The *Loyola Public Interest Law Reporter* is an innovative legal publication that focuses on reporting the most current legal topics in a news format directed to students, educators and practitioners. *PILR* is edited and produced by Loyola students and is housed within the Center for Public Service Law. Founded in 1995, *PILR* offers feature articles and news of legal developments in the areas of human rights, economic justice, criminal justice, the environment, and governance. In addition to an editorial staff selected through a write-on process, Loyola law students direct all aspects of *PILR*’s research, writing, graphics, production and business management.

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# TABLE of CONTENTS

<table>
<thead>
<tr>
<th>Author</th>
<th>Page</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lesley Shermeta</td>
<td>121</td>
<td><strong>FEATURE</strong> Morality Versus Vital Healthcare: The Debate over Bush’s Health and Human Services’ Midnight Regulation</td>
</tr>
<tr>
<td>Bill Metzinger</td>
<td>129</td>
<td>Second Class Citizens: Illinois’ Rural Uninsured and the Hospital Uninsured Patient Discount Act</td>
</tr>
<tr>
<td>Ana Maria Echiburu</td>
<td>136</td>
<td>Healthcare Standards in Immigration Detention Centers</td>
</tr>
<tr>
<td>Jessica Lienau</td>
<td>141</td>
<td>Coal Ash Waste: A History of Legislative Inaction</td>
</tr>
<tr>
<td>Sameena Mohammed</td>
<td>147</td>
<td>President Obama Keeps Campaign Promise in Signing Fair Pay Act, Drawing Praise and Criticism</td>
</tr>
<tr>
<td>Clay Rehrig</td>
<td>152</td>
<td>California Bans Gay Marriage by Simple Majority Vote</td>
</tr>
<tr>
<td>Ann Weilbaecher</td>
<td>157</td>
<td><strong>FEATURE</strong> Lost in Translation? The Promises and Pitfalls of Enacting U.S. Bayh-Dole Style Legislation in India</td>
</tr>
<tr>
<td>Christy O'Berry</td>
<td>166</td>
<td>Downloading That 12-track Album Could Cost You $360,000: Exploring How the PRO-IP Act Will Affect the Consumer</td>
</tr>
<tr>
<td>William Tasch</td>
<td>172</td>
<td>“MySpace Mom” Asks Court Not to Stretch Federal Crime Beyond Congress’ Intent</td>
</tr>
<tr>
<td>Lauren Rafferty</td>
<td>179</td>
<td>Illinois Schools Face Up to Facebook: Mandating Internet Safety Instruction in Illinois Public Schools</td>
</tr>
</tbody>
</table>
Jeremy Moorehouse 184 FEATURE
New Illinois Internet Grooming Law: When Individual Rights Collide with Public Policy

Liz Winiarski 192 Facing the Compliance Deadline for the Adam Walsh Child Protection and Safety Act, States Are Weighing All the Costs

Noah Hurwitz 199 From Bush to Obama: The Direction of Education

Jason Lewis 203 A Change for the Better?: The ADA Amendments Act of 2008

Angie Robertson 210 Federal Extension of Unemployment Compensation Is Signed into Law: Impact on Growing Number of Unemployed Americans

Chantal Kazay 215 Chicago 2016 Olympics: Legislative Impact on Construction, the Public and the Affordable Housing Market
Letter from the Editor

As promised in our Fall 2008 issue, this semester the Public Interest Law Reporter focuses exclusively on the importance and dynamic nature of legislation. Our writers have tackled local, state, national and foreign issues, all within the common theme of legislation.

One of the reasons I chose to focus an edition of PILR on legislation is that it is often perceived to be the “not-so-sexy” source of law next to common law precedent, but I disagree with this! The debates and history surrounding many pieces of legislation are often much more exciting than a few days in a courtroom. Our writers have delved into exactly these kinds of stories and are bringing them to our readers in the same way PILR always attempts to – dissecting complex legal issues and letting the facts speak for themselves.

Our writers have had an interesting challenge as they tackled their research in the infancy of a new Government. The 111th Congress has had an active start to their term with major new legislation in many spheres. Barack Obama started his presidency by signing the Lilly Ledbetter Fair Pay Act into law. The President had long championed this bill which amends the Civil Rights Act of 1964 stating that the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination resets with each new discriminatory paycheck, rather than, as the Supreme Court had ruled, at the date the pay was agreed on.

The Congress, in an attempt to relieve the failing economy, forged ahead in the first month and a half of 2009 and authored a new stimulus bill. On February 17th, the President signed the American Recovery and Reinvestment Act, an almost $800 billion stimulus bill, into law. The bill was definitely not universally supported; it garnered only three Republican Senate votes with all
other Republican senators voting against it – the ideal of bipartisan politics still apparently eluding our new leader for the time being.

Many fear that the new stimulus bill will be at the expense of many other campaign promises made during the Obama presidential campaign. There is concern that despite the promise of “green jobs,” the environment will be the biggest loser in the race for money and attention. However, this spring, Obama signed the Omnibus Public Lands Management Act of 2009 into law. This Act is intended to “protect, preserve, and pass down our nation’s most treasured landscapes to future generations.” Prior to enactment, a Wilderness Society spokesman called the bill “one of the most important wilderness bills Congress has ever considered.”

In February of this year, in what could be considered a step towards universal health coverage, new legislation was signed to expand the State Children’s Health Insurance Program (SCHIP). SCHIP is publicly funded health insurance for children and was first created in 1997 during the Clinton administration. The expansion, paid for by increasing tobacco taxes, will boost the number of covered children to around 11 million.

As well as bills already signed into law, there are many, many more bills that are in the proposal stage. With a new administration comes a change in tide on many issues and this has been evidenced by the wave of proposed legislation moving through Congress. Some proposals have been triggered by the economic crisis, such as the Helping Families Save Their Homes Act (a homeowner rescue bill), while others are spawned by the swing in power from right to left.

If one thing can be guaranteed, it is that 2009 will continue to be a very active year from a legislative perspective. Whether you are someone who enjoys following the twists and turns of the legislative process, or if you are just someone that enjoys a good read, we hope you enjoy this “legislation” issue of the Public Interest Law Reporter.

Sincerely,

Holly Carnell
Editor in Chief
FEATURE ARTICLE

MORALITY VERSUS VITAL HEALTHCARE: THE DEBATE OVER BUSH’S HEALTH AND HUMAN SERVICES’ MIDNIGHT REGULATION

by Lesley Shermeta

Should your doctor’s moral conscience come before your medical emergency? Should a medical provider who does not believe in pre-marital sex be able to deny testing and treatment of sexually transmitted infections to unmarried couples seeking assistance? Could someone who equates emergency
contraception with abortion deny rape victims access to this method and to the
means of avoiding an unintended pregnancy? These fears, as expressed by Ce-
cile Richards, President and CEO of Planned Parenthood Federation of
America (Planned Parenthood), became a reality on January 20, 2009, stem-
mring a debate about the prioritizing of morality over medical care.¹

As one President prepares to leave office and a new administration prepares to
step in, it is customary to see the outgoing administration increase its executive
activity. President Clinton, for example, issued 12 Executive Orders in his final
20 days in office.² It was no surprise, then, when President George W. Bush’s
administration rushed out a host of problematic regulations in its final
months.³ Among these so-called “midnight regulations” was the U.S. Depart-
ment of Health and Human Services’ (HHS) regulation called “Ensuring That
Department of Health and Human Services Funds Do Not Support Coercive
or Discriminatory Policies or Practices in Violation of Federal Law” (Regula-
tion).⁴ The Regulation was released in draft form in August 2008, formally
published in the Federal Register on December 19, 2008 and was scheduled to
take effect on January 20, 2009.⁵

THE HHS REGULATION

The Regulation deals with several provisions of federal law prohibiting recipi-
ents of certain federal funds from coercing individuals in the health care field
into participating in actions they find religiously or morally objectionable.⁶
These federal laws also prohibit discrimination on the basis of one’s objection
to, participation in, or refusal to participate in, specific medical procedures,
including abortion or sterilization.⁷ The Regulation is intended to ensure that,
in the delivery of health care and other health services, recipients of HHS
funds do not support coercive or discriminatory practices in violation of these
laws.⁸

The stated purpose of the Regulation is to “provide for the implementation
and enforcement of...statutory provisions [that] protect the rights of health
care entities...both individuals and institutions, to refuse to perform health
care services and research activities to which they may object for religious,
moral, ethical, or other reasons.”⁹
The Regulation applies to any state or local government or any other public entity receiving federal financial assistance. It allows employees, and even volunteers, of clinics and hospitals receiving government funding to deny access to a wide variety of medical services. Many interest groups and individuals took the chance to respond to this Regulation, but HHS went forward despite strong opposition, and the Regulation went into effect on President Barack Obama’s Inauguration Day.

SUPPORT FOR THE REGULATION

Supporters of the Regulation cite the dangers of forcing health care providers to perform or participate in procedures that go against their moral, religious, or personal beliefs as a way of discouraging individuals from entering or remaining in the health care profession. One commenter wrote that by insisting that health care professionals be willing to put their personal beliefs aside; “one contributes to the creation of a health care delivery system of professionals who blindly follow directives rather than [their] conscience, putting society at risk.”

Former HHS Assistant Secretary of Health, Admiral Joxel Garcia, M.D., defended the Regulation, saying that many health care providers routinely face pressure to change their medical practice – often in direct opposition to their personal convictions. During his practice as an OB-GYN, he witnessed this pressure first-hand, directly influencing his opinion that “[h]ealth care providers shouldn’t have to check their consciences at the hospital door.”

The Regulation has raised an issue of whether patients’ rights are being compromised in the process? With regard to commenters’ concerns about patients’ rights, HHS encourages full and open communication between patients and providers on sensitive issues surrounding the provision of health care services, including issues of morality and conscience. Patients are best served, according to the HHS, when their providers communicate clearly and early about any services in which they decline to participate.
CRITICISM OF THE REGULATION

Anticipated Impact

Part of the danger of the Regulation, according to Jessica Arons of the Center for American Progress, is its vagueness.\(^1\) The deliberate choice to not define certain terms in the Regulation may be problematic because it allows individuals to interpret abortion to include any form of contraception, going far beyond the legal and medical definitions of the term.\(^2\) Although the rule ostensibly protects only employees who object to abortion and sterilization, Arons says it is “written so vaguely that it could also apply to contraception, fertility treatments, HIV/AIDS services, gender reassignment, end-of-life care, or any other medical practice to which someone might have a personal moral (not even religious) objection.”\(^3\) The HHS regarded these claims as unfounded, insisting that there is a lack of evidence showing that this Regulation would create new barriers in accessing contraceptive services.\(^4\)

Another major concern is that the Regulation would limit access to patient care and that individuals could be denied access to services, with effects felt disproportionately by those in rural areas or otherwise underserved.\(^5\) Low-income and uninsured women are particularly at risk, as they rely on programs such as Title X and Medicaid for health care.\(^6\) Title X, for example, is the only federal program solely devoted to funding family planning and related reproductive health care services.\(^7\) Its 4,400 health centers assist five million young, low-income and uninsured women annually, including many from oppressed communities, and the services are usually free or subsidized.\(^8\) If these types of programs do not strictly adhere to the HHS rules, they will lose federal funds at a time of increasing economic crisis, when more women than ever will need government-funded health care.\(^9\)

States’ Rights Conflict

Another potential issue with this Regulation is whether it conflicts with states’ rights. Dick Blumenthal, the Attorney General for the state of Connecticut, stated that the Regulation “interferes with states’ rights because it cannot be implemented without riding roughshod over existing state regulations and without causing states to lose billions of dollars in federal aid to deliver health care.”\(^10\)
Connecticut is one among 27 states with laws requiring health insurance plans that cover prescription drugs to provide equitable coverage for contraception. Such state laws facilitating contraceptive access are at risk under this Regulation, which extends sweeping protections to health care entities seeking to restrict coverage for reproductive health care. Blumenthal stated that the rule “would supercede carefully crafted Connecticut statutes arrived at through a painstaking and controversial process that ultimately balances the rights of women to health care and contraception with the rights of providers to follow individual, moral and religious beliefs.”

Illinois Attorney General Lisa Madigan expressed similar concerns in her letter to the former Secretary of the HHS, Michael Leavitt, showing her “strenuous opposition” to the Regulation. In her letter to Leavitt, Madigan pointed out that the Regulation conflicts with Illinois laws that: 1) require insurers covering prescription drugs to provide coverage for the full range of FDA-approved contraceptive drugs and devices; 2) require hospital emergency rooms to provide emergency contraception-related services to sexual assault victims; and 3) mandate that pharmacies fill prescriptions for emergency contraception and other forms of contraception. Calling the Regulation an “ideologically motivated effort to effectively overturn state protections intended to help women access basic health care and make fully-informed, responsible and medically-based health-care decisions,” Madigan unsuccessfully urged Secretary Leavitt to reject the Regulation.

Taking Action

Opponents of the Regulation are making pleas to each branch of the government to aid in their struggle.

Judicial

Richards traveled to Connecticut to file a lawsuit against the Bush Administration “on behalf of the millions of women whose healthcare has been put in jeopardy by this parting shot at women’s health.” Blumenthal joined Planned Parenthood in the lawsuit “since [the Regulation] would undermine laws across the country, which currently protect women’s access to family planning, birth control and reproductive healthcare.”
The lawsuits are based on several claims, including that the process of developing, vetting and publishing the rule was flawed, and that the published rule exceeds the authority of the HHS. So far six additional states have joined the lawsuit (California, Illinois, Massachusetts, New Jersey, Oregon and Rhode Island), as well as groups such as the National Family Planning and Reproductive Health Association (NFPRHA) and the American Civil Liberties Union.

These litigants are seeking an injunction against enforcement of the rule, calling it “an unconscionable and unconstitutional midnight regulation and a ticking legal time bomb that threatens to blow apart vital women’s rights on inauguration day.”

**Legislative**

Public interest organizations such as the NFPRHA are also looking to Congress for action, which could be done in a variety of ways. One option is the passage of a resolution of disapproval of HHS’s regulation under the Congressional Review Act that would repeal the rule outright. Another option would be for Congress to attach a rider to an appropriations bill that would block funds for enforcement of the rule. Some members of Congress are considering a third option, taking action against the broader scope of midnight regulations, suspending the effective dates of all rules for some period of time or to put in place an expedited review process.

**Executive**

Perhaps the most promising attempt to overturn the Regulation, though, belongs to the executive branch. Richards found hope in President Obama’s administration when the global gag rule, which was an obstacle to women’s reproductive health care around the world, was immediately overturned. This move established women’s health as a priority of the administration and Planned Parenthood as well as other organizations are encouraging President Obama to work with them to overturn this Regulation.

Overturning the Regulation would be no quick process, but on March 10, 2009, Obama’s administration took the first step by proposing a rescission of the Regulation. The HHS, under the new administration, initiated a review and public comment period in response to comments on the originally pro-
posed Regulation, finding that a number of questions warranted further careful consideration.44

The public has 30 days to submit written or electronic comment on the regulatory changes proposed, at which point HHS will review the rescission to ensure its consistency with current administration policy.45

CONCLUSION

The Regulation has already had a profound impact on people on both sides of the issue, allowing medical care providers to practice in accordance with their personal beliefs while also making certain types of medical care unavailable to patients in need. This debate centers on a fundamental question of whose rights should be compromised—the doctor’s or the patient’s—a decision apparently left to the current administration.

NOTES

3 Id.
5 Jacobson, supra note 1.
7 Id.
8 Id.
9 Id. at 78,096-97.
10 Id. at 78,097.
11 Id. at 78,081.
12 Id.
14 Id.
16 Id.
17 Jacobson, supra note 1.
18 Id.
27 Id.
28 Id.
29 Id.
31 Id.
32 Id.
34 Id.
35 Jacobson, supra note 1.
37 Jacobson, supra note 1.
38 Id.
39 Id.
40 Id.
42 Id.
44 Id. at 10,208.
45 Id. at 10,209.
SECOND CLASS CITIZENS: ILLINOIS’ RURAL UNINSURED AND THE HOSPITAL UNINSURED PATIENT DISCOUNT ACT

by Bill Metzinger

On January 26, 2009, during then-Governor Rod Blagojevich’s anti-impeachment, turned farewell media tour, the Governor snubbed residents of Springfield and smaller Illinois communities telling Larry King that he refused to live in the Springfield Governor’s mansion because he wanted his kids to “live as normal a life as possible.”¹ With the recent passage of the Hospital Uninsured Patient Discount Act (HUPDA), rural Illinois residents have yet another reason to feel slighted.²
OVERVIEW OF HUPDA

HUPDA addresses the problem of Illinois citizens without private or government health insurance being charged sometimes two or three times the actual cost of medical care. Part of this disparate pricing is a product of private insurers and government programs like Medicare and Medicaid using their bargaining power to gain more favorable pricing from medical centers. Uninsured individuals with little or no bargaining power are often stuck with the full “sticker price” of medical care. A 2007 study in *Health Affairs*, a leading policy journal, reported that hospitals charge the uninsured 2.5 times more than what health insurers pay and more than three times more than Medicare’s allowable costs.

