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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Letter from the Editor

As future lawyers, we are called to protect the interests of our clients to the furthest extent possible under the law. This task has become all the more daunting as clients face increasingly limited resources and expanding governmental restrictions. We strive to ensure that our clients’ civil rights and liberties are protected. Even in the fight for the interests of our clients, however, we recognize that their interests are often at odds with greater society. Does our advocacy benefit one client at the expense of the rest of society? The challenge we confront is how we define our clients and how we reconcile their interests with those of the community. In this Fall issue of the Public Interest Law Reporter, we explore the dichotomy from a civil perspective.

We begin with one of the most relevant and pressing issues facing Americans today—adequate and affordable health care. The lead feature article looks at the tradeoff between a plaintiff’s right to collect medical malpractice damages and society’s interest in providing adequate and affordable health care for all Americans. Our PILR writer reports on potential solutions to the problem and weighs the costs of limiting access to justice against the benefits of reducing health care costs.

In our next feature, we further examine the interchange between individual and societal interests in health care. The article focuses on recent litigation, challenging Myriad Genetics patents on two human genes linked to breast cancer. Do patents on genetic material infringe the free flow of information and research or protect the interests of researchers and scientists? The ACLU
and Public Patent Foundation’s ground-breaking claims bring the ethical issues of patenting genetic material to the forefront.

Our PILR team reports on another hotly debated issue in need of reform: the tension between immigrant rights and national security. As a country comprised of immigrants, how do we bridge the gap between the rights of immigrants and the right to be secure? One writer examines the effects of legislation mandating the use of an internet-based identification system, E-Verify, that reviews the immigration status of federal contractor employees. In another piece, we see how U.S. immigration policy impacts the science and technology industry and the flow of foreign student enrollment in American graduate institutions.

Beyond these two core topics, our PILR writers bring to light the civil aspects of less publicized public interest issues, which nevertheless demand our attention. One of our feature articles highlights how law enforcement attempts to regulate the sex industry’s expansion into the internet realm. Another article, stressing the particular vulnerabilities of children, questions where we draw the line on the authority of school personnel to control youth with disabilities. Finally, a PILR writer reports on a recent Illinois lawsuit brought on behalf of all transgender individuals. The suit challenges state restrictions to amend a person’s birth certificate to reflect his or her gender identity.

As you read the articles that follow, we invite you to reflect on the dichotomy between representing the client and the interests of greater society. We hope your reflection will allow you to explore a new outlook. This issue of PILR will be complemented with its criminal counterpart in the Spring. For now, we hope you enjoy the “civil” issue and look forward to your continued support.

Sincerely,

Cerise Fritsch
Editor in Chief
MEDICAL MALPRACTICE REFORM: A SILVER BULLET FOR THE HEALTH CARE CRISIS?

by IAN BARNEY

Political strategy has catapulted medical malpractice reform to the forefront of the health care debate. Some see reform as a panacea, arguing that reforming the medical liability system would so significantly reduce health care costs that it should be central to any health care reform legislation. Others question the notion that malpractice reform would result in any meaningful cost-savings.

The centerpiece of any traditional reform package would likely be a cap on the amount of damages plaintiffs could recover in malpractice suits. By limiting
award size, damage caps provide built-in cost-savings that allow malpractice insurers to provide lower premiums.  

Caps may provide further savings by reducing the number of non-meritorious claims filed. Also, by increasing the predictability of malpractice costs, caps could limit the practice of defensive medicine.

Opponents of reform believe that, in the end, damage caps would reduce the quality of healthcare and restrict injured patients’ access to just compensation without reducing overall health care costs. Essentially, if cost-savings were not significant, the reforms would not be worth the limitations imposed on plaintiffs.

THE CASE FOR MALPRACTICE REFORM

The purpose of damage caps, and most other traditional medical malpractice reforms, is to reduce doctors’ malpractice insurance premiums by reducing litigation costs and increasing the predictability of malpractice claim outcomes. Primarily, caps reduce costs by limiting plaintiffs’ awards in malpractice cases.

Damage caps may also provide additional cost savings by discouraging attorneys from filing non-meritorious cases. Proponents argue that caps limit the incentive for attorneys to take on numerous medical malpractice cases, regardless of merit, in hopes that success in one case will generate a windfall.

By reducing litigation costs and increasing the predictability of malpractice claim outcomes, insurers should be able to provide cheaper malpractice insurance to doctors. One corollary of cheaper insurance is a reduction in the practice of defensive medicine. In theory, without the fear of crippling premiums caused by expensive malpractice claims, doctors would no longer order tests and procedures that are medically unnecessary. Eliminating this waste could result in significant health care savings.

A study by the Massachusetts Medical Society supports this idea. The study concluded that 83 percent of doctors in Massachusetts engage in defensive medicine to avoid medical malpractice liability.

Recently, House Republican Leader John Boehner of Ohio and Sen. Jon Kyl, R-Ariz., postulated that Americans could save over $100 billion a year by re-
Reducing defensive medicine costs through effective medical liability reform.13 “Almost everybody agrees that we can save between $100 billion and $200 billion if we had effective medical malpractice reform,” Sen. Kyl stated.14

However, Dr. Michelle Mello, Director of the Program in Law & Public Health for the Harvard School of Public Health, estimates that defensive medicine costs total approximately $20 billion a year.15 While her estimate may be lower than Boehner’s and Kyl’s, Mello agrees that there are savings to be had.

Though a hot target for cost-savings, many experts say that not all defensive medicine is bad. Tom Baker, a professor at the University of Pennsylvania Law School, says that the fear of malpractice liability forces doctors to engage in responsible behaviors, such as carefully examining patient records and spending more time with patients.16

Also, every extra test and procedure that doctors order is not necessarily linked to fear of malpractice liability. In a 2004 report, the Congressional Budget Office (CBO) found that “some so-called defensive medicine may be motivated less by liability concerns than by the income it generates for physicians or by the positive (albeit small) benefits to patients.”17

Nonetheless, eliminating health care costs by reducing both insurance premiums and excess defensive medicine costs is expected to produce at least some savings.18

Sen. Kyl points to Texas’ malpractice reforms as a case study. In 2003, the Texas legislature instituted a $250,000 cap on non-economic damages in medical malpractice cases involving physicians and a $1.6 million cap on economic damages.19 In 2007, the state reported a 21.3 percent drop in malpractice insurance premiums.20 The number of claims filed against physicians dropped from 6,038 in 2005 to 5,211 in 2006.21

After instituting a $500,000 cap on non-economic damages in 2005, Illinois saw an even more precipitous decline in the number of claims filed. In 2006, medical malpractice lawsuits in Cook County dropped 25 percent from the previous year.22 The American Medical Association contends that because of the cap some doctors in Illinois have experienced a 5 to 30 percent reduction in premiums.23
A damage cap in Georgia produced similar results. According to the Medical Association of Georgia, since Georgia’s state legislature instituted a damage cap in 2005, the number of malpractice claims filed has fallen by 36 percent and malpractice insurance premiums have dropped by 18 percent.24

**HOW MUCH WOULD MEDICAL MALPRACTICE REFORM SAVE?**

Although there are savings to be found in imposing damage caps, the efficacy of medical malpractice reform as a health care “silver bullet” is hotly disputed.

Dr. Mello disputes the idea that medical malpractice reform is a cure-all.25 According to her, although damage caps do provide a statistically significant reduction in malpractice costs, caps are relatively limited in their ability to bring down health care costs in the aggregate.26

Why are caps so limited in their effect? The CBO estimates that in 2009 the direct costs of the medical malpractice system will only total approximately $35 billion, or about 2 percent of total health care expenditures.27 These direct costs include malpractice insurance premiums, settlements, awards and administrative costs not covered by insurance.28

This means that even if malpractice insurance premiums were reduced by 25 to 30 percent, the reduction in overall health care spending would be miniscule – somewhere around 0.5 percent.29 The CBO also predicts that any savings reaped from reducing defensive medicine would be “very small.”30 Thus, even when combined with savings from defensive medicine, medical malpractice reform barely makes a dent in overall health care spending.

The CBO also points out that much of these prospective savings have already been realized because states have implemented their own reforms.31 According to the National Conference of State Legislatures, over thirty states currently have some form of a statutory damage cap or an impediment to receiving non-economic damages.32

**INJURED PATIENTS AND ACCESS TO COMPENSATION**

Though Sen. Kyl may view current medical malpractice compensation as “jackpot justice,”33 a study by the Department of Justice showed that in 2005
medical malpractice plaintiffs prevailed in state court trials only 22.7 percent of the time.34

Dr. Mello believes that “there are really too few claims,” and that patients should have increased access to compensation.35 Indeed, only about 2 percent of medical malpractice occurrences lead to a malpractice claim.36 For that reason, Dr. Mello argues for a system of health courts, where panels of expert judges would decide compensation for injured patients.37

H. Thomas Wells, Jr., former President of the ABA, argues: “The work of neutral scholars provides strong and objective evidence that caps discourage lawyers from filing meritorious malpractice cases, functionally depriving . . . persons of their day in court.”38 For the ABA, the reduction in access to courts is not worth the small impact that reform would have on overall health care costs.39

Attorney Barry Chevitz, a partner at Corboy & Demetrio, a prominent Chicago personal injury law firm, echoes these sentiments. According to Chevitz, expenses associated with litigating medical malpractice claims are onerous. “I have never tried a medical malpractice case for less than $100,000 in costs,” Chevitz states.40

Attorney Chip Berry, another partner at Corboy & Demetrio, says, “[t]he costs of bringing [malpractice] suits and pursuing them is very high. Consequently, many meritorious cases with less-than-catastrophic injuries are not filed at all.”41

The ABA supports this contention. It argues that the precipitous decline in the number of medical malpractice cases filed in Illinois, following the 2005 damage cap, resulted from meritorious cases going unfiled.42

In addition to calling into doubt the wisdom and efficacy of medical malpractice reform, plaintiffs’ attorneys have challenged the constitutionality of damage caps.

Currently, 4 states have constitutional provisions proscribing damage caps. Five state supreme courts have declared damage caps unconstitutional.43 There are also cases challenging the constitutionality of damage cap statutes currently pending in front of the Supreme Court of Georgia44 and the Supreme Court
of Illinois.\textsuperscript{45} This is the second time in a little over a decade that the issue has been before the Supreme Court of Illinois; in 1997 the Supreme Court of Illinois declared a statutory damage cap unconstitutional.\textsuperscript{46}

**PRACTICAL POLITICS AND THE FUTURE OF MEDICAL MALPRACTICE REFORM**

It is questionable whether traditional medical malpractice reform is the “silver bullet” to solving the economics of the health care crisis. Yet reform may be the “silver bullet” needed to strike grand compromise between Democrats and Republicans on health care reform.

In October, a major health care bill containing no significant malpractice reforms hit the floor of the Senate.\textsuperscript{47} Not surprisingly, the bill squeaked out of the Senate Finance Committee with only one Republican vote.\textsuperscript{48} Such a slim consensus poses serious problems for a bipartisan reform package.\textsuperscript{49}

Passing any sort of health care legislation will require that the Democrats garner 60 votes to defeat a Republican filibuster. Medical malpractice reform may be the olive branch needed to achieve this. Former Sen. Bill Bradley recently proposed such a trade off: the Democrats get to overhaul the health care system and the Republicans receive major medical malpractice reforms.\textsuperscript{50}

Though this proposal may be the key to generating historic compromise, any medical malpractice reform including damage caps seems unlikely.

President Obama, despite expressing interest in reform, has been adamant in his opposition of damage caps.\textsuperscript{51} Instead, the president has suggested federally funded state programs that experiment with alternative malpractice reforms such as Certificate of Merit programs and early disclosure models.\textsuperscript{52}

Certificate of Merit programs would require an individual to obtain an affidavit issued by experts or a panel of doctors stating that the individual’s malpractice claim has merit before the case can proceed to court.\textsuperscript{53} Early disclosure models would encourage doctors to disclose medical errors and apologize where appropriate, and the case would be sent to mediation before entering the civil court system.\textsuperscript{54}
Though significant, these proposals are likely inadequate when it comes to gathering health care reform support from Republicans whose mantra has been “oppose, oppose, oppose.” Republicans are looking for more comprehensive and systematic reform involving damage caps. Until they achieve it, their mantra is unlikely to change.

