



ST. JOHN'S UNIVERSITY

COLLEGE OF
PROFESSIONAL STUDIES

THE LEGAL APPRENTICE

FOREWORD

Dean Kathleen Voute' MacDonald

GOOD LEGAL WRITING IS SIMPLY GOOD WRITING: WORDS OF WELCOME

Chief Judge Loretta A. Preska

ARTICLES

CONSTITUTIONAL BANS ON ALCOHOL ADS IN COLLEGE PRESS

Shada Paula

STARBUCKS' BARRISTAS' BATTLE: TIP POOL SHARING

James Baek

THE CASE OF THE CONNECTICUT CHIMP: STRICT LIABILITY FOR DOMESTICALLY KEPT WILD ANIMALS

Jessica Fusco

PROFESSIONAL PHOTOGRAPHER'S LIABILITY FOR REFUSAL TO WORK A SAME-SEX WEDDING

Arturo Pena

A LEGAL WRITING RESOURCE: THE BIBLE

Professor Mary Noe

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THE LEGAL APPRENTICE

FOREWORDiv
Dean Kathleen Voute' MacDonald

GOOD LEGAL WRITING IS SIMPLY GOOD WRITING:
WORDS OF WELCOME v
Chief Judge Loretta A. Preska

ARTICLES

CONSTITUTIONAL BANS ON ALCOHOL ADS IN COLLEGE PRESS 1
Shada Paula

STARBUCK'S BARRISTAS' BATTLE: TIP POOL SHARING9
John Baek

THE CASE OF THE CONNECTICUT CHIMP: STRICT LIABILITY
FOR DOMESTICALLY KEPT WILD ANIMALS 17
Jessica Fusco

PROFESSIONAL PHOTOGRAPHER'S LIABILITY FOR
REFUSAL TO WORK A SAME-SEX WEDDING 27
Arturo Pena

A LEGAL WRITING RESOURCE: THE BIBLE 35
Professor Mary Noe

FOREWORD



With great pride in the student authors from the College of Professional Studies, I have read with enthusiasm the first edition of *The Legal Apprentice* journal. The journal showcases our students' writing excellence and provides them with an introductory experience in publishing their academic work. The journal is multi-disciplinary and accepts submissions from students across the St. John's campus, yet is very much the intellectual product of CPS, with

its editor, reviewers, and advisory committee all faculty of the College of Professional Studies. I especially commend Prof. Mary Noe, the first editor of the journal, for her vision in developing this scholarly journal for our students. All articles are blind reviewed and are subjected to a rigorous selection process for publication, based on content, style, clarity, organization and completeness. In addition to student articles, each edition will contain one article written by a legal professional.

I hope that this inaugural edition of *The Legal Apprentice* will provide inspiration to all CPS students. Reading the written work of their peers may spark an idea for a law-related issue in their professional disciplines, and may encourage them to submit their own articles for consideration and possible publication. The scholarly discourse promoted by our student authors will benefit the entire CPS community, faculty, students, and administrators alike. What a sense of pride and accomplishment our students can take away from their first experience as academic authors!

Kathleen Voute' MacDonald, Ed. D.
Dean, College of Professional Studies

GOOD LEGAL WRITING IS SIMPLY GOOD WRITING: WORDS OF WELCOME

CHIEF JUDGE LORETTA A. PRESKA[†]

Justice Scalia, receiving a lifetime achievement award from the *Scribes*, The American Society of Legal Writers, surprised his audience by telling them “I do not believe that legal writing exists. . . .”¹ He continued “Someone who is a good legal writer would, but for the need to master a different substantive subject, be an equivalently good writer of history, economics or, indeed, theology.”² Put another way, good legal writing is simply good writing.

Observers of the game of basketball may point out that “You can’t coach height,” meaning that a player’s height is an immutable characteristic. But proficiency in writing is not a genetic trait. It is a skill learned over a lifetime. We evolve and improve with practice. More writing begets better writing. I see this with my own law clerks who become better writers over the course of a single year.

Because it provides students with an opportunity to practice and perfect their writing skills, I applaud the creation of *The Legal Apprentice*. Professor Mary Noe, her faculty colleagues and the student competitors and authors have created a worthwhile showcase of fine writing.

The Court of which I am Chief Judge is no stranger to Professor Noe’s students. Since the fall of 2009, they have served as interns working in our Clerk’s Office assisting with important work. These students have also worked directly in the Chambers of four Judges of our Court. On behalf of the Court, I thank them for their valuable contributions.

I close with the wish that *The Legal Apprentice* continues and thrives for many years to come.

[†] Chief Judge, United States District Court, Southern District of New York; B.A., The College of Saint Rose; J.D. Fordham University, School of Law; LL.M., New York University, School of Law.

¹ ABA Journal News, Scalia: Legal Writing Doesn’t Exist (posted Aug. 9, 2008) www.abajournal.com/news/article/scalia_legal_writing_doesnt_exist.

² *Id.*

CONSTITUTIONAL BANS ON ALCOHOL ADS IN COLLEGE PRESS

SHADA PAULA†

INTRODUCTION

It is typical for many first-time college students to feel excited, eager and even nervous about embarking on a new chapter in their lives. I can relate to such feelings, having been a first-time college student myself. My freshman year at college consisted of meeting new people and spending many sleepless nights studying and partying. The party scene was new for me. Within the first couple of weeks of being on campus and attending a couple of parties, I realized that drinking alcohol is a popular aspect of a college student's social life. Every party I attended had alcohol easily accessible. Alcohol at these parties ranged anywhere from straight (non-chased) drinks to mixed drinks called "jungle juice," which often had unidentifiable alcohol.

There have been instances where I have seen students abuse alcohol and end up in the hospital from alcohol poisoning. Students who dorm at school do not have the constraints of supervision at home. That lack of supervision is one factor in abusive drinking. For many first-time college students, it is their first time having access to alcohol and many of them drink irresponsibly. Many students in college start at the age of eighteen. The legal drinking age in the United States is twenty one.¹ Underage alcohol consumption and abuse in colleges is a problem that affects everyone.

According to the National Survey on Drug Use and Health, "among full-time college students in 2012, 60.3 percent were

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¹ 23 U.S.C. §158. (2012).

current drinkers, 40.1 percent were binge drinkers, and 14.4 percent were heavy drinkers.”²

Many states have attempted to combat this underage alcohol consumption and abuse issue. For example, in an attempt to curtail underage college drinking, Virginia’s Alcohol Beverage Control Board (“ABC”) enacted a regulation in 2005 prohibiting college student publications from advertising alcohol. However, affected college student publications believed the regulation infringed on their right of free commercial speech.

This paper will examine a Virginia case brought by college publications regarding the ABC regulation. I have researched statistical information about college drinking and I suggest other methods to combat underage alcohol consumption on college campuses.

Editor’s Note:

The procedural history of this case is complex. The case was originally heard by the Virginia Federal District Court. That Court found the regulation unconstitutional.³ On appeal, the Court of Appeals reversed and remanded.⁴ The District Court then found the regulation constitutional. On yet a second appeal, the Court of Appeals reversed and found the regulation unconstitutional.⁵

The Virginia ABC is a state agency that regulates the sale and distribution of alcohol.

CASE SUMMARY

In June 2005, Virginia’s Alcohol Beverage Control Board issued a regulation prohibiting any college student publication from printing any advertisements of beer, wine or mixed drinks unless the ads were “in reference to a dining establishment.” ABC’s intent was noteworthy, to combat underage and abusive drinking at college campuses.

² U.S. Dept. of Health and Human Services, Substance Abuse and Mental Health Services Administration, Center for Behavioral Health Statistics and Quality, <http://store.samhsa.gov/home>.

³ *Edu. Media Co. at Va. Tech, Inc. and The Cavalier Daily Inc. v. Swecker*, 2011. WL 5603789, Sup. Ct. Va., (Nov. 04, 2011).

⁴ *Edu. Media Co. at Va Tech. Inc. And The Cavalier Daily Inc. v. Swecker*, 602 F3d 583 (4th Cir. 2010).

