NORTH EAST JOURNAL OF LEGAL STUDIES

Volume Fifteen **Spring 2006**

NORTH EAST JOURNAL OF LEGAL STUDIES

An official publication of the North East Academy of Legal Studies in Business, Inc. © 2006
ISSN: 1545-0597

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VOLUME 15 **SPRING 2006**

ARTICLES

OTHER ARTICLES

DISCRIMINATION ON THE HIGH SEAS—*SPECTOR V. NORWEGIAN CRUISE LINE, LTD.*

by

J.L. Yranski Nasuti*

In 1990, Congress passed the Americans with Disabilities Act (ADA)[1] establishing a comprehensive legislative prohibition against discrimination on the basis of a person's disabilities. Fifteen years later, in the case of *Spector v. Norwegian Cruise Line, Ltd.*,[2] the U.S. Supreme Court considered for the first time whether the provisions of Title III of the ADA apply to foreign-flag cruise ships operating in U.S. waters.[3] In a complicated and splintered decision, the Court concluded that although Title III is binding on foreign cruise ships that call on U.S. ports, it does not necessarily require foreign cruise lines to make the same types of structural alterations to their vessels that would normally be required to ensure the "full and equal enjoyment" of access to "places of public accommodation."

The plaintiffs in the *Spector* case include a number of disabled individuals and their traveling companions who purchased round-trip tickets for "Texaribbean Cruises" on the *Norwegian Sea* and the *Norwegian Star*. The defendant, the Norwegian Cruise Line, Ltd. (NCL), is a Bermuda corporation that registers many of its vessels, including the *Norwegian Sea* and the *Norwegian Star*, in the Bahamas. When the plaintiffs began their cruises from the port of Houston, Texas, they were

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happily anticipating dream vacations. By the time they returned, their dreams had turned into nightmares. This was because NCL had misled them into believing that the ships would be adequately equipped to accommodate disabled passengers. When that turned out not to be the case, the plaintiffs decided to sue NCL in state and federal court.[4]

I.

Spector v. Norwegian Cruise, Line, Ltd. was originally filed in the U.S. District Court for the Southern District of Texas. The complaint alleged that NCL had engaged in discriminatory policies, programs, and practices that denied them the full and equal enjoyment of NCL's goods, services, privileges, advantages or accommodations in violation of Title III of the ADA. The disabled plaintiffs, who are mobility impaired, based their complaint on the fact that the cruise vessels and related port excursions were not accessible to passengers who needed to use wheelchairs or scooters. More specifically, they claimed that a number of physical barriers on the ships denied them access not only to emergency evacuation equipment and emergency evacuation-related programs but also to facilities such as public restrooms, entertainment facilities, restaurants, swimming pools, and elevators, and to the more desirable cabins with balconies or windows. The disabled plaintiffs also alleged that they had been charged an additional amount for the assistance of crewmembers and for the use of four undesirable handicapped-accessible cabins.[5] The companion plaintiffs, on the other hand, claimed that they had been discriminated against and denied access to the ships' facilities solely because of their association with the disabled plaintiffs. That discrimination included having to pay higher fares to reserve the accessible cabins and effectively being restricted from making use of the otherwise inaccessible facilities on board the shop without abandoning their disabled companions. The disabled and

companion plaintiffs, all of whom stated that they intend to sail on NCL cruises in the future, sought relief in the form of a declaratory judgment, an injunction requiring NCL to remove certain barriers that obstructed their access to the ships' facilities, and reasonable attorneys' fees and costs.

NCL responded to the plaintiffs' complaint by filing a motion to dismiss based on the plaintiffs' failure to state a valid Title III claim. The defendant argued that, even though it had connections with the United States,[6] it did not have to comply with the ADA since it was a foreign entity. Judge John Rainey denied the defendant's motion to dismiss to the extent that it asserted the general inapplicability of Title III of the ADA to foreign-flagged cruise ships and the inability of the companion plaintiffs to present valid claims for associational discrimination. He did, however, dismiss that portion of the complaint that called for the removal of certain physical barriers on the ships since the federal government had failed to promulgate the necessary regulations relating to such a removal.[7]

The case was certified for an interlocutory appeal to the U.S. Court of Appeals for the Fifth Circuit where a three judge panel limited its *de novo* review of the motion to dismiss to the issue of whether Title III of the ADA applies to foreign flagged cruise ships.[8] Judge Edith H. Jones, writing for the court, held that even if Title III applies to domestic cruise ships, it certainly does not apply to foreign-flagged ships operating in U.S. territorial waters.[9] The decision relied on two legal rules--the presumption that general statutes (such as the ADA) do not apply to foreign ships in U.S. territorial waters unless there is a clear indication of congressional intent and on the principal that, absent the appearance of a contrary intent, domestic statutes do not apply extraterritorially.

The opinion of the Fifth Circuit began with the assertion that if a foreign ship voluntarily enters the territory of another country it subjects itself to the laws of that country.[10] The court qualified that statement by noting that just because the local sovereign has the right to exercise its authority does not mean that it is required to use that right to the outer limits of its jurisdictional reach.[11] The fact that the right is discretionary can present a problem for the court when it considers whether a particular domestic law is automatically applicable to foreign vessels within U.S. territorial waters. The Fifth Circuit resolved this dilemma by referring back to the earlier cases of *Benz v. Campania Naviera Hidalgo, S.A.*[12] and *McCulloch v. Sociedad Nacional de Marieros de Honduras.*[13] In *Benz,* the Supreme Court refused to apply the Labor Management Relations Act of 1947 (LMRA) to a labor dispute involving a foreign vessel and its foreign seamen that occurred while the vessel was temporarily in U.S. waters. The Court's rationale was that in those cases where the application of a general statute is discretionary, the judiciary should not apply the law unless Congress has clearly expressed an affirmative intention that the law be applicable to the foreign party.[14] In *McCulloch*, the Court had similarly refused to apply the National Labor Relations Act (NLRA) to the maritime operations of a foreign-flag ship employing alien seamen on the grounds that the plaintiffs "were unable to point to any specific language in the Act itself or in its extensive legislative history that reflected such a congressional intent."[15]

The Court of Appeals then considered whether a statute such as the ADA could be applied to foreign ships sailing in international waters. Citing a principle that had been articulated in the case of *EEOC v. Arabian American Oil Co. (Aramco),*[16] the court concluded that unless Congress indicated otherwise, American laws are not meant to apply extraterritorially.[17] By relying on this principle, a court can avoid a potential conflict

when the application of a domestic law would touch on the sovereignty of another nation. In the present case, that meant that the court did not have to impose the ADA on a foreign ship sailing in international waters and create a conflict in an area where international law has traditionally held that the flag state is responsible for adopting and enforcing laws to protect the welfare of the crew and passengers aboard a ship.[18]

After examining the statutory text of the ADA and its extensive legislative history, the Fifth Circuit concluded that Congress had not indicted any intention that the ADA apply to foreign-flagged cruise ships either within U.S. territorial waters or in international waters. The court further held that because of the possible international ramifications, "Congress's silence cannot be read to express an intent to legislate where issues touching on other nations' sovereignty are involved."[19] This conclusion affirmed a much earlier Supreme Court decision in which the court stated that an act of Congress "ought never to be construed to violate the law of nations, if any other possible construction remains."[20] By ruling in favor of NCL, the Fifth Circuit concluded that it had avoided a potential international problem that could have arisen if ADA standards were found to conflict with the International Convention on the Safety of Life at Sea (SOLAS).[21]

The Fifth Circuit specifically rejected the Eleventh Circuit's decision in the case of *Stevens v. Premier Cruises, Inc.*[22] In *Stevens*, the court held that, from the plain language of the statute, it was clear that the ADA applies to those aspects of cruise ships (such as restaurants, retail stores, and health spas) that qualify as places of "public accommodation."[23] It further noted that it could not resolve the issue of whether the statute applies to foreign vessels in U.S. territorial waters by invoking a presumption against extraterritorial jurisdiction. While the *Stevens'* court did not challenge the *Aramco* presumption

against the extraterritorial application of a domestic statute, it did challenge the assumption that a foreign ship in United States' waters was in fact "extraterritorial."[24] The Eleventh Circuit's interpretation of the *Benz* presumption was also more restrictive than the Fifth Circuit's. Rather than stating that a general statute may not apply to a foreign ship in U.S. waters unless there was clear Congressional intent to do so, the *per curiam* opinion stated the presumption to exclude the application of a general statute (absent Congressional intent) may only be invoked if the application would have an impact on "the internal management and affairs" of the foreign ship while it is in U. S. waters.[25] Since the U.S. passenger in the *Stevens'* case alleged violations of Title III of the ADA by a foreign ship while it was sailing in U.S. waters, the Fifth Circuit concluded that the ADA was applicable because the plaintiff's claims did not involve a matter of internal management and affairs.

II.

The U.S. Supreme Court granted *certiorari* in the *Spector* case in order to resolve the conflict between the Fifth and Eleventh Circuits on the question of whether Title III of the ADA applies to foreign-flag ships sailing in U.S. waters.[26] Justice Anthony Kennedy announced the judgment in favor of the plaintiffs in an opinion that, for the most part, reflected the legal reasoning of a plurality rather than a majority of his fellow justices. Only Justices John Paul Stevens and David Souter joined Kennedy's opinion in its entirety. Justices Ruth Bader Ginsburg and Stephen Breyer, who joined in a smaller portion of the decision, submitted a concurring opinion that was written by Ginsburg. Justice Clarence Thomas, on the other hand, submitted separate opinion that concurred in part, dissented in part, and concurred in part of the judgment. Thomas also joined part of the dissenting opinion that was written by Justice

Antonin Scalia and joined by Chief Justice William Rehnquist and Justice Sandra Day O'Connor.

In reversing the Fifth Circuit, Kennedy, Stevens, Souter, Ginsburg, and Breyer (the five justice majority) agreed on two basic points. The first was that Title III of the ADA was applicable to foreign-flag cruise ships sailing in U.S. waters. (Whether there was a qualification to that applicability was a matter of disagreement between Kennedy, Stevens, and Souter (who said yes) and Ginsburg and Breyer (who said no).) The second point of agreement was, that in the case of a foreign-flag cruise ship, it would be possible to use the ADA's "easily accomplishable and able to be carried out without much difficulty or expense" exception to an ADA mandate for the removal or modification of structural barriers in those instances where the removal or modification would result in the noncompliance with an international legal obligation or would create a significant risk of health or safety to others.

Kennedy, Stevens, and Souter (the plurality) qualified the holding that Title III of the ADA was applicable to foreign ships within the territorial waters of the United States in one significant way. According to the plurality, the presumption should be that a general statute applies to those vessels only if the interests of the United States or its citizens are at stake. As a result, those sections of a domestic law relating to matters that primarily concern the internal interests of the foreign-flag ship should not be presumed to apply unless Congress has articulated a clear statement of intent. As a consequence, those sections of the ADA calling for the removal of physical barriers to accessibility might very well be inapplicable if it can be shown that they relate primarily to a concern of internal interests.

Thomas joined the plurality in agreeing that it would be possible for the Court to adopt an application-by-application use of the internal affairs clear statement rule. That would enable the Court to impose Title III duties on a foreign-flag cruise ship in those instances where the making of permanent and significant structural modifications do not conflict with international law or threaten the safety or otherwise interfere with the foreign ships internal affairs. Thomas' concurring opinion noted that there was no clear Congressional statement of intent in the text of the ADA indicating that statute applied to the internal affairs of foreign vessels. That omission, however, did not preclude the application of the statute to matters other than those involving a foreign vessel's internal affairs. Thomas, on the other hand, was sharply critical of the plurality's attempt to distinguish *Spector* from another statutory interpretation case decided by the Court earlier in the same term.[27]

Scalia's dissenting opinion agreed with the plurality's conclusion that Congress must clearly express its intention that a particular general domestic statute will apply to foreign ships when the law would interfere with the internal order of a foreign-flag ship. That, however, represented the full extent of his agreement with the plurality. Scalia asserted that since the ADA did not contain a clear statement of Congressional intent applying it to a foreign vessel and since the structural modifications required by Title III would affect the ship's "internal order," the statute was entirely inapplicable to foreign ships. While Thomas agreed with Scalia's explanation of the clear statement rule, he did not join the latter half of the dissenting opinion that criticized the plurality for carving up of the ADA in such a way that those sections of the statute that affected the internal order were held inapplicable while those not affecting the internal order were held applicable.

III.

It was clear from the questions that the Supreme Court justices asked during the oral argument stage that they had reservations about applying the ADA to foreign-flag vessels.[28] Their uneasiness focused on practical problems: the extent to which ship owners would face conflicting international obligations if the requirements of the ADA were held to be applicable;[29] whether the ADA would apply to all kinds of ships (cruise lines with lots of passengers as well as merchant vessels with only a few passengers);[30] and whether the protections of the statute would be available to foreign as well as U.S. citizens, who purchased their tickets either abroad or in the United States, and who sailed primarily in U.S. territorial waters or international waters.[31] In addition, there was a concern that if the Court applied the ADA to foreign vessels (especially those normally berthed in countries that do not prohibit discrimination based on a person's disability) that it would be perceived as declaration "that the U.S. rules the world."[32] Finally, there was a discussion as to whether a possible consequence of exempting foreign ships in U.S. territorial waters from the anti-discrimination provisions of the ADA might allow the same ships to claim an exemption from the anti-discrimination provisions of Title II provisions of the Civil Rights Act of 1964 making it illegal to discriminate among passengers on the basis of race.[33]

Justice Kennedy's opinion addressed many of the practical concerns raised by his colleagues during the oral argument stage. Unfortunately, that did not ensure a majority consensus for much of the legal rationale of his decision. The five justices who made up the majority in this case all agreed that Title II of the ADA applied to cruise ships despite the fact that cruise ships are never expressly mentioned in the statute's definitions of "public accommodation" and "specified public transportation."[34] The same justices also agreed that foreign

cruise ships (such as those owned by NCL) fall within the covered categories. Ginsburg and Breyer, however, did not agree with Kennedy's discussion on two important matters: 1. The presumption that general statutes only apply to foreign vessels in U.S. waters when the statutes involve the interests of the United States and its citizens but not when they involve interests internal to the ship, and 2. The narrow exception that general statutes apply to the internal order or discipline of foreign ships but only if there is a clear statement of congressional intent.

Kennedy cited *Cunard S. S. Co. v. Mellon*[35] and *Uravic v. F. Jarka Co.*[36], 282 U.S. 234 (1931) as examples of cases in which the presumption of applicability subjected foreign vessels in U.S. waters to the provisions of general domestic statutes. In *Cunard,* the Supreme Court held that foreign ships sailing in and out of U.S. ports were bound by the provisions of the National Prohibition Act and could not travel through U.S. waters with liquor on board. It did not matter that the liquor was inaccessible to the passengers and crew while the ships were within the jurisdiction of the United States or that the consumption and transportation of liquor was permissible in all other ports of call. The presumption of applicability was valid because the Eighteenth Amendment and the resulting National Prohibition Act were matters of great interest to the United States. In *Uravic,* the question to be resolved was whether liability for torts could be limited simply because the actions took place aboard a foreign vessel in U.S. waters. The Supreme Court concluded that there was no reason to limit the liability when the torts go beyond the scope of discipline and private matters that do not interest the territorial power.

The plurality opinion noted that, as a matter of international comity, the presumption in favor of applicability must be disregarded when the provisions of the general statute would

only involve the internal order and discipline of the foreign vessel. Trying to predict when this exception to the presumption in favor of applicability comes into play is not easy. Kennedy cited *Wildenfus's Case*[37] (involving foreign crew members who were taken into the custody of the state of New Jersey for the murder of a fellow foreign crew member while on board a foreign ship docked in a U.S. port) as an instance where the Supreme Court allowed the law of New Jersey to deal with what otherwise might appear to be a matter of internal order and discipline. Comity was not applied in the *Wildenfus's Case* because the Court concluded that the crimes committed on the foreign ship disturbed the peace and tranquility of the United States and, therefore, extended beyond the internal order and discipline of the vessel.[38]

Unlike the Fifth Circuit, the plurality concluded that the decisions in *Benz* and *McCulloch* called for a narrow reading of the "internal order" exception to the presumption in favor of applicability of general statutes to foreign vessels.[39] The two cases relied on by the Court of Appeals did not establish a precedent whereby foreign vessels are always exempt from U.S. labor law. On the contrary, the vessels are exempt only when the laws involve the internal order of the vessels. When a dispute involves U.S. workers and a foreign vessel in U.S. territorial waters, the presumption in favor of the applicability of U.S. labor law prevails.[40] The one and only instance in which the Court must find a clear statement of congressional intent is when Congress wants a general statute to apply to the internal order of a foreign ship in U.S. waters.[41]

What exactly constitutes a matter of internal order is something that the plurality admits is problematic. Case law is ambiguous. In some instances, matters of internal order have been limited to those instances that have no effect on U.S. interests. In others, it has been expanded to include cases where

a statute promotes the welfare of U.S. interests but has a predominant effect on the foreign ship's internal affairs. Rather than establishing a precise definition, the plurality offers two guiding principles to determine if a clear statement of congressional intent is required. The first is the desire for international comity and the second is a presumed lack of interest by the United States in matters that bear no substantial relation to the peace and tranquility of the port.[42]

It is at this point that the plurality finally addressed the question of whether the presumption of applicability or the internal order exception would decide the outcome of this case. After reviewing the pleadings and briefs, the three justices identified five instances in which the Title III duties do not involve the internal affairs of the foreign vessels and, therefore are presumed to apply. Those duties include the charging of higher fares and special surcharges for disabled passengers; maintaining evacuation programs and equipment in locations that are not accessible to disabled individuals; requiring disabled individuals, but not other passengers, to waive any potential medical liability and to travel with a companion; reserving the right to remove from the ship any disabled individual whose presence endangers the "comfort" of other passengers; and failing to make reasonable accommodations in policies, practices, and procedures necessary to ensure the full enjoyment of services offered.[43] On the other hand, the three justices would not invoke the presumption in favor of applying the ADA when the statute requires the owner to make permanent and significant changes to the structure of the foreign vessel since those changes would relate to the internal affairs of the foreign vessel. The converting of the more desirable cabins so that they would become accessible to disabled passengers and the lowering of the ships' coamings are examples of structural changes that would not be required. According to the plurality opinion, "a permanent and significant modification to a

ship's physical structure goes to fundamental issues of ship design and construction, and it might be impossible for a ship to comply with all the requirements different jurisdictions might impose."[44] This does not mean that the United States lacks the ability to legislate structural changes in a foreign vessel that passes through its territorial waters. It only means that legislation would have to contain a clear congressional statement that the statute is intended to apply to foreign vessels in U.S waters.

Justices Ginsburg and Breyer rejoined Kennedy's opinion when he presented an alternative legal basis for applying the ADA to foreign flagships in a way that would not necessarily require the vessels to make certain kinds of structural modifications. The wording of Title III requires places of public accommodation and specified public transportation to remove barriers to the disabled—but only when the removals are "readily achievable."[45] Something is "readily achievable" if it is "easily accomplishable and able to be carried out without much difficulty or expense."[46] According to the majority, cost is not the only consideration in determining whether the removal of a barrier is easily achievable.[47] Another factor cited in the statute is "the impact . . . upon the operation of the facility."[48] In addition, §12182(b)(3) specifies that the requirements of the ADA do not apply if disabled individuals would pose "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."

Based on their understanding of the "readily achievable" provision of Title III, the majority concluded that domestic and foreign vessels might be able to avoid making structural changes if those changes would bring them into noncompliance with other international legal obligations such as the

International Convention for the Safety of Life at Sea (SOLAS). Since the breach of the international obligation "would create serious difficulties for the vessel and would have a substantial impact on its operation," it would not be "readily achievable."[49] Barrier removals would also fail the "readily achievable" test if they would have an effect on shipboard safety. In the *Spector* case, it would be the structural change on behalf of the disabled passengers (and not the disabled passengers themselves) that might create the safety threat to others.[50]

Although the plurality was willing to conclude that Title III does not require structural changes that conflict with international legal obligations or result in a real threat to the safety of the crew or other passengers, it did not think that this conclusion made its earlier discussion of the internal affairs clear statement rule irrelevant. The majority foresaw instances in which an initial invocation of the internal affairs rule for foreign vessels would avoid the problem of having to decide if a barrier should be removed when the removal is easily achievable even though it entails a permanent and significant structural change that interferes with a vessel's internal affairs. The "readily achievable" approach, on the other hand, could be used to resolve problems where the modifications would not interfere with to the vessel's basic architecture but would conflict with international obligations.[51]

The plurality, joined by Justice Thomas, held that if a particular Title III requirement interferes with a foreign ship's internal affairs, the clear statement rule applies and the requirement is avoided. (A domestic ship may not claim a similar exemption if the Title III requirement interferes with its internal affairs.) On the other hand, all other requirements that do not interfere with the foreign vessel's internal order are applicable to that vessel in the same way that they are applicable to a domestic vessel. The result is an application-by-

application use of the internal affairs clear statement rule that the four justices found to be consistent with previously decided cases.[52] To support this position, Kennedy invoked the Court's application of the clear statement rule in three cases involving foreign ships and U.S. labor law. The *Benz* and *McCulloch* cases concerned labor disputes between foreign-flag vessels and their foreign crews. In both cases, the Court refused to apply the U.S. labor laws to the disputes since there was no clear statement of intent by Congress to apply the laws to the internal affairs of foreign vessels.[53] The result was quite different in the case of *International Longshoremen's Association, Local 1416, AFL-CIO v. Ariadne Shipping Co.*[54] (in which the Court held that a U.S. labor law would apply to the foreign vessel in spite of the fact that there was no clear statement of intent). The crucial difference between *Ariadne* and the other two cases is that the aggrieved parties in *Ariadne* were American residents who had been employed by a foreign ship to do casual longshore work at U.S. ports. The relationship between the workers and the ship was characterized by the Court as being irregular and casual and, therefore, did not involve the ship's internal discipline and order.[55] Kennedy concluded "if the clear statement rule restricts some applications of the NLRA to foreign ships (e.g., labor relations with the foreign crew), but not others (e.g., labor relations with American longshoremen), it follows that the case-by-case application is also required under Title III of the ADA."[56] As a consequence, the clear statement of intent rule can be invoked by foreign vessels to avoid certain structural barrier modification requirements but could not be similarly invoked to allow for discriminatory ticket pricing.[57]

The plurality and Thomas agreed that the internal affairs clear statement of intent rule operates as an implied limitation on the otherwise unambiguous general terms of a statute. The Court saw this as being analogous to the principle that general statutes do not apply extraterritorially and the rule that general

statutes are presumed not to impose monetary liability on nonconsenting States.[58] The purpose for an implied limitation rule is to avoid the application of a seemingly unambiguous statute in sensitive areas that Congress was unlikely to have intended if it had, in fact, considered the full consequences with due deliberation.

The opinion ended with the plurality's defense of its application-by-application use of the clear statement rule in light of the Court's recent holding in the case of *Clark v. Martinez.*[59] Both Thomas and Scalia criticized Kennedy for failing to follow the *Martinez* rule that requires a statutory provision be interpreted consistently from case to case. Kennedy responded by differentiating *Martinez* from *Spector*. While the former case involved the consistent interpretation of statutory words, the latter involved "the implementation of a clear statement rule addressed to particular statutory applications."[60] *Martinez* was about resolving textual ambiguity. For the plurality, *Spector* was about the scope of an implied limitation rule.

IV.

Justice Kennedy's inability to achieve a majority consensus for the whole of his opinion was the result a fundamental disagreement over the application of the internal affairs rule to this particular case. Justices Ginsburg and Breyer agreed with the plurality in holding that Title III applies to cruise ships and allows them to resist structural modifications that conflict with international legal obligations. On the other hand, they also rejected the plurality's application of the internal affairs clear statement rule. According to Ginsburg's concurring opinion, the clear statement rule "derives from, and is moored to, the broader guide that statutes "should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with

principles of international law.""[61] In this case, the noninterference principal that underlies the internal affairs clear statement rule is satisfied, not by the rule itself, but by Title III's "readily achievable" provision. A structural modification is not "readily achievable" (and therefore is not mandatory) if it would interfere with an international legal obligation. Consequently there is no need to invoke the internal affairs rule.[62] Ginsburg also disagreed with the plurality's belief that the clear statement rule is needed to block certain structural changes on foreign vessels in those instances where the changes may be "readily achievable" and not in conflict with international obligations but where they still interfere with the ship's internal affairs. When international relations are not at risk, Ginsburg would apply the ADA without regard for its impact on the internal affairs of foreign ships sailing in U.S. waters. This is primarily because the United States has a strong interest in protecting American passengers on domestic and foreign ships that regularly sail in U.S. territorial waters and derive most of their income from U.S. passengers.[63]

While the fragmented opinion of the Court settled a number of legal issues, it also left a number of other issues in a state of confusion. It is clear that the Fifth Circuit will no longer be able to claim that the question of whether Title III of the ADA applies to domestic cruise ships is open. The Court has decided that even though cruise ships were not specifically mentioned in the ADA, they are covered under the statute's general definitions of "public accommodation" and "specified public transportation." The majority has also held that the ADA applies to foreign-flagged ships operating in U.S. waters. On the other hand, it was unable to agree on the rationale for allowing foreign vessels to operate in U.S. waters without making major structural changes to accommodate the disabled. The plurality's primary reason for limiting the accommodations requirement was the presumption that a general statute, such as

the ADA, can only apply to foreign vessels when the statute involves domestic interests and U.S. citizens and not when it involves the internal affairs of the ship (unless there is a clear statement of congressional intent stating otherwise). Justices Ginsburg and Breyer, who were the other members of the majority, summarily rejected that rationale. They suggested instead that the foreign vessels could avoid making certain structural changes based on ADA provisions that apply equally to domestic as well as foreign cruise ships. This line of reasoning was adopted in part by the plurality—but only as a decidedly secondary rationale. The plurality was willing to cut, delete, and paste together those sections of the ADA that were applicable to foreign ships. The cut and delete provisions would certainly include those that interfere with the internal affairs of the vessels. The two concurring justices, on the other hand, would have the entire ADA apply to the foreign vessels—including those sections that allow for exceptions to the statutory requirements.

The Court's decision in the *Spector* case was a patchwork of legal reasoning as well as a patchwork of actual consequences. From a pragmatic point of view, it was neither a slam-dunk for disabled passengers nor a devastating loss for the foreign cruise lines. While the splintered decision found the ADA to be applicable to foreign ships in U.S. waters, it also provided the foreign ships with a legal basis for refusing to make major structural alterations for the accommodation of disabled passengers. Thomas C. Goldstein, the attorney for the passengers, predicted that the practical consequences of the Supreme Court's decision would be that foreign cruise liners operating in U.S. waters would have to make a number of "straightforward changes" such as installing grab bars, lowering water fountains, and eliminating the surcharges and other special rules that are expensive and burdensome for the disabled passengers and their companions. On the other hand, he

conceded that the foreign flag ships would not have to make expensive structural changes such as widening doors, installing elevators, or moving specially fitted cabins.[64] Disabled passengers who, in the future, book cruises on the *Norwegian Sea* and the *Norwegian Star* might still find themselves prisoners in their windowless cabins—but they will be paying less money for that experience.

ENDNOTES

[1] 42 U.S.C. §12181 *et seq.* The purpose of the ADA is: "1. to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; 2. to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; 3. to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and 4. to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by peoples with disabilities. 42 U.S.C. §1(2).

[2] 545 U.S. ____ (2005); 125 S. Ct. 2169; 2005 U.S. LEXIS 4655 (2005).

[3] Title III, Section 302 (a) states that "no individual shall be discriminated against of the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182 (a).

[4] The state court action involved allegations of breach of contract, fraud or fraudulent inducement, unjust enrichment, negligent misrepresentation, and violations of the Texas Deceptive Trade Practices—Consumer Protection Act and the Texas Human Resources Code. *Spector v. Norwegian Cruise Line*, Court of Appeals of Texas, First District, Houston, 2004 Tex. App. LEXIS 2941 (2004); 270th District Court (Harris County, Texas), Trial Court Case No. 2000-39257.

[5] The rooms were undesirable in part because of their locations on the ship and because they lacked windows and balconies.

[6] NCL's connections with the United States include the fact that its principal place of business is in Miami, Florida; its cruise ships depart from, and return to, ports in the United States; it advertises extensively in the United States; most of its passengers are residents of the United States; and the terms and conditions of its cruise tickets include a U.S. choice of law clause.

[7] Unreported decision of the U.S. District Court for the Southern District of Texas, H-00-CV-2649.

[8] *Spector v. Norwegian Cruise Line*, 356 F.3rd 641 (5th Cir, 2004); 2004 U.S. App. LEXIS 340.

[9] *Id.* at 643. Jones specifically noted, "Whether Title III applies to domestic cruise ships remains an open question in [the Fifth Circuit.]"

[10] *Id.* at 644. Citing *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142; 77 S. Ct. 699 (1957); *Wildenhus's Case*, 120 U.S. 1, 7 S. Ct. 385 (1887).

[11] *Id.* at 644. Citing *Benz*, at 142.

[12] *Supra*, note 10.

[13] 372 U.S. 10, 83 S. Ct. 671 (1963).