While the politics of malpractice reform is certainly messy, it is clear that any successful malpractice reform would have to strike a delicate balance between reigning in unnecessary health care costs and ensuring that medical malpractice victims have adequate access to justice.

NOTES
2 Telephone Interview with Dr. Michelle Mello, Dir. of Program in Law & Public Health, Harvard School of Public Health (Sept. 14, 2009).
4 Telephone Interview with Dr. Michelle Mello, supra note 2.
5 Id.
6 Garber, supra note 3; Letter from Douglas W. Elmendorf, Director, Cong. Budget Office, to Senator Orrin G. Hatch, supra note 3.
10 LIMITING TORT LIABILITY FOR MEDICAL MALPRACTICE, supra note 8 at 2-3; Garber, supra note 3.
11 Garber, supra note 3; Eviatar, supra note 1.
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14 Hart, supra note 13.

15 Eviatar, supra note 1.

16 Id.

17 LIMITING TORT LIABILITY FOR MEDICAL MALPRACTICE, supra note 8 at 6.

18 Eviatar, supra note 1.


20 Id.


25 Telephone Interview with Dr. Michelle Mello, supra note 2.

26 Id.


28 Id.

29 LIMITING TORT LIABILITY FOR MEDICAL MALPRACTICE, supra note 8 at 6.

30 Id.


35 Telephone Interview with Dr. Michelle Mello, supra note 2.

36 Eviatar, supra note 1.

37 Telephone Interview with Dr. Michelle Mello, supra note 2.

38 Amicus Curiae Brief and Argument of the American Bar Association, supra note 22 at 6.


40 Email Interview with Barry R. Chevitz, Partner, Corboy & Demetrio (Sept 30, 2009).

41 Email Interview with Chip Barry, Partner, Corboy & Demetrio (Sept 30, 2009).

42 Amicus Curiae Brief and Argument of the American Bar Association, supra note 22 at 7.
43 National Conference of State Legislatures, *supra* note 32.
48 *Id.*
49 *Id.*
53 *Id.*
54 *Id.*
CAN PATENT PROTECTIONS TRAMPLE CIVIL LIBERTIES?
THE ACLU CHALLENGES THE PATENTABILITY OF BREAST CANCER GENES

by Ann Weilbaecher

A landmark lawsuit headed by the American Civil Liberties Union (ACLU) challenges the constitutionality and validity of patents on two human genes linked to inherited breast and ovarian cancer, BRCA1 and BRCA2.¹ According to the ACLU, gene patents “undermine the free exchange of information and scientific freedom, bodily integrity, and women’s health.”² The ACLU argues that the contested gene patents create a monopoly that illegally
limits women’s health care options, interferes with diagnostic testing, and stifles research.\(^3\)

The defendants argue that without intellectual property protection, companies will not make the necessary financial investments to validate genetic tests for diseases, which can cost millions of dollars.\(^4\) The defendants contend that “the patent system has worked exactly as it was designed to do” by rewarding the defendants’ landmark discoveries and encouraging life-saving research.\(^5\)

The ACLU’s suit organized over 150,000 scientists, physicians, activists and cancer patients as plaintiffs in the District Court for the Southern District of New York.\(^6\) The defendants include the University of Utah Research Foundation, which owns the patents, Myriad Genetics, the exclusive licensee, and the U.S. Patent and Trademark Office (USPTO).\(^7\) If successful, this lawsuit could have widespread effects not only on the validity of the BRCA1 and BRCA2 patents, but also on gene patents in general.\(^8\)

THE MYRIAD GENETICS CONTROVERSY

Approximately 12 percent of women develop breast cancer during their lives, and approximately 1.4 percent of women develop ovarian cancer.\(^9\) Women who carry inherited mutations on their BRCA1 and BRCA2 genes face a higher risk of breast cancer (from 40 to 85 percent) as well as a heightened risk of ovarian cancer (from 15 to 40 percent).\(^10\) Diagnostic tests can determine if a woman has a mutation on these genes, enabling her to take potentially life-saving preventative measures such as removing her breasts or ovaries.\(^11\)

Since the late 1990s, Myriad Genetics has held exclusive rights to the BRCA1 and BRCA2 gene patents and diagnostic tests.\(^12\) Under current U.S. patent law, a gene patent owner has the exclusive right, for up to 20 years, to control the patented gene’s use for research, diagnosis or treatment.\(^13\) The result is that Myriad Genetics is the only company that may legally conduct or authorize testing for the BRCA1 and BRCA2 genes.

According to the defendants, the limited exclusivity offered by patents was the incentive that allowed the University of Utah and Myriad Genetics to develop these diagnostic tools that “[have] helped thousands of women . . . take steps to reduce their risk of breast and ovarian cancer.”\(^14\)
The ACLU, however, argues that this exclusivity has thwarted research and access to diagnostic testing. Because Myriad Genetics has chosen to enforce their licenses strictly, women who want to receive testing for these susceptibility genes must go through Myriad Genetics, which charges more than $3,000 for the diagnostic test, known as the “BRACAnalysis”.

Additionally, the ACLU contends that because of this monopoly women do not have the option of receiving a second opinion or of having another lab perform the tests. Further, women who do not have insurance, or whose insurance does not cover the test, do not have access to this potentially life-saving diagnostic tool.

In Europe, numerous research institutes and genetics societies have filed notices of opposition to Myriad’s patents on the BRCA1 and BRCA2 genes. In Canada, the government’s policy is to let labs infringe on Myriad’s patents, thus allowing multiple labs to conduct the tests at lower prices.

In the United States, the controversy received public attention last year in an Emmy-nominated documentary called “In the Family.” In this documentary, filmmaker Joanna Rudnick chronicles her own experience of making a difficult decision when faced with a positive test result for inherited mutations on her BRCA genes: risk dramatically increased odds of developing cancer, or have her breasts and ovaries removed as preventive measures. Her film documents the struggles she and others facing a similar decision encounter and explores the detrimental effects of one company having a monopoly on the BRCA1 and BRCA2 genes.

*Image of Filmmaker, Joanna Rudnick (standing), while filming “In the Family.”*
According to Rudnick, “every film screening I have, someone inevitably will ask me the question, ‘How can you patent a gene? Isn’t that a product of nature?’ It’s been interesting to see how little awareness there is in the general public about the fact that gene patenting is taking place.”

She comments, “I was very hopeful when I heard that the ACLU was taking on not only Myriad Genetics but also the U.S. Patent Office, really challenging that gene patents are products of nature.”

**The Ethics of Patenting Genetic Material**

The ACLU lawsuit reinvigorates the public debate about the ethics of patenting material so intimately connected to life. In a famous interview on April 12, 1955, journalist Edward R. Murrow, asked the inventor of the polio vaccine, Dr. Jonas Salk, “Who owns the patent on this vaccine?” to which Dr. Salk responded, “Well, the people, I would say. There is no patent. Can you patent the sun?”

In a controversial New York Times opinion piece written in 2007, Michael Crichton, popular sci-fi writer and creator of television drama “ER,” decried the perils of patenting genes, claiming, “YOU, or someone you love, may die because of a gene patent.” “Gene patents are now used to halt research, prevent medical testing and keep vital information from you and your doctor,” he asserted.

According to Jordan Paradise, Associate Professor at Seton Hall University School of Law, “the ACLU lawsuit is fundamentally asking, is this something that is patenting human life?” She elaborates, “on the one extreme, there are people saying, you are patenting people and that’s akin to slavery.” She explains, however, that the moral and ethical arguments are not just about patenting the human body but whether these patents are driving up the cost of health care and whether people might not have access to certain information about themselves.

Proponents of gene patents, such as the Biotechnology Industry Organization (BIO), contend that restricting gene patents “would do far more harm than good to patients” because patenting and exclusive licensing practices are critical to fostering the development of important genetic tests. BIO maintains that...
gene patents also “create incentives to promote physician and patient education, broader insurance coverage, and improved compliance.”

THE ACLU LAWSUIT

The ACLU seeks nothing less than to invalidate all gene patents. Dan Ravicher, the Executive Director of the Public Patent Foundation, states that it “is absolutely our intent that upon victory this will render invalid patents on many other genes. We just had to pick one case as our case.”

Dr. Alice Martin, a geneticist and patent lawyer in Chicago, expresses concern that the ACLU is trying to eliminate gene patents in general, rather than simply targeting the poor licensing practices of one company, Myriad Genetics. “Don’t knock out the whole patent system because Myriad didn’t handle this properly,” she says.

The lawsuit claims that patents on the BRCA1 and BRCA2 genes and diagnostic tests are unconstitutional and invalid, violating legal principles that prohibit patents on products of nature. The foundational issue of being able to patent genetic sequences is really in direct conflict with over 150 years of Supreme Court precedent,” asserts Paradise.

Indeed, since 1852, the U.S. Supreme Court has found that laws of nature, products of nature, and abstract ideas are not patentable subject matter. Natural discoveries must remain “free to all men and reserved exclusively to none.”

However, the USPTO has granted gene patents since 1982. A 2005 study published in Science found that around 20 percent of human genes are currently patented, corresponding to 4,382 of the 23,688 genes listed in the National Center for Biotechnology Information’s gene database.

While the USPTO has concluded that naturally occurring genes found in the body are not patentable, genetic sequences that have been “isolated and purified” are. The USPTO’s rationale is twofold: (1) “the DNA molecule does not occur in that isolated form in nature;” and (2) the purified state of synthetic DNA preparations “is different from the naturally occurring compound.”
According to patent law scholar and research fellow at New York University School of Law, Matthew Herder, the doctrine of isolation and purification goes back to a 1911 case, Parke-Davis. In that case, Justice Learned Hand found that although adrenaline exits in the body, it does not exist in an isolated and purified form in a way that scientists can use.

The landmark Supreme Court case, Diamond v. Chakrabarty, further paved the way for living entities to be considered patentable subject matter. In 1980, the Supreme Court, by a vote of 5-4, approved a patent on a genetically engineered bacterium that had been modified to dissolve oil spills. This was the first time a patent on a living organism was granted in the United States. The Court famously concluded that "anything under the sun that is made by man" is patentable.

Although the USPTO cites Chakrabarty and Parke-Davis as a rationale for allowing gene patents, neither of these cases deals with genetic sequences. In fact, according to Paradise, no Supreme Court case has specifically addressed gene patents as patentable subject matter.

Scientists, advocates and scholars disagree whether the step of isolating and purifying a genetic sequence should be enough to constitute patentable subject matter. According to the ACLU complaint, an "'isolated and purified' human gene performs the exact same function as a non-isolated and purified human gene in a person’s body."

"This is simply not true," asserts Martin. "A gene acting outside the living state has a completely different function than in the body." Martin elaborates, "if I own the BCRA gene, I don’t own the gene in a human, because in a human, it is not isolated and purified, it is part of the circular DNA."

In addition to genetic sequence claims, the ACLU is also challenging correlation claims, that is, patents on the process of correlating the presence of a mutated gene with an increased risk of a certain disease. The plaintiffs argue that the process of comparing the association between a particular genetic sequence and a disease should not be patentable because it involves laws of nature.