The recently enacted bill that received unanimous support from both the Illinois House and Senate prevents hospitals from charging qualifying patients any more than 135 percent of the cost of treatment in excess of $300. Under the legislation, hospital costs will be determined from a hospital’s most recently filed Medicare cost report. HUPDA also capitates the amount a qualifying uninsured patient must pay a hospital in any single year at 25 percent of a family’s gross annual income. Hospital obligations under HUPDA began December 22, 2008, and as Illinois Attorney General Lisa Madigan described, “This is going to mean that people who need medical treatment are going to be able to get it and that they’re not going to go bankrupt doing it.”

In order to qualify for the benefits of the new legislation, Illinois residents must be uninsured, receive sufficiently low annual levels of income, and be unable to qualify for Medicare, Medicaid, AllKids, SCHIP, or other public programs. Because of the differences in costs of living between rural and urban areas, the statute sets different income thresholds for urban and rural hospitals.

Therefore, for families receiving treatment in an urban hospital, HUPDA requires beneficiaries of the act to earn less than 600 percent of the federal poverty level (FPL). This means that in 2009, an urban family of four must earn less than $132,300 in order to qualify for the hospital charge and annual spending caps. Individuals receiving medically necessary treatment in a “rural hospital,” however, must make less than 300 percent of the FPL, or $66,150 in 2009 for a family of four to reap the same benefits.

<table>
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<th>600% of FPL</th>
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**Urban Subsidy: “Rural” v. “Urban”**

Although generally higher urban incomes and costs of living justify some disparity in HUPDA’s means testing, analysis of the percent of individuals qualifying for the program in Illinois’ rural and urban communities suggests that Illinois’ legislature may have missed the mark.

To illustrate using one of the most extreme examples, consider Illinois’ “poorest” metropolitan communities of Rock Island and Moline in comparison to Mt. Zion and Edwardsville, two of Illinois’ most “wealthy” non-metropolitan communities. Because Rock Island and Moline are “metropolitan” communities, citizens receiving treatment in these communities benefit from the more liberal 600 percent poverty threshold. The expanded 600 percent poverty threshold allows nearly 86 percent of Rock Island and Moline’s three member families, if uninsured and unable to qualify for other public assistance, to benefit from HUPDA. On the other hand, residents of Mt. Zion and Edwardsville, assuming they do not travel to avoid treatment in a “rural hospital,” face the narrower 300 percent poverty threshold to receive HUPDA’s benefits. Assuming limited mobility when seeking medically necessary treatment, approximately 31 percent of Mt. Zion and Edwardsville families of three, if uninsured, are eligible to benefit from HUPDA. Therefore, in the
most extreme case, 45 percent more “urban” families of three are eligible to benefit from HUPDA even though roughly the same percentage of all of these communities are uninsured.20

While comparing Rock Island and Edwardsville admittedly highlights one of the most extreme effects of the HUPDA’s existing means testing, the average and median percentages of citizens qualifying are also telling. On average, 81 percent of urban families of three, assuming uninsured status, are eligible to benefit from HUPDA.21 In contrast, slightly more than 48 percent of rural families of the same size stand to benefit under the new legislation.22 Median levels of qualification are similarly skewed with nearly 82 percent of urban uninsured families of three eligible for HUPDA’s benefits as compared to 50 percent of rural families of three.23

Blagojevich’s Amendatory Veto

On August 26, 2008, then Governor Blagojevich signed an amendatory veto altering the terms of HUPDA.24 Although the ex-governor’s veto was overridden less than a month later, Blagojevich’s changes made qualifying for hospital discounts easier by increasing the income eligibility threshold to 800 percent of FPL for urban residents and 600 percent of FPL for rural residents.25 Under the Blagojevich standards, an urban family of four with an annual income of $176,400 or under, and a rural family of four with an annual income of $132,300 or less would be eligible for the same discounts as families of four earning significantly less. Danny Chun of the Illinois Hospital Association criticized the liberalized thresholds because they would allow most all Illinois’ uninsured to qualify under HUPDA.26 Chun also expressed concern that such liberal coverage might force some of the state’s financially strained hospitals to close, especially when Illinois hospitals are already absorbing nearly $2 billion a year in underpayments from Medicare and Medicaid and more than $1 billion a year in uncompensated care.27 Although the governor’s veto was short-lived, it did increase parity in the percentages of rural and urban percentages qualifying for the legislation’s benefits.28
REACTIONARY OR RESPONSIVE?

HUPDA is a progressive move towards aiding Illinois’ uninsured. The Illinois legislature should be commended for its unanimous support of the bill and appreciation that the federal poverty level, left unadjusted, is too under inclusive to accurately capture a majority of those in need of HUPDA’s benefits. The General Assembly should also be lauded for recognizing a difference in income levels between the urban and rural poor. However, despite the valiant effort, the significantly lower percentage of rural poor able to gain protection under HUPDA is problematic. Although precision tailoring of HUPDA’s means testing based upon each community’s level of income and uninsured population would be cost prohibitive, liberalizing rural income thresholds to allow rural families to more easily qualify, would restore parity between rural and urban citizens qualifying for HUPDA benefits. Even though Governor Blagojevich’s veto may have missed the mark, the legislature’s override may have thrown the baby out with the bathwater.

NOTES

1 Larry King Live: Governor Rod Blagojevich (CNN television broadcast Jan. 26, 2009) (transcript available at 2009 WLNR 1519972); See also, James Janega, Governor’s mansion no place like home. It may have 35 rooms, Baccarat chandeliers and a full-time chef; but the official Springfield residence has been passed up by the Blagojevich family—much to the disappointment of Downstaters, Ch. Trib., July 24, 2003, at 1.
2 210 ILCS 89/1 et seq.
5 Id.
7 210 ILCS 89/5.
8 210 ILCS 89/10.
9 Id.
10 210 ILCS 89/15.
11 210 ILCS 89/10(a)(1).
13 210 ILCS 89/5. “Metropolitan statistical areas” and “rural hospitals” are the only terms used within HUPDA. However, within this article, “metropolitan” is used interchangeably with “urban.”
Loyola Public Interest Law Reporter

14 210 ILCS 89/10.
16 “Poorest” determined as result of greatest percentage of residents of an Illinois metropolitan community with under $100,000 of income, $9,860 less than the threshold amount of income for an urban family of three to qualify for benefits of HUPDA. “Wealthiest” determined as result of greatest percentage of citizens in non-metropolitan communities reporting more than $50,000 in annual income, $4,930 less than the threshold amount of income for a rural family of three to qualify for HUPDA. Comparison also selected due to the parity in percentages of uninsured between the communities. See, Department of Health and Human Services, *Annual Update of the HHS Poverty Guidelines*, available at http://aspe.hhs.gov/poverty/09fedreg.shtml. See also, http://www.commerce.state.il.us/dceo/Bureaus/Facts_Figures/Illinois_Census_Data/2000_Census_Data.htm (follow “All Geographical Locations” hyperlink listed under “Selected Economic Characteristics.”)
20 Based on 2000 census data, 10.90% of Madison County (Edwardsville), 10.60% of Macon County (Mt. Zion), and 12.90% of Rock Island County were uninsured. See, U.S Census Bureau, “Health Insurance Coverage for Illinois Counties, 2000: Experimental Estimates”, available at http://www.census.gov/cgi-bin/ehhes/sahie/sahie.cgi.
22 Estimate based upon 2009 Federal Poverty Levels and percentage of residents from non-metropolitan areas making less than $50,000 in 2000. See Id.
23 Id.
25 Id.
27 Id.
28 While the current version of the law allows urban families to make twice as much as a rural family and still qualify for the HUPDA (600% v. 300%). See 210 ILCS 89/10(a). Blagojevich’s amendment would have allowed urban citizens to make only 25% more than their rural neighbors (800% v. 600%). See also, S.B. 2380 8/26/08 (P.A. 095-0965), available at http://www.ilga.gov/legislation/fulltext.asp?DocName=09500SB2380gms&GA=95&LegID=36352&SessionId=51&SpecSess=0&DocTypId=SB&DocNum=2380&GAIId=9&Session.
Hiu Lui Ng, a computer engineer from Hong Kong, moved to New York in 1992.¹ Fifteen years later, he had married a U.S. citizen and fathered two U.S.-born children. However, on July 19, 2007, Mr. Ng found himself detained by immigration officials because he remained in the U.S. beyond the time authorized by his visa.² In April 2008, while still detained, Mr. Ng began to complain of intense back pain.³ Lawyers and relatives of Mr. Ng claim that detention officials not only refused to take Mr. Ng to scheduled doctor’s appointments, but even refused to supply him a wheelchair when he could not walk.⁴ Another detainee, Marino De Los Santos, briefly shared a cell with Mr. Ng, who was assigned the top bunk.⁵ Mr. De Los Santos stated that Mr. Ng’s pain was so intense that he could hear Mr. Ng crying throughout the night.⁶
He also claimed that Mr. Ng could not even stand in the medication line in the detention center and had to hold on to a chair for support.7 Mr. De Los Santos further stated that officials at the detention center prohibited Mr. Ng from holding on to the chair and required that he stand without assistance.8 Mr. De Los Santos also recounted an incident when a bedridden Mr. Ng was visited by a nurse who laughed and said that Mr. Ng was faking his illness.9

By July 2008, Mr. Ng could no longer stand or walk.10 On August 6, 2008, Mr. Ng died with a fractured spine and untreated cancer in his lungs, liver, and bones11 at the Donald W. Wyatt Detention Center, a locally owned jail in Central Fall, Rhode Island.12 Later reports suggested that Mr. Ng had previously requested to visit the hospital in order to determine the cause of his illness. These requests, however, were refused.13

Oversight of Detention Facilities

Unfortunately, Mr. Ng’s story is not an uncommon account of medical treatment within a U.S. immigration detention center. Situations such as Mr. Ng’s raise the question as to whether a system of oversight should be implemented for detention centers. Currently the only legislation concerning detention facility standards is found in the Immigration and Nationality Act (Act).14 The section of the Act addressing these standards is Section 241(g), which states that the Department of Homeland Security (DHS) “shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal.” Section 241(h) also affects standards indirectly by rejecting “the possibility of a private right of action under the statute, such as to challenge a facility as an inappropriate place of detention.”15

Between May 11 and May 14, 2008, The Washington Post published findings of detainee medical mistreatment which they uncovered through review of government documents and interviews with detainees, their families, and government officials.16 The emergence of these accounts has led to increased scrutiny of the Bureau of Immigration and Customs Enforcement (ICE), an agency within the DHS17 that is ultimately responsible for the detention of undocumented aliens.18

Various organizations and individuals across the nation are now pressing for more accountability and oversight of ICE’s medical treatment of detainees.19
ICE has responded to these investigations and increasing pressure for additional oversight by stating that “the reporting on this issue has been misleading and exaggerated” and that since 2004, the number of detainees in ICE detention facilities has increased over 30 percent, yet the mortality rate has decreased significantly each year.

Further, ICE asserts that it has attempted to improve accountability and oversight by creating the Detention Facilities Inspection Group in February 2007. This independent body is responsible for reviewing and validating detention inspections as well as ensuring that agency standards are consistently applied so that corrective actions may be taken. ICE has also entered into an agreement with an independent company to place full-time quality assurance professionals at their 40 largest detention facilities and to arrange for rotational visits to the smaller facilities.

PROPOSED LEGISLATION

In further response, Representative Lucille Roybal-Allard (D-CA) introduced the Immigration Oversight and Fairness Act (bill) on February 26, 2009. This proposed bill includes various safeguards for detainees that, at a minimum, require that detention facilities “afford a continuum of prompt, high quality medical care, including care to address medical needs that existed prior to detention, at no cost to detainees.”

The bill aims to increase oversight of medical care in detention facilities by requiring that the Secretary of Homeland Security report in-custody deaths, including specific information surrounding the death, to Congress semi-annually and to the DHS Office of Inspector General within 24 hours. Further, the bill requires that denial of medical care be made within 72 hours of the request and that the denial be accompanied by a written explanation of why the denial was appropriate. The decision and explanation must be communicated to the detainee as well as the Secretary of DHS simultaneously. The detainee, however, retains the right to appeal a denial of medical treatment. The appeal, then, must be decided within seven days by an independent appeals board composed of health care professionals.

Proponents of the bill, such as Ahilan Arulanantham, Director of Immigrants’ Rights and National Security for the American Civil Liberties Union of South-
ern California, feel the bill is a positive measure to protect the health of ICE detainees and if the bill is passed it “should help ICE change its institutional culture and become more accountable, paving the way for the humane treatment of those in immigration detention.”\(^3\) Mary Meg McCarthy, the Executive Director of the National Immigrant Justice Center, believes the bill is a “common sense, cost-effective approach to immigration enforcement that underscores American traditions of promoting justice and protecting human rights.”\(^3\)

With over 33,000 individuals detained on any given day, this bill has the potential of providing a higher quality of health care to a significant amount of individuals within the immigration system.\(^3\) With the ongoing efforts of both our legislators and ICE, the standards of healthcare in detention centers could, and hopefully will, drastically improve, ensuring that detained individuals will no longer suffer as Mr. Ng while under the custody and care of our government.

