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FREE TO A GOOD HOME: AMERICA’S UNREGULATED ONLINE MARKET FOR ADOPTED CHILDREN

by Kathryn Huber

“My husband and I are seeking to find a new, loving home for our daughter, adopted a year and a half ago. She is 8 years old and was adopted from India. She has ADHD and was just diagnosed with RAD and we cannot handle these issues. We have done our best, but it just was not enough. . .please contact me if you would like to discuss the possibility of adopting this child.”

— Member of the Yahoo Group Adopting-From-Disruption in 2009

Nora Gateley, now 26, was given up for adoption at birth by her biological parents in Guangdong, China. Until age 12, Nora lived in an or-
phanage, where she contracted polio that required her to walk with a brace.  
In 1999, just when she had almost given up hope of ever being adopted, a Florida
couple arrived at the orphanage with an armful of gifts and Nora was told that
they would be her new parents. “I felt like the luckiest girl in the world,”
Nora recalls, “I never felt so special.” Just one year later, however, Nora’s
parents decided they did not wish to continue the adoption. Telling her only
that they were taking a road trip, Nora’s adoptive father took her on a two-day
drive from Florida, which ended in Trenton, Tennessee. With no explanation,
Nora was left at an isolated farmhouse with Tom and Debra Schmitz and their
nine adopted children. Alone, confused, and frightened, Nora had no idea
that she had been “re-homed,” that she would never see her adoptive parents
again, or that life with the Schmitz’s would soon turn into a living nightmare.

A Growing Problem

Nora’s story is hardly an anomaly. Re-homing, a term commonly used by
animal welfare groups when finding new placements for pets, is becoming in-
creasingly used by adoptive parents in the U.S. to transfer custody of their
children. Thanks to a perfect storm of weak legal protections with even
weaker enforcement, the fact that no authority tracks what happens to a
child in the U.S. after an international adoption, the prevalence of online
groups devoted to private custody transfers, and the lack of support or re-
sources for overwhelmed adoptive families, parents are increasingly turning
to the internet to give their children away to strangers – with no legal repercus-
sions or oversight.

It is hard to imagine what could drive a parent to this point. Many describe
themselves as so desperate, frustrated, or overwhelmed with providing for the
severe physical and mental health needs of a child that they adopted from
overseas that they were willing to hand their son or daughter over to virtually
any takers – even if the person was a stranger they met in a chat room. “I
would have given her away to a serial killer I was so desperate” said one adop-
tive mother. As in Nora’s case, some parents and interested guardians only
meet for the first time as they are handing off the child. There are usually no
background checks, no home visits, and no registration with any state or gov-
ernment agency.
For documentation, parents draft a simple power of attorney transferring guardianship which is not filed with any court or agency, and serves only as record that a child has been given away. Temporary guardianship has long been an option for parents experiencing a crisis; the process involves designating a trusted person to care for the children without involving child welfare authorities. However, when the guardian is a stranger instead of a trusted friend or relative and there is no intention of ever returning the child, the document starts to function alarmingly like a receipt.

The lack of oversight places children at significant risk of harm through abuse, neglect, trafficking, and exploitation. One couple that Reuters investigated, the Easons, had taken in several children through an online group. None of the parents of those children knew that Nicole Eason’s three biological children had been removed by child welfare authorities due to evidence of serious physical abuse, or that Nicole’s housemate and partner, Randy Winslow, was a convicted pedophile and self-described “little boy lover” who traded child pornography online.

Nora knew right away that something was wrong in her new adoptive home and she described the next two years she spent there as emotionally and physically abusive. At one point, Debra Schmitz handed her a shovel and ordered her outside to dig her own grave, telling Nora, “I don’t care if you die. Nobody will find you. You were never here in the first place.”

THE SPECIAL RISKS RE-HOMING POSES TO INTERNATIONALLY ADOPTED CHILDREN

Internationally adopted children are uniquely vulnerable to re-homing. While parents who adopt through the U.S. child welfare system must undergo an extensive training and approval process and receive access to resources post-adoption, those who adopt internationally through a private agency do not usually have to meet the same requirements or receive the training, or follow-up support. Consequently, they are often unprepared for the severe mental health or behavior issues that these children can present as a result of early trauma or inadequate care. “When you have a higher percentage of kids than ten years ago coming into the adoption pipeline with serious problems and a higher percentage of parents unprepared to deal with these issues . . . you have
a recipe for trouble”, says Professor Bruce Boyer, Director of the Civitas Child Law Clinic at Loyola University Chicago School of Law.  

Unlike domestic adoptions, no agency tracks how many international adoptions fail, which is often called an adoption disruption. Domestic adoptions generally disrupt about 10-25 percent of the time, meaning that if international disruption rates are similar, about 24,000 children adopted into the U.S. since the mid-1990s are no longer with the parents who adopted them. In one internet group, over 70 percent of the children advertised for re-homing were international adoptees.  

**HOPE FOR A SOLUTION**  

Presently, child welfare officials are advocating to strengthen the enforcement of federal laws that protect adopted children, including the Interstate Compact on the Placement of Children, or ICPC. This agreement governs the requirements for transferring guardianship of a child between states but it is currently not well understood, weakly enforced, and only carries minimal penalties for violation.  

Stephen Pennypacker, the child welfare official who first spoke out about the danger of unregulated re-homing, recently testified before a Florida Senate Committee, where he urged lawmakers to consider increasing the penalty for illegal custody transfers. While he is the first to admit that there is no easy answer to the problem, Pennypacker points to several key measures that could make a significant difference: increased enforcement of federal and inter-country adoption laws; more comprehensive support of children and families post-adoption through partnerships with community based care; an obligation for international adoption agencies to check in on children post-adoption and assist with placement in the event of a disruption; and the creation of law enforcement and prosecution task forces trained to handle this specialized issue, similar to those that now work to combat child pornography and sex trafficking.  

According to Professor Boyer, adoption agencies can help in two important ways: first, training for parents before they adopt a child and second, full disclosure of any and all relevant factors that may affect the child in his or her new home. Both ways acknowledge the difficulties of implementing such
measures, but cite the debate over them as an encouraging step – it means that people are starting to pay attention to the problem and seriously explore possible solutions.47

CONCLUSION

While the recent attention to the problem is a positive start, child welfare agencies, law-makers, and private adoption agencies must continue to cooperate to help combat the dangers of re-homing.48 By increasing legal protections,49 providing more training and support for parents,50 and cracking down on internet marketplaces51 the U.S. will be able to put a stop to this disturbing practice and ensure that children adopted internationally have the same opportunities to grow up in a safe home and a loving environment as do those children adopted domestically.

NOTES

3 Id.
4 Id.
5 Id.
6 Id.
7 Id.
8 Alba et.al, supra note 2.
9 Id.
10 Id; Twohey, supra note 1.
11 Twohey, supra note 1.
12 Id.
13 Id.
14 Id.
15 Id.; Keeping the Promise: The Critical Need for Post-Adoption Services to Enable Children and Families to Succeed, EVAN B. DONALDSON ADOPTION INSTITUTE, Oct.2010; see generally Darcy H. Merritt & Trudy Festinger, Post-Adoption Service Need and Access: Differences Between International, Kinship, and Non-Kinship Foster Care, Chilren and Youth Serv. Rev., April 2013 at 1900, 1913.


18 Twohey, supra note 17.

19 Id.; Alba et al., supra note 2; Twohey, supra note 1.

20 Twohey, supra note 1.

21 Id.

22 Id.

23 Id.


25 Twohey, supra note 17.

26 Id.

27 Id.

28 Alba et al., supra note 2.

29 Id.

30 Id.

31 Twohey, supra note 1.

32 Id.; see generally EVAN B. DONALDSON ADOPTION INSTITUTE, supra note 15; see generally Meritt, et al.

33 Twohey, supra note 1; see generally EVAN B. DONALDSON ADOPTION INSTITUTE, supra note 15; see generally Meritt, et al.

34 Interview with Bruce Boyer, Director of Civitas Child Law Institute, Loyola University Chicago School of Law (Nov. 13, 2013).

35 Twohey, supra note 1.

36 Id.

37 Id.


39 Recorded interview with Megan Twohey, Reuters Investigative Reporter, on The Voice of Russia radio Program (September 2013); Twohey, supra note 1.

40 Twohey, supra note 1.

41 Koff, supra note 38.

42 Telephone Interview with Stephen Pennypacker, Deputy Director and Training Director, Florida Department of Children and Families (Nov. 15, 2013).

43 Id.

44 Id.

45 Id.

46 Boyer, supra note 34.

47 Id.; Pennypacker, supra note 42.
48 Pennypacker, supra note 42; Boyer, supra note 34; CCAI Responds to Reuters “Re-homing” Series: For Reflection and Reform, CONGRESSIONAL COALITION ON ADOPTION INSTITUTE, Nov. 15, 2013.

49 Pennypacker, supra note 42; Boyer, supra note 34; CONGRESSIONAL COALITION ON ADOPTION INSTITUTE, supra note 48.

50 Pennypacker, supra note 42; Boyer, supra note 34; CONGRESSIONAL COALITION ON ADOPTION INSTITUTE, supra note 48.

51 Pennypacker, supra note 42; Boyer, supra note 34; CONGRESSIONAL COALITION ON ADOPTION INSTITUTE, supra note 48.
FEATURE ARTICLE

A HOMELESS BILL OF RIGHTS: STEP BY STEP FROM STATE TO STATE

by Jonathan Sheffield

When the New York Times profiled Barbara, she did not share her full name because she feared her employer would fire her if it knew the truth — she has no home. Barbara's fear is common for men and women who are homeless — that their lack of housing will cause their employer or others to discriminate against them. In some cases, these fears are well-founded, as several cities have responded to pervasive homelessness by pushing out people who have no home. In contrast, between 2012 and 2013, three jurisdictions enacted homeless persons' bills of rights to prevent discrimina-
Beyond the rights protected in these state homeless bills of rights, the United Nations recognizes that every person has a right to adequate housing. At one point in January 2012, 633,782 people experienced homelessness in the United States. While this national estimate decreased by 0.4 percent from 2011, 28 states and the District of Columbia saw increases in the number of people living homeless. Additionally, 71 percent of cities surveyed by the U.S. Conference of Mayors reported that more families were experiencing homelessness, and the Department of Housing and Urban Development estimated there was a 2 percent increase in homelessness among children nationally. These changes in the size and diversity of the homeless population are the result of a complex interplay of causes, including: affordable housing shortages, growing rent and income disparities, and eroding housing subsidy programs.

U.S. RESPONSES TO RISE IN HOMELESSNESS

Some municipalities have tried to prevent people from sleeping, eating, and living in public spaces by using the criminal justice system. Housing advocates refer to some of these practices as criminalizing homelessness. Criminalization measures penalize people for performing necessary, life-sustaining activities in public spaces when they have no alternative because of homelessness. Targeted life-sustaining activities include: sitting, sleeping, loitering, "panhandling," camping, storing belongings, and urinating. Municipalities also criminalize homelessness through disparate enforcement of laws, such as jaywalking or littering, against persons appearing to be homeless.

At one point in 2013, anti-homelessness reached a peak when Columbia, S.C. almost started moving individuals without homes to the outskirts of town and criminalizing their presence within city-limits. Under a rescinded city ordinance, police officers were to patrol the city-center in order to steer people who are homeless to a 24-hour privately operated emergency shelter outside the city. Officers were also instructed to strictly enforce the city’s quality-of-life ordinances, which ban loitering and public urination, among other activities. Michael Stoops, Director of Community Organizing at the National Coalition for the Homeless, said this was the “most comprehensive anti-homeless measure” that he had ever seen in the last 30 years. "Using one massive shelter on the outskirts to house all a city’s homeless is something that has never worked..."
anywhere in the country." Columbia is representative of several cities that have opted to take such measures, while other cities have taken different paths to achieve the same purpose.20

In contrast, Rhode Island, Illinois, and Connecticut have enacted laws that protect the civil rights of people experiencing homelessness.21
Rhode Island became the first state to prohibit discrimination based on housing status when it enacted the “Homeless Bill of Rights” on June 20, 2012. Over a year later, on August 22, 2013, Illinois enacted the “Bill of Rights for the Homeless Act” which became effective immediately. Most recently, Connecticut’s “Homeless Person’s Bill of Rights” became effective on October 1, 2013.

