dying/p2p-dying.pdf (accessed 12 September 2005)

7. http://www.riaa.com/news/newsletter/093004.asp (accessed on 12 September 2005)

TABLE 1: Summary of attitudinal measures. (Strongly Disagree =1 to Strongly Agree =5).

Hypothesis & Survey Statement	Mean Score	Mean Score		
	Age 18-24	Age 25 & up	t	p
H1: It is morally wrong to copy CDs for friends	2.12	2.67	3.67	0.000(*)
H2: It is morally wrong to download unauthorized music from the internet.	2.71	3.35	3.68	0.000(*)
H3: The record industry should prosecute those who have downloaded songs illegally from the internet.	1.98	2.80	5.20	0.000(*)
H4: Prices ranging from 88 cents to 99 cents per song download are fair for consumers.	2.97	3.62	4.08	0.000(*)
H5: The retail price of CDs is about right.	2.34	2.39	0.38	0.705
H6: File-sharing sites emerged because the perceived value of CDs was too low in relation to the number of good songs on each CD.	3.43	3.30	-0.74	0.461
H7: The government will eventually be able to put an end to illegal file sharing on the internet.	2.17	2.41	1.56	0.120
H8: The threat of being sued will keep me from illegally sharing files on the internet in the future.	3.04	3.50	2.71	0.007(*)
H9: It is wrong for the record industry to make such a big deal about music piracy.	2.98	2.54	-2.81	0.005(*)
H10: The relative ease of downloading and/or burning CDs makes it too tempting for me to swap music illegally.	3.18	2.57	-3.95	0.000(*)
H11: Other people in my household/dorm have engaged in unauthorized file sharing and/or CD burning.	3.60	2.56	-5.63	0.000(*)
H12: People would burn fewer CDs and share fewer files if the retail price of CDs were not so high.	3.84	3.83	-0.08	0.939
H13: It is OK to burn a "mix CD" of your favorite tunes to give to a friend.	3.96	3.50	-3.32	0.001(*)
H14: I resent the anti-copying features some record labels have started putting on their CDs.	3.25	2.87	-2.41	0.017(*)
(*) denotes significant at p=0.05 level				

THE EFFECT OF PUNISHMENT ON ETHICAL BEHAVIOR WHEN PERSONAL GAIN IS INVOLVED

Kathleen Gurley, Fayetteville State University
kgurley@uncfsu.edu
Paula Wood, Fayetteville State University
Inder Nijhawan, Fayetteville State University

ABSTRACT

With the recent onslaught of accounting frauds, the nature of unethical decision making in organizations has shifted from the lack of sensitivity for the ethical aspects of decisions to one where executives have used their positional power for personal gain. Congress reacted with stiffer laws and punishments, raising the question of the role of punishment in deterring corporate crime. This study investigates the effect of four variables, valence of the outcome, probability of getting caught, severity of punishment, and moral values, on ethical decision making. A survey with six ethical scenarios was administered in three different classes resulting in 115 completed surveys. Students were asked to select the scenario option they would actually do in the situation and to rate how significant the four variables were in their decision. The responses for the six scenarios were combined and analyzed using linear regression. Three of the four variables were significant in explaining the variance in selection of the ethical option. Moral values explained the most variance with severity of punishment being second and valence of the outcome third. This study contributes to the ethics literature by demonstrating the importance of punishment in supporting a person's choice of the ethical option.

INTRODUCTION

The corporate problems with unethical decision making have changed in nature over the years from issues related to product safety, environmental impact, and misleading marketing to more obvious uses of corporate power for personal gain. In the last six months we have seen two CEOs prosecuted and sentenced to jail terms for misuse of corporate funds, misleading investors, and misrepresenting financial results. Prior to these prosecutions, examples of unethical decision making at Enron, Tyco, WorldCom, and others have been attributed to a climate where executives have come to believe they are above the law (Bianco, Symonds, & Byrnes, 2002).

In response to the continuing corporate scandals, Congress passed the Sarbanes-Oxley Act, which was signed by President Bush in the summer of 1992. This act, along with the US Sentencing Guideline Amendments and the Department of Justice Principles of Federal Prosecution of Business Organizations, was passed to foster greater financial accuracy and curb corporate malfeasance. These actions demonstrate the first attempt to govern corporate conduct by imposing criminal liability directly on executives for investor fraud. These steps by the government are based on the belief that greater apprehension, prosecution, and punishment will deter these acts of unethical behavior (Imperato, 2005).

Much of the previous research on ethical behavior has taken the perspective of increasing cognitive moral development, raising sensitivity to ethical issues, and improving moral judgment; but much less attention has been paid to the impact that punishment and prosecution has on moral motivation.

LITERATURE REVIEW

Early Models

Rest (1986, 1994), in his extensive review of the literature on ethical development, realized that researchers were looking at different aspects of the decision-making process. He proposed a four-component model that includes moral sensitivity, moral judgment, moral motivation, and moral character. Moral sensitivity is the awareness of how one's actions affect other people and the realization that the cause-consequence chain of events that one's actions initiate has moral implications. Moral judgment is the person's ability to judge which line of action is more morally justifiable. The third component, moral motivation, is the importance given to moral values in competition with other values. Moral motivation helps explain why people choose an option they recognize to be less ethical. The last component, moral character, involves ego strength, perseverance, strength of conviction, and courage. Rest's work pointed out the importance of distinguishing between the four components of ethical decision making. Our study focuses on the moral motivation component of ethical behavior and factors in the ethical situation that impacts moral motivation.

One of the major contributions since Rest has been Jones' (1991) attention to the characteristics of the ethical issue itself and how these characteristics affect ethical behavior. He introduced the concept of moral intensity, which is composed of six dimensions that vary with the nature of the ethical issue: magnitude of consequences, social consensus, probability of effect, temporal immediacy, proximity, and concentration of effect.

A number of quantitative studies have tested Jones' model. Reviews of this research on moral intensity (Chia & Mee, 2000; May & Pauli, 2002) have found that magnitude of consequences is one of the most significant dimensions of moral intensity in influencing ethical decision making. Other studies (Morris & McDonald, 1995; Singhapakdi, Vitell, & Kraft, 1996; Singer & Singer, 1997) suggested that the six dimensions could be collapsed into two: potential harm and social pressure. More recent research studies on moral intensity have found that both magnitude of consequences and probability of effect have stood out in ethical issues analyzed (Leitsch, 2004; Watley & May, 2004).

Our study continues the research on magnitude of consequences but from a different perspective. Most of the past research has viewed the consequences as being inflicted on a victim other than the decision maker. Our research investigates ethical decision making when personal gain is involved.

Behavioral Theories

Several researchers (Randall & Gibson, 1991; Flannery & May, 2000) have approached ethical behavior based on the well known theory of planned behavior (Ajzen, 1985). The theory of planned behavior posits that intentions are key to explaining behaviors and are shaped by attitude toward the behavior, subjective norms, and perceived control over the behavior. Attitude toward performing the behavior is a function of beliefs that performing the behavior will lead to certain consequences and the individual's evaluation of those consequences. The theory predicts that the more positive the consequences, the more favorable the attitude toward the behavior will be. Randall and Gibson (1991) added moral obligation to the theory of planned behavior, which had been in Ajzen's original model but was later dropped. The results showed that attitude toward performing the behavior explained a large amount of the variance in intention, while subjective norms explained only a moderate amount of the variance.

The behavioral theories have also investigated the impact of punishment on ethical decision making. Early laboratory experiments found that personal gain significantly increased unethical decision behavior, whereas the threat of direct punishment reduced unethical decision behavior (Hegarty & Sims, 1978). Laczniak and Inderrieden (1987) looked at different levels of organizational support for ethical decision making and found that decision making from managers was influenced only when specific sanctions for misconduct were imposed. Trevino and Youngblood (1986), drawing on social learning theory, found that vicarious reward, but not punishment, influenced ethical decision making. In a later study, Trevino and Ball (1992) investigated different severity levels of vicarious punishment and found that only the harsh vicarious punishment group expected management to punish unethical behavior in the future.

The review of the behavior theories reinforces the importance of two of our four variables, valence of outcome and probability of getting caught, which is the basis of the attitude toward performing the behavior. Our fourth variable, severity of punishment, has received some attention by in ethics research, but much of the theory comes from the economics of crime.

Economics of Crime

Horvath and Kolomaznikova (2003) surveyed the most important findings of early models of economics of crime, including three models that studied rational individual decision making about entering into illegal activities (Becker, 1968; Ehrlich, 1973; & Heineke, 1978). That review found that gains from crime and income, probability and size of punishment, and attitudes towards risk are the main variables influencing the results of individual behavior.

Becker's (1968) seminal work on the economics of crime is the basis for all further research (Horvath & Kolomaznikova, 2003). Becker's high-fine-low-probability principle argues that individuals are deterred from criminal activities by a higher fine and by a probability of detection and conviction. The crime is committed only if the gain from the crime is more than the expected punishment, with expected punishment being the probability of detection and punishment times a monetary sanction. Similarly, Levitt (1997) states that changes in expected punishment is the most fundamental predictor for influencing criminal behavior in the economic approach.