[14] *Supra*, note 8, at 644. Citing *Benz*, s*upra*, note 10, at 147.

[15] *Id.* at 645. Citing *McCulloch*, *supra*, note 13, at 20.

[16] 499 U.S. 244, 256, 111 S. Ct. 1227 (1991).

[17] *Supra*, note 8, at 646.

[18] *Id.* at 646.

[19] *Id.* at 646.

[20] *Id*. at 646. Citing *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

[21] 32 U.S.T.47, 11/1/1974.

[22] 215 F.3d 1237 (11th Cir. 2000), rehearing denied, 284 F.3d 1187 (11th Cir. 2002). The *Sevens'* case also involved an ADA claim by a mobility-impaired passenger who had booked passage on a foreign-flag cruise ship that sailed from U.S. ports and that was not wheelchair accessible.

[23] *Id*. at 1241.

[24] *Id.* at 1242.

[25] *Id*. at 1242.

[26] It should be noted that the port cities for a majority of cruises booked by U.S. passengers are located in the Fifth and Eleventh Circuits.

[27] *Clark v. Martinez*, 125 S. Ct. 716, 2005 U.S. LEXIS 627 (2005).

[28] The participants in the oral arguments included attorneys for the original parties, for the government of the United States (acting as *amicus curiae* in support of the plaintiffs-petitioners), and for the government of the Bahamas (acting as *amicus curiae* in support of the defendant-respondent.)

[29] Transcript for the oral arguments in the case of *Spector v. Norwegian Cruise Line, Ltd.*, (Alderson Reporting Company), questions by O'Connor, at 3-4 and Breyer, at 38-39, 41.

[30] *Id.*, at 11-12, 14-15, questions by Breyer and Stevens.

[31] *Id.* at 6-8, 18-23, questions by Kennedy, Ginsburg, Stevens, Souter, and Scalia.

[32] *Id.* at 9, quoting Justice Ginsburg. Ginsburg suggested that when a party is required to comply with the ADA in designing a ship that ship is permanently altered whether it sails in U.S. waters or elsewhere. This point was repeated by Breyer when he noted that "there is no way they can change the ship structurally when it's in New York and not have it changed structurally when it's in Europe." (*Id*. at 15.) Souter's tongue in cheek response to such a consequence was that the United States "rules the world unless the world does not want to use the United States ports as ports of call." (*Id.* at 17.)

[33] *Id.* at 32-34, questions by Ginsburg.

[34] *Supra*, note 2, at 2177. (See 42 U.S.C. §§ 12181(7)(A)-(b), (I), (L), 12181(10)).

[35] 262 U.S. 100 (1923).

[36] 282 U.S. 234, 51 S. Ct. 111 (1931).

[37] 120 U.S. 1, 12 (1887).

[38] *Supra*, note 2, at 2177-2178.

[39] *Id*. at 2178.

[40] *Id*. at 2178. Citing *Longshoremen v. Ariadne Shipping Co.*, 397 U.S. 195, 198-201 (1970).

[41] *Id*. at 2178. Kennedy assumes that this reading of the clear statement rule solves the problem of whether a foreign ship in U.S. waters discriminate on the basis of race under Title II of the Civil Rights Act of 1964.

[42] *Id.* at 2179.

[43] *Id.* at 2179.

[44] *Id.* at 2180.

[45] §12182(b)(2)(A)(iv).

[46] §12181(9).

[47] The Court finds support for this conclusion in the fact that the statute's failure to define "difficulty" in §12181(9) and its use of the disjunctive ("easily accomplishable and able to be carried out without much difficulty and expense"). *Supra*, note 2, at 2180.

[48] §12181(9)(B). *Id.* at 2180.

[49] *Supra*, note 2, at 2180.

[50] *Id*. at 2181.

[51] *Id*. at 2181.

[52] *Id.* at 2181.

[53] *Id.* at 2181-2182.

[54] 397 U.S 195, 90 S. Ct. 872 (1970).

[55] *Supra*, note 2 at 2182.

[56] *Id.* at 2182.

[57] *Id.* at 2182.

[58] *Id*. at 2182.

[59] 543 U.S. ___ ; 125 S. Ct. 716 (2005).

[60] *Supra*, note 2, at 2183.

[61] *Id.* at 2184. Citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815, 113 S. Ct. 2891 (1993) (Scalia, J., dissenting).

[62] *Id.* at 2185.

[63] *Id.* at 2186.

[64] Linda Greenhouse, *Supreme Court Rules that Disabilities Act, in Part, Applies to Foreign Cruise Ships,* NY TIMES, June 7, 2005, A 21.

RACIAL DISCRIMINATION AT PRIVATE CLUBS

by

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Throughout United States history, private clubs have played an integral part in shaping the social environment of the nation.[1] From golf clubs to fraternal organizations, Americans have found numerous ways to organize different groups of people. Historically, many of these clubs discriminated on the basis of race by not opening their membership opportunities to non-whites. "The American country club has been one of the least diverse American institutions by design… created by white, Anglo-Saxon Protestants between 1880 and 1930 when economic, racial, cultural and ethnic lines divided the United States[2]."

The Civil Rights Act of 1964 had as one of its purposes the eradication of discrimination on the basis of race in places of public accommodation. The statute marked a major milestone in the fight against discrimination[3]. A series of Supreme Court cases involving membership discrimination in clubs set important precedents regarding the application of the Act, yet still left questions about its applicability.

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A major challenge for the court system has been developing a balance between controlling discriminatory practices and maintaining citizens' right to the freedom of association. "Although the Constitution does not expressly grant the right to freedom of association, the courts have held that this right may be inferred from other rights and protections guaranteed by the Constitution[4]." This incorporates both *intimate association* ("protects an individual's choice to enter into and maintain private relationships without excessive state intrusions.")[5] and *expressive association* ("the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.")[6]

Under federal law, a facility is prohibited from discrimination on the basis of race if it is deemed a place of public accommodation and if its operation affects interstate commerce. A truly private facility, however, is not under the purview of the Act.

What distinguishes a place of public accommodation from a private club? This paper will explain the guidelines and relevant statutes that determine which clubs are subject to discrimination laws on the basis of race in the federal system, and will then examine how New York State specifically has fought racial discrimination within clubs.

I. APPLICATION OF THE FEDERAL CIVIL RIGHTS ACT TO PRIVATE CLUBS

A. What Constitutes a Public Accommodation?

There are two requirements for application of the Civil Rights Act to a facility. First, the business must not be private, but rather a place of public accommodation; and second, the business must be engaged in interstate commerce. [7] Title II

provides that, "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin[8]."

Establishments that satisfy the dual requirements are listed in the statute and are typically hospitality related enterprises such as lodging and food service operations, gasoline stations, and places of exhibition or entertainment[9].

Equal access to places of public accommodation is, however, limited in 42 U.S.C. § 2000a (Title II) by the private club exemption. "The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."[10]

While Congress has provided a clear definition of what constitutes a place of public accommodation, it has failed to give the same explanation for determining what makes a club private. An extensive research study performed in 1997 found that "while the term private club is not specifically defined, the legislative history of the private club exemption indicates that unlike the broadly enumerated categories of public accommodations, determining whether a club is private is a fact-sensitive inquiry".[11]

The Supreme Court addressed the application of 42 U.S.C. § 2000a in the early case of *Daniel v. Paul.* [12] In this case, the plaintiffs (African American residents of Little Rock, Arkansas) asserted that they were discriminated against on the

basis of race when they were not allowed to enter a recreational area. They argued that the recreational area of Lake Nixon comprised of a snack bar, swimming facilities, miniature golf, and space designated for boating, sunbathing, picnicking, and dancing constituted a public facility, and was therefore subject to the provisions of Title II of the Civil Rights Act of 1964.[13]

While the Eastern District of Arkansas and the Court of Appeals for the Eight Circuit ruled that Lake Nixon fell under the protection of a private club title, the Supreme Court of the United States reversed the decision in 1969. Specifically, the court examined the use of the snack bar and the recreational area's description as a "place of entertainment." The Supreme Court categorized the establishment as involved in interstate commerce therefore making Title II relevant. "Clearly, the snack bar is principally engaged in selling food for consumption on the premises. Thus it is a covered public accommodation if 'it serves or offers to serve interstate travelers or a substantial portion of the food which it serves… have moved in commerce' We find that the snack bar is a covered public accommodation under either of these standards[14]." In addition, the owners of Lake Nixon chose to promote their recreational facility by using broad-based advertising media which certainly reached interstate travelers. Lastly, the court concluded that Lake Nixon was a place of entertainment under 42 U.S.C. § 2000a (Title II) based upon their availability of paddleboats and jukeboxes[15].

Since *Daniel v. Paul,* a series of cases have helped to elucidate the criteria by which the court will evaluate the character of an establishment. Some criteria utilized in the federal court system include: selectiveness in admission of members, existence of formal membership procedures, the degree of membership control over internal governance, particularly with regard to the new members, history of the

organization, use of club facilities by nonmembers, substantiality of dues, whether the organization advertises, and predominance of profit motive.[16] The discussion that follows will illustrate how courts have weighed these factors in their ongoing efforts to distinguish private from public.

- *Selectivity of Membership and the Existence of Formal Membership Procedures*

Genuine selectivity of the membership process has proven to be the most important factor in whether a club is private, and in *U.S. v. Lansdowne Swim Club*, the Supreme Court found that selectivity is a fundamental characteristic of a private club. [17] The court looked at a variety of features that reflect the level of membership selectivity within an organization. These include, "the substantiality of the membership fee, the numerical limit on club membership (apart from the capacity of the facilities), the membership's control over the selection of new members, the formality of the club's admission procedures, the standards of criteria for admissions, and whether and how many white applicants have been denied membership to the total number of white applicants."[18]

One of these features alone is not enough, however, to categorize the membership selection process as genuinely selective. In *Lansdowne*, for example, the club required substantial membership fees, limited the number of shareholder members and relied on a formal admission process directed by the shareholder members, but did not possess objective criteria for determining which applicants would be awarded membership. [19] Even though there were some criteria for admission that appeared selective, the court found that, "Where there is a policy of admission without any kind of investigation

of the applicant, the logical conclusion is that the membership is not selective."[20]

The courts thoroughly examined the interview process when verifying the degree of selectivity within the club. For example, if an application simply asks for family member names and addresses, or an interview fails to probe at the background and characteristics of an applicant, then the court may find that the club has failed to institute any form of eligibility standards (economic, social, geographic, or professional). The totality of formal admission procedures must operate in practice to limit membership. [21]

In determining the level of selectivity, the court will also examine the ethnicity of current members of the alleged private club. In *Lansdowne*, the court found that in the history of the club, only three non-black families had been denied membership and one non-black family had been denied associate privileges. This verified to the court that "there is no plan or purpose of exclusiveness. It is open to every white person…, there being no selective element other than race."[22]

- *The Degree of Membership Control over Internal Governance*

If a club is truly private, then the only people capable of running the operation are the actual members. If this authority is lost to the public, then it can be argued that the club has become a place of public accommodation. For example, in *Durham v. Red lake Fishing and Hunting Club*, the court determined that the members of a fishing and hunting club had little control over the operations of their establishment because the roads running over the club's property were open to the public and were maintained by the county.[23]

- *The History of the Organization*

Another way that the courts attempt to determine if the club is merely trying to avoid civil rights legislation, or if their exclusive policies are in fact vital to their organization, is to closely examine the history and/or stated purposes of the club. [24] "The club's history may also indicate whether the club was designed to be selective in its membership, which is central to the private club inquiry." [25] It is unlikely that a club will state in its bylaws that its reason for a private existence is to evade civil rights legislation, but it may be deemed public based on historical factors. For example, in *Lansdowne*, the court found that the historical purpose of the swim club was to serve as a "community pool" for families in the nearby area. It was not intended to function as a private club, and was zoned accordingly[26].

- *The Use of the Club Facilities by Nonmembers*

If a club is used in any way by the public, it will be deemed a place of public accommodation and will be forced to abide by the civil rights legislation.[27] In *Lansdowne* , the swim club permitted regular use of the club by non-members and also allowed members to pay a fee in order to bring in as many as guests as they wanted. In addition, swim meets open to the public were hosted at the swim club, and its parking lot was available for different organizations to use as a location for fundraisers. Even though the swim meets and fundraisers accounted for only several days out of each year, they aided the court in determining the club's status as a place of public accommodation[28].

- *Whether or not the Organization Advertises*

The way in which an entity seeks new members may also be a factor. If potential members are solicited through public advertising then the club cannot be deemed private. For example, in *Wright v. Salisbury Club,* the Salisbury Club was given a public status by the court after it released an advertisement which "invited readers to 'take advantage of a great opportunity' in the form of reduced initiation fees during a membership drive."[29] It was also found in the case that the club advertised beyond the bounds of the subdivision in which it was located. "The club represents itself as open to all residents of the Salisbury subdivision and has diligently tried to lure all subdivision residents onto its membership rolls. This extensive advertising belies the club's attempt to characterize itself as a truly private club."[30]

- *Predominance of the Club's Profit Motive*

Another method for establishing whether or not a club must abide by the civil rights legislation is to examine their financial status and purpose. "Courts have been most willing to protect the privacy and associational interests of club members when a club's purpose is fraternal or social and that purpose cannot be maintained without selective membership."[31] However, the courts are not lenient with providing status as a private club if the ultimate goal of the organization is to increase their profit levels. If this is found to be the case, then the club cannot claim release from discriminatory actions under the private club exemption. "Clubs must function as extensions of members' homes and not as extensions of their businesses… racial prejudice will not be permitted to infect channels of commerce under the guise of 'privacy.'"[32]

In spite of the daunting list of qualifications, private clubs do exist in the United States. In *Moose Lodge v. Irvis,*[33] the Supreme Court addressed the Lodge's guest services practices.[34]

Before reaching that issue, however, the court acknowledged the Lodge's status:

> …as a private club in the ordinary meaning of that term. It is a local chapter of a national fraternal organization having well-defined requirements for membership. It conducts all of its activities in a building that is owned by it. It is not publicly funded. Only members and guests are permitted in any lodge of the order; one may become a guest only by invitation of a member or upon invitation of the house committee.[35]

It appears that clubs which clearly fit the private category may be insulated from further inquiry regarding their advertising, their profit motive and the benefits reaped from the sale of food and beverages that have moved in interstate commerce.

B. What Constitutes Interstate Commerce?

For the application of 42 U.S.C. § 2000a to an entity, the entity must be a place of public accommodation and there must be the presence of interstate commerce. The statute defines commerce as "travel, trade, traffic, commerce, transportation or communication among the several States, or between the District of Columbia and any state, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but

through any other State or the District of Columbia or a foreign county."[36]

As noted above in *Daniel v. Paul*, the Supreme Court readily found that a recreational facility selling food to and advertising to interstate travelers was engaged in interstate commerce and was a place of public accommodation pursuant to the statute. [37] Other activities that may affect interstate commerce, and thus bring the establishment with the purview of the statute include club luncheons (to which guests may be invited) and club movie nights. [38] Both of these activities presumably would involve goods traveling in interstate commerce. A snack bar operated on the club's premises is also deemed to serve food which travels in interstate commerce.

II. APPLICATION OF ADDITIONAL FEDERAL ANTI-DISCRIMINATION STATUTES TO PRIVATE CLUBS

A. 42 U.S.C. §§ 1981 and 1982: Discrimination in Contractual and Property Rights

The majority of membership discrimination cases in clubs involve the application of Title II discussed above; however, several club discrimination cases have raised the issue as to whether or not property and contract rights relate to an individual's right to join an organization. To assess this issue, the federal courts have evaluated 42 U.S.C. §§ 1981 and 1982. 42 U.S.C. §1981 guarantees non-white citizens the equal right to "make and enforce contracts" as white citizens[39], while § 1982 "prohibits racial discrimination in the sale or rental of property[40]."

The Supreme Court examined the issue of property rights in regard to private club membership in *Tillman v. Wheaton-*

Haven Recreation Association. Plaintiffs filed suit against an association that operated a community swimming pool that limited its membership by number and their home address. The plaintiffs, an African American couple, purchased a home within the geographical preference area and applied for membership at the Wheaton-Haven Recreation Association. Their application was rejected, despite the availability of memberships.[41]

Both the District Court and the Court of Appeals for the Fourth Circuit held that the establishment was a private club, exempting them from the coverage of the civil rights statutes. Several issues arose when looking to reach a verdict including property rights of the plaintiffs and the use of the Wheaton-Haven swimming pool. The Court of Appeals claimed that § 1982 could not be applied to such a case since membership rights at the club could not be leased or transferred by simply purchasing property in the area. They turned to *Sullivan v. Little Huntington Park* for guidance.[42] In that case, "the Court (had) concluded that the right to enjoy a membership share in the corporation, assigned by a property owner as part of a leasehold he was granting, constituted 'a right to lease property' protected by § 1982."[43] In *Wheaton-Haven*, the Court of Appeals distinguished between the property-linked membership preferences that were available to those living within a ¾ mile radius of the club, and the property linked membership shares that were established in *Sullivan.*[44]

The United States Supreme Court reversed the holdings of the case. The Supreme Court concluded that *Wheaton-Haven* was a place of public accommodation due to the nature of their swimming pool, which was zoned as a community pool. Furthermore, the court clarified the relationship between property rights and membership rights in private club discrimination cases.[45]

Since *Wheaton-Haven* placed a limitation on membership based upon the location of one's residency, the club integrated membership rights with the rights associated with purchasing property in the designated area[46].

> When an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area, and the mandate of the federal civil rights statute (42 USCS 1982) granting all citizens the same property rights as white citizens then operates to guarantee a nonwhite resident, who purchases, leases, or holds property within the area, the same rights as are enjoyed by a white resident[47].

Similarly, in *Wright v. Salisbury Club*, the Court of Appeals found that the "close connection between club membership and ownership of subdivision property establishes the club membership as 'property' within the meaning of § 1982."[48]

In conclusion, for §§1981 and 1982 to be applied to a club in order to eliminate membership discrimination, the club must first be found to be a place of public accommodation. If this is the case, then a link must be found between the lease/ ownership of property and membership benefits within the club. A club arguing against the use of this statute would have to prove that it is in fact a private club, and therefore exempt from 42 U.S.C. §§ 1981 and 1982.

B. Application of 42 U.S.C. § 1983: Equal Protection and the State Action Requirement

Even if a club is truly private, it must also be able to prove that its discriminatory practices are not supported by state action. "Section 1983 prohibits anyone acting under color of state law from denying equal protection to any individual. Section 1983's utility in eradicating discriminatory membership practices of private clubs is also limited because the practices of the club must involve some state action in order to be actionable."[49]

The application of this statute was examined by the Supreme Court in *Moose Lodge v. Irvis.* The case was brought about when a Caucasian member took an African American as a guest to the local branch of his national fraternal organization, Moose Lodge[50]. Service was refused to the guest, Irvis, and he claimed that since the "Pennsylvania liquor board had issued appellant Moose Lodge a private club license that authorized the sale of alcoholic beverages on its premises, the refusal of service to him was a 'state action' for the purpose of the Equal Protection Clause of the Fourteenth Amendment".[51] The plaintiff argued that if a liquor license had been obtained and monitored by the state, this indicated a level of state involvement which should trigger the Equal Protection Clause.[52]

As noted earlier, both the Pennsylvania courts and the United States Supreme Court deemed that Moose Lodge was purely private and not a place of public accommodation. Thus the court moved on to the question of whether obtaining the liquor license constituted "state action" for the purpose of § 1983. It held that the liquor license alone did not create a partner or joint venture business relationship between the State and the private club.[53] The Supreme Court stated that, "the

operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment."[54]

One side of this issue is determining what actually constitutes state action. Since necessary services such as water, electricity, and police protection are controlled by the state, it is difficult to establish where state action begins.[55] In *Moose Wood Lodge v. Irvis*, the club argued that while a liquor license was controlled and regulated by the state, the license was essential to their success as a private organization. Limiting their ability to serve alcohol would, in essence, restrict their right to establish a thriving private organization. In this case, the court determined that the State was not involving itself in discriminatory practices on the basis that they were not closely involved in a business relationship with Moose Wood Lodge (a partnership or joint venture would have been required.)[56]

An example of when state action would be found to contribute to discriminatory practices was seen in *Burton v. Wilmington Parking Authority*. [57] In this case, a private restaurant owner refused service on the basis of the customer's race. The restaurant had leased its property in a building owned by a state-created parking authority. In this situation, the court found that there was a strong enough business relationship to constitute state action. The state-created parking authority had "so far insinuated itself into a position of interdependence with Eagle [the restaurant owner] that it must be recognized as a joint participant in the challenged activity, which on that account, cannot be considered to have been purely private as to fall within the scope of the Fourteenth Amendment." [58]

Even when there is some ongoing business relationship between the club and a governmental entity, it may not constitute 'state action'. For example, *in Golden v. Biscayne Yacht Club*,[59] a club leased its property from the City of Miami, Florida. Nevertheless, "As a matter of law and fact, they fall short of establishing that the City of Miami has so far insinuated itself into a position of interdependence with the club that it must be recognized as a joint participant in the internal membership policies of the club. The City of Miami has not significantly involved itself in those membership policies. The lease does not provide a sufficiently close nexus between the city and the club so that the action of the club may be fairly treated as that of the city."[60]

The case law thus indicates that the plaintiff must make a significant showing of state involvement in the purportedly private activity. Simply obtaining a liquor license or leasing space is not enough to constitute state action, but engaging in commercial activity open to the public while leasing space from the state would rise to the level of state action.

III. *CONTROLLING MEMBERSHIP DISCRIMINATION IN CLUBS IN NEW YORK STATE*

While a club acting as a place of public accommodation may not be held to federal statutes in regard to discrimination (absent interstate commerce or state action), the club may still be punished under state law for discriminatory practices. In New York State, a more expansive description is given to define a place of public accommodation, while a clear definition of what constitutes a private club is still lacking. Furthermore, a local law has been implemented in New York City to provide additional protections against forms of discrimination.

A. New York's Civil Rights Law § 40

Similar to 42 U.S.C. § 2000a (Title II), New York's Civil Rights Law § 40 addresses the issue of providing equal access, although it is specific within the jurisdiction of New York State.[61]

The New York Civil Rights Law § 40 states:

> All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any places of public accommodations, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons. No person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any such place shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or directly or indirectly publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color or national origin. [62]

B. New York's Executive Law § 292

This statute provides definitions of the types of organizations that constitute a place of public accommodation in New York State. It also clearly outlines when a club absolutely cannot be considered private.[63] New York State's classification is similar to that stated in Title II of the Civil

Rights Act of 1964. The majority of organizations deemed public by both the state and the federal system are hospitality or entertainment related. The New York law states:

> A place of public accommodation, resort or amusement within the meaning of this article, shall be deemed to include inns, taverns, road houses, hotels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises….[64]

Furthermore, this statute provides specific, quantitative restrictions on categorizing clubs. An organization is not to be considered distinctly private if it is comprised of more than one hundred members, or if nonmembers of the association regularly contribute payment for dues, fees, use of space, facilities, services, or food and beverage. [65]

A prime example of the application of section 40 of the Civil Rights Law and subdivision 9 of section 292 of the Executive Law is found in *Castle Hill Beach Club v. Arbury*. The beach club operated a 16-acre bathing and recreation area, which was advertised to the public in a telephone book advertisement. The club was charged with racial discrimination in 1957 when they refused to give an African American seasonal locker rights. The New York State Court of Appeals found that the club's method of advertisement, public bathing establishment license, and their openness to allowing unaffiliated day camps to use their facilities constituted the status of a place of public accommodation. [66]

Lastly, this statute also refers to the Benevolent Orders Law. Section 292(9) of that law states that any club described in the law "but formed under any other law of this state or a religious corporation incorporated under the education law or the religious corporation's law" [67] will be classified as a truly private club.[68]

C. Benevolent Orders Law Organizations

Close to sixty different societies are mentioned within the Benevolent Orders Law, mainly comprised of fraternal lodges with the purpose of social organization.[69]. A prime example from the list is, "any lodge of the Benevolent and Protective Order of Elks duly chartered by and installed according to the regulations of that organization."[70]

The application of the Benevolent Orders Law was examined recently in *Gifford v. Guilderland Lodge.* Since the Guilderland Lodge was a member of the Elk organization, formed under the Benevolent Orders Law, by definition it is a private institution regardless of whether or not other qualifications for exemption are met.[71] The court held that "a plain reading of the statute reveals that the exemption for organizations formed pursuant to the Benevolent Orders Law is absolute and not subject to limitation. This interpretation accords with the legislative intent behind the amendment deeming religious orders and benevolent orders to be distinctly private."[72]

An exception to this rule exists when an establishment covered under the Benevolent Orders Law opens its property to a public event. During this time, the club can no longer restrict its services or use of its facilities on the basis of race. This was seen in *Batavia Lodge No. 196, Loyal Order of Moose v. New York State Division of Human Rights.* [73] During a fashion show held at Batavia Lodge, which was open to the public, the lodge

refused beverage service to African American guests. The court ruled that "on occasion of the show the club was a place of public accommodation within the Human Rights Law (Executive Law, section 292)[74]," thus holding the lodge accountable for their discriminatory practices.

D. New York City Local Law Number 63

In an effort to further prohibit offensive discriminatory practices within clubs, New York City passed a local law to cover a broader range of discriminatory acts than those found in Executive Law § 292. This law does not apply to New York State as a whole, but solely to organizations operating in New York City. Whereas the Executive Law § 292 covers discrimination in places of public accommodation on the basis of race, creed, color or national origin, the City Human Rights Law also protects against discrimination on the account of gender, sex, and disability[75].

Passed in 1984, New York City's Local Law, No. 63 states that:

> An institution, club, or place of accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business. For the purpose of this section a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or

> the religious corporations law shall be deemed to be in its nature distinctly private. [76]

Upon passage of this law, it was challenged by the New York State Club Association (a collective group of clubs) which claimed that the law was an unconstitutional infringement of the freedom of association. The case reached the New York Court of Appeals where Local Law No. 63 was deemed constitutional[77].

CONCLUSION

The above review reveals that Congress and the courts have failed to establish a clear definition of what constitutes a private club. While they have been forced to create a balance between allowing for freedom of association and controlling discriminatory practices, exact guidelines for clubs to follow have not been established. Furthermore, the courts have not provided a clear basis for determining the existence of state action in a club. It has been left to the states to further eliminate unwarranted discrimination in most clubs, such as was accomplished in New York through the Benevolent Orders Law, Executive Law 292, and the New York City Local Law No. 63.

The appeal of private clubs may decline in the future with the growth of housing subdivisions that incorporate club amenities. On the other hand, the increasing popularity of exclusive gated communities may mask underlying discriminatory practices. With this in mind, it is possible that future anti-discrimination cases against private clubs may arise due to the fact that the court has yet to fully define a private club.

ENDNOTES

1 Larson, Shawn. *For Blacks Only: The Associational Freedom of Private Minority Clubs*, 49 Case W. Res. 359 (Winter, 1999).

2 Jolly-Ryan, Jennifer. *Chipping Away at Discrimination at the Country Club*, 25 Pepp. L. Rev. 495 (1997).

3 *See* Larson, *supra* note 1, at 369.

4 McKenna, Lois. *Freedom of Association or Gender Discrimination? New York State Club Association v. City of New York*., 38 Am. U.L. Rev. 1061, 1064. (Spring, 1989).

5 *Id.*

6 *See* Jolly-Ryan, *supra* note 2, at 502.

7 42 U.S.C.§ 2000 (a) and (c).

8 42 U.S.C.A. § 2000a(a) (2003).

9 Under 42 U.S.C.A. § 2000 a (b) the following establishments are considered places of public accommodation if their operation affects interstate commerce, or if discrimination or segregation by it is supported by state action.

1) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
2) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
3) Any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
4) Any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

10 42 U.S.C. § 2000a (2003.)

11 Jolly-Ryan, *supra* note 2, at 509.

12 395 U.S. 298, 302 (1969).

13 *Id.*

14 *Id*. at 304.

15 *Id.*

16 *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D.C. Conn. 1974).

17 *United States v. Lansdowne Swim Club*, 713 F. Supp. 785 (E.D.1989)

18 *Id.* at 797.

19 *Id.*

20 *Note*, 62 N.W.U.L.Rev. 244, 247, n. 21 (1967).

21 *Brown v. Loudoun Golf & Country Club*, Inc., 573 F.Supp. 399 (D.C.Va.,1983.)

22 *Sullivan v. Little Hunting Park*, 396 U.S. 229,236 90 S.Ct. 400, 404 (1969).

23 666 F.Supp. 954 W.D.Tex., (1987)

24 *Daniel v. Paul*, 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed.2d 318 (1969)

25 *See J*olly-Ryan, *supra* note 2, at 513.

26 *Id.*

27 Lansdowne Swim Club, *supra* note 17.

28 *Id.*

29 *Wright v. Salisbury Club, Ltd*., 632 F. 2d 309, 312- 313 (4th Cir. 1980).

30 *Id.*

31 Jolly-Ryan, *supra* note 2, at 515.

32 Cornelius, *supra*, note 16 at 1204.

33 *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972).

34 See discussion *infra* part II. B

35 *Moose Lodge*, *supra*, note 33 at 172.