The Rhode Island and Illinois laws use similar language and specify that a person who is homeless has the same rights and privileges as any other state resident, which includes the right to: (1) use and move freely in public spaces, including public sidewalks, parks, transportation, and buildings, among other spaces; (2) equal treatment by government agencies; (3) be free of discrimination while seeking or maintaining employment; (4) emergency medical care; (5) vote, register to vote, and receive documentation necessary for voting; (6) have personal records and confidential information not disclosed; and (7) a reasonable expectation of privacy over personal property to the same extent as one would have in a permanent residence.

Generally, the Connecticut law provides the same or similar protections. Although, unlike the others, it does explicitly prohibit “harassment or intimidation from law enforcement officers.”

Another key distinction in the Connecticut law is that it defines “homeless person” more broadly than the Rhode Island and Illinois laws. The Rhode Island law prevents discrimination based on “housing status,” which is defined as “having or not having a fixed or regular residence, including . . . living on the streets, in a homeless shelter, or similar temporary residence.” The Illinois law closely tracks this language. The Connecticut law, on the other hand, uses the general definition of “homeless individual” under 42 U.S.C § 11302, which includes an individual or family who lacks a fixed, regular, and adequate nighttime residence or resides in temporary living arrangements — such as cars, parks, abandoned buildings, public-transit, camp grounds, and shelters — and also people at imminent risk of homelessness or who are living in unstable conditions. By not including individuals at imminent risk of homelessness, the Rhode Island and Illinois laws protect a smaller class of people than the Connecticut law, possibly excluding those who live doubled-up.
with family or friends indefinitely — a common practice to avoid living on the street. Such thin protection from the street undoubtedly warrants homeless status.

However, not all parts of the Connecticut law are superior; it fails to provide recoverable money damages. The Rhode Island and Illinois laws provide such damages, stating in relevant part that a “court may award appropriate injunctive and declaratory relief, actual damages, and reasonable attorney’s fees and costs to a prevailing plaintiff.” This is important for three reasons. First, the prospect of recovering money encourages individuals who have been discriminated against to go through the effort of filing a claim and thereby enforce their rights. Second, representation by an attorney is more likely when attorney’s fees are available. Finally, the threat of recoverable damages gives pause to any would-be discriminator.

In fact, the Rhode Island and Illinois enforcement provisions are so strong that the Connecticut law was proposed with the same provision, but it was compromised out of the final version of the bill. Some lawmakers were concerned that the prospect of available damages would invite frivolous suits against employers and others.

THE U.N. RECOGNIZES A HUMAN RIGHT TO ADEQUATE HOUSING

The U.N. recognizes a human right to adequate housing that provides greater protections, freedoms, and entitlements than any American state’s homeless bill of rights. The right to adequate housing was first recognized as part of the right to an adequate standard of living in the 1948 Universal Declaration on Human Rights. As defined by the first Special Rapporteur, “the human right to adequate housing is the right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity.”

The U.N. has determined that governments and the private sector have affirmative obligations to fulfill the right to adequate housing. While the right to adequate housing does not oblige governments to construct housing for all citizens, it does require measures necessary to prevent homelessness, prohibit forced evictions, address discrimination, focus on vulnerable and marginalized
groups, ensure security of tenure, and guarantee that everyone’s housing is adequate.\textsuperscript{42}

The Special Rapporteur on adequate housing has called homelessness “perhaps the most visible and most severe symptom of the lack of respect for the right to adequate housing.”\textsuperscript{43} Moreover, the criminalization of homelessness in the U.S. has been condemned by the Special Rapporteur as discriminatory, cruel, inhuman, and degrading treatment.\textsuperscript{44}

Indeed, Scotland has shown the world that it is feasible to implement a human right to housing.\textsuperscript{45} Today, under Scotland’s Homelessness, Etc. Act of 2003, all people experiencing involuntary homelessness in Scotland have a right to be housed immediately and to live in permanent housing with supportive services.\textsuperscript{46} Local authorities have an obligation to ensure this right is met and must also undertake comprehensive affordable housing and homelessness prevention planning.\textsuperscript{47} While the Scotland law does require four threshold inquiries before a household may access the right, these inquiries have been modified over time to reduce the barriers they present.\textsuperscript{48}

**The Future for Homelessness in the U.S.**

Despite recent, scant decreases in the overall size of the homeless population, in order to end and prevent future homelessness, a concerted U.S. policy response is imperative.\textsuperscript{49} Homeless bills of rights are constructive, but the right to adequate housing contains greater protections, freedoms, and entitlements than any enacted homeless bill of rights.\textsuperscript{50} Therefore, the U.S., on a state-by-state basis, if not on a federal level, should adopt the right to adequate housing recognized by the U.N.

At least two cities and seven states are considering homeless bills of rights, including Baltimore, Md., California, Delaware, Madison, Wis., Minnesota, Missouri, Oregon, Tennessee, and Vermont.\textsuperscript{51} Notably, the California homeless persons’ bill of rights provides greater protections than the Rhode Island, Illinois, or Connecticut laws, and debate on the California legislation resumed in 2014 after being set on hold for more than half a year.\textsuperscript{52}

At the very least, future homeless rights laws should broadly define what it means to be homeless\textsuperscript{53} in addition to clearly defining examples of proscribed
discriminatory practices.\textsuperscript{54} However, it is important that future homeless rights laws broadly guarantee people who are homeless the same rights and privileges as any other state resident.\textsuperscript{55} The Rhode Island, Illinois, and Connecticut laws are an excellent model for broadly proscribing discrimination while enumerating instances of unlawful discriminatory practices.\textsuperscript{56} Additionally, future laws should provide a private right of action similar to the Rhode Island and Illinois laws, with recoverable damages available to aggrieved persons, ensuring widespread enforcement.\textsuperscript{57}

Advocacy efforts at the local, state, and national level will be instrumental in moving U.S. policy toward a right to adequate housing.\textsuperscript{58} Homeless persons’ bills of rights, a major legal development in the past year, are arguably an important stepping stone for municipalities, states, and the U.S. to recognize a right to adequate housing similar to that in Scotland. Persistent advocacy efforts may be able to bring this to fruition, but only time will tell.

\textbf{NOTES}


7 Id.

9 See State of Homelessness in America 2013 supra note 6, at 4, 16–25 (discussing economic and housing factors related to homelessness).

10 Criminalizing Crisis supra note 3, at 15.

11 Id.

12 Id. at 6–7.

13 Id.

14 Id. at 7.


16 Id.

17 Id.

18 Id.

19 Id.

20 Two cities in Florida (Miami and Tampa) have similar ordinances that criminalize life-sustaining activities in public spaces and attempt to move people experiencing homelessness outside of the city without a way back. See Scott Keyes, Miami Considers Jailing Homeless People For Eating, Sleeping In Public, THINK PROGRESS (July 16, 2013), http://thinkprogress.org/justice/2013/07/16/2307891/miami-criminalize-homelessness/; (discussing the Miami, FL ordinance criminalizing life-sustaining activities in public spaces without providing more funding to city shelters and a city commissioner’s attempt to renege on the city’s 1998 response to homelessness that included offering people a place to sleep); see also Amanda Mole, Tampa passes new ordinances on homeless despite protests, EXAMINER.COM (July 19, 2013), http://www.examiner.com/article/tampa-passes-new-ordinances-on-homeless-despite-protests (reporting that when shelters in Tampa are overcrowded the city plans to take people to shelters outside the city limits but the city has not stated how it plans to ensure such people can get back into the city); see also Scott Keyes, Tampa Passes New Law To Toss Homeless People In Jail For Sleeping In Public, THINK PROGRESS (July 22, 2013), http://thinkprogress.org/justice/2013/07/22/2335261/tampa-criminalize-homelessness/ (reporting that protesters included elementary school children handing out flyers and asking passersby, “Where are they supposed to go?”). Additionally, a Palo Alto, CA ordinance prohibits people from sleeping in their vehicle, a common practice for the working poor who have jobs in the city. See Scott Keyes, Palo Alto Passes New Ordinance To Criminalize Homelessness, THINK PROGRESS (Aug. 6, 2013) http://thinkprogress.org/justice/2013/08/06/2423041/palo-alto-homeless/ (reporting that in 2013, in addition to existing laws to effectively prevent people who are homeless from being in the city center, Palo Alto added a law to prohibit sleeping in cars which is punishable by six months in jail and a $1,000 fine).


25 It is worth noting that Illinois’s version of the law omits ‘seeking’ employment, which permits an employer to discriminate during the hiring process against people who are homeless but not against employees who become homeless. This was a compromise made in the Illinois


29 Id. (adopting the definition of homeless individual stated in 42 U.S.C § 11302); Homeless Bill of Rights, R.I. GEN. LAWS ANN. § 34-37.1-3 (2012) (prohibiting discrimination based on housing status and defining that term to mean the status of having or not having a fixed or regular residence, including the status of living on the streets, in a shelter, or in a temporary residence); Bill of Rights for the Homeless Act, 2013 Ill. Laws 098-0516 (same).

30 Homeless Bill of Rights, R.I. GEN. LAWS ANN. § 34-37.1-3 (2012)

31 Bill of Rights for the Homeless Act, 2013 Ill. Laws 098-0516


33 Id.


37 Id.

38 See U.N. Office of the High Commissioner for Human Rights, The right to adequate housing, General Comment 4 (Art.11 (1)) (1991), available at http://www.unhchr.ch/tbs/doc.nsf/ (Symbol)/469f4d91a9378221c12563ed0053547cOpendocument (stating protections found in human right to adequate housing); see also Jake Grovum, Activists Aim to Bolster Rhode Island’s Homeless Bill of Rights, STATELINE (Nov. 12, 2012), http://www.pewstates.org/projects/stateline/headlines/activists-aim-to-bolster-rhode-islands-homeless-bill-of-rights-85899429426 (commenting that early versions of Rhode Island’s bill focused on a right to housing, but advocates scaled the bill back to get it passed).

39 U.N. Right to Adequate Housing Fact Sheet supra note 5, at 1.


41 U.N. Right to Adequate Housing Fact Sheet supra note 5, at 29 – 37.

42 Id. at 3–6, 22–23.

43 Id. at 21.


45 CRIMINALIZING CRISIS supra note 3, at 53-54.

46 Id.

48 Id. The four inquiries are: (1) Does the household meet Scotland’s broad definition of homeless; (2) Is a member of the household in a “priority need” category defined by the law; (3) Did it become homeless intentionally and (4) Does the household have a connection to the LA?

49 See State of Homelessness in America 2013 supra note 6, at 4 (“Scant decreases in the overall size of the homeless population and the rate of homelessness between 2011 and 2012 remind us that there is still a great deal of work to be done”).

50 See supra notes 20-29 and accompanying text (detailing protections of both types of rights laws).


52 See T.J. Johnson, State Homeless ‘Bill of Rights’ Put on Hold Until Next Year, San Francisco Public Press (May 30, 2013), http://sfpublicpress.org/news/2013-05/state-homeless-bill-of-rights-put-on-hold-until-next-year#sthash.UOK3yt3F.dpuf (stating that the bill will go before the Appropriations Committee in January 2014). In a prior version, the bill would have gone beyond other enacted homeless persons’ bills of rights by guaranteeing a “right to safe, decent, permanent, affordable housing, as soon as possible.” Assembly Bill No. 5, 2013 – 2014 Reg. Sess. (Ca. 2013). If passed, this would arguably be closer to a human right to adequate housing. See generally U.N. Right to Adequate Housing Fact Sheet supra note 5 (explaining that the human right to adequate housing requires governments to take measures to prevent homelessness).

53 See supra notes 25 - 29 and accompanying text (discussing the drawbacks of the narrow definition of housing status, which is a proxy for definition of homelessness).

54 See supra note 28 and accompanying text (Connecticut’s law, by specifically stating the freedom to move without police interference, there can be no question that this law applies to cases involving police conduct).

55 See supra text accompanying note 34 (by providing that a person experiencing homelessness has the same rights as other state residents, rather than seeking to enumerate all rights protected, this provides protection for a host of important rights that do not bear mentioning).