Garoupa (2001) shows that substitutability between the probability of punishment and fine holds only if the expected punishment is close to the gain from crime. Specifically, the formula fails with very wealthy individuals who would require a high fine, since a low fine would be of little significance. Thus with very rich criminals, applying both high fines and high detection, a complementary relationship, is more effective.

HYPOTHESES

Our research investigates the impact of four variables (moral values, valence of outcome, probability of getting caught, and severity of punishment) and their effect on ethical decision making. Based on the review of the literature, magnitude of consequences and the probability of effect have proven to be important factors. Because we are investigating ethical issues dealing with personal gain, we chose to substitute valence of outcome for magnitude of consequences. Our second variable, probability of getting caught, is closely and inversely related to probability of effect. Following Randall and Gibson (1991), we added a variable to measure moral obligation and called it moral values. The fourth variable, severity of punishment, is directly related to ethical behavior. Based on the economic literature review, we expected severity of punishment to be a deterrent to unethical behavior.

Hypothesis 1.a. Valence is inversely related to ethical behavior.

Hypothesis 1.b. Moral values, probability of getting caught, and severity of punishment are directly related to ethical behavior.

Hypothesis 1.c. Moral values, valence of outcome, probability of getting caught, and severity of punishment are important and significant factors in explaining and predicting ethical behavior of individuals.

METHODOLOGY

The survey instrument was developed by looking for available scenarios that were already tested for validity. The scenarios were adopted from two external sources. The first source was the mini-cases from Lockheed Martin Corporation (Online Ethics Center, 2003). The second source was the Ethical Behavior Worksheet from Bateman and Snell's management textbook (2002, p. 169).

The survey was administered in three different classes resulting in 115 completed surveys. After each scenario, the respondents were asked to rate the importance of the four variables in the decision they made on the option selected in the scenario. Respondents rated each variable using a scale from "Not a factor"=1 to "Very significant factor"=5. The scenarios were combined to determine the overall contribution that the variables had in explaining the variance in the ethical score, which was calculated based on the option the participants chose for each scenario. The combination of the four scenarios resulted in 690 data points. A linear regression analysis was run to determine the amount of variance in the ethical score explained by the four factors.

RESULTS

The descriptive statistics and Pearson Correlation Coefficients for all the variables are shown below in Table 2.

The correlation coefficients support Hypothesis 1.a. in that valence of outcome is inversely related to the ethical score and is significant at the 0.05 level. The second hypothesis is also supported in that probability of getting caught, severity of punishment, and moral values all have a significant correlation at the 0.01 level with the ethical score. An unexpected result was the significant correlation between severity of punishment and moral values.

To test Hypothesis 1.c., a stepwise multiple regression was run. Three of the variables were significant in explaining the variance in the ethical score. The fourth variable, probability of getting caught, showed considerable collinearity. The results of the regression analysis show that Hypothesis 1.c. is supported, with the three remaining variables significantly explaining the ethical choices made by the participants.

Table 2: Correlation Coefficients

Variable	Mean	s.d,	1	2	3	4	5
1. Ethical Score	1.91	7.16	1	-08*	.17**	.19**	.34**
2. Valence of Outcome	3,64	2.56	-.08*	1	.02	.03	-.04
3. Prob. of Getting Caught	3.29	1.36	.17**	.02	1	.62**	.22**
4. Severity of Punishment	3.50	1.42	.19**	.03	.62**	1	.27**
5. Moral Values	3.49	1.31	.34**	-.04	.22**	.27**	1

* Correlation is significant at the 0.05 level (1-tailed)
** Correlation is significant at the 0.01 level (1-tailed)

SUMMARY AND CONCLUSIONS

This study investigated the effect that four variables had on ethical decision making. The four variables are valence of outcome, probability of getting caught, severity of punishment, and moral values. As in past studies, three of these variables, valence of outcome, severity of punishment, and moral values proved to be significant factors in explaining ethical decision making.

The most positive finding in this study is the major role that moral values played in ethical decision making. Moral values, overall, had the greatest impact on participants' choices of the ethical options. This finding demonstrates that people do not operate solely from an economic perspective, weighing only the risks versus the rewards. In this study, moral values took precedence.

The second major finding was the importance of the severity of punishment, a finding that is consistent with past research (Becker, 1968; Levitt, 1997). This variable explained the second largest amount of variance in the choice of the ethical option. In addition, severity of punishment had a significant, positive correlation with moral values. These results imply that the presence of punishment can encourage ethical decision making by giving more credence to people's moral values.

REFERENCES

(Listed in the full version of the paper)

LINKING ETHICS DECISIONS TO PHILOSOPHICAL RATIONALES: AN EMPIRICAL STUDY

Michael E. Hanna, University of Houston – Clear Lake
hanna@uhcl.edu
Stephen C. Caples, McNeese State University
scaples@mcneese.edu
Lonnie Phelps, McNeese State University
ldphelps@mcneese.edu

ABSTRACT

This paper investigates the attitudes of college students towards ethics in their own lives. Students were asked which of three common approaches to ethics was most relevant to their own situations. Then they were asked to evaluate several scenarios with regard to the ethics involved in some decisions that were described.

Statistical analyses were performed to determine if differing views towards ethics resulted in different responses to the ethical scenarios. We also investigated the differences in responses to the scenarios based on demographic information such as gender, academic classification, and major. Students who considered the moral absolutes approach to ethics as most important tended to view more actions as unethical than did those who rated the moral absolutes less important. A few other relationships were also statistically significant.

MACHIAVELLIANISM: HOW DO TODAY'S INDONESIAN STUDENTS COMPARE WITH U.S. STUDENTS OF TODAY AND THE 1960S?

Harry A. Harmon, Central Missouri State University
Robert L. Webster, Ouachita Baptist University
E. Ashley Brown, University of Jemberr, Indonesia
Kevin L. Hammond, University of Tennessee at Martin
Harmon@cmsu1.cmsu.edu

ABSTRACT

The tactics and strategies that were suggested by Niccolo Machiavelli in The Prince (1513) have become synonymous with manipulative and unethical practices. Machiavelli's writing to the politician has been used to describe business leaders as well. The business literature indicates that Machiavellian tactics do not guarantee success. The research we report examined the Machiavellian tendencies of college students in Indonesia and compares those results to the literature. Specifically, current data are compared to the original U.S. student sample of the 1960s and the Harmon and Webster student sample published in 2000. Statistically significant differences are reported that confirm expectations.

THE LEGAL ENVIRONMENT OF A SLAVE

Diane Y. Hughes,.Rowan University

ABSTRACT

The classification of slaves as property in this country resulted in some interesting case law. At times, they were classified as real property, at other times, personal. They were warranted, mortgaged or pledged, and conveyed in wills.

The purpose of this paper is to expand on some of the topics taught in an undergraduate business law course. It examines how issues of real property, personal property, wills and warranties were decided, with Black American slaves as the subject or property, in selected courts in the United States during the slavery era.

UNIVERSITY STUDENT ETHICS: THE DIFFERENTIAL EXPLANATORY EFFECT OF LOCUS OF CONTROL

Evelyn C. Hume, Longwood University
humeec@longwood.edu
Aileen Smith, Stephen F. Austin State University
asmith@sfasu.edu

ABSTRACT

With the ever-growing concern over business ethics, an increasing number of business programs require students to take an ethics course. However, researchers have found that ethics instruction alone does not control ethical orientation of students. Individual personal characteristics play a significant role in determining one's ethical decisions and actions. This study examines whether locus of control has discriminating power when the questionable actions are collaborative in nature. Additionally, the research tests whether locus of control has a differential moderating affect when the subjects are considering their own beliefs and actions and when they are considering the actions of others. The findings indicate that the locus of control variable has a significant influence on ethical behavior, even when the actions are collaborative. Moreover, the research shows that locus of control does not significantly influence student's perceptions regarding questionable behaviors of others.

PROPERTY LAW, PERSONHOOD AND ETHICS: STEM CELL RESEARCH & ITS IMPACT ON PROPERTY LAW

Ida M. Jones, California State University, Fresno
idaj@csufresno.edu

ABSTRACT

Developments in biotechnology raise a myriad of issues relating to intellectual property law and ethics. Intellectual property law and specifically patent law, has been forced to create guidelines for patenting living matter. Patent law permits patent-holders to obtain a limited-time monopoly for patents of novel, useful, non-obvious processes and devices. Matter found in nature cannot be patented. However, processes to discover stem cells and transgenic animals have been approved by the U.S. Patent and Trademark Office. This paper explores the definition of legal definitions of property and intellectual property and the basis for patentability of stem cells. It points out some inconsistencies in the laws relating to property as contrasted to the laws of "personhood" and explores ethical issues. It ends with several suggestions to use the information to stimulate critical analysis and evaluation of cases in the classroom.