### Notes

2. *Id.*; Press Release, Rhode Island Affiliate ACLU, Rhode Island ACLU Files Lawsuit on Behalf of Family of Wyatt Center Detainee Who Died in Custody; Suit Alleges Hiu Lui Ng Was Subjected to “Cruel, Inhumane, Malicious and Sadistic Behavior” (Feb. 9, 2009) (on file with author).
3. *Ill and in Pain, supra* note 1.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Ill and in Pain, supra* note 1.
11. *Id.; Cellmate Describes Pain, supra* note 4.
13. *Id.*
15. *Id.*
16. *Id.* at 274.
Loyola Public Interest Law Reporter

18 Pabst, supra note 13, at 271.
21 Papst, supra note 13, at 274.
22 U.S. Immigration and Customs Enforcement, supra note 17.
23 Id.
24 Id.
26 Id.
27 Id. at § 2(J).
28 Id.
29 Id. at § 2(D).
30 Id. at § 2(E).
31 ACLU of Southern California, supra note 16.
33 Id.
COAL ASH WASTE: A HISTORY OF LEGISLATIVE INACTION

by JESSICA LIENAU

Coal ash. Unlike the quintessentially trendy environmental issue of global warming, few Americans are even aware that millions of tons of toxic coal ash are piling up in over 1,300 waste disposal sites in 32 of the 50 states.¹ In the midst of an international financial crisis, the media portrays Washington, D.C. legislators as having but one focus: the economy. Countless state and local leaders suffering from the current economic recession have successfully lobbied in Washington, D.C. for federal aid.²

However, unlike the constituents being represented by these state and local leaders, the environment does not have a designated representative to lobby for it. Instead of proactive environmental legislation in Washington, it seems as if some sort of environmental disaster must thrust non-trendy issues on to the political scene in order for any progress to be made. That is exactly what has
happened with coal ash. In December 2008, 5.4 million cubic yards of coal ash sludge laced with arsenic and other toxic materials spilled from its Kingston, Tennessee waste pond onto over 300 acres of surrounding land, making it one of America’s worst environmental spills.3

HISTORY OF COAL ASH WASTE REGULATION

Coal ash is the often toxic solid waste that is left after burning coal to produce electricity.4 Coal ash is generally either stored in a landfill or a waste pond, called a lagoon, like the one in Kingston, Tennessee, where the coal ash is mixed with water.5 The lagoons are man-made and “hold a mixture of the noncombustible ingredients of coal and the ash trapped by equipment designed to reduce air pollution from the power plants.”6

The Environmental Protection Agency (EPA) concluded in 2006 that coal ash waste has “the potential to present danger to human health and the environment,” and that storage ponds create a greater risk than landfills in terms of spills and leaks.7 In 2007, the EPA determined that mere exposure to coal ash substantially increases one’s risk of cancer.8 Furthermore, the EPA found that disposal of coal ash in ponds elevates cancer risk if metals from the pond escape into drinking water sources.9 However, the EPA has never promulgated any national standards for coal ash waste disposal.10 Instead, much of the criticism, and therefore federal regulation, of coal has focused on the emissions from the coal-burning smokestacks.11

The amount of coal ash produced has grown to a staggering 130 million tons per year in the United States.12 This growth is due in part to the federal regulation of air pollutants, so contaminants and waste products that were once released into the air are now captured in coal ash.13 Due to both the EPA’s and the federal government’s failure to regulate this solid waste product, the states have been left with almost total authority to regulate coal ash as they see fit.14

According to Jeffrey Stant of the Environmental Integrity Project, a group created by former EPA enforcement attorneys, most states have lax regulations and monitoring of the waste sites is done on a voluntary basis by the utilities that own the sites.15 What this type of state-by-state regulation has led to, some argue, is in essence no regulation.16 Dr. Thomas A. Burke, an epidemiologist who testified on the health effects of coal ash before Congress in 2008,
said, “Your household garbage is managed much more consistently” than coal ash.17

OPPOSITION TO FEDERAL REGULATION

After the December 2008 spill, environmentalists claimed that the coal ash spill would become “the Exxon Valdez of the coal industry,” and force the federal government to regulate coal ash waste sites.18 However, there are opponents to federal legislation. Even after the December 2008 Tennessee spill, Glen Pugh, who manages solid waste for the Tennessee Department of Environment and Conservation and was in charge of the Kingston, Tennessee plant at the time of the spill, said, “I do think our regulations provide for the proper checks and reviews and evaluations. Something happened here that was unexpected.”19

The utility industry, as well as individual states, have lobbied against federal regulation because they believe that state regulation is working, despite the December 2008 spill.20 Jim Roewer, executive director of the Utility Solid Waste Activities Group, said, “A lot of people are claiming that if coal ash is not regulated as a hazardous waste at the federal level, then it’s not regulated,” a contention he strongly disagrees with.21 Furthermore, Roewer noted that there have only been four major spills of this kind in the last 50 years, which, in his opinion, obviates the need for federal intervention.22

“HAZARDOUS”: A SCIENTIFIC OR POLITICAL TERM?

Most environmental groups perceive state regulation alone as problematic because most states treat coal ash as though it’s not toxic.23 Eric Schaeffer, also of the Environmental Integrity Project, said, “The prevailing myth is that it’s safe. We have the EPA buying into that for years and really refusing to regulate this material for what it is. . .”24 Schaeffer refers to the fact that despite numerous internal investigations of coal ash, the EPA has never officially designated coal ash as hazardous.25 However, “officially” is the operative word in the preceding statement.

Although the EPA did find that coal ash was not hazardous in its 1988 and 1999 reports to Congress, in 2000 Carol Browner, the then-head Administra-
tor of the EPA and current Assistant to President Obama for Climate and Energy Change, sent a draft determination designating coal ash as hazardous to the Office of Management and Budget for review.\textsuperscript{26} However, critics argue that the Bush administration simply decided that the cost to the industry, industry employees, and ultimately tax payers, of a hazardous designation was too great.\textsuperscript{27} Ultimately, the EPA did not designate coal ash as hazardous, but instead “pledged to issue less stringent national standards under a ‘non-hazardous’ designation.”\textsuperscript{28} However, since 2000, the EPA has not issued new standards, even though more and more research, including its own, suggest that coal ash is more dangerous than it was once thought to be.\textsuperscript{29}

**ACTION**

With President Obama’s election, and a change in the White House, also came a regime change in the EPA. In her Senate confirmation hearings on January 14, 2009, newly appointed Administrator of the EPA Lisa Jackson pledged to consider regulating how coal ash is stored.\textsuperscript{30} “[Jackson] assured lawmakers that EPA decisions will be based on science and the law, not politics,” intimating that the Bush administration made environmental decisions based on politics.\textsuperscript{31}

The same day that Administrator Jackson testified before the Senate about possible EPA regulation of coal ash, House Natural Resources Committee Chairman Nick J. Rahall introduced legislation requiring federal standards to regulate the engineering of coal ash impoundments.\textsuperscript{32} Rahall stated, “The American public and our environment simply cannot afford to wait any longer to rein in the hazards posed by the shoddy and irresponsible coal ash disposal practices that currently exist.”\textsuperscript{33} Although environmentalists are commending Rep. Rahall for finally taking federal legislative action on coal ash, whether his legislation will actually become law remains to be seen.\textsuperscript{34}

Despite arguments for and against federal regulation, the facts cannot be ignored. There was a major spill in 2008 and it was not the first of its kind.\textsuperscript{35} Coal ash poses serious risks to the communities exposed to it.\textsuperscript{36} Legislation has been left to the states, but in the face of what seems like widespread state indifference, either Congress or the EPA needs to regulate.\textsuperscript{37} Hopefully the question will no longer be whether one of the two will regulate, but rather, which one will act first?
NOTES

6 Toxic Coal Ash, supra note 1.
7 Id.
8 Lombardi, supra note 4.
9 Toxic Coal Ash, supra note 1.
10 Id.
11 Id.
13 Id.
14 Id.
16 Id.
17 Dewan, supra note 12.
19 Id.
20 Clayton, supra note 5.
21 Id.
22 Shogren, supra note 18.
23 Id.
24 Id.
25 Id.
26 Lombardi, supra note 4.
27 Id.
28 Id.
29 Id.
31 Id.
33 Id.
35 *Toxic Coal Ash*, supra note 1.
36 *Id.*
PRESIDENT OBAMA KEEPS CAMPAIGN PROMISE IN SIGNING FAIR PAY ACT, DRAWING PRAISE AND CRITICISM

by SAMEENA MOHAMMED

In January 2008, then-Senator Barack Obama was one of several co-sponsors of the Lilly Ledbetter Fair Pay Act (Act).

One year later, in his new role as President of the United States, he has signed the legislation that he helped introduce. The Act was proposed to overturn the Supreme Court’s ruling in Ledbetter v. The Goodyear Tire & Rubber Co., in which the Court held that a timely wage discrimination complaint under Title VII must be filed within
180 days (or 300 days, depending on the state) of an employer’s discriminatory decision to pay less, not from the time discrimination is discovered. In the year and a half since the decision, over 1,300 courts, including 12 of the 13 federal Courts of Appeals, have cited Ledbetter in some capacity.

When this legislation was introduced in previous terms, President Bush threatened to veto it, and when it came up for consideration in the Senate in April 2008, it fell four votes short of overcoming a filibuster. President Obama often referenced Lilly Ledbetter, the plaintiff in the case, during his debates and campaign stops. On January 28, 2009, Congress passed the Act with a largely party-line vote, and the next day, as promised, President Obama signed the legislation into law, proclaiming that “making our economy work means making sure it works for everyone.”

The Act begins by finding that the Supreme Court in Ledbetter undermined Title VII protections by narrowly construing the statute of limitations period in which plaintiffs can bring pay discrimination claims. Under Ledbetter, a plaintiff would have 180 or 300 days from the time her employer made a discriminatory decision about her compensation to bring a claim. The problem with this, proponents of the legislation contend, is that potential plaintiffs often do not discover until years later that their employer is paying them less than their colleagues, due to the taboo on discussing salaries with co-workers. The Act takes this problem into account by providing that the 180 or 300 day claim-filing period would start anew every time plaintiffs receive a paycheck – every time they are affected by their employer’s decision to pay them less.

Supporters of the Act included Speaker of the House Nancy Pelosi, Democrat of California, and Senator Barbara A. Mikulski, Democrat of Maryland, the chief sponsor of the bill. The Equal Employment Opportunity Commission’s (EEOC) Acting Chairman, Stuart Ishimaru, also supported this legislation, noting, “The act is a victory for . . . all workers across the country who are shortchanged by receiving unequal pay for performing equal work.” Plaintiff-side labor and employment attorneys in Chicago, including Marvin Gittler and Lori Deem, note that the EEOC and the courts had been interpreting Title VII as this legislation requires for years prior to Ledbetter. Ms. Deem
explains, “The Court [in Ledbetter] really unsettled what was settled law,” and this Act has a restorative effect.14

A “TRIAL LAWYER GIVEAWAY?”15

While some praise the Act as restoring the status quo, not everyone shares in celebrating the realization of President Obama’s campaign promise. Senator Jim Inhofe, Republican of Oklahoma, argues that the bill essentially eliminates the statute of limitations on employment discrimination claims.16 Representative Howard P. McKeon, Republican of California, and a ranking member of the House Education and Labor Committee, has also been a vocal opponent of the bill, characterizing it as an “economic stimulus” for trial lawyers.17 The U.S. Chamber of Commerce shares his concern about the increase in litigation this legislation could spawn.18 Ms. Deem, however, dismisses these concerns as “overblown” because of the difficulties that persist in obtaining proof of wage discrimination.19
Max G. Brittain Jr., an employment lawyer practicing for over thirty years, also believes this legislation is redundant.\textsuperscript{20} According to Mr. Brittain, the Equal Pay Act is already in place as “a means by which a female [can] challenge pay decisions,” with a longer statute of limitations.\textsuperscript{21} Mr. Brittain further expressed concern at the difficulty employers may face in defending decades-old claims against supervisors who may have left the company or passed away.\textsuperscript{22}

In response to such fears, Mr. Gittler notes that “courts have always stepped in” when plaintiffs are intentionally dilatory in exercising their rights.\textsuperscript{23}

This controversial Act is significant not only as a realization of President Obama’s campaign promise, but because it signals the administration’s commitment to ensuring equal pay for equal work. Pending legislation, such as the Paycheck Fairness Act,\textsuperscript{24} which passed the House on January 9, 2009, is further evidence of the commitment by President Obama and his supporters to eliminate wage discrimination.\textsuperscript{25} Opponents, meanwhile, wary of increased litigation, will have new opportunities to issue challenges and amendments to the next wave of fair pay legislation.

\begin{notes}
9. Ledbetter, 127 S. Ct. at 2179.
\end{notes}
13 Telephone Interview with Lori Deem, Partner, Abrahamson Vorachek & Levinson, in Chi., Ill. (March 5, 2009); Telephone Interview with Marvin Gittler, Partner, Asher, Gittler, Greenfield & D’Alba, Ltd. in Chi., Ill. (Feb. 5, 2009).
14 Id.
19 Interview with Deem, supra note 13.
20 Telephone Interview with Max J. Brittain, Jr., Partner, Schiff Hardin, in Chi., Ill. (Feb. 27, 2009).
21 Id.
22 Id.
23 Interview with Gittler, supra note 13.
2008 was a bittersweet year for the gay rights movement. The Supreme Court of Connecticut granted same-sex couples the right to marry.\textsuperscript{1} 
\textit{Milk}, the blockbuster movie about a slain gay politician from San Francisco, generated immense media attention and was nominated for an Academy Award for Best Picture.\textsuperscript{2} Most notably though, the Supreme Court of California extended the fundamental right to marry to same-sex couples, only to have this right trumped by a ballot initiative a few months later.\textsuperscript{3} Proposition 8, California’s constitutional amendment to ban same-sex marriage, was approved by the voters of California on November 4 with 52 percent of the vote.\textsuperscript{4}
A FUNDAMENTAL RIGHT RECOGNIZED

In 2004, Gavin Newsome, the mayor of San Francisco, spurred the same-sex marriage battle when he began offering marriage licenses to same-sex couples on the steps of San Francisco’s City Hall. Subsequently, the Supreme Court of California intervened and ordered the city to stop issuing marriage licenses to same-sex couples based on a 2000 California law, which restricted marriage to a union between one man and one woman. However, the validity of this law and the court’s order to halt the gay marriages prompted six same-sex couples in California to file a law suit in the Supreme Court of California alleging discrimination on the basis of sexual orientation.

On May 15, 2008, these six couples finally received the recognition they were seeking. In a 4-3 ruling, the California Supreme Court struck down the state’s distinction between civil unions and marriages and ruled that homosexual couples must be afforded the same right to marry already granted to heterosexual couples. Further, it found that, in terms of judicial review, sexual orientation is a suspect classification similar to race or sex and now strict judicial scrutiny must be used when rights are denied based on sexual orientation. Conservative and religious-affiliated groups denounced the decision, and in response, collected enough signatures to place a constitutional amendment on the ballot in the next election. The result was Proposition 8, which unequivocally prohibited a same-sex couple from marrying under the Constitution of California.

. . . AND TAKEN AWAY

The battle over Proposition 8 was long and wrought with emotional entanglements. Both supporters and opponents fought tough battles and endured the other side’s blatant offensives. Proponents complained about the constant barrage of names like “bigot” and “homophobe,” while opponents worried about the religious condemnation paraded by the other side. Furthermore, it was expensive. More than $70 million was raised for and against the measure, totaling more than all similar campaigns combined. In the end, the amendment passed, banning same-sex marriages in the country’s largest state and putting the validity of over 18,000 same-sex couples’ marriages in jeopardy.
Proponents of the ban view it as a legal means of protecting one of the basic components of our society. Ed Vitagliano of the American Family Association calls Proposition 8 “an important short-term measure” in the drive to maintain traditional marriage. He explains that no matter what courts rule, two men cannot marry, but these court rulings have a profound effect on the views of people all over the country. For this reason, Vitagliano sees it as important for the people to stand up, reassert their own values, and not let society be dictated by judicial whim.

Among those whose marriage is now uncertain is Todd Young, a Chicago native, who traveled to California to marry his long time partner on August 1, 2008. He recalled feeling “disbelief” when he woke up to the results the morning after the election. Now, with the legal status of his marriage undecided, Young says this issue has become “a very emotional one.” Young explains that over the years, as a member of the gay community, he had come to accept his place in society as a second-class citizen. But for Young, the opportunity to marry finally provided a sense of equality with the rest of society, only to have it undermined by the emotional outcome of Proposition 8.

Although devastating for Young and the 18,000 other recently married couples, Jim Madigan, attorney and gay rights activist with Equality Illinois, explains that Proposition 8 is not a complete overruling of the rights recognized for gay couples. In fact, its effect is rather narrow because it only takes away the right to marry. Homosexuals remain a protected class, which was the real bite of the Supreme Court’s judgment. Because the Court defined homosexuals as an oppressed group, additional legislation based on sexual orientation must now pass heightened judicial scrutiny, and this part of the Court’s judgment will stand.

The Supreme Court of California has agreed to hear a case challenging the validity of Proposition 8 and the legal status of the 18,000 same-sex couples who were married in California during the five months gay marriage was legal. If Proposition 8 is upheld, it will reinforce the idea that the people of California can change their constitution by a simple majority vote, ensuring the marriage ban will remain in place only until the voters decide to overturn it through a similar ballot initiative in the future.
A MINORITY SUBJECTED TO THE WILL OF THE MAJORITY

The people of California voted and rejected gay marriage. Now the debate has evolved into what happens when the majority elects to strip a minority group of a recognized fundamental right. Gay activists have dubbed this fight “the civil rights struggle of our generation.”23 Ironically, in the same election where the first African-American was elected President, black voters overwhelming supported the ban on a minority group’s rights.24 The silver lining, though, is the Civil Rights Act of 1964, and the present activists’ persistence that equal rights are not a matter of if but when.25 Similar to how the Civil Rights Act elevated the status of all African-Americans and ended discrimination based on race, the gay movement hopes that something similar will be implemented regarding one’s right to marry regardless of sexual orientation. As one Illinois legislator explains, “the tendency to do what is right over what is wrong, and to expand individual’s rights rather than taking them away, always wins out in the end.”26 Sooner or later rights for gays and lesbians will be recognized, just like they were for the black community. And similar to what happened in 1964, progressive legislation should come first to protect a minority’s rights; voters’ hearts and minds will follow.