⁵ *Edu. Media v. Insley*, 731 F.3d 291 (4th Cir. 2013).

The regulation affected any college or university in the state of Virginia that prepared, edited, or published a newspaper for students at such institution, and intended to distribute such newspaper to persons under 21 years of age.

College Newspapers, an educational media non-profit company, and owner of The Colligate Times at Virginia Tech and The Cavalier Daily at the University of Virginia, brought a legal action against ABC challenging the regulation, arguing that the regulations infringed on College Newspapers' First Amendment right of free commercial speech and discriminated against college media outlets.

The case was brought in Federal Court which examined College Newspapers, right of free commercial speech and the governmental purpose of the regulation which was to combat underage and abusive drinking. The court applied the *Central Hudson* test.⁶

Editor's Note:

The Central Hudson case reviewed regulations restricting promotional advertising by utilities and the utilities' right to commercial free speech.

The U.S Supreme Court provided the following approach in determining if commercial free speech is protected by the First Amendment: was the communication either misleading or related to unlawful activity; did the State have a substantial interest and purpose in creating the regulations that could only be achieved by restricting commercial speech; and was the regulation narrowly tailored to achieve the State's goal.

College Newspapers made two arguments to support their claim. First, they argued that the challenged regulation is only tailored towards one segment of media, college newspapers. Second, they argued that the regulation fails the *Central Hudson* test because the regulation targeted a majority of their readers who are over the age of 21.

⁶ *Cen'l Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of NY*, , 447 U.S. 557, 564 (1980).

In 2008, College Newspapers won the initial battle at the trial level. The trial court determined that the challenged regulation was facially unconstitutional under *Central Hudson*.

In 2010, the appellate court determined that the challenged regulation on its face did not violate the First Amendment and remanded the case back to the District Court. Now the trial court ruled in favor of ABC concluding that the regulation complied with *Central Hudson* as-applied to the College Newspapers because of Virginia's great interest in regulating underage and abusive drinking on college campuses.

In 2013 the case was sent back to the appellate court where the court once again applied the *Central Hudson* test to the challenged regulation. Both parties agreed that the regulation served a substantial governmental interest. The issue was whether the regulation was narrowly tailored to serve such interest. The court determined that the challenged regulation was more extensive than necessary. The regulation prohibits a large number of adults who are 21 years of age or older from receiving information about a product they are legally able to consume. College Newspapers was able to prove a majority of their readers are over the age of 21. After a seven year long battle, the Federal Court of Appeals ruled in favor of the College Newspapers.

RESEARCH

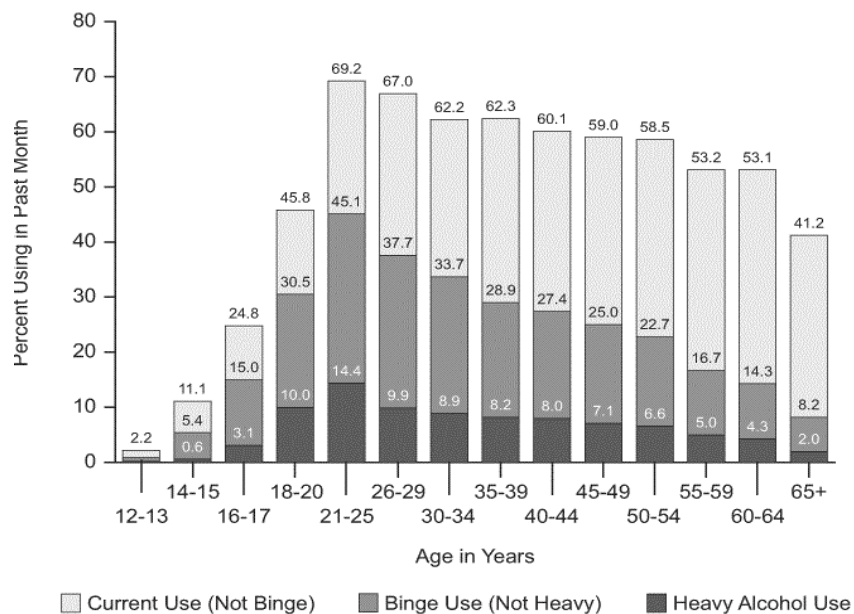
Although ABC's regulation was created to combat underage and abusive drinking on college campuses, it was not appropriately tailored and therefore it was unconstitutional. Several studies have proven that alcohol advertisements do not correlate with alcohol consumption.

Editor's Note:

In the ABC case, ABC offered the testimony of Dr. Henry Saffer, an economics professor at Kean University in New Jersey, who stated that advertising bans reduce the overall market demand for alcohol. The College Newspapers offered their own expert's testimony, Dr. Jon P. Nelson, an economics professor at Pennsylvania State University. Dr. Nelson testified that "[a]dvertising bans, partial or comprehensive, do not reduce the demand for alcohol. [I]n a 'mature market,' such as alcohol beverages, the primary effect of advertising is to create and

maintain brand loyalty[,]” Dr. Nelson supported his position by reference to all the alcohol advertisements on television, radio and the internet.⁷

There are however, college students that are drinking abusively and illegally. If imposing regulations on alcohol advertisements is not the way to solve the problem there needs to be another method because there are too many college students drinking irresponsibly. The following chart from the Substance Abuse and Mental Health Services Administration indicates the severity of the problem.



Results from the 2012 National Survey on Drug Use and Health:⁸

Editor's Note:

Just as alarming are statistics from The National Institute on Alcohol abuse and Alcoholism on the devastating effects of alcohol on college age students:⁹

⁷ See *Edu. Media supra* note 5, at 295, 296.

⁸ “Results from the 2012 National Survey on Drug Use and Health: Summary of National Findings.” www.samhsa.gov/data/NSDUH/2012.

Death: 1,825 college students between the ages of 18 and 24 die each year from alcohol-related unintentional injuries.

Assault: More than 690,000 students between the ages of 18 and 24 are assaulted by another student who has been drinking.

Sexual Abuse: More than 97,000 students between the ages of 18 and 24 are victims of alcohol-related sexual assault or date rape.

Injury: 599,000 students between the ages of 18 and 24 receive unintentional injuries while under the influence of alcohol.

Academic Problems: About 25 percent of college students report academic consequences of their drinking including missing class, falling behind, doing poorly on exams or papers, and receiving lower grades overall.

Health Problems/Suicide Attempts: More than 150,000 students develop an alcohol-related health problem, and between 1.2 and 1.5 percent of students indicate that they tried to commit suicide within the past year due to drinking or drug use.

OPINION

I believe there needs to be more emphasis on alcohol education in order to combat this problem. If more students understood how damaging alcohol can be there would be less students drinking irresponsibly. Perhaps universities can mandate that all incoming freshman take an alcohol education class. This class would educate students on the risks of alcohol consumption and provide statistical information. It would be unrealistic to assume that underage college students are never going to drink. However, there are ways of curtailing the number of underage drinkers and minimizing the amount of alcohol they consume. Enforcing a mandatory alcohol education class is one of those ways. This method would be effective because it would target all incoming college freshman.

As to the Court's decision on the ABC regulation, I agree with the Circuit Court ruling because ABC's regulation was ineffective in combating underage drinking. Although the regulation was created with good intentions, ABC failed to recognize that alcohol advertisements have little correlation to

⁹ Nat'l Institute on Alcohol Abuse and Alcoholism, <http://www.niaaa.nih.gov/alcohol-health/special-populations-co-occurring-disorders/college-drinking>.

alcohol consumption. This regulation is an example of an ineffective method of combating underage college drinking and abuse.

CONCLUSION

It is clear that underage alcohol consumption and abuse on college campuses across the United States is an important issue. It is time to find effective programs so that progress can be made to combat this issue.

STARBUCKS' BARRISTAS' BATTLE: TIP POOL SHARING

JOHN BAEK[†]

After a relaxing weekend, I am back into reality and ready to start my busy scheduled day. The first order of business is to grab a fresh cup of coffee at Starbucks. As I wait for my turn to order I observe a customer in front of me leave her change in a clear plastic jar. It's finally my turn and I see a jar with a couple of coins and a few dollar bills inside. The jar looks empty. Most days I don't leave any tip because I don't notice the jar but today is different. I am feeling guilty about not wanting to leave a tip.