36 42 U.S.C.§ 2000 (a) (c) (2003).

37 *Daniel v. Paul*, *supra* note 12.

38 *Id.*

39 42 U.S.C. § 1981 (2003).

40 42 U.S.C. § 1982 (2003).

41 410 U.S. 431, 93 S.Ct.1090, 35 L..Ed. 2d 403 (1973).

42 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969).

43 *Id.*

44 *Wheaton-Haven Recreation. supra* note 39 at 434.

45 *Id.*

46 *Id*

47 *Id*. at 438.

48 *Wright*, *supra* note 29.

49 Jolly-Ryan, *supra* note 2, at 505.

50 *Moose Lodge*, *supra* note 33.

51 *Id.* at 164.

52 *Moose Lodge*, *supra* note 33.

53 *Moose Lodge*, *supra* note 33.

54 *Id*. at 640.

55 *Id.*

56 *Id*

57 *Burton v. Wilmington Park Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45(1961).

58 *Id.* at 719.

59 530 F. 2d. 16 (C.A. Fla. 1976).

60 *Id.* at 18.

61 McKinney's New York Civil Rights Law § 40-c. (2004).

62 *Id.*

63 McKinney's New York Executive Law § 292(9) (2004).

64 *Id.*

65 *Id*

66 2 N.Y.2d 596, 162 N.Y.S.2d 1 (1957).

67 McKinney's New York Executive Law § 292(9) (2004).

68 *Id.*

69 Mc Kinney's Benevolent Orders Law § 2 (2004).

70 *Id*.

71 *Gifford v. Guilderland Lodge*, 707 N.Y.S. 2d 722 (3rd Dept, 2000).

72 *Id*. at 723.

73 *Batavia Lodge No. 196, Loyal Order of Moose v. New York State Division of Human Rights*, 35 N.Y.2d 143, 316 N.E.2d 318, 359 N.Y.S.2d 25 (1974).

74 *Id.* at 144.

75 Local Law No. 63 of the City of New York (Oct. 1984).

76 *Id.*

77 New York State Club Association v. City of New York, 69 N.Y.2d 211, 513 N.Y.S.2d 349 (1987).

"REASONABLE EXPECTATION OF PRIVACY" IN THE WORKPLACE: PERSONAL PROPERTY AND PERSONAL INFORMATION RIGHTS

by

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INTRODUCTION

Public and private sector employees often use the workplace for telephone conversations, computer use and desk or cabinet storage for personal rather than work related matters. Employers, because of concerns about civil or even criminal infractions, will institute procedures to search an employee's work area and to seize improper items or information. This paper will explore an employee's reasonable workplace expectations of privacy in regard to personal property and personal information.

THE RIGHT OF PRIVACY PROTECTED BY THE LAW

The Restatement of Torts recognizes that "any person who unreasonably and seriously interferes with another's interest in not having his affairs known to others…is liable to the other." [1]

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The U.S. Constitution does not explicitly guarantee an individual's right of privacy, but it has been argued that such a right of privacy has always been implied. [2] The individual should be free from invasions by other individuals and by the state. *Griswold v. Connecticut*, in fact, recognized a penumbra of rights to privacy which the state may not invade. The Court's decision nullified a state statute forbidding the sale and use of contraceptives to individuals who had the private right to procreation decisions.[3] First Amendment rights to freedom of association, Fourth Amendment rights to freedom from unreasonable searches and seizures and the Fourteenth Amendment due process implication of these rights concerning state actions bind federal and state agencies. These provisions imply a reasonable standard of freedom from privacy invasion not only by governmental agencies but even by individual employers. The protection extends to important life matters such as that described in *Griswold* and to a second series of cases which recognize an individual's right to protect highly personal matters from disclosure.[4] This expectation of privacy has resulted in a series of rules which offer protection to public sector and private sector employees.

THE ORTEGA DECISION AND PUBLIC SECTOR WORKPLACE PROPERTY SEARCHES

The issue of a public employee's right of privacy came before the U.S. Supreme Court in the 1987 decision of *O'Connor v. Ortega*.[5] Dr. Magno Ortega, a physician and psychiatrist, was Chief of Professional Education at Napa State Hospital for seventeen years. He instructed young resident physicians in hospital psychiatric programs. Dr. O'Connor, the Executive Director of the Hospital, came to believe that an Apple computer allegedly donated to Ortega had actually been obtained from involuntary contributions by the residents.

Employees also alleged that he had sexually harassed two female employees at the Hospital. A resident physician indicated that Dr. Ortega had taken inappropriate disciplinary action against him. Ortega was asked to take administrative leave. During the administrative leave, Ortega's office was thoroughly searched on a number of occasions by Hospital personnel. An accountant, security guards, and the Hospital Administrator searched his office. The ostensible reason for the search was a routine inventory of state property, even though there was no dismissal at the time of the search. Various items were seized from Ortega's desk and file cabinets including a Valentine's Day card, a photograph, and a book of poetry all of which had been sent to him by a former resident physician. These items were used to impeach a witness at a later hearing before the California State Personnel Board concerning Ortega's dismissal. Hospital employees had also seized billing documentation of one of Ortega's private patients. State and private property were not separated in the search. His personal property, however, was then placed in a box for his retrieval.

Ortega then sued the hospital and the State of California for damages, alleging that the search of his office violated his Fourth Amendment rights. The U.S. District Court dismissed the case. It concluded the search was proper because of the need to secure state property in the office. The 9th Circuit Court of Appeals affirmed in part and reversed in part. The court concluded that Dr. Ortega had a reasonable expectation of privacy in his office, that the inventory procedure concerned only terminated or departing employees, and that the search did violate the plaintiff's Fourth Amendment rights. It then remanded the case for a determination of damages. [6] The United States Supreme Court, in a 5-4 decision, reversed and remanded the decision of the Court of Appeals for a determination of the justification and reasonableness of both the search and its scope.

Writing for a plurality of the Court, Justice Sandra D. O'Connor stated that both the District Court and Court of Appeals erred in granting summary judgments. The trial court should determine the justification for the searches and seizures by evaluating them in terms of their reasonableness. She noted that

> The [Fourth Amendment] concept of probable cause has little meaning for a routine inventory conducted by public employers for the purpose of securing state property….To ensure the efficient and proper operation of the agency, therefore, public employers must be given wide latitude to enter employee offices for work-related non-investigatory reasons.[7]

The standard of reasonableness must be used for routine inventories and also for any investigation of work-related employee misconduct.[8]

All of the members of the Court recognized that Dr. Ortega did have a reasonable expectation of privacy with respect to the contents in his desk and cabinets. The doctor had not shared any of these items of office furniture with other employees, had occupied the office for seventeen years, and had kept materials in his office, including personal correspondence, medical files and correspondence with private patients, personal financial records, personal gifts, mementos, and other personal items. Hospital personnel clearly considered the items to be personal since they had originally boxed the items for transmission to Ortega. The Justices concluded, therefore, that Ortega did have a reasonable expectation of privacy with respect to the items, but that it was necessary to permit the Hospital to explain exigencies which permitted it to invade Ortega's privacy.[9]

The Court noted that workplace privacy involves a balance between employee privacy interests and an employer's right to know. Police authorities seek to gather evidence for criminal proceedings, but employers often need to enter offices of employees for legitimate work-related purposes, rather than to confirm suspicions of employee criminal activity. Employers seek to procure correspondence, files, reports, and other data, particularly when the employee is not present. Employers may also wish legitimately to safeguard property or records. Requiring the employer to procure a search warrant would be seriously disruptive and unduly burdensome.[10] The Court proceeded to discuss whether "the search was either a non-investigatory work-related intrusion or an investigatory search for evidence of suspected work-related employee misfeasance."[11]

Probable cause, according to the Court, has little meaning in the workplace when it concerns a search of an office to obtain a file, for routine inventory purposes, and for non-criminal work related employee misconduct. Public and even private employers have substantially different needs than criminal authorities inasmuch as they wish to ensure the efficient and proper operation of their offices and to eliminate inefficiency, mismanagement, and incompetence. It is unrealistic to compel these employers to learn the subtle distinctions for the probable cause standard. Thus, a standard of "reasonableness" should govern work related intrusions rather than probable cause.[12]

An employer's legitimate search of an employee's work area depends, to a great extent, on the subtle factual distinctions which describe the public or private nature of the employment facility, the existing published employment policies in place that permit a search, and whether the search was related to the employee's work-related activities. Citing

previous criminal prosecution decisions, *Terry v. Ohio,*[13] and *New Jersey v. T.L.O.,* [14] the Court indicated that reasonableness standard requires a two-fold inquiry: "whether the…action was justified at its inception" and "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"[15] The Court in *Ortega* could not make a determination of reasonableness inasmuch as no evidentiary hearing had taken place; instead, summary judgment had been granted. The Court noted that even if the Hospital failed to articulate a policy concerning the search of an employee's workplace, the lack of such policy did not in itself make the search unlawful. The conduct by the employer's agents had to be reviewed in the light of all of the circumstances.[16]

In a concurring opinion, Justice Scalia argued that the Fourth Amendment's right of privacy protection should not be determined on a case-by-case basis in the light of the reasonable expectation of the parties. The Fourth Amendment, he observed, generally protects a government employee's privacy; no further inquiry is necessary in the circumstances of the case to determine that Ortega's rights were violated.[17]

The four dissenters (Justices Blackmun, Brennan, Marshall, and Stevens) found no special need to dispense with the warrant and probable cause requirements of the Fourth Amendment. The search was neither based on a hospital policy nor a practice of routine entrance into the plaintiff's offices. It was exceptional and investigatory. All of the Justices conceded an expectation of privacy by Dr. Ortega particularly in the light of the investigatory nature of the search as distinguished from a search for a particular file during routine business activities.[18]

Ultimately, seventeen years after the search was initially conducted, the Court of Appeals affirmed a District Court jury verdict in favor of Dr. Ortega in the sum of $436,000 in compensatory and punitive damages.[19]

PRIVATE AND PUBLIC SECTOR WORKPLACE PROPERTY AND INFORMATION SEARCHES AFTER ORTEGA

Property, Personal Information and the Internet

The *Ortega* decision indicated that employees in the private sector also have reasonable expectations of rights to privacy. A private sector employer making a civil search at a workplace appears to have fairly broad latitude. *Skinner v. Railway Executives' Association*[20] upheld the Federal Railroad Administration regulation of employee use and possession of alcohol or any controlled substance in the workplace.[21] The regulation permitted search of the workplace and toxicological testing. Section 219.203(a) of those regulations spurred constitutional issues. This regulation requires railroads to take all practicable steps to assure that all railroad employees provide blood and urine samples for toxicological testing upon the occurrence of a major railroad accident involving a fatality, release of hazardous materials accompanied by evacuation, or damage to railroad property of $500,000 or more. An amendment to these provisions required toxicological testing following an "impact accident", that is, a collision resulting in injury or damage to railroad property of $50,000 or more.[22] Failure to cooperate in the testing would result in a suspension for covered service for nine months. An additional section of the regulation permitted but did not mandate railroads to require employees to submit to breath or urine tests in certain additional circumstances such as a suspicious reportable accident, noncompliance with signal and excessive speeding,

and where a supervisor has reasonable suspicion that an employee was under the influence of alcohol or impaired by drugs.[23]

The Court initially acknowledged that the Fourth Amendment applies to governmental searches and seizures and not to private parties unless they act as an instrument or agent of the government.[24] The governmental regulations in this case gave the government a more than passive relationship to the private railroad. But the Court decided that the mandated toxicological tests were reasonable invasions of privacy in the circumstances of the case. The bases for the government regulations were not to prosecute, but rather to prevent accidents and casualties; the regulations were needed to ensure the safety of the public.[25] Abuse of discretion is regulated by making such searches subject to civil penalties. Imposing a warrant requirement would do little to assure the certainty and regularity of the regulations while significantly hindering the safety objectives of the government's program. The interference with a railroad employee's privacy is not significant and is performed under certain narrow circumstances. Also, requiring a warrant in circumstances following a serious accident would jeopardize an investigation and would be chaotic, causing the loss or deterioration of evidence furnished by the tests.[26]

A private or public employee, furthermore, may lose his or her workplace privacy right by sharing the workplace with others who have access to the workplace environment and who consent to the search. The search may result in civil discipline and in criminal liability. *United States v. Buettner-Janusch*[27] describes an employee at New York University (NYU) who was arrested for conspiracy to manufacture and distribute LSD and other unlawful substances. The defendant's laboratory, accessible to a number of persons, had a door always open to

his laboratory assistant, graduate students, and others. An undergraduate student became suspicious of the lab synthesizing of chemicals into illegal drugs, and he reported his concerns to the lab assistant. An attorney for the assistant suggested that the Federal Drug Enforcement Agency (DEA) be contacted. The DEA tested the substances and the results were positive. The Agency informed the NYU President and the United States Attorney's Office. The lab assistant and student opened the lab for a full inspection by DEA agents. The Agency arrested the defendant, who protested that the warrantless search was impermissible under the Fourth Amendment. The Court decided that the government's search and seizure did not violate the defendant's rights because persons having proper access and common authority over the lab freely and voluntarily consented to the search.

The *Ortega* decision also enunciated a number of other rules to determine the reasonableness of an employer's search in opposition to the employee's expectation of privacy. The factors in making the determination include whether office regulations place employees on notice that certain areas are subject to search, and whether the property seized is owned by the employer or owned by the employee.

The 1993 decision *United States v. Mancini*[28] described a public employee's expectations. Mancini, the mayor of North Providence, Rhode Island, objected to the seizure of his appointment calendars discovered in a search of the town's archive attic. On the basis of the information contained in the calendar, Mancini was indicted for allegedly accepting a $2,000 payment from real estate developers in exchange for the issuance of certain certificates of occupancy. A conviction would have resulted in civil and criminal liabilities.

The FBI had gone to the Town Hall to interview the town's building inspector. They served him with subpoenas calling for the production of certain certificates of occupancy. The inspector informed the agents that the records were kept in the archive attic. At the inspector's direction, keys were obtained and a search was conducted for the records. The mayor's personal appointment books were discovered in a separate box. The agents then procured a warrant based on the discovery and retrieved the mayor's personal documents. The Court of Appeals affirmed the District Court's suppression of the documents holding that the defendant's personal appointment calendars were a "non-public record." The documents were considered analogous to the personal effects located in the desk and filing cabinets of Dr. Ortega. While Mancini's secretaries did have access to the appointment calendar, his Fourth Amendment protection was not compromised.[29] The storage of the calendar in the attic did not waive Mancini's expectations of privacy. The office he occupied as mayor for 19 years was located just below the attic; he took steps to maintain the privacy of his records by clearly labeling them and segregating them from the other items in the secured archive attic; and he instructed his Chief of Staff that no one was to have access to any of his boxes without his permission.[30]

The *Ortega* decision was also cited extensively in *United States v. Slanina.*[31] In this case, the Court of Appeals upheld the introduction of evidence concerning the possession of child pornography.[32] The Court noted that, under *Ortega,* the routine office inspection in this case came within the Supreme Court's exception "that public employer's intrusions on the constitutionally protected privacy interests of government employees for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all of the

circumstances."[33] Even though the warrantless search resulted in a criminal prosecution, its major focus concerned work-related misconduct. The evidence, therefore, may be used in the criminal prosecution. Under *Ortega*, the mere conjunction of the civil and criminal aspects does not frustrate the government employer's interest in having an efficient and proper operation of the workplace.[34]

The illegal material was located in a computer at the defendant's place of employment. The defendant, a Texas fire marshal, had moved his desk, records and computer from the local City Hall to a nearby firehouse, which lacked Internet access. A Management Information Systems Coordinator was called. The coordinator sought to install the city network on the defendant's and other fire station computers but could not access the defendant's computer without his password. While the defendant was at home recuperating from dental surgery, the coordinator called him to obtain the password. The defendant reluctantly disclosed it, and the unlawful materials were found on the defendant's computer. He volunteered that he had additional child pornography materials on his computer located at home.

The Court found that the defendant did have an expectation of privacy but that that expectation was not reasonable. Other city employees did have a grand master key to his office, but it was a private office. Moreover, the failure of the city to give notice of the monitoring of computers and the lack of any other evidence that other employees had routine access to the defendant's computer all establish that he had an expectation of privacy. That expectation of privacy, however, was not reasonable in the circumstances of the case because of the defendant's criminal activity. The *Ortega* Court noted that the doctor's expectation of privacy was reasonable because it did not concern a criminal as well as a civil element.

A number of other cases have upheld the employers' claims of reasonableness in searches of workplaces. In *American Postal Workers Union v. United States Postal Service*,[35] the postal union and other plaintiffs sued alleging denial of their Fourth Amendment privacy rights arising out of a search of all of the lockers of postal workers at a facility because of claims that there was possible illicit drug traffic and use. The searches ultimately yielded some 582 pieces of mail wrongfully stored in lockers and other postal property. The court dismissed the action against the Service. The employees had no reasonable expectation of privacy because of clear waivers signed by them indicating that property owned by the Postal Service is "at all times subject to examination by duly authorized postal officials in the discharge of their official duties." In addition, the collective bargaining agreement with the postal union also granted permission to the Postal Service to make inspections of lockers and other property. The inspection did not encompass personal items, such as pocketbooks and carrying cases. The inspections satisfied the *Ortega* test. Even where criminal activity was being investigated, the collective bargaining agreement provided only that union stewards be present during the search.[36] The Service therefore could discipline or fire employees for misconduct.

The Court in *Hector Vega-Rodriguez v. Puerto Rico Telephone Co.*[37] held that employees at a telephone company facility had no reasonable expectation of privacy concerning a video surveillance system that was exclusively visual and without microphones. The cameras surveyed the work space as well as traffic passing through the main entrance to the building. The rest of the area was not under surveillance. The Court noted that business premises have a lesser degree of privacy expectations than residences. It was implausible to have a reasonable expectation of privacy with respect to an open and undifferentiated work area. The plaintiffs did not

have exclusive use and did not occupy private offices or cubicles; rather they were employed in a vast, undivided space.[38]

Special Rules Concerning Employees Entrusted With Public Safety or Security

Shields v. Burge[39] concerned a warrantless search of a police officer's desk, state-issued automobile, and a locked briefcase within the vehicle. The searches arose from an investigation of alleged misconduct by a State Police officer in Illinois. The investigation concerned a report that Shield had unlawfully transferred marijuana to a confidential source. The 7th Circuit Court of Appeals agreed with the District Court's holding that the search of Shield's desk and his state owned automobile did not violate the Fourth Amendment as discussed in *Ortega.* The issue of privacy of the closed briefcase troubled the Court, but it upheld the reasonableness of the search due to the "special interest in police integrity" that outweighs the protection that would normally be given to closed personal briefcases in other types of cases.[40]

In *Schowengerdt v. United States*[41] the defendant civilian military engineer worked on classified projects requiring "secret" security classification. The projects consisted of secret and top-secret weapons design, manufacturing, and testing. The plaintiff's office and those of other employees were searched on numerous occasions to assure proper storage of classified documents. On one occasion, investigators found a sealed envelope that exhibited the plaintiff's interest in heterosexual and homosexual activities. No office action was then taken other than a verbal admonishment, but the plaintiff was released from the Naval Reserves. His secret security clearance remained. The 9th Circuit Court of Appeals found that the sensitive nature of the

plaintiff's position, his knowledge of the numerous inspections made of work areas at the facility, and other indicia of lack of privacy precluded a Fourth Amendment claim.[42]

Employee E-Mail Protection

Public and private sector employers have generally examined e-mails being sent by employees. They do so for legitimate and illegitimate reasons. Some employers read such e-mails because of their concern that messages that may create litigation exposure for their firms. Employers also want to monitor lack of company commitment and waste of company resources. On the other hand, some employers have abused such examination by examining and divulging highly confidential messages.

In *Bourke v. Nissan Motor Corp.,*[43] the plaintiffs were employed by Nissan to assist an Infiniti car dealership to solve problems with its computer system. A co-worker of the plaintiffs was conducting a training session demonstrating the use of e-mail at the dealership. She randomly selected a message sent by Bourke to another employee that contained personal matters. The co-worker reported the incident to her supervisor. Nissan then examined e-mail messages of the entire group and found many personal messages were being sent by employees. Nissan issued warnings to the plaintiffs and prohibited use of the company computer system for personal purposes. After several warnings, the plaintiff Bourke resigned and a second plaintiff was fired. Plaintiffs sued for breach of their privacy rights. The California State Appeals Court dismissed the action. There was no reasonable expectation of privacy in their use of company computers to send personal e-mails while employed by Nissan. No violation of the Penal Code that forbids intentional wire-tapping occurred. Nissan had access to the network without resort to a telephone line tap and

did not access messages during transmission. Nissan did not violate the eavesdropping or recording of a confidential message, since no amplifying or recording device was used to retrieve and read the e-mail messages. Moreover, there was no proof that the plaintiffs were fired or caused to resign as a result of the e-mail activity.

In *Smyth v. Pillsbury,*[44] Pillsbury allegedly told its employees that their e-mails would be confidential. The employees were also told that e-mails would not be intercepted and used by the company for purposes of termination or reprimand. In October 1994, plaintiff received e-mail communications from his supervisor over his computer at home. He responded and exchanged e-mails with his supervisor. At a later date, Pillsbury intercepted Smyth's e-mail messages made in October of 1994 and dismissed him from employment on the ground that the e-mails were inappropriate and unprofessional. One of the e-mails contained threats to "kill the backstabbing bastards" and said that the planned office holiday party was a "Jim Jones Kool Aid affair." The Court decided that the employee could have no reasonable expectation of privacy in e-mail communications voluntarily made by him to his supervisor over the company e-mail system. Companies have a continuing and vital interest in preventing inappropriate and unprofessional comments as well as illegal activity over their e-mail systems. Such concerns outweigh any privacy interest the employee may have in the protection of his or her privacy.

In *McLaren v. Microsoft,*[45] plaintiff was given access to Microsoft's e-mail system by means of his employee network password. Plaintiff and other employees also were allowed a "personal folder" for storage of e-mail which was accessible only by the employee by means of a second password.

Microsoft read the e-mail stored in the plaintiff's personal folder. The Texas State Court of Appeals dismissed the invasion of privacy suit. It held that the plaintiff had no reasonable expectation of privacy as to his e-mail because the e-mail traveled through a number of points in the e-mail system that was accessible to Microsoft, which had a valid interest in preventing unprofessional comments on its e-mail system.

In *United States v. Bunkers*,[46] postal authorities investigated the disappearance of a number of C.O.D. parcels at the facility. It narrowed the search to the defendant, Bunkers. On one occasion they saw her take a package from her assigned work area to the locker room; she emerged shortly thereafter without it. The authorities placed a second lock on the defendant's locker. The locker was then opened in her presence and the stolen items seized. The Postal Manual states that the locker was furnished "…to be used for [her] convenience and…subject to search by supervisors and postal inspectors."[47] The 9th Circuit Court of Appeals, citing *Katz v. United States*,[48] stated that the protection of the Fourth Amendment is not dependent on a property right but rather was dependent on a reasonable expectation of freedom form government intrusion. The postal authorities had reasonable grounds of suspicion of criminal behavior by the defendant and its sealing of the locker with a second lock maintained the status quo. Furthermore, the Postal Manual alerts users of a locker that they had no reasonable expectation of privacy as to its contents.[49]

CONCLUSION

The *Ortega* decision did confront the issue of expectation of privacy in the workplace. But the Court's reasoning burdened trial courts with the task of determining the

employee's reasonable expectation of privacy, the reasonableness of the search by the public or private employer, the nature of any "consensual" search and other facts and circumstances evidencing a possible violation of the employee's privacy rights.

A number of rules, however, can be discerned. The public or private employer may conduct a search after receiving some evidence of work-related misconduct or as a normal part of office efficiency. It is normally imperative that the public or private employer not search the employees' personal possessions such as a purse, wallet or mutually designated personal desk drawer; any search should be limited to an investigation of the public or private employer's own property. It is true that private employers have a somewhat greater right than public employers to institute a search of their property, but this discretion should not be unreasonably abused. It is advisable those public and private employers clearly publish rules of employee privacy and that employees sign a written understanding that the employees have no expectation of privacy as to office telephone, computer, and other work-related facilities.

The Courts have also evolved a rule of discernment concerning a public or private employee's criminal activity. Routine employer investigation for office efficiency or to determine employee misconduct may often lead to discovery of criminal acts. Prosecution for that criminal activity may validly follow without violation of Fourth Amendment guarantees, even though a warrant was not first obtained. But if criminal activity is initially suspected and being investigated, then it is imperative that a search warrant be procured based on the probable cause standard.

ENDNOTES

[1] Restatement of Torts, Section 867.

[2] For a discussion, see Alpheus Thomas Mason, "The Right to Privacy" in *Brandeis: A Free Man's Life*, (New York: The Viking Press, 1946) at p. 70; also found in 4 *Harv. L. Rev.* 193 (1890). Samuel Warren was the classmate and law partner of the famed U.S. Supreme Court Justice, Louis Brandeis.

[3] 381 U.S. 479 (1965).

[4] *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Circuit, 1998).

[5] 480 U.S. 710 (1987).

[6] 764 F.2d 703 (1985).

[7] 480 U.S. 710, 726.

[8] *Id* at 724.

[9] *Id* at 725.

[10] *Id.* at 726.

[11] *Id.* at 723.

[12] *Id.* at 727-728.

[13] 392 U.S. at 20.

[14] 469 U.S. at 341. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Supreme Court determined that although the Fourth Amendment's prohibition on unreasonable searches and seizures applied to search conducted by school officials, they need not obtain a search warrant before searching a student within their school and were not subject to the probable cause standard but rather are subject to a reasonableness standard. In the said case a New Jersey High School teacher discovered a 14-year-old student smoking in a lavatory in violation of school rules. When brought to the office of the vice-principal, she was told to open her purse, after having

denied smoking, at which time cigarettes, cigarette rolling papers used for smoking marijuana and other related items were discovered.

[15] *Id.* at 728-729.

[16] *Id.* at 728.

[17] *Id*. at 731-733.

[18] *Id.* at 732-743.

[19] 146 F.3d 1149 (9th Cir. 1998).

[20] 489 U.S. 602 (1989).

[21] 49 CFR Section 219.101(a)(1)(1987).

[22] Section 219.201(a)(2).

[23] Section 219.301(b)(1)(2)(3).

[24] At 614 citing *Coolidge v. New Hampshire*, 403 U.S. 443, 447 (1971) and *Burdeau v. McDowell* (256 U.S. 465, 475 (1921).

[25] *Skinner* at 621.

[26] *Id.* at 621-631.

[27] 646 F.2d 759 (2nd Cir. 1981).

[28] 8 F.3d 104 (1993).

[29] *Id.* at 108.

[30] *Id.* at 110.

[31] 283 F.3d 670 (5th Cir. 2002).

[32] *Id.* at 676.

[33] *Ortega* at 725-26.

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[34] *Slanina* at 677-680.

[35] 871 F.2d 556 (6th Cir. 1989).

[36] *Id*. at 559-560.

[37] 110 F.3d 174 (1st Cir. 1997).

[38] *Id.* at 180.

[39] 874 F.2d 1201 (7th Cir. 1988).

[40] *Id.* at 1209

[41] 944 F.2d 483 (9th Cir. 1991).

[42] *Id.* at 488.

[43] No. B068705 (C.A., 2d App. Dis. 1993).

[44] 914 F. Supp. 97 (E.D.Pa. 1996).

[45] No. 05-97-00824, 1999 LEXIS. App. Lexis 4103 (Tex. Crt. of App., May 28, 1999).

[46] 521 F.2d 1217 (9th Cir. 1975).

[47] *Id*. at 1219.

[48] 389 U.S. 347 (1967).

[49] *United States v. Bunkers*, 521 F.2d 1217, 1220 (9th Cir. 1975).

SHREDDING THE FIRST AMENDMENT; BUYING AND SHACKLING FREE SPEECH

By

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INTRODUCTION

Perhaps no President truly loves the First Amendment. The Seventies, for example, spawned news stories and articles about Nixon and his secret enemies list and his hatred for the protesters against the Vietnam War. Years after Nixon's 1974 resignation over the Watergate scandal and fall from grace, a 1991 Time magazine article chronicled the release of a fresh batch of White House tapes, sequels to the famous oval office tapes that Nixon recorded of daily conversations with staff and his henchmen. The original smoking-gun tapes released in 1974 brought down the Nixon White House and sent to federal prison his counsel, John Dean; Attorney General, John Mitchell; Chief-of-Staff, Haldeman; and his domestic policy advisor, Ehrlichman.

In 1991, after years of wrangling over their release, sixty

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additional hours of White House tapes were revealed, and Time magazine wrote that these tapes "came as a timely reminder that Nixon is . . . an unindicted co-conspirator who is lucky to have escaped prison."[1] "Listen to any random conversation on any day," Time editor Margaret Carlson wrote, "and the mask of respectable elder statesman melts away to reveal a deceitful, lowbrow, vindictive character, dangerously armed with the full power of the IRS, FBI and CIA, and all too willing to use it. Audit his enemies, he orders. 'We have to do it artfully so that we don't create an issue by abusing the IRS politically,' says Nixon, warming to the subject. 'And there are ways to do it. Goddam it, sneak in the middle of the night.'"[2]

The tapes released in 1991 show, Carlson wrote, "just how coarse and ruthless a man"[3] Nixon was; at one point Nixon "enthuses over a suggestion to recruit 'eight thugs' from the Teamsters Union--'murderers'--to gang up on peace protestors. 'They've got guys who will go in and knock their heads off,' says Nixon. 'Sure,' adds Haldeman. 'Beat the s___out of some of these people.'"[4].