Young believes that although his legal status might revert back from “married” to “single,” he is emotionally no less married.27 He will continue to fight for gay marriage, stating that “we have to claim this right so others can claim it more easily.”28 In response to Young and to those 18,000 same-sex couples, Vitagliano says, “they simply aren’t married.”29 He explains that “marriage can only be between one man and one woman,” and for him, this traditional view of marriage is important to defend, even if it means another constitutional amendment.30

Galvanized by the passage of Proposition 8, the gay movement vows to continue this fight.

NOTES

4 Id.
7 Id.
8 In re Marriage Cases, 183 P.3d 384 (Sup. Ct. 2008).
9 Interview with Jim Madigan, Interim Executive Director, Equality Illinois, in Chicago, Ill. (Mar. 9, 2009).
12 Showdown; Proposition 8, supra note 1.
13 Jessica Garrison, supra note 3.
14 Telephone Interview with Ed Vitagliano, Director of Research, American Family Assoc. (Feb. 6, 2009).
15 Id.
16 Id.
17 Interview with Todd Young in Chicago, Ill. (Feb. 11, 2009).
18 Id.
19 Id.
20 Interview with Jim Madigan, supra note 9.
21 Id.
22 Id.
25 Interview with Jim Madigan, supra note 9.
26 Interview with Greg Harris, Illinois State Representative, in Chicago, Ill. (Mar. 27, 2009).
27 Interview with Todd Young, supra note 17.
28 Id.
29 Interview with Ed Vitagliano, supra note 14.
30 Id.
FEATURE ARTICLE

LOST IN TRANSLATION? THE PROMISES AND PITFALLS OF ENACTING U.S. BAYH-DOLE STYLE LEGISLATION IN INDIA

By Ann Weilbaecher

The Rajya Sabha, India’s Upper House of Parliament, recently began considering a contentious piece of intellectual property legislation modeled after the U.S. Patent and Trademark Law Amendments Act of 1980 (Bayh-Dole Act).¹ The Protection and Utilisation of Public Funded Intellectual Property Bill, 2008 (Indian Bayh-Dole Bill) allows universities, rather than the government, to patent discoveries derived from publicly funded research.² The
Indian Bayh-Dole Bill also gives inventors and institutions a share in the royalties and licensing fees generated from the resulting commercial products. While proponents argue that the Indian Bayh-Dole Bill will result in greater interaction among the government, academic institutions and industry, critics caution that the proposed legislation’s emphasis on commercialization will threaten the public interest. These critics assert that the purported benefits of the Bayh-Dole Act have been overstated in the U.S., and that the Indian Bayh-Dole Bill has the potential to hinder innovation and access to essential medicines and treatments in India.

U.S. BAYH-DOLE ACT

The Indian Bayh-Dole Bill is closely modeled after the U.S. Bayh-Dole Act, which gives universities the right to obtain patents on innovations resulting from government-funded research and to issue exclusive licenses on those patents. Journalists and commentators have referred to the Bayh-Dole Act as “possibly the most inspired piece of legislation to be enacted in America over the past half-century,” and “the Magna Carta for university technology transfer.”

Proponents report that before the Bayh-Dole Act, thousands of government-funded inventions were collecting dust in university laboratories across the U.S. According to the U.S. Government Accountability Office, the federal government owned 28,000 patents and less than five percent of those patents were licensed to industry. Advocates allege that since its inception, “the overall effect of the Bayh-Dole Act has been to contribute more than $40 billion annually to the American economy.”

BAYH-DOLE EMULATION ABROAD

In the hopes of achieving similar benefits, developing and emerging countries such as Brazil, South Africa, Malaysia and China have implemented Bayh-Dole style legislation in the past several years. Scholars, however, express concern that many countries are adopting such legislation based upon faulty assumptions about the Act’s efficacy in the U.S. They contend that the Bayh-Dole Act is only one of a number of factors that has lead to increased patenting and licensing. Further, scholars suggest that Bayh-Dole style legislation may even
inhibit scientific research and innovation in developing countries because too many patents can lead to overlapping claims and time-consuming disputes.\(^\text{15}\)

India is the most recent example of a country considering enacting legislation similar to the Bayh-Dole Act. Scholars question the wisdom of transplanting U.S. style legislation to a country like India, given the different cultural, economic, social, and legal context of modern day India compared with the U.S. in the 1980s when the Bayh-Dole Act was enacted.\(^\text{16}\) Shamnad Basheer, an associate at New Delhi’s Oxford Intellectual Property Research Center, asks rhetorically, “Does it make sense for India to blindly import such a bill, given that we have a different set of circumstances (in terms of the nature of university research, relationship with industry, cultural specificities) than what prevailed in the US in the ’80s?”\(^\text{17}\) Basheer recommends that the legislators “study what the specific Indian conditions are and then customize the bill to those conditions.”\(^\text{18}\)

**SECRECY OF THE LEGISLATION**

The Union Cabinet, India’s highest executive authority, approved the Indian Bayh-Dole Bill on October, 31, 2008, before legislators released a draft to the public.\(^\text{19}\) Although drafting began in 2005, the Minister of Science and Technology first disclosed the Indian Bayh-Dole Bill in December 2008, just before it was formally introduced to Parliament.\(^\text{20}\) Basheer was instrumental in bringing the bill to the public’s attention, posting unofficial drafts on his website, Spicy \textit{IP}, and calling for public interest groups and stakeholders to demand transparency.\(^\text{21}\)

The secrecy of the legislation has spurred public outcry. “I think it’s part of a troubling impunity in which governments feel that they can act in debating these issues that have very important public interest implications,” states Ethan Guillen, Executive Director of Universities Allied for Essential Medicines (UAEM), a student-run public interest group.\(^\text{22}\) “It’s the same trend where governments go behind closed doors and work with industry-minded groups to create these policies that are then foisted upon the public without any real civil society or public interest comment,” says Guillen.\(^\text{23}\)

Some, however, are not as concerned with the lack of transparency. Naryanan Suresh, Group Editor of India’s first biotechnology business magazine, \textit{Biospec-}
trum India, points out that there is no set procedure for releasing draft documents before they are introduced to Parliament. In fact, legislators are only required to publicly disclose documents after they are introduced to Parliament, according to Suresh.

While Basheer acknowledges the government acted legally, he asserts that transparency is a “good norm,” especially with legislation that has such import to the public interest as the Indian Bayh-Dole Bill.

**GENERATING WEALTH**

Proponents argue that the Indian Bayh-Dole Bill will allow universities to reap financial benefits from their discoveries, and, as a result, jump start scientific innovation in India. According to Suresh, there is widespread support for the Indian Bayh-Dole Bill among biotech experts who believe the legislation could spur innovation in the biotech sector like it did in the U.S. He adds, “In India, scientists are no different from scientists anywhere else in the world” and would be motivated by a bill that allows them to commercialize their research.

Under the Indian Bayh-Dole Bill, scientists would be allowed to retain at least 30 percent of the royalties earned from patents and licenses resulting from government funded research. Universities would retain 40 percent of the net income, and the remaining income would finance the management of intellectual property at the university. Unlike the U.S. Bayh-Dole Act, the Indian Bayh-Dole Bill actually specifies a minimum percentage to which inventors are entitled.

India’s Science Minister, Kapil Sibal, expressed confidence that the bill will be passed, and that it will assist Indian universities to “make millions through patents.” “That statement is pretty deeply misinformed if you think about universities as a whole in the U.S.,” says Professor Matthew Herder, visiting intellectual property law professor at Loyola University Chicago School of Law. “There have only been a few universities that have made a lot of money after Bayh-Dole, and those that have been successful . . .were those that were successful before for the most part.”
According to Basheer, “The costs of operating the technology transfer offices far exceed the money most universities make out of licensing.” He elaborates, “That is why we were very anxious that they disclose the bill at an earlier stage. I think there’s enough empirical evidence to show that . . . a large number of universities would not necessarily make money.”

SAFEGUARDS TO ACCESS

The most pressing concern outlined by public interest groups is that the Indian Bayh-Dole Bill will threaten access to the fruits of government funded research. UAEM cautions that the Indian Bayh-Dole Bill will “allow the institutions and their licensees to charge monopoly prices that may place life-saving medicine out of the reach of India’s poorest consumers, denying them the opportunity to benefit from publicly-funded research.” According to Guillen, “The Bayh-Dole Act is at the basis of everything that UAEM is trying to change.”

Guillen expresses concern that the Indian Bayh-Dole Bill contains even fewer safeguards to preserve public access than the Bayh-Dole Act. When the Bayh Dole Act was debated in the U.S., there was an emphasis on preserving public access to the results of publicly funded research. As a consequence, a “march-in right” provision was added whereby if anything was brought to market under unreasonable circumstances, the government could take action. The Indian Bayh-Dole Bill has no such “march-in right” provision.

Guillen asserts, however, that the “march-in right” process has been “imperfect and extremely flawed” in the U.S., because the government has never invoked these “march-in rights.” Herder notes, “What we don’t know is if there are cases where a license was disseminated broadly because the government said they were going to invoke march-in rights behind the scenes.” He elaborates, “If they have been used behind the scenes, it can still be a valuable tool.”

Basheer contends that in an earlier draft of the legislation there was a clause specifying that the compulsory licensing provisions under the Indian Patent Act would apply to the Indian Bayh-Dole Bill. Compulsory licensing would have a similar effect as “march-in rights” in that the government could use patented discoveries for a limited period without the consent of the patent
holder.48 This clause, however, did not appear in the publicly released version of the Indian Bayh-Dole Bill.49

When asked about the removal of the compulsory licensing clause from the Indian Bayh-Dole Bill, Herder speculates, “If the real goal in adopting this legislation is to attract investment from foreign firms because of a familiarity with a Bayh-Dole like regime, then having a compulsory licensing provision would be a cost because it is totally foreign in the U.S.”50 He further explains, “Most of the free trade agreements the U.S. has entered into since the 1980s have been conditioned on getting rid of compulsory licensing regimes.”51

According to Basheer, the removal of the compulsory licensing clause effectively has no impact on the bill.52 Provisions of the Indian Patent Act would apply to the Indian Bayh-Dole Bill even if it is not explicitly written into the new legislation.53 Basheer emphasizes that the compulsory licensing provisions in the Indian Patent Act are less than ideal and have many bottlenecks towards implementation.54 Thus, Basheer recommends stronger public access safeguards in the Indian Bayh-Dole Bill, with wider compulsory licensing norms, including removal of the three-year wait time to invoke compulsory licenses in some cases.55

Further, Basheer recommends non-exclusive licensing provisions, particularly with regards to platform technologies, to ensure greater access to the results of publicly funded research.56 Guillen agrees, stating that UAEM recommends, “global access licensing internationally, to ensure that publicly funded discoveries, medicines and health technologies are available at a low cost in developing countries.”57

OVER-EMPHASIS ON PATENTING

Yet another problem is the strong emphasis on patenting to the exclusion of other forms of knowledge dissemination. As a rationale for adopting the Indian Bayh-Dole Bill, proponents frequently note that only three percent of patents filed in the Indian patent office were filed by Indian universities.58 However, according to Guillen, “This is not a good metric to go by because just patenting something tells you nothing about whether the discovery should have been patented, how it is eventually licensed and used, or if it was actually licensed to the right company and will eventually benefit the public.”59 More-
over, legal scholars argue that an over-emphasis on patenting fails to recognize
the importance of other avenues of knowledge dissemination, such as publica-
tions, conferences, and the training of students.\textsuperscript{60} Of particular concern is
whether a strong emphasis on patenting will lead to a weakened commitment
to open science, manifested in publication delays, secrecy and withholding of
data and materials.\textsuperscript{61}

FUTURE OF THE BILL

With upcoming Indian elections in May 2009, the future of the Indian Bayh-
Dole Bill is unclear. According to Basheer, the Upper House has submitted
the bill to a Parliamentary Standing Committee, which usually takes four to six
months to receive submissions and give their report to the Parliament.\textsuperscript{62}
Basheer expects the Indian Bayh-Dole Bill to be enacted, even if a new admin-
istration is elected.\textsuperscript{63} Guillen concurs, noting that there is widespread support
among the government and industry groups.\textsuperscript{64}

Legal scholars and public interest advocates believe that in the world’s largest
democracy, the Indian government should widen the debate to hear public
interest perspectives.\textsuperscript{65} They argue that this open approach will make it easier
to learn from the experience of the Bayh-Dole Act in the U.S. and to draw the
right lessons for India.\textsuperscript{66}

NOTES

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2 See \textit{The Protection and Utilisation of Public Funded Intellectual Property Bill, 2008 §5
pdf.
3 See \textit{The Protection and Utilisation of Public Funded Intellectual Property Bill, 2008 §10
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4 Vartak & Saurastri, supra note 1, at 62.
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31 Id.
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33 Padman, supra note 6, at 685.
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36 Basheer interview, supra note 17.
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50 Herder interview, supra note 34.
51 Id.
52 Basheer Access Blog Post, supra note 48.
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60 So et. al., supra note 5, at 2078.
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66 Guillen interview, supra note 22; Basheer interview, supra note 18; See So et. al., supra note 5, at 2078-79, 2082.
DOWNLOADING THAT 12-TRACK ALBUM COULD COST YOU $360,000:
EXPLORING HOW THE PRO-IP ACT WILL AFFECT THE CONSUMER

by CHRISTY O’BERRY

Minnesota mother, Jammie Thomas, was sued by a record company for downloading 24 songs, which cost less than $54 on a commercial site, and making them available to others through a peer-to-peer online file-sharing program. Based on a jury instruction, which made electronic distribution on a
peer-to-peer network a violation of the copyright owners’ exclusive right of distribution, “regardless of whether actual distribution has been shown,” Thomas was penalized with damages upwards of $222,000.3

Typically, a person who illegally downloads songs for their own enjoyment or personal use, a personal use infringer, is unaware of the penalties for illegally downloading songs and, therefore, the penalties do not serve as a deterrent.4 In fact, among those questioned, the biggest deterrent to illegal downloading was the potential for inadvertently downloading computer viruses.5 Several of the participants that admitted to illegally downloading songs said that they later purchased the album or later attended live shows.6 Should a personal use infringer be penalized for downloading a song when they later purchased the album or supported the artist in another way?

On October 13, 2008 former President George W. Bush signed into law the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (PRO-IP Act or Act).7 The Act increases the power of the federal government to protect intellectual property owners by creating a new position, the Intellectual Property Enforcement Coordinator, commonly referred to as the “IP Czar,” who will oversee and coordinate domestic and international enforcement activities.8 Additionally, the Act increases penalties available in civil cases against trademark counterfeitors.9
Educational property covers a range of products, including patents, trademarks, and copyrights. Certainly, the big issue with counterfeit patents and trademarks is the health and safety of the consumer when purchasing counterfeit pharmaceuticals, electronics, and auto parts. However, when it comes to copyright protection in the digital age, where music downloading is the norm, the law has been crafted in a way that protects big business rather than the consumer because it does not differentiate between the personal use infringer and the large-scale infringer, who illegally downloads songs, copies them, and sells them in the marketplace.

Prior to the enactment of the PRO-IP Act, the Recording Industry Association of America (RIAA), whose goal is to “foster a business and legal climate that protects the authors of original works in music,” seemed to be concerned with digital music piracy by the personal use infringer over the large-scale infringer. In an attempt to stem illegal downloading, the RIAA began suing individuals that were illegally downloading music. In fact, in just over five years the RIAA sued over 35,000 individuals for illegal downloads.

After suing several single mothers, a dead person, and a 13-year old girl, the RIAA realized that lawsuits against the individual infringer were not an effective or efficient deterrent of internet music piracy. The RIAA, however, did view the PRO-IP Act as an effective deterrent because, through the PRO-IP Act, the government acts as the watchdog and enforces IP rights.

A copyright protects authors of “original works” for a fixed period of time, conferring exclusive rights on the copyright holder. Original works include literary, dramatic, musical, artistic, and other works. A work is created when it is fixed in a tangible medium such as a recording. Copyright infringement, or creating counterfeit works, is the unauthorized use of a copyrighted work, in a manner that violates one of the copyright owner’s exclusive rights, such as the right to reproduce or perform the copyrighted work, or to make derivative works. Fair use is a defense to infringement that allows limited use of copyrighted material without requiring permission from the copyright holder.