When people go out to eat at a restaurant, it is customary to leave a tip based on the price of the meal. Customers provide tips in response to the waiter's service and attitude towards the customers. But what about when you walk into a coffee shop? The employees at Starbucks don't function like waiters in a restaurant. So should we give these employees a tip? Do all of the employees share the tips? Unfortunately there are many details that the consumer does not know about the process of sharing tips. Most companies have strict procedures to follow about receiving and distributing tips to its employees.

Starbucks' employees went to war with each other in a lawsuit to determine who gets to share in the tips. This paper will focus on recent court decisions regarding Starbucks cases on tip sharing; my research about the types of employees who are tipped, the cost of living in certain cities in the United States; and my opinion as to why I agree with the court's decision.

CASE SUMMARY¹

Starbucks "baristas" sued Starbucks for violating Labor Law 196-d², 193³ and 198-b⁴ in allowing the shift supervisors to share

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¹ *In re Starbucks Employee Gratuity Litigation*, 264 F.R.D. 67 (S.D.N.Y. Dec 16, 2009).

in the tip pool. The baristas claim was that the shift supervisors, who had supervisory roles were agents of the employer and therefore were not permitted to share the tips.

Starbucks has a written policy on how to collect, store, and distribute the customers' tips. The tips are collected in a cup. Once the container is full, the shift supervisor takes the money and stores it in a safe. Finally, at the end of each week the tips are distributed to baristas and shift supervisors. The policy also states that Starbucks does not permit assistant store managers or store managers to participate in any tip distribution because, under the Labor Law 196-d,⁵ they are considered "agents" of the employer.

There are different hierarchies within each Starbucks store. Barista is a starting position dealing with customer oriented services, operating the cash register, and cleaning the store. They work on a part-time, hourly basis. Shift supervisors do the same work as the baristas. They also work part-time, on an hourly basis. However, in addition, the shift supervisors have some supervisory authority over the baristas. For example, shift supervisors can direct which stations baristas should go to. Shift supervisors also may be responsible to open and close the store, collect deposit slips and place them in the safe and make deposits to the bank. Superior to shift supervisors are assistant store managers, who dedicate most of their time to customer oriented services but have more managerial and supervisory authority than shift supervisors. For example, assistant store managers can be involved with the process of hiring employee and closing and opening shops. They work as full-time employees and receive a salary with a minimum of 37 hours per work week. Unlike baristas or shift supervisors, assistant store managers can get quarterly bonuses and various benefits.

² N.Y. Labor Law §196-d states "No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. This provision shall not apply to ... the sharing of tips by a waiter with a busboy or similar employee."

³ N.Y. Labor Law §193.

⁴ N.Y. Labor Law §198-b.

⁵ N.Y. Labor Law §196-d.

Editor's Note:

Two cases were filed, one from the baristas challenging Starbucks' policy in sharing tips with shift supervisors. In a second similar case, Starbucks' assistant store managers also sued Starbucks for violations of New York Labor Law §196-d.⁶ The store managers wanted to be included in tip distribution. The trial court dismissed the actions.

Both plaintiffs appealed. The appellate court joined the two similar cases. The court would decide the cases on the definition of an "agent" in the context of New York Labor Law §196-d. Since the questions had not yet been determined by New York's highest court; the appellate court posed two questions for the New York court to answer: what factors determine whether an employee is eligible to share in a tip-splitting arrangement and has Starbucks violated New York Labor law by excluding some employees from sharing in tips.⁷

Editor's Note:

The United States Court of Appeals for the Second Circuit certified these questions for the New York Court of Appeals. The New York Court of Appeals' decision stated that whether an employee is an agent or an officer of the employer is determined not by full authority but rather a meaningful authority over other employees. Though shift supervisors may have some authority, their authority is limited and not meaningful.⁸

The federal appeals court also reviewed the New York State Wage Order, which clarified the Department of Labor's tip-splitting policies and a set of written guidelines dating back to 1972. The Wage Order makes clear that an employee's ability to participate in a tip pool under the last sentence of Labor Law § 196-d "shall be based upon duties and not titles" (12 NYCRR 146-2.14[e]).

The appellate court affirmed the trial court's decision; baristas had to share the tips with the shift supervisors but not with the assistant managers.

⁶ *Winans v. Starbucks*, 769 F. Supp.2d 515 (S.D.N.Y. 2011).

⁷ *Barenboim v. Starbucks Corp.* 698 F.3d 104, 118 (2d Cir. 2012).

⁸ *Barenboim v. Starbucks Corp.* 21 N.Y.3d 460, 470 (N.Y.2013).

RESEARCH

Some employees can make restaurant patrons feel uncomfortable if the tip, in their opinion, is unsatisfactory despite their lack of quality service. Tips can be a critical part of some employees' salaries.

Tips, like regular income wage, are subjected to social security tax, Medicare tax, and federal income tax. The procedure however is different from taxing a regular pay check. Employees must keep track of their tips using the form 4070A or through other methods they prefer. Employees who earn more than \$20 a month in tips must report the amount to their employer. It is important to note that service charges such as automatic gratuity for large parties, bottle service, room service, and delivery charges are not considered tips; these service charges are treated like a regular income wage. According to the United States Department of Labor, the employers must calculate how much they have to pay for social security tax, Medicare tax, and federal income tax from the employees' total pay check including the tip reports.⁹ Whether an employee can receive tips from a customer is entirely up to the owner of the business.

A blogger who dined at Sushi Yasuda, a restaurant in New York City, posted that the owner of the restaurant recently enforced a strict policy to ban their employees from receiving any tips from customers. The blogger posted a picture of the receipt on his website and on the bottom of the receipt it read "Following the custom in Japan, Sushi Yasuda's service staff are fully compensated by their salary. Therefore gratuities are not accepted. Thank you."¹⁰ Unlike the fully compensated staff at Sushi Yasuda, there are employees who are utterly dependant on tips to compensate for their salaries because they receive \$2.13/hr as their wage set by the Fair Labor Standards Act (FLSA).¹¹ These types of employees are usually waiters who work at restaurants. The idea of tip dependent employees is that they will receive enough in tips to match up to the regular federal minimum wage per hour, \$7.25. If the tips do not meet the regular federal minimum wage per hour, the employer must cover the missing amount from the business' revenue under

⁹ Fair Labor Standards Act Advisor, www.dol.gov/elaws/faq/esa/flsa/002.htm.

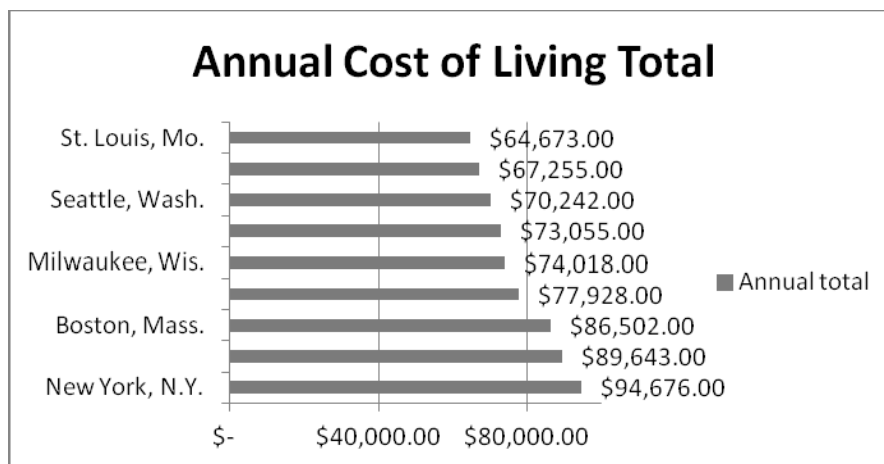
¹⁰ <http://thepricehike.com/post/52308734397/nycs-sushi-yasuda-eliminates-tipping-gratuities-no>.

¹¹ 29 U.S.C.A. §203.

