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**Do United States Laws Prohibiting Discrimination on the Basis of Disability Apply to Study Abroad Programs ?**

In serving as counsel to a university with substantial study abroad programs, I and other attorneys in my office are frequently called upon to ponder the circumstances under which our operations abroad must comply with statutes protecting the rights of the disabled. This paper, which may still not have progressed too far beyond what we at the Nonprofit Forum designate a “nugget,” examines the conflicts in the relatively sparse decisional law and traces them to the somewhat erratic course of the law regarding the extraterritorial application of American statutes. I then offer a series of simple hypotheticals, based on actual fact patterns, which test the various approaches which have been used to decide cases of extraterritorial application and illustrate why outcomes are inconsistent and difficult to predict.

At the outset, one should be mindful of the diversity of study abroad arrangements. For example, an American student already enrolled for an undergraduate degree in an American college or university may enroll directly in a foreign university’s educational program or be placed there through the auspices of his or her home institution (with or without academic credits being transferable back to the home campus). On the other hand, certain other American institutions of higher education operate their own programs abroad. Enrollees in these American managed programs may be Americans

(e.g. taking a semester abroad) or, on occasion, foreigners from the host country or elsewhere, and faculty may be drawn from both the home institution and foreign universities. The applicability of American laws protecting the disabled from discrimination to any particular study abroad program may in the end come to depend on particular permutations of such factual variations.

## **PART I: THE STATE OF THE LAW TODAY**

### **The Federal Disabilities Laws in Brief**

Two federal laws prohibit universities from discriminating against individuals with disabilities. Passed in 1973, the Rehabilitation Act outlaws disability-based discrimination by the federal government. Section 504 of the Rehabilitation Act applies this prohibition to recipients of federal funding.<sup>1</sup> In 1990, Congress broadened the protections for people with disabilities with the passage of the Americans with Disabilities Act (ADA) which extended the prohibition against disability-based discrimination to employers, recipients of state and local funding and private actors. Title III of the ADA governs public accommodations, including private universities.<sup>2</sup> As recipients of federal money, most private universities are governed by both Section 504 of the Rehabilitation Act and Title III of the ADA.

The requirements imposed by Section 504 and Title III overlap significantly; consequently, courts tend to analyze and apply the statutes in unison.<sup>3</sup> Section 504

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<sup>1</sup> Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1999).

<sup>2</sup> Americans with Disabilities Act of 1990, Title III, 42 U.S.C. § 12182 (1999). Public universities and other public schools are governed by Title II of the ADA. 42 U.S.C. § 12131 *et seq.*

<sup>3</sup> *See e.g.* Rodriguez v. City of New York, 197 F. 3d 611, 618 (2d Cir. 1999) (“Because Section 504 of the Rehabilitation Act and the ADA impose identical requirements, we consider these claims in tandem”);

provides that “no otherwise qualified individual with a disability in the United States. . . shall, solely by reason of her or his disability, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .”<sup>4</sup> The law specifically identifies colleges, universities and other postsecondary institutions as within its scope. Modeled on the Rehabilitation Act, the ADA employs new language in its proscription of disability-based discrimination by public accommodations: “No individual shall be discriminated against on 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. . . .”<sup>5</sup> Most legal authorities have assumed that the extraterritorial reach of Section 504 and Title III is identical.<sup>6</sup>

The text of Title III provides further definition of unlawful discrimination which has been used to enforce both the ADA and the Rehabilitation Act. Beyond the straightforward denial of benefits, the law sets forth five other types of discrimination which will be deemed unlawful whether or not they are intended to disadvantage individuals with disabilities. Each of the five sorts has its own standard.

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*Bird v. Lewis & Clark College*, 104 F. Supp. 2d 1271, 1274 (D. Or. 2000) (“Because both of these statutes apply to federally funded educational institutions, courts frequently analyze discrimination claims under these statutes under the same rubric”).

<sup>4</sup> 29 U.S.C. § 794.

<sup>5</sup> 42 U.S.C. § 12182(a).

<sup>6</sup> An argument can be made that Section 504 and Title III should not be considered in tandem: unlike Title III, Section 504 contains specific language which could be interpreted as precluding extraterritorial application. The statute’s ban on disability-based discrimination provides, “No otherwise qualified individual with a disability *in the United States* shall. . . .” 29 U.S.C. § 794 (emphasis added). But none of the legal authorities considering the question has given weight to this language. Most neglect even to address it. Those who have discussed it have not deemed it dispositive. *See e.g. King v. Bd. of Control Eastern Michigan University*, 221 F. Supp 2d 783 (D. Mich. 2002) (finding “in the United States” did not prevent Title IX’s application to claims arising out of activity abroad.)

Universities and others cannot impose eligibility criteria that screen out or tend to screen out individuals with disabilities unless such criteria can be shown to be *necessary* for the provision of the goods being offered.<sup>7</sup> Thus, universities must have extremely good reasons for requiring students to pass physical or mental health exams prior to participation in particular programs or activities.<sup>8</sup> In the context of study abroad, many universities interpret this as a bar against any categorical preclusion of students with severe anorexia or other mental health conditions unless the student would pose a threat to others participating in the program.