POTENTIAL INTEREST: Faculty that teach business law and who incorporate business ethics into their courses can use the information in this paper to construct class activities and to enhance their presentation of information on property law and ethics. This paper can be used to generate research projects for students relating to these topics.

THE NATIONWIDE JOB SAFETY AND HEALTH LEGISLATION: AN INTERVIEW WITH OPPOSING VIEWPOINTS CIRCA 1982

Rob H. Kamery, Nova Southeastern University
robhkamery@yahoo.com

ABSTRACT

The first nationwide job safety and health legislation was signed by President Nixon on December 29, 1970 as the Occupational Safety and Health Act of 1970. The need for such an Act was accentuated by the fact that prior to its passage, 14,000 workers died and 2.2 million more were disabled in the work place each year. Work-related deaths and accidents meant estimated annual losses of $1.5 billion in wages and $8 billion in the GNP (Anonymous, 1971). Federal agencies protected selected industries such as railroading and mining, but many industries in many areas had no standards or protection. It was under these circumstances that the program now known simply as OSHA was born.

INTRODUCTION

As stated in the preamble of the law, the basic purpose of OSHA is: to assure safe and healthy working conditions for working men and women by authorizing enforcement of the standards developed under the act, to assist and encourage the states in their efforts to assure safe and healthful working conditions, to provide for research information, education, and training in the field of occupational safety and health, and to achieve other purposes (Anonymous, 1972).

The federal government first became involved in the safety and health area in 1890. The first federal legislation concerned inspection practices and safety standards for coal mines. In 1902, the Public Health Service was formed for the purpose of conducting research and studies for occupational health programs. The Occupational Health Division in the Department of Health, Education, and Welfare was created in 1914 (Anonymous, 1971).

INDUSTRIAL SAFETY--1960s-1970s

The first bill concerning industrial hazardous materials was introduced in 1965 but was not passed. On January 23, 1968, President Johnson introduced the first Occupational Safety and Health Program, which was designed to protect the worker on the job. The bill was introduced by Congressman O'Hare from Michigan, rejected by the House Rules Committee, and never passed (Anonymous, 1971).

On June 13th 1970, House Resolution 16785 was approved by the House Labor Committee along straight party lines with the exception of one Republican defector. Twelve of the remaining 15 Republican members declared the bill unacceptable in an appendage to the Committee report (Anonymous, 1971). Almost a week after the Senate version of the bill had been passed, House Resolution 16785 reached the House floor. Congressman Steiger read a letter of support for the bill from the Secretary of Labor. The Steiger-Sikes substitute was accepted as an amendment to the Committee bill.

At the same time, the House Subcommittee was still trying to come to an agreement. Senate hearings were also underway. Finally, a Conference Committee produced the next and final version of the bill, which gave the Secretary of Labor authority to fix and police standards. The bill also created a commission to review violation charges. This bill was accepted by Congress and signed by the President on December 29, 1970. It became effective April 1971.

TOSHA INTERVIEW

The following interview was conducted with Rob Williamson, Area Supervisor with the Tennessee Department of Labor, Occupational Safety and Health Administration, during a class presentation in Labor Economics at Christian Brothers College on April 2, 1982.

Question: Mr. Williamson, what is your background and how did you get involved with OSHA activities and enforcement?

Answer: For over 30 years, I was an industrial safety engineer for the Memphis Light, Gas, and Water Division. After I retired from there, I began a second career with TOSHA.

Question: You say TOSHA rather than OSHA. Can you explain the difference?

Answer: When the Williams-Steiger Act was signed by President Nixon in 1970, the federal program was established and placed into effect in January 1971. At that point, the federal government offered to allow and to assist the states in establishing their own program as long as the states agreed to follow federal guidelines. Part of the agreement was the fact that the federal government would provide 50% of the state's funding for their individual programs. A total of 26 states instituted self-administration. However, only 23 states met the federal requirements and guidelines. Now only 19 states currently administer independent programs. Early in 1973, the state assembly voted to set up the Tennessee OSHA program under the auspices of the Tennessee Department of Labor. In order to make sure that the local office is continuing to follow federally accepted policies, a federal inspector monitors the activities of the local office a couple of times per year.

Question: When first initiated, there seemed to be a great deal of apprehension and misunderstanding about the conduct of the OSHA program. What were some of the causes for these problems?

Answer: The major cause of conflict was the initial problem of setting down proper standards--those that would be realistic to the employer, but would carry out the basic assigned task of providing maximum protection for the worker. On the original drafting committee, there was not a single safety professional included. This group established rules and regulations for general industries that covered over 2900 pages. Even though such respected agencies as the American National Standards Institute, Fire Prevention Commission, and other industrial safety agencies were consulted, many of the standards were lengthy and redundant. An example would be portable ladders, which had over 29 written pages of requirements. Instead of the rules being tailored to various industries, they were combined and applied to all. The situation with the burdensome regulations existed until January of 1979 when the federal director asked a number of safety engineers to help develop a common approach to the regulations (Williamson, 1982).

COUNTER-VIEWPOINTS TO TOSHA

To counter the comments from the bureaucratic viewpoint, two additional interviews were conducted. The first was with Aubrey Ellis, Plant Manager of Clemco, a company dealing in the assembly and sales of safety equipment and metal fabrications.

Question: As a plant manager who has been inspected several times by OSHA, what is your opinion of OSHA?

Answer: We have been inspected four times since 1974. During the first few inspections, the inspectors proved to be very non-professional. They did not know what they were talking about and spent a great deal of time looking at small, insignificant items that they could find in a manual. Since those first inspections, the OSHA inspectors seem to be better trained. They display the attitude that they are just another guy with a job to do. They are very courteous and cooperative as possible.

Question: What were some of the items noted on your inspections?

Answer: In 1974, the plant was required to install $735 worth of carbon dioxide monitors for our air breathing equipment in the sandblasting area. Two $50 fines were levied for large drill presses not being mounted to the floor. The presses were specifically designed not to be permanently mounted, but the "book" said differently. One of the things we found most amusing was the fact that refrigerators in the break areas were cited for not being grounded. Most of the inspections consisted of checking electrical cords, heights of railing, and proper grounding of equipment. More recent inspections have dealt with technical items in such areas as the machine shop and paint areas. Since our facility is fairly new, we have had a distinct advantage over most facilities. As each new area was added, the specifications were double-checked to assure that all OSHA rules had been considered.

Question: Have you ever requested a courtesy inspection or any of the other available services from TOSHA on a voluntary basis?

Answer: No! You just don't invite foxes into the hen house. In all seriousness, our staff is highly safety conscious and most of our corporate standards meet or exceed the OSHA requirements. Safety is a 24-hour a day project with us.

Question: If you could change anything in OSHA, what would you change?

Answer: At this point, the primary targets should be those companies with abnormally high occupational accident rates. The poorer performers should be forced to clean up their acts. Some of the criteria to be considered include a high-hazard company with a high percentage of injuries. Those companies with a lot of employee complaints should be constantly checked (Ellis, 1982, April).

The third interview was with Mike Hortnett, a plant manager with Metal Products, which manufacturers metal threshold and weather products, as well as vinyl extensions.

Question: How much experience have you had with OSHA since you became a plant manager?

Answer: We have averaged about one inspection per year since I took over in 1977.

Question: What have been your initial impressions of the inspections?

Answer: The quality of the inspector depends on his personal knowledge. An inexperienced inspector will spend all of his time checking the presence and height of toe rails and whether or not tools are grounded properly. The inexperienced inspector tends to spend all of his time looking for small items and will often walk right by a major problem area. Because of disruptions caused in the plant, such as employees being upset, and a duplication of efforts between OSHA and TOSHA, we are not as cooperative as we could have been. The inspectors are required to identify themselves and to wait until the corporate office approves requests for testing. While going through an inspection, I have found that many of inspectors are really just out looking for a job. During the inspection, the inspectors feel like they have to find something. We have tried to make on-the-spot corrections where possible and have other deficiencies corrected in the shortest feasible time span. We have never been fined where the fine was not appealed and withdrawn.

Question: Have you ever requested a courtesy inspection?

Answer: Yes. When I first took over as plant manager, I asked for a courtesy inspection. They came up with several good suggestions. Since that time, I feel like that with the combination of parent company standards and the safety awareness of our supervisors that we don't need them back.

Question: In your opinion, is the OSHA problem worthwhile and should it be continued?

Answer: I feel like it is unfair to larger companies. OSHA feels like they can intimidate you. Besides, they are not as stringent with their requirements as our own company is. Even though they always seem to show up at inappropriate times, their intentions are well meant (Hortnett, 1982, April).