FLSA. Finally, there are employees who get paid the minimum wage or higher and are allowed to accept tips, such as baristas and shift supervisors at Starbucks Coffee.

Ginger Adams Otis from the NYdailynews.com compared the highest cost of living in New York and the lowest cost of living in Marshall County, Mississippi. "A family of four trying to scrape by in Manhattan on \$93,500 — which would cover food, transport, housing, health care, child care and taxes but not vacations, eating out or savings — could do the same on \$48,000 in Marshall County, a new study says."¹²

Chart from Economic Policy Institute¹³



OPINION

Tipping is a customer's way of showing gratitude towards employees. I tip at Starbucks when I order multiple drinks, when my orders are complicated, or when the employee's service and attitude is beyond what is expected of them.

Baristas trying to exclude shift supervisors from tip distribution at the end of each week seems short sighted. Both positions are part-time. Both baristas, and shift supervisors' primary roles are to take orders from the customers and make their drinks. I cannot tell the difference between a barista and a

¹² www.nydailynews.com/new-york/nyc-tops-new-living-expenses-article-1.1390134.

¹³ www.epi.org/publication/ib368-basic-family-budgets.

shift supervisor when I walk into a Starbucks Coffee shop. In order to become eligible for shift supervisor you must work as a barista for two years. Shift supervisors are granted minimal supervisory tasks and a raise with their promotion from barista. The minimal supervisory roles refer to shift supervisor's ability to assign baristas to certain stations, to guide flow of customers, and to give feedback to baristas.

The current dispute between the baristas and the shift supervisors is because of their minimal supervisory tasks. However the baristas have the wrong perspective on the issue. Shift supervisors are merely baristas with experience and with experience comes knowledge and responsibility. The responsibilities the shift supervisors acquire with their positions are because of their knowledge of how to work each station and their knowledge of what to do during high traffic hours in the store. For example shift supervisors' authority enables them to guide other fellow employees when the stores get hectic.

The Court of Appeals of New York refers to the part of Labor Law Section 196-d which states "Nothing in this subdivision shall be construed as affecting the . . . sharing of tips by a waiter with a busyboy or similar employee." The last part of the section, "similar employee," refers to employees like shift supervisors whose main tasks are almost identical to a waiter, in this case a barista.

Shift supervisors earn more than baristas, which begs the question: so why do they need the tip money? Why should they participate in sharing tips when they earn more money? Shift supervisors' higher wage is based on their experience and the time and dedication that they put in when they worked as a barista before they got promoted. The limited supervisory role that comes with the promotion is not significant authority but an awareness of what is going on in the store and the ability to effect the flow of the store in a positive manner. It is nothing more than extra tasks for the shift supervisors and their higher wage is compensating for those tasks. If the baristas excel in their performance and receive good evaluations, they will be promoted to shift supervisor.

CONCLUSION

Tipping has become a customary behavior in our society, we must not forget the meaning behind it. Employees and employers

who contribute in the whole process of tipping should understand that tips reflect the quality of the customer's experience. The root of the dispute that came from the *Starbucks* cases is that lower wage employees' living costs and expenses in areas like New York are greater than their income and they are trying to increase that income by sharing in the tipping pool. Both baristas and shift employees are struggling for more money to live a better life for themselves and their families. This problem has been going on for some years and will continue.

THE CASE OF THE CONNECTICUT CHIMP: STRICT LIABILITY FOR DOMESTICALLY KEPT WILD ANIMALS

JESSICA FUSCO†

The annual number of recorded fatalities and catastrophic injuries resulting from the attack of privately owned domesticated and wild animals has been on a steady increase in the United States. Every year more and more innocent third party citizens are falling victim to these brutal attacks. Without the proper laws and restrictions to govern the public's ability to own and house potentially dangerous animals, no one is safe from a potential attack. A recent case in Connecticut has forced the State's legislature to reconsider the statutory restrictions on owning wild animals.¹ This article consists of three parts: a summary of the case that caused the legislature to amend the wild animal statutes in Connecticut, my research into the statistics and history of animal attack cases in the United States, and my opinion regarding the amended law and potential future amendments.

CASE SUMMARY²

Sandra Herold, a Connecticut resident, adopted her adult chimpanzee in its infancy. She then raised the primate for the next fourteen years in her Connecticut home. The chimpanzee was treated as a family member. Sandra would allow it to ride in her car, drink wine from stemmed glasses, use a computer, and dress and bathe itself.

† Jessica Fusco is a sophomore at St. John's University, College of Professional Studies. Her major is Legal Studies.

¹ Conn.Gen.Stat. Ann. §26-40a, (4), 2013:

“(a) No person shall possess a potentially dangerous animal. For the purposes of this section, the following wildlife, or any hybrid thereof, shall be considered potentially dangerous animals...

(4) The hominidae, including, but not limited to, the gorilla, chimpanzee and orangutan.”

² *Nash v. Herold*, 2010 WL 2573764 (Conn. Super. Ct. 2010).

The chimpanzee had demonstrated unpredictable and dangerous behavior on several occasions throughout the fourteen years Sandra had custody of it. It bit a woman on her hand in 1996, and then tried to drag the woman into a car. In 1998, the chimpanzee bit a man on his thumb. In 2003, it escaped from Sandra's car and roamed the city of Stamford for several hours prior to its capture.

In February of 2009, the chimpanzee escaped from Sandra's home. Unable to capture the animal, Sandra desperately requested help from an acquaintance, Charla Nash. Charla arrived at Sandra's home to help coax the animal back inside. Charla was aware of the dangerous propensities of the chimpanzee's behavior before agreeing to assist Sandra in capturing it. Shortly thereafter, the chimpanzee attacked Charla without provocation or warning. The attack left Charla with physical injuries including: traumatic brain damage, a traumatic eye injury, the loss of both hands, and significant destruction to her facial structure. When the police arrived on the property, the chimpanzee escaped again. Soon thereafter, the chimpanzee returned and attacked the police, causing damage to a police car, and forcing one of the officers to shoot and kill the chimpanzee in self-defense.

A lawsuit was initiated by Charla against Sandra. Charla's brother represented her in the legal action because Charla's injuries left her unable to represent herself in court.

Charla sued Sandra based on a theory of strict liability. Strict liability can be defined as liability without fault.³

Editor's Note:

Connecticut courts have applied the theory of strict liability for defectively manufactured products that cause injury to a party or for an activity that is abnormally or inherently dangerous, such as blasting with explosives. In Connecticut, a party must have a basis in statutory law to sue for strict liability or rely on courts to impose such liability.⁴

In this case, Charla claims that Sandra should be held strictly liable because Sandra knew or should have known of the

³ Black's Law Dictionary (abridged 6th ed.1991).

⁴ *Torres v. Dept. of Corrections*, 50 Conn.Supp. 72, 78 (2006).

inherently dangerous nature of her chimpanzee, a wild animal. Connecticut had no legal precedent to follow for this case.

Charla claims Sandra was strictly liable because she failed to take the proper precautionary action to ensure the safety of the public when deciding to house the chimpanzee with dangerous propensities. Other states have decided that owners of wild animals are strictly liable for injuries caused by such animals.⁵

Sandra argues that Connecticut does not recognize strict liability for such a claim and she believes her chimpanzee is not an inherently dangerous animal. Sandra claims that Charla has failed to set forth facts that would allow her to claim strict liability and that Charla can only have a claim for negligence. Sandra also contends that she did not break any laws or regulations by housing the chimpanzee and should not be held accountable for its action, as she had no fault in the situation.

Editor's Note:

Since Connecticut had no legal precedent on such an issue, the court reviewed cases from other states and other legal authority.

A legal encyclopedia states that an owner of a wild animal is held strictly liable for the actions of the animal, as well as the damages the animal causes to another person's property or well-being.⁶ An Indiana court held keepers of animals such as tigers strictly liable for the damages caused by the actions of the animal.⁷ In a scholarly treatise on wild animals and strict liability, the theory is that animals such as tigers cannot be considered safe no matter how domesticated they are and therefore the strict liability laws applies. It is the species itself that is considered wild by law, not the individual animal. The private owner of a domesticated animal may have reason to believe that the animal has been successfully tamed, and therefore no longer possesses the vicious characteristics the species is known to possess. However, the owners are nonetheless taking a risk that

⁵ *Irvine v. Rare Feline Breeding Center, Inc.*, 685 N.E.2d 120, 125 (Ind.App.1997).