Universities must also make reasonable modifications in policies, practices or procedures that are necessary to afford the goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities; only when a modification would “fundamentally alter” the nature of the goods or services provided may a public accommodation decline to offer it.<sup>9</sup> For example, a vision-impaired student who uses a guide dog must be permitted to bring the dog into classrooms and dorm rooms, even if the university otherwise prohibits pets on campus.<sup>10</sup> An individual with a learning disability must, generally speaking, be given extra time to complete an exam. Students with certain other health concerns must be granted special authority to live alone, even when all other students are assigned to housing accommodations with roommates.

The law also requires universities to offer auxiliary aids and services to ensure that individuals with disabilities are not excluded, denied services or otherwise treated

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<sup>7</sup> 42 U.S.C. § 12182(b)(2)(A)(i).

<sup>8</sup> The statute does, however, allow universities to exclude individuals with disabilities when their participation would pose a “direct threat to the health or safety of others.” 42 U.S.C §12182(b)(3). *See also* School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).

<sup>9</sup> 42 U.S.C. § 12182(b)(2)(A)(ii).

<sup>10</sup> 28 C.F.R. § 36.302(c)

differently, unless a university can establish that a particular aid or service would amount to a fundamental alteration or result in undue burden.<sup>11</sup> Auxiliary services may include sign language interpreters, note takers, computer assistants, and open and closed captioning.<sup>12</sup> Regulations interpreting “undue burden” establish several factors to be considered, including the geographic separateness and the administrative or fiscal relationship of the site in question to any parent corporation or entity, the overall financial resources of the parent entity, the type of operation of the parent entity, and the nature and cost of the action needed. Neither the regulations nor the case law provides a clear standard for understanding when an auxiliary aid rises to the level of undue burden.

The ADA also mandates removal of architectural barriers and communication barriers that are structural in nature in existing facilities where such removal is *readily achievable*.<sup>13</sup> Thus, public accommodations have been required to build ramps and make other modifications to become wheelchair accessible. To interpret readily achievable, the regulations list factors identical to those provided for undue burden.<sup>14</sup>

In cases where architectural modifications are not readily achievable, the ADA requires public accommodations to make their services available through alternative methods whenever alternative methods are readily achievable.

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<sup>11</sup> 42 U.S.C. § 12182(b)(2)(A)(iii).

<sup>12</sup> 28 C.F.R. § 36.303. It is worth noting that whereas the only exception to the reasonable accommodation requirement is for fundamental alteration, in the case of auxiliary aids and services undue burden can also justify an exemption.

<sup>13</sup> 42 U.S.C. § 12182 (b)(2)(A)(iv).

<sup>14</sup> 28 C.F.R. § 36.104.

## Study Abroad in Limbo

No definitive answer exists to the question of whether the Rehabilitation Act and the ADA apply to the foreign based programs of American institutions. The United States Department of Education's Office of Civil Rights (OCR) has issued conflicting rulings: in two cases, study abroad programs were subjected to a factual analysis to determine their compliance with the federal disabilities laws, while in another the ADA and Rehabilitation Act were stated not to reach beyond U.S. borders. After a federal district court in Oregon held that the laws do apply extraterritorially, the Ninth Circuit on appeal explicitly declined to address the issue, instead affirming the lower court's holding that the defendant university had complied with the laws in any case.<sup>15</sup> A recent article published in the *Stanford Law and Policy Review* characterized the issue as "unresolved."<sup>16</sup>

### A. Precedent Denying Extraterritorial Applicability

The argument that federal disability protections do not apply to study abroad programs centers on the Supreme Court's ruling in *E.E.O.C. v. Arabian American Oil Co., (Aramco)*, a case involving a different civil rights statute.<sup>17</sup> A United States citizen who worked for the American company, Aramco, in Saudi Arabia brought a complaint under Title VII of the Civil Rights Act of 1964 alleging the employer had discriminated against him on the basis of race, religion and national origin. The Court held that the

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<sup>15</sup> *Bird v. Lewis & Clark College*, 303 F.3d 101 (9th Cir. 2002), *aff'g* 104 F. Supp. 2d 1271 (D. Or. 2000).

<sup>16</sup> Arlene S. Kanter, *The Presumption Against Extraterritoriality As Applied to Disability Discrimination Laws: Where Does it Leave Students With Disabilities Studying Abroad?*, 14 STAN. L. & POL'Y REV. 291 (2003).

<sup>17</sup> *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244 (1991).

employee did not have a cause of action: Title VII did not apply extraterritorially even to the employment practices of American companies employing American citizens abroad. The court relied upon the “longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”<sup>18</sup> Thus, *Aramco* stood for both the specific decision that American companies operating abroad would not be bound by Title VII and for the explicit affirmation of the presumption against extraterritoriality.

Congress negated the Court’s ruling with respect to extraterritorial employment within a few months. The Civil Rights Act Amendments Act of 1991 extended the reach of Title VII by expressly including Americans employed overseas by American controlled companies among the class protected under the law and at the same time amended Title I of the ADA, which prohibits disability-based discrimination by employers. It did so by providing an additional sentence to the definition of “employee” under both Title VII and the ADA: “with respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.”<sup>19</sup>

But the presumption against extraterritoriality articulated in *Aramco* remains intact, and *Aramco* continues to stand for the proposition that laws of Congress are presumed not to apply abroad.<sup>20</sup> Even after Congress overturned *Aramco*, a student bringing a claim under the ADA or Section 504 would have to address the presumption that, except with respect to employment, the statutes do not govern extraterritorially.