According to an amicus brief filed by the American Medical Association and four other medical organizations, "for a process [or correlation] claim that ap-
plies a law of nature to be patent eligible, it also must transform an article to a different state or thing, or use a particular machine.” 63 The amicus brief asserts, “Myriad’s correlation claims do not require a specific machine nor transform an article to a different state or thing.” 64

The validity of this “machine-or-transformation” test is currently before the Supreme Court in Bilski v. Kappos. 65 Although Bilski involves a process for hedging risk in commodities trading, the test might be applied to all process patents including genetic diagnostic processes. 66 According to Herder, the ACLU’s correlation claims thus could be impacted by the Supreme Court’s decision in Bilski. 67

**GENE PATENTS VIOLATE THE FIRST AMENDMENT**

In addition to challenging whether genes constitute patentable subject matter, the plaintiffs are the first to apply the First Amendment to a gene patent challenge. 68 The lawsuit claims that patents on the BRCA1 and BRCA2 genes limit research and the free flow of information, violating the First Amendment. 69 The plaintiffs argue that “providing a private company a monopoly that has the effect of inhibiting, even completely preventing scientific inquiry, into a field of knowledge is not permissible under the First Amendment.” 70

“We should care a lot about scientists’ ability to disseminate their knowledge,” asserts Herder. 71 “People are raising concerns about whether the percentage of false positives or false negatives is higher than it would otherwise be if competitors were offering the services. And that’s a very real health care quality concern.” 72 A 2006 study published in the *Journal of the American Medical Association* found that the Myriad diagnostic test missed mutations of 12% of the 300 people examined from high-risk families. 73

Rudnick points out that Myriad Genetics has a valuable repository of data on people who have tested positive or negative for BRCA1 and BRCA2. 74 “I believe they are no longer participating in registering that data in DNA databases. That makes me even more concerned that really important and potentially illuminating information may be out there but not shared with other scientists who are working on this.” 75
Rudnick also expressed concerns about Myriad’s patents preventing women from obtaining a second opinion.76 “If I’m going to take preventative measures and remove my body parts, I want a second opinion. It seemed to me there was nowhere else in medicine where you couldn’t get a second opinion, and Myriad’s monopoly was limiting that.”77

The ACLU recently survived its first hurdle—a motion to dismiss by the defendants.78 On Nov. 1, 2009, Judge Robert W. Sweet denied the motion noting, “resolution of these issues will have far-reaching implications, not only for gene-based health care and the health of millions of women facing the specter of breast cancer, but also for the future course of biomedical research.”79

Whether the ACLU lawsuit will ultimately prevail remains to be seen. What is clear is that this lawsuit is reinvigorating the debate on a national scale of the ethics and constitutionality of “patenting life” and the need to ensure accessibility of genetic information and diagnostic tests to patients and researchers. Regardless of the outcome of the case, the ACLU has brought a once obscure concept of what constitutes patentable subject matter to the forefront of public debates.

Notes

5 Memorandum of Law in Support of Defendant’s Motion to Dismiss, Ass’n. for Molecular Pathology v. U.S. Patent and Trademark Office, 09 Civ. 4515 at 1-2 (S.D.N.Y. July 13, 2009) [hereinafter Motion to Dismiss].
6 Peeples, supra note 1.
8 See ACLU, supra note 2, at 8.
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10 Id.; Complaint, supra note 5, ¶ 39.
11 See Schwartz, supra note 1.
14 Motion to Dismiss, supra note 5, at 4.
15 Complaint, supra note 5, ¶ 2.
16 Id. at ¶ 2, 92.
17 Id. at ¶ 2, 90.
18 Id. at ¶ 2, 93; ACLU, supra note 2, at 6.
23 Id.
24 Grateful acknowledgement to Kartemquin Films for permission to reprint the picture from their website at http://inthefamily.kartemquin.com/film.
26 Id.
29 Id.
30 Telephone interview with Jordan Paradise, Associate Professor of Law, Seton Hall University School of Law (Oct. 22, 2009).
31 Id.
32 Id.

36 Id.

37 Interview with Alice O. Martin, Partner and Co-chair of the Life Sciences Practice Group, Barnes & Thornburg, LLP, in Chi., Ill. (Oct 14, 2009). The opinions or views expressed in this interview are those of Dr. Martin only and do not in any way reflect upon Barnes & Thornburg, LLP or any of its clients.

38 Id.

39 Complaint, supra note 5, ¶ 4.

40 Paradise, supra note 30.


42 Chakrabarty, 447 U.S. at 309 (quoting Funk Bros. Seed Co., 333 U.S. at 130).


45 SECRETARY’S ADVISORY COMMITTEE ON GENETICS, HEALTH AND SOCIETY, 110 DRAFT REPORT ON GENE PATENTS AND LICENSING PRACTICES AND THEIR IMPACT ON PATIENT ACCESS TO GENETIC TESTS 24 (Mar. 9, 2009) [hereinafter DRAFT REPORT]; USPTO Utility Examination Guidelines, 66 Fed. Reg. 1092, 1093 (Jan. 5, 2001), available at http://www.uspto.gov/web/offices/com/sol/notices/utilexmguide.pdf (“Thus, an inventor’s discovery of a gene can be the basis for a patent on the genetic composition isolated from its natural state and processed through purifying steps that separate the gene from other molecules naturally associated with it.”)

46 USPTO Utility Examination Guidelines, supra note 45, at 1093.

47 Id.

48 Telephone Interview with Matthew Herder, Kauffman Fellow specializing in patent law and bioethics, New York University School of Law (Oct. 22, 2009).

49 Id.; see Parke-Davis & Co. v. H.K. Mulford & Co., 189 F. 95, 107-09 (C.C.S.D.N.Y. 1911).

50 Diamond v. Chakrabarty, 447 U.S. 303, 310 (1980); see also Peeples, supra note 1.

51 Chakrabarty, 447 U.S. at 305, 310, 318.


53 Chakrabarty, 447 U.S. at 309 (quoting the Committee Reports accompanying the 1952 Patent Act).

54 DRAFT REPORT, supra note 45, at 25; USPTO Utility Examination Guidelines, supra note ???, at 1093.

55 Paradise, supra note 30; see also DRAFT REPORT, supra note 45, at 25.

56 See DRAFT REPORT, supra note 45, at 25-26; Schwartz, supra note 1.

57 Complaint, supra note 5, at ¶ 51.

58 Martin, supra note 37.

59 Id.

60 Id.

61 Complaint, supra note 5, ¶¶ 4, 71.
62 Complaint, supra note 5, ¶¶ 4, 78-79; Brief for American Medical Association et al. as Amici Curiae in Support of Plaintiff’s Opposition to Defendant’s Motion to Dismiss and in Support of Plaintiff’s Motion for Summary Judgment, Ass’n. for Molecular Pathology v. U.S. Patent and Trademark Office, 09 Civ. 4515 1, 4 (S.D.N.Y, Aug. 27, 2009) [hereinafter AMA].
63 AMA, supra note 62, at 4-5.
64 Id. at 5.
66 Browning, supra note 65; DRAFT REPORT, supra note 45, at 27; SUBHASHINI CHAN-
67 Herder, supra note 48.
68 Motion for Summary Judgment, supra note 7, at 33.
69 Id. at 33-34.
70 Id. at 35.
71 Herder, supra note 48.
72 Id.
73 Tom Walsh et al., Spectrum of Mutations in BRCA1, BRCA2, CHEK2, and TP53 in Families at High Risk of Breast Cancer, 295 JAMA 1379, 1379, 1386 (2006).
74 Rudnick, supra note 25.
75 Id.
76 Id.
77 Id.
79 Id. at 2-3.
MANDATORY USE OF E-VERIFY BY FEDERAL CONTRACTORS: BENEFITS, BURDENS, AND IMPLICATIONS

by Christina McMahon

In March 2008, Fernando Tinoco – a Mexican immigrant and legal U.S. citizen as of 1989 – began his first day of employment at a Chicago meatpacking plant for Tyson foods.¹ Only two hours later, security guards escorted him to the door.²
The company terminated Tinoco because E-Verify— an internet-based system that checks identification information against Department of Homeland Security (DHS) and Social Security Administration (SSA) databases— identified his immigration status as “tentative non-confirmation,” meaning that he might be working in the U.S. illegally.³

Non-confirmed workers have eight days to present themselves at federal government offices for review of their status before they are issued “final non-confirmation” status, barring them from their jobs.⁴ However, by the time Tinoco obtained confirmation that he was indeed a U.S. citizen, security would not allow him back into the plant.⁵ “I went back and the security guard chased me away, told me not to come back to the company because I was fired,” Tinoco stated.⁶

Stories of misidentification like Tinoco’s run at the forefront of debates surrounding a recently enacted government regulation mandating that federal contractors use E-Verify. Supporters tout the regulation as a safeguard to legal employment, while opponents fear that widespread use of the system could bring about racial profiling and potential mistreatment of legal immigrant workers.⁷

**CHAMBER OF COMMERCE OF U.S. v. NAPOLIANO**

For now, the government mandate remains due to a recent decision in *Chamber of Commerce of U.S. v. Napolitano*. On June 12, 2008, the Bush Administration issued Executive Order 13,465 (Order), requiring federal contractors to use E-Verify as a term of each federal contract.⁸ The Order, originally to take effect on Jan. 15, 2009, was delayed four times after the U.S. Chamber of Commerce Business Coalition (Business Coalition) filed suit for injunctive relief against Janet Napolitano, Director of Homeland Security.⁹

The Business Coalition argued that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) prohibits the Executive Branch from ordering employers to use E-Verify.¹⁰ However, on Aug. 25, 2009, the U.S. District Court for the Southern District of Maryland denied the injunction. The court relied on the defense’s argument that “government contractors are not required to use E-Verify because entities can simply choose not to be a
government contractor.” The Court noted that “nobody has a right to be a government contractor.”

Though the Business Coalition is appealing the Court’s ruling, the decision cleared the way for implementation of the Order on Sept. 8, 2009. This rule, mandating the usage of E-Verify, applies to all contractors working on federal contracts worth at least $100,000 and any subcontractors whose share is more than $3,000. Therefore, almost all federal contractors are now required, not merely encouraged, to use E-Verify when hiring new employees.

THE E-VERIFY DEBATE

Opponents to government-mandated use of E-Verify cite fears over the cost of implementation, and the rule’s ability to turn employers into an arm of immigration agents.

Angelo Amador, the U.S. Chamber of Commerce’s Executive Director for immigration policy, states that the rule “will cost millions of dollars for some employers to implement... costs that will ultimately be borne by the American people, which pay the taxes used for federal contracts.” According to the U.S. Government Accountability Office (GAO), implementation will cost the U.S. Citizenship and Immigration Services (USCIS) approximately $838 million and the SSA over $281 million.

However, supporters of the legislation feel that the cost of the program is warranted. Supporters argue that E-Verify will make it easier for businesses to comply with U.S. immigration law while protecting American jobs for American citizens, especially in light of the recent economy. According to recently appointed USCIS Director Alejandro Mayorkas, E-Verify “assists employers in abiding by the law and it also protects the workforce.”

Supporters are also impressed with the program’s ease of use. According to the GAO, 92 percent of inquiries confirm whether an employee is eligible within seconds. Bob Dane, a spokesman for the Federation for American Immigration Reform in Washington, opines “if you’re an employer, you’re no longer required to be a document expert. With E-Verify, you can tap into an automated Internet database that runs against almost 500 million records. It’s fast, easy, and free to use. What’s not to like?”
Chicago-based federal electrical contractor, Jim Boyd, agrees, indicating that his day-to-day operations “ha[ve] not changed” under the new regulations. He states, “the [E-Verify] system is easy and quick to use... it’s better than having no resources available to help confirm eligibility.”

However, opponents worry that E-Verify may often result in misidentifications. A DHS study asserts that 0.5 percent of workers whose names were submitted to E-Verify were initially deemed ineligible but later found to be eligible. According to the Cato Institute, a think tank headquartered in Washington, D.C., “With 55 million new hires each year, that is approximately 11,000 tentative non-confirmations per workday in the U.S.” In response to these rates of misidentification, the American Civil Liberties Union (ACLU) stated that the expansion of E-Verify without correcting defects in the system “could lead to discrimination against workers who are perceived to be foreign born.”

However, the ACLU has also expressed that they would not be opposed to E-Verify provided that certain safeguards of immigrant rights are enacted. “Currently there is no recourse for a citizen or legal resident who is improperly identified as ineligible to work. No appeal process has been developed,” states the ACLU. Perhaps an appeal process might alleviate some opponents’ fears.

Despite the objections raised and the pending Napolitano appeal, the government is still pressing ahead with mandated use of E-Verify. The ACLU-recommended safeguards have not yet been enacted, but the SSA is currently working on system revisions to help eliminate misidentifications. Unfortunately, these revisions come too late for Tinoco and other individuals mislabeled by E-Verify.

NOTES

2 Id.
5 Id.
6 Id.
11 Id. at 7.
12 Id. at 8.
13 E-Verify Executive Order, supra note 9.
14 Id.
15 Id.
20 Strohm, supra note 3.
21 GAO, supra note 18.
22 Id.
23 Marks, supra note 1.
24 Telephone interview with Jim Boyd, Electrical Contractor, Boyd Electric (Oct. 1, 2009).
25 Id.
27 Id.
28 Harper, supra note 4.
29 ACLU, supra note 7.
30 Id.
31 GAO, supra note 18.
THE ROLE OF FOREIGN STUDENTS IN THE FUTURE OF U.S. SCIENCE AND TECHNOLOGY INDUSTRIES

by Tim Reeb

According to a March 2009 Duke University study, fewer international students are applying to U.S. engineering schools each year. Additionally, more foreign engineering graduates are choosing to leave the United States after graduation. The Duke study suggests that these trends may be caused by the U.S. H-1B visa program.