⁶ 3B C.J.S., Animals § 319 (2013).

⁷ *Irvine v. Rare Feline Breeding Center, Inc.*, 685 N.E.2d 120, 125 (Ind.App.1997).

*the animal may unpredictably revert back to its instinct. Therefore, regardless of how domesticated, an animal of dangerous propensities may seem, it is considered to put the public at risk.*⁸

The court examined a federal decision that analogizes keeping a wild animal in a backyard to an “abnormally dangerous activity.”⁹

The trial court determined that the injuries sustained were horrific and that the owner of the chimpanzee should be held strictly liable for injuries because of the inherent dangerous nature of chimpanzees.

RESEARCH

In the United States privately owned primates have accounted for hundreds of recorded injuries to humans, however no fatalities have been documented.¹⁰ However, dogs are considered domesticated animals, and have accounted for hundreds of fatalities in the past decade alone.¹¹ This suggests that the level of domestication in any animal does not affect how safe the animal is for private owning.

The present case demonstrated that no matter how domesticated a wild animal may seem, it is impossible to say that it will not unpredictably revert back to its natural born instinct. Chimpanzees are wild animals with a known tendency to bite and damage their surroundings.¹² Because of these natural instincts, chimpanzees are considered a dangerous animal, and therefore, do not make suitable pets for private owners. The private owning of a chimpanzee places the public at an unnecessary risk.

The number of citizens owning wild animals is miniscule compared to the number of citizens owning dogs. The number of injuries caused by certain breeds of dogs are numerous and troubling. Certain breeds of dogs are known to instinctively possess dangerous predispositions. Many organizations have

⁸ 3B C.J.S. Animals § 323 (2013).

⁹ *G.J. Leasing Co., Inc. v. Union Electric Co.*, 54 F.3d 379 (7th Cir.1995).

¹⁰ The Humane Society of the United States, www.humansociety.org.

¹¹ Dogsbite.org, www.Dogsbite.org.

¹² Lincoln Park Zoo Chimpcare, www.chimpcare.org.

conducted studies to determine what breeds of dogs put the public at the greatest risk of attack.

Editor's Note:

The Center for Disease Control has analyzed the data recorded from dog attacks in the USA: Table 1—Breeds of dogs involved in human dog bite-related fatalities (DBRF) in the United States, by 20 year period, between 1979 and 1998.¹³ The following is a chart from The Center for Disease Control.

Table 1—Breeds of dogs involved in human dog bite-related fatalities (DBRF) in the United States, by 2-year period, between 1979 and 1998. Death-based approach of counting most frequent purebreds and crossbreds involved in 7 or more human DBRF

Breed	1979-1980	1981-1982	1983-1984	1985-1986	1987-1988	1989-1990	1991-1992	1993-1994	1995-1996	1997-1998	Total
Purebred											
Pit bull-type	2	5	10	9	11*	8	6	5	4*	6	66
Rottweiler	0	0	1	1	3	1	3	10	10	10	39
German Shepherd Dog	2	1	4*	1	1	4*	2	0	2	0	17
Husky-type	2	1	2	2	0	2	2	1	2	1	15
Malamute	2	0	3	1	0	2	3	1	0	0	12
Doberman Pinscher	0	1	0	2	2	2	1	0	0	1	9
Chow Chow	0	1	0	0	0	2	3	0	2	0	8
Great Dane	3	1	0	0	0	0	0	1	1	1	7
Saint Bernard	1	2	1	0	0	0	0	0	0	3	7
Crossbred											
Wolf-dog hybrid	0	1	1	2	1	4	1	2	2	0	14
Mixed-breed	0	3	1	2	1	2	0	1	1	1	12
German Shepherd Dog	0	2	0	2	2	2†	0	1	2	0	10†
Pit bull-type	0	1	0	3	2†	3	1	1	0	0	10†
Husky-type	0	1	1	2	1	1	0	0	0	0	6
Rottweiler	0	0	0	0	1†	1	0	1	1	2	5†
Alaskan Malamute	0	0	0	0	0	2	1	0	0	0	3
Chow Chow	0	0	0	0	0	1	0	1	1	0	3
Doberman Pinscher	0	0	0	0	1	0	0	0	0	1	0
Saint Bernard	0	0	0	0	0	0	1	0	0	0	1
Great Dane	0	0	0	0	0	0	0	0	0	1†	0†
No. deaths for which breed was known	10	20	26*	24	22	34*	24	25	26*	27	238

*Numbers differ from previous reports because police/guard dogs "at work" were excluded, and 1 new DBRF was identified as occurring in 1996. †A purebred dog and a crossbred dog of this breed were involved in a single fatality; therefore, that breed is counted only once in the total column.

It is undisputable that the attacks caused by these dogs are as catastrophic as those caused by the chimpanzee. After the Connecticut Court decided the present case the Connecticut legislature took action to protect the public from dangerous animals such as the chimpanzee. The new law prohibits the private possession of potentially dangerous animals, specifically including, "[t]he hominidae, including, but not limited to, the gorilla, chimpanzee and orangutan."¹⁴

There has been no such precautionary actions to protect its citizens against equally dangerous breeds of dogs.

One breed of dog that has historically had a vicious reputation is the pitbull. Historically, pit bulls have been bred to fight. By 1500, the blood sport, "bull baiting," had become a popular pastime in England. Bull baiting is a horrendous battle sport, where bulldogs were pitted against a bull in a fight to the

¹³ JAVMA Vol. 217 No. 6 Sept. 15, 2000, www.cdc.gov/HomeandRecreationalSafety/images/dogbreeds-a.pdf.

¹⁴ Conn. Gen. Stat. §26-40a (2013).

death. Breeders that took part in this sport began to selectively breed the bulldog to develop it into a muscular dog known for its powerful jaw strength. However, the public became outraged by the gruesome nature of the sport, and bull baiting was eventually banned in England in 1835. Soon after, bull baiting was replaced with a similar activity called rattling. In this sport, people made bets and wagers on how many rats a bulldog could kill in a given period of time. The bulldog was then cross breed with the terrier in order to give it better speed and agility to excel further in this game. This new cross breed is known today as the pit bull. Pit bulls more recently have been known for their role in dog fighting. Dog fighting is a sport that has been banned in the United States, as of April 2007. In this sport, individuals pit two dogs against each other in a grotesque battle resulting in the death of one dog, and in severe cases, both dogs.¹⁵

Knowing the background of the pit bull, it is understandable that the breed would be known today for its vicious tendencies. Nevertheless, the State of Connecticut now does not allow possession of a wild animal, such as a chimpanzee, yet allows possession of a vicious dog, such as a pit bull.

Editor's Note:

During the writing of this article, on October 1, 2013 Connecticut enacted C.G.S.A. § 22-357 "Damage by dogs to person or property" which imposes strict liability on the owner or keeper of any dog that does damage to the body or property of any person.

OPINION

As a citizen of Connecticut, and an avid pet owner, I agree with the court's decision to hold Sandra strictly liable for the damages caused by the Chimpanzee. I am also in support of the Connecticut legislative action banning the private owning of dangerous wild animals such as the chimpanzee. However, it is my opinion that stricter regulations should be put into place for owners of dangerous dogs as well.

Housing a chimpanzee, or any wild animal, in a domesticated environment, not only puts the public and third parties in a dangerous situation, but also forces the animal to

¹⁵ Dogbite.org, www.dogsbite.org.

live an unnatural life. The strict regulations decided on by Connecticut's Legislature subsequent to the chimpanzee attack case are necessary to protect the animal in similar situations. It is inequitable to expect an animal to act in a way contradictory to its natural instinct.