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<sup>18</sup> *Id.* at 248 (citing *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

<sup>19</sup> 42 U.S.C. §§ 2000e(f), 12111(4)

<sup>20</sup> *See e.g.* *Kollias v. D & G Marine Maintenance*, 29 F. 3d 67 (2d Cir. 1994) (examining the Longshore Harbor Workers’ Compensation Act under the presumption against extraterritoriality); *Subafilms Ltd. v. MGM -Pathe Communications Co.*, 24 F. 3d 1088 (9th Cir. 1994) (considering extraterritorial violations of the Copyright Act).

In historical context, Aramco seemed not only to affirm a presumption against extraterritoriality, but also to heighten the burden of overcoming it. Writing for the majority, Chief Justice Rehnquist does not clearly identify the standard that would be used in evaluating Congressional intent, but he did remark that the burden would not be met “unless there is ‘the affirmative intention of the Congress clearly expressed.’”<sup>21</sup> And although the plaintiffs had offered several pieces of evidence to show that Congress had intended the statute to apply abroad, the Court ruled that the burden had not been overcome.<sup>22</sup> Both the language used by the Court and the weight given to the evidence offered suggested that a very high showing would be required to overcome the presumption against extraterritoriality.

In dissent, Justice Marshall, joined by two others, criticized the majority for transforming the presumption into a “clear statement” rule (i.e. one which requires courts to give credence only to the language of the statute itself). Cases cited by the majority, they argued, had actually addressed a “wholly independent rule of construction: that an act of congress ought never to be construed to violate the law of nations if any other

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<sup>21</sup> 499 U.S. at 248 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

<sup>22</sup> The individual plaintiff and the EEOC had offered three significant pieces of evidence to show that Congress had intended Title VII to apply abroad. First, they pointed to the statute’s broad definition of “commerce.” An employer was subject to the statute if it had employed 15 or more employees for a specific period and was “engaged in commerce;” the term commerce included “trade, traffic (etc.). . . among the several States or between a State and any place outside thereof.” The Court dismissed this as “boilerplate language” which could not show Congressional intent for extraterritorial application. The plaintiffs also pointed to the “alien-exemption” provision of the statute: the statute “shall not apply to an employer with respect to the employment of aliens outside any State.” If the statute did not apply abroad, why would Congress explicitly exempt aliens outside any state? The Court accepted the defendant’s argument that the alien exemption clause was not a clear indication of Congressional intent since the language could refer to aliens employed in U.S. *possessions*, which are part of the United States but not within any state. Finally the court declined to defer to the EEOC’s interpretation of the law as extending extraterritorially: “We are of the view that, even when considered in combination with petitioners’ other arguments, the EEOC’s interpretation is insufficiently weighty to overcome the presumption. . . .” 499 U.S. at 251-8 .



possible construction remains,” a rule known as the “Charming Betsey” presumption.<sup>23</sup>

In the absence of such a conflict, Marshall argued, the court must give effect to “all available indicia of the legislative will.”<sup>24</sup>

In subsequent decisions the Court has in fact looked to legislative history and other indications outside the four corners of the statute to determine extraterritorial intent. In *Sale v. Haitian Centers Council, Inc.* the Court held that the Immigration and Nationality Act, which prohibits the deportation or return of aliens to countries where they will be subject to persecution, does not apply extraterritorially to Haitians found by the Coast Guard on the high seas.<sup>25</sup> But it did so only after examining “all available evidence about the meaning” of the provision in question, including the structure of the larger statute and its legislative history.<sup>26</sup> Likewise, the Court looked to legislative history to determine that the Federal Tort Claims Act does not apply to claims arising in Antarctica in *Smith v. United States*.<sup>27</sup>

In the case of the disabilities laws, legislative history may undercut the argument for extraterritorial application: the fact that Congress responded to Aramco by amending only Title I of the ADA—leaving Title II, Title III and the Rehabilitation Act unaltered—tends to support the presumption that Congress did not intend such provisions to apply abroad. This form of reasoning was used by the Fourth Circuit in the age discrimination

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<sup>23</sup> 499 U.S. at 264 (Marshall, J. dissenting) (internal citations omitted).

<sup>24</sup> *Id.* at 261 (Marshall, J. dissenting). Marshall stated that the inference raised from the alien exemption (see note 22, *supra*). should itself be enough to overcome the presumption; he also pointed to other evidence, including legislative history, which suggested that Congress had in fact intended the law to apply abroad.

<sup>25</sup> 509 U.S. 155 (1993).

<sup>26</sup> *Id.* at 177.

<sup>27</sup> 507 U.S. 197 (1993).

case, *Reyes-Gaona v. North Carolina Growers Association*<sup>28</sup> The case involved a Mexican citizen working in Mexico for an American company which he claimed had violated the Age Discrimination in Employment Act (ADEA). Initially, courts had held that the ADEA could not be applied to any conduct by American employers abroad.<sup>29</sup> In 1984, Congress amended the ADEA so that the term employee included “any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.”<sup>30</sup> As amended, the ADEA remained silent with respect to foreign employees of American companies abroad.<sup>31</sup> Citing *Aramco*, the Court used this legislative history to uphold the presumption against extraterritorial application: “when it desires to do so, Congress knows how to expand the jurisdictional reach of a statute.”<sup>32</sup> It further stated that “the doctrine of *expression unis est exclusion alterius* instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded.”<sup>33</sup>

In 2001 in a case concerning Arizona State University (ASU), the Department of Education’s Office of Civil Rights (OCR) seems to have adopted an interpretation of Title III and Section 504 as having no extraterritorial application.<sup>34</sup> The complaint arose from ASU’s refusal to provide a sign language interpreter for a hearing-impaired student

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<sup>28</sup> 250 F.3d 861 (4th Cir. 2001).