Given the importance of foreign graduates to their industries, U.S. science and technology companies have lobbied Congress to change the H-1B program to
make it easier for foreign graduates to work in the United States. However, Congress has not altered the program. At least one congressman cited concerns that an influx in foreign workers would take jobs away from Americans.

Despite the current stalemate on the H-1B visa program, both sides appear to agree that changes need to be made if the United States is going to stay competitive in science and technology industries in the future.

### The Role of Foreign Engineers in the United States

Traditionally, foreign students received a large percentage of the engineering degrees awarded in the United States and, upon graduation, constituted a large portion of the U.S. science and technology workforce. As recently as 2007, foreign students received nearly 60 percent of all engineering doctorate degrees awarded in the United States. Additionally, immigrant entrepreneurs founded 25 percent of U.S. engineering and technology companies established in the past decade and contributed to approximately 24 percent of international patent applications.

However, a current trend suggests that U.S. science and technology industries may need to look elsewhere for future innovation. In 2006, the number of foreign students applying to American engineering schools grew at a rate of 19 percent. That number then dropped to 13 percent in 2007 and to 4 percent in 2008 and 2009. To compound this decline, a growing number of foreign students who do study in the United States are returning home after graduation.

### Why the Decline?

The Duke study suggests that the U.S. H-1B visa program may be the cause of these trends. The study found that a substantial majority of foreign students, including 85 percent of Indian and Chinese students, express concerns about obtaining H-1B work visas following graduation.

The H-1B is a non-immigrant visa that allows U.S. employers to temporarily employ foreign workers in “specialty occupations,” such as engineering and mathematics. The annual supply of H-1B visas, limited by a statutory cap, is often filled within days of the application process opening. With limited H-
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1B visas available, some foreign students believe attending an American graduate school is too risky because they may not be able to work in the United States following graduation.17

EXPANDING THE H-1B PROGRAM: SOLUTION OR OBSTACLE?

Jim Reeb, Director of Manufacturing at Caterpillar, one of the United States’ largest employers of engineers, understands the plight science and technology companies are facing.18 “Many U.S. science and technology companies blame their difficulty in finding qualified workers, in part, on the H-1B program, and want the cap expanded or removed altogether,” Reeb says.19

Microsoft Chairman Bill Gates has consistently urged Congress to let more foreign-born engineers work in the United States.20 “I can’t overstate the impact [the cap] has, not only on the decision of the people who are educated here to stay here, but also on their decision to even come to the United States in the first place.”21

Some members of Congress, however, do not appear persuaded by the views of individuals such as Gates. Rep. Dana Rohrabacher, R-Calif., for example, believes that companies may be seeking more H-1B visas because foreign-born workers can be paid less.22 In order to hire enough Americans, “you’d have to raise wages,” he said in response to Gates’ remarks.23 “There are plenty of [Americans] out there to hire, but people want to have the top-quality people from India and China and elsewhere.”24 Rohrabacher added, “There is no excuse for keeping out ‘B’ and ‘C’ American students just because there was an ‘A’ student from India.”25

ENCOURAGING FUTURE AMERICAN ENGINEERS

Jim Reeb believes the U.S. educational system can solve this problem.26 “Regardless of your view relative to the H-1B program, the key issue is educating Americans,” Reeb states.27 “Right now, not enough Americans want to be engineers, but if we change that, the H-1B issue becomes irrelevant.”28

Congress appears to agree. In 2007, the House of Representatives passed a bill aimed at increasing the number of math and science teachers in the United States by 10,000 per year and increasing the number of math and science
students to 10 million. Included in the bill is a program that creates grants for centers that develop engineering and technology curriculum and teaching methods. These grants are aimed at increasing the number and performance of undergraduate students in engineering and technology courses.

If the goal is to increase the number of American engineers in the United States, it is important that more Americans start enrolling in engineering programs. Fortunately, there is good news on this front. A recent survey found an 11 percent surge in American students entering engineering programs in 2009. Though the increase in American engineering students is a great start, it may come too late. If recent foreign-student trends continue, U.S. science and technology companies may not be able to meet their future demands for engineers.

NOTES

2 Id.
5 Id.
6 Id.
7 Telephone Interview with Jim Reeb, Director of Manufacturing, Caterpillar, Inc. (Nov. 3, 2009).
8 Wadhwa, supra note 3.
10 Council of Graduate Schools, supra note 1.
11 Id.
12 Wadhwa, supra note 3.
13 Id.
14 Id.
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18 Interview with Reeb, supra note 7.
19 Id.
20 Damast, supra note 17.
21 Id.
22 Id.
23 Id.
24 Interview with Reeb, supra note 7.
25 Id.
26 Id.
27 Id.
28 Id.
30 Id.
31 Id.
CAN THE CFTC AND SEC WORK TOGETHER TO PREVENT ANOTHER MADOFF?

by Chantal Kazay

On June 30, 2009, federal Judge Denny Chin of the Southern District of New York sentenced Bernard Madoff (Madoff) to 150 years in prison for operating the largest Ponzi scheme in history. Madoff, a previously respected figure in American finance, managed his scheme under the guise of an asset management business. Astonishingly, the Securities Exchange Commission (SEC) failed to detect Madoff’s scheme for over a decade.

As of Sept. 22, 2009, the scandal caused losses to 200,336 investors that exceeded $13 billion dollars. Investors and the American people alike have criticized financial regulators for not catching Madoff sooner, especially due to the scheme’s length and magnitude. As a result of the scheme, investors worry
that other scammers, similar to Madoff, remain undetected or unaddressed by regulatory agencies.6

A similar concern is whether a Madoff-like scheme could happen to the Commodity Futures Trading Commission (CFTC). On Oct. 16, 2009, the SEC and the CFTC began to address this problem by proposing changes to Congress on how the two agencies can collaborate when regulating similar securities and futures investments.7

WHAT IS A PONZI SCHEME?

The mechanics of a Ponzi scheme are simple: a fraudster lures assets to an investment proposal with seemingly too-good-to-be-true terms, and then uses the contributions of new investors to pay returns to earlier investors.8 The investment proposal appears to be profitable, but the fraudster is actually stealing money from investors.9 To remain afloat, Ponzi schemes require an infinite supply of new funds.10

Ponzi schemes end when new investments are insufficient to meet existing investor redemption demands.11 Allan Horwich, a senior lecturer of securities litigation at Northwestern University Law School, says Madoff was able to keep his scheme going for so long by paying promised returns.12 “By meeting the demands of insistent investors, Madoff was able to deflect any suspicion on the part of investors,”13 says Horwich. “This meant that only outsiders – for example, competing firms and journalists – and not his investors were complaining to the Securities Exchange Commission.”14

Figure 1.0 is a hypothetical illustration of how a professional money manager, James Smith, may use investor funds while operating a Ponzi scheme. Figure 1.0 illustrates the source, movement and use of funds in a common, non-complex Ponzi scheme.15

**FIGURE 1.0**

<table>
<thead>
<tr>
<th>Smith Personal Usage</th>
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<tbody>
<tr>
<td>Condo Deposit</td>
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<td>Condo Rent</td>
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<tr>
<td>Dining Out</td>
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<th>James Smith “Hedge Fund”</th>
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<tr>
<td>Cash In (A)</td>
</tr>
<tr>
<td>Personal Use</td>
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<tr>
<td>Cash Balance</td>
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Investor A
Balance $100,000
The CFTC and the SEC: What Do They Actually Do?

The CFTC ensures the open and efficient operation of the futures exchange markets. It is also responsible for protecting investors and the public from fraud, manipulation and abusive trading practices related to the sale of commodity and financial futures and options.

The CFTC is the government agency responsible for supervising the trade of futures such as grains, precious metals, oil and currencies. It also regulates trading in derivatives linked to stock indexes and bonds. With the Senate’s approval, the President appoints one chairperson and five futures market commissioners to the CFTC.

Similarly, the SEC protects investors, maintains fair, orderly and efficient markets and facilitates capital formation within the securities exchange markets. The SEC is the government agency responsible for overseeing the trading of stocks and options. Like the CFTC, with the Senate’s approval, the President appoints one chairperson and five securities market commissioners to the SEC.

The futures and securities regulations share common ground with respect to the broad public policy objectives of protecting investors, ensuring market integrity and promoting price transparency. CFTC Chairman Gary Gensler believes the CFTC is, in some ways, similar to the SEC. “There are areas where the CFTC and SEC regulate similar products, practices or markets, but do so differently,” says Gensler. “There are times when these differences are appropriate, but at other times, they could stifle competition, increase costs or limit investor protection.”

Because the SEC and the CFTC have overlapping and parallel jurisdiction on certain futures and options, regulation of those instruments is difficult at times.

Could Madoff Happen to the CFTC or the SEC Again?

CFTC Commissioner Bart Chilton believes Madoff-like Ponzi schemes are already happening within the futures exchange market. “There are hundreds of [schemes] going on all the time,” says Chilton. “There is a virtual 'Ponzi-
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Palooza’ out there, [and] new investor money [is] being used to pay previous investors,” says Chilton. “Consumers are being victimized all the time.”

Chilton believes that in order to combat the Ponzi schemes, the regulatory agencies need the appropriate resources and tools to address them. One solution Chilton suggests is to give both the SEC and the CFTC criminal authority to prosecute “bottom feeders,” or fraudsters. As it currently stands, the CFTC and the SEC can only bring civil action against market manipulators.

John Coffee, Columbia University securities law professor, also believes that the CFTC needs more of the powers the SEC has to act on cases of insider trading and market manipulation. The CFTC “needs legislation prohibiting insider trading on commodities and transactions within its jurisdiction,” says Coffee. The CFTC should be able to impose financial penalties in cases of violations.

The SEC “is armed with a greater enforcement club,” says Coffee. The SEC can impose penalties without going to court. According to Coffee, “the bottom line here is that it would make sense to harmonize these penalty levels so that both agencies have equivalent powers.” This would prevent future Ponzi schemes from occurring in either the SEC or CFTC.

The CFTC and SEC have battled over regulatory turf in the past, but recently the organizations agreed on sharing regulation of the $600 trillion over-the-counter derivatives market. The growth of the unfettered market for derivatives, the complex financial instruments blamed for advancing the financial crisis, has made the need to fix gaps and overlaps in the two agencies’ regulations especially critical.

For example, the SEC and CFTC joint-report to Congress recommends legislation to expand the agencies’ authority in certain areas and to increase its enforcement powers by establishing protections for whistle-blowers. It also recommends new rules to improve their efficiency in working together. “These recommendations will help to fill regulatory gaps, eliminate inconsistent oversight and promote greater collaboration,” says SEC chairwoman Mary L. Schapiro. Hopefully, new legislation will enable these agencies to harmonize their efforts and work together to detect Madoff-like schemes within the commodities and securities’ markets sooner in the future.
NOTES

3 Jill E Fisch, Top Cop or Regulatory Flop? The SEC at 75, 95 VA. L. REV. 785, 810-11 (June 2009).
5 Fisch, supra note 3 at 811.
6 Id. at 813.
9 Id.
10 Catherine Rampell, A Scheme with No Off Button, N.Y. TIMES, Dec. 21, 2008, at WK5.
11 Frankel, supra note 8.
12 Telephone interview with Allan Horwich, Senior Lecturer, Northwestern Law School (Oct. 9, 2009).
13 Id.
14 Id.
15 FIGURE 1.0: After being promised a 25 percent return on an investment of $100,000, Investor A invests $100,000 in James Smith’s hedge fund. Smith immediately rents a fully furnished million-dollar condominium in the most exclusive building in town, using $25,000 of the funds as a deposit and paying $35,000 per month in rent. He also uses Investor A’s funds to pay other personal expenses. Smith’s total personal expenses for the period are $80,000. Smith invites Investor A to his home and gives him a check for $20,000 to cover the interest earned on Investor A’s initial $100,000 investment. Smith assures Investor A that he can pay a 30 percent return on an investment of $200,000. Smith eventually convinces Investor A to keep his initial principal investment of $100,000 and invest an additional $100,000. Investor A relies on the seeming success of his initial investment, the check for the interest earned, the perceived personal success of Smith, and the promise of a 30 percent return on an investment when investing additional funds. Note that Smith does not invest any of the funds received from Investor A. Even if Smith had not used any of the investors’ funds for personal expenses, because of the initial $20,000 payment to Investor A, the scheme is already in debt with liabilities in excess of the invested funds.
17 Id.
18 Id.
19 Id.
20 Id.
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22 Id.