Part of the PRO-IP Act focuses on increasing penalties for copyright infringement. Statutory damages for the infringer, whether a personal use infringer or large-scale infringer, can be in the range of $750 to $30,000 for downloading a song that costs one dollar. Neither the copyright law nor the PRO-IP
Act differentiates between the personal use infringer and the large-scale infringer.24

The Electronic Frontier Foundation and Public Knowledge, two non-profit organizations that work to protect the public’s interest in the digital age, argue that the Act goes too far to protect big business at the expense of the casualdownloader and creates civil penalties that far outweigh the offense.25 Other critics argue that copyright law should be crafted to encourage professional and amateur creativity while protecting the profits of the copyright holder, striking a balance between the needs of the artist and the interests of the consumer.26

It is clear that the author of the PRO-IP Act, Senator Patrick Leahy, and the Act’s supporters were concerned with protecting the public from counterfeit goods and preventing the theft of intellectual property for commercial advantage or activity rather than going after personal use infringers.27 However, the broad language of the Act leaves open the potential for abuse because the Act does not make clear the reach of the term “commercial activity or advantage.”28

One of the most controversial, and as yet untested, provisions of the Act is the expansion of government power to seize equipment involved in making, or equipment with the potential for making, counterfeit goods.29 Section 102 of the Act authorizes the government, in a civil action, to order the impounding of all means by which copyright protected material can be reproduced.30 Read broadly, this provision could include a personal computer that was used to download one copyrighted work, be it a song or a movie.31

With the first 100 days of his Presidency behind him, President Barack Obama has yet to appoint the “IP Czar,” despite pressure from several senators that backed the Act, which means it is unclear what the role of the “IP Czar” will be and even more what impact this Act will have on the protection of intellectual property.32 Intellectual property has been called the “petroleum of the 21st century,”33 and the “lifeblood of our economy,” therefore making its protection an increasing government concern.34
NOTES

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5 Id.
6 Id.
9 Id.
10 See Id.
11 Id.
12 Esguerra, supra note 1.
15 Id.
19 Id.
20 Id.
21 Id.
24 Id.
25 Id.
28 Id.
30 See PRO-IP Act, supra note 22.
31 Felber, supra note 8.
33 Interview with Rodrigo Leon Urrutia, Attorney, Silva & Cia., in Santiago, Chile (Mar. 5, 2009).
34 Zralek, supra note 27, at 37.
“MYSPACE MOM” ASKS COURT NOT TO STRETCH FEDERAL CRIME BEYOND CONGRESS’ INTENT

by WILLIAM TASCH

When a person engages in indisputably despicable behavior, and a child dies as a result, does it matter if she is convicted under a statute that was never intended to cover the particular situation? This is the question that George Wu, Federal District Judge in the Central District of California, must confront in the case of a Missouri woman whose severe cyber-bullying drove a 13-year-old girl to suicide.

The woman, Lori Drew, and Ashley Grills, an 18-year-old family friend, opened a MySpace account posing as a 16-year-old boy named “Josh Evans.”
The account was opened solely for the purpose of harassing the victim, Megan Meier, who had gotten in a tiff with Drew’s daughter at school. Drew and Grills, as “Josh,” flirted with Meier and lured her into an online relationship. About a month later, “Josh” broke off the relationship and turned vindictive. Shortly after receiving a message from Josh telling her that “the world would be a better place without you,” Meier hanged herself.

Prosecutors in Missouri investigated the incident, but concluded that Drew and Grills’ conduct was not prohibited under the state’s criminal code. “We did not have a charge to fit it,” Lt. Craig McGuire, the spokesman for the local sheriff’s department told the Suburban Journals newspaper. “I don’t know that anybody can sit down and say, ‘This is why this young girl took her life.’”

Later, Thomas P. O’Brien, United States Attorney in the district of California where MySpace servers are located, found a charge. His office indicted Drew under the Computer Fraud and Abuse Act (CFAA). The CFAA was intended to extend and more clearly define crimes prohibiting malicious computer hacking. Drew’s conduct was illegal access of a computer system under the CFAA, O’Brien argued, because Drew had accessed MySpace servers using a false identity, which is in violation of MySpace terms of service. The jury found Drew guilty on this theory. Now the judge must decide whether, as a matter of law, the verdict can stand.

The case has incited widespread debate, and raised questions about how far a court should stretch a statute to cover unpredicted circumstances begging for recognition under the law. Many are satisfied that Drew’s conviction now makes her eligible for a 20 year maximum sentence, and are willing to overlook the fact that the statute was not originally intended to apply to her situation.

Many legal scholars, however, worry about the precedent that Drew’s conviction might set. According to the prosecution’s theory of the case, anyone who has misrepresented any information about themselves in a website registration form would be guilty of a federal crime. It would be illegal to violate the terms of service of a website, essentially giving individual websites the ability to define crimes under the Act. This, the scholars argue, could not have been Congress’ intent.
UNAUTHORIZED ACCESS?

Congress passed the CFAA in 1986 to equip prosecutors with the power to punish malicious computer hackers seeking sensitive data from computer systems. The Senate Judiciary Committee report recommending passage clarified that the law was aimed at “a new type of criminal—one who uses computers to steal, to defraud, and to abuse the property of others.”

The provisions relevant to the Drew case remain the same as they were in 1986. The jury convicted Drew of “intentionally access[ing] a computer without authorization or exceed[ing] authorized access, and thereby obtain[ing] . . . information from any” computer used in interstate commerce or communication. Drew accessed MySpace servers without authorization, the indictment alleged, by using MySpace in violation of MySpace Terms of Service (TOS). The TOS require, *inter alia*, MySpace users to give truthful registration information and to refrain from harassing behavior.

The indictment further alleged that Drew’s violation of the CFAA was done in furtherance of a tortious act, namely, intentional infliction of emotional distress. This would upgrade the crime to a felony.

The judge instructed the jury that “access without authorization” “means to access a computer without the approval, permission or sanction of the computer’s owner.” The jury convicted Drew of unauthorized access, though it did not find her violation to be in furtherance of intentional infliction of emotional distress.

After the trial and the jury’s decision, Judge Wu agreed to hear a post-verdict Rule 29 motion for judgment of acquittal. He considers this motion currently.

USING WEBSITE TERMS OF SERVICE TO DELINEATE THE SCOPE OF CRIMINAL LAW

Drew’s legal team focuses its argument on the limits that courts have traditionally placed when a crime is defined as committing an act without consent or authorization. Orin Kerr, a George Washington University Law Professor and former Justice Department technology crime prosecutor, volunteered to
represent Drew as post-verdict counsel *pro bono*.

In his supplemental brief, Kerr argues that “[a] website Terms of Service can define the contract between owner and user, but it does not define the scope of criminal law.” The contrary holding risks rendering millions of internet users into federal criminals, Kerr cautioned.

In response, the Government asserts that the plain terms of the CFAA support the verdict, and pointed to a number of cases where lower courts have held that exceeding the computer system owner’s TOS constituted “unauthorized access,” giving rise to civil liability under the CFAA. The government further argued that Drew’s reference to the millions of TOS violations which occur on a daily basis essentially boils down to an “everybody does it” argument which the court should not endorse.

Outside the courtroom, the legal opposition to Drew’s verdict bred controversy and occasionally emotional outrage. Some observers believe the verdict should be upheld because it had a positive result. Parry Aftab, an attorney who advocates for online child safety, told MSNBC that it was “about time that there was some justice” coming out of the circumstances surrounding Meier’s death.

Meier’s mother herself has spoken out in support of the prosecution. The day of the indictment, the elder Meier recounted disappointment when the local prosecutor in Missouri brought no charges, and expressed gratitude that “some court system finally sees that there is some criminal justice here.”

Numerous policy and legal analysts warn, however, that upholding Drew’s conviction could set dangerous precedent. “Drew’s conduct was irresponsible, but it was not criminal,” writes Andrew M. Grossman, Senior Legal Analyst at the Heritage Foundation.

Matthew L. Levine, a former federal prosecutor and current defense attorney, told the Associated Press: “[u]nfortunately, there’s not a law that covers every bad thing in the world. It’s a bad idea to use laws that have very different purpose.” The fear is that the Government’s theory allows website operators, rather than legislatures, to define criminal conduct under the CFAA.
CREATIVE LEGAL SOLUTIONS IN A LEGISLATION VACUUM

Despite disagreements about whether CFAA should be construed to prohibit Drew’s conduct, most agree that there “ought to be a law” more squarely addressed at cyber-bullying. Indeed, Meier’s home state of Missouri has since adopted such a law, but a similar bill introduced in Congress was quietly defeated last year.38

In the absence of nationwide legislative protection, the attorneys general from 49 states and the District of Columbia entered agreements with officials from MySpace and Facebook last year which require the adoption of more robust child-protection measures.39 Under the agreements, the companies must more actively police malicious user activity occurring on their sites.40 MySpace and Facebook are also required to erect technical barriers on their sites which, *inter alia*, prevent children’s profiles from being searched and ensure that children cannot register as adults.41

Though most agree these steps are beneficial, they do not offer perfect protection. For those that circumvent the counter-measures, the sites can do little more than ban the individual from further use. The sites can cooperate with prosecuting authorities to punish the individual, but, as Drew’s case illustrates, these authorities need the right legislation in place in order to be successful. Where legislators have not taken action, prosecutors, judges, and regulators must do what they can with the authority they have, and may be asked again to risk stretching that authority to the breaking point.

NOTES


3 *Id.*

4 *Id.*

5 *Id.*


Indictment, supra note 9, at 8-10.


See, e.g., GROSSMAN, supra note 15.

Hughes, supra note 11; SENATE JUDICIARY COMMITTEE CFAA REPORT, supra note 11, at 2479-80.


Id. at 2480.


Indictment, supra note 9, at 4-5. The prosecutor also included a conspiracy charge, charging that Drew, her daughter, and her daughter’s friend had committed the alleged crimes as co-conspirators. Id. at 1-8. This charge was later dismissed after the jury failed to reach a verdict on it. Joel Carrier, Prosecutor Dismisses Felony Charge Against Lori Drew in MySpace Case, St. LOUIS-DISPATCH, Dec. 31, 2008, available at http://www.stltoday.com/stltoday/news/stories.nsf/strcharles/story/B0C034B2BD4F2FBC862575300071D769/Opendocument.

Indictment, supra note 9, at 10.


Government’s Response to Defendant’s Supplement to Rule 29 Motion, supra note 13 at 4.

Chris Ayres, 'MySpace Bully' Lori Drew Escapes Felony Charges over Suicide of Megan Meier, TIMES (LONDON), Nov. 27, 2008, available at http://technology.timesonline.co.uk/tol/news/tech_and_web/the_web/article5246833.ece.
28 Supplement to Rule 29 Motion, supra note 14.
29 Kerr is a recurring contributor to the well-known Volokh Conspiracy blog. In a humorous illustration of his view of the jury verdict, Kerr posted new terms of use for visitors of the Volokh Conspiracy—"any accessing the Volokh Conspiracy in a way that violates these terms is unauthorized, and according to the Justice Department is a federal crime that can lead to your arrest and imprisonment for up to one year for every visit to the blog":

1. You will not post comments that are abusive, profane, or irrelevant. Civil and relevant comments only, as indicated by our comment policy.
2. You are not an employee of the U.S. government. Yes, that includes postal service employees, law clerks, judges, and interns. We’re a libertarian-leaning blog, and we’re for the private sector only. Government types, keep out.
3. Your middle name is not “Ralph.” I’ve always thought Ralph was a funny name, and even odder as a middle name. No one with the middle name “Ralph” is welcome here.
4. You’re super nice. We have strict civility rules here, and this blog is only for people who are super nice. If you are not super nice, as judged by me, your visit to this blog is unauthorized.
5. You have never visited Alaska. Okay, this one is totally arbitrary, but it’s our blog and we can keep out who we want. Alaska visitors are out, too.

30 Supplement to Rule 29 Motion, supra note 14, at 7-8. For the enforceability of website user agreements, known as “clickwrap” and “browsewrap” agreements, see James J. Tracy, Student Comment, Browsewrap Agreements: Register.com, Inc. v. Verio, Inc., 11 B.U. J. SCI. & TECH. L. 164 (2005) (reporting that clickwrap agreements, where users must click to acknowledge agreement before the website allows entry, have generally been enforced, but “most courts have refused to enforce browsewrap agreements,” which purport to be binding without seeking any affirmative acknowledgement of consent from the user.).
31 Supplement to Rule 29 Motion, supra note 14, at 7-8. The brief pointed out that even the founder of MySpace, Tom Anderson, had lied in his registration by entering a younger age than he was. Id.
32 Government’s Response to Defendant’s Supplement to Rule 29 Motion, supra note 13, at 4-12.
33 Id. at 18-21.
34 Breaking News (MSNBC television broadcast May 15, 2008).
35 Id.
40 Id.
41 Id.

178
ILLINOIS SCHOOLS FACE UP TO FACEBOOK: MANDATING INTERNET SAFETY INSTRUCTION IN ILLINOIS PUBLIC SCHOOLS

by Lauren Rafferty

A 14-year-old New Jersey girl was arrested on March 29, 2009, on child pornography charges for posting nude photos of herself on MySpace. Police believe that she took more than 30 pictures of herself for her boyfriend, presenting an unusual case for prosecutors where the victim of pornography is the same person as the perpetrator. This teenager’s story highlights the dynamic nature of internet risks for students.
Children today are faced with a host of new dangers and risks as a result of internet connectivity and internet applications such as social networking and media sharing sites. These dangers include sexual predators who use the internet to communicate with their victims, undesirable exposure from the posting of private photos that end up public, “cyber-bullying,” and even becoming unwilling stars in online videos. Videos of fights between classmates recorded on a camera phone or digital camera are increasingly common on media sharing sites like YouTube. Recently one video depicted two teenage girls coaxed by their friends into punching and choking each other. Another video showed a fight set to music and included pre-fight interviews with the teenagers involved.

**ILLINOIS’ RESPONSE TO INTERNET DANGERS**

In an effort to curb these dangers to children, the Illinois legislature passed a bill requiring public schools to incorporate some form of internet safety instruction into the school year beginning in the 2009-2010 school year. The legislation does not specifically outline a curriculum for schools, but rather grants school boards the discretion to determine the “scope and duration of this unit of instruction.” However, the statute does recommend topics for instruction, including “responsible use of social networking websites,” “recognizing online solicitations,” “risks of transmitting personal information,” “reporting online harassment and cyber-bullying,” and “reporting illegal activities and communications.” The legislation also requires that the Illinois State Board of Education provide materials that will aid schools in their instruction.

Illinois is not the first state to take the step of requiring internet safety to be incorporated into the curriculum of public schools. Virginia was the first state to pass such legislation. The Virginia legislation was enacted in response to the threat of sexual predators and the problems posed by social-networking sites that students frequent. Virginia’s mandatory internet safety instruction began the 2007-2008 school year. More states are sure to follow Illinois and Virginia as internet safety is a national issue.
INTERNET FEARS: A REALITY FOR ILLINOIS STUDENTS

Beverly Stewart, a seventh grade teacher at Lundahl Middle School in Crystal Lake, Illinois, has not seen any incidents of cyber-bullying but does think the internet poses increasing problems to her students, particularly because her students “use the internet both in and out of school and...don’t have a clue of its dangers.”12 Stewart, who has been teaching for over 20 years, has certainly seen the changing nature of bullying that comes with an increased use of the internet.13 More and more students go online daily, both at home and school, and 58 percent of teenagers have an online profile.14 Furthermore, 32 percent of teenagers who use the internet have been contacted by a complete stranger online.15 The same percentage of teens have experienced at least some form of harassment online, such as receiving threatening messages, having private material forwarded without permission, having a rumor spread about them, or having a photo of themselves posted without permission.16

With cyber-bullying on the rise, insults and fights that a teacher may have been able to break up in his or her classroom are now being carried over to social networking websites. Recently a teenager filed suit against one such website, Facebook, demanding $3 million in damages for bullying she claims she suffered at the hand of former high school classmates on the website.17 She alleges that classmates used Facebook to spread rumors that she had contracted AIDS and participated in bestiality.18 Extreme examples such as this one require that Illinois schools effectively implement this new legislation.