<sup>29</sup> See e.g. *Cleary v. U.S. Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984).

<sup>30</sup> 29 U.S.C. § 630(f).

<sup>31</sup> As amended, the ADEA, Title VII of the Civil Rights Act of 1964 and Title I of the ADA each apply only to American employers operating abroad, either directly or through subsidiary organizations. For example, an exception to Title I provides, “This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.” 42 U.S.C. § 12112(c).

<sup>32</sup> 250 F.3d at 865.

<sup>33</sup> *Id.*

<sup>34</sup> *Arizona State University (AZ), Complaint No. 08-01-2047*, 22 NDLR P 239 (Dep’t of Educ. Dec. 3, 2001).

enrolled in a study abroad program through University College Cork in Ireland. Finding for the university in categorical but otherwise unelaborated language, the ruling opined, “it is OCR’s position that neither Section 504 nor Title II [the provision of the ADA regulating public universities] requires the University to provide auxiliary aids and services in overseas programs. Nor does either statute otherwise prohibit discrimination on the basis of disability in overseas programs.”

#### B. Precedent Applying Section 504 and the ADA to Study Abroad

Contrariwise, there is also a significant amount of law maintaining that the ADA and Section 504 do reach beyond U.S. borders to regulate the activities and operations of American organizations abroad. Although the ASU ruling appears absolute, it neglected to address prior decisions issued by OCR itself that came out the other way and required study abroad programs to adhere to the federal disabilities laws. In addition, a district court in Oregon recently came to the conclusion that the laws do apply extraterritorially to study abroad programs.

OCR first addressed disability-based discrimination in study abroad programs in 1990 in a case concerning St. Louis University.<sup>35</sup> A student complained that the university had failed to accommodate his learning disability in its Madrid study-abroad program in violation of Section 504. Although OCR found for the University, it did so only after determining that St. Louis had in fact complied with the requirements of Section 504. It seemed to have given little thought as to why Section 504 should apply,

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<sup>35</sup> St. Louis University (MO), Complaint No. 07-90-2032, 1 NDLR P 259 (Dep’t of Educ. Dec. 12, 1990).

remarking simply “the University is a recipient of Federal financial assistance and, therefore, must comply with the regulation implementing Section 504.”<sup>36</sup>

The St. Louis University decision might have been disregarded in light of the Supreme Court’s subsequent ruling in *Aramco*, but OCR adhered to its initial interpretation of Section 504 in 1992—a year after *Aramco*—in a case concerning the College of St. Scholastica.<sup>37</sup> OCR ruled that the school had violated Section 504 when it refused to provide an American Sign Language interpreter for a deaf student who planned to attend its study abroad program in Ireland. The ruling made no mention at all of the question of extraterritoriality.

More recently, an Oregon district court also concluded that the ADA and the Rehabilitation Act apply to study abroad programs notwithstanding the presumption against extraterritoriality. In *Bird v. Lewis & Clark College* a wheelchair-bound student claimed her school failed appropriately to accommodate her during a study abroad program in Australia.<sup>38</sup> In an unpublished memorandum, the Court concluded that the student could sue the college under the federal disabilities laws.<sup>39</sup> Applying the laws the Court ultimately found that the defendant had met its obligations under Title III and the Rehabilitation Act. On appeal, the Ninth Circuit did not address the question of extraterritoriality claiming it unnecessary after upholding the lower court’s finding that *Lewis & Clark* had satisfied the disabilities laws.<sup>40</sup>

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<sup>36</sup> *Id.* at 259.

<sup>37</sup> College of St. Scholastica (MN), Complaint No. 05-92-2095, 3 NDLR P 196 (Dep’t of Educ. Sep. 15, 1992).

<sup>38</sup> 104 F. Supp. 2d 1271 (D. Or. 2000).

<sup>39</sup> Cited in Kanter, *supra* note 16 at 307.

<sup>40</sup> 303 F. 3d 1015, 1021 (9th Cir. 2002).

Extraterritoriality also finds support in *King v. Eastern Michigan University* (EMU), a 2002 case under Title IX of the Civil Rights Act of 1964.<sup>41</sup> In considering whether several incidents of sexual harassment that occurred during an EMU study abroad program in South Africa violated Title IX, the Court began by describing the presumption against extraterritoriality. The Court would not analyze the overseas programs under Title IX unless there was “affirmative evidence” of Congress’ intent for extraterritorial application.<sup>42</sup> Although there was no specific mention of extraterritoriality in the statute itself or in the legislative history, the court concluded that there was sufficient evidence to support application abroad. The Court pointed to the inclusive language of the law: “No person in the United States shall, on the basis of sex, be excluded from participation in, denied the benefits of, or be subjected to discrimination under *any education program or activity* receiving Federal financial assistance” and remarked that there was no exemption in the statute or regulations for study abroad programs.<sup>43</sup> The Court stressed that Title IX is remedial legislation with a broad purpose that “sweeps within its scope every single university education program.”<sup>44</sup> The opinion also referenced legislative history quoting statements made by the sponsor of the law during floor debate which had labeled the law a “strong and comprehensive measure,” which would have “broad” and “far reaching” impact and would “root out, as thoroughly as possible at the present time, the social evil of sex discrimination in education.”<sup>45</sup>

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<sup>41</sup> 221 F. Supp. 2d 783 (D. Mich. 2002).