56 See generally supra text accompanying notes 27-37 (discussing the laws’ provisions).

57 Id.

Robert Calden dedicated four years of his life to serve in the military, fighting in the Vietnam War from 1967 to 1971. While abroad, Calden suffered a knee injury and upon returning to the United States in 1971, he received a 10 percent rate for disability benefits. It wasn’t until 2011 that Calden filed his second disability claim, indicating that his knee injury had worsened. At that time, he also filed a new claim for his work with Agent Orange along the Mekong Delta. After waiting more than a year and a half, the Department of Veterans Affairs (VA) finally approved him for 80 percent disability benefits. Calden is one of thousands of veterans who wait countless months to receive benefits.
SYSTEMIC BACKLOG OF DISABILITY CLAIMS

The VA estimates that veterans, like Calden, who submit a secondary claim—a claim for a disability that developed or worsened by a service-connected condition—wait an average of 273 days to receive benefits. Veterans that submit a new claim—a claim for a benefit that was not filed before—typically wait an even longer period that averages 327 days. These figures indicate that there is a systemic backlog of disability claims for veterans, resulting in delayed access to medical benefits.

As of October 1, 2013, approximately 418,000 disability claims were waiting to be processed, more than half of which had been pending more than 125 days. The VA faces pressure from Congress, veteran advocates, and news media outlets to resolve the backlog crisis. In 2012, two non-profit groups, Veterans for Common Sense and Veterans United for Truth, brought action against the VA, alleging that “unconscionable delays” in obtaining disability benefits violated statutory and constitutional rights.

After much public outcry, the VA executed new tactics, intending to end the backlog by 2015. These tactics included transitioning to an electronic processing system, making efforts to expedite medical examinations, and creating incentives for applicants to submit all necessary documents for a claim at once through a Fully Developed Claim (FDC). The FDC, if submitted between August 6, 2013 and August 5, 2015, will be given high priority and veterans will be eligible for up to one year of retroactive benefits.

EFFECTS OF THE VA’S INITIATIVES

Since the VA enacted its new plan, the disability backlog has decreased by 34 percent from March to November 2013. According to the Secretary of the VA, Eric Shinseki, although the VA has “completed nearly all claims that have been pending two years or longer . . . much work remains to be done to eliminate the backlog” by 2015.

Critics question whether the new initiatives emphasize speed over accuracy. Despite a decrease in the backlog, the number of claims going to appeal due to errors has increased. For example, in 2011 the Board of Veterans’ Appeals
found that nearly 35,000 out of 50,000 appeals had errors. The Board estimates that during the next four years, the amount of cases pending appeal will double due to an increase in veterans who believe the VA wrongfully denied them benefits. This suggests that veterans may have to wait even longer for their claims to be reviewed, further delaying them access to medical benefits.

Even Calden faces the possibility of an appeal in his future. Calden recently sought to increase his benefits from 80 to 100 percent after his doctor found a blood clot in his injured knee while he waited for his second disability claim to be approved. The blood clot eventually moved to his lungs and he had to have surgery, incurring more than $160,000 in medical expenses. “I thought maybe I could ask them to pay for it, but I just got a letter the other day saying that they wouldn’t approve of it, but I could appeal,” he said. Veterans, like Calden, fight for their country, yet still find themselves fighting for coverage long after they return home.

**Homeless Veterans**

When soldiers return home from service, many lack financial means and don’t have a family or social support network to help them through difficult times. When these factors are compounded by medical conditions such as post-traumatic stress disorder or a substance-abuse disorder, life becomes an even greater struggle. For veterans who end up becoming homeless, the process of obtaining benefits on their own can be an even bigger challenge because it is difficult to regain stability.

Veterans organizations often compare filing a disability claim to filing a complex tax return or defending one’s self in a lawsuit. Generally, the process is difficult to navigate without assistance. Stephen Leon, a veteran who served two tours in Afghanistan, struggled to receive disability benefits until he enlisted the help of an advocate in 2012. Now he receives a 70 percent rate for his disabilities and is no longer at risk of becoming homeless. Leon claims that without the help of the advocate or his disability benefits, he would probably be homeless.

The U.S. Department of Housing and Urban Development estimates that more than 62,000 veterans are still on the streets, a number which the VA intends to decrease. In order to help get veterans off of the streets, the VA has
stated that it intends to provide $4.4 billion in health care to homeless veterans in 2013. As a result, veterans who are homeless will hopefully be able to receive proper care for their war-related disabilities and regain stability.

CONCLUSION

As the disability backlog declines, the number of claims on appeal rises. While there is still a lot of work to be done, the VA continues to move toward its goal of providing more veterans with disability benefits by 2015. Although critics question the effectiveness of the VA’s strategy, it is not disputed that there is a national movement toward helping veterans obtain benefits, particularly those who are disenfranchised and homeless. As Calden states, “All the people I served with . . . we just worked together.” Now our nation should work together to help the men and women who respectably fought for our country.

NOTES

1 Interview with Robert Calden, Disabled Veteran, Millwright, (Oct. 14, 2013) [hereinafter Calden Interview](the name has been changed for privacy reasons).
2 Id.; See also, U.S. Dep’t of Veterans Affairs, Veterans Comp. Benefits Rates Tables, available at http://www.benefits.va.gov/COMPENSATION/resources_comp01.asp (indicating that a rate of 10 percent receives $129 compensation).
3 Calden Interview, supra note 1.
4 Id.
5 Id.
7 See id. (indicating that the average wait after a veteran files a claim is 273 days); See also U.S. Dep’t of Veterans Affairs, Compensation, [hereinafter Compensation], available at http://www.benefits.va.gov/compensation/types-claims.asp (last visited Nov. 15, 2013)(indicating that a secondary claim develops as a result of or is worsened by another service-connected condition).
8 See Martinez, supra note 6 (stating that veterans who submit a new claim wait an average of 327 days); see also Compensation, supra note 7 (indicating that a new claim is for a benefit that may or may not have been filed before and is generally based entirely on new evidence).
9 See Martinez, supra note 6.
12 See Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1014-15 (9th Cir. 2012).
13 See Press Release, U.S. Dep’t of Veterans Affairs, VA Processes Nearly All Disability Claims Pending Over 2 Years, Moves to Complete Those Older Than 1 Year (June 20, 2013) [hereinafter Press Release, VA Processes Claims], available at http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2454.
17 Id.
21 Id.
22 Id.
23 See Jared Serbu, As VA Works to Eliminate One Backlog, One More Might Emerge, FEDERAL NEWS RADIO (June 19, 2013, 10:06am), available at http://www.federalnewsradio.com/108/3363126/As-VA-works-to-eliminate-one-backlog-one-more-might-emerge (indicating that the VA’s Board of Veterans Appeals expects to handle 54,000 appeals by the end of 2013 and perhaps up to 100,000 four years from 2013).
24 Id. (indicating that in 2012 it took an average of 1,040 days between the time a veteran submitted an appeal at a regional office and the board’s final decision).
25 Calden Interview, supra note 1.
26 Id.
27 Id.
28 Id.
29 See Martinez, supra note 6.
31 Id.
33 Martinez, supra note 6.
34 See Shinn, supra note 32.
35 Id.
36 Id.
37 Id.
38 See FAQ Homeless, supra note 30 (indicating that 62,619 veterans are homeless on any given night).
40 Id.
41 See Glantz, supra note 20.
43 See Homeless Veterans, supra note 39.
44 Calden Interview, supra note 1.
GRAB FOR WATER COULD SPARK CONFLICT IN PAKISTAN AND INDIA

by Nicole Livanos

In both India and Pakistan, water shortages are pressing concerns and have been a source of conflict among the countries since their very beginnings. The 1947 Indian Independence Bill, which created Muslim-majority Pakistan and Hindu-majority India, drew lines based purely on religious grounds and paid no attention to hydrology.1 In response to concerns about the location of water sources, Pakistan and India entered into the Indus Waters Treaty (IWT) in 1960.2

Pursuant to the IWT, the Jhelum, Chenab, and Indus rivers were designated to Pakistan, and the Ravi and Sutlej rivers were allocated to India.3 The headwaters of the rivers lie in conflict-stricken Kashmir, a highly desirable area for...
both countries. “India and Pakistan need to keep water from becoming one more weapon in their geopolitical rivalries,” warns Paul Brown, former environment correspondent at the British Guardian. This concern is of international importance, as tensions are rising between the two countries in response to a final decision by the international Permanent Court of Arbitration over accusations of India violating the IWT by building dams.

Pakistani development economist Haris Gazdar believes that more water can be made available, but stresses that “conservation and management require not only investment but changes in social and political organization and technology.”

Pakistan’s Water Woes

“Water shortages present the greatest future threat to the viability of Pakistan as a state and society,” explains South Asia scholar, Anatol Lieven. By 2030, Pakistan is expected to face a downgrade in categorization from “water stressed” to “water scarce” by the United Nations. Rapid population growth and outdated infrastructure are two culprits of this decline.

Inefficient irrigation and drainage techniques have degraded the agriculture soil in Pakistan and worsened the shortages. Due to the scarcity of electricity, small-scale farmers are forced to pump for groundwater using old diesel-powered pumps, which adds the cost of rising fuel prices. In addition, over-irrigation has caused soil salinity — an increase in the salt content in the soil — making vast expanses of land unable to yield meaningful harvests.

Floods and poor drainage technology also plague the nation, and global warming has further exacerbated this problem. The Indus River Basin obtains water stocks from snow and rains of the Himalayas. Rising global temperatures have caused the mountain’s glaciers to thin by up to a meter per year. As they thin, river floods will overwhelm the deficient drainage system, and once the glaciers disappear, paramount river flows will continue to decrease dramatically, by up to 30 to 40 percent over 100 years’ time. Pakistani development economist Haris Gazdar believes that more water can be made available, but stresses that “conservation and management require not only investment but changes in social and political organization and technology.”
INDIA’S WATER MISFORTUNES

Similar to Pakistan, India also suffers from severe water problems. According to the National Geophysical Research Institute (NGRI), groundwater in Delhi, the world’s second most populous city, may run dry in three to five years. NGRI hydrogeologists blame not only agriculture infrastructure, but also urban planning. Cities are turning into “concrete jungles,” resulting in very little rainfall getting infiltrated into the earth for conversion into groundwater. Ideally, 16 percent of total rainfall must seep into the earth to be recharged as groundwater. Currently in Delhi, barely 8 percent infiltrates the ground.

India’s geography also presents many obstacles for water access. Residents in the mountainous regions must travel long distances to reach a water supply, as vast parts of India are arid, making freshwater scarce. India disproportionately holds merely 4 percent of the world’s water supply, while claiming home to around 16 percent of the world’s population. India lacks adequate infrastructure, as water plants lose 30 to 70 percent of water daily due to leaky pipes and theft. “Collective annual costs for pumps and other such measures are three times what the city [Delhi] would need to maintain its water system adequately,” according to Smita Misra, senior economist at the World Bank.

WATER CAPTURING METHODS

Pakistan and India both rely on the monsoon season to replenish water supplies. The monsoon season runs from April through October, with barren grounds in the remaining months. In Cherrapunju, India, nearly 40 feet of rain falls each year, which is more than 12 times the amount that falls in Seattle annually. Despite this great amount, poor retrieval methods and contaminated waterways do not allow for much of the rainwater to be captured for safe use. Though a similar amount of rain cascades over Pakistan, high levels of evapotranspiration — the amount of water that is consumed by evaporation and the transpiration of plants — cause the moisture from the monsoons to be rapidly consumed by the earth. MIT professor of Islamic architecture and urbanism, James Wescoat Jr., found that “in no case does annual precipitation exceed the annual actual evapotranspiration that can occur.” Therefore, little of the abundant rainfall is captured for storage.
THE RIGHT TO SAFE WATER

Nearly 90 percent of Pakistan’s nominal water supply is used for agriculture, leaving little for human consumption. Over the last 60 years, Pakistan’s per capita water availability has fallen by 75 percent, placing Pakistan last in per capita water availability amongst 26 Asian countries and the United States. Similarly, the Water Resources Group study finds that by 2030, “water demand in India will grow to almost 1.5 trillion [cubic meters], driven by domestic demand for rice, wheat, and sugar for a growing population.” India’s current water supply is only 740 billion cubic meters.