23 Id.


26 Id.


29 Id.

30 Id.

31 Id.

32 Id.


34 Kopecki and Gallu, supra note 25.

35 Id.

36 Id.

37 Id.

38 Id.

39 Id.

40 2 Market Regulators, supra note 7.

41 Id.

42 Id.

43 Id.

44 Id.

36
On July 20, 2009, the Iranian government passed a new law to increase its access to information about Internet users. The Iranian Parliament introduced the law, requiring Internet service providers to save all data sent and received for a minimum of three months, five weeks after Mahmoud Ahmadinejad won Iran’s controversial presidential election.

Both the U.S. government and some Iranian citizens view the law as the Iranian government’s attempt to strengthen its already tight censorship of the Iranian people. In response to this post-election censorship, the U.S. Congress enacted the Victim of Iranian Censorship (VOICE) Act to provide Iranian...
citizens with greater freedoms in the digital age. The Act provides $50 million to assist the Iranian people in avoiding their government’s Internet restrictions.

However, it remains unclear whether the Iranian government will even be able to implement the new Internet law. From an American perspective, Iran’s control over its citizens has been challenged. According to Jason Peterson, a Foreign Services Officer with the U.S. government stationed in Beirut, Lebanon, “based on the election results and how the aftermath was handled, the government’s power over the country has been called into question.” Even if the Iranian government’s power has weakened since the election, the Iranian government is not open to U.S. intervention. The Iranian government, through its state-run media sources, has criticized the VOICE Act and accused the U.S. government of trying to undermine the Iranian regime.

**POST-PRESIDENTIAL ELECTION CENSORSHIP & U.S. RESPONSE**

After the 2009 presidential election results were announced, supporters of Mir Hossein Mousavi, the opposition candidate, relied on the Internet to voice their protests and to organize peaceful demonstrations in Tehran. In response to this use of the Internet, the Iranian government tightened the censorship of its people by using an advanced filtering system to block websites.

As an additional measure, the Iranian government passed a new law that requires all Internet service providers to save all data sent and received for a minimum of three months. The government’s stated purpose for the legislation’s enactment was that it was an effort to provide more security against cyber crimes. According to Qorban-Ali Dorri-Najafabadi, Iran’s prosecutor general, “the law protects the rights of the people and prevents violation of their privacy in cyberspace.”

According to media watchdog group, Reporters without Borders, this law fails to provide more Internet security and, rather, reflects the government’s ongoing efforts to censor its people. “The government is acutely aware of the rising influence of weblogs and is attempting to filter Internet sites that provide blog hosting and setup.”
However, some Iranian citizens remain skeptical about the regime’s ability
to censor its own people even with this new legislation.\(^{18}\) Former Iranian President Ali Akbar Hashemi Rafsanjani expressed doubts that any government action would slow the movement toward a freer Iran.\(^ {19}\) He stated, “any wakened consciousness would not be satisfied with the resulting situation.”\(^ {20}\) Additionally, according to Iranian blogger Potkin Azarmehr, “given how Internet savvy the young Iranians are and the help they are getting from Iranian expats. . .there will be a way around” any law the government passes.\(^ {21}\)

The U.S. government intends to assist Iranian citizens as they find a way around government censorship.\(^ {22}\) The U.S. Congress took a step towards doing so by drafting the VOICE Act in July 2009.\(^ {23}\) The Act seeks to provide money to educate Iranians on anti-censorship methods and to create Internet protocols for overcoming government filters.\(^ {24}\) On Oct. 28, 2009, President Obama signed the VOICE Act into law.\(^ {25}\)

The Act calls for an examination by the U.S. government into the business practices of non-Iranian corporations that have provided Internet censoring technology to the Iranian government.\(^ {26}\) The Act also allocates $30 million to the Broadcasting Board of Governors (BBG), the government agency responsible for all U.S. civilian international broadcasting.\(^ {27}\) The BBG will use these funds to help develop technologies to prevent the Iranian government from blocking Internet access.\(^ {28}\)

Furthermore, Congress set aside an additional $20 million for an education program titled the “Iranian Electronic Education, Exchange, and Media Fund.”\(^ {29}\) This fund will create an educational program to help Iranians learn how to circumvent blocked websites and share information more freely.\(^ {30}\)

According to legislation co-sponsor, Sen. Joe Lieberman, I-Conn., the Act “will help the Iranian people stay one step ahead of their regime, in getting access to information and safely exercising freedom of speech, assembly and expression online.”\(^ {31}\)

The Iranian government, however, is not pleased with this U.S. intervention.\(^ {32}\) The government contends it is not censoring the Iranian people.\(^ {33}\) It views the new U.S. legislation as unnecessary and unwanted.\(^ {34}\) Fatemeh Alia, a senior member of the Iranian Parliament, called the VOICE Act “a U.S. attempt to destabilize the Iranian government.”\(^ {35}\) Furthermore, Iranian cleric Ayatollah
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Jannati asserts that the U.S. government is using the VOICE Act to engage in hostilities with Iran.\textsuperscript{36} In reference to the Act, he stated, “It shows [U.S. government officials] have no good intentions towards Iran, and constantly want to engage in enmity.”\textsuperscript{37}

Regardless of how the Iranian government feels about the U.S. aid, it will be interesting to see how the recent legislation in both Iran and the U.S. affects Internet censorship within Iran. It is clear the U.S. government is committed to helping those in Iran who can create change by continuing to voice their opinions on the Internet.\textsuperscript{38} It seems that with this U.S. support, the Iranian people will have more resources to overcome the Internet censorship that has plagued their country for the last decade.\textsuperscript{39}

\textbf{NOTES}

2. Id.
4. Id.
5. Id.
7. See Telephone Interview with Jason Peterson, Foreign Services Officer, United States State Dep’t. (Nov. 12, 2009).
8. Id.
10. Id.
13. Iran Internet Law, \textit{supra} note 1.
14. Id.
15. Id.
16. Id.
17. Id.
19. Id.
20. Id.
21 Iran Internet Law, supra note 1.
22 Lake, supra note 3.
23 Id.
24 Id.
26 Id.
27 Id.
28 Id.
29 Id.
30 Id.
31 Id.
34 Iran Raises Voice, supra note 9.
35 Id.
36 Iran Shrugs Off Another Year, supra note 32.
37 Id.
38 Lake, supra note 3.
THE OLDEST PROFESSION FINDS A NEW MEDIUM: CRAIGSLIST AND THE SEX INDUSTRY

by Jeff McDonald

Commonly known as the world’s oldest profession, prostitution is a very contemporary problem in many cities, with 58,784 reported arrests for commercialized sex last year.¹ Though prostitutes have traditionally used informal bulletins or the classified section in the back of newspapers to advertise their services, the Internet now offers them a marketing option that is low cost, wide-ranging and highly anonymous.² Many government agencies and public policy groups identify the bulletin board website Craigslist.org as the most popular forum for prostitution and worry about the criminal implications.³
Because of the website’s illicit following, law enforcement agents across the country have targeted Craigslist with pleas, threats and even lawsuits in an effort to force it to crack down on ads for illegal services. Craigslist, however, has been resistant to curtail user accessibility.

“ADULT SERVICES”

Craigslist is arguably the largest classified ad resource in the world. The company maintains individualized bulletin boards for 450 cities worldwide. Almost 50 million new classified ads are posted each month. Although Craigslist only employs approximately 30 people in its San Francisco offices, it enjoys the eighth-highest traffic ranking of any website in the United States and is the 29th most popular website in the world.

Users can find the controversial ads in Craigslist’s “Adult Services” section. The link is placed next to other service-for-money categories, such as legal, automotive, computer and real estate. All Craigslist users must agree to the site’s Terms of Use, which state in part: “You agree not to post, email, or otherwise make available Content . . . that advertises any illegal service. . . .” To reach the “Adult Services” section, users must click through an additional disclaimer screen to verify that they are 18 or older.

Craigslist currently employs computerized word searches to automatically screen ads in the “Adult Services” section that are likely to violate the website’s Terms of Use. Law enforcement officials conducting searches of the site have found that this safeguard is not particularly effective; offending ads still abound.

Craigslist does not attempt to manually screen ads before they are posted; the company contends this would be a nearly impossible task, causing such long delays that their service would largely become unusable. Instead, the site depends heavily on user moderation to spot ads for illegal services.

Most ad pages have a button to flag the ad as inappropriate. Interestingly, ads in the “Adult Services” section do not have this option because they have been pre-screened by Craigslist’s computers. To flag an ad in this section, a user must email it separately to Craigslist.
According to Craigslist, the “Adult Services” category was originally created because users had complained about suggestive ads for sensual massage and escort services being interspersed with more benign content. Rather than attempt to screen them, the company decided to sequester the racy classifieds in their own section.

While many types of ads are free to post, Craigslist charges a $10 fee to post in “Adult Services” in order to reduce ad volume. All of the net revenue from these fees is donated to charity.

Despite the $10 fee imposed a year ago, erotic ads still abound in the “Adult Services” section.

A Pledge to Change

As Craigslist grew both in popularity and notoriety as a digital facilitator of prostitution, law enforcement officials nationwide increased pressure on the company to reform its posting policies. On Nov. 6, 2008, Craigslist signed a joint statement with the National Center for Missing and Exploited Children and the Attorneys General of 43 states and territories, promising to take stronger steps to prevent misuse of the site for illegal activity.
In accordance with this agreement, the company began its computerized scanning policy, as well as tagging adult ads to enable recognition by parental screening software. Craigslist deletes an ad when user-submitted flags reach a certain threshold. It has also implemented telephone number and credit card verification.

Connecticut Attorney General Richard Blumenthal spearheaded the push for the joint statement. "The mere act of authentication will be a very significant deterrent," Blumenthal told the *New York Times*. "There are very few prostitutes who want to be called by Craigslist and asked to give additional identifying information."

In spite of the pledge, illicit use of Craigslist continued, occasionally with shockingly brutal consequences. In March 2009, 16-year-old John Katehis was charged with the killing of radio news broadcaster George Weber. Weber met Katehis when the teen answered Weber’s Craigslist ad offering $60 for a sadomasochist rendezvous. Weber’s body was later found in his Brooklyn apartment with over 50 stab wounds.

In April 2009, Philip Markoff, who later became known as the "Craigslist Killer," was arrested for the murder of a masseuse he had contacted through her sex advertisement on Craigslist. Markoff had previously used the website to lure a prostitute to his hotel room in order to ambush and rob her.

By the time that story was breaking, Blumenthal was demanding that Craigslist completely remove the ad category, then called "Erotic Services." Other parties to the original statement voiced similar complaints. Illinois Attorney General Lisa Madigan accused the company of ignoring the joint statement and called the section an "Internet brothel." Craigslist’s most vocal critic may have been South Carolina Attorney General Henry McMaster, who warned of criminal prosecution against company executives if the ad category was not taken down. On May 15, 2009, McMaster threatened to commence his criminal investigation. Craigslist stalled the investigation by suing for a restraining order against the South Carolina Attorney General five days later.

Craigslist did concede to pressure by changing the name "Erotic Services" to the more ambiguous "Adult Services" on its bulletin boards for all U.S. cities,
though international Craigslist sites retain the original “Erotic” category. In addition, Craigslist has filed 14 separate lawsuits against businesses it claims offer software and services designed to circumvent the company’s automated compliance measures. Though these are viewed as positive steps, law enforcement officials believe the site should be doing more.

Craigslist confines erotic ads to the computer-screened “Adult Services” section, listing them among other paid services.