Connecticut's statutory law enables a person that has been bitten, or shows visible evidence of an animal attack, to kill the assailant animal during the attack, provided that they are not on the animal owner's property. It is instinctive for many animals, including chimpanzees and certain breeds of dogs, to attack and bite when they feel threatened. For that reason, housing an animal with the instinct to attack puts the animal in a life-threatening situation that they do not have the capacity to understand and therefore prevent.

Moreover, housing animals with dangerous predispositions in residential areas puts the public in an easily avoidable dangerous situation. Hundreds of injuries, including fatalities, are recorded annually in the United States due to privately owned animal attacks. The majority of these attacks victimize innocent third parties with no prior relation to the attacking animal. In most animal attack cases, the animal is killed after the attack because of the risk that they post to the public. As a result, both the human and the animal suffer in an animal attack incident. However, these situations can be easily avoided by enforcing stricter restrictions on animal owners.

I do not believe pit bulls and other dangerous dog breeds should be banned from private owning. However, strict regulations should be required for the owning of these breeds. When a citizen applies to attain a permit for the owning of a dangerous dog, a background check should be completed to further qualify the applicants. Citizens that have previously owned a dog involved in a recorded attack incident should be denied the ability to own another dangerous dog. Inexperienced dog owners should also be denied a permit for owning an inherently dangerous dog. In addition, prior to granting a permit to own a dangerous dog, the potential owner's home should be visited in order to guarantee the dog will be housed in an environment suitable for its needs. A potentially dangerous dog requires a sufficient amount of space so that it will be less inclined to wander onto public, or neighboring property. Additionally, housing dangerous animals in heavily trafficked

areas puts both the animal and the public in increased contact. Housing a potentially dangerous animal in an apartment-style residence increases its risk exponentially. For this reason, the US Army has banned pit bulls from military housing units.

By implementing these strict standards, inexperienced dog owners, as well as individuals living in close confines with their neighbors will be discouraged and prohibited from owning dog breeds that are proven to put the public at a higher risk of attack. As a result, the number of attack incidents recorded annually should diminish.

Understandably, there are contradicting arguments to my opinion. First, it is a popular belief that dogs act according to their training, meaning that a properly trained pit bull (or any other inherently dangerous breed) possesses no vicious tendencies. This statement is certainly true to an extent, however, similar to the chimpanzee case, it is impossible to predict that an animal will not unexpectedly revert back to its natural born instinct. The pit bull for example was bred to have a strong muscular jaw and agility to be able to kill rats, bulls, and other dogs.¹⁶ Regardless of the nurture aspect in training a dog, you cannot reverse its nature and instinct.

Another argument is that it would be difficult to mandate what dogs are considered dangerous and therefore require a permit. Even dog breeds without inherently dangerous tendencies have been involved in attack incidents. How then can we determine what dogs are safe and what dogs are not?

Of course it is impossible to generalize a dog's temperament based on breed alone. There are many other factors that need to be considered. Traumatic incidents in the dog's early years can attribute to its temperament, as well as nutrition, and its socialization. For this reason, dogs that may not be known to attack by breed can still be considered to have a vicious temperament. It would be impossible to control the owning of these individual dogs entirely, however, it is possible to control ownership to an extent using personality testing. Personality tests are currently used in Connecticut's dog shelters and by dog breeders in order to match the right dog to the right owner. These tests categorize individual dogs by playfulness, trainability, shyness, aggressiveness, as well as other

¹⁶ *Id.*

characteristics. These tests are extremely helpful in determining if an individual dog has vicious tendencies. If an individual dog is classified as an abnormally aggressive dog, it generally does not get put up for adoption because of the risk it puts the potential owner and the public at.

It is a fact proven by statistical evidence that certain breeds of dogs account for more attacks than others. Although it is impossible to regulate all vicious dogs, by requiring special permits for the dog breeds known to possess vicious tendencies by nature, Connecticut would be minimizing the risk of attack on its citizens. Connecticut has already taken action to protect its citizens from the attack of privately owned wild animals. Since certain breeds of dogs have been proven to cause equally significant damage, it makes sense to take the same precautionary actions for inherently dangerous domesticated animals as well.

CONCLUSION

The current laws in the United States require revision in order to keep them up to date with society. If there is an issue putting the public at a higher risk of a danger, new restrictions should be considered to keep the public safe. Because of the continual increase in life-threatening animal attacks, new regulations should be considered in an attempt to break the ever-increasing pattern. The case of the chimpanzee attack lead Connecticut's Legislature to amend the statutes regarding wild animals possession. However, the statistical and historical research portrayed in this article proves that domesticated animals have accounted for equally damaging attacks. The issue of pets attacking third parties should be amended. By changing the laws regarding wild animals and neglecting to amend the laws for domesticated animals, the state is only partially fixing the problem.

PROFESSIONAL PHOTOGRAPHER'S LIABILITY FOR REFUSAL TO WORK A SAME-SEX WEDDING

ARTURO PENA[†]

INTRODUCTION

Can a professional photographer refuse to take pictures of a gay marriage? Is the photographer violating antidiscrimination laws? What rights does the photographer have? What if the photographer's religious beliefs are opposed to gay marriages? Can the photographer just say "no." The Supreme Court of New Mexico addressed this controversial issue in the recent case *Elane Photography v. Vanessa Willock*.¹ The complex case raised a series of important problems, which became even more puzzling in light of the parties involved. On the one hand, devout Christian photographers claimed that their free speech and religious freedom rights would be infringed if the court required them to take photos of a gay couple. On the other, a gay couple felt discriminated against because the photographer of their choice refused to take their pictures because they were gay. The way in which these rights and laws converge and the Court's opinion is both interesting and significant. In a society where the Constitution gives everyone the right to religious freedom, can the law require a business to accept customers who have a contrary view? This paper will review the New Mexico case and submit my opinion on this controversial issue.

Editor's Note:

The case originated with the New Mexico Human Rights Commission, which found Elane had discriminated against the

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¹ *Wilcox v. Elane Photograph*, 2009 WL 8747805 (N. Mex. Dist. Ct., Dec. 11, 2009).

couple. On appeal, the New Mexico State District Court,² the New Mexico Court of Appeals³ and the Supreme Court of New Mexico⁴ all affirmed the Commission's decision.

CASE SUMMARY

Wilcox contacted Elane Photography through e-mail about the possibility of acquiring their services for the wedding. The leading photographer and co-owner of the business replied that the company photographs only “traditional” weddings and consequently declined to photograph the Wilcox wedding. To confirm this policy, Wilcox’s partner e-mailed Elane asking the same question but this time with regards to a heterosexual marriage. Elane responded by giving the pricing information and inviting Wilcox’s partner to discuss the services.

Wilcox filed a suit against Elane, claiming she had been discriminated against on the basis of sexual orientation in violation of the New Mexico Human Rights Act (“NM Human Rights Act”). The NM Human Rights Commission, composed of eleven citizens appointed by the Governor, ruled in favor of Wilcox. Elane appealed claiming that the application of the law is unconstitutional and a violation of Elane’s right of religious freedom and freedom of speech. The Court of Appeals affirmed the decision of the Commission, and Elane appealed again to the New Mexico Supreme Court.

The issues were the following; (i) whether Elane Photography violated the NH Human Rights Act when it refused to photograph the commitment ceremony, and if so, whether this application of the NH Human Rights Act violates Free Speech or the Free Exercise Clause of the First Amendment to the United States Constitution or the New Mexico Religious Freedom Restoration Act (NMRFRA).⁵

Editor’s Note:

First Amendment freedom of expression applies not only to the written or spoken word, but also to expressive conduct and

² Id.

³ *Wilcox v. Elane Photograph*, 284 P3d 428, (N. Mex. Ct. of App. 2012).

⁴ *Wilcox. v. Elane Photograph*, 309 P3d 53 (N. Mex. Sup. Ct. 2013).

⁵ N.M.Stat. Ann. §28-22-1(1978).