This is an alarming situation for India and Pakistan, as both countries are concerned that their growing populations will lose access to the basic human right to water. In August 2013, Pakistan’s government collected water samples from across the country and found 80 percent were unsafe for drinking. Similar issues exist in India where 97 million people lack improved drinking water sources, defined as those protected from outside contaminants such as fecal matter. A UNICEF study reveals nearly 600,000 Indian children die each year because of diarrhea or pneumonia, often caused by toxic water. “History shows us civilizations have vanished once water is also gone,” warns Mrinal Kati Sen, Director of the NGRI. “Water carries people and we need to wake up now and do something before it is too late.”

HOPE FOR THE FUTURE

David Rieser, professor of environmental law at Loyola University Chicago School of Law, believes that the U.S. and U.S. companies have a role to play in water scarce regions. Specifically, Rieser believes that countries like the U.S. can share with Pakistan and India their expertise in “technology that would allow people to conserve water, use water differently, and build facilities that don’t require as much water.” Pakistan and India must take advantage of opportunities to learn and make improvements in order to develop their water management and infrastructure systems. This is especially crucial now, as foul play by either country in relation to the IWT could create tremendous differences that could have monstrous impacts.
NOTES


3 Id.

4 Lipschutz, supra note 1.


10 Id.

11 Id.


13 Id.

14 Id.

15 Id.


17 Husain, supra note 1.


19 Id.

20 Id.

21 Id.


23 Id.

24 Id.

25 Id.

26 Id.

28 Harris, *supra* note 22.

29 Harris, *supra* note 22.


32 Id.

33 Id.

34 Kugelman *supra* note 12.

35 Kugelman *supra* note 12.


37 Id.


40 Id.


43 Mujumdar *supra* note 18.

44 Mujumdar *supra* note 18.

45 Interview with David Rieser, Adjunct Law Professor, Loyola University Chicago School of Law, in Chicago, IL. (Oct. 16, 2013).

46 Husain, *supra* note 5.
Currency is an ancient technology that evolved from the bartering of tiny stones for goods thousands of years ago. This technology developed because it became impractical to trade cattle or fruit for long-term trades, and coins were developed by 500 BC in order to alleviate such problems. Currency built the city of Rome, put a man on the moon, and even supercharged the Internet. Yet we take currency, an ancient and incredibly complex technology, seemingly for granted. With the birth of the Internet, a brand new form
of currency, crypto currency, was also born; its more common name is Bitcoin.34

Bitcoin is a decentralized currency and 100 percent powered by peer-to-peer transactions.5 No single organization supervises or oversees this market; the currency is both valued and managed by the consensus of all its users.6 The only way the currency continues to be viable is if everyone uses the same programs and consents to honor its market value.7 It is this lack of oversight, coupled with the nature of the market that has led some regulators to view this digital money as the “wild west” of currency that permits anonymous transactions to occur very easily.8 This has earned the currency its moniker, “hackercash.”9

CREATION AND FUNCTIONALITY OF THE BITCOIN MARKET

Originally conceived by David Chaum in 1998, crypto currency was created as a means to not only have a purely digital electronic currency, but also to permit people to have total anonymity in connection with their transactions.10 Building on this theory, a software developer working under the pseudonym “Satoshi Nakamoto” designed the protocol and “mined” the first bitcoin in January of 2009.11 This “mining” process would be the primary method of increasing the money supply for the currency and participants in the market use the same process today.12

This mining process has been explained as users “solving math problems” to earn coins.13 This method releases coins not only to expand the currency worldwide, but also to prevent an over-flooding of the market.14 One major concern with bitcoin has been its volatility and the fact that an over-flooding of the market would cause the price to drop, triggering fears that it will never be accepted as a currency.15

Bitcoin is planning to release coins through this mining process under a predetermined schedule through the year 2140 with the goal of ultimately having 21 million bitcoins in circulation.16 This mining process produces 25 coins every 10 minutes per successful mining attempt.17 In order to manage the release of the currency and to continuously increase the money supply, the amount of coins that can be successfully mined from each attempt will be halved over
time. This pre-determined schedule would still allow bitcoins to be mined in 100 years but only in fractional amounts.

After a miner completes this process, miners are now in possession of a set of coins. The miner can then choose to either hold the currency or exchange the currency with other users/vendors for goods, services or even other forms of currency like the Euro or the U.S. dollar. The advantage of such exchanges is that there can be no way to trace the transaction; so long as an individual has the bitcoin program, one can accept the bitcoin anywhere on the planet. Additionally, as evidenced by the history of this market, the exact rate of conversion between bitcoins and U.S. dollars or other forms of currency is hard to consistently predict and is considered one of the major concerns with the currency.

INVESTMENT AND ACCESSIBILITY OF THE MARKET

A significant advantage of bitcoin is that as long as you have the program or even just an Internet connection, you can use and obtain this currency. This allows the currency to be accessible nearly anywhere on the planet. Given the interest in monetizing the currency, which is defined as the application of the
currency to the U.S. dollar and the Euro for exchange purposes, there is also intense demand for investment in the market. 24

Bitcoin has drawn comparisons to the dotcom boom in the late 1990s in the sense that it is being considered the next frontier of digital innovation that could bring a substantial windfall of profits. 25 Venture capitalists have poured their money into opportunities that are building up mining operations and companies that are making concerted efforts to provide inroads to the market. 26 In fact, through June of 2013, there have already been multiple deals, totaling over $12 million dollars, where investors are backing bitcoin-supporting companies. 27 Analysts have opined that there would be upwards of $65 million to $100 million in available investment capital for future starts-ups. 28

Some of these businesses are not even connected to the mining of the bitcoins but are rather aimed at providing investors an opportunity to invest in bitcoins themselves. 29 These companies, some powered by high-end Wall Street investment firms, are creating funds or trusts that are solely based on bitcoin valuation and give investors a vehicle to speculate on the pricing of the coins themselves. 30 There have been some notable investors behind these types of trusts including the Winklevoss twins, famous for their role in the creation of Facebook, and three of the original founders of PayPal. 31

The most obvious application of bitcoin technology is trying to design a method for traditional brick and mortar businesses so they can accept these digital coins. 32 While some creative inventors have been able to capture the specific technical codes powering bitcoins and encapsulate these codes into a physical “coin,” most vendors would be unlikely to accept these items as payment. 33 While the coins are technically valid representations of the coins, vendors have to choose to take these coins and then have to find a way to manage the physical items. 34 Additionally, there are numerous companies that are trying to corner the market and the resulting competition confuses the issue and the acceptance of these currencies. 35

To address this problem of a lack of standardized physical currencies, many venture capitalists have started pouring their investment capital into digital platforms that allow merchants to accept these coins for transactions. 36 One company, Coinbase, claims it handles 175,000 transactions a month and has already raised $6 million dollars in investments to support its services. 37 Coinbase offers to accept bitcoins for merchants and charges a one percent
transaction fee to convert it to U.S. dollars for merchants. An Atlanta based company, BitPay, charges a similar fee and assists over 10,000 merchants in 164 countries to use this platform so they can accept bitcoins. To summarize, the advantages of this currency are diverse and are readily available to any interested investor who is willing to eat a little bit of risk.

**NO REGULATION, NO PROBLEMS?**

This developing and volatile market has a darker side, which has drawn concerns from Congress, the Department of the Treasury and the SEC. Senators Thomas Carper (D-Del.) and Tom Coburn (R-OK) opined in a letter to the Department of Justice (DOJ) and the SEC that "the speed at which payments can be sent globally and the potentially profitable investments that can be made by trading virtual currency have made them attractive to entrepreneurs and investors alike, however, their near anonymous and decentralized nature has also attracted criminals who value few things more than being allowed to operate in the shadows."41

Many market observers of bitcoins have commented that if one knew how to work the system, it would be possible to conduct transactions in a way that would totally disguise the entire transaction from any observation. It would not be overly difficult to disguise the identities of the parties to the transaction from any law enforcement or other agencies. This conduct is illegal in the U.S., but it is also suspicious because one of the reasons why parties would require a transaction to be totally untraceable suggests illegal activities.

This concern about giving criminals a chance to easily disguise their transactions is a major problem for criminal enforcement agencies since their main weapons to combat organized crime activities is to “follow the money”. If agencies are unable to trace transactions associated with criminal activity, they will be greatly disadvantaged in their ability to combat these problems. These problems are currently under investigation not only by the FBI but also by the Department of Homeland Security. The FBI is concerned that the technology could be co-opted by criminal forces in order to launder money from their illegal activities and never be caught. Another issue is that bitcoins could be used to bypass internal revenue and currency regulations to the detriment of the U.S.
The SEC has worked with the Department of Transportation (DOT) and other agencies to declare bitcoin a legal currency that the SEC has authority to regulate. While the SEC declared that it simply has this ability, the official seal of approval for this concept was approved by a court in Texas in SEC v. Shavers and Bitcoin Savings and Trust. In this case, Shavers was accused of effectively running a ponzi scheme aimed at defrauding investors of their investment and disguising the losses under the guise of the volatility of the new market of bitcoins. The court found Shavers guilty of fraud.

Donating Bitcoins to U.S. Candidates?

Dan Backer, an election attorney in Washington DC, has opined that allowing campaigns to accept these coins as valid tender for donations would be beneficial. “It’s a great idea,” said Backer, “[it would] expand the number of Americans who can get involved in campaigns to support the candidates they want, how they want. It is the next logical iteration of the democratization of the political process enabled by the Internet.” Backer is a huge supporter of allowing campaigns to accept donations via bitcoins and is currently arguing before the Federal Election Commission (FEC) to permit candidates and their committees to accept donations in this form. Currently, the FEC does not allow donations but it may choose to do so in the future.

Backer brushes off the concerns that anonymous or foreign entities could donate funds to campaigns through these coins as a work-around from the current laws because he feels such concerns are irrelevant or easily remedied, and states that many already accept donations through credit cards online and have a very low rate of fraud or other legal issues associated. Under the current law, campaigns are required to ask for a donor’s name, occupation, and to solicit information concerning their citizenship. Alternatively, Backer states that the FEC could require campaigns to apply this same standard and refuse to accept bitcoin donations from entities that intentionally disguise their identity or attempt to sidestep legal requirements.

What’s Next?

Given the market capitalization of bitcoins, it is clear that there is money in the market and people are clearly interested in using this currency. There are
many legal issues but this is true for new ideas and how the law reacts to them. With the SEC now taking control of the matter, it is likely that future regulations will be implemented to address these legal concerns and grant people more access to this currency.

NOTES

3 DAVID CHAUM, BLIND SIGNATURES FOR UNTRACEABLE PAYMENTS, ADVANCES IN CRYPTOLOGY PROCEEDINGS OF CRYPTO 82, 199-203 (Springer US, 1st ed. 1983).
6 Id.
7 Id.
9 Derek Dion, I’ll Gladly Trade You Two Bits On Tuesday For A Byte Today: Bitcoin, Regulating Fraud In The E-Conomy Of Hacker-Cash, II. Journal of Law, Technology & Policy (May 2013).
17 Id.
18 Id.
19 Id.
20 Id.
27 Id.
28 Id.
30 Id.
34 Id.
38 Id.
39 Id.
41 Id.
43 Id.
44 Id.
47 Id.
53 Id.
54 Id.
58 Id.
59 Id.
50 YEARS OF (NON) EQUAL PAY FOR EQUAL WORK

by Katie Rinkus

This past June marked the 50th anniversary of the day the Equal Pay Act of 1963 was signed into law. Under this Act, employers are prohibited from discriminating on the basis of sex with regard to wage payments. Fifty years later, working women still face widespread wage discrimination, and women employed in the legal profession are no exception.

Women in the United States earned only 77 cents to the dollar earned by men in comparable positions in 2011. Minority women fare even worse: African-American women earned 69 cents to the dollar, while Latina women earned 60 cents to the dollar. Research conducted by the Institute for Women’s Policy Research in September 2013 demonstrates that at the current rate, women will not achieve pay parity until 2058.
These statistics lead to two overarching questions: Why is sex-based wage discrimination still an issue 50 years after the Equal Pay Act was enacted, and what is currently being done to address this disparity?

**The Lilly Ledbetter Effect**

Partially in response to the ineffectiveness of the Equal Pay Act, President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009. This Act states that wage discrimination claims begin to “accrue” under a variety of circumstances: whenever an employee receives a discriminatory paycheck, whenever a discriminatory pay decision or practice is adopted, or whenever a person becomes subject to or is otherwise affected by the decision or practice.