<sup>42</sup> *Id.* at 787.

<sup>43</sup> *Id.* at 788, *quoting* 20 U.S.C. § 1681 (emphasis in quotation).

<sup>44</sup> *Id.* at 788

<sup>45</sup> *Id.* at 789, *quoting* 118 Cong.Rec. 5803, 117 Cong.Rec. 30404.

Likewise, the language and legislative history of the ADA and Rehabilitation Act provide evidence of Congressional intent for the disabilities laws to be comprehensive—evidence which a court using the EMU approach could cite to overcome the presumption against extraterritoriality. Echoing Title IX, Section 504 forbids disability-based discrimination under “*any program or activity* receiving Federal financial assistance.”<sup>46</sup> Title III of the ADA guarantees “the *full and equal* enjoyment of the goods, services (etc.). . . of *any place of public accommodation*.”<sup>47</sup> And like Title IX, neither Section 504 nor Title III exempts activities abroad. The stated purpose of the ADA offers further evidence of the expansiveness of the law’s reach. “It is the purpose of this chapter to provide a clear and *comprehensive* national mandate for the elimination of discrimination against individuals with disabilities,” and “to *invoke the sweep of congressional authority*. . . .”<sup>48</sup>

### C. Failed Attempts at Reconciling the Cases

#### 1. *Factual Distinctions: programs operated by the defendant American university v. programs operated by another non-American institution.*

Several commentators have tried to reconcile the cases addressing disabilities laws and study abroad programs by distinguishing between programs run by American universities and those provided by non-American schools or institutions for which American universities provide credit. St. Louis University and St. Scholastica, the two cases in which OCR applied the disabilities laws to study abroad programs, involved

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<sup>46</sup> 29 U.S.C. § 794 (emphasis added).

<sup>47</sup> 42 U.S.C. § 12182 (emphasis added).

<sup>48</sup> 42 U.S.C. § 12101 (emphasis added).

programs that were actually operated by the American university defendants. Likewise, the defendants in *Bird v. Lewis & Clark* and *EMU* ran the programs under which they were sued—and which were evaluated under the disabilities laws and Title IX respectively. In contrast, *ASU*, the case in which OCR held the disabilities laws do not apply extraterritorially, related to a study abroad program run by University College Cork. Some have suggested OCR’s ruling in *ASU* depended on the fact that the university did not directly control the study abroad program in question.<sup>49</sup> But OCR made no mention of *ASU*’s indirect relationship to the study abroad program in its decision.<sup>50</sup> And, Howard Kallum, a representative from OCR’s Washington D.C. office, reportedly has refuted the distinction: at a conference hosted by the University of North Carolina in the spring of 2002, Kallum endorsed *ASU*, stating the disabilities laws do not apply to study abroad, regardless of who operates the program.<sup>51</sup>

## 2. *Chronological Distinctions: old v. new decisions.*

It is worth noting that the decisions concerning study abroad programs cannot sensibly be sorted chronologically. The OCR rulings requiring study abroad programs to comply with the federal disabilities laws both occurred in the early 1990s. Arguably, OCR reversed its position with *ASU* in 2001, and *ASU* stands as OCR’s current interpretation of law. But even after *ASU*, the Ninth Circuit affirmed a ruling rooted in a

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<sup>49</sup> See e.g. Kanter, *supra* note 16 at 315.

<sup>50</sup> *ASU*, 22 NDLR P at 239.

<sup>51</sup> Kallum’s appearance at the UNC Study Abroad legal workshop is described in a email posted on NACUANET. Email from E. Goldgeiger, Associate General Counsel, North Carolina State University, to National Association of College and University Attorneys (May 20, 2002) (on file with author).

factual analysis of Lewis & Clark College's study abroad program, leaving the question of extraterritoriality unresolved.<sup>52</sup>

### 3. *Geographical distinctions: region v. region*

The division of authority concerning the application of the disabilities laws to study abroad programs might be compared to a circuit split. The Department of Education maintains twelve regional offices, each with its own OCR. Every decision addressing this question has been issued by a different regional office. The early rulings applying the disabilities laws abroad were issued by Region VII (St. Louis University) and Region V (St. Scholastica). Region VIII published ASU and declared the disabilities laws not to apply extraterritorially. The Oregon district court which reached the opposite conclusion in *Bird v. Lewis*, falls within Region X. Most Regions have yet to rule on the question.

## **PART II: FRAMING POTENTIAL SOLUTIONS**

The confusion surrounding the appropriate geographical reach of disability-based protections derives less from the statutes themselves than from the law of extraterritoriality. Aramco portrayed the presumption against extraterritoriality as a “longstanding principle of American law.”<sup>53</sup> In fact, the canon of interpretation had long been on the decline.<sup>54</sup> After a period of forty years during which the Supreme Court had not once applied the presumption against extraterritoriality, the decision amounted to a

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<sup>52</sup> 303 F.3d 1015.

<sup>53</sup> 499 U.S. at 248.

<sup>54</sup> See William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. OF INT'L. L. 85 (describing the wane of the presumption in the half century prior to Aramco).



significant revival.<sup>55</sup> In the years following *Aramco*, courts have struggled to make sense of how and when this reinvigorated presumption against extraterritoriality should be applied.