Providers, not Publishers

Craigslist has faced legal challenges over the content of its ads in the past. As a defense, the company has cited Section 230 of the Communications Decency Act of 1996 (CDA). The CDA states that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

Providing services, such as software, photo + video, and music instr.
In 2006, this defense was tested when the Chicago Lawyers’ Committee for Civil Rights Under the Law sued the company over discriminatory housing ads posted in the Chicago area.\(^5\) The Court of Appeals for the Seventh Circuit ruled that under Section 230 of the CDA websites were not legally responsible for the posted content of their users.\(^5\)

According to the Seventh Circuit, Craigslist and other online bulletin boards are providers, not publishers.\(^5\) “One might as well say that people who save money ‘cause’ bank robbery, because if there were no banks there could be no bank robberies,” the court reasoned.\(^5\) “An interactive computer service ‘causes’ postings only in the sense of providing a place where people can post.”\(^5\)

Despite this ruling, Cook County, Ill. Sheriff Tom Dart became the next to sue the company on March 5, 2009, in an effort to block prostitution advertising.\(^5\) The complaint alleged that Craigslist was a public nuisance, accused the company of solicitation and racketeering and included the naughty-sounding charge of “directing persons to houses of ill-fame.”\(^5\)

From January 2007 to March 2009, the Sheriff estimated that his office arrested over 200 people through Craigslist for prostitution-related crimes.\(^5\) “We want for them to be good corporate citizens and not to allow their business to be used to facilitate crime,” said Sheriff’s Office spokesman Steve Patterson.\(^5\) “We believe they are knowingly allowing their business to be used for criminal activity and we’d like them to stop.”\(^5\)

The Coalition Against Trafficking in Women filed an amicus brief backing Dart on public policy grounds.\(^5\) The group accused Craigslist of profiting from prostitution, and ultimately the sex trade.\(^5\) In its brief, the Coalition alleged that many prostitutes begin working as minors.\(^5\) Supporting the group’s argument, the FBI found more than 2,800 ads for child prostitution in a recent sting.\(^5\)

In its defense, Craigslist returned to the Seventh Circuit’s interpretation of the CDA.\(^5\) The company claimed that a publisher cannot be held responsible for illegal postings unless it produced the postings or encouraged the illegal content.\(^5\)
The District Court sided with Craigslist, labeling the site a neutral party not responsible for the crimes of its users. It criticized Dart for failing to make allegations meaningfully different from those already rejected by the Seventh Circuit. Dart is considering appealing the ruling.

Despite the adverse outcome, the Cook County Sheriff’s Office still contends that a more proactive approach is needed on Craigslist's part to address the problem. According to Patterson, the adult services ads are too profitable to Craigslist for the company to remove them of its own volition, even though the $10 fee is donated to charity.

While Craigslist does not keep the money from these postings, it does collect revenue for job and apartment ads in certain markets. “A majority of traffic to Craigslist’s website is for these [adult services] ads,” Patterson said. “They use the traffic numbers to charge for apartment postings. . . They come up with the amount they charge based on total web traffic.”

Some believe the focus on Craigslist has a more political purpose. Thomas Bucaro, a Chicago attorney who has represented more prostitutes than he admits he can remember, believes the suit is more a grab for headlines than a legitimate crime-reduction tactic. He states, “Sheriff [Dart] gets great publicity for prostitution cases. . . Anything for sex gets in the news.”

Bucaro sees the suit as a move to check a practice that has thus far escaped serious regulation. “It makes Craigslist look bad,” Bucaro said. He speculates that putting the spotlight on Craigslist may force the company to take some sort of action to save face. “You can justify Mr. Dart’s behavior as a control technique.”

Thus far, Craigslist has been able to resist pressure from law enforcement without major changes to the way it operates. But with state and local governments left to pay for prostitution enforcement, police certainly have an incentive to find new and creative ways of reigning in the Internet bulletin board.
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12 Id.
17 Craigslist, supra note 15.
18 Id.
19 Craigslist, supra note 11.
21 Id.
22 Craigslist, supra note 15.
23 Id.
25 Craigslist, supra note 15.
26 Blumenthal, supra note 16.
28 Id.
29 Id.
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30  Id.
33  Id.
36  Thompson & Rotondaro, supra note 34.
38  Id.
41  Id.
44  Kharif, supra note 5.
45  Craigslist, supra note 11.
46  Craigslist, supra note 31.
47  Telephone Interview with Steve Patterson, Spokesperson, Cook County Sheriff's Office, in Chi., Ill. (Oct. 21, 2009).
48  Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008).
50  Chicago Lawyers’ Comm. for Civil Rights, supra note 48.
51  Id. at 671.
52  Id.
53  Id.
54  Id.
56  Id. at 18-26.
57  Id. at 14-15.
58  Interview with Patterson, supra note 47.
59  Id.
61  Id. at 7.
62  Id. at 3.
63  CNN, supra note 3.
65 *Id.* at 14-16.
67 *Id.* at 7.
69 Interview with Patterson, *supra* note 47.
70 *Id.*
71 Craigslist, *supra* note 8.
72 Interview with Patterson, *supra* note 47.
73 *Id.*
74 Interview with Bucaro, *supra* note 2.
75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.*
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MAKING THE CUT: JOBS, PROGRAMS AND SERVICES FOR INDIVIDUALS WITH DISABILITIES ELIMINATED BY 2010 BUDGET IN ILLINOIS

by Ellen Westley

“...I don’t want to just sit here and twiddle my thumbs,” said Deborah Weinfuss, an individual with a cognitive disability, after Illinois state budget cuts eliminated a program that has allowed her to live and work independently since 1990.¹ Weinfuss is just one of many individuals with disabilities who have been affected by the extensive 2010 budget cuts to human service providers in Illinois.²
The Illinois state legislature reduced the budgets of these providers by 14 percent for the 2010 fiscal year. Gov. Pat Quinn was able to prevent additional proposed cuts to these agencies by borrowing money from pension notes and deferring debt owed to state service providers until next year. But the massive Illinois state deficit has not disappeared. In fact, it is growing.

Many agencies that serve individuals with disabilities support an increase in income taxes to reduce the large state deficit and prevent future cuts next year. However, the majority of Illinois citizens oppose an increase in taxes. If the state does not receive a revenue increase before the 2011 budget is created next June, individuals with disabilities may see additional programs and services cut from their lives.

The Cuts

On July 1, 2009, Illinois began the new fiscal year for 2010 without a budget. In late June, Illinois lawmakers passed a budget, described by many as the “Doomsday Budget,” that proposed to cut 50 percent of funding for human service providers. However, on June 30, 2009, organizations such as Equip for Equality filed lawsuits against the state to stop the drastic cuts in the Doomsday Budget. Because the proposed 50 percent cuts would have resulted in substantial hardship for individuals in Illinois, Gov. Quinn vetoed the Doomsday Budget.

The governor sought an increase in income taxes to help solve state budget problems, but legislators continued to support cuts over increased taxes. On July 15, 2009, Gov. Quinn finally approved a 2010 budget. The budget cut $1 billion overall and classified another $1 billion as part of a reserve fund.

The 2010 budget funds human service providers at an average of 86 percent of last year’s budget. Though not as drastic as the Doomsday Budget, disability assistance agencies were still forced to cut employees and programs due to this 14 percent reduction and a 15-day delay in approving the budget.

Unlike past years, where the Illinois legislature allocated a specific amount of funding to each program in Illinois, the 2010 budget instead provides state agencies with lump sums. Under this funding scheme, Gov. Quinn and directors from agencies such as the Department of Human Services (DHS) make
autonomous decisions about how the 86 percent funding levels will be distributed. Critics charge that this system lacks necessary oversight and delegates too much responsibility to the governor. "Essentially by doing this, we have made him the king of Illinois," Sen. Donne Trotter, D-Chicago, said.

In the future, additional cuts are likely as many state officials feel the 2010 budget only delays dealing with the state’s large deficit until next year. In order to fund the $26 billion budget, the governor borrowed $3.5 million in pension notes to pay state employee pensions and deferred $3 billion owed to service providers into next year.

Meanwhile, the state’s financial situation continues to deteriorate. The deficit was $9.2 billion when the budget passed, and the governor projects it to be $11.6 billion by the start of the 2011 fiscal year. One think tank recently published a study reporting the Illinois state deficit as $13 billion as of Nov. 11, 2009.

THE EFFECTS

As an immediate result of the 2010 cuts, 19 agencies serving people with physical disabilities reported over 100 jobs lost, services eliminated for over 1,000 people and programs affected for thousands more. Nine agencies serving people with mental illnesses reported laying off over 200 employees and eliminating services for thousands. The eliminated services include job training and other programs for disabled and mentally ill adults living independently.

State budget deficit problems may continue to negatively affect individuals with disabilities in the near future. Without a significant revenue increase, services that provide community access to the disabled community remain at risk. But Illinois is already behind when it comes to providing residential and community supports to individuals with disabilities.

Illinois ranks 51st, dead last, in the United States in 2008 for funding residential services for individuals with disabilities, according to a research project administered by the University of Colorado. Additionally, Illinois ranks 47th for the inclusion of individuals with disabilities in communities according to a 2009 study conducted by United Cerebral Palsy.
These rankings indicate that Illinois may be violating the Supreme Court’s decision in *Olmstead v. L.C. ex. rel. Zimring*. In that case, the court held that states are required to place persons with disabilities in community settings rather than in institutions when the community placement is appropriate, the individual with a disability does not oppose the transfer and the placement can be reasonably accommodated.\(^\text{34}\)

Many disability-rights advocates were fighting back against a perceived lack of *Olmstead* community compliance even before the budget cuts occurred.\(^\text{35}\) By reducing the budget and cutting programs that help disabled individuals such as Weinfuss spend more time in their communities, Illinois necessarily moves further from the Supreme Court’s vision in *Olmstead*. Mike Ervin, writer and member of Chicago ADAPT’s disability-rights activist community, says this “is like responding to *Brown v. Board of Education* by re-segregating our schools.”\(^\text{36}\)

**THE ONGOING FIGHT**

Individuals and organizations have been meeting with Gov. Quinn and agency directors as the 2010 fiscal year budget is implemented.\(^\text{37}\) These groups are trying to convince the governor to allocate money to their specific programs from the lump sums.\(^\text{38}\)

For example, Chicago ADAPT, Access Living, Mike Ervin and other individuals all joined the fight to keep the Home Services Program intact after the 2010 budget was released.\(^\text{39}\) They attended rallies, wrote cards to the governor and even met with his policy personnel and DHS representatives to stop the proposed cuts to the program.\(^\text{40}\)

Ervin and 30,000 other individuals with disabilities in Illinois rely on the program to live independently in their homes.\(^\text{41}\) Ervin receives 279 hours per month of assistance from Personal Assistants (PAs) through this program.\(^\text{42}\)

“Having a disability is expensive. . . just in order to be able to get out of bed, get dressed and get the equipment we need,” Ervin noted. “Making it in the real world is not possible without some public assistance for most people with disabilities.”\(^\text{43}\)
Sign at a rally to defend community-based services for persons with disabilities in Illinois.

In order to stick to the 2010 budget, Gov. Quinn must continue to cut various programs’ funding. In terms of home services, he threatened to eliminate PA coordinators (the program participants’ advocates), to lower the asset limit and to cap the hourly amount of services individuals receive in the program. The current asset limit is $17,500, but the state was threatening to reduce it to $2,000 in order to cut the program’s size and assist only the poorest individuals. This new asset limit could have forced individuals to liquidate their assets or even quit their jobs in order to maintain their benefits.

However, the state agreed not to change the limit after listening to Ervin and others in the program. “That was a big win because that meant that people who worked did not have to make a difficult choice between their services and their careers, identities and all the other things that come along with not staying at home and watching television all day,” Ervin said.

Additionally, Illinois restored 80 percent of the funding for PA coordinators and decided not to impose hourly caps on services. Yet, because Illinois still
faces a state deficit of at least $11.6 million, it is unclear whether services saved this year, such as home services, will survive for much longer.52

RAISE TAXES?