Furthermore, the Act allows individuals subjected to discriminatory practices to assert their rights in numerous ways. It therefore promotes voluntary compliance by employers, as employers will have a strong incentive to eliminate discriminatory compensation practices. According to Laurel Bellows, past president of the American Bar Association (ABA) and proponent of women’s compensation rights, the Act gives women an incentive to look into their employers’ compensation practices. “If you don’t know what you’re being paid, you don’t know if you’re being treated equally,” explains Bellows.

**How Do Other Countries Compare?**

Sex-based wage discrimination is not a problem unique to the U.S., but it is an issue prevalent among European countries as well. According to a report conducted by the European Commission in July 2013, the pay gap in the European Union is 16.2 percent. This is only slightly lower than the pay disparity in the U.S., which is 23 percent.

Each European country differs in terms of how it tackles this problem. The United Kingdom, for example, enacted the Equality Act 2010, which allows employees greater access to information regarding their employers’ compensation practices. Additionally, in an effort to reach all European countries, the European Commission initiated the “Equality Pays Off” project, which aims to implement training activities, events, and tools for companies to address the pay gap. For example, the project offers an opportunity for companies from
all over Europe to exchange their experiences in fostering gender equality in the workplace, particularly in terms of tackling the causes of the pay gap.\textsuperscript{14} Even though the European Commission has worked with various companies in Europe to eliminate the pay disparity, women in these countries, similar to women in the U.S., continue to be paid less than men for equal work.

**Bringing it Home: What Is Being Done Within the Legal Profession**

Pay discrimination continues to exist within the legal profession, and Bellows has made it her professional mission to bring this issue to the forefront. When Bellows was president of the ABA in 2012, she instituted the Gender Equity Task Force, which is part of the ABA’s Commission on Women. “The ABA had policies on [addressing] equality and this was a perfect place to launch a campaign for awareness of the continued problem,” explains Bellows.\textsuperscript{15} Bellows notes that research conducted by the National Association of Women’s Lawyers confirms that there is a gender pay gap in the legal profession, as women attorneys receive only 89 cents to the dollar earned by male attorneys working in comparable positions.\textsuperscript{16} “These facts are very serious,” states Bellows, “This money adds up through retirement, and the money is just lost.”

The Gender Equity Task Force has published various publications that provide women with information necessary for negotiating equitable pay.\textsuperscript{17} Bellows points out that because raising compensation issues with law firms can be very controversial, it is very difficult to determine whether one is receiving equitable pay.\textsuperscript{18} This is one of the main reasons Bellows initially instituted the task force, as she believes that protecting pay information is one of the most important goals of this movement. Additionally, the task force has generated a “toolkit” for state and local bar associations to reference when discussing compensation.\textsuperscript{19} Bellows notes that this toolkit is extremely important to the movement because while the ABA cannot speak to every law firm in the country, state and local bar associations can.\textsuperscript{20}

**Conclusion**

It is clear that true pay equity will not and cannot occur until all employers realize the barriers that women face and embrace new methods of change. In
order to eliminate the gender pay gap, it is imperative that employers enact specific solutions that make pay information more accessible and transparent to all employees.

NOTES

3 Id.
7 Id.
8 Telephone interview with Laurel Bellows, Founder and Managing Principal of The Bellows Law Group and former president of the American Bar Association (Oct. 11, 2013) [hereinafter Bellows Interview].
9 Id.
11 Pay Equity, supra note 4.
14 Id.
15 Id.
16 Id.
17 Id.
18 Id.
20 Bellows Interview, supra note 8.
On January 6, 2013, the Obama Administration announced that it was "taking a major step toward bolstering legal immigration and protecting families" by creating the "provisional unlawful presence waiver." The provisional unlawful presence waiver was enthusiastically marketed as "a fix to a
Catch-22 in immigration law that could spare hundreds of thousands of American citizens from prolonged separations from illegal immigrant spouses and children.”

**Promises to “Keep Families Together”**

The provisional waiver was optimistically anticipated to be a “rational solution to a simple problem” that would “ease a path to [a] green card” and allow “thousands upon thousands of families” to remain together in the United States. It was expected to “open up a huge door” and bring hundreds of thousands of undocumented immigrants hiding in the shadows “into the light.” The Obama administration stated that the main goal of the provisional unlawful presence waiver was “to prevent the long separation of families.” It was considered an administrative action that balanced “humane policies with the rule of law.”
STANDARD WAIVER OF GROUNDS OF INADMISSIBILITY

Under current immigration law, certain individuals who are present in the U.S. in violation of the law but are actively seeking an immigration visa, adjustment of status, or other immigration benefit, may file Form I-601 in order to seek a Waiver of Grounds of Inadmissibility.7 An immigration waiver is a pardon of some past offense, such as entering the U.S. illegally.8 The waiver process requires an alien who is an immediate relative of a U.S. citizen to leave the U.S. and appear for a visa interview abroad.9 At this interview, a consular officer from the Department of State must determine whether the individual is ineligible for a visa because he is inadmissible to the U.S.10 If the consular officer abroad indicates that the individual is eligible to seek a Waiver of Grounds of Inadmissibility, then Form I-601 may be filed with the U.S. Citizenship and Immigration Services (USCIS).11 It takes approximately six months for the government to issue a decision on a waiver.12

One of the most notorious problems in the U.S. immigration system is unlawful presence, which complicates the filing and adjudication of Form I-601. The Immigration and Nationality Act defines unlawful presence as “the period where an individual is present in the United States after the expiration of the period of lawful stay authorized by the government, or is present in the United States without having been admitted or paroled.”13 An individual who has been unlawfully present in the U.S. for more than 180 days but less than one year, and voluntarily leaves the U.S., is barred from reentry for a period of three years.14 An individual who has been unlawfully present in the U.S. for one year or more and leaves the U.S. is barred from reentry for a period of 10 years.15 Thus, an individual who has been unlawfully present in the U.S. and departs to attend their visa interview risks the possibility of having their waiver denied and subsequently being barred from reentry into the U.S.

OBAMA’S NEW POLICY: THE PROVISIONAL UNLAWFUL PRESENCE WAIVER

The provisional unlawful presence waiver, also known as the “stateside waiver” or “family unity waiver,” became effective on March 4, 2013.16 An individual may apply for the provisional waiver by filing Form I-601A, rather than Form I-601.17 The provisional waiver contrasts a standard Waiver of Grounds of Inadmissibility as it “allows individuals, who only need a waiver of inadmissi-
bility for unlawful presence, to apply for a waiver in the United States. . .before they depart for their immigrant visa interviews at a U.S. embassy or consulate abroad.” Thus, this stateside waiver allows aliens to remain in the U.S. until they receive a decision on their waiver, preventing the possible three or 10-year unlawful presence bar.

DISAPPOINTING OUTCOMES

While the provisional unlawful presence waiver was intended to keep families together and avoid the consequences associated with unlawful presence, provisional waiver decisions recently issued by USCIS have proven disappointing.

According to immigration attorney Keren Zwick, provisional waivers present a variety of problems, and “are much harder to get approved than we had previously anticipated.” Zwick states that because provisional waivers are often referred to as “stateside waivers,” “people are under the [false] impression that they don’t have to go back” to their country of origin, and that the waiver process can be completed within the U.S. However, an alien is still required to briefly depart the U.S. after the waiver is approved, and then reenter legally. Zwick exemplifies the hardship this can impose: “I deal with a lot of lesbian, gay, bisexual, and transgender clients who don’t want to leave the U.S. out of fear of persecution, no matter if it is a year, or for three weeks, or however long it is taking for the waivers to be adjudicated.”

According to immigration attorney Nacios Toro, “the problem [with the provisional waiver] is just the way the media portrayed it — as easily reuniting families, keeping families together. In actuality, that [is] not what it [is] doing. It [is] harder to get a waiver here.” The Form I-601A seems to require “a higher standard than what the Obama Administration has indicated,” in that it explicitly states that the alien’s qualifying relative must be either a spouse or parent who is a U.S. citizen. Therefore, even if an alien’s initial petitioner was a U.S. citizen, if their qualifying relative for purposes of the waiver is a parent or spouse who is only a lawful permanent resident, the alien is not eligible to file an I-601A.

Additionally, immigration attorney Rosalba Piña questions how the provisional waiver can maintain family unity and keep families together when it does not extend relief to aliens who are parents of U.S. citizen children. If an alien
applying for an I-601A has a U.S. citizen child, but not a U.S. citizen parent or spouse, he or she is ineligible for the waiver. 27

“It [is] hard to get the waiver here, because even though it appears to be so broad that a lot of people can benefit, when you really look at it at the end of the day, very few people can actually benefit.” 28 The provisional waiver is limited because it is a discretionary determination and, therefore, is not reviewable in federal court. 29 Furthermore, motions to reconsider or reopen a denied provisional waiver are not permitted. 30 Consequently, if a provisional waiver is denied, an alien’s only option is to restart the process from the beginning and “hopefully better document the hardship.” 31

According to the American Immigration Lawyers Association, provisional waivers are being needlessly denied due to USCIS “applying an overly rigid interpretation of [the] ‘reason to believe’” standard. 32 The reason to believe standard parallels the probable cause standard and similarly requires more than mere speculation or conjecture. 33 “[T]here must exist the probability, supported by evidence, that the alien is not entitled to status.” 34 This application of the reason to believe standard is causing denial of provisional waiver applications where there is only “a mere suspicion of inadmissibility on grounds other than unlawful presence,” without even requesting additional evidence. 35

USCIS relies on the reason to believe standard to deny provisional waivers due to “any prior criminal issue,” regardless of the nature or severity of the offense, or how long ago it occurred. 36 Even though question 29 on Form I-601A indicates “that traffic violations are not considered when evaluating eligibility,” waiver applications have been denied for mere traffic citations or violations, or “because of a ‘hit’ on the application’s record, without any analysis of the accompanying evidence.” 37 Numerous I-601A waiver applications have been denied “based on an allegation that the applicant provided a false name or date of birth when apprehended at the border” without consideration of evidence submitted explaining why the applicant is not inadmissible. 38

Applications have also been denied due only to a conviction for a DUI, an offense that does not constitute a crime involving moral turpitude for immigration purposes, and thus “does not render a person inadmissible.” 39 Further, applications have been denied due to convictions for minor transgressions that fall under the petty offense exception for immigration purposes. 40 Crimes that fall under this exception do not render an alien inadmissible. 41
NO MORE BAND-AID IMMIGRATION REFORM

The provisional unlawful presence waiver was “a good idea in theory,” explains Zwick.42 “To his credit, President Obama is trying to put as many band-aids on the broken immigration system as he can,” but the results are simply “not as good as they should have been.”43 The denials, limitations, and unavailability of the provisional waiver to those it was intended to benefit undermine the goals of the policy. Upon implementation, it is clear that the Obama Administration’s efforts to “keep families together” fell short. Empty promises and piecemeal, band-aid immigration policies are unacceptable. Comprehensive immigration reform is the only way to prevent separation of families and maintain family unity.