The most fundamental and persistent uncertainty is the question of what actually constitutes an extraterritorial application. Some courts identify extraterritorial application as the application of American laws to conduct that occurs outside the United States. Others consider extraterritoriality the application of American law to activity that does not have significant effects within this country. In one recent decision, a federal district court looked to the “center of gravity” of the parties’ relationship to determine whether the case was one of extraterritoriality. These varying concepts of extraterritoriality suggest overlapping but distinct approaches for applying the presumption against extraterritoriality which will now be explored by a series of hypotheticals involving the disability discrimination and other civil rights statutes.

*Case 1: An American Student (S) pursuing a bachelor’s degree at an American University (U) spends a semester at U’s satellite campus in Madrid. The classes that S takes in Madrid will earn credit toward her American degree. S has a learning disability and requests one hour of extra time for her three hour in-class exams. Does the ADA require U to grant S’s request?*

Assume that U would be required to provide the requested accommodation if S were studying at U’s home campus in the United States. In essence, this question asks why S should be treated differently during her one semester in Madrid than during the seven semesters she spends in the United States. Put another way, what justifies the disparity of treatment of S and her classmates who remain at the home campus?

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<sup>55</sup> See *Id.* at 91 (“It was the decision in *Aramco* that breathed new life into the presumption.”).

Although there is precedent that U would be authorized to refuse S while she studies at a campus outside the United States, the ASU ruling announcing this position provided no rationale for the disparate treatment.

Filling in the blanks for the Department of Education, we might characterize this as a straightforward application of the historical presumption against extraterritoriality. The test in question will be given abroad; American laws are presumed not to reach beyond U.S. borders; therefore, in the absence of clear evidence suggesting that Congress intended the disabilities laws to apply overseas, the test will not be governed by the ADA or Rehabilitation Act. As Oliver Wendell Holmes, Jr. explained in 1909, “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”<sup>56</sup>

Drawing on Holmes’ reasoning, courts considering the reach of civil rights laws have tended to emphasize the location of the questionable conduct as the trigger of the presumption against extraterritoriality. In *Reyes-Gaona v. North Carolina Growers Association*, *supra*, the Fourth Circuit considered whether a Mexican plaintiff who submitted an application in Mexico for a position in North Carolina could claim age discrimination under the ADEA.<sup>57</sup> The court rejected the plaintiff’s argument that the case did not involve extraterritorial application because the desired job would have been in the United States; given that the application had been submitted from outside the United States it raised questions of extraterritoriality and the presumption applied. A second example of the principle can be found in the Eleventh Circuit case, *Stevens v.*

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<sup>56</sup> *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

<sup>57</sup> 250 F. 3d 861.

Premier Cruises.<sup>58</sup> A wheelchair bound guest aboard a Bahamian cruise ship sued the cruise company under Title III of the ADA claiming the ship was not wheelchair accessible. Avoiding the question of whether Title III applies abroad, the court held that the case was not one of extraterritoriality. The ship had traveled to Florida; “a foreign-flag ship sailing in United States waters is not extraterritorial.” Even though the ship was generally governed by Bahamian law, the fact that it had been physically situated within the territory of the United States, albeit temporarily, rendered the conduct local and the application of American law unproblematic.

Using this approach, the applicability of the presumption against extraterritoriality turns on the test’s being given outside U.S. borders. The fact that the test will be offered by an American institution, to an American student, enrolled for credit toward a degree to be awarded in America arguably would have no bearing whatsoever. For all conduct occurring overseas, American laws presumably do not apply.

In the alternative, a court might choose to focus on the effects of the test to be taken to determine that this would not be a case of extraterritorial application at all. Given that the grade S receives on the test will appear on her American transcript and will effect her standing as a student (and eventual graduate) of U in America, one might say that regardless of where the test is physically administered, imposing the requested accommodation would not constitute an extension of the disabilities laws beyond U.S. borders.

The Second Circuit articulated this type of effects test in *Schoenbaum v. Firstbrook*, in which the court considered whether the Securities Exchange Act of 1934

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<sup>58</sup> 215 F.3d 1237 (11th Cir. 2000).

could be used as the basis of a shareholder derivative suit brought by an American shareholder of a Canadian corporation listed on both the American Stock Exchange and the Toronto Stock Exchange.<sup>59</sup> The shareholder claimed that the corporation had been damaged by the approval of a transaction with a French corporation, which he characterized as insider trading. All of the relevant decisions and activity occurred in Canada. Overruling the lower court's holding that the presumption against extraterritoriality blocked a suit under Rule 10b-5, the court stressed the impact that alleged violations of the law could have in the United States:

We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities. In our view, neither the usual presumption against extraterritorial application of legislation nor the specific language of Section 30(b) show Congressional intent to preclude application of the Exchange Act to transactions regarding stocks traded in the United States which are effected outside the United States, when extraterritorial application of the Act is necessary to protect American investors.<sup>60</sup>

Although the court seemed to frame this as part of its analysis into whether Congress had expressed an intent for extraterritorial application so as to overcome the presumption, the reasoning has since been adopted by courts and legal scholars as a mechanism for avoiding the presumption altogether.<sup>61</sup> Hastings Law Professor, William S. Dodge, has argued that “acts of Congress should presumptively apply only to conduct that causes

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<sup>59</sup> 405 F. 2d 200 (2d Cir. 1968).

<sup>60</sup> *Id.* at 206. To reinforce the presumption against extraterritoriality, the defendants had pointed to Section 30(b) of the act which provides the Act does not apply 'to any person insofar as he transacts a business in securities without the jurisdiction of the United States. . . .' 15 U.S.C. §78dd(b).