OVERVIEW OF THE INTERVIEWS

In retrospect, the opportunity to conduct these interviews provided the interviewer with a rare opportunity to cross the full spectrum of OSHA. To be able to sit down and listen to an individual who has had years and years of industrial safety experience and was now on the other side of the fence was certainly informative. Very seldom is it possible to meet an individual heading up a government agency who obviously lacks many of the bureaucratic synonyms normally associated with the government. Not only that, but Williamson's knowledge of the subject was complete and his anxiety to communicate his knowledge to others as a useable tool was totally refreshing.

From an industrial viewpoint, the two plant managers proved to be extreme opposites in personality, although they work under much the same conditions and had the same educational backgrounds and work experience. Both seemed to have learned lessons through their experiences with OSHA and felt that at least now the program has merit. Neither liked the large volume of rules that existed prior to 1979, but both believed that the basic principles were valid and the quality of both inspections and inspectors was improving. As may or may not be evident in the interview, the second plant manager was opposed to anything that was not of his own creation.

CONCLUSION

Even before its passage, the Occupational Safety and Health Act of 1970 was beset with problems. These problems continued throughout its growth period. However, through the maturation process, OSHA began to address these problems and try to solve them. It abolished hundreds of nitpicking standards in the late seventies and modified its inspection selection techniques. OSHA is still not a perfect agency by any means. There still remain some problems and high costs, but even if these detriments can never be completely resolved, the benefits gained may more than justify OSHA's continued presence.

REFERENCES

Anonymous (1971). *ABC's of the job safety and health act.* Washington, D.C.:Bureau of National Affairs, 13-18.

Anonymous (1972). *Occupational Safety and Health Act of 1970, law and explanation*. Chicago: Commerce Clearing House, 2, 16.

Ellis, A. (1982, April). Clemco, Incorporated, Memphis, Tennessee. Personal interview.

Grimaldi, J. & R. Simonds (1980). *Safety management*. Homewood, IL: Richard D. Irwin, 311, 314-315, 337.

Hortnett, M. (1982, April). Southern Metal Products, Memphis, Tennessee. Personal interview.

Williamson, R. (1982, April). TOSHA, Memphis, Tennessee. Personal interview.

THE ETHICS OF TAX EVASION: A SURVEY OF GERMAN BUSINESS STUDENTS

Robert W. McGee, Barry University
rmcgee@mail.barry.edu
Inge Nickerson, Barry University
inickerson@mail.barry.edu
Werner Fees, Georg-Simon-Ohm Fachhochschule, Germany
Werner.fees@fh-nuernberg.de

ABSTRACT

This paper examines the issue of the ethics of tax evasion. It begins with a review of the literature and proceeds to discuss the three main views on the issue that have emerged over the last 500 years. The paper then reports on the results of a survey taken of German business students.

WHEN IS TAX EVASION ETHICALLY JUSTIFIABLE? A SURVEY OF GERMAN OPINION

Robert W. McGee, Barry University
RMCGEE@mail.barry.edu
Inge Nickerson, Barry University
INICKERSON@mail.barry.edu
Werner Fees, Georg-Simon-Ohm Fachhochschule
werner.fees@fh-de

ABSTRACT

This paper examines the issue of the ethics of tax evasion. It begins with a review of the literature and proceeds to discuss the three main views on the issue that have emerged over the last 500 years. The paper then reports on the results of a survey taken of German business students.

INTRODUCTION

Over the centuries, three basic views have emerged on the ethics of tax evasion. View One takes the position that tax evasion is always, or almost always unethical. There are basically three underlying rationales for this belief. One reason is the belief that individuals have a duty to the state to pay whatever taxes the state demands. This view is especially prevalent in democracies, where there is a strong belief that individuals should conform to majority rule. The second rationale for an ethical duty to pay taxes is because the individual has a duty to other members of the community. This view holds that individuals should not be freeloaders by taking advantage of the services the state provides while not contributing to the payment of those services. A corollary of this belief is the view that if tax dodgers do not pay their fair share, then law abiding taxpayers must pay more than their fair share. The third rationale is that we owe a duty to God to pay taxes, or, stated differently, God has commanded us to pay our taxes. This view holds no water among atheists, of course, but the view is strongly held in some religious circles.

View Two might be labeled the anarchist view. This view holds that there is never any duty to pay taxes because the state is illegitimate, a mere thief that has no moral authority to take anything from anyone. The state is no more than a mafia that, under democracy, has its leaders chosen by the people. There is no such thing as a social contract according to this position. Where there is no explicit agreement to pay taxes there also is no duty. All taxation necessarily involves the taking of property by force or the threat of force, without the owner's permission. Thus, it meets the definition of theft. Stated as an equation, TAXATION = THEFT. A corollary equation is that FAIR SHARE = 0.

View Three holds that tax evasion may be ethical under some circumstances and unethical under other circumstances. This view is the prevalent view, both in the literature and according to the present survey.

REVIEW OF THE LITERATURE

Although many studies have been done on tax compliance, very few have examined compliance, or rather noncompliance, primarily from the perspective of ethics. Most studies on tax evasion look at the issue from a public finance or economics perspective, although ethical issues may be mentioned briefly, in passing. The most comprehensive twentieth century work on the ethics of tax evasion was a doctoral thesis written by Martin Crowe (1944), titled *The Moral Obligation of Paying Just Taxes*. This thesis reviewed the theological and philosophical debate that had been going on, mostly within the Catholic Church, over the previous 500 years. Some of the debate took place in the Latin language. Crowe introduced this debate to an English language readership. A more recent doctoral dissertation on the topic was written by Torgler (2003), who discussed tax evasion from the perspective of public finance but also touched on some psychological and philosophical aspects of the issue.

Leiker (1998) speculates on how Rousseau would have viewed the ethics of tax evasion. Alfonso Morales (1998) examined the views of Mexican immigrant street vendors and found that their loyalty to their families exceeded their loyalty to the government.

A number of articles have been written from various religious perspectives. Cohn (1998) and Tamari (1998) discuss the Jewish literature on tax evasion, and on ethics in general. Much of this literature is in Hebrew or a language other than English. McGee (1998c, 1999) comments on these two articles from a secular perspective.

A few articles have been written on the ethics of tax evasion from various Christian viewpoints. Gronbacher (1998) addresses the issue from the perspectives of Catholic social thought and classical liberalism. Schansberg (1998) looks at the Biblical literature for guidance. Pennock (1998) discusses just war theory in connection with the moral obligation to pay just taxes, and not to pay unjust or immoral taxes. Smith and Kimball (1998) provide a Mormon perspective. McGee (1998b, 1999) comments on the various Christian views from a secular perspective. When Jesus is asked whether people should pay taxes to Caesar, Jesus replied that we should give to Caesar the things that are Caesar's and give God the things that are God's [Matthew 22:17, 21]. But Jesus did not elaborate on the point. He did not say that we are only obligated to give government 10 percent or 5 percent or any particular percent of our income.

There are passages in the Bible that seemingly take an absolutist position. Romans 13, 1-2 supports the Divine Right of Kings, which basically holds that whoever is in charge of government is there with God's approval and anyone who disputes that fact or who fails to obey is subject to damnation. It is a sin against God to break any law. Thus, Mao, Stalin and Hitler must all be obeyed, even though they were the three biggest monsters of the twentieth century, because they are there with God's approval.

A few other religious views are also addressed in the literature. Murtuza and Ghazanfar (1998) discuss the ethics of tax evasion from the Muslim perspective. McGee (1998a, 1999) comments on their article and also discusses the ethics of tax evasion under Islam citing Islamic business ethics literature (1997). DeMoville (1998) discusses the Baha'i perspective and cites the relevant literature to buttress his arguments. McGee (1999a) commented on the DeMoville article.

METHODOLOGY

After reviewing the Crowe thesis (1944), which summarized the 500 year theological and philosophical debate that has been going on regarding the ethics of tax evasion, and after becoming familiar with the scant recent philosophical literature on the topic, a questionnaire was developed that incorporates all the major issues that have been discussed in the literature. The questionnaire includes 18 statements that reflect all three viewpoints on the issue. The questionnaire was then distributed to business school graduate students and upper level undergraduate students at the Georg-Simon-Ohm Fachhochschule in Nuernberg, Germany. Seventy-one (71) usable responses, 30 from MBA students and 41 from upper-division International Business majors, were received.

Respondents were asked to indicate their agreement or disagreement with each statement by placing a number from 1 to 7 in the space provided. The statements generally started with the phrase "Tax evasion is ethical if…" A score of one (1) indicated strong agreement with the statement. A score of seven (7) indicated strong disagreement. Table 1 summarizes the results of the survey.