NOTES

3 Id.
4 Id.
6 A Common-Sense Immigration Move, supra note 1.
7 I-601, Application for Waiver of Grounds of Inadmissibility, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, July 2, 2013, available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f0d1a/?vgnextoid=bb515f56ff55d010VgnVCM10000045f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD.
8 JOSEPH A. VAIL, ESSENTIALS OF REMOVAL AND RELIEF: REPRESENTING INDIVIDUALS IN IMMIGRATION PROCEEDINGS, 237 (Stephanie L. Browning, 2006).
9 Provisional Unlawful Presence Waivers, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, May 6, 2013, available at https://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3eb5b9ac892436a7543f0d1a/?vgnextoid=bc41875dce56310VgnVCM100000082ca60aRCRD&vgnextchannel=bc41875dce56310VgnVCM100000082ca60aRCRD.
11 Id.
13 Vail, supra note 2, at 77.
14 Id.
15 Id.
17 Provisional Unlawful Presence Waivers, supra note 9.
18 Id.
19 Interview with Keren Zwick, Immigration Attorney, National Immigrant Justice Center (Oct. 16, 2013).
20 Id.
21 Id.
22 Id.
23 Interview with Nacios Toro, Immigration Attorney, Law Offices of Rosalba Piña (Sep. 27, 2013).
24 Interview with Rosalba Piña, Immigration Attorney, Law Offices of Rosalba Piña (Sep. 27, 2013).
25 Id.
26 Id.
27 Id.
28 Id.
29 Piña, supra note 24.
30 Id.
31 Id.
33 Id.
34 Id.
35 Id.
36 Id.
37 Application of “Reason to Believe,” supra note 34.
38 Id.
39 Id.; Matter of Lopez-Meza, 22 I&N Dec. 1188, 1194 (BIA 1999); Murillo-Salmeron v. INS, 327 F.3d 898 (9th Cir. 2003).
40 Application of “Reason to Believe,” supra note 34.
41 Id.
42 Interview with Keren Zwick, supra note 19.
43 Id.
STOP THE “STOP AND FRISK?” HOW *FLOYD V. CITY OF NEW YORK* WILL LIMIT THE POWER OF LAW ENFORCEMENT ACROSS THE NATION

by JESSICA L. FANGMAN

Amid heated debate and controversy, Judge Shira A. Scheindlin found the New York Police Department’s (NYPD) application of the “stop and frisk” street patrol method in violation of the constitutional rights of the citizens it was designed to protect.¹ Stop and frisk is a law enforcement mechanism, which was found constitutional in *Terry v. Ohio*, and allows an officer to stop an individual when there is a reasonable suspicion the person “might be about to commit a crime or is in the process of committing a crime.”² An
officer that has reasonable suspicion can conduct a frisk or pat down of the person to determine whether the individual is carrying a weapon.\textsuperscript{3}

\textbf{THE CASE AND THE COURT’S FINDING}

In 2013, a group of individuals filed suit against New York City, alleging the NYPD’s implementation of the stop and frisk police method “violated both the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.”\textsuperscript{4} After a lengthy bench trial, Judge Scheindlin found “nine of the stops and frisks were unconstitutional – that is, they were not based on reasonable suspicion.”\textsuperscript{5} The court further found that while five stops were constitutional, the frisks following those stops were unconstitutional.\textsuperscript{6} Finally, five of the nineteen stops and frisks presented for review at trial were found to be constitutional.\textsuperscript{7} Judge Scheindlin held that not only did the NYPD’s employment of stop and frisk police tactics infringe upon Fourth Amendment rights, but “the city adopted a policy of indirect racial profiling by targeting racially defined groups for stops based on local crime suspect data,” which is a violation of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{8}

In her opinion, Judge Scheindlin cited statistics that were prepared for the trial, including that between January 2004 and June 2012, the NYPD conducted over 4.4 million stops.\textsuperscript{9} While the goal of the stop and frisk is to retrieve weapons and prevent crime, “in 98.5 percent of the 2.3 million frisks, no weapon was found.”\textsuperscript{10} The heated racial argument is due in part to the following statistics: of the 4.4 million stops, 52 percent were black, 31 percent were Hispanic, and 10 percent were white.\textsuperscript{11} Judge Scheindlin concedes that “any one stop is a limited intrusion in duration and deprivation of liberty,” but argues that each stop is also a demeaning and humiliating experience.\textsuperscript{12}

\textbf{FORMER MAYOR BLOOMBERG’S COMMENTS POST-RULING}

New York City’s former mayor Michael Bloomberg immediately addressed the August 2013 ruling at a news conference along with NYPD Police Commissioner, Ray Kelly.\textsuperscript{13} Former Mayor Bloomberg is confident that the NYPD’s stop and frisk practice has made New York the safest big city in America.\textsuperscript{14} Since inception of stop and frisk in New York City, 8,000 guns have been
taken off the streets, as well as some 80,000 other weapons. Former Mayor Bloomberg offered some statistics: “Today, we have the lowest percentage of teenagers carrying guns of any major city across our country – and the possibility of being stopped acts as a vital deterrent, which is a critically important byproduct of Stop-Question-Frisk. The fact that fewer guns are on the street now shows that our efforts have been successful. There is just no question that Stop-Question-Frisk has saved countless lives. And we know that most of the lives saved, based on the statistics, have been black and Hispanic young men.”

AN UNCONSTITUTIONAL POLICE PRACTICE?

Those who criticize the stop and frisk policing method often do so because it conflicts with an individual’s constitutional rights. The New York Civil Liberties Union (NYCLU) found that no research has ever proven the effectiveness of the practice, and the small number of arrests, summons, and guns recovered demonstrate that the practice is ineffective. In fact, crime statistics do not support the claim that New York City is safer because of the practice. For example, while violent crimes fell 29 percent from 2001 through 2010, reports show that other large cities within the U.S. have also experienced a decline in violent crimes, and these cities do not employ stop and frisk.

In response to the criticism that stop and frisk is a racially biased policing method, former Mayor Bloomberg stated that the NYPD fights crime wherever crime is occurring, and they don’t worry if their work doesn’t match up to a census chart. As a result, New York City reports declining rates in gun possession, fewer shootings, and fewer homicides. Former Mayor Bloomberg concluded his comments by stating: “Let’s be clear: People have a right to walk down the street without being targeted by the police,” but “people also have a right to walk down the street without being killed or mugged.”

NOT JUST NEW YORK

Stop and frisk is not a police method solely implemented in New York City or the U.S.; England has its own version of the policing method, known as the “stop and search.” England’s stop and search policy is governed by the Police and Criminal Evidence Act of 1984 (PACE), which provides that “the police
are required to have ‘reasonable suspicion’ that the person stopped is in possession of stolen or prohibited articles.” 22 PACE offers a detailed discussion of what constitutes reasonable suspicion. 23 In part, PACE provides that reasonable suspicion “cannot be based on generalizations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity.”24 However, more often than not, race plays a leading role in the police officer’s decision of who to stop.25

In England, the purported racial profiling methods of the stop and search has also generated staunch opposition to the stop and search policing technique. Since 1995, the number of recorded stops and searches of Asians have remained between 1.5 and 2.5 times the rate for Caucasians, and for African Americans, it is usually between 4 and 8 times the rate than for Caucasians.26 Additionally, while roughly one million stop and searches take place a year, only 9 percent lead to an actual arrest.27

CONCLUSION

This ruling does not command the NYPD to halt its stop and frisk tactics, but rather, it compels the court and the NYPD to address the constitutional concerns.28 Judge Scheindlin has “called for a federal monitor to oversee broad reforms, including the use of body-worn cameras for some patrol officers.”29 Law enforcement, citizens, and lawmakers must work together to uphold the constitutional rights of our citizens and protect our streets. In considering how the stop and frisk method can be improved, Former Cook County State’s Attorney Richard Devine believes that the “limits of reasonable suspicion must be recognized,” and there must be sufficient guidance for police officers so they can properly implement stop and frisk type policies and exercise their authority responsibly.30 Until such guidance is provided, the potential value of stop and frisk as a policing practice might not be recognized.

NOTES

3 Id.
5 Id. at 6.
6 Id.
7 Id.
8 Id. at 7.
9 Id. at 3.
10 Id.
11 Id. at 4.
12 Id. at 2.
14 Id.
15 Id.
16 Id.
19 Id.
20 Id.
21 Niamh Eastwood, Stop-and-Frisk: Not Just an American Problem, OPEN SOCIETY FOUN-
23 Id. at 16.
24 Id.
25 Id. at 5.
26 Id. at 13.
28 Goldstein, supra note 1.
29 Id.
30 Interview with Richard Devine, Partner at Meckler, Bulger, Tilson, Marick & Pearson, LLC (Oct. 8, 2013).
On August 20, 2012, President Obama was asked about the prospect of United States intervention in Syria’s civil war. The President stated that
the U.S. had “communicated in no uncertain terms with every player in the region that [the possibility that chemical weapons might fall into the wrong hands is] a red line for us and that there would be enormous consequences if we start seeing movement on the chemical weapons front or the use of chemical weapons.”

He later explained that the “red line” terminology was not own creation but rather the international communities’ standard.

**A History of Grappling With the Threat of Chemical Weapons**

The international community’s attempts to address the use of chemical weapons predate the nearly 100,000 deaths caused by such weapons in World War I. In 1899, 25 nations ratified the “Declaration Concerning Asphyxiating Gasses” at the International Peace Conference at The Hague. Signatories of the agreement agreed to abstain from the use of projectiles designed to spread “asphyxiating or deleterious gases.” Limited in scope, the treaty only applied when two powers that were parties to the agreement were at war, and ceased to operate in the event that a nation not a party to the agreement intervened in the conflict. Notably, the U.S. was the only power at the International Peace Conference that did not become a party to the agreement. The U.S. representative refused to sign on to the declaration reasoning that the technology was still nascent and believing that gas warfare was just as humane as other forms of warfare.

In 1925, the international community created the more expansive Geneva Protocol which was ratified by the U.S. 50 years later in 1975. Finally, the 1993 Chemical Weapons Convention (CWC) was created to comprehensively address the elimination of chemical weapons.

**Human Rights Concern over Chemical Weapons**

According to the Organization for the Prohibition on Chemical Weapons (OPCW), the CWC defines a chemical weapon as “any toxic chemical or its precursor that can cause death, injury, temporary incapacitation or sensory irritation through its chemical action.” The CWC also identifies some of the well-known chemical agents and itemizes four categories of agents: choking, blister, blood, and nerve. Devices intended to deliver chemical weapons are
themselves considered chemical weapons by the convention even when they do not contain toxic material.  

Multiple human rights organizations have devoted attention to the use and misuse of chemical weapons, including Human Rights Watch (HRW), Physicians for Human Rights (PHR), and the UN Human Rights Counsel, which recently issued a report on the situation Syria. The August 2013 report fails to reach conclusions about the chemical agents used, their delivery systems, or the perpetrators. Notwithstanding the inconclusiveness of its report, the Counsel explicitly recommended that the rejection of weaponized chemical weapons be part of the precautions to minimize the impact of attacks on civilians.

In the context of warfare, the use of chemical agents and weapons is of significant concern to human rights advocates because of their indiscriminate nature. Chemical weapons have the potential to affect not just those in the immediate vicinity of deployment, but those downwind.

Alastair W.M. Hay, Professor of Environmental Toxicology at the University of Leeds notes that in combat, chemical weapons are often used as an adjunct to traditional arms. “In an entrenched position, riot control agents can be used to flush people [or] soldiers out of trenches and then kill them. Chlorine does the same thing. In the civilian setting [chemical agents are used] because police forces want something that is not as harmful as a baton or a gun.”

The U.S.’ Record on Chemical Weapons

Although the U.S. refused to sign the 1899 Declaration, believing at the time that chemical weapons were humane, its modern-day position is characterized by unambiguous rhetoric opposing the use of chemical weapons. Similarly, in 1942 President Roosevelt referred to reports that the Axis powers were considering the use of chemical weapons and stated:

“Use of such weapons has been outlawed by the general opinion of civilized mankind. This country has not used them, and I hope that we never will be compelled to use them. I state categorically that we shall under no circumstances resort to the use of such weapons unless they are first used by our enemies.”

57
Despite its straightforward public statements, the U.S. position may actually be less categorical and more complex. It was at the insistence of the U.S. that the Geneva Protocol was adopted in 1925, long before President Roosevelt’s statement. The U.S., however, would not ratify the agreement until 1975.

It was recently reported that in 1988, the U.S. helped Saddam Hussein in Iraq’s war with Iran by providing intelligence conveying the location of Iranian troops posed to gain a major strategic advantage. It did so, “fully aware that Hussein’s military would attack with chemical weapons, including sarin, a lethal nerve agent.” The recently declassified documents which brought to light the U.S.’ involvement in Iraq include a November 4, 1983 CIA memo reporting that “the Iranians are trying to acquire proof of Iraq’s use of mustard agent to present to the UN [and that] Tehran would take such evidence to the UN and charge US complicity in violating international law.” The memo concluded that international outcry against Iraq for the use of chemical weapons was unlikely, however, and that even if Iran obtained firm evidence of Iraq’s widespread use of chemical weapons, real sanctions were unlikely since the Soviet Union employed similar weapons in Afghanistan and Southeast Asia without repercussion.