*artistic expression.*⁶ *Elane Photography submits that their wedding photos are expressions and therefore shielded by the First Amendment. Elane has control over the photos it is hired to take and the editing of those photos. Elane argues that its refusal to photograph is not based on sexual orientation but rather its refusal to endorse same sex marriages. However, the Court found that the photos do not contain Elane's message and therefore that laws requiring Elane to photograph same sex couples do not violate the First Amendment.*

The New Mexico Supreme Court decided that Elane did discriminate and violated the NM Human Rights Act when refusing to photograph a homosexual commitment ceremony. Also, this interpretation of the NM Human Rights Act is consistent with the First Amendment to the U.S. Constitution.

The NM Human Rights Act protects certain classes of people against discrimination from businesses that offer their services to the public. The statute states that refusing to offer services due to race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap is unlawful.

Elane Photography claims it did not discriminate on the basis of sexual orientation, but rather was discriminating on the basis of the behavior that people of certain sexual orientations display. In other words, Elane claims that it discriminated based on the actions that certain people display, not merely on the basis of whether a person belongs to a certain group. The Court rejected this distinction. The Court stated that accepting such distinction would greatly impair the effectiveness of the NM Human Rights Act. When the law protects against discrimination based on sexual orientation, it also protects conduct that is inseparable from being gay.

Furthermore, the plaintiff argues that it did not violate the NM Human Rights Act because it would photograph a homosexual person if such person does not demonstrate homosexual behavior in the photograph. But the Court dismissed this argument by noting that drawing a distinction between homosexual and heterosexual clients with regards to the services

⁶ See *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 65–66 (2006).

provided is enough to discriminate and thus violate the NM Human Rights Act.

The Court also rejected Elane Photography's free speech argument. Elane Photography argued that photography is an expressive art form and, thus, it should be considered free speech. By photographing a same sex marriage, Elane Photography would be expressing a positive message about gay weddings, something it does not want to do. Elane argued that the government cannot require a person to speak its message or "host or accommodate another speaker's message." As support for Elane's argument, Elane's cited to *Hurley*⁷ where parade organizers were afforded free speech protection to exclude gay, lesbian and bisexual ("GLIB") marchers. To require the organizers to permit a GLIB organization to march in the parade would require the organizer to host a GLIB message, in violation of the organizers' First Amendment rights.

But, distinguishing the cases cited by Elane, the Court held that the NM Human Rights Act does not make Elane Photography display any message through its photographs. The photos taken as part of a business are merely capturing a moment of a person's event, not the photographer's expression.

The law mandates that, if Elane Photography wishes to operate as a service of "public accommodation" as defined in NM Human Rights Act Section 28-1-2(H), it cannot discriminate based on sexual orientation. Section 28-1-2(H) of the NM Human Rights Act states that a public accommodation is "any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place that is by its nature and use distinctly private."

The Court found that Elane Photography's refusal to take the wedding photos was discriminatory and violated New Mexico Law.

Editor's Note:

In Hurley, the The South Boston Allied War Veterans Council was authorized to organize and conduct the St. Patrick's Day-

⁷ *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

Evacuation Day Parade. In 1992 and 1993, the Council denied an Irish gay, lesbian, and bisexual organization's, ("GLIB"), request to march behind their banner in the parade. GLIB sued the Council alleging violations of Massachusetts law forbidding discrimination on the basis of sexual orientation in a place of public accommodation. The U.S. Supreme Court found the state's public-accommodation law could not be applied to the expressive speech of a private parade. The Council's right of free speech permitted them to exclude participants with messages opposite that of the Council.

The Court further concluded that the decision of Elane Photography of offering its services to the public at large is a business decision, and has nothing to do with the owners' freedom of speech. The NM Human Rights Act does not interfere with the plaintiff's photos or expressive content, only with its choice of clients. It is the business operations of Elane Photography that are regulated by the NM Human Rights Act, not the photo content. The Court also notes that Elane's photographs are shared only with its clients and their relatives, not with the public at large.

Furthermore, the Court concluded that observers will not believe that Elane Photography approves of same sex marriage merely because of their pictures. Elane Photography can easily write a declaration for the costumers to see that it does not approve of such unions, but photographs them in compliance with New Mexico law. The observers will also know that photography businesses are hired on demand, and that the thoughts evoked through the photographs are not necessarily the thoughts of the photo company. The photo company is just doing its job by photographing an event with people that may not share their views.

The Court rejected that creative and expressive professions are exempt from antidiscrimination laws.⁸ Also, Elane's claim that the NM Human Rights Act violates its free exercise of religion is at first sight unclear. It is unclear whether a company itself should be treated as a person for free exercise purposes, but even assuming it should be treated as one, the right of free exercise does not exempt an individual from complying with

⁸ *Hishon v. King & Spadling*, 467 U.S. 69, 71-73 (1984).

antidiscrimination laws on the grounds that his or her religion prescribes discriminatory action.

OPINION

Despite the fact that I was initially persuaded by Elane Photography's arguments and against the New Mexico Supreme Court's interpretation of public accommodation laws and its consistency with the First Amendment Right of Free Speech, I now conclude that the Court's decision is fair.

Elane Photography recently petitioned for a writ of certiorari to the United States Supreme Court relying on *Hurley*. I think that the New Mexico Supreme Court properly distinguished *Hurley* and that the United States Supreme Court will not disturb the New Mexico Supreme Court's decision.

Elane Photography does not have a private message but rather a business. The New Mexico Court is not forcing Elane to express anything. The New Mexico courts are simply stating that if a photography company chooses to offer its wedding services to heterosexual couples, it must do the same for homosexual couples. The object of the law's application is not on Elane Photography's expression but its business decision to refuse to offer its service to homosexuals. As the New Mexico Court stated, the purpose of antidiscrimination laws is to reduce discrimination by businesses. If businesses such as photographers were exempt because of the expressive content that they create, the exemption would undermine the whole purpose of the antidiscrimination laws.

Elane Photography may be anticipating challenges posed by technological advances like social media. If photographs are uploaded to Facebook, Instagram or Twitter, there would be many individuals viewing them who may not realize that the pictures posted on websites are not endorsing views held by the photographer.

Nevertheless, I share the court's opinion in that "it is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the . . . couple's views." Disclaimers are therefore not necessary to avoid confusion as to whether a photographer endorses the message he expresses at the request of a paying customer. The nature of the photography business is widely known and no one would think that every image produced by a photographer expresses a

message that the photographer completely and wholeheartedly agrees with.

CONCLUSION

Public accommodation laws that target discrimination in businesses are consistent with the First Amendment. Indeed, nobody disputes that the beliefs held by Elane Photography are genuine and truly inspire their lives. Yet if they are to continue as a wedding photography business, they are required to do something against their deeply seated convictions.

As a Christian, the idea of compromising beliefs because of American laws is a hard reality. That was the main factor driving my investigation of the law in this case. I tried my best to discredit the New Mexico Courts' arguments in hopes of avoiding such compromise. But after much analysis and meditation, the conclusion was undeniable: the courts of the United States uphold the U.S. Constitution on behalf of all citizens and protect their differing beliefs. And it is comforting to know that I share this with all citizens of the United States. Despite different worldviews we function as one nation.

A LEGAL WRITING RESOURCE: THE BIBLE

MARY NOE J.D.†

A legal writer should strive to convey facts and ideas with clarity and conciseness. Chief Justice John Roberts described the fastidious use of language as the “building blocks of law.”¹ Analogies, metaphors and story-telling also have a role in communicating ideas. I propose that Bible stories and quotations may be particularly effective for legal writers.

The owners of the copyright to the 1970s pop-hit “Alone Again (Naturally),” written by Gilbert O’Sullivan, brought suit against hip-hop artist Bix Markie, who had “sampled” or utilized a small portion of the O’Sullivan song in his own work. Judge Kevin Thomas Duffy did not view the issue as complex or free from doubt. His opinion began with the following words: “Thou shalt not steal.”² Judge Duffy quickly transitioned from a Devine edict to the laws of the United States: “The conduct of the defendants herein, however, violates not only the Seventh Commandment but also the copyright laws of this country.”³ Judge Duffy conveyed his meaning in a simple, concise and almost rhythmic style.