OUT OF THE CAPITOL AND INTO THE CLASSROOM: IMPLEMENTATION OF ILLINOIS LEGISLATION

However large the problems faced by teachers and parents of teenagers and young children, it remains unclear how schools in Illinois will implement this new requirement when it takes effect next year. The Illinois State Board of Education, required by statute to provide resources to school boards on its website, has provided example practices of internet safety instruction delivered by school districts that have already incorporated it into their curriculum.19 Schools that have implemented the requirement include Collinsville Community School District 92 and Community High School District 128, among others.20 School District 92 has the most comprehensive curricular informa-
tion on its website, providing curricular ideas for all grade levels using a variety of media and gives tips for internet safety that include links to various internet safety tools, such as tutorials on changing MySpace and Facebook security and privacy settings.21

It is clear that with the diversity in dangers children and teenagers face online, mandatory internet safety instruction serves a vitally important purpose. Brooke Walper, a high school math teacher at Glenbrook North High School in Northbrook, Illinois, thinks that this instruction is imperative.22 Walper, who is in her second year of teaching, highlights many of the dangers she sees for her students by noting that “part of the problem is that they don’t know anything that they say/post online can be kept forever and used against them.”23 She also states, “I think a lot of kids think they have friends and a social life online so they are willing to do things that they wouldn’t necessarily do in person,” suggesting that students such as the 14-year-old New Jersey teenager may post things online that they would not feel comfortable sharing in their normal everyday lives.24 Stewart feels “the most important thing the teenagers should learn is there is no privacy on the internet. Once your name and information is ‘out there,’ who knows the millions of people who have access to this information?”25

While Walper and Stewart believe that internet safety instruction is a valuable use of school time in middle school and high school, they also agree that parents must have a role to play in making the internet safer for their children.26 Walper says that parents “should monitor what students do and how much they do online.”27 Stewart, however, feels strongly that schools can and should play a major role in internet safety instruction. Stewart explained, “...it should be the responsibility of parents but if it is taught in the schools we know our ‘mission’ will be accomplished. We have no way of guaranteeing that parents will take it upon themselves to teach internet safety.”28

Since many students use the internet away from school in ways that may affect their classmates in school, Illinois has given part of the responsibility for educating children about internet safety to school districts. It remains to be seen, however, how public schools in the state will actually implement these changes and if the changes will effectuate major changes in the way that children use the internet and technology.
NOTES

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6 Id.
7 Id.
8 Id.
10 Id.
11 Id.
12 E-mail Interview with Beverly Stewart, Teacher, Lundahl Middle School, Crystal Lake, Illinois (March 9, 2009).
13 Id.
14 Amanda Lenhart, Teens, Online Stranger Contact & Cyberbullying What the Research is Telling Us, PEW INTERNET & AMER. LIFE PROJECT, Presentation, available at http://www.pewinternet.org/Presentations/2008/Teens-Online-Stranger-Contact—Cyberbullying.aspx
15 Id.
16 Id.
18 Id.
20 Id.
22 E-mail Interview with Brooke Walper, Teacher, Glenbrook North High School, Northbrook, Illinois (March 9, 2009).
23 Id.
24 Id.
25 Interview with Stewart, supra note 12.
26 See Interview with Walper, supra note 22; See also Interview with Stewart, supra note 12.
27 Interview with Walper, supra note 22.
28 Interview with Stewart, supra note 12.
FEATURE ARTICLE

NEW ILLINOIS INTERNET GROOMING LAW: WHEN INDIVIDUAL RIGHTS COLLIDE WITH PUBLIC POLICY

by JEREMY MOOREHOUSE

Illinois Senate Bill 2382 came into effect on January 1, 2009, granting law enforcement broad power to punish alleged sex offenders who utilize the internet to solicit sex from children. Albeit the new legislation is well-intentioned and focuses on the protection of children, such laws have traditionally
faced various challenges alleging unequal treatment and overly harsh punishments.2

LAYING THE GROUNDWORK FOR CHILD PROTECTION

Illinois Senate Bill 2382, frequently referred to as the “Internet Grooming Law” (IGL),3 prohibits any person from knowingly using a computer or internet media, including bulletin boards or other transmissions, “to seduce, solicit, lure, or entice” a child or their guardian to commit a sexual offense or engage in sex with a child.4 The new law punishes those convicted as class four felons.5 In this context, individuals face heavy penalties, including mandatory prison sentences of no less than one year and no more than three years, as well as public registration as a sex offender.6

Given the prevalence of online social networking and wide access to online media, the IGL is designed to protect children from sex predators who utilize technology as a means of seduction.7 Traditionally, public policy has overwhelmingly supported the protection of children, as have both local8 and federal governments.9 However, problems associated with creating laws to protect children from sex offenders are compounded due to definitional concerns and the problem of vigilantism.10 In some instances, individuals accused of sexually abusing a minor are subjected to physical confrontations, including vicious attacks by private citizens and confrontation from local media.11

Additionally, defining a crime of this nature can be problematic, particularly where contact or harm is not directly required. Suppose an individual knowingly uses an online social networking website and law enforcement considers their use to involve solicitation of minors, even though the individual has no intent to target a minor. Under the IGL, regardless of whether or not they intended to solicit a minor, the individual faces potential imprisonment of up to three years and12 public registration as a sex offender.13 If later charged under similar laws, that individual could face greatly enhanced punishment under Illinois’ recidivist (repeat) offender statute.14 Thus, the burden then falls upon lawmakers to carefully craft legislation that protects not only potential victims, but also those accused in sexual offense cases.15

Regardless of public policy concerns and the myriad of issues that arise when creating new legislation, lawmakers walk a thin line as two main viewpoints
have emerged, the “child advocate perspective” and the “civil liberties prospective.” Those embracing the child advocate perspective support harsher laws that penalize child predators, while those in favor of the latter believe these laws unjustly stigmatize and inhibit the civil rights of convicted individuals.16

THE CHILD ADVOCATE PERSPECTIVE

The “child advocate perspective” supports that protecting children is paramount and high penalties are necessary for those convicted of engaging in or attempting to engage in the sexual abuse of a minor.17 Indeed, protecting children is the focus of the new IGL as it targets only those engaged in, or attempting to engage in, sexual conduct with a child.18

Illinois State Senator Antonio Munoz backed the IGL.19 Senator Munoz believes that Illinois is taking positive strides in combating child predators in the State.20 He explained, “I believe we need to take every possible step to ensure that children throughout the State of Illinois are protected from sexual predators.”21

Illinois faces legitimate, serious concerns when combating child predators in the State.22 Given the fact that 5,596 sex crimes were committed in Illinois during 2007 alone, local politicians have a vested interest in punishing those convicted of sexual offenses, particularly those committed against children.23 Of the 5,596 sex crimes, 2,733 (49 percent) were committed against victims age 16 and younger.24

Although the Illinois Attorney General and individual defendants have yet to challenge the IGL, a review of its text makes it apparent that legislators crafted the law to avoid arbitrary punishment while still permitting wide latitude by setting the mental state at “knowingly.”25 This means that individuals must make some conscious, knowing action to commit a crime before being punished. Additionally, lawmakers attempted to create a high level of deterrence as the IGL works in conjunction with the Illinois recidivist enhancement statute, which results in enhanced sentences if a victim is a minor, or prison sentences of up to ten years for repeat offenses.26 The purpose of such enhancements is to authorize enhanced sentences to deter the defendant or others from committing the same crime.27
On this basis, supporters of the child advocate perspective find that expanding state laws to punish child predators more severely will protect more children and deter future crimes, particularly given the emerging threat that modern advances in technology and the internet pose to potential victims.  

THE CIVIL LIBERTIES PERSPECTIVE  

In contrast, the “civil liberties perspective” considers the heavy toll inflicted upon individuals convicted under the sex offender laws, including the new IGL. Legislation such as the IGL may have an adverse impact on those convicted, including: harsh treatment, stigmatization, and public humiliation.

While child advocates point to the necessity of legislation that more harshly punishes sex offenders who target children, a disconnect has arisen. For instance, a recent investigation conducted by forty-nine state Attorney Generals found that the sexual solicitation of children via the internet does not pose a significant threat. Where no significant problems exist, then the rate of repeat offenders that target children is also very low—two factors that together suggest that sex offender laws may at times be poorly planned or overly harsh. Indeed, if crime rates are low, then why are additional penalties required? 

The IGL includes the mental state of “knowingly,” which indicates an elevated mental state to charge and convict an individual. However, the law also includes broad language that encompasses a wide range of conduct. Civil liberties advocates argue that whether or not an individual convicted under such a law is actually guilty or wrongfully convicted, the punishments imposed lead to stigmatization, labeling, and castigation. Though civil liberties advocates believe that child sex abuse should be punished, they believe that legislators too often focus on “Draconian legislation aimed at sex offenders.” Even if a charged defendant is found innocent, the negative connotation of child sex abuse charges coupled with the public nature of proceedings could lead to severe stigmatization and the damaging of one’s reputation in the community, job market, and other realms.

Although the protection of children is paramount in our society and laws, civil rights advocates call for legislation that would punish sex offenders but avoid
drawing undue attention to those convicted under such legislation by way of public registration as a sex offender or other means.38

PUBLIC POLICY COLLIDING WITH INDIVIDUAL RIGHTS

Although addressing paramount public policy concerns, rape and sex offender laws become problematic because they are often strict liability offenses, requiring a very reduced mental state and sometimes no intent requirement at all to face conviction.39 Crafting the IGL to require a particular mental state and to avoid strict liability punishment is likely to give rise to judicial and jury misconceptions.40 For example, there is no available precedent because the IGL has just come into effect. Thus, a case involving a defendant charged for showing offensive internet material to a minor may also be charged under the new law even if he had not met the requisite mental state or did not intend to solicit sex.41

Problems abound as victims, arguably, suffer no harm because the IGL covers attempted solicitation. Indeed, it is possible that there is no victim if an individual posts to an online message board available to the general public, but the posting is not targeted at a specific child and no child ever reads its contents.42 If an individual was indicted under the IGL for an online posting, regardless of whether or not he is ultimately convicted, he faces public stigmatization, humiliation, threats to employment, and threats to personal safety in his community.43

However, child advocates believe any subsequent effects of punishment are greatly outweighed by the public’s interest to protect children from a new mode of attack.44 Accordingly, punishing an individual for making an online posting is entirely justified.45 “I don’t feel the regulations which protect our children from sexual predators are too harsh,” Senator Munoz stated. He explained further, “In the digital age we live in, sexual predators can now get to our children through the internet and other electronic means. [The IGL] brings current statutes up to date so the internet cannot be used to lure children to the predator.”46

Conversely, civil liberties advocates would find the effect of charging an individual under the IGL has unduly harsh and stigmatizing effects, particularly where there is no clear victim.47 As one author found, stigmatization of sex
offenders occurs “by creating registries to deter recidivists while simultaneously trying to ‘brand’ and ‘shame’ each offender.” Although the protection of children is important, it cannot be used as a catchall excuse to impose harsh or disproportionate punishments on convicted sex offenders. In our legal system where punishments must fit crimes, it may be haphazard to impose a devastating punishment on an individual, especially in situations where there may not be any victim or intended victim.

Because constitutional challenges to sex offender laws often fail, it falls upon lawmakers to rectify the opposing child and civil liberties views, to balance the protection of children with the sanctity of individual rights, and to avoid disproportionate or stigmatizing punishments. However, because it is unlikely that such laws will ever be scaled back or repealed, despite the best efforts of civil liberties advocates, it may be public awareness that has to change in order to reveal the true impact of such laws on both offender and victim.

NOTES

3 720 ILCS 5/11-25 (West 2009).
4 Id.
5 Id.
7 See e.g. 720 ILCS 5/11-25 (West 2009) focusing on the use of “computer online services . . . to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child”); see also Monique Garcia, New Illinois Laws for 2009 Touch on Broad Range of Issues, Chi. Trib., Jan. 1, 2009, available at http://www.chicagotribune.com/news/local/chi-new-laws-bar-01jan01,0,3507978.story (stating that the purpose of the internet grooming law is to protect children).
8 In Illinois, sex offenders are subjected to additional penalties beyond normal sentencing requirements. See 730 ILCS 150 to 152 (West 2009).
9 On the federal level, the U.S. Department of Justice has taken significant strides in targeting and penalizing child predators and sex offenders. See U.S. Department of Justice, Child Exploitation and Obscenity Section Home Page. http://www.usdoj.gov/criminal/ceos/ (this prosecutorial office is charged with trying cases involving the violation of federal child protection legislation, including child pornography, child prostitution, obscenity, trafficking and child sex tourism, international parental kidnapping, and child support enforcement).
Loyola Public Interest Law Reporter

10 See U.S. v. Morris, 549 F.3d 548, 551 (7th Cir. 2008) (addressing private vigilantism and private sting operations, including internet-based attacks and actual physical confrontations).
11 Id; see also Michael Starr, ‘Dateline’ Perv DA a Suicide, N.Y. POST, Nov. 7, 2006, available at http://www.nypost.com/seven/11072006/tv/dateline_perv_da_a_suicide_tv_michael_starr.htm (regarding a Texas prosecutor who committed suicide after being confronted by a reality television show while being served).
12 730 ILCS 5/5-8-1(a)(7) (West 2009).
13 730 ILCS 5/5-5-3.2 (West 2009).
15 See Morris, 549 F.3d at 551 (addressing problems of vigilantism and impact on individual defendants).
16 See also Bernie Mayer, Reflections on the State of Consensus-Based Decision Making in Child Welfare, 47 FAM. CT. REV. 10, 11 (2009) (addressing the tradeoff between state interference and child protection, and noting that protecting children has been a longstanding principle in our legal system, descended from ancient times).
17 Email correspondence with Illinois State Senator Antonio Munoz (on file with author).
18 720 ILCS 5/11-25 (West 2009).
20 Antonio Munoz, supra note 17.
21 Id.
24 Id.
25 720 ILCS 5/11-25(a) (West 2009).
27 Id.
31 Antonio Munoz, supra note 17.
33 Id.
34 720 ILCS 5/11-25(a) (West 2009).
35 ACLU of Illinois, The Illinois Brief, supra note 29 at 6; see also ACLU of Illinois: Frequently Asked Questions, supra note 2 (regarding the reasons for attacking Illinois sex offender laws).
38 ACLU of Illinois, *The Illinois Brief*, *supra* note 29 at 6; see also Shawdra Jones, *Setting Their Record Straight: Granting Wrongly Branded Individuals Relief from Sex Offender Registration*, 41 COLUM. J.L. & SOC. PROBS. 479, 480-81 (2008) (addressing the stigma associated with sex offenders).
39 *See e.g.*, 720 ILCS 5/12-13 (West 2009) (Illinois codification for criminal sexual assault; the Illinois legislature did not require a mental state for culpability of certain offenses such as sexual assault of a minor).
40 Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 200-202 (1993) (discussing mens rea issues that arise in sex offender cases and the misuse of “motive” in such cases).
41 There is no provision in 720 ILCS 5/11-25 (West 2009) that would bar the coupling of an indictment under the Internet Grooming Law with other sex offenses, giving rise to a potential for prosecutorial abuse.
42 *See Linda Quigley, The Intersection Between Domestic Violence and the Child Welfare System: The Role Courts Can Play in the Protection of Battered Mothers and Their Children*, 13 WM. & MARY J. WOMEN & L. 867, 874 (regarding unintended victims of domestic and sexual abuse crimes); *see also* 720 ILCS 5/12-13 (West 2009) (there is no requirement that a child is actually harmed or that an actual victim exists).
43 John Douard, *Sex Offender as Scapegoat: The Monstrous Other Within*, 53 N.Y.L. SCH. L. REV. 31, 44 (2008/2009) (“Undeniably, child sexual abuse is a stigmatizing crime . . . the value of stigmatizing the crime does not warrant stigmatizing the offenders through disgust, humiliation, isolation, and exclusion, because in doing so, we undermine efforts to understand and treat sex offenders.”).
45 Indeed, this would be supported by the prevailing view that harsher punishments are warranted for those sex offenders who target children. *Id.*
48 Jones, *supra* note 38 at 498.
FACING THE COMPLIANCE DEADLINE FOR THE ADAM WALSH CHILD PROTECTION AND SAFETY ACT, STATES ARE WEIGHING ALL THE COSTS

by LIZ WIJNIARSKI

In 1981, 6-year-old Adam Walsh was abducted from a Florida mall, never to be heard from again.1 Walsh’s severed head was found two weeks later in a canal over one hundred miles away.2 The police determined Walsh had been abused and tortured.3 Two years later, serial killer Ottis Toole confessed to the crime.4 As Toole later recanted and was never tried in court because of a lack of physical evidence, Walsh’s parents struggled to receive closure.5 Toole eventually died in 1996 of liver failure while serving time in a maximum security
prison in Florida for a separate arson-murder. However, in December 2008, the Hollywood, Florida Police Department officially announced that Toole was in fact Walsh’s killer, and the case was closed. Hollywood police chief Chadwick Wagner announced at a press conference that “If Ottis Toole was alive today, he would be arrested for the abduction and murder of Adam Walsh.”