And yet, as much as Nixon disregarded the First Amendment's protection of free speech and the innate right (and obligation in a democracy) to criticize one's government, Nixon's White House looks like child's play compared to the rough and tumble world of George W. Bush's administration. While Nixon harassed his enemies and fought with the protesters, his attacks on free speech compared to the Bush offensive is like the difference between the instruments of war during the American revolution and the "shock and awe" light and power display in March 2003 Iraq. Bush's strafing of First Amendment freedoms is sophisticated, high tech, a full throttle

multi-media show that includes within its arsenal multiple strategies.

THE ADMINISTRATION'S MULTI-MEDIA ASSAULT ON FREE SPEECH

Conscription of Federal Employees

The Bush administration's arsenal to subvert honest debate over political issues includes the conscription of federal employees to market the administration's agenda. Over the objections of many of its own employees, the Social Security Administration has engaged in a major effort to publicize the financial problems of Social Security and to convince the public that private accounts are needed as part of any solution. Agency plans to market Bush's "private accounts" program are set forth in internal documents, including a "tactical plan" for communications promoting the idea that Social Security faces bankruptcy requiring immediate action. Agency employees have complained to Social Security officials that they are being forced into a political battle over the future of the program and question the accuracy of the administration's statements.[5] Many employees believe “there is no immediate crisis.”[6]

Prepackaged Television News Segments

The Bush administration has also marketed its agenda by producing its own prepackaged television news, such as a "news" segment of a jubilant Iraqi-American telling a camera crew, "Thank you, Bush. Thank you, U.S.A," after the fall of Baghdad. A second report told of "another success" in the Bush administration's "drive to strengthen aviation security," the reporter calling it "one of the most remarkable campaigns in aviation history." To the viewer, each report looked like any other 90-second news story. In fact, the federal

government produced, wrote, and directed these stories. The "fall of Baghdad" spot was made by the State Department. The "reporter" covering airport safety was a public relations professional working under a false name for the Transportation Security Administration. At least 20 federal agencies, including the Defense Department and the Census Bureau, have made and distributed hundreds of television "news" segments in the past four years.[7] Without any acknowledgement that the government produced these segments, they are broadcast across the country. The reports often feature "interviews" with senior administration officials "in which questions are scripted and answers rehearsed."[8]

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Journalists on the Administration Payroll

Not only has the administration produced news segments using fake reporters, it has also contracted with real journalists to market its political agenda. The Department of Education paid commentator Armstrong Williams $240,000 to promote Bush's “No Child Left Behind” program in his syndicated newspaper column and television show.[9] Williams never disclosed his financial ties to the Bush administration. In 2002, CNN reported that columnist Maggie Gallagher repeatedly defended President Bush's push for a $300 million initiative encouraging marriage as a way of strengthening families without ever mentioning that the Department of Health and Human Services paid her $21,500 to market the proposal.[10]

Hyping the News

The administration has also distorted news stories in order to market the Iraq war to Americans unsure the Iraqis welcome our intervention and bombing of their country. For many Americans, one of the most memorable pictures of the 2003

Iraq war was the toppling of the statue of Saddam Hussein on April 9, 2003, in Baghdad's Firdos Square with jubilant Iraqis rejoicing over his downfall. The networks spent the day replaying footage of ecstatic Iraqis noosing a statue of Saddam Hussein and pulling it to the ground. Watching the film footage, Fox News anchor David Asman gushed: "If you don't have goose bumps now, you will never have them in your life."[11] Donald Rumsfeld called the pictures "breathtaking"[12] and hailed the fall of the statue as equivalent to the fall of the Berlin Wall and the collapse of the Soviet Union.[13]

The video of the statue being destroyed was broadcast around the world as proof of massive Iraqi support for the U.S. invasion of their country. However, still photos by Reuters news source show a long-shot view of Firdos Square empty except for the U.S. Marines, the International Press, and a small handful of Iraqis, perhaps a few dozen.[14] No more than 200 people are in the square, which Marines have sealed off with tanks. A U.S. mechanized vehicle is used to pull the statue of Saddam from its base.[15] The still photos raised questions as to whether this was a carefully orchestrated media event.

A subsequent Army report revealed the event was a photo op. It was a Marine colonel--not Iraqi civilians as the public widely assumed—who decided to topple the statue. The colonel selected the statue as a "target of opportunity."[16] The military used loudspeakers to encourage the few dozen Iraqi civilians to assist. When a Marine recovery vehicle topples the statue with a chain, the effort appears to be Iraqi-inspired because the military had managed to pack the vehicle with cheering Iraqi children.[17]. . .

Questions have also been raised about the authenticity of the Jessica Lynch rescue. The story of Private Lynch's capture by Iraqis and her rescue by U.S. special-forces became (as with the fall of Hussein's statue) a rallying cry for American patriotism. The 19-year old army clerk from West Virginia was captured when her company was ambushed. Nine soldiers were killed, and Lynch was taken to the local hospital. Eight days later U.S. special-forces stormed the hospital to rescue her and filmed the dramatic events on a night vision camera.[18]

A military spokesman informed journalists that soldiers had exchanged fire with the Fedayeen during Jessica's rescue before they were able to whisk her away by helicopter.[19] News organizations repeated military reports that she heroically resisted capture by firing at her attackers.[20] News reports claimed she had stab and bullet wounds and that she had been slapped about on her hospital bed and interrogated.[21]

The BBC investigated the story and said the version depicted by the U.S. military was "flawed."[22] One doctor who treated Jessica said she had a broken arm, a broken thigh and a dislocated ankle from the road traffic accident, but no stab or bullet wounds.[23] Witnesses said that the U.S. special-forces knew that the Iraqi military had fled a day before they stormed the hospital. Doctors told the BBC that they were surprised by the raid. "There was no military, there were no soldiers in the hospital."[24] "It was like a Hollywood film. They cried 'go, go, go,' with guns and blanks without bullets, blanks and the sound of explosions."[25]

The BBC investigation also disclosed that two days before special-forces swooped down on the hospital, Dr. Harith had arranged to deliver Jessica to the Americans in an ambulance. But as the ambulance with Jessica inside approached a

checkpoint, American troops opened fire, forcing it to flee back to the hospital. When military footage of the rescue was released, General Vincent Brooks, a U.S. spokesman, spun the rescue mission: "Some brave souls put their lives on the line to make this happen, loyal to a creed that they know that they'll never leave a fallen comrade."[26] The BBC concluded that Private Lynch's story "is one of the most stunning pieces of news management ever conceived."[27]

Months after her ordeal, Jessica confirmed that the military version of her capture and rescue was a fraud. During an interview with ABC anchor Diane Sawyer, Jessica said that she had not received any stab or bullet wounds, and that she never fired her weapon.. She told Diane Sawyer that the Iraqi doctors treated her kindly, and the hospital was already in friendly hands when her rescuers arrived.[28] Asked about how she felt about reports of her heroism (for which she received the bronze star), she told Sawyer she was hurt that "people would make up stories that they had no truth about."[29]

Despite Jessica Lynch's admission, many Americans still believe she is a hero who emptied her gun rather than be captured and that her rescue was a bold, daring event where American soldiers put their lives on the line to save their comrade from the Iraqis and certain death. Her honesty came months after the military version of the events pounded the airways over and over. Under these circumstances, a lie repeated often enough becomes the truth..

Dismantling Public Broadcasting's Right to Free Speech and Independence from Partisan Politics

Public television and radio executives have charged that the Bush administration has subverted the independence of public

programming and threatened their First Amendment rights to free speech. Public programming executives have been in conflict with the Bush appointees who lead the Corporation for Public Broadcasting, which allocates $400 million each year in federal funding for public television and radio. Although federal law is supposed to insulate public broadcasting from politics, the Republican-dominated board is upset over what they consider to be an anti-Bush bias in public television and radio programming.[30]

The corporation's former chairman, Kenneth Tomlinson, made concerted efforts while chairman to ensure "balanced" programming.[31] Mr. Tomlinson paid two Republican lobbyists $15,000 (with public broadcasting funds) and enlisted the help of presidential adviser Karl Rove to kill a legislative proposal requiring the president to fill about half the seats on the Corporation board with people who had experience in local radio and television.[32] If the legislative proposal had passed, the administration would have lost the ability to control the board.

In 2004, to monitor anti-administration bias, Tomlinson secretly hired a researcher, Fred Mann, to monitor political leanings of the guests on Bill Moyers "Now" program.[33] Without notifying the corporation board, paid Mann $14,170 to monitor guests. Guests were rated either L for liberal or C for conservative, and "anti-administration" was affixed to any segment raising questions about the Bush presidency.[34] Conservative Republican Senator Chuck Hagel received an L simply because he had expressed doubts about Iraq during a discussion primarily devoted to praising Ronald Reagan.[35] Journalists also received an L rating if they merely asked their guests questions about administration policies. Tomlinson also rated guests on the show by such labels as "anti-Bush" or "anti-

Delay," a reference to Representative Tom DeLay, the House majority leader.[36] In paying Mann to monitor programming for anti-Bush bias, Tomlinson used taxpayer money to help the administration compile potential blacklists. In so doing, Tomlinson took a page from Richard Nixon, another president "who tried to subvert public broadcasting in his war to silence critical news media."[37]

In November 2004, when members of the Association of Public Television Stations and PBS met in Baltimore, Tomlinson told them they should make sure their programming better reflected the Republican mandate.[38]

In March 2005, on the recommendation of Bush administration officials, Tomlinson hired the director of the White House Office of Global Communications, Mary Catherine Andrews, as a senior staff member. While still working for the White House, she helped draft guidelines for two ombudsmen whom the Republican-controlled corporation board had appointed to scrutinize the content of public radio and television broadcasts for political balance.[39]

In April 2005, in retaliation for what it considers anti-administration bias, the corporation's board informed its staff that it should prepare to redirect grant money away from national newscasts and toward music programs.[40]

The Inspector General's office for the Corporation for Public Broadcasting began an investigation into Tomlinson's activities for possible violations of federal law. In November 2005, the internal investigative report issued by the Inspector General concluded that Tomlinson had repeatedly violated federal law and ethics rules and instead of insulating public broadcasting from partisan politics as required by law, he had

been a beacon of partisanship. Tomlinson has since left the corporation.[41]

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The Clear Channel Connection and the Drive to Monopoly and Suppression of Speech

The administration's assault on public programming, as well as its other efforts to control speech and stifle dissent, is exacerbated by the diminishing diversity in the media, as major outlets gobble up markets like pac-man. In the last few years Clear Channel has been the clear winner, as it buys up markets nationwide and portrays a right wing agenda. That they are in lock-step with this administration is clear, as shown by the significant financial support the corporate officers at Clear Channel have given George W. Bush. As Howard Stern, a critic of the Bush administration has learned, if you take on Bush you take on Clear Channel, and Clear Channel can pull your plug in major markets.

How did the move towards media monopoly happen, when the Federal Communications Commission was the government watchdog that insured diversity in the media industry? In the past twenty years neoconservatives have made concerted efforts to take over Congress, the executive branch, and the judiciary. In 1996 a Republican-led Congress passed legislation permitting a media corporation to control more and more of the market. In 2000, George Bush appointed Michael Powell, the son of Colin Powell, to be the FCC director; and in Mr. Powell the Bush administration found a man willing to foster the Bush administration’s desire to contain the media.

Clear Channel, which has strong financial ties to George W. Bush, has become, with the help of the Republican-led FCC

and Republican Congress, a media giant, which partners with the Bush administration to stifle dissent. Before passage of the 1996 Telecommunications Act, a company could own no more than 40 radio stations in the entire country. With the Act's sweeping relaxation of ownership limits, Clear Channel grew from 40 radio stations to approximately 1,240 radio stations in 300 cities. It now dominates the audience share in 248 of 250 major markets with 100 million worldwide listeners.[42]

Under the leadership of Michael Powell, who served from 2000 to March 2005, the FCC pushed deregulation even further than the 1996 Telecommunications Act and helped Clear Channel become one of the biggest media companies in America. And Clear Channel's connection to George W. Bush dates back to the early 1990's. Tom Hicks, a Clear Channel board member is a major Bush donor, who has had financial ties to Bush since the 1990's when they partnered over major business deals worth millions of dollars while Bush was governor of Texas. Clear Channel's CEO Lowry Mays is also a staunch Republican and Bush supporter. Both he and Clear Channel were major contributors to Bush's campaigns.[43]

Clear Channel has the ability to control programming on their stations and to regulate who gets air time and who doesn't. The Chicago Tribune released a 'banned play-list" of songs Clear Channel radio DJ's were told could not be played after the September 11 attacks on the World Trade Center and the Pentagon. Over 150 songs were banned, including John Lennon's "Imagine," Louis Armstrong's "What a Wonderful World," and R.E.M.'s "It's the End of the World (As We Know It)." Clear Channel also banned the Dixie Chicks from being played after they expressed anti-Bush sentiments regarding the Iraq war.[44]

Clear Channel controls a lot of press. The control of that press reached to Howard Stern, the controversial radio talk show host in New York. They removed Stern from the Clear Channel stations because of his comments critical of the Bush administration. Stern attacked Bush's National Guard service, his stance on stem cell research, his use of 9/11 images in Bush's campaign ads, and labeled Bush as an enemy of civil liberties, abortion rights and gay rights "George W. Bush is going to be out of office in November thanks to me," Stern told his listeners on March 19, 2004.[45]

When Clear Channel removed Stern from its stations, Stern launched a personal campaign to educate his audience about the financial ties between Clear Channel and the Bush administration.[46] But Stern's criticism of President Bush didn't just rev up Clear Channel to punish Stern; the FCC, doing the President's bidding, jumped on the bandwagon. On March 18, 2004, the FCC fined the Infinity Broadcasting Company $27,500 for a program that aired on July 26, 200l when Stern described slang words for raunchy sex acts and body parts.[47] But anyone listening to Stern's shows knows they are always raunchy. The timing of the FCC fine is suspicious--it comes almost three years after the show aired in 200l, and it comes directly on the heels of Stern's outspoken criticism of Bush.[48]

Clear Channel's reach to protect the airways from comments critical of the Bush administration has extended to conservative talk show hosts who expressed opinions unfavorable to George W. Bush. One of those hosts who has lost his job with Clear Channel is Charles Goyette, a conservative talk show host in Phoenix, who was named the ":Best Talk Show Host of 2003" by the Phoenix Sun Times.[49] His crime? He criticized Bush and his ever-shifting pretext for a first strike in Iraq.[50] Mr. Goyette is a life-long Republican

who served in the military, receiving the Army Commendation Medal. His county Republican Party elected him its "Man of the Year" in 1988.[51] Nevertheless, he has been caught in the wake of the assault on freedom of speech. Also caught in that wake was talk show host Roxanne Cordonier, a radio personality at Clear Channel's WMYI 102.5 in Greenville, South Carolina. Cordonier, who was the South Carolina Broadcasters Association's 2002 Radio Personality of the Year, said that "she was belittled on the air and reprimanded by the station for opposing the invasion of Iraq. Then she was fired."[52]

Prosecuting the Protesters

Included in the arsenal to stifle dissent, protesters have been arrested and jailed, not only during the presidential race but going back to just shortly after Bush's first inaugural in January 2001. Those with signs critical of the Bush administration are asked to move to "protest zones," set up by local law enforcement officials at the request of the Secret Service. These zones are well out-of-sight of the presidential motorcade and out-of-sight of cameras and reporters. If the individual with a sign critical of the President, such as a "No oil for war" placard, refuses to move to the "protest" zone, he/she is arrested and charged with whatever criminal offense enforcement authorities can dream up.[53]

In Florida, at a Bush rally at Legends field in 2001, three demonstrators--two of whom were grandmothers--were arrested for holding up small handwritten protest signs outside the designated zone."[54] In Florida in 2003, seven protesters were arrested when Bush came to a rally at the USF Sun Dome. They had refused to be cordoned into a protest zone hundreds of yards from the entrance to the Dome.[55] One of the

arrested protesters was a 62-year-old man holding a sign, "War is good business. Invest your sons."[56] The seven were charged with "trespassing," "obstructing without violence," and "disorderly conduct."[57]

When President Bush traveled to Pittsburgh, Pennsylvania, on Labor day 2002, retired steel worker Bill Neel was there to greet him with a sign proclaiming, "The Bush family must surely love the poor, they made so many of us."[58] At the direction of the Secret Service, the local police had set up a "designated free-speech zone" a third of a mile from the location of Bush's speech. The police cleared the motorcade path of all critical signs, but folks with pro-Bush signs were permitted to line the president's route. Neel refused to go to the designated area and was arrested for "disorderly conduct."[59]

At Neel's trial, a police detective testified that the Secret Service had told local police to confine to a "free speech area" those "people that were there making a statement pretty much against the president and his views."[60] The district court judge threw out the disorderly conduct charge against Neel, declaring, "I believe this is America. Whatever happened to 'I don't agree with you, but I'll agree to the death your right to say it?"[61]

On July 4, 2004, President Bush was speaking at the state capitol in Charleston, West Virginia, and Nicole and Jeff Rank waited outside the capitol to protest his visit. People near them "wore pro-Bush T-shirts and Bush-Cheney campaign buttons, some of which were sold on the capitol grounds."[62] The Ranks, however, wore T-shirts with Bush's name spelled out in a circle with a line through it. Law enforcement officers told the couple to take the shirts off, cover them, or get out.[63] When they refused and sat down, they were arrested.[64]

The Charleston police alleged that the Ranks were in a "no-trespassing zone and refused to leave."[65] The Ranks were handcuffed, jailed for a couple of hours, and charged with trespassing.[66] Nicole Rank was "temporarily suspended from her job as deputy environmental liaison officer for the Federal Emergency Management Agency."[67] On July 15, a judge dismissed the charges.[68]

City officials informed the ACLU that "local police were acting at the request of the Secret Service,"[69] and the ACLU, on behalf of the Ranks, filed suit on September 14, 2004, against the Secret Service and Greg Jenkins, the deputy assistant to President Bush and director of White House advance work.[70] The Ranks alleged that their First Amendment rights were violated and seek compensatory damages. On April 28, 2005, the federal district court granted defendants' Motion to Stay Discovery.[71] Defendants' Motion to Dismiss is pending.[72]

Arrests of protesters for “trespassing” or for "disorderly conduct" for exercising their First Amendment freedoms are not isolated incidents, and the Secret Service has frequently been implicated in such arrests and prosecutions. In response, on September 23, 2003, the ACLU filed a federal law suit in Philadelphia, ACORN v. City of Philadelphia,[73] charging that the Secret Service, one of several named defendants, had carried out a "pattern and practice" of discriminating against protesters in violation of their free speech rights.

The ACLU law suit filed in Philadelphia in September 2003 listed more than fifteen examples of police censorship at events around the country, saying that all had been initiated at the behest of the Secret Service. In addition to Pennsylvania, the

incidents described took place in Arizona, California, Connecticut, Indiana, Michigan, Missouri, New Jersey, New Mexico, South Carolina, Texas, and Washington--among other places.[74] The ACLU sought a declaratory judgment and court order banning the practices of the government in restricting free speech and arguing that absent judicial intervention, similar violations of First Amendment rights would occur in the near future at political conventions and functions associated with the forthcoming presidential election.[75]

On May 6, 2004, federal district court judge John Fullam dismissed ACORN's complaint, holding that the court did not have subject matter jurisdiction to issue a declaratory judgment against the city of Philadelphia and the U.S. Secret Service of the Department of Homeland Security since any future harm at future events was too speculative.[76] Judge Fullam held that the plaintiffs could not show that they were threatened with real and imminent injury or that there was a "concrete likelihood that their constitutional rights will be violated unless injunctive relief is granted."[77] In dismissing the compliant, Judge Fullam noted that "the most that can be said is that there is a likelihood" that disputes will arise at future events, but held that such disputes as to First Amendment violations must be decided by judicial intervention at the time they arise.[78]

Judge Fullam dismissed the complaint even though the ACLU had significant evidence of the administration's sustained pattern and practice of clearing parade routes of protesters with signs critical of this administration. Thus, there was a "concrete likelihood"--in reality, an almost certainty--of future First Amendment violations. And since parades and other political functions occur in a short time frame--a matter of a couple of hours--the court's position that judicial intervention would move so quickly as to protect the protester's

right of free speech is unrealistic. And in fact, after Judge Fullam's dismissal of the ACLU complaint, the Secret Service continued to sweep areas clean of protesters along parade routes or at political functions in violation of their rights.[79]

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CONCLUSION

What is the solution to the administration's systemic assault on the First Amendment? Should new laws be passed or others repealed? The first order of business should be for Congress to mend several laws: Before passage of the 1996 Telecommunications Act, a company could not own more than 40 radio stations in the entire country. With the passage of the Act, Clear Channel grew from 40 radio stations to over 1200 and dominates major markets. Diversity of expression, just as diversity of culture, brings a richness and vitality to a democracy and enables its citizens to make better decisions, more reasoned and better-informed. The 1996 Telecommunications Act that has allowed Clear Channel to gobble up markets should be repealed, and Clear Channel should be divested over time of some of its stations. Certainly, the government has broken up monopolies before, and Clear Channel has a huge share of the radio market. Whether Clear Channel leans to the right or the left is not the point. The point is that no company should be able to control the press. And Clear Channel controls a lot of access to the American people.

Congress must also pass additional legislation insulating the Corporation for Public Broadcasting from partisan politics. A president must not be allowed to stack the corporation board with political appointees, who may, as has happened in this administration, threaten the independence of public

broadcasting stations if they do not cover the political issues of the day as the administration desires. An administration should not be able to force on the Bill Moyers program, or any other program, individuals with a specific viewpoint. That editorial decision must be left to the executives and program hosts for each station.

The Corporation for Public Broadcasting must not become part of the state's propaganda machine. Making television and radio part of an administration's arsenal of weapons to monopolize speech is deadly to the political health of this country.

To protect against an administration packing the Corporation for Public Broadcasting board and infringing on editorial discretion, Congress should pass legislation ensuring non-partisan board membership. As discussed *supra*, Mr. Tomlinson with the help of Karl Rove helped kill a legislative proposal which would have required the president to fill approximately half the seats on the board with people who had experience in local radio and television. This legislation would likely diminish a president's ability to control the board and should be passed. In addition, Congress should pass legislation affirming and clarifying that the corporate board cannot interfere with the editorial decisions of public programming as to which views and opinions are aired or stressed.

Congress should also pass legislation to stop taxpayer-funded covert propaganda campaigns wherein the administration pays commentators and journalists such as Armstrong Williams and Maggie Gallagher to hawk the administration’s programs and policies to a public unaware that they are on the administration’s payroll. In January 2005, Democratic lawmakers introduced a bill designed to stop

taxpayer-funded "covert propaganda campaigns" violating a provision included in annual appropriation acts since 1951. Titled the federal Propaganda Prohibition Act, the bill would become—and should become--a permanent part of federal law.[80]

There are other ways to foster respect for freedom of speech. Investigations by the Government Accountability Office (Congress' investigative arm) and the Department of Education's inspector general of journalists on the administrative payroll should continue. Such investigations can shed light on federal law violations, as did the Inspector General's investigative report on Tomlinson's activities as chairman of the Corporation for Public Broadcasting. However, such investigations provide only partial protection to preserving the integrity of free speech, as the threat of such investigations has done little to deter questionable activities.

To preserve free speech, perhaps a Senate or House bipartisan committee should also be formed to serve as the watchdog protecting First Amendment freedoms, giving the committee subpoena power to depose any federal employee, including the executive branch, if the committee believes that an investigation is warranted. But since there are already investigative tools available to Congress, such as the Government Accountability Office and inspector general offices for the agencies, establishing additional bureaucracy may not advance the First Amendment cause significantly even though these tools work imperfectly.

The judiciary, on the other hand, should certainly be expected to protect a person's right to free speech, but simply dismissing trumped-up criminal charges such as "trespassing" or "disorderly conduct" is insufficient to encourage robust

debate vital to the well-being of a democracy. The judiciary should also award compensatory and punitive damages for false imprisonment and allow recovery of attorney's fees for successfully defending criminal charges brought in violation of First Amendment freedoms. The judiciary must zealously protect protesters from government harassment designed to muffle dissent. The judiciary must be the sentinel protecting the First Amendment.

ENDNOTES

[1] Margaret Carlson, *Notes from the Underground*, Time, June 17, 1991, at 28.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Robert Pear, *Social Security Enlisted to Push its own Revision*, N.Y. Times, Jan. 16, 2005, at Al.

[6] *Id.* "Trust fund dollars should not be used to promote a political agenda," said Dana Duggins, a vice president of the Social Security Council of the American Federation of Government Employees, which represents more than 50,000 of the agency's 64,000 workers.

[7] David Barstow & Robin Stein, *Under Bush, a New Age of Prepackaged News*, ,N.Y. Times, Mar. 13, 2005, http//www.nytimes.com/2005/03/13/politics/13covert.html?th.

[8] *Id.* Some reports were produced to support the administration's most cherished policy objectives, such as regime change in Iraq or Medicare reform. The government's "news-making apparatus has produced a quiet drumbeat of broadcasts describing a vigilant and compassionate administration." *Id.*

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[9] Greg Toppo, Jim Drinkard & Mark Memmott, *Lawmaker: Education Probe Obstructed*, USA Today, Apr. 15, 2005, at 9A.

[10] *Bush: Pundit Payments Will Stop*, CNN.com, Jan. 27, 2005, http://www.cnn.com/2005/ALLPOLITICS/01/26/paid.pundits/

[11] Matthew Gilbert & Suzanne C. Ryan, *Did Iconic Images from Baghdad Reveal More About the Media than Iraq?*, Boston Globe, Apr. 10, 2003, at D1.

[12] *Staging the Fall of Saddam Hussein's Statue: a Tale of Two Photos*, Rumor Mill News, Mar. 22, 2005, http://www.rumormillnews.com/cgi-bin/archive.

[13] Gilbert & Ryan, *supra* note 11. Documentary filmmaker Ken Burns said that replaying the film footage over and over of the fall of Hussein's statue reminded him of "the power of images to show us what we want to see." *Id.* "When we repeat an image over and over again, we're forgetting all the other places we could also be looking at that moment. These images become justification, proof of what we want them to become. That's the nature of iconic images." *Id.*

[14] *Id. See also Staging the Fall of Saddam Hussein's Statue: a Tale of Two Photos, supra* note 12.

[15] Gilbert & Ryan, *supra* note 11.

[16] David Zucchino, *Army Stage-Managed Fall of Hussein Statue*, L.A. Times, July 3, 2004, http://www.duckdaotsu.org/070304-statue.html

[17] *Id.*

[18] *Saving Private Lynch Story 'Flawed'*, BBC News, May 15, 2003, http://news.bbc.co.uk/1/hi/programmes/correspondent/3028585.stm

[19] David D. Kirkpatrick, *Jessica Lynch Criticizes U.S. Accounts of Her Ordeal*, N.Y. Times, Nov. 7, 2003, at A25.

[20] *Id.*

[21] *Id. See also Saving Private Lynch Story 'Flawed', supra* note 18.

[22] *Saving Private Lynch Story 'Flawed', supra* note 18.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Kirkpatrick, *supra* note 19. "From the time I woke up in that hospital, no one beat me, no one slapped me, no one, nothing," she told Sawyer, adding, "I'm so thankful for those people, because that's why I'm alive today." *Id.*

[29] *Id.*

[30] Stephen Labaton, *A Battle Over Programming at National Public Radio,* N.Y. Times, May 16, 2005, http://www.nytimes.com/05/16/business/media/16radio.html.?th&emc=th.

[31] *Public Broadcasting Chief Denies Meddling,* USA Today, July 11, 2005, http.//www.usatoday.com/news/Washington/2005-07-11-pbs. Tomlinson's critics charged that he was turning public television and radio "into a political pawn of the Republican party." *Id.*

[32] *See id.*; Stephen Labaton, Lorne Manly & Elizabeth Jensen, *Chairman Exerts Pressure on PBS, Alleging Biases,* N.Y. Times, May 2, 2005, http://query.nytimes.com/search/restricted/article?

[33] Stephen Labaton, *Democrats Call for Firing of Broadcast Chairman,* N.Y. Times, June 22, 2005, http.//www.nytimes.com/2005/06/22/national/22broadcast.html

[34] *See* Frank Rich, *The Armstrong Williams News Hour*, N.Y. Times, June 26, 2005, http.//www.nytimes.com/2005/06/26/opinion/26rich.html.

[35] *Id.*

[36] Labaton, *supra* note 33.

[37] Rich, *supra* note 34.

[38].Labaton, *supra* note 32.

[39] *Id.*

[40] Labaton, *supra* note 30.

[41] *Public Broadcasting's Enemy Within,* N.Y. Times, Nov. 28, 2005..