<sup>61</sup> *See e.g.* Robinson v. TCI/US West Communications, Inc, 117 F.3d 900 (5th Cir. 1997); Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d. 252 (2d Cir. 1989); *see also* Zoelsch v. Arthur Andersen & Co., 824 F. 2d 27 (D.C. Cir. 1987) (advocating the effects test while employing a conduct based test).

effects within the United States regardless of where that conduct occurs.”<sup>62</sup> Using Dodge’s reasoning, U would be required to provide extra time for S’s exam, because the effects of the test will primarily be felt within the United States.

A recent federal district court ruling used a similar though distinct test: the court looked to the location of the parties’ relationship as a whole, instead of the place of the particular events or their effects, in determining what constituted extraterritoriality. In *Torrico v. IBM*, a citizen of Chile working for IBM sued the company under Title I of the ADA.<sup>63</sup> The plaintiff had worked for IBM in New York for one year before accepting a four-year “temporary assignment” in Chile; while there, his claim under Title I arose. Because he was not a U.S. citizen, the plaintiff fell outside the scope of the 1991 amendments to the ADA. Nonetheless, the Court held that he could sue under the ADA; even though his daily work was in Chile, it did not constitute “employment in a foreign a country.” Thus application of the ADA would not be considered extraterritorial.

The court used a “center of gravity” test to locate the site of employment explaining, “it is the center of gravity of the entire employment *relationship* . . . rather than one or more particular locations where employment duties may have been performed, that answers the factual question of whether an individual is employed in a foreign country or in the United States. . . .” The plaintiff alleged that he had entered into the employment relationship in New York and begun work there. In addition his compensation and benefits continued to be paid by IBM U.S. in New York, and he continued to communicate with colleagues in the New York office. If *Torrico* were to

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<sup>62</sup> Dodge, *supra* note 54 at 90.

<sup>63</sup> 213 F. Supp 2d 390 (S.D.N.Y. 2002).

succeed in proving these facts at trial, they would support a finding that he had been employed in New York.<sup>64</sup>

In Case 1, the center of gravity between S and U is clearly within the United States. S applied for admission to U and enrolled in the United States. Seven of her eight semesters will be spent in the United States. She will earn a degree in the United States. While in Madrid, she likely pays tuition to U's home campus in the United States. Torrico would characterize this as a case of domestic application and the presumption against extraterritoriality would have no relevance.

Thus, each of three distinct approaches to the meaning of "extraterritorial," each with support in the law, is able to provide a framework for the analysis of Case 1. A second hypothetical case (with three variations) further illuminates each approach.

*Case 2(a): An American Student (S) enrolled in a course at U's Madrid campus is being sexually harassed by her American teacher. Although S is earning a degree from U, she is not taking the course for credit. Does the sexual harassment violate Title IX?*

Using the traditional location of the specific conduct test, this activity presumably falls outside the scope of Title IX. The Ninth Circuit case, *Arno v. Club Med*, provides an example of this approach in the context of gender discrimination.<sup>65</sup> An American citizen working for the American company, Club Med, claimed she was raped by her supervisor while on a six-month assignment in Guadeloupe. Although the court heard the case in 1994, the events arose prior to the 1991 Civil Rights Act amendments: The parties agreed that under *Aramco* the rape was not itself subject to suit under Title VII

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<sup>64</sup> *Id.* at 403-405.

<sup>65</sup> 22 F. 3d 1464 (9th Cir. 1994).

because Title VII did not extend to Americans' activity in French territory at that time. Instead, the plaintiff claimed that Club Med violated Title VII by failing to take the requisite remedial action after she returned to America and filed a complaint with the company's New York office. The Court rejected Arno's claim. Because the rape had occurred outside the United States it did not violate Title VII at all. With no underlying violation, Club Med's American employees were under no obligation to investigate or take other remedial action.<sup>66</sup> The decision echoed Holmes' reasoning in *American Banana*: the very lawfulness of the act was determined by the country where it was committed.

The locus of the relationship test would provide an equally straightforward, though opposite, conclusion. Just as in our first fact pattern, in this case the center of S and U's relationship is in the United States. Therefore application of American laws would not be extraterritorial and the presumption would not apply. Indeed the Torricco court offered a similar scenario as a hypothetical; to stress the temporary aspect of the plaintiff's assignment, the court analogized it to an airline mechanic working at JFK Airport in New York. According to the court, if the mechanic's employer asked her to go abroad on a special two-week assignment, the employer could not lawfully discriminate against her on the basis of sex. "In this hypothetical, the worker was not 'employed in foreign country,' but in the United states."<sup>67</sup> The example exactly mirrored the facts of Arno. But while the Arno Court emphasized the location of the acts themselves, Torricco stressed the location of *employment*.

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<sup>66</sup> *Id.* at 1472.

<sup>67</sup> 213 F. Supp. at 402.

The facts pose a somewhat more difficult question under the effects test. Unlike our previous hypothetical, the behavior complained of here does not directly impact S's American transcript or the credit earned toward her American degree. Still, a case might be made that significant effects of the sexual harassment will occur in the United States. For example, although the court cast EMU as a case *applying* the presumption against extraterritoriality, the opinion also provided support for the argument that sexual harassment overseas has effects domestically.