Back in June, while Illinois legislators supported 50 percent cuts in the 2010 budget, Gov. Quinn supported a 50 percent increase in income taxes.53 This past year, the Illinois Senate passed HB 174, which would have generated over $5 billion permanently by increasing the personal income tax from 3 percent to 5 percent and the corporate income tax from 4.8 percent to 5 percent.54 HB 174 passed in the Senate but was never called for a vote in the House.55

Last May, Sen. Larry Bomke, R-Springfield, said he was not sure he could support an income tax hike even if it would stop cuts to state services.56 “I recognize how that will affect the local economy, but it’s very difficult to vote for an income tax increase given the economic times we are faced with,” Bomke said.57

But there are individuals who believe that a tax increase is necessary. The Responsible Budget Coalition, comprised of large organizations in the human services and education communities, is trying to work off HB 174 to convince legislators to increase taxes in 2010.58 Dan Lesser, a member of the Coalition and a senior staff attorney for the Sargent Shriver Center on National Poverty Law, said, “It is very possible that what we have seen up to now [in the budget cuts] is an appetizer for what is going to happen next year if we do not get a substantial revenue increase.”59

Lesser did note, however, that the hardest vote for a legislator to cast is an increase in income taxes.60 Recent polls indicate that Illinois citizens are opposed to an increase in income taxes.61 Whether legislators raise taxes or not, Illinois citizens will feel the effects.62 “No matter what [legislators] do to resolve the budget questions, they are going to make people mad,” said David Yepsen, director of the Paul Simon Public Policy Institute.63

THE ROAD AHEAD

Approximately $5.6 billion of the $26 billion 2010 fiscal year budget is covered by borrowed pension funds, federal stimulus funds and special funds.64
When legislators create the 2011 fiscal year budget, they will face debt left over from the 2010 fiscal year, zero stimulus funds and interest on borrowed pension notes.65

Ralph Matire, Executor Director of the Center for Tax & Accountability, wrote, “This isn’t some theoretical problem. Real, serious cuts are being made to vital services. If the state doesn’t get its act together and pass meaningful tax reform that includes a significant revenue increase, the future looks bleak.”66

While Illinois legislators remain wary about raising taxes in this economic climate, the Senate did pass HB 174 last year.67 “What we have been told is that [Senators] did not take heat in their districts for that vote so maybe that will make others more courageous about increasing taxes,” Lesser said.68

In order to prevent additional cuts in the future, agencies that provide assistance to individuals with disabilities will continue to voice their concerns to these legislators. Lesser said, “I think it is always effective to get your representative to come out and see the services you are providing. We certainly encourage providers to do that and I think a lot of them have.”69

While individuals with disabilities like Deborah Weinfuss and Mike Ervin continue to speak out about losing their services and programs, they could still see intensified cuts next year if the state does not generate more revenue, through increased taxes or other means. Even in the current economic climate in Illinois, Ervin says, “the worst thing to do is to let these [programs] go.”70

For the disabled community, budget cuts can extinguish livelihoods and limit community accessibility in violation of Olmstead.71 “For us,” Ervin says, “this [disabled rights’] movement has been going on for 30 plus years and these programs that support community living, like home services and accessible transportation, are the major victories of the movement.”72

The Home Services Program currently remains, but without a substantial revenue increase, Illinois may let more of the program’s services go. Additional cuts to social service agencies seem likely next summer due to the massive state deficit. Unfortunately, individuals who made the cut this year, with and without disabilities, may not be as fortunate when Illinois creates its 2011 budget.
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11 HRYCyna, supra note 2, at 1.


13 Flannery, supra note 10.


16 Id.

17 Arado, supra note 3. See also Ormsby, supra note 4.

18 Arado, supra note 3.

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20 Id.

21 Id.

22 Id.

23 Cullotta, supra note 15.

24 Ormsby, supra note 4.

25 Riopell, supra note 5.
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26 Cullotta, supra note 15; Quinn, supra note 6.
27 Riopell, supra note 5.
28 HRYCyna, supra note 2, at 3.
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30 Id.
31 Interview with Lesser, supra note 9.
36 Interview with Mike Ervin, Chicago-based writer and disability-rights activist with ADAPT, in Chi., Ill. (Oct. 7, 2009).
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38 Id.
39 Id.
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43 Id.
44 Grateful acknowledgement to Access Living and Max Goodman for permission to use this photo.
46 Community Fights Cuts, supra note 41.
47 Interview with Ervin, supra note 36.
48 Id.
49 Id.
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52 Quinn, supra note 6; Interview with Lesser, supra note 9.
53 Cullotta, supra note 15.
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55 Id. at 5.
56 Finke, supra note 14.
57 Id.
58 Interview with Lesser, supra note 9.
59 Id.
60 Id.
61 Carvlin, supra note 8.
63 Id.

65 Id.

66 Id.

67 HRYCZYNA, *supra* note 2, at 5.

68 Interview with Lesser, *supra* note 9.

69 Id.

70 Interview with Ervin, *supra* note 36.


72 Interview with Ervin, *supra* note 36.
A TIME OUT OR A KNOCK OUT: HAS THE USE OF RESTRAINT AGAINST STUDENTS WITH DISABILITIES BECOME A FORM OF CORPORAL PUNISHMENT?

by Susie Bucaro

On May 25, 2006, a 7-year-old girl with Attention Deficit Disorder suffocated under the body weight of a daycare clinic staff member who pinned her to the floor. Angie Arndt would not stop blowing bubbles in her
milk. As punishment, Bradley Ridout laid his 250-pound body on her torso while two other staff members held down her arms and ankles. After 50 minutes in this position, Angie’s crying and resistance subsided. A medical examiner ruled positional asphyxia as the cause of her death.

The use of corporal punishment in public schools, although legal in 20 states, generates controversy when a routine disciplinary measure results in the death of a child.

Under the Individuals with Disabilities Education Act (IDEA), students with disabilities are statutorily entitled to a Free and Appropriate Public Education (FAPE). An appropriate education allows a child to make educational progress, and to prepare and equip her to further her education, live independently and participate in the workforce. IDEA, however, does not explicitly prohibit the use of physical restraint or other forms of corporal punishment.

Angie’s death raises the question: should it?

THE LEGALITY OF RESTRAINING STUDENTS WITH DISABILITIES

In response to Angie Arndt’s death and reports of similar incidents involving restraint-induced injuries, the American Civil Liberties Union (ACLU) and the Human Rights Watch launched a study on the use of corporal punishment against students with disabilities. The investigation culminated in a seventy-page report entitled “Impairing Education: Corporal Punishment of Students with Disabilities in US Public Schools.”

The report, based on 202 in-person and telephonic interviews conducted between December 2007 and June 2009, suggested that a quarter of a million school children are subject to violent forms of punishment. Furthermore, students with disabilities are affected at a disproportionately high rate: 19 percent of students subjected to corporal punishment are students with disabilities, even though they comprise only 14 percent of the nationwide student population.

Corporal punishment often takes the form of paddling. From 2006 to 2007, nearly 42,000 students with disabilities nationwide were paddled at least once. Face-down restraint, however, is one of the most lethal school prac-
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...tices, since it may result in sudden fatal cardiac arrhythmia or respiratory arrest. Restrained can also lead to cerebral oxygen deprivation, lacerations, abrasions, muscle injuries, hyperextension of the arms, as well as forms of psychological trauma.

Despite these consequences, both corporal punishment and restraint are legal. In Ingraham v. Wright, the U.S. Supreme Court validated the constitutionality of corporal punishment in public schools, finding that the protection against cruel and unusual punishment did not apply to students. More recently, under the George W. Bush Administration, the Office of Special Education Programs took the position that IDEA does not expressly prohibit the use of physical restraints on students with disabilities.

Students who qualify for assistance under IDEA receive an Individualized Education Program (IEP). An IEP includes the individualized educational and related services a student with a disability needs to receive a FAPE. According to Jennifer O’Connell, a Speech Language Pathologist at Reinberg Elementary School in Chicago, IDEA also requires the personalization of the disciplinary action to be used on a specific child. Under “IDEA and what is stated in a [child’s] IEP,” she states, “we must treat [every] child as an individual.” If restraint is permitted by state law, the IEP team must consider whether its use is consistent with the terms of a given child’s IEP.

The IDEA standard, therefore, delegates a significant amount of deference to the disciplinarian. In an educational environment where resources and training for alternative methods of discipline are unavailable, disciplinarians may resort to corporal punishment because it is quick and easy to administer.

Furthermore, a trend toward teacher victimization suggests that educators resort to restraints because they often face threats of injury or physical attacks from students. From 2003 to 2004, the percentage of public school teachers who reported being threatened during the school year ranged from 4 to 18 percent by state. A teacher facing imminent violence may be justified in exercising physical restraint in order to protect herself or others. The danger, perhaps, lies in misuse: when corporal punishment becomes the answer to non-violent misbehavior, like Angie Arndt blowing bubbles in her milk.
RESTRAINT IN PRACTICE: A FORM OF CORPORAL PUNISHMENT?

Bridget Connolly, Special Education Coordinator at Niles West High School in Skokie, Illinois, believes lawful bans against corporal punishment contribute to resolving the problem. Even though federal law permits corporal punishment, a majority of states have enacted legislation outlawing it. “Although there are some isolated incidents that you hear happen in the Chicago area schools,” says Connolly, “corporal punishment has been banned in Illinois.”

Jo Pelishek, however, has another opinion. Pelishek, a Wisconsin advocate for children with disabilities, believes that the use of corporal punishment against students with disabilities is more widespread than most people think. Indeed, even though corporal punishment is unlawful under Wisconsin law, restraint remains legal. In 2006, the Centers for Medicare and Medicaid Services (CMS) issued a policy defining restraint for facilities receiving Medicaid and other types of federal funding. The CMS definition reflects the most current federal thinking on restraint, defining it as any manual method that immobilizes or reduces the ability of an individual to move his or her arms, legs, body or head freely. Only five states – Colorado, Connecticut, Iowa, Michigan and Pennsylvania – have rejected the CMS definition and banned restraint. Wisconsin and the remaining 90 percent of state jurisdictions allow it.

Following Angie’s death, the Northwest Counseling and Guidance Day Clinic in Rice Lake, Wisconsin, pled no contest to a felony count of negligent abuse. In a statement to Pioneer Press, Ridout’s attorney stated, “he was simply doing what he was trained to do by the facility.” The facility, following Wisconsin state law, permitted its staff to use restraint in emergency situations. Again, perhaps the danger of restraint lies in its misuse: when blowing bubbles in one’s milk is mislabeled as an emergency situation.

A recent incident on Chicago’s south side further supports Pelishek’s position. In October 2009, a police officer tackled Marshawn Pitts, a student receiving special education services, to the ground at the Academy for Learning High School in Dolton, Illinois. When the police officer asked Marshawn to tuck in his shirt, he allegedly cursed at him and responded, “You can’t make me.”
The officer placed Marshawn, a 15-year-old boy, in a face down restraint position, injuring his mouth and breaking his nose.45

Marshawn receives special education services because he has a learning disability resulting from a brain injury he suffered as a child.46 Pelishek notes that students like Marshawn tend to have disabilities that impair impulse control or understanding, leading them to be more prone to difficult behavior.47 “Using physical intervention. . .[and] corporal punishment,” adds Pelishek “only perpetuates the problem.”48 Pelishek advocates the approach taken by the ACLU and Human Rights Watch report, which calls for more positive behavioral support programs, rather than violent forms of discipline.49

Marshawn has transferred to another school and is seeking a legal remedy against the police officer who assaulted him.50 However, for Angie Arndt, any remedial measures come too late. For other children with behavioral problems, there is hope that staff members will learn when to restrain not only the children under their care but also themselves.