[42] "Seeing Through the Fog of Clear Channel," The Straight Poop, Mar. 31, 2005, http://search.iwon.com/commerce/cached.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* He told his audience: "I gotta tell you something; there's a lot of people saying that the second that I started saying, 'I think we gotta get Bush out of the presidency,' that's when Clear Channel banged my ass outta here. Then I find out that Clear Channel is such a big contributor to President Bush . . . . I'm going, 'Maybe that's why I was thrown off, because I don't like the way the country is leaning too much to the religious right.' And then, bam! Let's get rid of Stern. I used to think, 'Oh, I can't believe that.' But that's it! That's what's going on here! I know it! I know it!" *Id.*

[47] *Id.*

[48] Although the FCC punished Stern and the Infinity Broadcasting Company for lewd remarks, it has not given any indication it intends to punish Pat Robertson, founder of the Christian Coalition of America, for his

remarks on August 22, 2005, on his television show, "The Seven Hundred Club," encouraging the violation of international and federal laws. During his televised show, he suggested that American operatives assassinate the democratically-elected Venezuelan President Hugo Chavez. *See Pat Robertson Calls for the Assassination of Hugo Chavez*, USA Today, Aug. 23. 2005, http://www.usatoday.com/news/nation/2005-08-22-robertson-x.htm. "We have the ability to take him out, and I think the time has come that we exercise that ability," Robertson told his audience. "We don't need another $200 billion war to get rid" of Chavez. *Id.* Chavez has been one of the most outspoken critics of President Bush. *Id.*

[49] Charles Goyette, *How to Lose Your Job in Talk Radio*, The American Conservative, Feb. 2, 2004, at 1-3, 5..

[50] *Id. at 1-3.*

[51] *Id.* at 2-3.

[52] *Id.*

[53] *See, e.g.*, Matthew Rothschild, *Muzzled on the Campaign Trail*, The Progressive, Nov. 2004, at 25-30.

[54] James Bouvard, *Quarantining Dissent: How the Secret Service Protects Bush from Free Speech*, San Francisco Chronicle, Jan. 4, 2004, at D1.

[55] *Id*

[56] *Id*

[57] *Id*

[58] *Id*

[59] *Id.* Neel later commented, "As far as I'm concerned, the whole country is a free-speech zone. If the Bush administration has its way, anyone who criticizes them will be out of sight and out of mind." *Id.*

[60] *Id.*

[61] *Id.*

[62] Rothschild, *supra* note 53, at 27.

[63] *Id.* at 27-28.

[64] *Id.* at 28.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *See* Rank v. Jenkins, 2005 WL 1009625 (S.D. W. Va.)

[72] *Id.*

[73] Civil action No. 03-4312, filed in the U.S. District Court for the Eastern District of Pennsylvania before the Honorable John Fullam.

[74] *Secret Service Ordered Local Police to Restrict Anti-bush Protesters at Rallies, ACLU Charges in Unprecedented Nationwide Lawsuit.* ACLU Report, Sept. 23, 2003, at l, http://www.aclu.org/FreeSpeech/FreeSpeech.cfm? ACLU's Witold Walczak spoke of the protesters, "The individuals we are talking about didn't pose a security threat; they posed a political threat." *Id.*

[75] Acorn v. City of Phila., 2004 WL 1012693 (E.D. Pa. 2004)

[76] *Id.*

[77] *Id.*, citing City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983)

[78] *Id.*

[79] To control dissent, the Bush arsenal of weapons reaches beyond even the Secret Service, the Justice Department, and the strategies discussed. The administration is also using the Homeland Security Department to intimidate protesters. The Homeland Security Department has recommended that local police departments view critics of the war on terrorism as potential terrorists. As part of a May 2003 terrorist advisory, the Homeland Security Department asked local law enforcement agencies to keep an eye on anyone who "expresses a dislike of attitudes and decisions of the United States government." Bouvard, *supra* note 54, at 4 Under this directive, millions of American could be added to the official lists of "suspected terrorists" and then monitored for their activities. It is reminiscent of Nixon's "audit his enemies list." "And there are ways to do it," Nixon intoned. "Goddam it, sneak in in the middle of the night." In February 2003 the New York Sun suggested that the New York Police Department "send two witnesses along for each participant" in an anti-war demonstration, "with an eye toward preserving at least the possibility of an eventual treason prosecution" since all the demonstrators were guilty of "giving, at the very least, comfort to Saddam Hussein." *Id.*

[80] *See Bush: Pundit Payments Will Stop, supra* note 10.

INTERSTATE BANK ACQUISITIONS: HAVE STATE BANKING LAWS BEEN PREEMPTED BY FEDERAL REGULATIONS?

By

David S. Kistler*

I. INTRODUCTION

The purpose of this paper is to review a limited number of specific applications of the Riegle-Neal Banking and Branching Efficiency Act of 1994. This is not an all-inclusive review of this law nor all the cases revolving around this law. The paper is simply a case analysis of the application, compliance, and interpretation of that law in certain selected instances. Topics under examination are presented due to the interesting nature of the issues that were presented. Specifically the topics include bank mergers, creation of additional branch banks, and relocation of banks.

II. SPECIFIC APPLICATIONS IN CASE ANALYSIS

It should be noted that the specific cases presented in this paper are only individual examples of what has occurred in the way of cases regarding application of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. This paper is not intended to be an all-inclusive coverage of the statute.

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A. Mergers – TeamBank v. McClure[1]
(U.S. Court of Appeals, 8th Circuit)

1. Factual Background:

Teambank originally was established in the state of Kansas. In 1997 it moved into Missouri and established its headquarters there. In 2000 Teambank agreed to a merger with First National Bank (FNB). FNB's headquarters were in Kansas. An application of merger was sent to the Office of the Comptroller of the Currency (OCC) for approval. Approval was granted. A problem developed when the State of Missouri, through the Director of the Missouri Division of Finance (Department of Economic Development), objected to the merger. Its position was that the merger was prohibited under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 since the state laws of Missouri were violated. Specifically, the Missouri "minimum-age" statute and the relocation statute were not followed. The "minimum-age" law was passed in 1997 and requires that instate banks be in existence for a minimum of 5 years before being acquired by an out-of-state bank (V.A.M.S. §§ 362.077, subd. 1, 362.610). The relocation law was passed in 1999 and determines the age of a bank that relocates to Missouri starts with the date of relocation (V.A.M.S. § 362.077.2). Teambank simultaneously merged with FNB and filed for an injunction to stop the state of Missouri Division of Finance from denying the merger. The Office of the Comptroller of the Currency filed a brief Amicus Curiae in support of Teambank. Trial court granted the injunction in a summary judgment. The state of Missouri appealed.

2. Opinion of the Court:

The appeals court affirmed the trial court's decision relying heavily upon the brief filed by the OCC. The court stated that the OCC's opinion was persuasive and should be given deference. The three main points were

- Inapplicable is the minimum-age requirements of Missouri state law
- Inapplicable is the relocation statute of Missouri state law
- Preemption overrides the relocation statute of Missouri state law

The general rule of law is stated in 12 U.S.C.A. §1831u(a)(5) in that the Riegle-Neal Act prohibits states from interfering with a bank merger of out-of-state and in state banks. Federal law also states an exception exists in that states are allowed to place constraints upon the out-of-state banks. One such constraint is the "minimum age" rule under Title 12 U.S.C.A. §1831u(a)(5)(A). This rule allows a restriction on the acquiring of an instate bank. A maximum time restraint of 5 years is allowed as per Title 12 U.S.C.A. §1831u(a)(5)(B). The Missouri Division of Finance attempted to apply this rule to the Teambank merger. The court held that the rule did not apply in this situation because the instate bank was merging with an out-of-state bank. The bank attempting the merger was an instate Missouri bank. The bank being merged had its headquarters in Kansas. Therefore, if a "minimum age" rule applied, it should be from that state and not Missouri. Kansas had no such law. This "minimum age" rule here applies only to out of state banks attempting a merger with an instate Missouri bank.

The second argument from the Missouri Division of Finance was the relocation rule. The court held that the

relocation rule did not apply since there is a general presumption that a government cannot apply a statute retroactively. The relocation statute was passed in 1999. Teambank had moved its headquarters to Missouri in 1997. It was also held that the rule is inapplicable because the banks were not relocating to Missouri since they were already operating out of that state. The statute applies to a bank which is relocating to Missouri and not to a bank which already exists in Missouri. In addition, the court concluded that the relocation statute was contrary to the Riegle-Neal Act. The Missouri law determined a banks age from the date of moving into the state. The Riegle-Neal Act determines a banks age from the date of original existence of that bank as per Title 12 U.S.C.A. §1831u(a)(5)(A).

It is important to note that OCC's findings were given deference under *Chevron*.[2] Here the court felt obligated to give deference to the findings of an agency where that agency is authorized to administer the statutes in question. Before deference should be granted, such findings must be part of " 'relatively formal' administrative procedures, such as 'notice-and-comment rulemaking or formal adjudication.' "[3] Only if the OCC's decision is an "arbitrary, capricious, or manifestly contrary to law"[4] will the court not give deference to the decision.

3. Analysis:

Of the two banks in question, the bank attempting the merger (Teambank) was headquartered in Missouri and the other bank (FNB) was headquartered in Kansas. The Missouri "minimum age "statute applied to out-of-state banks merging with banks in Missouri. Therefore, this statute did not apply to Teambank. This statute was misapplied by the Missouri Division of Finance.

The Missouri relocation statute restricted out-of-state banks from attempting a merger with an in-state bank. This statute did not apply since it was passed after Teambank moved into Missouri. Generally, a statute cannot be applied on a retroactive basis. It also ran afoul of the Riegle-Neal Act allowing the federal law to preempt the state law. The conflict between federal law and Missouri law centered on the words "existence" when used in federal law and "relocated" when used in Missouri law. Federal law defined the age of a bank starting at its "existence." Missouri state law defined the age of a bank starting at its "relocation." The basic point was that the life of a bank cannot be calculated using both words and, therefore, federal law preempted state law.

B. Additional Branches – Bank of Guam, N.A. v. Guam Banking Bd.[5]
(Supreme Court of the Territory of Guam)

1. Factual Background:

The First Hawaiian Bank ("First Bank") made two agreements with the Union Bank of California ("Union Bank"). One was a Purchase and Assumption Agreement. This was for the purchase of all assets and liabilities of Union Bank. The other agreement was for the sublease of Union Bank's branch premise in Tamuning, Guam. First Bank then filed two applications. One application was for an approval from the Guam Banking Board ("GBB") for the establishment of a branch bank in Tamuning "at the same location where Union Bank was operating its branch."[6] This was granted by the GBB. Another application was for approval of this additional branch from the Federal Deposit Insurance Corporation (FDIC). This was granted by the FDIC. The entire matter, however, was disputed by the Bank of Guam ("Guam Bank"). The FDIC wrote a letter of opinion in which it supported First

Banks actions. Upon approval of the branch, Guam Bank filed a complaint in Superior Court of Guam to review the decision of GBB. The Bank of Guam cited two sections of the law of Guam for opposing the branch: 11 GCA §106601(c) and 11 CGA §106355(b). First Bank contends that 11 GCA §106601(c) is preempted by federal law and that 11 CGA §106355(b) is inapplicable. The court affirmed the GBB's decision. Guam Bank then filed an appeal to the Supreme Court of Guam. Judgment of the Supreme Court affirmed the lower courts decision based upon several sections of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.

2. Opinion of the Court:

Two issues were before the court: 1) Whether 11 GCA §106601(c.) is preempted by federal law and 2) Whether 11 CGA §106355(b) is inapplicable in the current situation. Since both questions are questions of law, they are reviewed by a higher court *de novo*.

The first question to be answered involved whether a preemption or a presumption against preemption should be held. Bank regulations have had a dual nature of oversight by both the federal and state governments in the United States. A presumption against preemption will exist in this case "since states traditionally possess a significant amount of authority to regulate the area of banking."[7] This means that the court will assume that the state law is valid unless a presumption could be shown through Congressional intent to the contrary.

Guam law 11 GCA §106601(c.) reads "no out-of-state bank having a branch office in Guam as of the effective date of this Act may establish any additional branches except and until it engages in an interstate merger transaction with a territorial

bank."[8] It should noted that this law applies only to out-of-state banks. First Bank stated that it was aware that the action of establishing a branch violated this section of the laws of Guam. Federal law "recognizes a state's authority to enact statutes restricting intrastate branching by an out-of-state state bank"[9] The argument against enforcement was based on Title 12 U.S.C. §1831a(j)(1). This section, known as the Non-Discrimination Clause, holds that the application of the law must be nondiscriminatory or applied equally to all banks. The court held that the Guam law did not apply to out-of-state national banks under two sections of federal law: 12 U.S.C. §36(c.) and 12 U.S.C. §36(f)(1)(A). The first federal law states that new branches can be established by a national bank if State banks also come under the State law. Guam law 11 G.C.A. §106601(c.) does not require compliance from State banks of Guam and is therefore preempted by federal law 12 U.S.C. §36(c). The court also found that the second federal law also preempted Guam's state law. Federal law 12 U.S.C. §36(f)(1)(A) states that the laws of a State must apply equally to both state banks as well as out-of-state national banks. Since this did not occur under Guam's law, the federal law preempted State law. The reason was that since Guam's law "does not apply to a host state bank, it cannot be applied to an out-of-state national bank."[10]

The court uses legislative intent and legislative history to further support its decision. The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 was stated as having as its chief aim to provide an equality between banks when confronting state branching laws.

Guam bank also attacked the opinion written by the FDIC. The court found favor with the opinion. First, the court recognized that the FDIC along with the Office of the Comptroller of the Currency (OCC) are administrative

agencies responsible for the administration of the Riegle-Neal Act. Second, the court held the FDIC opinion letter in high regard. "It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute."[11]

An interesting feature of preemption is that federal law does not necessarily automatically apply if a state law is struck down. Under title 12 U.S.C. §1831a(j)(1), a host state's law, if struck down, is replaced by the law of the home state. Host state is where the bank branch was to be established and home state is where the foreign bank is from. Before this takes place the court must examine the host state to see if another of its laws would apply. In this situation that happens. Guam law 11 GCA §106601(b) is applied. This law allows additional branch banks subject to approval of the Guam Banking Board (GBB).

Guam law 11 GCA §106355(b) states "[a]n out-of-state bank that does not operate a branch in Guam acquired through an interstate merger . . . may not establish and operate a branch in Guam through the acquisition of a branch."[12] The court felt that this law applied only to the initial entry of an out of state bank. The court took the two agreements by First Bank and concluded that "it constitutes an interstate merger transaction under the Riegle-Neal Act."[13] Therefore, since First Bank has already established a presence in Guam, 11 GCA §106355(b) does not apply to First Bank. The federal definition of merger under 12 U.S.C.A. § 1831u(g)(6)-(g)(7) includes the word "acquire."

3. Analysis:

A state court used the Riegle-Neal Act to justify the expansion of an out-of-state bank into the territory of Guam. The out-of-state bank did indeed purchase a bank that had

branches within Guam. Therefore, a presence did exist for First Bank. The host state bank, the Bank of Guam, was attempting to stop the expansion. When examined in totality, this expansion was really a simple change of ownership. The first Guam law, 11 GCA §106601(c.), was defeated on the grounds of discrimination. Failure to require Guam "state" banks to perform in the same manner as out-of-state banks required that the law be preempted. The second Guam law is more complex to analyze. Since a presence was established this law became inapplicable. Perhaps the most interesting aspect of the case was the determination of the presence in Guam of First Bank. The question is how was the initial presence established? It would appear that the purchase established the presence. The court never made a direct statement as to how presence was established. If Guam law applied only to an initial entry, was not the purchase and the sublease together the initial entry? Both agreements should be considered together under the Totality of the Circumstances Test? Another problem is the definitions of merger and acquisition. Federal law seems to include an acquisition within a merger. This would result in the Guam statute 11 GCA §106601(c) being preempted by federal law. I agree in the courts decision but find fault with its reasoning.

C. Relocation – Ghiglieri v. Ludwig[14]
(U.S. Court of Appeals, 5th Circuit)

1. Factual Background:

The Commercial National Bank of Texarkana (CNB) filed for approval from the Comptroller of the Currency (OCC) for two changes. The first petition was to move its headquarters to Texarkana, Texas from Texarkana, Arkansas. The second petition was to establish a branch banking operation at the former headquarters location in Arkansas. CNB operated

several branches in Arkansas. Both the Texas State Banking Commissioner (Commissioner) and the Arkansas State Bank Department objected to the applications of CNB. Only the Commissioner filed suit in federal district court against CNB and OCC. Summary judgments were sought by all the parties. Commissioner had five grounds for his objections:

- Relocation of CNB's main office violated federal law
- CNB's applications were defective
- CNB's alleged main office was really a branch office
- Former branch could not be retained after move of headquarters
- Creation of the new branch at the former headquarters site was prohibited

District court found for the Commissioner on the last two arguments. CNB and OCC appealed.

2. Opinion of the Court:

As to the claim that the former branch could not be retained after move of headquarters the appeals court reversed the trial courts decision. It was found that federal law was silent on the issue of whether a national bank, after relocating its main office in another state, could still operate its former branches. The court felt that the OCC's interpretation allowing such a move was within its power and reasonable in its reasoning. Deference was given to the OCC's interpretation.

The second issue on whether the creation of the new branch at the former headquarters site was prohibited was more complex. Under 12 U.S.C.A. §36(c,) the court found that a new branch can be established "within the limits of the city, town or village in which association is situated."[15] The one

requirement to this allowance was that the business must be authorized by the State. Since the branch is in Arkansas, Arkansas State law governs. The OCC used two provisions of Arkansas State law to justify its opinion. Ark. Code Ann. § 23-32-1202(b)(1) allows a bank to start a new branch "anywhere within the county in which the establishing bank's principal banking office is located"[16] (Arkansas county relocation statute). The court, however, declined to base its decision on this provision. Instead, the court used the second Arkansas State law provision cited by the OCC. In Ark. Code Ann. § 23-32-1202(b)(2) a bank is allowed to establish a branch bank at the former headquarters site "so long as the use as a banking facility is uninterrupted"[17] (Arkansas continual use statute). The reasoning of the court was that since a simultaneous application for removal of the headquarters and establishment of the branch were made, there was an uninterrupted banking service offered. Thus, the second section of Arkansas State law was met.

3. Analysis:

Both states (by the Texas State Banking Commissioner and the Arkansas State Bank Department) objected to the applications of CNB. Only Texas decided to file suit and this was over the relocation to Texas and the establishment of a branch in Arkansas. Only two reasons for the Texas objection survived the Federal District court and both dealt with the branch banks in Arkansas. The first objection was dealt with by the court in a rather quick and decisive manner. It was the second objection that was the more difficult issue. The OCC presented two reasons for allowance of the creation of a new branch at the former headquarters site. Here the court refused to comment on the Arkansas county relocation statute. Exactly how this statute can be used in branch relocations remains unclear. What was used as justification was the Arkansas

continual use statute. This statute simply requires that the headquarters is relocated and that the prior headquarters site be continually used as a banking facility. Relocation is not defined to be within the state. By reading the statute without a within the state restriction, relocation can be made anywhere.

D. Relocation – McQueen v. Williams[18]
(U.S. Circuit Court of Appeals, 6th Circuit)

1. Factual Background:

In a complex series of moves KeyCorp, a bank holding company, sought to consolidate its holdings in three different states into a regional national bank. KeyCorp filed three different applications to the Office of the Comptroller of the Currency (OCC). Application number one included:

- A conversion of Society-Michigan, a Michigan State bank, into Society-N.A., a national bank.
- Move the headquarters of Society-N.A. from Ann Arbor to Bronson
- Retain all existing branches in Michigan
- Convert the former headquarters (Ann Arbor) into a branch

Application number two included:

- Move the headquarters of Society-N.A. from Bronson across state lines to Angola, Indiana.
- Retain all existing branches in Michigan.
- Convert the former headquarters (Bronson) into a branch.

Application number three included:

- Merger the Indiana and Michigan banks (Society-N.A., Michigan with Society-N.A., Indiana).
- Retain all existing branches in Indiana and Michigan
- Move the headquarters to South Bend, Indiana

In addition, KeyCorp sought a fourth step: the new bank would relocate to Bryan, Ohio and then to Cleveland, Ohio. All of this was summarized in a news release by KeyCorp in 1995 in that the statement was made of a creation of a regional banking association. In a condensed package, the bank sought to move its headquarters to Ohio and merger along the way.

Several independent facts are relevant. Ann Arbor, Michigan had a population over 100,000 at this time compared with Bronson, Michigan, which had a population of 2,000 plus. KeyCorp through its bank, Society-Michigan, contacted the Commissioner of the Michigan Financial Institutions Bureau (Commissioner) twice. First was a meeting and second was through a letter outlining the steps that KeyCorp intended to take. "The Commissioner claims that the plan outlined in the letter is different from what the parties had discussed at the prior meeting."[19] The Commissioner went on to claim that KeyCorp used deception into trying to get approval for its plan of operation.

An objection to the plan was filed by the Commissioner with the OCC and a cease and desist order was filed by the Commissioner against Society-Michigan. Nevertheless, the OCC approved the KeyCorp applications. The Commissioner then filed suit in federal district court seeking a judicial review regarding the OCC's decision. Both parties filed for summary judgments. Trial court granted a judgment for OCC on all counts and the Commissioner appealed.

2. Opinion of the Court:

The standard of review of the issues is *de novo* since a summary judgment was granted. Deference is given to the OCC decisions. It should be noted that even with deference being given, the court must still review the OCC's decision to determine whether the decision was founded on permissible interpretations of the statutes used.

Initially the appellate court refused to look at the individual segments of the overall picture as independent moves. Instead, the Totality of the Circumstance Test was used where the court examined the entire effect of all the transactions. In doing so the court narrowed the problem into "two issues, either of which is dispositive of the entire case."[20]

The first issue was whether the move of the headquarters from Ann Arbor to Bronson was to be allowed. KeyCorp and the OCC viewed the move as a *de novo* designation of the headquarters of the Society-Michigan bank. The Commissioner viewed the move as a relocation. Here the Commissioner objected to the move on two grounds. First, if the Society-Michigan bank is classified as a State bank, approval from the Commissioner is required before such a move can be granted. No approval was given and therefore, the move is not valid. Second, if the Society-Michigan bank is classified as a national bank, the 30-mile rule comes in play.[21] This rule states that a main office (headquarters) of a bank can be relocated to within a 30-mile distance from the original main office of the bank. The move from Ann Arbor to Bronson was in excess of 30 miles and, therefore, the move is invalid again.

In reviewing the statutes regarding the designation of the move as a relocation or a *de novo* establishment, the court

found that "the statutes are silent on this issue."[22] The court found that the different between a *de novo* bank and a relocation is that the latter "had been operating as a business and was required by state law to maintain a 'principal office.'"[23] Therefore, this is not a *de novo* establishment of a new bank. The OCC tried to argue that a banks "principal office" and "main office" are different. Federal laws refer to the "main office" as being under the 30-mile rule. Michigan State law refers to a "principal office." The OCC tried to argue that move was of a "main office" and not of a "principal office." The court found no difference between the two.

In using a Totality of the Circumstances Test, the court found that the move was a sham. There was no business reason to move a headquarters from a city of 100,000 plus population to a small village of only 2,000 plus people other than to be within 30 miles of the next intended relocation. In essence the first application was a fraudulent action.

The second issue was whether the Doctrine of Competitive Equality or the Implied Retention Theory was the appropriate legal standard to be used. The court gave several findings:

- That branch retention is governed by Title 12 U.S.C.A. § 36 and therefore, state law controls.
- Title 12 U.S.C.A. § 30 is not independent from title 12 U.S.C.A. § 36.
- The Implied Retention Theory has no legal support and therefore, the Doctrine of Competitive Equality is the rule of law.
- The Doctrine of Competitive Equality under Title 12 U.S.C.A. § 36 requires equal treatment between national banks and state banks in that the national banks cannot accomplish that which a state bank cannot accomplish.

As a background to the legal conclusions it should be understood that banks under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 allowed states to opt-in or become part of the interstate banking system. Michigan had opted-in with the restriction that interstate banking was allowed only if the other state in the interstate transaction had also opted-in (a reciprocity requirement). Indiana did not opt-in. As a consequence, a Michigan State bank could not do interstate banking with Indiana under Michigan law. KeyCorp tried to circumvent this state law by going to a national bank status.

Under federal law Title 12 U.S.C.A. § 36 deals with relocation, while Title 12 U.S.C.A. § 30 deals with conversion. One of the questions the court looked at was whether the above two sections were independent of each other or tied together. Some courts have held that they are independent. This court rejected the findings of the 5th circuit in such respects and found that there was "simply no authority, in statute or applicable case law, for the OCC's 'implied retention' theory."[24] Even if the statutes were independent, the "relocation would still be subject to state law via § 36 (c.) and the firmly embedded doctrine of competitive equality."[25]

When looking at the actions of KeyCorp in totality, the court held that the actions were a sham transaction in attempting to evade state law. The conclusion was that "while a relocation itself may be permissible, the OCC may not approve a combination of applications that constitute an effort to evade the state's branching laws."[26]

3. Analysis:

On an individual basis, each of the applications might have been able to pass scrutiny. The problem for the bank was that

the court saw the final effect from all of the individual attempts as a maneuver to avoid state banking laws. With the news release from KeyCorp, it should have been clear what the overall objective of the company was. An interesting question is what would the effect of KeyCorp's attempted overall move be if the individual steps were taken? Suppose application number one was filed and KeyCorp waited for approval. Thereafter, KeyCorp would have filed application number two and again wait for approval. Finally, KeyCorp would file application number three. Patience might have resulted in a successful evasion of Michigan State law.

In comparing the two concepts that were used by the OCC and the Commissioner, the court examined the matter with the concept of what is a level playing field for all contestants. Since the Implied Retention Theory did not create equality between state banks and national banks, it was struck down.

III. CONCLUSION

The title of this paper refers to the question of whether the state banking laws have been preempted by federal regulations when it comes to interstate bank acquisitions. From the above case decisions the answer is a resounding "no." The cases indicate that the dual nature of the State and federal statutory requirements still exist in the United States. *Teambank v. McClure* shows that certain State laws, such as the "minimum age" law, are still valid even if other State laws, such as the relocation law, are clearly preempted by federal law. *Bank of Guam v. First Hawaiian*, using the Riegle-Neal Banking and Branching Efficiency Act of 1994, justifies a national bank to create additional banks within a state (or territory in this situation). Preemption of State law by federal law occurred here. *Ghiglieri v. Ludwig* highlights the point that a plaintiff State can contest banking actions in a foreign state if the bank

committing the action has a nexus with the plaintiff state. State law was used to help justify relocation. *McQueen v. Williams* proves that state banking laws have power in that a national bank cannot take individual steps to circumvent state law. Neither state laws nor federal laws are relied on exclusively in banking regulations

ENDNOTES

[1] *Teambank v. McClure*, 279 F.3d 614, (8th Cir. Feb 06, 2002).

[2] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[3] *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 2172-73, 150 L.Ed. 2d. 292 (2001).

[4] *Teambank v. McClure*, 279 F.3d 614, at 7.

[5] *Bank of Guam v. First Hawaiian*, 2003 WL 21051699 (Guam Terr.), 2003 Guam 9 (Guam Terr. May 12, 2003).

[6] Id. at 2.

[7] Id. at 3.

[8] 11 Guam Code Ann. § 106601(c.).

[9] *Bank of Guam v. First Hawaiian*, 2003 WL 21051699 (Guam Terr.), at 4.

[10] Id. at 5.

[11] *Clarke v. Securities Industry Ass'n*, 479 U.S.388, 403, 107 S.Ct. 750, 759 (1987).

[12] 11 Guam Code Ann. § 106355(b).

[13] *Bank of Guam v. First Hawaiian*, 2003 WL 21051699 (Guam Terr.), at 8.

[14] *Ghiglieri v. Ludwig*, 125 F.3d 941, N.D.Tex. (May 22, 1996).

[15] Id. at 3.

[16] Ark. Stat. Ann. § 23-32-1202(b)(1).

[17] Ark. Stat. Ann. § 23-32-1202(b)(2).

[18] *McQueen v. Williams*, 177 F.3d. 523, 1999 Fed.App. 0177P, (6th Cir. May 19, 1999).

[19] Id. at 5.

[20] Id. at 6.

[21]12 U.S.C.A. § 30(b).

[22] *McQueen v. Williams*, 177 F.3d. 523, 1999 Fed.App. 0177P, at 9.

[23] Id. at 10.

[24] Id. at 18.

[25] Id.

[26] Id.

SOCIAL SECURITY: PAST, PRESENT, AND FUTURE?

by

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Social Security is a tax that employees and employers are required to pay. This tax provides employees with four different types of insurance protection: Retirement benefits, disability benefits, life insurance benefits and health insurance benefits. The focus of this paper is the retirement benefits and the new reform proposals. Social Security also includes programs to benefit the aged, the blind and the disabled. The Social Security Administration became an independent government agency in 1995. The future of Social Security is uncertain. Many new reform ideas have been proposed. If the system is not altered soon, it may eventually begin to fail. In the immortal words of an addendum to the Social Security bill, Mallard Filmore, cartoonist, "STOP ROBBING SOCIAL SECURITY TO PAY FOR OTHER STUFF!!"