Equality of opportunity in study abroad programs, unquestionably mandated by Title IX, requires extraterritorial application of Title IX. Holding otherwise could clearly create discrimination within the United States. That is, allowing sex discrimination to occur unremedied in study abroad programs could close those educational opportunities to female students by requiring them to submit to sexual harassment in order to participate.<sup>68</sup>

*Case 2(b): S is being sexually harassed by her American citizen teacher in a course offered by U in Madrid. S is not herself an American citizen or resident. She is not enrolled in a degree program at U, and she is not earning credit for the course. Does the sexual harassment violate Title IX?*

In this variation our analysis under the location of the specific conduct test remains unchanged; whenever conduct occurs abroad, the presumption against extraterritoriality applies. Here, S would likely be confronted by the presumption under the other two tests as well. Except perhaps to argue about the effect of not disciplining the future behavior of the American faculty member vis-à-vis his American students in the same program, S would have a difficult time establishing the American effects of the sexual harassment. She is not earning an American degree which could be compromised. And she would gain little support from the *EMU* reasoning cited above. Nor could S

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<sup>68</sup> 221 F. Supp. 2d at 790.



characterize her relationship with U as centered in the United States. The sum total of S's interactions with U relate to S's enrollment in the non-credit course in Madrid. Thus, each of the three definitions of extraterritorial would be triggered here, and S would face the presumption.

*Case 2(c) An American Student (S) enrolled in a course at U's Madrid campus is being sexually harassed by her teacher (T), a Spanish citizen and resident of Spain. S is earning a degree from U, but she is not taking the course for credit. Does the sexual harassment violate Title IX?*

Again, the analysis under the location of the specific conduct test would be unchanged.

One might argue that S's case under the effects test is weakened. Unlike our student in Case 2(a), in this case, upon her return as a matriculated student in the United States, S will presumably never again have to encounter T. This subtraction, albeit small, coupled with the fact that the student was not enrolled for credit, might arguably render the American effects insufficient to sustain a cause of action. On the other hand, had the student been enrolled for credit toward her American degree, the subtraction resulting from the professor's citizenship and residency might well not be considered meaningful.

What about the relationship test? One might argue that since S's only interactions are in Spain with a local national, the relationship should be considered to exist in Spain. Still, as a full-time degree student of U, for whom T was an agent, S could perhaps more plausibly claim the United States as the center of her relationship with U, and the presumption against extraterritoriality would not apply.

Here the effects and relationship tests might well be found to enable S to sue in an American court, even under circumstances in which the central figure, T, could

potentially be unavailable as a witness in the United States. U may be forced to engage in a costly process of locating and preserving evidence from Spain. Tests such as the effects test and relationship test which serve to extend the applicability of American law can be predicted to subject American institutions operating abroad to such increased costs and burdens.

One might also pause to observe in passing that the American law prohibitions against sexual harassment may themselves be inconsistent with local cultural norms. That said, as T's employer, U would presumably have the authority to require T to comply with its sexual harassment policy regardless.

### **Conclusion/Overview**

As it stands today, the law does not provide a predictable answer to the seemingly straightforward question of whether study abroad programs must comply with the ADA and other civil rights statutes. As suggested above, courts might move to address the unresolved ambiguity surrounding the presumption against extraterritoriality in a number of ways.

A. Continue to define the problem away. The effects and relationship tests developed by courts in recent years have been used to characterize cases so as to avoid the presumption against extraterritoriality altogether. These tests may be fairly accused of giving aid and comfort to legal fiction. How else can an individual who has for four years shown up to an office in Chile be said to be working in the United States? A more straightforward application of the traditional presumption against extraterritoriality, however, would leave otherwise compelling cases unaddressed.

B. Strengthen the presumption against extraterritoriality by insisting upon the traditional definition of extraterritorial and requiring a clear indication of extraterritorial intent. As the hypotheticals above highlight, the ambiguity surrounding the presumption against extraterritoriality could be significantly reduced by such an insistence, and the presumption against extraterritoriality would be applied whenever the action underlying the lawsuit occurs outside U.S. borders. Absent an adequately clear demonstration of the intent of Congress to the contrary, a judge would give no weight to the location of the effects of the conduct or the national identity of the parties.

C. Weaken the presumption so as to allow facts and circumstances to enter that analysis. While the restoration of the traditional presumption against extraterritoriality would have the benefits of clarity and simplicity in application, it would continue to ignore the tension which causes the erratic case law. Clearly, the judiciary is not entirely comfortable with the results of a strict application of the presumption. Although it may be disingenuous to characterize activity physically located outside the United States as not extraterritorial, the complete irrelevance of such activity's domestic elements under *Aramco* feels unnatural as well. By allowing the particular facts and circumstances of the case to be used in rebuttal along with the traditional examination of Congressional intent, the factors motivating the legal fictions in play today might be applied with more intellectual honesty, engendering perhaps a greater coherence in the decisions.<sup>69</sup>

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<sup>69</sup> In his discussion of the presumption against extraterritoriality, William Dodge persuasively argues that Congressional concern naturally centers on domestic effects: "The reason Congress regulates anticompetitive conduct, securities fraud, employment discrimination, pollution, and the like is to prevent the harmful effects that flow from that conduct. . . . To say that Congress is 'primarily concerned with domestic conditions' then, is really to say that Congress is primarily concerned with conduct that causes effects in the United States." Dodge, *supra* note 54 at 118. Thus, the domestic effects of extraterritorial application could comfortably be analyzed alongside, or even as part of, the analysis of Congressional intent.