SURVEY RESULTS

Table 1
Ranking of Combined International Business and MBA Students
(1=strongly agree; 7=strongly disagree)

Rank	Score	Statement
1	6.38	Tax evasion is ethical even if most of the money collected is spent wisely.
2	6.31	Tax evasion is ethical even if a large portion of the money collected is spent on projects that do benefit me.
3	6.21	Tax evasion is ethical even if a large portion of the money collected is spent on worthy projects.
4	6.04	Tax evasion is ethical if a large portion of the money collected is spent on projects that do not benefit me.
5	6.00	Tax evasion is ethical if the probability of getting caught is low.
6	5.97	Tax evasion is ethical even if tax rates are not too high because government is not entitled to take as much as it is taking from me
7	5.72	Tax evasion is ethical if everyone is doing it.
8	5.13	Tax evasion is ethical even if it means that if I pay less, others will have to pay more.
9	5.07	Tax evasion is ethical if tax rates are too high.
10	4.76	Tax evasion is ethical if a large portion of the money collected is spent on projects that I morally disapprove of.
11	4.48	Tax evasion is ethical if I can't afford to pay.
12	4.25	Tax evasion is ethical if some of the proceeds go to support a war that I consider to be unjust.
13	4.24	Tax evasion is ethical if the tax system is unfair.
14	4.03	Tax evasion is ethical if a large portion of the money collected is wasted.
15	3.69	Tax evasion is ethical if the government imprisons people for their political opinions.
16	3.65	Tax evasion is ethical if a significant portion of the money collected winds up in the pockets of corrupt politicians or their families and friends.
17	3.59	Tax evasion would be ethical if I were a Jew living in Nazi Germany in 1935.
18	3.41	Tax evasion is ethical if the government discriminates against me because of my religion, race or ethnic background.

REFERENCES

Cohn, Gordon (1998). The Jewish View on Paying Taxes. *Journal of Accounting, Ethics & Public Policy* 1(2), 109-120, reprinted in Robert W. McGee (Ed.), *The Ethics of Tax Evasion* (pp. 180-189). Dumont, NJ: The Dumont Institute for Public Policy Research, 1998.

Crowe, Martin T. (1944). *The Moral Obligation of Paying Just Taxes*, The Catholic University of America Studies in Sacred Theology No. 84.

Gronbacher, Gregory M.A. (1998). Taxation: Catholic Social Thought and Classical Liberalism. *Journal of Accounting, Ethics & Public Policy* 1(1), 91-100, reprinted in Robert W. McGee (Ed.), *The Ethics of Tax Evasion* (pp. 158-167). Dumont, NJ: The Dumont Institute for Public Policy Research, 1998.

Leiker, Bret H. (1998). Rousseau and the Legitimacy of Tax Evasion. *Journal of Accounting, Ethics & Public Policy* 1(1), 45-57, reprinted in Robert W. McGee (Ed.), *The Ethics of Tax Evasion* (pp. 89-101). Dumont, NJ: The Dumont Institute for Public Policy Research, 1998.

McGee, Robert W. (1998a). The Ethics of Tax Evasion in Islam: A Comment. *Journal of Accounting, Ethics & Public Policy* 1(2), 162-168, reprinted in Robert W. McGee (Ed.), *The Ethics of Tax Evasion* (pp. 214-219). Dumont, NJ: The Dumont Institute for Public Policy Research, 1998.

McGee, Robert W. (1998b). Christian Views on the Ethics of Tax Evasion. *Journal of Accounting, Ethics & Public Policy* 1(2), 210-225. Reprinted at http://ssrn.com/abstract=461398.

McGee, Robert W. (1998c). Jewish Views on the Ethics of Tax Evasion. *Journal of Accounting, Ethics & Public Policy* 1(3), 323-336. Reprinted at http://ssrn.com/abstract=461399.

McGee, Robert W. (1999) Is It Unethical to Evade Taxes in an Evil or Corrupt State? A Look at Jewish, Christian, Muslim, Mormon and Baha'i Perspectives. *Journal of Accounting, Ethics & Public Policy* 2(1), 149-181. Reprinted at http://ssrn.com/abstract=251469.

Morales, Alfonso (1998). Income Tax Compliance and Alternative Views of Ethics and Human Nature. *Journal of Accounting, Ethics & Public Policy* 1(3), 380-399, reprinted in Robert W. McGee (Ed.), *The Ethics of Tax Evasion* (pp. 242-258). Dumont, NJ: The Dumont Institute for Public Policy Research, 1998.

Murtuza, Athar and S.M. Ghazanfar (1998). Taxation as a Form of Worship: Exploring the Nature of Zakat. *Journal of Accounting, Ethics & Public Policy* 1(2), 134-161, reprinted in Robert W. McGee (Ed.), *The Ethics of Tax Evasion* (pp. 190-212). Dumont, NJ: The Dumont Institute for Public Policy Research, 1998.

Pennock, Robert T. (1998). Death and Taxes: On the Justice of Conscientious War Tax Resistance. *Journal of Accounting, Ethics & Public Policy* 1(1), 58-76, reprinted in Robert W. McGee (Ed.), *The Ethics of Tax Evasion* (pp. 124-142). Dumont, NJ: The Dumont Institute for Public Policy Research, 1998.

Schansberg, D. Eric (1998). The Ethics of Tax Evasion Within Biblical Christianity: Are There Limits to "Rendering Unto Caesar"? *Journal of Accounting, Ethics & Public Policy* 1(1), 77-90, reprinted in Robert W. McGee (Ed.), *The Ethics of Tax Evasion* (pp. 144-157). Dumont, NJ: The Dumont Institute for Public Policy Research, 1998.

Smith, Sheldon R. and Kevin C. Kimball (1998). Tax Evasion and Ethics: A Perspective from Members of The Church of Jesus Christ of Latter-Day Saints. *Journal of Accounting, Ethics & Public Policy* 1(3), 337-348, reprinted in Robert W. McGee (Ed.), *The Ethics of Tax Evasion* (pp. 220-229). Dumont, NJ: The Dumont Institute for Public Policy Research, 1998.

Tamari, Meir (1998). Ethical Issues in Tax Evasion: A Jewish Perspective. *Journal of Accounting, Ethics & Public Policy* 1(2), 121-132, reprinted in Robert W. McGee (Ed.), *The Ethics of Tax Evasion* (pp. 168-178). Dumont, NJ: The Dumont Institute for Public Policy Research, 1998.

Torgler, Benno (2003). *Tax Morale: Theory and Empirical Analysis of Tax Compliance*. Dissertation der Universität Basel zur Erlangung der Würde eines Doktors der Staatswissenschaften.

DOES THE SELECTION METHOD OF PUBLIC UTILITY COMMISSION AFFECT THE RELATIVE CUSTOMER CLASS PRICES IN A DEREGULATED ENVIRONMENT?

Banamber Mishra, McNeese State University
Bmishra@mcneese.edu

ABSTRACT

State Public Utility Commissions (PUCs) operate in distinct political, economic and institutional environments. Historically PUCs have had substantial discretion in approving the rate structure of electric utility firms. The three major customer classes served by electric utilities are residential, commercial, and industrial customers. Today, there is considerable variation in rates both across and within customer classes. Some of these differences in customer class prices are due to exogenous factors, which are beyond the control of PUCs. The regulatory reform in electric power industry gathered momentum in early 1990s and it is being implemented on a state-by-state basis. Seven states (Alabama, Arizona, Georgia, Louisiana, Mississippi, Okalahoma, and South Dakota) directly elect their regulatory commissions where as other states either select or appoint their PUCs. Does the state PUCs that are directly elected by the voting public respond differently in setting customer class prices than PUCs that are appointed by the Governors? Is one group of customers favored at the expense of another group in the context of the average prices that they pay for the usage of electricity? Is the price spread, i.e. the difference in the average customer class prices, affected by the selection method? The proposed research will investigate the impact of PUC selection method on relative customer class prices and price spread using the data for the period of 1998-1999.

Many empirical studies have focused on the average price charged to all electric utility customers. In a classic study, Stigler and Friendland (1962) find that regulation had no effect on average rates. More recently, studies by Harris and Navaro (1983), Mann and Primeaux (1983), Primeaux and Mann (1986), Boyes and McDowell (1989) suggest that the method of selecting the commissioners has small or no significant effect on average utility rates. Irrespective of any systematic effect of regulation on average level of utility rates, there may be significant variations in differential prices charged to the various customer classes across regulatory regimes. The selection method may result in greater dispersion in customer class prices, while leaving the average price essentially unaffected.

If institutions matter, there are reasons for expecting differences in the structure of utility rates across regulatory regimes. There are a number of competing theories of regulation and most are consistent with the proposition that politically determined variables may systematically influence customer class prices. In Stigler's capture theory, regulated firms succeed in controlling the PUC so that, to a degree, it acts in the interest of the regulated industry. Viewed from this perspective it is apparent that a state's institutions and regulatory statues can deter or contribute to capture. There are sophisticated variations on the capture theory of regulation in which competition among interest groups can influence regulatory outcomes. Taken together Posner's (1974) and Peltzman's (1976) theories of regulation strongly suggest that differences in customer class pricing across PUCs is likely even if regulation has no effect on the overall average level of utility rates. Formby, Mishra, and Thistle (1991) have shown that regulatory regime does matter with respect to electric utility customer class prices. In another study, Thistle, Mishra, and Formby (1995) found that the 'elected regime' negatively influences the cost of capital of electric utilities.