It should be noted that the system needs some adjustments but it does not need to be destroyed it in order to "fix it". As stated by the prominent defender of the Social Security system, the American Association of Retired Persons (AARP), "*if you have a problem with the sink, you don't tear down the entire house*". Let's not turn Social Security into Social Insecurity.

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Yes, the program is in need of reform, which can be done with a few moderate changes, but it is not in need of a radical overhaul. Creating private accounts that take money out of Social Security is an extreme measure that will hurt all generations and could add up to two trillion dollars in more debt. If such is the case, our children and grandchildren will be stuck with the bill.

I. HISTORY

In 1935, while facing America's largest recession ever, President Franklin D Roosevelt proposed and Congress passed a program known as Social Security. This new program served as a response to high poverty rates among the elderly.[1] In addition to protecting the elderly, Social Security also provided survivor and disability benefits to every eligible American citizen.[2] This program began as a safety net to make sure people received benefits at the retirement age of sixty-five,[3] based on an individual's years of service in the workforce.[4] Relying on a pay-as-you-go system, Social Security benefits were originally designed so that current workers would be supporting the current population of retirees, relying on the promise that they would be supported during their retirement in return. Social Security was designed as a system where everyone working pays, and many receive. It was strongly supported in its early years. Social Security was a great success reducing the poverty rate among elderly citizens from fifty percent in 1935 to eleven percent in 1996.[5] Social Security was the most popular government run program of the last sixty years.[6] The program was especially appreciated by those individuals who have received the benefits.[7]

Today most of the payroll taxes are distributed directly to the retirees.[8] When a surplus exists, the remaining taxes/funds

are borrowed by the Treasury Department to meet other current expenses of the government.[9] During the Clinton administration a surplus existed because the Baby Boomers were paying taxes, while the smaller generation of people born during the Great Depression and World War II were retiring.[10] However, it is evident that in the future when the Baby Boomers retire, there will not be enough workers in the work force to pay for Social Security benefits for all of these individuals. Due to its significance in the economy, Social Security is closely observed by the elderly, those approaching retirement age, critics, and economists. Every four years, the president appoints a group of thirteen private citizens to review the long-term prospects for Social Security.[11] Some of the recommendations produced by these groups have led to significant changes in Social Security.[12]

Today, most retired Americans rely significantly on Social Security as a portion or as all of their future income. Social Security and Medicare currently account for one-third of total federal spending.[13] Of the 44 million people currently benefiting from the Social Security program, two-thirds of the people receiving Social Security benefits rely on it to provide for half of their income.[14] One-third of recipients rely on it to maintain a status above the poverty line[15] and for ten million Americans on Social Security is their entire income.[16]

Unfortunately, over time many aspects of the economy have changed threatening the future of social security. The cost of Social Security taxes in the early years of the system amounted to only a few hundred dollars a year.[17] Today many individuals are paying $8,000 a year in Social Security taxes.[18] Social Security is the largest current payroll tax that Americans are subject to paying.[19] If the system is not soon reformed, it is evident that the poverty rates among elderly will return to those of 1935.

II. PROBLEMS FACING SOCIAL SECURITY

A. The Truth about Social Security

Social Security in its current form is headed toward failure. It is currently financially and politically unsustainable.[20] Due to changes in demographics that were not addressed as they occurred, Social Security is in dire need of immediate reform. If these reforms are not made, the system faces failure. When Social Security was initiated the average male lived to be sixty-two, while the retirement age was set at sixty-five.[21] The average male lives to be seventy -two today; but, the retirement age remains at sixty- five years six months.[22] The number of elderly individuals in America has seen a dramatic increase. In 1940, the population of people over sixty-five was only seven percent.[23] It is projected, that by the year 2050 more than twenty percent of the population will be over the age of sixty-five.[24] When Social Security began, twenty-five contributors paid Social Security taxes for each recipient.[25] In 1950 the worker to retiree ratio dropped to sixteen to one.[26] Experts estimate that by 2030, the ratio will drop to two contributors for each retiree.[27] In 1980, new retirees recovered the value of their payroll tax contributions in only three years.[28] In 1996, that number jumped to fourteen years to recover the value contributed.[29] Estimates show that it will take twenty-five years for people who retire in 2030 to recover the value of the payroll taxes they contributed.[30] If this estimate is accurate, it means that workers must live to the age of ninety to break even on Social Security.[31] These statistics alone show the major faults of the Social Security system and indicate at the same time that America has been living beyond its means for a long time. [32] There are various arguments pro and con of whether or not the system needs reorganization.

B. That Baby Boomer Dilemma

Social Security will face the biggest challenge in its sixty-six year history in the next few decades when the 76 million baby boomers begin to retire, forcing the Social Security system to reform. The pay-as-you-go system works well in times when workers significantly outnumber retirees; however, the system will begin to face great difficulty when the number of retirees becomes larger than the number of workers.[33] As the current generation of workers begins to retire, they will produce enormous bills that younger workers will not want to pay.[34] These large bills have the potential to create a huge deficit.[35] The government cannot deny this group their retirement benefits; however, it is unfair to request that the younger generation of workers pay extra taxes to cover retirement benefits for the older generation and their own.[36] The older generation is beginning to fear that their benefits may eventually be reduced. This situation has obviously caused a great degree of fear and anxiety in the older generation.

On the other side of the issue, the younger generation is not free of worries. The younger generation fears that they will pay Social Security taxes and never receive any of the expected benefits. The younger workers are a smaller generation due to the lower fertility rates since the 1960's. [37] It is impossible for such a small group of people to pay off the benefits of the retirees rate**,** without enormous increases in taxes, or a reduction in the Social Security benefits and an increase in tax rates to where they were immediately preceding President Bush's program which will require an income tax increase, by rate or higher income base for the tax. Cutting benefits now for the older generation is also unproductive.[38] This procedure would simply make a bad deal worse, especially for the

younger generation which already expects a low return on their taxes.[39] The younger generation is realizing that even if they do receive all of their currently projected benefits, they would still only be receiving an interest rate around one percent.[40]

It should also be noted that the Federal Government has used the funds which were allocated and collected for Social Security and then utilized same in order to balance the budgets. This could have made a substantial difference. As contributors watch the future value of their payroll taxes deteriorate, they are realizing the present system is unappealing.[41] The current system of Social Security may be outdated, but it does, however, provide a monetary cushion to its recipients.

C. Different Views of Social Security and its Problems

Despite being a major concern for America, Social Security is often left untouched in politics. According to Stephanie Ward, manager of government relations for Ceridian Corp, "The success of Social Security also has made it the 'third rail' of American politics - - touch it and politicians are practically guaranteed to lose office."[42] Some politicians have discussed Social Security reform but, most avoid the issue as it is an explosive political topic thought to be a "no-win" situation. During the Clinton Administration Congress began recommending serious proposals for reforming Social Security.[43]

Different analysts have various views of Social Security. Some consider Social Security a tax. However, when looked at from this perspective it is regressive and has been found to hurt the people of lower income.[44] Others view Social Security as a savings plan. If this is the case, it is a very unrewarding savings plan. The average return is only one to two percent return. Nevertheless, a recent study in the State of Texas

showed that private accounts and private plans earn far less than the Social Security plan.

Many proposals include an increase in taxes. A reform proposed by the late Senator Moynihan suggests a minimum of a thirty percent increase in taxes by 2012.[45] Another problem with reforming the system is the significant cost America faces while transitioning from the current system to a new one.[46] President Clinton proposed a reform policy that would have increased taxes, while cutting benefits to the retirees.[47] The proposal was unpopular and would have maintained the current system for a few additional years, but it did not offer a solution.[48] An argument raised with the Bush Administration is that with fewer workers paying taxes to support a large amount of retirees, Social Security will go bankrupt without a valid reform. The actual facts do not sustain this position..

Americans are also more dependent on the Social Security system today than they were in the past. The system was intended to provide a minimum income to protect against poverty among the elderly; however, many people are counting on this money to support them during their retirement.[49] Social Security Commissioner Kenneth Apfel stated that many people sixty-five and older rely on Social Security for forty percent of their income.[50] Reliance on Social Security increases to eighty-one percent for people who fall into the lowest income bracket.[51] Americans are not prepared for the failing Social Security system, many have failed to open private retirement accounts. The Labor Department reported that twenty percent of Americans do not have independent savings for retirement.[52] Many Americans are also not provided with a savings plan through their employer and only fifty- three percent of Americans have an employer-provided retirement plan.[53] The situation is even more dismal for those individuals working for a small business. Eighty percent of workers in small businesses

do not have an employer-provided retirement plan. One can see the necessity for reform. Many Americans have poorly planned for the future. In the event that Social Security retirement benefits are cut, low-income retirees will likely be forced into poverty.[54]

Employees are not the only people affected by the failing Social Security system. Employers and human resource departments should show concern about how the changes will impact Social Security.[55] The current system will cause an increase in payroll taxes for both the employee and the employer, in addition to reduced retirement benefits.[56] The taxes would have to be increased from 12.4 percent to 14.6 percent, or an 18 percent increase, today to maintain the system for 75 years.[57] The failure of the system will cause problems for employers who integrate their own pension plans with Social Security.[58] Some employers may even have to boost their pension plans to compensate for reduced Social Security benefits.[59]

III. SOCIAL SECURITY REFORM PROPOSALS

Numerous proposals are being discussed to reform Social Security, including privatization and an increase in the retirement age. Even within these two main proposals, various ideas are being proposed by many different people. The Clinton administration laid the ground work for Social Security reform and brought the topic into the public eye. Most younger Americans under 55 favor the idea of privatization, but it is too early to make a decision on the best reform proposal. In reality the best reform, may be a combination of many different new policies.

A. The Clinton Administration

During the Clinton Administration, Congress made its first real steps toward creating realistic Social Security reform proposals. Shortly before leaving office, President Clinton and Congress proposed the "lock box" plan. The "lock box" plan consisted of a plan to reserve surpluses generated by payroll taxes for Social Security only.[60] Previously, surpluses were loaned to the Treasury to benefit other departments, including education and defense.[61] While little was accomplished in regard to Social Security reform during the Clinton Administration, the first tentative steps were taken.

B. Raising the Retirement Age

An increase in the retirement age has received enough support to be considered one of the strongest proposals. Currently the retirement age is gradually increasing until it reaches sixty-seven in 2027.[62] Increasing the retirement age is a sensible idea, because it has not been raised since the program began; however the average life expectancy has increased by approximately ten years.[63] However, this proposal poses serious challenges for the workers and their employees that must be dealt with before any additional reform can be implemented in regards to the retirement age.

People realize that the retirement age of sixty-five years six months is quickly becoming a thing of the past. New laws are already increasing the age, with discussions of increasing it again. Currently, proposals suggest the retirement age be increased to sixty-seven by 2011.[64] A gradual increase to the age of seventy is then suggested.[65] Many proposals find it necessary to link the retirement age to the average life expectancy. Had this proposal been implemented in 1935, the current retirement age would be seventy-two.[66]

To some, Social Security reform stretches beyond retirement benefits. The proposal of increasing in the retirement age, while almost necessary, is extremely unpopular, especially among the elderly citizens. The elderly are beginning to fear that they will be forced to work much longer than their predecessors.[67] Not only do the workers not want to work longer, many of them may be physically incapable of doing so. In response to the physical limitations of the workers, employers are faced with the challenge of retaining and accommodating the workers.[68] In addition to this, older employees may have additional needs that the employers will have to respond to. In order to perform effectively, older workers may need to work different hours or in different conditions.[69] Employers must also deal with age discrimination complaints. "Age discrimination complaints comprise twenty percent of charges filed with the Equal Employment Opportunity Commission".[70] It is feared that the increased retirement age will cause legal complaints in regard to age discrimination to become more prevalent.[71] Younger workers will also be negatively affected by this policy. Employers will have to expand diversity training to include new issues related to the increased retirement age. Issues will include dealing with age differences, operational hostility due to decreased turnover, and fewer advancement opportunities for younger workers.[72]

Some employers will be benefit from the increased retirement age. Because the number of younger workers is expected to be limited, employers will struggle to find the skilled workers they need.[73] Employers will benefit by having their skilled workers working longer.[74] As employers begin to face labor shortages, they will try to recruit and maintain their experienced employees.[75] "The organization that first succeeds in attracting and holding knowledgeable workers past traditional retirement age, and makes them fully productive,

will have a tremendous competitive advantage," says Peter Drucker, author of Management Challenges for the 21st Century.[76]

C. Privatization of Social Security Benefits

Privatization is the most popular proposal by conservatives in connection with Social Security reform efforts. Privatization would impose more fundamental changes than increasing the retirement age, but if successful, privatization could save the future of Social Security.[77] Most reform proposals for privatization suggest having two elements of social security.[78] The first element would be reduced traditional Social Security benefits.[79] The second element would create an additional potential benefit created by investing funds in private retirement accounts.[80] The members of the commission to review Social Security all agree that some of the money, which exceeds 400 billion dollars, should be invested in the stock market.[81] This proposal is popular because it seems as if it will offer better benefits. In the view of the authors however, it is a panacea of fantasy to believe that this will be a long term solution. The stock market has shown to be extraordinarily volatile. It should be noted that private investment accounts in the Galveston Texas experiment are earning less than what the Social Security system has been earning annually.[82] There are several other issues that should be addressed.

The privatization proposal includes reserving a portion, approximately one to five percent, of the existing payroll tax, adding a new tax, such as a 1.6 percent increase, or setting aside budget surpluses and distributing this money to personal retirement accounts.[83] Proponents argue that private market investments will provide a better return over time.[84] "The Social Security Administration estimates that during the 20th century, the real annual return on stocks amounts to 7 percent,

compared to 2.3 percent for federal government bonds," stated Stephanie Ward.[85] The combination of Social Security benefits and privatization is expected to provide a return of between four and five percent.[85] The increase in return is a promising characteristic of this proposal. Of course, the possibility of an increased reward brings with it a greater risk. Privatization eliminates the universal benefits of Social Security.[87] The returns on investments will now be partially dependent on the stock market.[88] Individuals who make poor investment choices may face poverty.[89] Privatization does offer a potentially increased reward; however, it may prove to be unstable.

Initiating privatization will be a complicated process, and it is not guaranteed that the United States financial institutions can handle an increase of almost 200 million accounts.[90] Currently 144 million people are in the workforce with 44 million retirees.[91] This number is eighty-three times larger than the current largest public defined contribution plan.[92] The United States' financial institutions are currently only holding 31 million accounts.[93] Serious investigations would have to be done to determine if opening nearly 200 million new accounts is even feasible.

As with increasing the retirement age, privatization also imposes new duties and obligations on employers. Employers will be responsible for educating their employees about their investment choices and how they interact with employer-provided pension plans, 401 (k) plans, and additional employee savings plans.[94] Because many employees lack financial knowledge of many employees, they will seek advice from their human resources departments, imposing a new demand on employers.[95] Employees will also expect access to information on personal benefits and investment information.[96] By providing self-service access to information employers will be helping employees, while also placing more liability on the individuals, rather than the employer.[97] Individuals will also

be able to monitor their individual results.[98] While this new process of education may seem like an inconvenience to the employer, it may prove to be extremely beneficial to the employee. The employer will also benefit by educating the employee, because it will receive a small portion of the employer's liability.

It should be noted that the "guru" ability of investment advisors or experts doesn't exist. Privatization will bring in a great deal of speculation and doesn't take into consideration the vagaries of market turbulence and "crashes". The government will also face new duties as a result of a Social Security reform involving privatization. The government will now be forced to oversee that employers comply with new standards in regard to managing private accounts for its employees.[99] The government will enforce compliance in order to limit liability.[100] Without strict enforcement of new policies and education on these policies, many individuals may make unwise decisions, destroying their retirement funds. The government is providing the public with a great service by enforcing compliance among employers.

IV. BENEFITS OF SOCIAL SECURITY REFORM

The upside positives of reforming the Social Security system on the surface may appear to be endless. The reform will provide benefits to workers, retirees, and the United States economy. With the current failing system, workers are skeptical of the system and the possibility of receiving what has been promised. Workers will gain from the reforms because they are ensured that a form of Social Security will still exist when they retire.[101] Without intense worries, the workers should be more willing to pay taxes to support the current retirees.[102] The assurance of the workers then benefits the retirees. The new system also gives hope of an increase in

benefits.[103] Proponents claim that if privatization is implemented payroll taxes will be reduced significantly and possibly even eliminated.[104] This seems overly optimistic as well as unrealistic. Workers also benefit by gaining limited control of their retirement plan, with a chance at complete freedom to choose how much they rely on privatization and Social Security.[105] By combining privatization with the current Social Security system the economy is expected to strengthen. Some economists are expecting an increase in national savings, investment, and economic growth.[106] Reform will assist in modernizing the United States' outdated system.[107] One of the most important benefits is the limited cost of transferring to a new system. The cost of the transfer is temporary because the revenue loss will be offset by lower amount spent on Social Security. [108]

These arguments seem to be specious in that the lowest income earners spend the most of what they earn, thus at the end will have very little saved or less than what Social Security could have provided. This can create the same problem that existed prior to the enactment of Social Security, i.e., more welfare and poverty for the elderly, the 4.6 million widows and widowers, the 6.4 million disabled workers and the 4 million children currently covered under our Social Security system.

V. SUCCESS OF SOCIAL SECURITY REFORM ABROAD

Proponents may try to show that privatization has proven successful around the globe. Throughout the world, twenty-nine countries rely on private savings and insurance in place of some or all of the normal public Social Security benefits.[109] Thailand and South Korea, two of the worlds fastest growing countries are completely reliant on private investments to provide retirement benefits.[110] Japan, Australia, India,

Malaysia, Finland, Great Britain, and Chile have all began to include privatization as a part of their retirement benefit program.[111] For almost ten years, Chile has provided workers the option to pay into a private alternative system rather than the country's social security system.[112] The returns on the individual savings accounts finance the workers' benefits in retirement.[113] Chilean workers also have the option to use payments to purchase life, disability, and health insurance.[114] Social attitudes toward business and industry have changed in Chile with ninety percent of Chilean workers now using a private system. Great Britain has also experienced an amount of success with a similar plan. Workers in Great Britain were allowed to opt out of nearly half of the country's Social Security benefits, and pay into employer-sponsored pensions instead.[115] Half of the workers are now using private pensions and have an enhanced worker loyalty.[116]

VI. ANTI - REFORM ARGUMENTS

While the vast majority of Americans realize that Social Security reform is desperately needed, the proposals to change the system still face resistance. Many people are hesitant to drastically change a system that has been functioning productively for almost seventy years. Pursuing a proposed reform would be the most radical change in Social Security since it was established.[117] Others choose to ignore the threat of failure in the future, stating that the system works fine at the moment.[118] Many recognize that the system has enough money to pay promised benefits now, and for approximately twenty additional years.[119] Some opponents of reform fear the transition to a new system will be too costly.[120] If the money collected through taxes is all invested in private accounts, the government would need to find money to provide current retirees with their deserved benefits. Many of the people opposing Social Security reform fail to see the big picture. It is

evident that Social Security currently works as it is. However, it is possible that the benefits of privatization will be greater for workers than their current benefits. It is also understood that while the system is working today, it will begin to fail in the future. In order to provide a brighter future for American workers, the problems with the Social Security system need to be addressed and reformed today.

One of the major issues which the government has never addressed in its long -term Social Security financial problem, is the fact that illegal immigrants are bolstering Social Security with billions of dollars.[121] It is impossible to know the exact number of immigrants making payments, but it is estimated by the government through the Government Accountability Office, as well as the Social Security Administration, that in the current decade there has been a mushrooming of payments by illegal immigrants and their employers for Social Security taxes. It is estimated that six to seven billion dollars of the Social Security tax revenue and about 1.5 billion dollars in Medicare taxes have been paid by persons who will never secure any benefits because they are filing false papers and documents in order to secure the jobs. They move from location to location and job to job in order to remain employed. Their geographic distribution is far and wide in the United States.

VII. CONCLUSION

Is the current Social Security system really at death's door or are rumors of its demise greatly exaggerated? Several myths have to be addressed. The first myth as presented by President Bush is that the Social Security system requires a dramatic reorganization and that Social Security is not sustainable in its present form. The argument presented is that with privatization, a portion of the Social Security taxes now paid

would be diverted into an account that each taxpayer would control themselves. (Under the current system, all surplus Social Security revenue is invested in special U.S. Treasury Bonds). The facts show that Social Security is in better shape today than at any other time since it was enacted in 1935. This was accomplished by adjustments made during the Reagan Administration in 1983. Since then, the trust fund reserves have gone from nearly zero to 1.6 trillion dollars.

Social Security trustees acknowledge that by 2028 the system will need to begin redeeming the bonds in its reserve, but they calculate the fund will be able to meet 100% of its obligations until 2042. By that date, the principal will be exhausted but the system will still bring in enough revenue from the taxes collected and will be able to pay nearly 75% of the benefit amounts. The Congressional Budget Office has presented a report that says the system will be able to pay full benefits until 2052 and 80% thereafter. Income tax revenues combined with interest earnings from trust reserves will still be enough to maintain a positive trust fund balance and pay benefits. Clearly, the system needs to be fine-tuned, but "dismantling the whole system would be like buying a new car because the one you have has a flat tire," observed Peter R. Orschag, a senior fellow of economic studies at the Brookings Institution in Washington, D.C.

The argument that Social Security reserves exist only on paper is false. The paper is U.S. Treasury Bonds which have been earning a combined interest rate of about 6% a year. U.S. Treasury Bonds have always been paid off and are one of the safest investments in the world. In the year 2003, some 80 billion, about 13% of Social Security's total income came from interest on these bonds.

Social Security can be strengthened by making small adjustments just as we have done in the past. These include raising the cap on wages subject to Social Security (currently for taxes on income up to $90,000.00) and investing part of the Social Security surplus in other vehicles that pay higher interest than Treasury Bonds do. The authors are opposed to privatization as it could effectively scuttle Social Security. Siphoning money from Social Security will not strengthen it. It will just make the problem worse.

The transition costs caused for those who favor privatization would be crushing. They are estimated as high as two to three trillion dollars according to AARP's economic analysis. The amount of additional national debt that would generate could eat into any returns people might actually get from a private account system.

Diverting a portion of Social Security money to private accounts would mean there would be fewer dollars available to pay Social Security benefits. That would leave less of a reserve as well as less cash on hand to pay beneficiaries thus resulting in hard choices as to whether or not to cut benefits, raise taxes or watch the trust fund dissipate sooner. Some of the issues that have not been discussed are what is to become of Medicare or Medicaid? Also, there is concern that it will increase the welfare rolls as a result of a possibility of failure of the privatization of Social Security. As previously noted, what is to become of the widows, widowers, disabled persons and children presently dependent on Social Security in the event the new proposals fail.

There is a crisis brewing in a vital government entitlement program. The program in need of emergency treatment is not Social Security, but Medicare. During March 2005, the Medicare Trustees Annual Report released made it eminently

clear, that premiums and government spending are soaring. It is anticipated that Medicare will fall in the red decades sooner than Social Security. Medicare spending will definitely outstrip Social Security spending and it is a looming crisis that deserves a high priority in Washington.

The White House reports that Medicare already had its moment in 2003 when the prescription drug benefit was enacted. Officials have suggested that they get the benefits on line in 2006 before doing anything more. This appears to be a very specious argument. Medicare's getting little attention from the government because its problems are thorny and ideas for solving them are in short supply.

Another method to consider is to change the statute that paid Social Security to full-time employees when they reach the age of 65. Raising the age at which workers are eligible to receive benefits should create a substantial reserve. Also, it might be better to pay only those who retire and not those who are full-time employees. At present, one may continue working and receive full benefits at age sixty-five years six months. Last but not least, the funds taken from the trust over the years should be returned and to reverse all of the income tax reductions granted by the Bush Administration.

Social Security clearly needs to be reformed. Within a few decades the system will face enormous deficits if the problematic issues are not addressed immediately. It is clear this system was created with great intentions to help the people of that time period. However, demographics and the economic situation in the United States have changed drastically. The system has become outdated, and is in desperate need of modernization. If the system begins to fail without a new or modified system in its place, the consequences may be detrimental for many Americans. Without retirement plans,

and with the inability to work due to old age, the poverty of the elderly may become a prevalent problem in the economy again. For many Americans it is too late to start a retirement savings account that will amount to enough money to live comfortably with. For those individuals who are already retired and those who will soon retire without individual retirement plans, they will not be able to survive without the Social Security retirement benefits they are relying on. It is evident that the citizens of the United States heavily rely on the system and it is up to our political leaders to ensure that the system lasts for many more generations.

No clear answer exists for solving the Social Security problem. It appears that the best solution is to include a variety of changes to the system. Simply increasing the retirement age or changing all accounts to privatization will not solve the problem. All interested parties need to look to other governments and see what they have done to successfully bring about this change to their own Social Security programs. If foreign nations can make it work, the United States should be able to establish an equally beneficial program. It is most important that all changes be enforced gradually.

Increasing the age of retirement is a necessity in reforming the Social Security system. With modern technology people are living longer and healthier lives. The government needs to consider the 10 year increase in the average life expectancy of people since 1935. The retirement age should be increased gradually over the years in correlation with the average life expectancy.

The United States must also immediately begin to investigate the possibilities of transferring a portion of the payroll taxes into private accounts. This process is enormous, and will definitely be challenging. With so many similar programs already established in foreign countries, however, the

United States should be able to come up with a system that will work efficiently in our economy. But it is clear that with the right educational programs for employees, privatization has the potential to provide huge benefits to both United States citizens and the United States government.

There is no right or wrong answer in this case; however, some solutions seem preferable to others. Any option that provides more benefit than the current system would be considered a major success among the worried and frustrated citizens. The main goal of the government in its quest to find the perfect solution should be to maintain benefits without increasing the burden of taxes.

It should be noted that simply rejecting outright the President's privatization plan will not be enough. The country needs to strengthen Social Security's finances with a long-term, progressive package of tax and benefit reforms making it truly easier to save for retirement. There are many good ideas being proposed for both of these goals. They are waiting for politicians and government officials who are courageous enough to champion them.

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PROSTITUTION: AN ANALYSIS OF MODERN DAY SLAVERY

by

Martin Han Clarke and Winston Spencer Waters*

"Neither slavery nor involuntary servitude… shall exist within the United States."[1] Although the Thirteenth Amendment provides that slavery shall not exist within our borders, it is not clear whether it curtails allowing domestic corporations from engaging in the use of slave labor in foreign settings. This paper will analyze modern slavery in various settings. We will first attempt to define slavery as it exists today. We will then look at militarized commerce in foreign countries where multinational corporations have engaged in the use of forced labor to gain profits despite knowledge of such abuses. An analysis of current cases in the field will be made along with an analysis of the Alien Tort Claims Act (hereinafter referred to as, "ATCA") and other remedies and legislation used to allow redress for victims of modern day slavery. We will then review slavery in the sex trade industry including trafficking, profiles of victims, current domestic legislation and international policies towards the prevention of prostitution.

This paper will review slavery in other industries such as manufacturing, textiles and agriculture. We will also review alleged abuses of slavery and forced labor domestically. This paper will address the recent reparations issues concerning

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the interment camps of World War II in which former Japanese-American prisoners have sought repayment of lost assets. This paper does not explore the recent claims for reparations against German companies which utilized forced labor from concentration camps during World War II. We will not explore the "happy worker" prostitution topics associated with Asian women during World War II. Rather, this paper will review the current state of slavery throughout the globe.

I. Slavery

The Rome Statute of the International Criminal Court defines enslavement as "the exercise of any and all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.[2] "White Slavery" was a term created in the 20th Century to describe prostitution.[3] Though somewhat dated, the term still appears in descriptions of the trafficking of women for prostitution.

The *Doe v. Unocal* case, discussed below, held that a military's use of forced labor by villagers was a "modern version of slavery."[4] The court arrived at this determination by stating courts have included forced labor in the definition of the term "slavery" in the context of the Thirteenth Amendment. "The undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of *completely free and voluntary labor* throughout the United States."[5]

The Ninth Circuit Court of Appeals decision in *Unocal* stated that forced labor equaled slavery, citing *Pollack v. Williams,* 322 U.S. 4, 17 (1944). The case cited a number of federal cases holding that forced labor was a modern variant of slavery. However, there isn't consensus that forced

labor is equivalent to slavery. The League of Nation's Slavery Convention, the International Labor Organization Forced Labor Convention and other conventions have all distinguished forced labor from slavery, allowed the use of forced labor for public purposes.[6] Indeed, the United States Constitution allowed involuntary servitude as a punishment "for crime whereof the party shall have been duly convicted."[7] It is not clear as to whether international law has seen fit to classify forced labor as a wrong which all nations would define as violations of *jus cogens* norms. These norms go beyond customary law. Some countries, such as Myanmar, have attempted to use semantics in order to avoid calling forced labor slavery. They classify slave labor as "voluntary labor" on the
part of individuals. Myanmar military's use of forced labor is more akin to a public service requirement of limited duration than to slavery.[8] These conscripted workers
have no rights and have been brutalized.