The CIA memo reflects how the goal of preventing the propagation of chemical weapons use was offset by political considerations; namely, avoiding setbacks in efforts to strengthen ties between the U.S. and Iraq. Another declassified CIA document speaks of the proliferation of chemical weapons over a 20 year period in the 1970’s and 80’s and cites “apparent international tolerance for [chemical] weapons use in local conflicts”. These conditions, the report concludes “increases the probability that chemical weapons will be used more frequently in the future and complicates the ability of the U.S. to conclude an effective chemical weapons treaty.”

The Reagan administration may have made a similar calculus in electing to keep quiet when it discovered what was believed to be a chemical weapon nerve agent production facility and a storage facility in Israel in 1982. Israel signed the CWC in 1992 but has not yet ratified it, creating doubt as to whether the U.S. ally still maintains its stockpile of chemical weapons.

Reports that chemical agents may have been used in the war in Bosnia and Herzegovina in July of 1995 prompted the U.S. to investigate; however, the government refuses to release the report. Will the future declassification of
secret memos one day reveal that the U.S. was complicit in those acts? Ultimately, the U.S.’ actual position is unknown.

CONCERNS OVER TEAR GAS AND THE PUSH TO EXPAND THE CWC

It is now confirmed that the chemical agent used in Syria was sarin gas, a “Schedule 1” chemical banned by the CWC. Sarin causes painful symptoms which include heavy sweating, drooling, respiratory distress, nausea, vomiting, lack of bladder and bowel control, altered mental status, and generalized muscle weakness and twitching.

Tear gas, which is considered a riot control agent under the CWC and not banned, can cause severe tearing, eye spasms, corneal damage, burning in the nose and throat, respiratory distress, severe chemical and flame burns and may even damage chromosomes and change DNA.

According to an August 2012 PHR report, Bahrain, Chile, Egypt, Honduras, Israel, Libya, Panama, Syria, Tunisia, Turkey, Uganda and Yemen have all deployed tear gas against civilians. In Bahrain, for example, PHR describes how security forces are using tear gas “...as weapons not just to disperse
crowds but to wound, harm, harass, and intimidate. . . protesters, in violation of UN protocols for the use of force.”

PHR has called for the creation of an international group of health professionals, public health experts, lawyers, and law enforcement officials to draft guiding principles on the use of all toxic chemical agents, and to determine whether certain such agents including tear gas, which are now considered non-lethal, should be reclassified under the CWC.

The goal appears to be putting “some international rules in place on when and where these agents should be used”, as opposed to banning them all together.

Not everyone is focused on expanding the scope of the CWC. According to Yasemin Balci of the Verification Research, Training and Information Centre (VERTIC), the most significant legal issue concerning chemical weapons today is that the large percentage of state parties —101 states or 53 percent — have not passed adequate legislation to prevent the misuse of certain toxic chemicals. Balci explains that important steps to prevent proliferation, such as setting up authorization procedures for their import and export and deciding who can produce, acquire, retain or use them, are being skipped. “The state parties in question might not have a sizeable chemical industry, but their lack of legislation creates loopholes in the global system, which can be exploited by those with malicious intent, whether they are state or non-state actors.”

THE RESPONSE IN SYRIA AND ITS SIGNIFICANCE FOR THE FUTURE OF CHEMICAL WEAPONS

By late 2012, it was well known that Syria had an operational chemical weapons program. Reports began to surface that president Bashar al-Assad’s regime had deployed chemical weapons. It was not until September of 2013, however, that the U.S. and Russia agreed to work together and devise a plan to dismantle Syria’s chemical weapons program. With a plan in place, momentum quickly built to address the issue - Syria’s embattled president has signed the CWC, and the dismantling of the nation’s chemical weapons program is underway.
On September 20, 2013, Syria submitted a declaration of its stockpiles of chemical weapons to the OPCW, as required by the agreement negotiated by the U.S. and Russia. The OPCW then adopted a timeline for destroying Syria’s chemical weapons, which was unanimously adopted by the UN Security Council.

UN and OPCW officials arrived in Syria on October 1st and began monitoring the destruction of Syria’s stockpiles of chemical weapons by Syrian officials. Syrian forces are reported to have rendered inoperable all of the declared chemical production facilities and mixing and filling plants. The next stage of the process is the removal and destruction of the chemicals themselves. The first load of chemicals left Syria on a Danish frigate and marine vessels from China and Russia on January 7, 2014. Those vessels will dock at ports in Italy where the materials will be trans-loaded onto American vessels which will transport the cargo to international waters for destruction.

**CONCLUSION**

Despite a hundred-year history of increasing agreement that the use of chemical weapons is a line that should not be crossed, the exact location of that line is still unclear; we have used chemical agents in war, in genocide, and on protestors. Multiple international agreements are in place, yet the use of chemical agents is still a serious concern for human rights organizations around the world. The impending resolution of the issue in Syria suggests a move by the international community in the right direction. However, in other parts of the world such as Bahrain, the U.S. and international response to the use of chemical agents seems to add to the precedent that despite widespread international agreement that chemical weapons are intolerable, the U.S. will sometimes tolerate them.

**NOTES**


6. Id.

7. Id.


9. Id. at 376.


11. Email Interview with Yasemin Balci, Legal Officer, Verification Research, Training and Information Centre (VERTIC) (Oct. 17, 2013).

12. The OPCW “is the implementing body of the Chemical Weapons Convention (CWC), which entered into force in 1997. As of today, the OPCW has 189 Member States who are working together to achieve a world free from chemical weapons. They share the collective goal of preventing chemistry from ever again being used for warfare, thereby strengthening international security.” See About the OPCW, Org. for the Prohibition of Chemical Weapons, http://www.opcw.org/about-opcw/ (last visited Nov. 15, 2013).


14. Id.

15. Id.


18. Id.

19. Email Interview with Alastair W.M. Hay, Professor of Environmental Toxicology, University of Leeds (Oct. 19, 2013).

20. Id.
Professor Hay also works with PHR. Id.


The protocol entered into force in 1928. Bunn, supra note 8 at 378.


Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

39 “The nerve agent sarin (isopropyl methylphosphonofluoridate) is a water-soluble chemical warfare agent (CWA) that is among the most lethal in existence; a single drop can prove deadly. Sarin is an odorless, tasteless, and colorless compound that can be inhaled or absorbed through the skin or eyes, and may be deployed by bombs or in projectiles, including missiles and rockets. . . . Signs and symptoms appear within one minute of exposure [and include] Eye irritation, including pinpoint pupils, blurred vision, pain, excessive tearing; Heavy sweating and drooling; Respiratory distress, described as a tightness and cough; Nausea, abdominal pain, vomiting, lack of bladder and bowel control; Altered mental status; Unusually low or high blood pressure; Unusually slow or fast heart rate; [and] Generalized muscle weakness and twitching.” See Recognition and Treatment of Sarin Exposure, Chemical Warfare Agent Identification Fact Sheet Series, PHYSICIANS FOR HUMAN RIGHTS, April 2013, https://s3.amazonaws.com/PHR_other/PHR_Sarin_Fact_Sheet_04-13.pdf.

40 “The chemical CS [o-Chlorobenzylidene malononitrile] remains the most commonly used lachrymatory riot control agent today. Symptoms of CS exposure include severe tearing, burning in the nose and throat, eye spasms, chest tightness, coughing, and wheezing among other signs of oral and respiratory distress. . . . The most toxic chemical lachrymatory agent currently available is chloracetophenone (CN), which irritates the skin and eyes more than CS. As a result, CS gas has generally replaced CN as a riot control agent in many countries, as it is thought to be less toxic—although Handheld Mace still contains a small percentage of CN. Though acute effects of exposure to CN are similar to effects of exposure to CS, CN has a greater potential to cause corneal damage, especially when cartridges have expired. . . . [Other chemical riot-control agents include] ibenz (b, f)-1, 4-oxazepine (CR). . . Oleoresin capsicum (OC) and pelargonic acid vanillylamide (PAVA). . . Some tests. . . have shown that CS gas can damage chromosomes and change DNA, raising the potential of these agents to cause long-term carcinogenic and deleterious reproductive effects, as well as concerns about their long-term harmful effects on the pulmonary system following inhalation. In addition, these toxic chemical agents can cause severe burns including (1) chemical burns resulting from direct contact with CS; (2) contact burns from touching the CS canisters; and (3) flame burns, when a grenade explodes too close to an individual. It has also been suggested that CS inhalation may cause breathing complications, such as laryngospasm that can complicate operative procedures.” Weaponizing Tear Gas: Bahrain’s Unprecedented Use of Toxic Chemical Agents Against Civilians, PHYSICIANS FOR HUMAN RIGHTS, 11-14, Aug. 2012, available at https://s3.amazonaws.com/PHR_Reports/Bahrain-TearGas-Aug2012-small.pdf. [hereinafter Weaponizing; Louis Charbonneau and Michelle Nichols, U.N. confirms sarin used in Syria attack; U.S., UK, France blame Assad, REUTERS, Sep. 16, 2103, http://www.reuters.com/article/2013/09/16/us-syria-crisis-un-idUSBRE98F0ED20130916; Tear gas is not “banned” in the sense that riot control agents are not Schedule 1 chemicals; the CWC provides that “[e]ach State Party undertakes not to use riot control agents as a method of warfare.” Convention On The Prohibition Of The Development, Production, Stockpiling And Use Of Chemical Weapons And On Their Destruction, available at http://www.opcw.org/index.php?eID=dam_frontend_push&docID=6357; however, “there is an “exemption [which] applies to their use for law enforcement. Defining law enforcement is the problem. Tear gases. . . differ from other agents like incapacitants which are sometimes called non-lethal but are anything but. Most incapacitants act on the CNS system causing temporary incapacitation whereas riot control agents act on the pain receptors in the skin. Any incapacitants around today if used to incapacitate will also kill a proportion of people because some will be exposed to lethal concen-
trations in the attempt to incapacitate all... riot control agents will stay for many years but... getting agreed rules on their use is so important.” Hay, supra note 23.

41 Weaponizing, Supra note 47 at 10-11.


44 Hay, supra note 23.

45 VERTIC is an independent, non-profit that supports the development, implementation and verification of international agreements

46 Id., supra note 11.

47 Id.

48 Id.


50 Id.


53 Timeline of Syrian Chemical Weapons Activity, supra note 59.

54 Id.

55 The UN reports that the destruction of weapons commenced on October 6th Id.


LIKE LAMBS TO THE SLAUGHTER: HOW UNREGULATED IMMIGRATION PRACTITIONERS HARM IMMIGRANTS

by JOSEPH M. GIELT

Fraud committed by immigration consultants has become an increasing problem within the immigrant community. Children in the United States are desperate for their undocumented parents and siblings to remain here, while undocumented immigrants are anxious for permission to work. Their desperation, coupled with the complexities of immigration law, makes the de-
frauding of immigrants a seemingly effortless, and profitable, endeavor. With comprehensive immigration reform on the horizon, millions of immigrants could potentially become eligible to legalize their immigration status. These immigrants will need qualified, competent representation, as well as an awareness of individuals looking to scam or defraud them. In anticipation of a potential reform bill, local, state, and federal governments are stepping up campaigns to educate the community and criminalize the unlawful practice of immigration law.

In June 2012, President Obama announced a new program that grants temporary protection and work authorization for undocumented immigrants who came to the U.S. as children. The number of immigrants seeking help greatly exceeded immigration attorneys’ resources. Alisa Daubenspeck, supervising attorney at the Central American Resource Center (CARECEN) in Los Angeles, recalls how difficult it was to balance the steady stream of clients her organization normally serves with the huge influx of new clients wanting to file applications under the new program. “It nearly killed us. There are just not enough people practicing immigration law to meet the demand,” said Daubenspeck.

**The Notario Problem**

The difficulties inherent in the immigration process has forced immigrants and undocumented individuals to find help elsewhere, and many look for trusted individuals within their community who speak their language and share their culture. For many Spanish-speaking immigrants living in the U.S., this means a visit to consult with a notario público or notario for immigration help.