On July 25, 2006, the House of Representatives passed the controversial Adam Walsh Child Protection and Safety Act of 2006 (Act). The stated purpose of the Act is to protect the public, in particular children, from violent sex offenders by implementing a more comprehensive system for the registration of sex offenders. The Act mandates state conformity with various aspects of its national sex offender registration system. State failure to “substantially comply” with the provisions of the Act results in a 10 percent reduction of funding under the Omnibus Crime Control and Safe Street Act of 1968 (Byrne grant). However, some states have refused to activate portions of the Act and other states that are in compliance have already encountered a wave of litigation. With a compliance deadline of July 2009, states are carefully weighing the pros and cons of complying with the Act.

REACHING INTO TAXPAYER POCKETS: FINANCIAL COSTS OF THE ACT

An important consideration states are making is the financial cost of implementing the Act. The Washington D.C.-based Justice Policy Institute calculated that it will cost Illinois $20,846,306 to fulfill the Act’s requirements the first year of implementation. The estimated cost of implementing the Act takes into account court and administrative costs, law enforcement costs and new personnel. In contrast, by losing 10 percent of the Byrne grants, the state loses only $850,100. Thus, Illinois stands to save a significant chunk of money by cherry picking the parts of the Act it chooses to comply with.

ADDITIONAL BURDENS ON THE STATES: CONSTITUTIONAL CHALLENGES TO THE ACT

Come July, Illinois will most likely be out of compliance with the Act because it only adheres to some of its provisions. The Act stipulates that once a sex offender is registered with the state, his or her status is permanent. Conversely, Illinois currently allows for juveniles in good standing to petition for removal from the registry. To meet good standing eligibility, the sex offender
must keep their registration information current, complete a treatment pro-
gram and check in with a probation officer.\textsuperscript{19} Shauna Boliker, of the Cook
County Office of the State’s Attorney and Head of the Sex Crimes Unit, ac-
knowledges that this is a tough area of law and that there should be “some
uniformity but we need to look at juveniles as a different class from the adult
offender.”\textsuperscript{20}

Boliker’s doubts concerning downfalls of the Act’s rigid classification system
and its failure to account for individual circumstances are illustrated by the
story of Ricky. Ricky and Amanda began their consensual high school ro-
mance when they met at a club.\textsuperscript{21} Ricky thought they were both 16. However,
Amanda had lied and was actually 13.\textsuperscript{22} After engaging in a consensual sexual
relationship, Ricky was convicted of statutory rape because the law classified
Amanda as a minor who was legally unable to consent to the act.\textsuperscript{23} As a
registered sex offender, Ricky has been kicked out of high school, harassed by
strangers and neighbors, and is unable to get a job.\textsuperscript{24} Further, he is not allowed
to cross state lines without telling a parole officer, even for trivial matters such
as going to the mall.\textsuperscript{25}

Cory Rayburn Yung, Professor at John Marshall Law School and author of the
blog “Sex Crimes,” argues that the uniform standards of the Act fail to differ-
entiate among the diversity of sex offenses.\textsuperscript{26} According to the Act, individuals
convicted of kidnapping or false imprisonment of a minor without a sexual
element present must also register.\textsuperscript{27} The implications of this are illustrated in
People v. Fuller, an Illinois Appellate Court case in which the Act’s rigid classi-
fication system was upheld. In Fuller, the court upheld the lower court’s deci-
sion requiring a defendant to register as a sex offender although no claims of
sexual misconduct or even contact with the children were made against the
defendant.\textsuperscript{28} He was merely convicted of stealing a van occupied by two chil-
dren.\textsuperscript{29} After weighing the evidence, Presiding Judge Cohen determined that
promoting public safety was served by the registration system.\textsuperscript{30}

Illinois is not alone in its recent flood of litigation over the Act. Other states
are also experiencing a rise in their court and administrative costs as offenders
have started challenging the constitutionality of the Act’s classification system
in courts across the country. In Nevada, the American Civil Liberties Union
(ACLU) challenged the constitutionality of the Act on behalf of 12 anony-

194
restrictive.\textsuperscript{31} The ACLU argued that by classifying sex offenders into three tiers based on the crimes committed, punishments are not individually tailored.\textsuperscript{32} Nevada’s old system categorized sex offenders by their risk of reoffending.\textsuperscript{33} The consequences of the new system are extraordinary; registration on the sex offender list is for life and there is a heavy stigma attached to this label.\textsuperscript{34} As a result, a federal judge issued an order preventing Nevada’s sex offender law from being implemented until these Constitutional issues were resolved.\textsuperscript{35}

Another constitutional challenge prompted by the Act relates to its retroactive implementation. A February 2007 regulation by the Illinois Attorney General mandated that all convicted sex offenders register with the state, even those who were convicted before the passage of the Act.\textsuperscript{36} In \textit{U.S. v. Dixon}, defendants Dixon and Carr challenged their individual convictions for failing to register for interstate travel.\textsuperscript{37} As opposed to uniformly applying the Act’s provisions, the U.S. 7th Circuit Court elected to acquit Dixon but uphold Carr’s conviction.\textsuperscript{38} The Court’s decision to be flexible in applying the Act was based on the dates of Dixon’s and Carr’s individual charges, stating that parties need “reasonable time” to adapt to the Attorney General’s regulation.\textsuperscript{39} The Court’s holding reflects the analysis that in Dixon’s case, five months was a reasonable time to expect compliance with a regulation, and in Carr’s case, six weeks was not.\textsuperscript{40}

\textbf{TAKING PUNISHMENT OUT OF JUDGES’ HANDS: HOW THE ACT VIOLATES THE SEPARATION OF POWERS DOCTRINE}

Furthermore, because punishments are not being individually tailored and are mandated by Congress through the Act, critics argue that the separation of powers doctrine is not being met. Yung asserts that legislatively-mandated punishments are “taking it out of the judges’ hands and making it a one-sided spit ball.”\textsuperscript{41} This sentiment is echoed in a class action lawsuit filed in Ohio, which alleges that by allowing the Ohio Attorney General to engage in sentencing instead of a judge, the role of the judiciary is being encroached upon.\textsuperscript{42} The firm representing the appellant sex offenders announced that it intends to file similar motions attacking the Act on several fronts in other counties,\textsuperscript{43} and Communications Director for Ohio Attorney General Marc Dann said that several similar challenges to the Act have already been filed.\textsuperscript{44}
Yung believes that this is the only the beginning and that courts will soon be flooded with cases challenging the Act. While these lawsuits may result in the overbroad punishment of sex offenders, leading to appeals and the expenditure of more taxpayer money, arguably this inefficient and costly method of challenging the Act is the only way to distinguish the Ottis Toole's from the Rickys under its rigid provisions.


NOTES

2 Id.
3 Id.
4 Id.
5 Id.
6 Id.
8 Id.
10. Id.
11. Id.
12. Id.
14. Id.
15. Id. (based off Illinois' 2006 Byrne grant, which the U.S. House of Representatives estimates will be equivalent to the funding appropriated in 2006).
16. Id.
17. Id.
18. Telephone Interview with Shauna Boliker, States Attorney, Head of Sex Crimes Unit, Cook County (Nov. 5, 2008).
19. Id.
20. Id.
22. Id.
23. Id.
24. Id.
25. Id.
27. Walsh Act, supra note 9.
29. Fuller, 756 N.E.2d at 279.
30. Fuller, 756 N.E.2d at 732.
32. Id.
33. Id.
34. Walsh Act, supra note 9.
35. Id.
37. Id.
38. Id.
39. Id.
40. Id.
41. Telephone interview with Cory Rayburn Yung, supra note 26.
42. Challenges to the Adam Walsh Sex Offender Law: Ohio and Elsewhere, CLEVELAND-MARSHALL COLLEGE OF LAW LIBRARY BLOG, Nov. 16, 2008, http://cmlawlibraryblog.classcaster.org/blog/national/2008/06/10/challenges_to_adam_walsh_sex_offender_law_ohio_and_elsewhere; Lou Grieco, Attorney Challenges constitutionally of Walsh statute, DAYTON DAILY NEWS,
Loyola Public Interest Law Reporter


43 Id.
44 Id.
FROM BUSH TO OBAMA: THE DIRECTION OF EDUCATION

by Noah Hurwitz

In 2001, Congress passed the No Child Left Behind Act (NCLB), which included a requirement that school districts administer standardized tests to students to determine whether test scores are improving year to year, with the overall goal of achieving grade level proficiency in math and reading for every student by 2014.1 NCLB requires school districts to make “adequate yearly progress.”2 Failure to achieve “adequate yearly progress” puts the district at risk to lose federal funding and to be labeled as “failing.”3 Furthermore, parents are given the option to transfer their child to another school.4

After almost eight years, NCLB’s legacy on America’s public education system is still being debated. While NCLB is praised for narrowing the gap between white and minority students in some areas, it is also criticized for interfering with state and local control of public education.5 However, there is a general
consensus from the new Obama administration that changes are coming both to NCLB and to future federal government expenditures on education.

NEGATIVE REACTIONS TO NCLB

Originally, NCLB was designed to increase accountability and transparency in student academic performance by nationally standardizing educational goals. However, parents, teachers, and administrators have complained that the program fundamentally exposes public education failures, rather than increasing academic performance.6 U.S. Secretary of Education, Arne Duncan, criticized the academic benchmarks set forth by NCLB, saying that students may meet NCLB standards and still be “. . . woefully unprepared to be successful in high school and have almost no chance of going to a good university.”7

Dissatisfaction is evident in Minnesota, where two school districts recently sent a resolution to their state legislature urging them to withdraw from NCLB if the Act is not reformed by October 2010.8 The districts complained that the standardized testing required by NCLB does not account for vast student learning disparities among school districts throughout the state.9

Moreover, in Michigan, Republican U.S. Representative Pete Hoekstra introduced a bill to free states from NCLB mandates by allowing them to provide the U.S. Secretary of Education with a “declaration of intent” to take full responsibility for their students’ education, while still receiving federal support.10 Hoekstra criticizes NCLB for creating “a one-size-fits-all approach to education” that has only “. . . created more testing, more paperwork, and has cost schools more money to comply with costly federal mandates.”11

STIMULUS SETS ASIDE MONEY FOR EDUCATION

As pledged by President Obama shortly after his inauguration, Congress recently passed a $787 billion economic recovery plan, allocating almost $100 billion to public education.12 The Department of Education vowed to disperse half the stimulus money to states almost immediately and the rest within six months.13 Characterized more as “spending,” than “stimulus” money, the influx of funds are designed to increase early childhood education, prevent teacher layoffs, overhaul aging schools, and educate low-income children.14
The stimulus money will also serve low-income college students by increasing the maximum Pell Grant from $4,731 to $5,550 a year.\textsuperscript{15} In Michigan, the legislature will receive about $2.5 billion for education from the stimulus and will direct it towards bridging shortfalls in school district budgets and programs to help poor, disabled, and other at-risk students.\textsuperscript{16} Virginia will receive $1.5 billion for similar purposes, but local officials worry the money will not be enough to stave off future budget cuts if the economy does not improve next year.\textsuperscript{17}

NCLB AND EDUCATION MOVING FORWARD

While the jury is still out on NCLB’s impact, it is apparent that education under Obama and Duncan is moving in a different direction. As a first step, Duncan will likely rename the oft-criticized NCLB in order to erase the stigma associated with the program’s name.\textsuperscript{18} From there, the new administration has promised more flexible goals, innovative approaches, and wider funding for public education.\textsuperscript{19}

Recently, Duncan encouraged underfunded school districts to apply for the “Race to the Top Fund,” or the roughly $5 billion set aside in Obama’s budget for schools “willing to challenge the status quo.”\textsuperscript{20} Also referred to as the “Flexible Fund,” the Department of Education will award money to states on a discretionary basis, as opposed to the more rigid formulas of NCLB.\textsuperscript{21} U.S. Representative Christopher Murphy has already announced that he secured a $262,000 federal grant from Duncan’s new fund to build a family literacy center in Danbury, Connecticut, intended to foster parental and community support of early childhood education.\textsuperscript{22}

The Danbury project underscores Duncan’s pledge to support more creative approaches to education and reflects the increased spending expected from the new administration.\textsuperscript{23} Given politicians’ general disfavor with the current NCLB, expectations for Obama’s education platform will likely be higher than they have been in previous years.
NOTES

2 Id.
3 Id.
4 Id.
9 Id.
11 Id.
17 Harrison, supra note 13.
19 Id.
23 Id.
A CHANGE FOR THE BETTER?: THE ADA AMENDMENTS ACT OF 2008

By JASON LEWIS

Consider the following scenario: James Todd, a stocker at a local factory, suffered from epilepsy.\(^1\) Although he took medication to control his condition, he continued to experience seizures on a weekly basis.\(^2\) His medication caused him to have decreased cognitive functioning and memory problems.\(^3\) Despite his condition, a U.S. District Court ruled that Todd was not substantially limited in a major life activity. Therefore, he did not qualify as disabled under the Americans with Disabilities Act (ADA), and was not entitled to the Act's legal protections.\(^4\)

Court decisions such as Todd's case resulted in many disability advocates fearing that disabled individuals "could be forced to choose between treating their..."
conditions and forfeiting their protections under the ADA, or not treating their conditions and being protected.”

In response to this concern, Congress passed the ADA Amendments Act of 2008 (ADAAA), which became effective on January 1, 2009. Congress, among other goals, aimed to restore the original intent and protections of the ADA by providing broad coverage to disabled persons.

Notwithstanding Congress' intent, however, disabled individuals and advocacy groups still have a lingering question: while the new bill professes to expand coverage, will courts follow suit and interpret the ADAAA accordingly?

THE ADA AMENDMENTS ACT

President George H.W. Bush signed the original ADA into law on July 26, 1990. Through the legislation, Congress aimed to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” As such, Title I of the Act prohibits private employers from discriminating against qualified individuals with disabilities in all terms, conditions, and privileges of employment.

In the text of the Act, Congress specifically defines a disabled individual as: (1) a person that has a “physical or mental impairment that substantially limits one or more major life activities”; (2) has “a record of such an impairment”; or (3) is “regarded as having such an impairment.”
However, Congress did not define “substantially limits” or “major life activities” in the Act. U.S. District Courts and Courts of Appeals varied in their interpretation of these two terms until the Supreme Court addressed them in two ADA cases: *Sutton v. United Air Lines, Inc.* in 1999 and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* in 2002.\(^\text{12}\)

In *Sutton*, the Court ruled that when determining whether one’s impairment “substantially limits” a “major life activity,” it must look to the corrective measures that the individual uses in treating the impairment.\(^\text{13}\) Thus, because the plaintiffs in *Sutton* could fully correct their visual impairments with glasses or contact lenses, they were not substantially limited within the meaning of the Act.\(^\text{14}\)

In *Toyota*, the Court ruled that the terms “substantially” and “major” “need[ed] to be interpreted strictly to create a demanding standard for qualifying as disabled.”\(^\text{15}\) Moreover, the Court stated that in order to be substantially limited in performing a major life activity under the ADA, “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”\(^\text{16}\)

Congress specifically rejected the rulings of these two cases in the ADAAA. In reference to *Sutton*, Congress directly addressed mitigating measures.

“The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.”\(^\text{17}\) Under the Amendments, the Court in *Sutton* now would not consider the plaintiffs’ use of glasses or contact lenses when determining whether they were substantially limited under the Act.

In reference to *Toyota*, Congress stated that judicial decisions “ha[ve] created an inappropriately high level of limitation necessary to obtain coverage under the ADA. . .The definition of disability in this Act shall be construed in favor of broad coverage of individuals.”\(^\text{18}\)
HOW HAVE ADVOCACY GROUPS RESPONDED TO THE NEW AMENDMENTS?