Professor Tobias Wolff raises an interesting question as to whether an American citizen could own a slave so long as that citizen did not bring the slave to the United States.[9] 18 U.S.C. § 1583 was passed in 1866 to prevent individuals from kidnapping free persons and transporting them to territories and countries which permitted slavery. Could that individual be held liable in the U.S. for owning that slave? We will discuss, *infra*, the case law behind establishing a claim against an individual for violations of international law in a United States federal court of law.

Slavery is common in many parts of the world today. The Central Intelligence Agency estimates that up to 20,000 slaves are sold into the United States a year.[10] There are an estimated 27 million people in slavery today. By far the most common

form of slavery is bonded servitude wherein an individual must work to pay off debts that may contain enormous and outrageous interest rates. A seventy (70) year old man was recently freed by the International Justice Mission, he had been working since 1946 to pay off his parents Four ($4.00) Dollar loan.[11] There is active slave trading in Sudan; children being used in the textile trade in Pakistan, cane cutters in Haiti and the Dominican Republic along with countless other atrocities in many countries including the United States. Around the globe there is an active slave industry which appears to continually thrive due to non-prosecution. The international community has long recognized that slavery was wrong. The 1948 Universal Declaration of Human Rights stated prohibitions against slavery.[12] A number of other international Conventions will be discussed below.

II. Types of Slavery

A. Use of Militarized Commerce by Corporations

Militarized commerce describes the process by which the military of a country will force indigenous peoples to work under the threat of violence. Corporations doing business with those countries profit from this type of forced labor. Many of the victims of such forced labor programs are now seeking redress against the governments that enslave them presently and/or in the past as well as the corporations that have profited from them.

1. Doe v. Unocal

The country of Burma was the subject of a *coup d'etat* by the military. The new regime, called the State Law and Order Restoration Council, renamed the country Myanmar.[13] As part of the change in government, the new military regime created the Myanmar Oil and Gas Enterprise (hereinafter referred to as "the

Enterprise") with the intent to utilize the country's natural gas resources and to attract foreign investment into the country.[14] The Enterprise created a joint venture with Total, SA, a French entity, to process and transport oil from the Tenasserim region of the country by way of a pipeline.[15] The fuel was to be sold to neighboring Thailand. The Myanmar military was assigned the responsibility of providing the labor, materials, and security while "Total, SA" funded, organized and monitored the project.[16] Unocal, an American corporation operating in the State of California, joined the venture by purchasing a forty-eight percent interest in the venture. The Myanmar military was alleged to have used the villagers, mostly members of the Karen ethnic minority, as slaves to clear the dense jungle for the pipeline, build the infrastructure for the pipeline and to serve as porters for Unocal, Total and military personnel.[17] Several villagers and former Burmese government factions brought claims against Unocal and the Myanmar military as a result of the forced labor.

The plaintiffs in the *Unocal* case alleged both the Myanmar military regime and Unocal were liable for the military's forced labor, murder, rape and torture of Myanmar villagers.[18] One plaintiff stated that her husband attempted to escape and as retaliation, she and her child were thrown into a fire resulting in the death of her child.[19] Further, there were allegations that villagers who refused to work or who were too weak to work were summarily executed.[20]

The military government of Myanmar has a horrendous record of breaches of international law and human rights abuses. Former President Clinton enacted conditional economic sanctions against Myanmar as a result of these abuses.[21] Notwithstanding these known abuses, Unocal entered into the joint venture with the Myanmar military.

The *Unocal* case is actually a series of cases held over a seven-year period. Because of different plaintiffs, there have been multiple and conflicting holdings in the case against *Unocal*. In *Doe v. Unocal Corp*, 963 F. Supp. 880 (C.D. Cal 1997), *Unocal* was sued in the Central District Court of California under different theories of liability including international aiding and abetting theory, violations of the Alien Tort Claims Act, Racketeering Influenced and Corrupt Organization Act liability and as a state actor.[22] A central issue in the case was whether an American company could be held guilty for international law violations committed by a state actor. Another issue was whether the company could be sued within a forum in the United States. The Alien Tort Claims Act, which will be discussed in further detail below, allows a foreign party to sue an American company in a United States forum for violations of international law.[23]

The District Court initially dismissed the case stating that the Myanmar Enterprise as the alter ego of the Myanmar military, was immune from claims because of the Foreign Sovereign Immunities Act.[24] The District Court reviewed the plaintiff's claims against Total, and as it was a foreign company, dismissed the claim. Finally, the court stated that the plaintiffs did not have a case against Unocal as they lacked evidence to establish that Unocal actively participated in the forced labor of the villagers.[25] In the initial court case against Unocal, the court focused on Unocal's awareness of the alleged use of forced labor. However, there was evidence that correspondence was sent between employees and Unocal. This correspondence could have lead one to believe that Unocal entered into the joint venture with knowledge that the company was going to be benefiting from slave labor. In 1995, Unocal's own consultant stated that it was his "conclusion that egregious human rights violations have occurred and are occurring now, in southern Burma. The most common are forced relocation without compensation of families

from land near/along the pipeline route; forced labor to work on infrastructure projects supporting the pipeline and imprisonment and/or execution by the army of those opposing such actions…Unocal, by seeming to have accepted [the Myanmar Military's] version of events, appears at best naïve and at worst a willing partner in the situation."[26] The plaintiffs appealed to the Court of Appeals.

On September 18, 2002, the Ninth Circuit Court of Appeals reviewed the case and reversed in part the lower courts holding. The court upheld the dismissal of the plaintiff's torture claims but stated that there were material issues warranting review regarding Unocal's conduct with regard to ATCA liability. Concerning the ATCA issue, the court 1) established that the alleged torts, including the forced labor, were *jus cogens* violations of international law allowing an ATCA action and 2) established that state action was not required to bring Unocal into court because "there are a handful of crimes including slave trading to which the law of nations attributes individual liability such that state action is not required."[27] The court also held that there may have been enough evidence to hold Unocal liable under ATCA for aiding and abetting the military in the forced labor.[28] The court further held that the standard of proof for aiding and abetting was "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime."[29] The evidence showed that Unocal was aware of the forced labor in the manufacturing of the pipeline. The case against the Myanmar Military was dismissed under the Foreign Sovereign Immunities Act.

The *Unocal* case highlights the conflict between holding a state actor liable in a federal forum and that state actors ability to use the Foreign Sovereign Immunities Act to avoid being held liable for slave labor. Further, a litany of cases have highlighted

the difficult issues in holding a U.S. company guilty for actions committed in a foreign state and under color of a private actor rather than an act of state. As a result of the *Unocal* case, a multi-national corporation that engages in benefiting from the use of slave labor for foreign countries may find themselves within a federal court under the an ATCA claim.

B. Manufacturing and Textile Industries

In recent years companies like Nike, the Gap and Kathy Lee Gifford have brought media attention to the plight of workers in the textile and manufacturing industries. American companies have used foreign intermediaries that have received products from sweatshops in Central America, Asia, Pakistan, India, and Saipan to name a few points of origin.[30] In Pakistan, cigarettes and textiles are manufactured by children serving as bonded laborers because their fingers are small and their parents are in debt to the employer or another who then loans them to the employer.

Defendants sometimes use retaliatory methods to discourage plaintiffs from bringing claims. In *Does I to XXIII v. Advanced Textile Corporation*, 214 F.3d 1058 (9th Cir. 2000), garment workers in Saipan filed a number of separate claims of action against twenty-six American clothing manufacturers for the alleged use of forced labor.[31] American retailers used foreign contractors that obtained the victims and thereby profited from their abuse while not directly employing the laborers. The laborers came from different countries in Asian lured by the promise of great wages. They paid large fees to travel to Saipan and, once there, they were used as bonded servants.[32] Their working conditions were horrible and deductions were made for living expenses such that their wages did not cover their debts. The plaintiff's once again used ATCA, RICO and the Fair Labor Standards Act to gain entry into a United States forum.

As a means to pressure the plaintiffs to drop their claims, the defendants will try to force plaintiffs to relinquish their anonymity. In *Advanced Textiles*, the defendants attempted to force the plaintiffs to use their real names in court filings. The plaintiffs were concerned by the threat of retaliation by their home countries in addition to threats by the host countries.[33] The District Court dismissed the case for failure of the plaintiffs to use their names. The Court of Appeals held that plaintiffs may preserve their anonymity in judicial proceedings in special circumstances where the parties need for anonymity outweighs the prejudice to the opposing party and the public's interest in knowing the identity.[34] Most of the defendants in the Saipan suits have settled with the plaintiffs.

C. Agricultural Industries

One of the industries with the most pervasive record of using slave labor is the agricultural industry. While the previous cases have highlighted forced labor in other countries, the United States has had cases of forced labor in the agricultural and sex industries as well.[35] Because of Florida's large agricultural industry, abuses have been found there with regard to migrant workers being used as forced laborers to pay their debt for travel to the United States. In 2000 Congress passed the Victims of Trafficking and Violence Protection Act.[36] The law criminalized forced labor, trafficking of children, and allows immigration remedies for those victims.[37]

One of the dilemmas faced by states is that most of the laws that are used against the traffickers of forced laborers are federal. Florida does not have a state law that would allow prosecution.[38] Most of the actual investigation and arrests are made by state police authorities who then must turn the

defendants over to federal authorities to prosecute under tougher federal guidelines.

In other countries bonded servitude is rampant, including Africa, India, and countries such as Pakistan and Nepal have had records of abuses in their agricultural industries.[39] Countries such as Mauritania and the Sudan still have an outright system of slavery. Public interest groups have resorted to buying the freedom of slaves outright in the Sudan.[40] The American Anti-Slavery Group and Christian Solidarity International have freed 80,000 individuals by paying $20 to $50 apiece for their freedom.[41] West Africa, which produces nearly 40% of the world's cocoa has had a history of slave labor.[42] It appears that cocoa produced by companies using slavelabor have sold chocolate to manufacturers here in the United States.

D. Slavery within the Sex Trade Industry

While researching the topic, the authors were struck by the individual brutal accounts of victims of international prostitution rings. Countries all over the globe currently use women and children to work as prostitutes. Children as young as five are used in brothels. Many women from the countries of the former Soviet block have been trafficked into the United States to work in the sex trade industry. Asia, Africa and Latin America also send enormous numbers of women across borders or within their own countries for use in brothels, pornography and other trades. Although men and boys are sometimes recruited into the sex trade industry, the greatest number of victims are women and children.

1. Entry into Slavery

The protocol appears standard with regards to how women are lured into the sex trade industry. They generally come from improvised countries or regions of countries. They are recruited under the guise of doing another activity in another country or in a larger city, i.e. factory jobs, housework, waitressing, dancing, or modeling. They are sometimes lured by marriage prospects as well. In the former Soviet bloc for instance, the victims are routed to Albania, Italy or Greece and once they reach their country of destination, their passports are burned and they are informed that they are owned by their handlers.[43] Some are raped along the way. There are estimates that at least 4000 women a year are transported into the U.S. per year alone from the former Soviet block.[44]

In other countries, families in rural regions sell their children to recruiters with the promise that the children will be well treated as domestic house-workers. They are then sent to cities where they are used as prostitutes. In Europe and the United States, sex tours are organized whereby men pay for tours of brothels in Southeast Asia. Not all of the victims originate from foreign countries. There are reports of American women being lured to Asia or the Middle East under the guise of singing, modeling or waitressing jobs only to find their passports taken and then being kept captive as forced laborers.[45]

2. Legislation Against Trafficking Women and Children

The United Nations has passed a number of Conventions covering the illegal trafficking of victims. Despite all of the various Conventions, prosecution was ineffectual.[46] The 1949 UN Convention for the Suppression of the Traffic in Persons

and of the Exploitation of the Prostitution of Others attempted to have member states create systems within their own government to prevent prostitution. The 1979 Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Suppression of Traffic in Women and Children along with others all attempted to prohibit the exploitation of women in prostitution.[47]

The United States became a signatory to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children; Child Prostitution and Child Pornography; and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.[48] The United Nations Convention on the Rights of the Child have all been instrumental in protecting children from sexual exploitation. The International Labor Organization promulgated the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor to combat child exploitation.[49]

Individual countries have attempted to curtail the sex trade industry via domestic legislation. In Bangladesh, Argentina, Cambodia and Columbia, ministries have been created that utilize domestic agencies to eliminate child prostitution and trafficking.[50] Domestically, the United States has passed legislation including the Trafficking Victims Protection Act of 2000.[51] To assist in the execution of the controlling trafficking, an interagency task force was created within the Department of State called the United States Department of State Office to Monitor and Combat Trafficking in Persons.[52] To buttress his position against international prostitution, President Bush issued a Presidential directive, "Trafficking in Persons National Security Presidential Directive," on February 25, 2003 outlining a focus against

trafficking. [53] Despite a number of international and domestic initiatives, prosecution of the traffickers has been problematic. Prosecution is dependent upon member states enforcing laws against their own individual citizens. Recently, Australia granted visas to sex victims to enter Australia to testify against a sex traders.[54] One of the dilemmas faced by the victims is that once they are discovered in the brothels or attempt to gain freedom, they are then prosecuted as illegal aliens and then deported. The 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children placed an emphasis on suggesting that member states agree to incorporate statutory systems to allow victims to remain in the country.[55] Domestically, United States allows 5000 visas per year under the Trafficking Victims Protection Act to victims of trafficking.[56]

III. The Alien Tort Claims Act

The Alien Tort Claims Act provides that the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.[57] Therefore, this statute allows federal courts to hear any civil action by an alien plaintiff for a tort committed in violation of the law of that foreign nation. Although the Alien Tort Claim Act has been appearing
in journals and legal reports recently, it is actually a very old law. The tenets appeared as part of the Judiciary Act of 1789.[58] In 1980, in *Filartiga v. Pena–Iralag*,[59] the plaintiff established ATCA as a law providing a means by which individuals could find a forum for redress against the violation of fundamental rights derived from international law. The case also suggested that ATCA was a means by which a plaintiff could bring a tort action into a federal forum based upon a violation of international law.[60] The use of ATCA is relatively new and as such has not had much history to allow courts to rule based upon precedent.[61]

Historically, international law focused on the actions of states rather than private actors. When considering whether a private actor may be guilty of slave labor in a domestic forum the courts once focused on whether the actor was acting on behalf of a state. That changed with the holding from *Kadic v. Kardzic,* 70 F.3d 232 (1995). In that case, the court held that the ATCA could be used to hold private actors liable for violating international law, removing the state actor requirements.

1. Policy Arguments Against the Alien Tort Claims Act.

There have been a number of criticisms against the use of the ATCA to find multinational corporations guilty of violations of human rights. Critics of the use of ATCA against multinational enterprises claim that judicial actions threaten to dismantle the role of the executive and legislative branches of the U.S. government in dealing with foreign affairs. Furthermore, critics contend that ATCA suits could potentially impede foreign investment by multinational corporations, which agreeably play an important role in expanding the protection of human rights abroad.[62]

Thus, how does one bring the violator into court using this antiquated law? The ATCA allows a federal district court to hear any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States. In terms of finding private actors liable without regard to state action, courts have looked to *jus cogens* norms to determine that slavery, genocide, torture and running reaction will allow ATCA to be used to find private actors liable.[63] The Fair Labor Standards Act and the Racketeering Influenced and Corrupt Organizations Act have also been used by foreign litigants to sue American companies that used forced labor.

ENDNOTES

[1] U.S. Const. amend. XIII, § 1.

[2] Linda Smith and Mohamed Mattar, Global Challenges: Trafficking in Persons, Humanitarian Intervention, and Energy Policy, 28 Fletcher Forum of World Affairs 155 (Winter, 2004).

[3] Tal Raviv, International Trafficking in Persons: A Focus on Women and Children-The Current Situation and The Recent International Legal Response., 9 Cardozo Women's L.J. 659, 665 (2003).

[4] *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

[5] *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), citing, *Pollock v. Williams*, 322 U.S. 4, 17, 88 L. Ed. 1095, 64 S. Ct. 792 (1944).

[8] *Doe 1 v. Unocal*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

[15] *Id.*

[16] *Id.*

[17] Wolff, supra, note 7 at 998.

[20] *Id.*

[23] 28 U.S.C. § 1350.

[26] *Doe II v. Unocal*, 2002 WL 31063976, at 5.

[27] Id. at 9.

[28] Id. at 10.

[29] Id.

[32] *Does I to XXIII v. Advanced Textile Corporation*, 214 F.3d 1058 (9th Cir. 2000). See also Cynthia Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 8 U.C. Davis L. Rev. 293(2002).

[33] *Id.* at 1065.

[34] *Id.* at 1068.

[36] 2000 Pub. L. No. 106-386.

[37] Coonan, supra note 35 at 289.

[39] Wolff, supra note 7.

[43] Tiffany St. Clair King, The Modern Slave trade, 8 U.C. Davis Journal of Int'l Law and Policy, 293, 298 (Spring 2002).

[44] Id. at 296.

[45] Michelle Dunbar, Past, Present an Future of International Trafficking in Women for Prostitution, 8 Buff. Women's L.J. 103, 106 (2000)

[46] Raviv, supra note 3 at 666.

[47] *Id.*

[49] *Id.*

[52] See Executive Order 13257. See also Linda Smith and Mohamed Mattar, *Global Challenges: Trafficking in Persons, Humanitarian Intervention, and Energy Policy*, 28 Fletcher Forum of World Affairs 155 (Winter, 2004).

[53] Smith, supra note 2 at 196.

[55] The 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational International Crime, (November 15, 2000), art. 7(1).

[56] Trafficking Victims Protection Act of 2000, Public Law No. 106-386, 114 Stat. 1464, 1466 (2000) §§ 102(b)(1)-(2).

[59] *Filartiga v. Pena – Iralag*, 630 F.2d 876 (2d Cir. 1980).

[60] Tyz, supra note 13 at 565.

[61] *Id.* at 560.

[62] Bridgeford, supra note 22, citing Demian Betz, Holding Multinational Corporations Responsible for Human Rights Abuses Committed by Security Forces in Conflict-Ridden Nations: An Argument Against Exporting Federal Jurisdiction for the Purposes of Regulation, Corporate Behavior Abroad, 14 DePaul Bus. L.J. 163, 184202, (2001); Donald T. Kochan, Suits Brought Under Alien Tort Claims Act Undermine Federal Governments Authority, Recording, Aug. 23, 2000; Lisa Girion, Firms Liable for Other Abuses: US Appeals Judges OK Lawsuits over Rights Violations Abroad, Milwaukee J. Sentinal, Sept 19, 2002 at D1.

IN-COURSE HONORS: CREATING AN HONORS PROJECT FOR AN UNDERGRADUATE CONTRACTS CLASS

by Susan Lorde Martin*

INTRODUCTION

Many institutions of higher education, in an effort to attract larger numbers of students who have superior SAT scores and high school grade point averages, have created honors colleges or other honors programs.[1] Part of the honors experience at some institutions is the in-course honors,[2] also known as the individually negotiated honors option,[3] or the honors contract option.[4] This option allows students in an honors program to receive honors credit in standard courses by obtaining the consent of the course instructor to supervise more advanced work than the course normally requires.[5]

This article first provides an overview of undergraduate honors programs at colleges and universities. Then it discusses the in-course honors option (as it will henceforth be called) as part of such programs. The main purpose of the article is to describe the undergraduate contracts course in schools of business and propose an appropriate in-course honors option for it. The goals of the option are to give the undergraduate business student an opportunity to analyze and synthesize a wide variety of contract cases in order to develop a practical prospective approach to the legal implications of business activities.

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HONORS PROGRAMS IN UNDERGRADUATE INSTITUTIONS

About 800 universities, colleges, and community colleges are members of the National Collegiate Honors Council (NCHC), an organization that supports undergraduate honors learning.[6] Almost half of public four-year colleges have honors programs.[7] About eleven percent of private four-year institutions have honors programs.[8] Most programs are at institutions rated "very competitive" or "competitive" by the Barron's college guides.[9] No institution rated "most competitive" has an honors program.[10] The honors program is a means for institutions other than the most competitive ones to recruit superior students at lower cost than by providing merit-based scholarship aid.[11] Institutions also note that an honors program provides a laboratory to experiment with new courses and pedagogies that can be used by the entire academic community if proven successful.[12] Those are two of the ways that an honors program can raise the academic level of the entire institution according to administrators.[13]

From the students' perspective honors programs provide a way to get a high quality academic experience for less money. Students chosen to participate in an honors experience may expect access to faculty mentors and special arrangements for courses, trips, social activities, and group dormitory facilities.[14] Their honors classes will generally be small and discussion-oriented to them "'a chance to present their own interpretations of ideas'" and to help them "'mature intellectually and prepare them to engage in their own explorations and research.'"[15] One commentator has concluded that regular undergraduate education at many large public universities is "deplorable" and has advocated turning "regular undergraduate education into one large honors program."[16]

The NCHC describes a "fully-developed" honors program as one which" 1) has specific criteria, such as SAT, GPA, written essay, to identify qualified students; 2) is institutionalized via a mission statement, a guaranteed budget, a stable and permanent administrative and academic structure; 3) has a director who reports to the institution's chief academic officer; 4) has a specific honors curriculum; 5) requires participating students to complete twenty to twenty-five percent of their total course work within the honors program; 6) recognizes student participation in the program by a notation on transcripts, a separate listing in commencement programs, or the granting of an honors degree; 7) has carefully selected its faculty for its outstanding teaching and counseling abilities; 8) has a physical location that includes facilities such as a library, lounge, reading room, and computers.[17]

Honors programs are generally structured as either an "honors college" or an "honors program."[18] Generally, honors colleges are larger and more likely to have special provisions, such as separate dormitories or dormitory wings and special scholarships, for the participating students.[19] The NCHC's Ad Hoc Task Force on Honors Colleges came to the following conclusions in its report last year: 1) an honors college should be an equal unit in the university structure with a full-time dean and a budget at least equivalent to other academic units of the same size in the university; 2) it should have considerable control over admissions which should be by separate application; 3) its requirements should constitute at least twenty percent of degree requirements, and an honors project should be required; 4) it should offer "substantial honors residential opportunities;" 5) its graduates should have their participation noted at graduation, on their diplomas, and on their transcripts; 6) it should have an external advisory board and involvement with development and alumni affairs; 7) it should have a "significant enhancement of

core physical facilities;" and 8) it should offer an interdisciplinary degree program in addition to departmental majors.[20]

Honors programs generally include several different types of courses. The most common type is an honors section of a standard course.[21] Other types are independent study, special seminars or labs, special courses (often interdisciplinary), and in-course honors options.[22]

IN-COURSE HONORS OPTIONS

The existence of the in-course honors option (ICHO) is sometimes explained as providing honors students with honors study and honors credit for courses that do not have special honors sections.[23] That explanation has led some researchers to conclude that an honors program with too many ICHOs is demonstrating a weak commitment by the institution to the program.[24] Nevertheless, no institution has or could reasonably be expected to have separate honors sections for every course offered, particularly in smaller institutions or in small departments and, therefore, the availability of ICHOs is necessary to allow students to complete all the requirements for an honors degree.

The ICHO Contract

ICHOs involve an agreement between the student and the instructor of the chosen course. Generally, the student will approach the instructor before the start or at the very beginning of the semester to request the instructor's participation in the ICHO, and the two will negotiate the requirements of the ICHO. In some institutions, all that is required is the agreement between the two parties.[25] In others, the agreed-upon ICHO has to be approved by

other faculty who oversee the honors program[26] or by a program director.[27]

The ICHO contract generally will include the goals and objectives of the honors work, topics covered, relationship to the standard course, activities to be undertaken, meetings between student and instructor, and evaluation methods.[28] Activities commonly include additional readings, research, writing, and contact time with the instructor beyond that generally required for the standard course; however, it is the quality of those activities, not merely the quantity, that is supposed to give the student depth of understanding and development of critical and independent thinking skills beyond that achieved in the standard course.[29] Words used to describe honors work include sophisticated, probing, intellectually demanding, and intellectually satisfying.[30]

Rules on grading vary by institution. In some programs, a grade is given for the standard course alone, and if the ICHO work is completed successfully, then an honors designation is added to the course.[31] In others, in order to get the honors designation the student has to complete the ICHO and achieve a certain grade in the regular course, an A or B for example.[32] In others, honors work must count at least a certain percentage of the course grade.[33] In still others, grading is left entirely to the instructor[34]or to the student who decides whether the honors portion will be evaluated independently or as part of the course.[35]

Faculty Participation

ICHOs clearly impose additional workloads on instructors.[36] The instructor must develop the ICHO; he or she must meet with the student on a regular basis to provide individual instruction; and he or she must evaluate the student's ICHO work. Generally, participation is voluntary, and the

instructor receives no additional pay or released time. Some programs provide a nominal fee.

Student Participation

Although honors programs emphasize that ICHOs should focus on quality rather than quantity, in fact, some are very specific about the quantity they expect. Some examples of suggested projects that have been quantified are a "7- to 15-page-paper," "1-2 hours of tutoring per week," and "a 15-20 minute presentation."[37] Some programs succumb to the quantification temptation in order "to make sure that all students are doing approximately equivalent amounts of work" and, perhaps, to avoid student complaints about unfair treatment.[38] Some programs advise students doing more extensive projects to consider registering for an additional independent honors study course for which they will get additional credits instead of merely getting an "H" added to a standard course.[39]

Assessment

With the current heavy emphasis placed on outcome assessment in institutions of higher education, honors programs generally have procedures for assessing the achievement of their objectives.[40] There is no independent procedure, however, for assessing outcomes in ICHOs. Instead, assessment focuses on honors students' GPAs, grades in honors courses and on honors papers, and responses to student surveys.[41] Therefore, ascertaining the success of ICHOs depends on anecdotal reports of satisfaction of students and instructors who participate in them.

The next section describes a standard class that lends itself well to an ICHO.

THE UNDERGRADUATE CONTRACTS COURSE

The purpose of an undergraduate course in contract law is to provide the business student with a basic knowledge of the fundamentals of contract principles contained in the common law, Uniform Commercial Code (UCC), and the United Nations Convention on Contracts for the International Sale of Goods (CISG) that are used in the business world. The course should help business students understand contract principles and appreciate how contract law affects the conduct of business domestically and internationally and is related to the general legal environment of business and the ethical conduct of business. Students study contract and commercial transactions in contemporary business situations including e-commerce. They do exercises involving the fundamentals of contract negotiations, drafting, damages, and dispute resoultion. They study actual contracts and cases. The objectives of the course are often achieved through a combination of lecture, discussion, analysis of cases and contracts, and the drafting of simple contracts.

A noticeable difference between the study of contracts in an undergraduate business class and an introductory contracts class in law school is the emphasis on a retrospective approach in the latter and a more prospective approach in the business class. The law student studies cases that have been decided and analyzes the application of the law to the facts of the specific case. The business student reads cases to determine how to make appropriate business decisions in the future. Unfortunately, in a one-semester undergraduate contracts class so much time must be spent on learning the basic legal rules and applying them in very basic negotiating and drafting exercises, there is little time left to

use more advanced critical thinking skills to read a wider variety of cases than those which illustrate the basic contracts concepts, and to develop business strategies based on a knowledge of contract law.

AN ICHO IN A CONTRACTS CLASS

A student participating in a university honors program or college may ask the instructor of a contracts class to create an ICHO for the instructor's standard course. The contracts class lends itself particularly well to an ICHO like the one that follows.

Purpose of the ICHO

Goals of the ICHO: to provide the student with: 1) a deeper understanding of contract law's effect on business activities, with a particular emphasis on creating contractual relationships that have the greatest chance of avoiding disputes and litigation; 2) greater familiarity with judicial opinions and skill in reading and analyzing them; and 3) increased ability to write concise, focused, and cogent business memos that are supported by legal research.

Honors option activities: the student will review all contract cases decided in New York State appellate courts in the last two years. (Any jurisdiction or combination of jurisdictions could be chosen; the reason for this specific choice is explained in the next section.) She will read them, brief them, and discuss them with the instructor during biweekly meetings. Her final honors project will be a memo describing "Strategies for Avoiding Litigation Arising from Contractual Agreements." The memo will rely on the cases briefed.

Relationship between the ICHO and regular course content: the course teaches basic U.S. contract law and its relationship to business activities. Its readings include some full case opinions and excerpts from opinions. Reading a greater variety of current cases provides a better understanding of the law and of mistakes business people make in drafting and performing contracts. The additional aspect of briefing cases encourages a greater understanding of the legal principles and the facts involved. The regular course curriculum requires the drafting of a simple contract. The ICHO final memo provides an additional opportunity to focus on the importance of organization and clarity in business and legal writing and requires a more sophisticated synthesis and analysis of cases currently appearing before courts.

An Example of the ICHO Final Project

The student[42] briefed forty cases that were decided by the New York Appellate Division. The instructor had all the advance sheets, so the student was able to look through all in hard copy, selecting the ones that had appropriate cases. Generally, the opinions are very short so the amount of reading is not burdensome. This method has the added advantage of giving the student the opportunity just to browse through large numbers of cases to see what is actually being litigated currently in the courts.