Biblical stories, often well-known to readers, may provide rich illustrations of an author’s point. In researching the common law doctrine of witness sequestration, the exclusion of one witness during the testimony of another, I stumbled upon a particularly effective use of the Biblical story of Susanna.

The Book of Daniel tells the story of Susanna, a beautiful woman who was falsely accused of adultery by two elders who desired her. The elders agreed to recant their accusations if Susanna would have sex with them. She refused and the elders persisted in their accusation. Daniel proposed that the elders be

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¹ www.youtube.com/watch?v=ZljBzn7rbPE (lasted visited Feb. 3, 2014).

² *Grand Upright Music Limited v. Warner Brothers Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y.1991).

³ *Id.* at 182.

questioned separately. Each one provided a different description of the tree where the event occurred. Susanna was found innocent and the two elders with the inconsistent stories were put to death.⁴

One federal appellate court referred to the story of Susanna as the “wisdom of the ages” which the court asserted was the basis for Rule 615 of the Federal Rules of Evidence, which expressly requires the exclusion of a witness during the testimony of another under specified circumstances. The Court described the sequestration of witnesses as “one of the most important trial mechanisms for reaching truth.”⁵

A poor understanding of Biblical wisdom, however, may lead to a judicial rebuke. Judges have often relied upon the story of Solomon and the two would be mothers as a source of wisdom. One Biblically-challenged lawyer tried to argue that the trial judge had encouraged a jury to reach a compromise verdict, a legal no-no, by expressing the hope that the jury would have the “judgment of Solomon.”⁶ The lawyer argued that the remark was a veiled reference to “splitting the baby,” which was an invitation to the jury to find a mid-point between positions rather than decide the case according to legal principles. The actual Bible story describes two women who each claimed to be the mother of the child. King Solomon suggested that the dispute be resolved by using a sword to divide the child awarding one-half to each. When one of the women expressed her horror and said that she would rather give up the child than see it killed, Solomon declared her, because of her love of the child, to be the true mother.⁷ The appellate court gave its own take on the story: “the woman who had falsely claimed the child responded the Old Testament equivalent of ‘let ‘er rip. . .’” In affirming the trial court, the appellate court added: “A jury blessed with the judgment of Solomon would be wise in discerning the truth. Agreeing with the district court, we wish such wisdom on every jury.”⁸

⁴ *Daniel 13:53-59.*

⁵ *United States v. Rhynes*, 218 F.3d 310, (4th Cir. 2000).

⁶ *Walter Intern. Prod., Inc. v. Salinas*, 2009 WL 9113379 (Oct. 26, 2009).

⁷ 1 Kings 3:16-28.

⁸ *Walter Intern. Prod., Inc. v. Salinas*, 650 F.3d 1402 (11th Cir. 2011).

Shakespeare's Antonio in the Merchant of Venice warned that the devil can cite scripture,⁹ and the same may be said of proponents of opposing legal positions. An army reservist argued that he should be able to wear a wig to cover his long hair.¹⁰ The lawyer defending the Army's position cited the Biblical story of Absalom, who in a fateful battle was caught by his shocks of hair in the boughs of an oak-tree and hanged.¹¹ The Biblical reference appears not to have impressed the judge who responded: "While the Court appreciates the Government's metaphorical use of the Biblical story of Absalom, 2 Kings, 18:9-15, metaphors are no substitute for facts and can often cut both ways. Cf. Samson and Delilah, Judges, 16:17-19."¹² The Court's Biblical citation was to the story of Samson, who declared that his great strength was because "No razor has ever been used on my head."¹³

One judge has cited a Biblical antecedent to the right to due process, even in a proceeding as informal as a school suspension proceeding. "When the Apostle Paul was put on trial in the first century A.D. before Festus, that Roman governor refused to proceed against him without a hearing, reporting to King Agrippa that 'It was not the custom of the Romans to give up anyone before the accused met the accusers face to face and had opportunity to make his defense concerning the charge laid against him.'"¹⁴ Notably, the Court was not suggesting that the students' right to due process was required because the Bible said so. It was nothing more than a recognition that certain rights have been time honored and were likely incorporated into the notion of due process at the time of adoption of the Fourteenth Amendment.

As demonstrated, Bible stories can provide a crisp example to underscore an important point without the need for lengthy prose. Judge Guido Calabresi of the United States Court of Appeals for the Second Circuit employed a New Testament story as a perfect beginning to a concurring opinion in a constitutional challenge to a campaign finance law. The concurrence, with no prior introduction, began with a quote from Luke:

⁹ Scene III, Merchant of Venice.

¹⁰ *Harris v. Kaine*, 352 F. Supp.769 (S.D.N.Y. 1972).

¹¹ 2 Kings, 18:9-15.

¹² *Harris v. Kaine*, 352 F. Supp.769 (S.D.N.Y. 1972).

¹³ *Harris v. Kaine*, 352 F. Supp. at 777 n.6.

¹⁴ *Givens v. Poe*, 346 F. Supp.202 (W.D.N.C.).

“As Jesus looked up, he saw the rich putting their gifts into the temple treasury. He also saw a poor widow put in two very small copper coins. ‘Truly I tell you,’ he said, ‘this poor widow has put in more than all the others. All these people gave their gifts out of their wealth; but she out of her poverty put in all she had to live on.’ Luke 21:1–4.”¹⁵

Judge Calabresi later drives home the meaning of the quote with language of one of his concurrences in a prior case, “In other words, and crucially, a large contribution by a person of great means may influence an election enormously, and yet may represent a far lesser intensity of desire than a pittance given by a poor person.”¹⁶

Federal forfeiture laws may have a severe impact upon an innocent third party. One such case occurred when Pearson Yacht Leasing Co., leased a pleasure yacht to two Puerto Rican residents, who registered the yacht with a local governmental authority. When the law enforcement discovered marijuana on the yacht, it seized the yacht. Notice of forfeiture was given to the registered users of the yacht and not to the owners. After 15 days the yacht was forfeited to the government. The Leasing Company attempted to repossess the yacht and then learned of the forfeiture. The Leasing Company challenged the forfeiture statute, claiming that it was unconstitutional as applied because it never received notice of the forfeiture and because its property was forfeited without compensation or finding of any fault as to them.

The case came before the United States Supreme Court and the majority opinion recalled a Bible story to deliver the bad news to the Leasing Company. The Court started with a reference to the common law of England, where any object that either directly or indirectly causes the accidental death of a King’s subject is forfeited. The king would use the value of the object forfeited to provide money for the people or for charity. Then the Court refers to the roots of that common law, the story recounted in Exodus 21:28: “[i]f an ox gore a man or a woman, and they die, he [the ox] shall be stoned and his flesh shall not be

¹⁵ *Ognibene v. Parkes*, 671 F.3d 174, 197 (2d Cir. 2011).

¹⁶ *Id.* at 199 (quoting *Landell v. Sorrell*, 406 F.3d 159, 161 (2d Cir. 2005)).

eaten.”¹⁷ The details of the Bible story are a bit crass but the point was made.

Federal and State courts have cited to the Bible on “punitive damages, forgiveness of debts, due process, alien rights, statutory construction, basic agency doctrine, tenancy by the entirety, the two-witness rule, the right of confrontation, judicial impartiality, criminalization of sodomy, the necessity defense to criminal charges, the right of free travel, usury, eminent domain, impeachment of witnesses, the law of apportionment, property tax exemptions, double jeopardy, and various elements of past and present domestic relations law.”¹⁸

The Bible is the oldest and best known literary work and may aid in the understanding of a legal argument.¹⁹ However, Bible references that appeal to a religious authority rather than the court’s authority are inappropriate.

The writer should strive to communicate clearly, succinctly and efficiently for the reader, who may in turn become a writer as well. As one inspired author put it, “So in everything, do to others what you would have them do to you, for this sums up the Law and the Prophets.” Matthew 7:12.

¹⁷ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 footnote 17 (1974).

¹⁸ J. Michael Medina, *The Bible Annotated: Use of the Bible in Reported American Decisions*, 12 N. ILL. U.L.REV. 187 (1991).

¹⁹ *Gaede v. State*, 801 N.W.2d 707, (Sup. Ct. N.D.).