Barry Taylor, Director of Equip for Equality, a disability-rights advocacy organization, states that the ADAAA restores Congress’ initial intent of eliminating disability discrimination.

“Everyone was optimistic when the ADA was first passed; Congress made findings that we thought would redress disability discrimination. However, over time, courts began to construe the statute so narrowly that it negated the intent of Congress.”

“People with disabilities will [now] have their claims decided on the merits of the case rather than on technicalities,” Taylor said.

Andrew Imparato, President of the American Association of People with Disabilities, also expressed his satisfaction with the ADAAA.

“This is the most important piece of disability legislation since the enactment of the ADA in 1990,” Imparato said.

Most employer-advocate groups generally support the new amendments.

The U.S. Chamber of Commerce, an organization that represents businesses, stated that the new legislation “strikes the right balance between protections for individuals with disabilities and the obligations and requirements of employers.”

Randel Johnson, vice president of Labor, Immigration and Employee Benefits at the U.S. Chamber of Commerce, stated that “[a]fter many months of negotiation, the legislation represents a sound compromise between the Senate, the House, the business community, and the disability community.”

Despite the overwhelming support for the ADAAA, some employer-advocate groups express skepticism over the broad coverage that the Act may afford disabled employees.

Andrew Grossman, Senior Legal Policy Analyst for The Heritage Foundation, stated that “Under [the ADAAA], most employees could claim they have an
impaired, such as asthma or chronic stress, and sue if they were either laid off or not hired in the first place, contending discrimination.”

Grossman is also concerned that the ADAAA may disproportionately impact small business. “Big businesses have the structure in place – general counsel offices, compliance experts, disability consultants – to make these accommodations in a relatively efficient manner. For a small business, however, the costs of compliance on a per-employee basis are far higher,” Grossman said.

“To accommodate a single disabled employee, a small employer may need to bring in a number of outside experts, including a labor lawyer, an ADA consultant, and even an ergonomics expert or engineer,” Grossman added. “By requiring the expertise of outside professionals, such laws put small businesses at a competitive disadvantage to larger firms, which can spread increased costs across their entire workforce.”

Nevertheless, employment law professor Michael Zimmer states that the overall bipartisanship of the bill made its signing into law less contentious.

“Since both employee and employer rights’ groups were [in support of the bill,] the [Bush] administration had no reason not to go along with it.”

WHAT DOES THE FUTURE HOLD?

While courts have yet to apply the ADAAA to disability discrimination cases, practitioners feel that the ADAAA will encourage more claimants to come forward.

“The number of cases that we have seen has increased dramatically,” Taylor said. “[Whereas before] many private attorneys were not taking many disability cases because of their difficulty, the number now will likely go up.”

Republican Representative Roy Blunt of Missouri expresses that the ADAAA will be a positive factor for the workforce. “[The bill] puts people to work, creates opportunity and makes America a more productive country,” Blunt said.

Still, Zimmer questions how the courts will interpret the new ADAAA. “Before, courts were frightened about [interpreting the statute broadly] because
they did not want to open the door to unending litigation. Given Congress’ instructions to interpret the statute broadly, it will be interesting to see how courts now treat discrimination claims.”

Thus, it will be up to the courts to execute Congress’ mandate to provide broad coverage for disabled workers.

NOTES

2  Id. at 449.
3  Id. at 453-54.
7  Id.
13  Sutton, 527 U.S. at 488-89.
14  Id.
15  Toyota, 534 U.S. at 197.
16  Id. at 198.
17  ADAAA, supra note 6.
18  Id.
19  Interview with Barry Taylor, Legal Advocacy Director, Equip for Equality, in Chicago, Ill. (Feb. 15, 2009).
20  Id.
21  Reuters, supra note 5.
23  Id.
25  Id.
26  Id.
27 Interview with Michael Zimmer, Employment Law Professor, Loyola University Chicago School of Law, in Chicago, Ill. (Feb. 15, 2009).
28 Interview with Barry Taylor, supra note 19.
30 Interview with Michael Zimmer, supra note 27.
FEDERAL EXTENSION OF UNEMPLOYMENT COMPENSATION IS SIGNED INTO LAW: IMPACT ON GROWING NUMBER OF UNEMPLOYED AMERICANS

by Angie Robertson

Every Monday since April 2008, a small group of seasoned Chicago-area business people have met to discuss career development issues. These events, which may appear to outsiders as typical corporate board meetings, are actually job-search strategizing sessions of the Executive Network Group of Greater Chicago section for unemployed white-collar workers. Jim Moor-
man, who arranged for the group to meet at his church, lost his job 16 months earlier as a senior engineer at Motorola, where he worked for 33 years and was making more than $100,000 annually.³

Unfortunately, unemployed workers like the ones in this group are no longer a rarity. The most recent figures from the U.S. Bureau of Labor Statistics indicate that the number of long-term unemployed, those jobless for 27 weeks or more, nearly doubled between February 2008 and February 2009, increasing from 1.3 million to a total of 2.9 million.⁴ In Illinois, the total number of unemployed in December 2008 was 505,300, exceeding 500,000 for the first time since February 1992.⁵

FEDERAL LEGISLATIVE RESPONSES & STATE REACTIONS

On November 20, 2008, former President George W. Bush signed the Unemployment Compensation Extension Act of 2008 (Act), which increases the weeks of benefits available to workers who run out of their state unemployment insurance benefits.⁶ The Act was introduced in the House on September 8, 2008 and swiftly passed by a 368 to 28 majority on October 3, 2008.⁷ The urgency behind the Act continued as it survived an 89 to 6 vote in the Senate on November 20, 2008 and was signed by former President Bush on the same day.⁸

The new legislation allows an extension from 27 weeks to 33 weeks of unemployment benefits to those who qualify under their state laws.⁹ Since unemployment benefits are primarily addressed through state agencies, qualification standards vary from state to state.¹⁰ Funding for unemployment is raised through state and federal unemployment insurance taxes on employers.¹¹ State tax rates vary from state to state, as does the amount of each worker’s income that is subject to the tax.¹² Twenty states with industries that have been hit particularly hard by the recession are having trouble funding unemployment insurance, and six states are already borrowing from the federal government to pay benefits to laid-off workers, reports Rick McHugh, Midwest Coordinator for the National Employment Law Project, a group advocating for modernizing the unemployment compensation system.¹³ With revenues vanishing, the states collectively face a $70 billion budget gap this year.¹⁴ To address this gap, half of all states have already started cancelling infrastructure projects, cutting health-care benefits or laying off workers.¹⁵
Implementation of the Act will require additional federal money be contrib-
uted to state unemployment funds. Emergency funding to state unemploy-
ment funds was approved as a part of the recently-passed economic stimulus
plan. However, some Republican governors, such as Governor Bobby Jindal
of Louisiana and Governor Charlie Crist of Florida, have stated that they may
not accept the funds due to ideological disagreement with the current Demo-
cratic leadership. These governors contend that increased government
spending will spur the increase of business taxes and, thus, increase lay-offs of
employees.

**WHITE-COLLAR UNEMPLOYMENT**

Meanwhile, white-collar unemployment rose to 4.6 percent in December of
2008, up from 3 percent the year before. Lawrence Mishel, president of the
Economic Policy Institute, says white-collar unemployment has risen faster in
the past year than in any other recession dating to at least the 1970s. White-
collar workers also tend to form a disproportionate share of the long-term
unemployed. Thomas Lam, Economist at the Singapore-based United Over-
seas Bank, explains that current white-collar workers who lose their job have
just a 22 percent chance of landing a new job within the same month that they
lost their previous job. Figures like this indicate that this is the worst market
for job seekers than any since the 1990s.

Unfortunately for many white-collar workers, many jobs will not be re-
placed. For example, the U.S. has been producing too many MBAs for de-
cades and not enough health-care employees. Meanwhile, the financial sector
is shrinking and there is a large need for health-care workers. With few jobs
available, “people are moving down the pay scale,” says Dean Baker, Co-Direc-
tor of the Center for Economic and Policy Research, a think tank in Washin-
gton, D.C.

**EMPLOYED PART-TIME FOR ECONOMIC REASONS**

The Executive Network Group of Greater Chicago section for unemployed
white-collar workers co-leader Bob Roeder has two children and was laid off
two years earlier from a sales management position worth almost six figures,
but has now taken up part-time work plowing snow. An increase in the
number of Americans working part-time makes unemployment benefits less available to the current workforce than during the last major job recession in the early 1990’s. Nearly two-thirds of part-time workers are ineligible for unemployment benefits under state unemployment laws. In February 2009, the number of people who worked part-time for economic reasons raised nationally by 787,000 since the previous month and 3.7 million since February 2008, reaching a national total of 8.6 million. This category includes people like Mr. Roeder, who would like to work full-time, but are working part-time because their hours had been cut back or because they were unable to find full-time jobs.

The 33-week extension for the workers who qualified for the Unemployment Compensation Extension Act ends in March or April of 2009, when benefits will discontinue unless Congress passes additional legislation to continue lengthen the extension. While career changes and job retraining may be necessary for some workers after a recession, extensions of unemployment benefits continue to be the most logical economic solution during difficult times, explains Loyola University of Chicago Graduate School of Business Economics Chair Marc Hayford. “Extending of unemployment benefits during a recession is not only the humane thing to do,” he states, “but it helps dampen the drop in spending and is good for the economy.”

NOTES

2 Id.
3 Id.
7 Id.; (Bill status summary including voting records is available online the Library of Congress website, www.thomas.gov).
8 Id.
9 Unemployment Compensation Extension Act, supra note 6, § II(1),(2).
10 Lou, supra note 1.
11 National Unemployment Law Project, Question & Answer The Unemployment Insurance Modernization Act: Filling The Gaps In The Unemployment Safety Net While Stimulating The
Loyola Public Interest Law Reporter

12 Id.
13 Id.
14 Id.
15 Id.
16 National Unemployment Law Project, supra note 11.
19 Id.
20 Lou, supra note 1.
21 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 National Unemployment Law Project, supra note 11.
28 Id.
29 Lou, supra note 1.
30 Id.
32 Id.
33 Id.
34 Interview with Marc Hayford, Economics Chair, Loyola University Chicago Graduate School of Business, in Chi., Ill. (Mar. 30, 2009).
35 Id.
The city of Chicago passed legislation necessary to establish the legal framework for the successful staging of the 2016 Olympic Games. With the passage of the comprehensive Olympic Approvals Ordinances, the Chicago City Council authorized Mayor Richard M. Daley to sign the Host City Contract and all other agreements necessary for hosting the Games, including the Joint Marketing Programme Agreement, which authorizes various parties to cooperate in marketing their products and/or services for a mutual benefit.
Loyola Public Interest Law Reporter

The ordinances include the City of Chicago Olympic Commitments Agreement, which sets forth the city’s guarantees as required by the International Olympic Committee (IOC), and the 2016 Olympic and Paralympic Games Governmental Cooperation Agreement, which establishes hosting commitments between the city of Chicago and its many governmental partners. Part of the legislation passed by the City Council includes a $500 million guarantee of taxpayer money against any shortfall in the Olympic Games operations.

Like most sporting events, the modern day Olympic Games are big business. As such, Mayor Richard M. Daley and Chicago 2016 Chairman Patrick Ryan created a comprehensive bid detailing the financial and logistical components of a potential Chicago Olympics. On January 12, 2009, the Chicago City Council approved an ordinance establishing a new Tax Increment Financing (TIF) District to help pay for the proposed Olympic Village in Bronzeville, while also reaffirming the city’s $500 million pledge to cover any shortfall. A TIF allows the City of Chicago and other Illinois cities and towns to generate property tax dollars for economic development in designated geographic areas and then re-invest the new property tax dollars generated from the designated TIF district for a 20-30 year period.

CHICAGO 2016 PROPOSAL

The Chicago 2016 Proposal (Proposal) projects an Olympic budget of $5 billion, including $1.1 billion for the construction of the Olympic Village, $366 million for the Olympic Stadium, and $80 million for an aquatics center. Initially, Mayor Richard M. Daley stated the funding would come exclusively from private investors, with Chicago 2016 projecting a $525 million operating surplus, but that changed when United States Olympic Committee Vice President Bob Ctvrtlik indicated that a large scale project like the Olympics could not proceed without the guarantee of public money. The Proposal also includes a financial safety net of $450 million, $375 million in IOC cancellation insurance and another $500 million in insurance coverage. The Proposal was submitted before the Illinois legislators approved an increased state financial guarantee from $150 million to $250 million. This new funding currently awaits Governor Patrick Quinn’s signature.

The likelihood of tapping into the $500 million taxpayer guarantee is virtually impossible, given that no Olympic Games have experienced an operating over-
run since 1972. However, it is the construction costs – not the operating budget – that are of greater concern.\textsuperscript{12} As the Community Media Workshop’s Curtis Black reminds us, Mayor Richard M. Daley’s track record of predicting, and sticking to, project budgets is less than perfect.\textsuperscript{13} Here are a few examples:\textsuperscript{14}

<table>
<thead>
<tr>
<th>Project</th>
<th>Original Cost</th>
<th>Final Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Soldier Field</td>
<td>$587 million</td>
<td>$655 million</td>
</tr>
<tr>
<td>Millennium Park</td>
<td>$150 million (no public financing)</td>
<td>$475 million (more than half public financing)</td>
</tr>
<tr>
<td>O’Hare Expansion</td>
<td>(first phase) $6.6 billion</td>
<td>$8 billion</td>
</tr>
<tr>
<td>Block 37 superstation</td>
<td>$213 million</td>
<td>Has reached $320 million (project now stalled)</td>
</tr>
</tbody>
</table>

If the Chicago 2016 bid is successful, the city plans to build one of the major stadiums in Washington Park – one of Chicago’s largest green spaces.\textsuperscript{15} Chicago’s bid calls for the erection of a temporary 80,000-seat stadium\textsuperscript{16} that will be reduced to a 5,000-seat amphitheater after the games are over.\textsuperscript{17} If this stadium is built, the 350-acre park that hosts softball, baseball, soccer, cricket, and tennis leagues will be off-limits to local athletes, picnickers, and residents for four years.\textsuperscript{18}

**Support and Concerns for Chicago Olympics**

White House Chief of Staff Rahm Emmanuel, a native Chicagoan and former Illinois Congressman, said “bringing the 2016 Olympics to our nation’s third coast will be a boom for Chicago and a gold medal for the United States.”\textsuperscript{19} Rep. Will Burns (D-Chicago), whose South Side district would house the Olympic Village and several event venues, said the $500 million taxpayer guarantee is viewed as an important component to have in place by the time the Olympics committee reviews the Chicago proposal in early April.\textsuperscript{20}

Although legislative and public support for Chicago’s bid remains high, some community members are voicing their opposition to public tax elements of the plan. In a recent *Chicago Tribune* article, 64 percent of respondents support Chicago’s 2016 bid, but 75 percent opposed the use of taxpayer dollars to pay for any shortfalls.\textsuperscript{21}
Some residents of the South Side community are expressing fears that neighborhood redevelopment, buoyed by funding to build the Olympic Stadium, will push them out of the area, while environmentalists fear that the bulldozing and paving will cause permanent damage to the ecosystem. If Chicago’s bid is successful, the political, legislative, and legal battles over the use of public lands and funds will escalate as Chicago begins construction for the Olympic Games.

Mayor Daley believes “the 2016 games will leave a lasting legacy in the forms of affordable housing (and) athletic facilities.” However, some groups opposed to the Olympic bid have claimed just the opposite, that a concentration of new development, designated TIF District and sports facilities on the Near South Side would drive up home prices and displace low-income residents. “There’s ways that you can structure these types of developments that could help . . . [to preserve]. . . and [create new]. . . housing,” says Kevin Jackson, Executive Director of the nonprofit Chicago Rehab Network.

Although the Chicago Rehab Network currently has no position on how the Olympics could affect affordable housing, it is making people aware of the potential consequences. “We’ve been really committed at Rehab Network to create as much transparency and understanding about what some past experiences around the globe have been,” Jackson says.

As of now, the Chicago 2016 Olympic bid has not affected affordable housing markets or used the $500 million guarantee of taxpayer money.

NOTES

2 Id.
3 Id.
4 Id.
9 Id.
11 Id.
14 Id.
16 Id.
18 Joravsky, supra note 15.
22 Id.
26 Id.
27 Id.
28 Id.
29 Id.
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