In a more recent study, using the data over the deregulation period of 1998-1999, Mishra (2002) has found that the average residential customer class price is lower under an 'elected' regime compared to an 'appointed regime.' The proposed study intends to investigate whether the residential customers benefit at the expense of commercial and/or industrial customers by examining the relative customer class prices and the price spread under an 'elected' regime.

The proposed study will include economic variables that are likely to contribute to differing relative customer class prices and dispersion in customer class prices. Cost of service and demand elasticities are also likely to influence the differences in customer class prices. In addition to the selection method of PUCs, economic variables such as per capita income, manufacturing employment, population density, energy price, and other variables will be included in the study to control for demand and supply conditions that vary across states. The proposed research will investigate the impact of PUC selection method on relative customer class prices and price dispersion using the data for the period of 1998-1999 which is particularly important consumers in a regulated environment.

REFERENCES

Boyes, and McDowell (1989), "Election of Public Utility Commissioners: A reexamination of the Importance of Institutional Setting," Public Choice, Vol. 61.

Formby, Mishra, and Thistle, "Regulation and Differentials in Electric Utility Customer Class Prices: 1974-83," Southern Business and Economic Journal, Vol. 14.

Harris and Navarro (1963), "Does Electing Public Utility Commissioners Bring Lower Electric Rates?" Public Utility Fortnightly, Vol. 112.

Mann and Primeaux (1983), "The Controversial Question of Commissioners Selection," Public Utility Fortnightly, Vol. 112

Mishra (2002), "Does the Selection Method of Public Utility Commission Make Any Difference in Electricity Prices in a Deregulated Environment?" Research Journal of Business Disciplines, Vol. 8

Peltzman (1976), "Toward a More General Theory of Regulation," Journal of Law and Economics, Vol. 19.

Posner (1974), "Theories of Economic Regulation," Bell Journal of Economics, Vol. 5.

Primeaux and Mann (1986), "Regulatory Selection methods and Electricity Prices," Land Economics, Vol. 62.

Stigler and Friedland, "What can Regulators Regulate? – The Case of Electricity," Journal of Law and Economics, 5.

Thistle, Mishra, and Formby (1995), "Public Utility Regulation and Bond Ratings," Public Choice, Vol. 84.

ASSET PROTECTION AFTER THE NEW BANKRUPTCY ACT

Matthew Monippallil, Eastern Illinois University
cfmmm@eiu.edu

ABSTRACT

Many people are deeply suspicious of planning for asset protection and consider it an unethical, unscrupulous activity. However, due to the expanded theories of tort liability, the ensuing litigation explosion, and the extraordinarily high jury awards, many high net worth individuals and their advisors today view asset protection an essential part of estate planning, preservation and transmission. This paper discusses the various methods of asset protection planning and their limitations, especially in the light of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The paper also examines in detail the benefits and pitfalls associated with domestic and offshore asset protection trusts.

COMMUNICATIONS WITHIN THE SUPPLY CHAIN: ANTITRUST CONCERNS UNDER CONDITIONS OF MONOPSONY AND OLIGOPSONY

Gary P. Schneider, University of San Diego
garys@sandiego.edu
Carol M. Bruton, California State University San Marcos
cbruton@csusm.edu

ABSTRACT

In recent years, companies have formed complex alliances and operating agreements that allow the sharing of information among participants in specific supply chains. Because many of the companies involved in these arrangments are large businesses with a wide range of operations, they often find themselves competing with another company in one line of business while supplying, partnering, buying from that same company in other lines of business. The use of Internet technologies has enabled these companies to share information in highly selective and closely monitored ways, which is important when the other company might simultaneously be a competitor and a partner, for example. In the United States, government regulators considering antitrust action or reviewing proposed mergers are required to evaluate these relationships and information flows among the parties. This paper examines the issues that arise from information sharing in today supply chain relationships.

COMPLEX SUPPLY CHAIN STRUCTURES

During the past three decades, businesses have realized that they can reduce production costs and increase product quality by taking a more active role in negotiations with suppliers (Schneider, 2005). By engaging suppliers in cooperative, long-term relationships, companies have found that they can work together with these suppliers to identify new ways to provide their own customers with faster, cheaper, and better service (Dobbs, 1999). By coordinating the efforts of supply chain participants, firms that engage in supply chain management are reaching beyond the limits of their own organization hierarchical structure and creating a new network form of organization among the members of the supply chain (Schneider, 2005).

Supply chain management was originally developed as a way to reduce costs (Chopra and Meindl, 2001). It focused on very specific elements in the supply chain and tried to identify opportunities for process efficiency. Today, supply chain management is used to add value in the form of benefits to the ultimate consumer at the end of the supply chain. This requires a more holistic view of the entire supply chain than had been common in the early days of supply chain management (Simchi-Levi, et al., 2003).

Businesses that engage in supply chain management work to establish long-term relationships with a small number of very capable suppliers. These suppliers, called tier one suppliers, in turn develop long-term relationships with a larger number of suppliers that provide components and raw materials to them. These tier two suppliers manage relationships with the next level of suppliers, called tier three suppliers, that provide them with components and raw materials (Chopra and Meindl, 2001). A key element of these relationships is trust between the parties. The long-term relationships created among participants in the supply chain are called supply alliances. The level of information sharing that must take place among the supply chain participants can be a major barrier to entering into these alliances (Radhakrishnan and Srinidhi, 2005). Firms are not accustomed to disclosing detailed operating information and often perceive that information disclosure might hurt the firm by placing it at a competitive disadvantage (Raisch, 2001).

In exchange for the stability of the closer, long-term relationships, buyers expect annual price reductions and quality improvements from suppliers at each stage of the supply chain. However, all supply chain participants share information and work together to create value. Ideally, the supply chain coordination creates enough value that each level of supplier can share the benefits of reduced cost and more efficient operations. By working together, supply chain members can reduce costs and increase the value of the product or service to the ultimate consumer (Ayers, 1999; Morgan and Monezka, 2003).

Some researchers who study the interaction of firms within an industry value chain are beginning to use the term upply web or alue net instead of upply chain because many industry value chains no longer consist of a single sequence of companies linked in a single line, but include many parallel lines that are interconnected in a web or network configuration (Bovel and Joseph, 2000; Chopra and Meindl, 2001). The increased competitive forces of globalization and new technologies have caused many companies to undertake collaborations with other companies that will allow them to expand into foreign markets, fund innovation efforts that require large capital investments, and reduce costs in production, logistics, and administration (Merkow, 2000).

In terms of economic organization, these collaborations are networks (Castells, 1996) rather than hierarchies or markets (Coase, 1937; Williamson, 1975). The traditional purchasing model had one hierarchically structured firm negotiating purchase terms with several similarly structured supplier firms, playing each supplier against the others. As is typical in a network organization, more businesses are now giving their procurement departments new tools to negotiate with suppliers, including the possibility of forming strategic alliances. For example, a buying firm might enter into an alliance with a supplier to develop a new technology that will reduce overall product costs. The technology development might be done by a third firm using research conducted by a fourth firm. Such alliances and outsourcing contracts are examples of a move toward network economic structures (Schneider, 2005).

COMMUNICATION AND INFORMATION SHARING

Supply chain participants tend to work toward their individual goals. Coordination of goals across the entire supply chain is an important part of meeting the ultimate consumer needs. if each company in the supply chain is working toward its own goal, it is unlikely that the ultimate consumer need will be met efficiently or at low cost. Fischer (1997) describes one area in which differences in organizational goals often arise. He notes that firms often organize themselves to achieve either efficient process goals or market-responsive flexibility goals.

Some companies structure themselves to be efficient producers, whereas others structure themselves to be flexible producers (Lee, 2004). The kinds of things that allow a firm to be an efficient, low-cost producer are exactly the things that prevent a firm from being flexible enough to respond to market changes. For example, the efficient producer invests in expensive machines that can stamp out large numbers of low-cost items. This investment drives down the cost of production, but makes it difficult for the producer to be flexible. A large investment in specialized machinery prevents that producer from reconfiguring the plant layout. If even one member of the supply chain for a product that requires flexible production operates as an efficient producer (instead of as a flexible producer), every other firm in the supply chain suffers Fischer, 1997). The efficient producer creates bottlenecks that hamper the best efforts of all other supply chain members. Information flows up and down the supply chain can keep each participant informed of what the ultimate consumer demands. The participants can then plot a strategy to meet those demands (Morgan and Monezka, 2003).

ANTITRUST CONCERNS

Unfortunately, the antitrust laws of the United States and other developed countries were drafted long before the network form of economic organization was even conceived. Pate (2003) and Wilke (2004) note that under conditions of monopsony or oligopsony, U.S. firms that construct complex supply chain structures and communicate data about demand or pricing among the parties to those structures can find themselves in violation of the Sherman Antitrust Act (1890). Pate (2003) reported that the U.S. Department of Justice was increasingly being asked for clarifications of its stance on a wide variety of supply chain and collaboration relationships among companies that were competitors in some of their businesses.