The student wrote a two-part memo. The first part was titled, "Rules for Good Contract Drafting," and contained nine rules that she created. Her first rule was, "Write everything down." She discussed *Shah v. Micro Connections, Inc*.[43] in which the court granted summary judgment to the defendants because the plaintiff alleged that their purchase of his corporation was based on an oral agreement which contradicted the terms of a preexisting written contract.[44] The court held that when there is a dispute between oral and written agreements, the oral agreement

is unenforceable.[45] The student also suggested including a merger clause in written contracts, relying on *SAA-A v. Morgan Stanley Dean Witter*.[46] The parties in that case had a contract containing a merger clause that said the agreement "cannot be changed unless mutually agreed upon in writing by both parties."[47] The plaintiff alleged that the defendant agreed to pay $500,000 to the plaintiff for a training program the plaintiff had implemented.[48] Because this payment was not included in the writing that was the full and final agreement, the court barred any testimony about it.[49]

The student's second rule was, "Use plain language." She cited *Commercial Tenant Serv., Inc. v. First Union Nat'l Bank*[50] and *Goldstein v. Plonicki*[51] to illustrate that when agreements are clear and unambiguous, courts will grant summary judgment motions upholding them. She contrasted that outcome with the one in *Apollo Steel Corp. v. Sicolo & Massaro, Inc.*[52] in which the court denied a summary judgment motion because of ambiguous contract terms that created triable issues of fact.[53]

The third rule was a warning about including "as-is" clauses in contracts, noting that courts enforce those clauses and will not hold sellers responsible for defects that arise in the subject matter of the contract.[54] The fourth rule encouraged the inclusion of specific dates for performance in a contract. In *Teramo Co. v. O'Brien-Sheipe Funeral Home*[55]a property owner sued a contractor for breach of contract for failing to complete work in a timely manner.[56] The contract did not contain a date for completion or a "time is of the essence" clause.[57] The court held that "when a contract fails to state a date for completion, a reasonable time is implied," that a reasonable time is judged on a case by case basis, and that the contractor did finish in a reasonable time.[58]

The fifth rule was an exhortation to know the statute of frauds. *Lincolnshire Management v. Les Gantiers*[59]and *Envtl. Prods. v. Consol. Rail Corp.*[60] were cited for the proposition that if an original agreement requires a writing, then so does its modification. An oral agreement was enforced in *Hynes v. Griebel*[61] because the contract could have been performed within one year. An oral agreement to transfer a fifty percent ownership of real property was barred in G*ora v. Drizin.*[62]

The sixth rule was to understand the basic offer-acceptance requirements for contract formation. In *Metro. Steel Indus. v. Citnalta Constr. Corp*.[63] the court held that there was no enforceable contract when the offeree returned the offer unsigned with substantial modifications, in effect, rejecting the offer and making a counteroffer.[64] The seventh rule was to recognize the importance of a course of performance and a course of dealing, summarized by the student as "Actions speak louder than words." In *Canon Fin. Serv. v. Medico Stationery Serv.*[65] the lessor of a copying machine sued the lessee for breaching the equipment lease by not making payments.[66] The lease gave the lessee ten days to decide whether or not to keep the copier.[67] Although the lessee complained about the operation of the copier, the lessee kept it and used it for eight months and, therefore, the granted the lessor's motion for summary judgment.[68] In *Dzek v. Desco Vitroglaze*[69]the plaintiff sued a subcontractor for breach of an oral contract that required the subcontractor to pay the plaintiff ten percent of the proceeds form the subcontractor's work.[70] The court looked to the parties' prior course of dealing, substantiated by several checks written to the plaintiff by the subcontractor for ten percent of payments received by the subcontractor, and enforced the oral agreement.[71]

The eighth rule was to understand privity requirements. In *Hampton Living v. Carltun on the Park*[72] the court held that the county, which had given permission to a developer to renovate leased county property, was not liable to a construction company hired by the developer when the developer refused to pay for the construction company's work; the county never indicated an intent to pay, but merely gave consent to the renovation.[73] On the other hand, in *Lionheart Global Appreciation v. Essential Res.*[74] the court held that when the defendant entered into an agreement with the plaintiff's escrow agent, the defendant created a relationship with the plaintiff that was equivalent to privity and, therefore, the defendant was liable to the plaintiff for a breach of the agreement.[75]

The student's ninth and final rule was to specify when a contract terminates to eliminate uncertainty about the existence of a contract and the parties' obligations. In *Stainless Corp. v. Middlesex*[76] the defendant alleged that by sending a letter terminating the contract with the plaintiff, the defendant ended his obligations to perform under the contract.[77] The contract contained a list of occurrences that would permit an early contract termination, and the letter failed to cite any of those.[78] Therefore, the court granted the plaintiff's summary judgment motion for contract breach.[79] Carolina *Cas. Ins. v. ADC Contracting & Constr.*[80] and *MCK Bldg. Assoc. v. St. Lawrence Univ.*[81] were also used to illustrate that plaintiffs would win their breach of contract suits when defendants did not follow the terms of their contracts in attempting to terminate them.

The second part of the student's memo listed some examples of disputes that should not have been litigated. The student cited several cases[82] to illustrate that when there is an existing contract, a court will not award damages under a quasi-contract theory. She explained how a force majeure clause using

"plant shutdown" language could not be used to avoid performance when the plant was shut voluntarily to avoid financial hardship.[83] Last, she admonished plaintiffs to make sure they could prove the damages they were seeking.[84]

CONCLUSION

An ICHO can provide an opportunity for interested students to undertake more sophisticated learning in an undergraduate contracts class. In addition to learning basic black letter rules in greater depth than in the standard course, students can reap several other advantages. Required regular meetings with the instructor create a teaching/learning relationship that the student might otherwise not pursue by dropping in during office hours. Browsing through advance sheets helps give the student a sense of the fun of research and reading cases. Reducing the cases to lessons for businesspeople encourages the student to analyze and synthesize information and to write in a clear, focused style. As Murray Sperber has suggested, all students should have available the advantages of honors programs;[85] however, for most instructors it would not be possible to make the kind of project described here available to all students because of the size of classes, lack of motivation and abilities of some students in very heterogeneous classes, and availability of materials. Nevertheless, this ICHO serves the purpose for which it was intended and can make both the student and instructor more appreciative of their common enterprise.

ENDNOTES

2 *See, e.g.*, California State University at San Marcos, *Criteria for Approval of In-Course Honors Proposals*, available at www.csusm.edu/honors_program/proposap.htm (last visited Dec. 16, 2004).

3 *See, e.g.*, Hofstra University Honors College, *Honors Courses and Honors Option Courses*, available at www.hofstra.edu/huhc (last visited Dec. 16, 2004).
4 *See, e.g.*, University of Alabama in Huntsville, *Honors Credit Contracts*, available at www.uah.edu/honors/contracts.htm (last visited Dec. 16, 2004).
5 *Id.*
11 Long, *supra* note 1, at 1.
12 *See, e.g.*, Clarke College (Dubuque, Iowa), *News Release: Clarke College Honors Program Included in Peterson's Guide*, available at www.clarke.edu/news/releases/1999/nov9.htm (Nov. 9, 1999).
13 *See, id.*
15 Murray Sperber, *End the Mediocrity of Our Public Universities*, CHRON. HIGHER EDUC., Oct. 20, 2000 (quoting Dr. Joan Digby, Peterson's Honors Programs (1997)).
16 *Id.*
17 National Collegiate Honors Council, *Basic Characteristics*, available at www.nchchonors.org/basic.htm (last visited Jan. 12, 2005).
20 Ad Hoc Task Force on Honors Colleges, *Basic Characteristics of a Fully Developed Honors College*, available at www.nchchonors.org (Nov. 11, 2004).
22 *Id.*
25 *See, e.g.*, *supra* note 23.
26 *See, e.g.*, Hofstra University Honors College, *Honors Courses and Honors Option Courses*, available at http://people.hofsta.edy/faculty/John_S_Russell/Honors/INHOs (last visited Jan. 16, 2005); University of Florida College of Agriculture & Life Sciences, *Proposal for Individual In-Course Honors Contract*, available at www.cals.ufl.edu (last visited Jan. 16, 2005).
27 *See, e.g.*, Northern Illinois University, *In-Course Honors*, available at www.honors.niu.edu (last visited Jan. 16, 2005).
29 *See, e.g.*, Hofstra, *supra* note 26; Trinity International University, *In-Course Honors*, available at www.tiu.edu/honors/in-course_honors.html (last visited Dec. 16, 2004); *UAH*, *supra* note 22; University of Florida, *supra* note 26.
30 *See, e.g.*, Hofstra, *supra* note 26.
34 *See, e.g.*, Hofstra, *supra* note 26.
35 Western Illinois University, *Permission to Enroll in "In-Course Honors,"* available at www.wiu.edu/users/wiuhon/prospective/incourse.shtml (last visited Dec. 16, 2004).
39 *See, e.g.*, Illinois State, *supra* note 31.
43 729 N.Y. Supp. 2d 497 (App. Div. 2001).
46 721 N.Y. Supp. 2d 640 (App. Div. 2001).

49 *Id.* At 642.
50 762 N.Y. Supp. 2d 342 (App. Div. 2003).
51 53 N.Y. Supp. 2d 510 (App. Div. 2003).
52 752 N.Y. Supp. 2d 493 (App. Div. 2002).
53 *Id.* At 494.
55 725 N.Y. Supp. 2d 87 (App. Div. 2001).
58 *Id.*
59 755 N.Y. Supp. 2d 391 (App. Div. 2003).
60 728 N.Y. Supp. 2d 256 (App. Div. 2001).
61 754 N.Y. Supp. 2d 293 (App. Div. 2002).
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82 *See, e.g.*, West end Int'l v. Aim Constr., 729 N.Y. Supp. 2d 112 (App. Div. 2001); Shah v. Micro Connection, Inc., 729 N.Y. Supp. 2d 497 (App. Div. 2001)..
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"POWER NEGOTIATION AND PERSUASIVE COMMUNICATION" AS A BUSINESS LAW REQUIREMENT

by

Peter M. Edelstein**

ABSTRACT

Attaining what one desires in life usually depends, in some measure, on one's ability to negotiate and to communicate successfully. A business education is not complete unless our undergraduate business law students learn how to apply their knowledge to achieve their career objectives. This article addresses the author's conclusion that there exists a real need for incorporating the skills of artful negotiation and the craft of persuasive communication into the law curriculum and describes the author's experience with a new course designed to accomplish that mission.

I. INTRODUCTION

The author has been very fortunate to be teaching for more than three decades and practicing law for almost four. As a professor, observations over that period indicate that there is a

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disconnect between the substance of what law professors teach and the immediate application of that substance when students move from the university environment to the business environment. As instructors, we all strive to impart the best education we can, but notwithstanding our efforts, there remains a shock effect when the former student, now an employee, is told something to the following effect: *"Write Jones a letter concerning our purchase of 100 widgets. Try to get us the best deal you can."* An instructor may know that our students may recognize a contract. The students may even know how to write a letter. But whether they will know how to bargain for favorable terms and to reduce their agreement to a writing that will be enforced by law, is subject to question.

Among the author's observations, as a lawyer, is that strong negotiation and communication skills can compensate for mediocre legal talent or a weak case. In a business environment these skills may distinguish a successful entrepreneur from a disappointed one.

Undergraduate students are usually not experts in the art of negotiation, and the quality of their communication skills speaks for itself.

This article describes the perceived need for, and the creation and development of, an undergraduate course specifically designed to teach these skills; skills that will enhance the ability of business law students to achieve success in the world of commerce.

The author respectfully suggests that the course described herein or an abbreviated or selective version of the same could be incorporated into almost any business law program.

This article is organized from the general to the specific. The beginning describes how the course was created, followed by the elements of the course, and finally a description of the assignments given to the students.

II. THE COURSE

Pace University has instituted an Honors College, the curriculum of which crosses the disciplines taught in the individual schools. Last year the author was invited to consider teaching in the Honors College and as an irresistible inducement was told that any subject the author chose would be acceptable. Even a newly designed course would be welcomed. If a writing component could be included, it would qualify as a “writing enhanced course” and that label seemed to be quite meaningful to the administration. *Innovation* was this year’s buzzword. This author was in teacher heaven. After teaching many different courses including law, real estate, modern business practices and legal documents, an attempt could now be made to provide the missing link: to teach students, while still in college, skills usually learned in the business world by potentially high risk trial and error.

To attract students to the course a sexy title was needed. The result was: *Power Negotiation and Persuasive Communication*; (read: “skillful negotiation” and “artful communication”). In the business universe these skills are not only closely related, but often overlap. Both negotiation and communication may be written or oral; both are designed to achieve an objective; and both are such common practices in the marketplace that one may wonder why there is a need to offer them as a discrete course. It is suggested, however, that if early and enviable success is one’s desire, these talents are necessary

and should be learned while in an insulated academic environment. And, there is probably no better, nor more natural area in which to teach these subjects than related to the study of the law.

Because the course was, in essence, an experiment, the following disclaimer was included in the syllabus.

> "This is a new course. The syllabus may or may not be followed. The instructor reserves the right to add to, delete from, change, alter, modify or amend the syllabus or change the sequence of subjects or commingle topics at any time without notice of warning of any kind. This is an Honors Course, you can handle it. The disclaimer is void where prohibited."[1]

In an attempt to hook the students' attention with a clear and relevant example of what was to come, the course opened with the following: *"Even an eight year old knows intuitively that in order to negotiate effectively with Santa he or she had better write a pretty persuasive letter."*

Three short texts were required. The first, a currently popular mass media paperback designed for the commercial market, entitled, "The Only Negotiating Guide You'll Ever Need," by Peter B. Stark and Jane Flaherty[2]; the second, the classic, "The Elements of Style," by Strunk and White[3]; the third, "Edelstein's Student Guide"[4]. The cost of all three books totaled about $25. The students thought the professor was a hero for saving them money and he got a perverse pleasure by denying the textbook publishers their ubiquitous $150 per textbook charge.

Within the first two weeks of class, the students were required to read and be familiar with the contents of all three books. Thereafter, the books were used as reference sources and at various times specific portions were assigned for review. A series of assignments, discussed below, were designed to have the students incrementally apply the skills covered in class.

In addition to the required texts, in class, there was frequent reference to a book by George Carlin, the comedian, and social critic. He has written an hilarious, irreverent and very colorful book[5] that was not a required text. In fact, it was kept hidden (with the dust cover removed). One of the subjects covered throughout the book is the growing use of euphemisms that “…obscure meaning rather than enhance it…” It became part of the class routine to read one of these sections at the beginning of each class. This created a light mood while focusing on the precise use of language. Some examples:

> “I don’t know when the whole thing started, but I do know that at some point in my life *toilet paper* became *bathroom tissue* …And then just as my *loafers* were becoming *slip ons*, my *sneakers* turned into *running shoes*, and in no time, my running shoes became *athletic footwear*.”[6]

> “Of course, if you didn’t want to wear a *hairpiece* or a *rug* (nice old-fashioned term), you could always look around for a good *hair-replacement system*. Keep an eye out for *systems*, folks, they’re everywhere. The clerk who sold me

> my *answering machine* said I was purchasing a *voice-processing system*; a *mattress and a box spring set* is now called a *sleep system*…The *heater and air conditioner* became *climate control systems*, your *brakes* have been replaced by a *braking system*, and your *seat belts* and *air bags* are now known as the *impact management system*."[7]

Two principles were stressed from the outset: (i) all work would be evaluated as to both form and content and, (ii) average quality work was unacceptable. This was an honors class and all work was to be excellent. Students were told that the instructor would consider all their work products to be the best they were capable of producing.

To maintain a high level of interest, the author often related anecdotes from his experiences to illustrate the course content. Students seemed to have an unusual fondness for real-life stories and their reactions prompted some fascinating class discourse. The anecdotes were not intended to focus on the author but they did, after all, enable dialogues about true events.

Some examples:

- About two months ago their professor was stopped, on the Interstate, by a New York State Trooper for speeding. The first thing he said was "You're going to lose your license for this." By

applying (what turned out to be) effective negotiating techniques, the officer wished the author an enjoyable weekend and did not even issue a warning.[8]

- When representing a very elderly woman plaintiff at a pre-trial settlement conference in the judge’s chambers, the author observed that the judge was also a very senior citizen. The insurance company had unconscionably delayed the trial for many years so the author kept repeating to the judge, “They’re stalling because they’re waiting for her to die…,” until the judge forced the insurance company into a very favorable settlement.[9]

- The author went to buy a treadmill at a nation-wide retail chain. The price on the tag was $1299.00. After friendly discussion, the author bought the treadmill for $600.00 and the store waived the $40.00 delivery charge.[10]

III. COURSE CONTENT

The course contained three major and related components: negotiating skills, elements of proper writing style and effective

business communication. Each component was the subject of class discussion with the students trading examples and hypotheticals.

A. Negotiation Skills

Negotiation was defined as: "any communication between two or more people the objective of which is to change their relationship."[11] The common perception of two people bargaining over price was shown to be only one example of negotiation. Signaling to change lanes on a crowded highway, or asking your spouse to get the ketchup are also forms of negotiation.

The study of negotiating skills included the following topics, among others:

- The possible outcomes of negotiation. The "win-win" outcome, being the most desirable.[12] Neither side feels he or she was a loser.

- The different values of considering times as a negotiating technique. In most negotiations 80% of the resolution occurs in the last 20% of the time.[13] Therefore, be patient, persistent, know your counterpart's time pressures. If necessary, be prepared to move your deadline.[14]

- The value of information. Prepare your own case *and* prepare your counterpart’s case as if it were your own.[15]

- The use of different kinds of power and their affect on negotiation.[16]

- Questioning skills and the use of restrictive or expansive questions.[17]

- Listening skills and the benefits of listening.[18]

- Nonverbal behavior. How to interpret the body-language of your counterpart.[19]

- Preparing to negotiate. Do your homework (and do your counterpart’s homework).[20] Determine your needs and wants. Prepare a list of items to be negotiated that you will willingly trade for something you want or need. Create a back-up position, sometimes referred to as a BATNA (“Best Alternative to a Negotiated Agreement”).[21] A BANTA provides acceptable options if the negotiation is not

resolved in part or at all in the form you desired.[22]

- Recognize the traits of human nature. It is a common perception that people want to be helpful. Being helpful gives one the feeling of power and superiority over the person being helped; it feeds one's ego. Use this trait as a basis for applying particular negotiating skills.

- Empathize. It is this author's opinion that if the key to successful negotiation was required to be represented by a single word it would be "empathy." Empathy is the ability to experience the feeling of another.[23] By projecting yourself into the thoughts of your counterpart; by understanding his or her wants and needs, pressures and objectives; by determining various ways to satisfy your counterpart, negotiating style and skills can be adapted to achieve your desired result.

It is beyond the scope of this article to attempt to address all the tactics for successful negotiation, but some examples may convey the types of techniques discussed in class:

- Ask, “Is that your best offer?” A good technique, but generally more valuable toward the end of the negotiations to obtain maximum effect.[24]

- In the beginning, concede, but only in small doses. Save the big issues for later. Concessions build good will and create a psychic indebtedness in your counterpart.[25]

- “I’ll meet you in the middle.” Like “Is that your best offer?” is most valuable near the end.[26]

- Silence works wonders. By not responding, you force the other side to negotiate against him or her self.[27]

- “Do you have the authority?” Everyone wants to have authority (power). By using this question the other side is now prepared to prove his or her power, and at the same time you have given him or her the ability to expand his or her ego by helping you. The opposite question may achieve the same result, “If you don’t have the authority, then…”[28]

- There are no “freebies”. Always get something for everything you give up.[29]

- Try to save the most problematic issues for the last ones. You will then be in position to review the entire score and evaluate how well you did. The last issue may have now morphed into something different than it was at first. And, you can still use all of your other negotiating skills.[30]

- “Try walking in my shoes.” Ask “What would *you* do if you were me?” This may elicit a sympathetic response.[31]

- “Let’s come back to that later.” This extremely valuable technique: (i) buys the opportunity to evaluate how to handle the issue by measuring progress or lack of progress and makes the counterpart consider how much he or she may have to give in the continuing negotiations to win that point and, (ii) defers decision on a point that could potentially poison the well.[32]

- Be persistent. Wear the other side down. Be a pit bull. Do not let go of an issue. People get tired, cranky, have to get home, or have other time pressures. You may win the point by attrition.[33]

- Ask for help. Lose all sense of shame. “I simply need you to help me on this.” Once again, an attempt to evoke the human characteristic of the desire to be helpful.[34]

B. Writing Style

This instructor has observed a continuing decline by students in the proper use of the English language. Many students arrive in the classroom with a noticeable deficiency in basic communication skills.

While a law course many not be the designated venue for language skills rehab, this course was inclusive enough to allow a review of what the students should have already mastered.

The elements of proper writing style included rules of usage, and principles of composition, and form. “The Elements of Style”[35] was required when the author went to college and still retains the same valuable qualities (and some not so valuable) as it did in the 60’s. This book was used primarily as a reference source.

Subjects included:

- Use of commas[36]
- Watch the use of pronouns[37]
- Make paragraphs the unit of composition[38]
- Omit useless words[39]
- Keep related words together[40]
- Use of colloquialisms, headings, hyphens, margins, numbers, parenthesis, quotations.[41]
- Commonly misused words and expressions[42]
- An approach to style[43]

Strunk and White, the authors, still produce a great little book. But, there is a vast difference in writing a composition, essay, prose, poetry, love letter or social correspondence, on the one hand, and written communication intended to achieve a business or legal objective, on the other. So while "The Elements of Style" is an available communication tools, it should not be considered the Bible.

C. Business Communication

The class focused on the following principles of effective business communication: precision, conciseness, simplicity, and clarity, which principles have much in common with the design of an artful brief or memorandum of law or presentation an of oral agreement.[44]

1. Precision. Be accurate. The objective is to avoid confusion, ambiguity and misunderstanding.

    - Chose the right word[45]
    - Use a dictionary, thesaurus, spell-check[46]
    - Chose repetition over confusion[47]
    - Use defined terms[48]

2. Conciseness. Do not waste words. Verbosity wastes time. The chances for confusion are in direct proportion to how much is said.

    - Eliminate unnecessary words[49]
    - Eliminate the long wind-up[50]
    - Avoid pointless repetition[51]
    - Rewrite to cut excess verbiage[52]

3. Simplicity. The objective in business communication is to be understood by the recipient.[53] Never use a long word when a short one will do.[54]

    - Avoid the formal and stuffy; chose the simple[55]
    - Avoid technical jargon unless communicating with a person known to be familiar with such terms.[56]
    - Avoid foreign expressions [57]
    - Do not overuse nouns[58]

4. Clarity.

- Follow normal sentence order: subject, verb, and object[59]
- Put modifiers with the word or phrase modified[60]
- Beware of double negatives[61]

The class reviewed various lists comparing the proper and improper use of terms, expressions and phrases. The students offered many examples of their own.

The classroom mantra became: proof, edit, rewrite, proof, edit, rewrite, proof, edit, rewrite…"

IV. METHODOLOGY

The class sessions were loosely structured. Students were invited to participate by asking questions, relating their experiences and discussing topical matters. When textual material was assigned, the students were required to read the designated portion of the texts then urged to think about the material covered and ask themselves questions to confirm their understanding. Students were told to be prepared to discuss the readings in class. They were informed that they would be questioned by using the Socratic method.

The course kept both skillful negotiation and artful communication on the table at all times. The subjects were not divided into separate areas for fear of having the students view them as only tenuously related. A businessperson should appreciate that each subject complements and reinforces the effect of the other.

To adhere to AACSB guidelines and to please the administration, where applicable, in classroom discourse, students were informed that we would analyze any substantive materials would be analyzed in light of ethical considerations; global implications; the influence of political, social, legal and regulatory issues; the impact of diversity on organizations.

Progress was slower at the beginning of the course because it was important to fully understand the basic principles; thereafter, there was a substantial increase in speed and coverage.

At the beginning of the course each student completed several written assignments. Team assignments were reserved for more difficult work addressed later in the semester.

V. ASSIGNMENTS

Assignments “One” through “Six”, to be completed by the individual students, were due one week from the date of the assignment and introduced the students to the different forms of communication and to concepts related to the preparation for a business venture. Numbers “Seven” through “Ten” were in the form of *Team Assignments*. To create the teams, the class was divided into random groups of four students. Goals of the team assignments were to teach group communication, social intercourse, leadership and management skills. The team approach tried to emulate a corporate environment. For Assignment “Ten,” students were given approximately three weeks for completion.

The assignments were as follows:

Assignment Number One: The purpose was to illustrate the difference between *business* communications and other communications.

Assignment Number Two: The purpose was to illustrate the form of a *memorandum* and introduce subjects included in commercial law.

Assignment Number Three: In this assignment the form of a *business letter* and elements of persuasive communication were introduced.

Team Assignment Number Four: The purpose was to expose the students to the difference between corporations, partnerships, LLC's and other business units.

Assignment Number Five: This assignment was intended to cause the students to choose a business unit and offer details to illustrate how it suited their particular hypothetical business.

Team Assignment Number Six: This assignment introduced the concept of a franchise.

Team Assignment Number Seven: Number "Seven" was specific as to the nature of their particular business and required research as to the relationship of a franchisor and franchisee.

Team Assignment Number Eight: Number "Eight" introduced financial considerations related to the actual business venture.

Team Assignment Number Nine: This assignment introduced the concept of *a business plan*. Substantial effort including independent research was required. The assignment illustrated that a business plan is a disclosure document as well as a sales document involving the artful use of language and negotiating skills.

VI. CONCLUSION

Because this whole adventure was a trial balloon, in the middle of the semester the class was invited to submit evaluations of the course to that date. All responses indicated that the course was appreciated as practical and valuable. It was rewarding to think that the students believed they learned something of real utility.

They figured out that the eight-year old that wanted presents might have been on to something. He or she had to empathize with Santa; to think, “*what would Santa want me to say and how can I say it effectively?*"

At the beginning of the course the students had only a vague idea of the proper form of a business letter. By the end of the course, not only were they using the proper form in a neat and attractive presentation, but by learning negotiating techniques, their communications had an impressive and persuasive quality.

The author respectfully suggests that any law professor who values skillful negotiation and artful communication could pick and chose components of this course to gracefully fit into most existing basic law courses.

Although this particular pedagogical experiment created a new course and used Honor Students as guinea pigs, its success

indicates that there is no reason the course should not be required to be taken by all business students. Now, all that remains is the task of convincing the Dean.

ENDNOTES

[1] PETER M. EDELSTEIN, EDELSTEIN'S STUDENT GUIDE (2005).

[2] PETER B. STARK & JANE FLAHERTY, THE ONLY NEGOTIATING GUIDE YOU'LL EVER NEED (2003).
[3] WILLIAM STRUNK, JR. AND E.B. WHITE, THE ELEMENTS OF STYLE (4th ed. 2000).
[4] EDELSTEIN, *supra*, note 1.
[5] GEORGE CARLIN, WHEN WILL JESUS BRING THE PORKCHOPS (2004).
[6] *Id.* at 62.
[7] *Id.* at 62-63.
[8] True story, honest.
[9] True story.
[10] Still true.
[11] STARK & FLAHERTY, *supra* note 2, at 3.
[12] *Id.* at 9, et. seq.
[13] *Id.* at 17, et seq.
[14] *Id.* at 13.
[15] *Id.* at 21.
[16] *Id.* at 21-26.
[17] *Id.* at 27-36.
[18] *Id.* at 39-34.
[19] *Id.* at 45-52.
[20] *Id.* at 81.
[21] *Id.* at 82, *See* also, Thompson, THE MIND AND HEART OF THE NEGOTIATOR (2005).
[22] *Id.* at 84.
[23] *See* Random House Webster's College Dictionary (2nd ed. 1997).
[24] STARK & FLAHERTY, *supra*, note 2, at 99.
[25] *Id.* at 103. For an absolutely fascinating example of this application, see the New York Times, October 11, 2005. The article entitled, "American and Israeli Share Nobel Prize in Economics," by Louis Uchitelle, describes the "game theory" that considered, "The Oslo peace process…a success in part

because of negotiation proceeded in small steps. Each side made small concessions and the other reciprocated, but neither would make a big concession. In the case of a big concession, there could be considerable damage if the other side did not reciprocate.”

[26] *Id.* at 105.
[27] *Id.* at 106.
[28] *Id.* at 109.
[29] *Id.* at 113.
[30] *Id.* at 119.
[31] *Id.* at 127.
[32] *Id.* at 131.
[33] *Id.* at 143.
[34] *Id.* at 159.
[35] STRUNK & WHITE, *supra*, note 3.
[36] *Id.* at 2-6.
[37] *Id.* at 10.
[38] *Id.* at 15.
[39] *Id.* at 23.
[40] *Id.* at 28.
[41] *Id.* at 34-38.
[42] *Id.* at 39-65.
[43] *Id.* at 66-85.
[44] *See* HENRY WEIHOFEN, LEGAL WRITING STYLE (1980).
[45] *Id.* at 12.
[46] *Id.* at 14.
[47] *Id.* at 16.
[48] *Id.* at 22.
[49] *Id.* at 42.
[50] *Id.* at 49.
[51] *Id.* at 50.
[52] *Id.* at 59.
[53] *Id.* at 61.
[54] *Id.* at 63.
[55] *Id.* at 65.
[56] *Id.* at 66.
[57] *Id.* at 67.
[58] *Id.* at 70.
[59] *Id.* at 85.
[60] *Id.* at 86.
[61] *Id.* at 94.