In Spanish-speaking Latin America, a notario is a highly-respected attorney, and often an important public official with years of legal training. What many immigrants living in the U.S. do not realize, however, is that a notary public – the English translation of notario público – is not authorized to practice law or give legal advice, but merely to authenticate documents and give oaths. Because of this, notarios and immigration consultants often prey on immigrants by muddling the distinction. They offer legal advice, submit immigration forms to the U.S. Citizenship and Immigration Services (USCIS) when the immigrant is ineligible, misrepresent facts on USCIS forms, and even
take an immigrant’s money without filing USCIS documents.14 “It’s inevitable that notarios are going to get involved,” Daubenspeck says.15

Deceitful attorneys or agencies that offer fraudulent immigration services demand large sums of money for services that they have no intention of providing, or know they do not have the ability to provide.16 Undocumented individuals who fall victim to the scheme are therefore exploited for their money and private information, which then affects other aspects of their lives, particularly in relation to employment, wages, and housing.17

State’s Increase Regulation and Enforcement

Given this reality, many recent state laws were passed to increase penalties for immigration consultants and notarios who engage in the unauthorized practice of law.18 For example, in December 2012, New York Governor Andrew M. Cuomo signed legislation to make the unlicensed practice of law a felony, punishable by up to four years in prison, rather than a misdemeanor.19 Likewise, it is a felony-level crime in New Jersey for an immigration consultant to engage in the unauthorized practice of immigration law, and those who fraudulently claim to be an attorney or render legal services or advice could face up to five years in prison.20 Other states with large foreign-born populations,21 like California, Texas, and Illinois, have enacted misdemeanor violations for first-time offenders of this type.22 To increase the overall effectiveness of deterring immigration consultants from offering legal advice and filing frivolous claims for benefits, criminal penalties must be widely publicized to increase reporting and widely prosecuted to protect immigrant communities from further abuse.23

State and national bar associations have been spreading the word about the dangers of notario fraud,24 while grassroots and public interest organizations attempt to mitigate the serious immigration consequences by blogging and participating in direct actions.25 Many state bar associations have committees that draft ethics opinions and investigate complaints surrounding the unauthorized practice of immigration law.26 But criminal convictions are rare, in part because prosecuting agencies rely heavily on tips from individuals who were harmed.27 When a good tip does come in, many prosecutors’ offices go after immigration services fraud or pursue civil remedies.28 For example, in June 2013, a woman pled guilty to holding herself out as an attorney with experience to handle immigration matters, and received a nine-month jail sentence
Civil remedies were created for use by victims of notario fraud, prosecutors, and the general public in California. In California, Assembly Bill (AB) 1159 was signed into law on October 5, 2013, to combat fraud prospectively in the event that an immigration reform act were to become law. It requires attorneys to deposit clients’ retainers into trust accounts until the attorney files the application, and attorneys would also have to provide a written contract that provides contact information to report complaints. The American Immigration Lawyers Association (AILA) opposed AB 1159, believing that it would force solo practitioners to dramatically increase the amount they charge for their services. The bill doubles the required bond or malpractice insurance coverage amount for immigration consultants to $100,000 to “benefit . . . any person damaged by any fraud, misstatement, misrepresentation, unlawful act or omission, or failure to provide . . . services.” The California legislature’s passage of AB 1159 sends a clear message that the state not only takes notario fraud seriously, but recognizes attorneys’ roll in using deceptive trade practices to harm immigrants too.

**Federal Responses to Combating Immigration Scams**

The Department of Homeland Security, the Federal Trade Commission, and the Department of Justice unveiled a new campaign in June 2011 to stop the unauthorized practice of immigration law. The initiative uses enforcement, education, and continued inter-agency collaboration to crack down on schemes aimed at defrauding immigrants. These measures are helping to raise awareness across the country about how to identify and avoid common scams, who to contact to complain, and where to find trustworthy legal services. Only an attorney or an accredited representative working for a non-profit agency recognized by the Board of Immigration Appeals (BIA) is allowed to practice immigration law. Certain non-profit organizations can apply for recognition by the BIA, and once recognized, the organization can apply to have its employees become BIA-accredited representatives.
MORE FEDERAL REGULATION NEEDED

Part of the problem could stem from the difficulties an immigrant faces in determining whether a person is actually authorized to practice immigration law.45 Both the Department of Justice’s Executive Office for Immigration Review (EOIR)46 and the Department of Homeland Security47 permit a variety of other people to appear before its immigration courts and USCIS offices besides licensed attorneys admitted to practice in the state where a particular immigration court or USCIS office is located.48 Out-of-state attorneys, law students, accredited representatives who work at qualifying non-profit agencies, consular officials, and even reputable individuals of good moral character49 can all represent immigrants before the immigration courts and USCIS.50

There are problems with the EOIR’s recognition and accreditation system. Daubenspeck notes, “Sometimes these non-profits do bad work, too.51 They may not even have a lawyer on staff in the building. The BIA requires no [standardized] test for minimum knowledge, and no oversight.”52 In a recent decision, the BIA held that “one formal training course designed for new practitioners” covering the basics of immigration law and procedure is sufficient for a person at a recognized organization to become accredited.53 For EOIR to expand the number of recognized organizations and accredited representatives to meet the growing demand for immigration legal services, some immigration practitioners are pushing for mandated training and testing and the submission of writing samples and legal reasoning analyses by representatives before accreditation.54 Other possibilities include requiring a recognized non-profit to apply to be re-recognized every three to five years, guarantees of adequate supervision, and a conspicuous complaint process.55 While these steps may seem onerous, they will help the EOIR prevent itself from the unintended sanctioning of inadequate provision of legal services.

CONCLUSION

Recent positive steps at the state level, with increased criminal penalties for unauthorized practice of law and greater regulation of immigration consultants, must also be matched at the federal level. In a rare coalescence of federal bipartisan collaboration, the U.S. Senate passed a comprehensive immigration reform bill – S. 744 – in June 2013.56 The bill includes a provision to combat
fraudulent scams against immigrants, allowing for injunctive relief against immigration service providers who “engage in fraudulent conduct that substantially interferes with the proper administration of the immigration laws or who willfully misrepresents such provider’s legal authority to provide representation . . . .”57 Unfortunately, the U.S. House of Representatives has refused to take up consideration of S. 744, and instead, House leadership has indicated that if they plan to work on any immigration legislation at all, it will be done piecemeal.58

Immigrants need lots of help navigating the complex world of U.S. immigration laws, and outreach campaigns must effectively communicate the dangers of unauthorized immigration practitioners providing such assistance.59 Daubenspeck believes that, at the end of the day, collaboration is key, but remains realistic: “This is all hard to plan because we don’t know if and when immigration reform is going to happen. It would take such a huge effort. It’s hard to believe that this would be pulled off in time.”60 But the more work done now to stop notario fraud and to increase competent, low-cost non-profit legal services, the greater the odds61 immigrant families have of staying together in the U.S. once an immigration overhaul arrives.62

NOTES

1 Immigration consultants are permitted to render only non-legal services, like filling out forms to be sent to the U.S. Citizenship and Immigration Services (USCIS), translating a client’s answers to put on those forms, but not choosing or advising which forms to fill out or advising on how to answer on the forms. See Immigration Consultants Act, CAL. BUS. & PROF. CODE § 22400, et seq. (2013).


3 See, e.g., Hena Mansori, Rethink Immigration: If Our Immigration Laws Were Just, Gilberto Would Still Be With His Kids, NAT’L IMMIGRANT JUST. CTR. (Sept. 11, 2013, 8:10 PM), http://immigrantjustice.org/staff/blog/rethink-immigration-if-our-immigration-laws-were-just-gilberto-would-still-be-his-kids#.UoGpmvmsiSo; see also KEEPING FAMILIES TOGETHER, www.keepingfamiliestogether.net (last visited Nov. 11, 2013).


Telephone Interview with Alisa M. Daubenspeck, supra note 9.


“Sometimes they are easy to fix, but other times there is no relief.” Telephone Interview with Alisa M. Daubenspeck, supra note 9.


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22 Cal. Bus. & Prof. Code § 22445(b) (2013); Tex. Gov’t Code Ann. § 406.017(d) (2013); 815 Ill. Comp. Stat. 505/2AA(m) (2013). See also State ex rel. Indiana State Bar Ass’n v. Diaz, 838 N.E.2d 433 (Ind. 2005) (referencing Ind. Code § 33-42-2-10, which punishes as a Class A Misdemeanor a non-attorney who knowingly or willingly advertises in a foreign language and calls themselves some variant of a notary public without disclosing that the person is not a lawyer licensed to practice in the state).


26 Dawn Chase, UPL Committee Takes on Immigration Consultant Fraud, 59 Va. L. Mag. 52 (2010), available at http://www.vsb.org/docs/wlawermagazine/vl0710_upl.pdf. Because immigration law is federal-based law, many attorneys exclusively practice in this area in an out-of-state jurisdiction. Texas, Florida and Virginia allow this practice, so long as the attorney discloses the limitations on his or her practice and does not advise on matters of state law. See, Sup. Ct. of Tex. Prof. Eth. Comm., Eth. Op. 516 (1996) (“It is assumed that representing clients in Texas solely on issues or matters before the [USCIS] and in federal courts would not constitute the unauthorized practice of law in Texas”). However, any such representation that also involves advice or other legal services relating to matters of Texas law would not be within the scope of this assumption and may, depending on the circumstances, constitute the unauthorized practice of law in Texas”; R. 4-7.11 of Rules Regulating the Fla. Bar (2013) (“In the areas of immigration, patent, and tax, a lawyer from another jurisdiction may establish a regular or permanent presence in Florida to practice only that specific federal practice as authorized by federal law. . . . Such a lawyer must include in all advertisements that the lawyer is ‘Not a Member of The Florida Bar’”; Va. State Bar Unauthorized Practice of Law Comm., Op. 55 (1983) (“It is not the unauthorized practice of law for an attorney, not licensed in the Commonwealth of Virginia, to maintain an office in Virginia for a practice limited exclusively to United States Immigration and Naturalization matters”). Other jurisdictions, like Pennsylvania, refuse to let attorneys licensed out-of-state to open an office there. Penn. Bar Ass’n Unauthorized Practice of Law Comm., Op. 96-101 (1996).


28 Id.

Abundis, supra note 27.

Id.


See CAL. BUS. & PROF. CODE § 22465.5(b) (2013) (“Any other party who, upon information and belief, claims a violation of this chapter has been committed by an immigration consultant may bring a civil action for injunctive relief on behalf of the general public and, upon prevailing, shall recover reasonable attorneys’ fees and costs.”)

CAL. AB 1159 “Immigration Services.” (2013)

CAL. BUS. & PROF. CODE §§ 6240, 6242-43 (2013)


CAL. BUS. & PROF. CODE §§ 22443.1(a)(1), (b) (2013) (becoming operative on July 1, 2014)


National Initiative to Combat Immigration Services Scams, supra note 6.


National Initiative to Combat Immigration Services Scams, supra note 6.


8 C.F.R. § 292.2 (2013) (“BIA will recognize a “non-profit religious, charitable, social service, or similar organization” if it charges nominal fees and "has at its disposal adequate knowledge, information, and experience.”)

Kathy John, Immigration Fraud Prevention Counsel, Exec. Off. For Immigr. Rev., Speaker at the Chicago Bar Association Unauthorized Practice and Multidisciplinary Practice Committee’s Discussion About Immigration Fraud and Notarios with Federal and State Officials: Unauthorized Practice of Immigration Law (Nov. 15, 2013) (noting that disbarred or suspended attorneys on some occasions continue to provide legal services to immigrants).

The Department of Justice’s Executive Office for Immigration Review (EOIR) oversees both the immigration courts and the Board of Immigration Appeals (BIA), the highest administrative appellate authority over immigration and naturalization law. EOIR at a Glance, U.S. Dep’t of Justice, Exec. Office for Immigration Rev. (Sept. 9, 2010), http://www.justice.gov/eoir/press/2010/EOIRatAGlance09092010.htm.

In March 2003, the Department of Homeland Security (DHS) reorganized the former Immigration and Naturalization Service (INS) into an adjudicative arm (USCIS), an internal

48 8 C.F.R. § 292.1 (2013)
49 So long as that person is not an immigration consultant. Id.
50 Id.
52 Telephone Interview with Alisa M. Daubenspeck, supra note 9.
54 Report of the Special Committee on Immigration Representation, supra note 51, at 32-34.
55 Id.
57 S. 744, 113th Cong. § 3708 (2013).
59 National Initiative to Combat Immigration Services Scams, supra note 6.
60 Telephone Interview with Alisa M. Daubenspeck, supra note 9.