A monopsony occurs when a firm is the sole or dominant buyer of goods or services in a market and has the ability to force suppliers to sell at below market prices. An oligopsony occurs when a small number of firms are together the dominant buyers of goods or services in a market and have the ability to force suppliers to sell at below market prices (Hannaford, 2005). Since an unfair practice by a firm with monopsony or oligopsony power would drive ultimate consumer prices down, at least temporarily, one might ask why an antitrust law devoted to protecting consumers might be invoked at all. But the consumer does not always benefit from the reduced prices paid by the dominant buyer.

REFERENCES

Ayers, J. 1999. upply Chain Strategies, *Information Systems Management*, 16(2), Spring, 72-80.

Bovel, D. and M. Joseph. 2000. rom Supply Chain to Value Net, *Journal of Business Strategy*, 21(4), July ugust, 24-28.

Castells, M. 1996. *The Rise of the Network Society*. Cambridge, MA: Blackwell.

Coase, R. 1937. he Nature of the Firm, Economica, 4(4), November, 386-405.

Chopra, S. and P. Meindl. 2001. *Supply Chain Management*. Upper Saddle River, NJ: Prentice-Hall.

Dobbs, J. 1999. *Competition New Battleground: The Integrated Value Chain*. Cambridge, MA: Cambridge Technology Partners.

Fisher, M. 1997. hat Is the Right Supply Chain for Your Product? *Harvard Business Review*, 75(2), March pril, 105-116.

Hannaford, S. 2005. oth Sides Now, *Harvard Business Review*, 83(3), March, 17.

Jap, S. and J. Mohr. 2002. everaging Internet Technologies in B2B Relationships, *California Management Review*, 44(4), Summer, 24-39.

Lee, H. 2004. he Triple-A Supply Chain, *Harvard Business Review*, 82(10), October, 102-112.

Levinson, M. 2002. ow to Grow Your Own B2B Network, *CIO Magazine*, June 15, 60-64.

Merkow, M. 2000. 2B, Privacy, and You art Two, *ECommerce-Guide*, December 26. (http://www.ecommerce-guide.com/news/trends/article.php/544011)

Morgan, J. and R. Monczka. 2003. hy Supply Chains Must Be Strategic, *Purchasing*, April 17, 42-45.

Pate, R. 2003. tatement Before the Committee on the Judiciary Concerning Antitrust Enforcement in the Agricultural Marketplace, *United States Senate*, October 30.

Radhakrishnan, S. and B. Srinidhi. 2005. haring Demand Information in a Value Chain: Implications for Pricing and Profitability, *Review of Quantitative Finance & Accounting*; 24(1), February, 23-45.

Power, D. and A. Sohal. 2002. mplementation and Usage of Electronic Commerce in Managing the Supply Chain: A Comparative Study of Ten Australian Companies, *Benchmarking: An International Journal*, 9(2), 190-208.

Raisch, W. 2001. *The eMarketplace: Strategies for Success in B2B Ecommerce*. New York: McGraw-Hill.

Schneider, G. 2005. *Electronic Commerce*, Sixth Edition. Boston: Course Technology.
Sherman Antitrust Act. 1890. 15 USC 1.
Simchi-Levi, D. P. Kaminsky, and E. Simchi-Levi. 2003. *Designing & Managing the Supply Chain*, Second Edition. New York: McGraw-Hill.
Wilke, J. 2004. ow Driving Prices Lower Can Violate Antitrust Statutes, *The Wall Street Journal*, January 27, A1.
Williamson, O. 1975. *Markets and Hierarchies: Analysis and Antitrust Implications*. New York: Free Press.

THE SARBANES-OXLEY ACT AND ACCOUNTANT LIABILITY

Jerry Wegman, University of Idaho
wegman@uidaho.edu

ABSTRACT

President Bush signed the Sarbanes-Oxley Act (SOA) into law on July 30, 2002. At that time he said that it brought about "the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt". The SOA was passed in response to corporate scandals involving Enron, WorldCom and others. It was intended to restore public confidence in our capital markets. Much of the SOA is directed at corporate and securities industry behavior. But the SOA also raises the regulatory bar far higher for the accounting profession, especially for accounts who audit public companies. The SOA created a new regulatory agency to oversee accountants' work: the Public Company Accounting Oversight Board (PCAOB). The SOA also imposed high ethical standards, including prohibiting conflicts of interest and even potential conflicts of interest. Civil and criminal penalties for violations were increased. The net effect was to substantially increase the legal liability of accountants.

Business schools are trying to include SOA materials into their curricula. However, as the AACSB publication BizEd pointed out in August 2005, there is a lack of material that is appropriate for classes in accounting and business law. This paper will help to fill that need. It examines and assesses those parts of the SOA that impact accountant liability, particularly the new regulatory agency and also accountant independence. The SOA is then assessed and its future considered.

INTRODUCTION

As most readers know, the Sarbanes-Oxley Act (SOA) is the most far-reaching and significant new federal regulatory statute affecting accountants and corporate governance since the Securities Acts of 1933 and 1934. Corporate scandals involving Enron, WorldCom and others had shaken public confidence in American capital markets. Public outrage plus the obvious need for reform led to the passage of the SOA which was signed into law on July30, 2002.

The SOA significantly affected the legal liability of accountants. A new federal regulatory agency, the Public Company Accounting Oversight Board was created to oversee auditors' work, with authority to conduct inspections and punish violations. Conflicts of interest were prohibited, and a high wall was erected separating the audit function from consulting and other non-audit functions. Auditing standards were no longer controlled by the accounting profession. Auditors' civil and criminal liability were increased, and additional record-keeping burdens imposed. Audits of public companies became riskier for accountants but also more profitable, reflecting the greater amount of work and risk involved.

The topic of accountant liability is an important one in accounting and business law classes, especially at the Junior, Senior and Graduate level. The SOA significantly impacted this liability. However, business schools have had difficulty incorporating SOA material into their curricula. As the AACSB publication BizEd recently pointed out, every school it surveyed "incorporated at least some SOX material in its courses" but there was a "lack of dedicated material on Sarbanes-Oxley" that was appropriate. Most of what has been written on SOA deals with corporate compliance and is directed at lawyers and practicing accountants. Very little has been written that directly addresses SOA's impact on accountant liability that is also appropriate for business and accounting students. The contribution of this paper is to help fill that void.

THE SARBANES-OXLEY ACT AND ACCOUNTANT LIABILITY

The SOA is a large and complex statute that contains eleven titles. Title I creates a new regulatory agency to oversee auditors' work, the Public Company Accounting Oversight Board (PCAOB). Title II deals with auditor independence and auditor conflicts of interest. These two titles contain the provisions of greatest interest to accountants. Title III deals with corporate responsibility. Title IV provides for enhanced financial disclosures. Section 404 of this title requires a management assessment of internal controls. This Section has added substantial cost to audits and is the subject of much criticism and complaint; it will be discussed below. Title V deals with financial analyst conflict of interest. Title VI deals with the authority of the Board. TitleVII requires various studies and reports by the GAO and SEC relating to consolidation of public accounting firms and violations of securities laws. Title VIII increases penalties for corporate and criminal fraud. Section 804 makes a significant change in the law by extending the Statute of Limitations to two years after discovery or five years after the date of violation. Previously it had been one year and three years. This Section has been extensively litigated and will be discussed in the section on litigation. Title IX increases penalties for white-collar crime. Title X requires the signing of corporate tax returns by chief executive officers. Title XI increases potential prison terms under the Federal Sentencing Guidelines and deals with corporate fraud and accountability. It also contains a provision prohibiting retaliation against informants. In all there are 1,107 separate Sections in this statute. Those that impact the legal liability of accountants will now be discussed.

The Public Company Accounting Oversight Board (PCAOB)

Title I of SOA created the PCAOB, and defines its authority. This represents the first time the accounting profession experienced direct external oversight by a government-sponsored organization. The Board consists of five members, appointed by the SEC for five year terms. Two must be or have been certified public accountants, and three can not be or have been CPAs. It is a private nonprofit organization but was established by Congress and has strong ties to the SEC. Section 109 describes the funding of the PCAOB and is of interest. Recall that in the section above titled "Origins and Attitudes" the precursor to the PCAOB, the Public Oversight Board (POB) had proven ineffectual in part because it lacked a reliable, independent funding source. Section 109(d) states that PCAOB funding will come from public companies, in proportion to their market capitalization. This is a funding source independent of accounting firms or their professional association.

Sections 104 and 105 may have the greatest impact on accountants' liability of all sections of the SOA. These sections deal with inspections, investigations and disciplinary action that can be taken by the PCAOB against accounting firms and accountants. The PCAOB may in effect audit the auditors. Sections 104 and 105 give the PCAOB strong oversight power, in contrast to the flaccid or non-existent oversight power of the predecessor POB.

Section 104(b) requires the PCAOB to conduct inspections of accounting firms that perform audits on public companies. Larger firms are to be inspected more often: firms that perform audits for more than 100 public companies are to be inspected once each year. Accounting firms that perform 100 or fewer public company audits are to be inspected "not less frequently than once every 3 years". This scaling of inspection frequency to audit firm size and activity is interesting. It is certainly a rational response to treat a Big Four accounting firm differently from a small accounting firm that might perform only a handful of public company audits each year. However SOA does not provide a similar scaled response to the public companies themselves. The standards are the same for public companies large and small. Small companies have complained loudly that their cost of compliance with SOA is proportionally much greater than that of large companies.

If a regular PCAOB inspection reveals violations, an investigation may follow. Section 105(b) authorizes the PCAOB to perform investigations that include subpoenaing of witnesses and documents. The PCAOB may require the testimony "of the firm or any person associated with a registered public accounting firm". In order to perform audits of public companies, accounting firms must register with the PCAOB, per Section 102. If a person or firm fails to cooperate with the investigation, registration may be suspended or revoked. The teeth of this section are found in Section 105(c)(4). In addition to suspension or revocation of registration, the PCAOB may impose a "civil money penalty" of "not more than $750,000 for a natural person or $15,000,000 for any other person" for violations that consist of "intentional or knowing conduct, including reckless conduct" or "repeated instances of negligent conduct". Note the conjunctive, "or". Even a negligent, unintentional violation, if repeated, can bring on these severe penalties. If the violation is not intentional or knowing, the penalties are less severe but still substantial: up to $100,000 for natural person or $2,000,000 for others. Natural persons are, of course, accountants and other employees of an accounting firm. The "other persons" are the firms themselves. PCAOB's inspections began in May 2004 and it is currently inspecting the eight largest U.S. public accounting firms and also a number of smaller firms.

Section 103 gives PCAOB the independent standard-setting authority that Lynn Turner (see above in the "Origins and Attitudes" section) and others complained was lacking previously. Section 103(a)(1) provides authority to create "attestation standards, such quality control standards , and such ethics standards to be used by registered public accounting firms…". They must preserve audit papers and "other information related to any audit report, in sufficient detail to support the conclusions reached in such reports" for at least 7 years. Storing these records for 7 years brings accountants into compliance with the requirements of Section 103; a failure to store them for at least 5 years can result in criminal liability that carries a maximum of 10 years in prison, per Section 802, discussed below.

Another Section in Title I that may be of interest to academics is Section 109(c)(2). That Section states that "all funds collected by the Board as a result of the assessment of monetary penalties shall be used to fund a merit scholarship program for undergraduate and graduate students enrolled in accredited accounting degree programs…" Academic Accounting departments may wish to contact the PCAOB regarding that provision.

The Board has been creative in seeking complaints. It recently created a new online form (www.pcaobus.org/tips), an email address (tips@paaobus.org) and a toll-free phone number (800.741.3158). It is interested in receiving tips on potential violations of the SOA, especially if they are relevant to one of PCAOB's inspections. Information can be provided anonymously.

Auditor Independence

Title II addresses auditor independence. Lack of auditor independence from the companies they are auditing is generally credited with contributing to audit failures and accountant-related corporate scandal. Many accounting firms collected substantial professional fees for non-audit related services performed for their audit clients. In some cases the non-audit fees exceeded the audit fees. For example, Arthur Anderson collected $21 million annually for audit services and $29 million annually for consulting services. An auditor in that position would not be inclined to push too hard on the audit side for fear of losing the even more lucrative consulting side. Such an auditor faces a clear conflict of interest. In order to eliminate that conflict, SOA puts up a high wall separating audit work and other accounting work.

Section 201 provides a laundry-list of nine specific services that an auditor may not perform for a public company audit client. These include bookkeeping, financial information system work, appraisal or valuation, actuarial services, internal audit outsourcing, management or human resource services, investment banking, legal work related to the audit and "any other service that the Board determines, by regulation, is impermissible."

Section 203 requires audit partner rotation. The "lead (or coordinating) audit partner (having primary responsibility for the audit)" may not work for more than 5 years on a audits for the same public company. In this way SOA hopes to curtail the natural congenial relationships that may develop over many years between corporate managers and auditors. These relationships pose a potential conflict of interest. Also, the knowledge that a new audit partner will be reviewing his/her work may tend to make the audit partner behave more correctly. However, at least one commentator feels that audit partner rotation does not go far enough.

Title II contains a section that has not drawn much attention, but is potentially very significant. Section 207 calls for the Comptroller General of the U.S. to conduct a study of the "potential effects of requiring the mandatory rotation of registered public accounting firms." This goes far beyond merely rotating auditing partners within the same firm. Perhaps Congress is waiting to see how effective SOA will be, and whether even more stringent regulation will be required.

Other Sections That Impact Accountant Liability

While Titles I and II deal directly with audit practice and accountant liability, other sections of the SOA also relate to accountant liability. These include Section 802, which increased criminal penalty for "destruction, alteration, or falsification of records in Federal investigations" to a maximum of 20 years in prison. Accountants are required by this section to "maintain all audit or review workpapers for a period of 5 years", and an accountant who "knowingly and willfully" violates this requirement faces a maximum sentence of 10 years in prison. Section 806 increases the maximum sentence for securities fraud to 25 years in prison. Section 804 increases the Statute of Limitations cut-off for bringing private actions under the Securities Act of 1934 to 2 years from date of discovery and 5 years from date of violation. Previously it had been 1 year and 3 years. Section 805 requires the U.S. Sentencing Commission to review its sentencing guidelines with a view to increasing sentences for violations of the SOA. The very last section of the SOA, Section 1107, makes it a crime to retaliate against whistleblowers. The maximum sentence is 10 years in prison. Retaliation includes "any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense". This last section may be of assistance to an accountant such as an internal auditor who discovers a violation and reports it.

CONCLUSION

We have seen that the SOA substantially changed the liability environment in which auditors of public companies must operate. Before the SOA liability would typically come about only <u>after</u> a corporate collapse. But while auditors knew that the resulting liability would be great, they also knew that for any given audit it was very unlikely to occur. Now, as William McDonough, Chair of the PCAOB has said "under the new system, auditors understand that their work is much more likely to be reviewed within months or even weeks by the PCAOB's well-experienced, full-time inspectors." It is now far more likely that violations will be caught.

Auditors are now much more sensitive to conflicts of interest. The SOA lists specific conflicts to avoid, such as consulting work and other non-audit work. It also gives the PCAOB authority to outlaw additional conflicts. This has changed the fundamental economic structure of the public accounting profession. Audits can no longer be "loss leaders" supporting other more profitable work. Congenial personal relationships between auditors and corporate officers are now discouraged and the term of "lead accountants" auditing a public company is now limited to 5 years. Audits have become more adversarial, and more expensive.

Accountants now face greater risk when performing audits of public companies. A PCAOB inspection could result in suspension or termination of the accountant's and/or the firm's registration status. Without registration, the accountant or firm is prohibited from performing audits of public companies. In a worst case scenario, prison terms of 10 years could result from willfully failing to maintain all audit workpapers for five years. An accountant could spend 20 years in a federal prison for willfully destroying or altering documents.

No longer will auditing standards be formulated by an industry-friendly body like the Auditing Standards Board of the AICPA. They will now be formulated by the tough-minded PCAOB. The more stringent standards and practices mandated by the SOA might become accepted as best practices and be imposed even in ordinary negligence lawsuits.

All these changes might seem disheartening to accountants and especially those auditing public companies. And yet there is a very bright and hopeful side to the changes that the SOA has brought about. Progressive firms like Deloitte & Touche view the SOA as "a bridge to excellence". Their booklet by that title states "corporate leaders who embrace the spirit of the law – strong ethics, good governance, reliable reporting – will get a re-energized company, reassured investors, and maybe even reduced costs". Business Week Online recently reported a decline in "vehement railing against Sarbanes-Oxley" as corporations begin to see benefits of improved business controls and processes.

It is clear that the SOA is here to stay. It addresses the critical need to restore investor confidence following unprecedented business scandals. While it has increased the cost of compliance for corporations and added to auditors' legal liability, it has also brought about more reliable financial reporting, improved internal control processes and eliminated many conflicts of interest. It has also led to a greater emphasis on ethical behavior. Moreover, the SOA represents the best kind of regulation: that which seeks to prevent harm, not just to provide a remedy for those injured by that harm.

The benefits of the SOA appear to outweigh its costs. Moreover it is unlikely that Congress will significantly weaken it. It would be politically inopportune to appear to side with the corporate abusers. However, it is well recognized that the SOA was drafted in haste, and fine-tuning will no doubt occur. One measure that is almost certain to be adopted is a reduction of the regulatory burden and cost on small corporations. Congressman Oxley has recently said that if he could do it all again, he would provide "a bit more flexibility for small and medium-size companies".

Authors' Index