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RICCI V. DESTEFANO: DISPARATE IMPACT AND TITLE VII IMPLICATIONS ON EMPLOYMENT

by BILL SCHRAMM

On June 29, 2009, the Supreme Court overturned then Judge Sotomayor’s decision in Ricci v. DeStefano (Ricci), holding that the city violated Title VII of the Civil Rights Act of 1964, which was intended to prevent discrimination.1 In so holding, the Court gave employers and employees a new standard for evaluating employment promotion examinations.2

Additionally, the Court’s decision changed how employers will attempt to avoid employees’ potential discrimination claims.3 Therefore, Ricci may have a widespread impact on civil rights issues.4 If dissenting Justice Ginsburg’s pre-
diction holds true, however, the opinion “will not have staying power” because Congress may pass legislation to change these implications in the near future.5

A DIVIDED SUPREME COURT RULES IN FAVOR OF THE NEW HAVEN FIREFIGHTERS

In 2003, 118 New Haven firefighters took a written and oral promotional examination.6 Though the tests were “carefully constructed,” white and Hispanic candidates scored significantly higher than black candidates.7 If New Haven accepted the results, the city would promote almost exclusively white candidates.8

Instead, the city rejected the results.9 Thereafter, 18 firefighters – 17 white and one Hispanic – filed a lawsuit against the city of New Haven.10 These candidates alleged that, by not certifying the promotion test results, the city violated the Equal Protection Clause of the 14th Amendment and Title VII.11

The plaintiffs alleged a disparate treatment claim,12 one of the two kinds of Title VII claims.13 Disparate treatment claims are those that are intentionally discriminatory.14 Disparate impact claims, conversely, have a disproportionately adverse effect on minorities despite the fact that they are not intentionally discriminatory.15

The Court granted summary judgment for the firefighters and held that by discarding the test results, the city violated Title VII.16 In holding for the firefighters, the Court noted, “fear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.”17 This meant that the city could not discard the test results simply to avoid a potential disparate impact claim.
New Haven firefighters celebrate after the Supreme Court ruled in their favor.\textsuperscript{18}

The Court further held that Title VII does not prohibit an employer from taking into account how to fairly design a test for all individuals, regardless of their race, before the employer administers the test.\textsuperscript{19} However, in order to justify abandonment of the test results, the employer must show a “strong basis in evidence” that the employer would lose a disparate impact suit brought by employees who did not pass the test.\textsuperscript{20}

In her dissent, Justice Ginsburg noted that Congress enacted Title VII in order to include those who were previously kept out of the workforce.\textsuperscript{21} Conversely, she thinks the \textit{Ricci} decision makes inclusion more difficult for these very groups.\textsuperscript{22} While sympathetic to the firefighters, she noted, “concern about exposure to disparate-impact liability, however well grounded, is insufficient to insulate an employer from attack.”\textsuperscript{23}

\textbf{Civil Rights Activists’ Reactions}

Echoing the beliefs of many civil rights groups, the National Association for the Advancement of Colored People (NAACP) states that \textit{Ricci} “is a step backward for equal opportunity in employment.”\textsuperscript{24} The NAACP expresses disap-
pointment in the Court’s decision “to create a new flawed legal standard.” Similarly, the Lawyer’s Committee for Civil Rights states, “With this decision, the Court has endangered critical equal employment opportunity safeguards that have been in place for decades to encourage employers to utilize tests that are both fair and effective.”

Rep. Eleanor Holmes Norton, D-D.C., former chair of the Equal Employment Opportunity Commission, pledged her dedication to the Civil Rights Act’s intent, stating she will introduce a bill to overturn the Supreme Court’s decision. According to Rep. Norton, the Court’s decision goes against the policy of Title VII, which was to encourage employers to correct their own practices and to avoid, rather than invite, litigation. As a result of Ricci, she believes “the Court invites employers to stare discrimination in the face and keep walking, to their peril.”

EMPLOYER IMPACT

In the aftermath of Ricci, it is clear that an employer may not discard a test solely because it may have an adverse impact on minorities. Thus, an employer must use the test results regardless of the impact on a minority group unless: (1) there is strong evidence that the result is not job-related and consistent with business activity or (2) there is powerful evidence that another test would have had less of a disproportionate impact on that group.

Ricci thus presents a difficult Title VII situation for employers. If employers use the results of a test that has disproportionate results, they may face a disparate impact suit. However, if the employers discard the same results, they may be subject to a disparate treatment suit.

Therefore, according to Loyola University Chicago School of Law Professor Michael Zimmer, “[Ricci] is a trap for the unwary.” If employers take into account the risk of disparate impact, they have to do it before they administer the test, not after they receive the results. The new standard will make it more difficult for employers to discard the results of tests once they are administered, even if there is a disproportionate and negative impact on a racial group.
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THE FUTURE OF TITLE VII

As *Ricci* indicated, there is a recurring conflict in Title VII.\(^3\)\(^6\) It can be difficult to avoid disparate impact without intentionally discriminating against others.\(^3\)\(^7\)

This potential conflict has not gone unnoticed. Justice Scalia wrote in his concurrence, “The resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection.”\(^3\)\(^8\)

Though Title VII lives on for the present, employers and employees are faced with difficult disparate impact standards and new challenges because of *Ricci’s* reinterpretation of the law.

NOTES

3 Id.
4 Vicini, supra note 1.
5 *Ricci*, supra note 1 at 2691; Interview with Michael Zimmer, Professor of Law, Loyola Univ. Chi. School of Law (Oct. 14, 2009).
6 Benjes, supra note 2.
7 Id.
8 Id.
9 Id.
10 Id.
11 *Ricci*, supra note 1, at 2664.
12 Id. at 2673.
13 Id. at 2672.
14 Id.
15 Id.
16 Id. at 2681.
17 *Ricci*, supra note 1, at 2681.
18 Grateful acknowledgement to The Yale Daily News for permission to reprint the picture.
20 Id.
22 Ricci, supra note 1, at 2701.
23 Id.
25 Id.
27 Press Release, Eleanor Holmes Norton, Norton, a Former EEOC Chair, to Introduce Bill to Return Job Discrimination Statute to Its Intended Meaning Following New Haven Firefighters Decision (June 29, 2009).
28 Id.
29 Id.
30 Faegre, supra note 2.
33 Zimmer, supra note 5.
34 Id.; Reed, supra note 19.
37 Id.
38 Ricci, supra note 1, at 2682.
THE REVIVAL OF NEW SOURCE REVIEW PROVISIONS UNDER THE CLEAN AIR ACT: MIDWEST GENERATION LITIGATION

by Amber Battin

The Obama administration recently re-invigorated the focus on pollution from energy production by promising to clean up the environment. The center of this revival of regulatory provisions for air quality is Illinois, due to the litigation surrounding the pollution output of six Chicago-area coal energy plants.

The United States and the state of Illinois recently filed a complaint against Midwest Generation, claiming that it is operating the six plants in violation of
the New Source Review provisions of the Clean Air Act. Midwest Generation has improved its pollution output in the past 10 years; however, Illinois Attorney General Lisa Madigan said that she is “very concerned about the negative health effects that these aging plants have on the people who live in the communities where the Midwest Generation facilities are located.” Midwest Generation has not yet filed an answer to the pending complaint.

WHAT IS NEW SOURCE REVIEW?

Congress enacted the Clean Air Act in 1963 and added the New Source Review provisions in 1970. With the enactment of the New Source Review provisions, Congress intended that as established energy plants altered their facilities, they would simultaneously install the best available control technology to manage their output of pollutants. When an energy plant is looking to make major modifications to its facilities, beyond routine maintenance, they are required by law to apply for construction permits certifying that the pollution output of the facility will not increase.

MIDWEST GENERATION LITIGATION

In 1999, Midwest Generation purchased six Chicago-area coal power plants from Commonwealth Energy. At that time, there were nine maintenance projects in progress to make various repairs to the facilities at the six plants. When it purchased the plants, Midwest Generation accepted liability for these maintenance projects. At the core of the current litigation against Midwest Generation is whether the execution of these maintenance projects sufficiently alters the output of criteria pollutants from those six plants to trigger the application of New Source Review provisions.

Since 1999, Midwest Generation has reduced the output of nitrous oxide from their plants by 50 percent and reduced the output of sulfur dioxide by 30 percent. In December 2006, Midwest Generation entered into an agreement with the Illinois Environmental Protection Agency (IL EPA) to reduce the output of mercury and to further reduce the output of nitrous oxide and sulfur dioxide from the six plants by the end of 2018. Midwest Generation is presently complying with the agreements regarding nitrous oxide and sulfur dioxide and has fully implemented mercury controls. In fact, “Mercury output
from the six plants is down 80 percent,” says Charlie Parnell, spokesperson for Midwest Generation.21

Despite this reduction in emissions, on July 31, 2007, the U.S. Environmental Protection Agency (U.S. EPA) issued a Notice of Violation to Midwest Generation for operating its plants in violation of the Clean Air Act23 and its New Source Review provisions24 regarding opacity and particulate matter.25 Midwest Generation and the U.S. EPA met on several occasions in attempts to negotiate an agreement that would respond to the issues raised in the Notice of Violation.26 However, the parties never reached an agreement.27

On Aug. 29, 2009, the U.S. government and the state of Illinois filed a lawsuit against Midwest Generation in the Northern District of Illinois, alleging the improper operation of its six Chicago-area coal plants.28 The complaint identifies four environmental concerns: nitrous oxide emissions, sulfur dioxide emissions, opacity and particulate matter.29 The claims asserted in the lawsuit are three-fold:

1. Failure to file petitions before making modifications30 to Midwest Generation coal plants;31

2. Failure to use the best available control technology32 in operation of their coal plants;33 and
(3) Continued operation of coal energy plants in such a manner causing unsafe levels of air pollutants to be released into the air in Illinois.  

Mr. Parnell, spokesperson for Midwest Generation, states that, “[Midwest Generation is] unsure as to what action [it is] required to take in regards to opacity and particulate matter.”  

However, the U.S. EPA Notice of Violation issued to Midwest Generation states that from 2002 to 2006 Midwest Generation’s six plants emitted particulate matter having opacity greater than 30 percent for a total of 38,378 minutes in violation of Illinois law.  

Additionally, five citizens groups have moved to intervene in the opacity claims against Midwest Generation. The Sierra Club states, “Midwest Generation’s own reports document that all of the company’s coal plants regularly violate opacity regulations.”  

CONCLUSION  

Midwest Generation has not yet filed its answer to the pending complaint, but Mr. Parnell states that “Midwest Generation believes their [December 2006] agreement with the IL EPA [is] compliant with the New Source Review provisions.” What direction this New Source Review litigation involving the US EPA will take is yet to be seen, but the IL EPA has not joined as a party to this lawsuit.  

NOTES  


3 Id.  

4 Telephone Interview with Charlie Parnell, Spokesperson, Midwest Generation (Oct. 12, 2009).  


6 Parnell, supra note 4.  


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10 The term ‘best available control technology’ is defined by statute as that technology which reduces pollution output as much as possible taking into account the individual circumstances involved. 42 U.S.C. § 7479(3) (2009).


12 The term ‘modification’ is defined by statute as “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.” 42 U.S.C. § 7411(a)(4) (2009).

13 Martin, supra note 11.

14 Parnell, supra note 4.

15 Id.

16 Id.

17 Complaint, supra note 2.

18 Parnell, supra note 4.


20 Parnell, supra note 4.

21 Id.

22 Map created using Google Maps (maps.google.com) on September 15, 2009.


26 Parnell, supra note 4.

27 Id.

28 Complaint, supra note 2.

29 Id.

30 Definition of ‘modification’, supra note 12.

31 Complaint, supra note 2, Counts 1, 3, 4, 6, 7, 9, 10, 12, 13, 15, 17, 18, 20, 21, 23, 24, 26, 27, 29, 36, 38.

32 Definition of ‘best available control technology’, supra note 10.

33 Complaint, supra note 2, Counts 3, 6, 9, 12, 13, 15, 20, 23, 26, 27, 29, 38.

34 Complaint, supra note 2, Counts 2, 5, 8, 11, 14, 16, 19, 22, 25, 28, 30, 32, 34, 35, 37.

35 Parnell, supra note 4.


40 Parnell, supra note 4.
CONGRESSIONAL RESTRICTIONS ON LEGAL AID ATTORNEYS: BURDENSOME OR NECESSARY?

by Valerie Uribe

On Oct. 8, 2009, Rep. Robert Scott, D-Va., introduced the Civil Access to Justice Act of 2009 (CAJ Act). The CAJ Act proposes to lift restrictions on the categories of clients and cases that the Legal Services Corporation (LSC) can take on. The LSC is a non-profit organization that promotes equal access to justice and ensures that low-income Americans receive high quality legal assistance.
The main purpose of the CAJ Act is to reauthorize the Act that regulates the LSC. The LSC has been operating without reauthorization since 1977. Additionally, the bill proposes to lift most of the restrictions limiting LSC services.

**What Are the Restrictions?**

The main restrictions on LSC funds include prohibitions on: lobbying government offices or legislative bodies except for in limited situations; representing people who are not U.S. citizens with few exceptions; litigating class action suits; and collecting attorneys’ fees. Other restrictions limit soliciting clients in person, litigating abortion-related claims, redistricting activities, influencing the taking of the census, representing prisoners and representing people being evicted from public housing for criminal or drug charges.

When some members of Congress sought to eliminate the LSC in 1995, legislators compromised in order to maintain it by creating limits on the categories of clients and cases that legal aid offices could handle. Since then, the restrictions have been annually attached to LSC appropriations bills. Critics of the LSC stated that the purpose of enacting these restrictions was to keep the LSC apolitical.

**The Civil Access to Justice Act**

While the main purpose of the CAJ Act is to reauthorize the Act that regulates the LSC, the actual impact of reauthorization is much greater. The bill proposes to lift the restrictions prohibiting the collection of attorneys’ fees, class-action lawsuits and lobbying with non-federal funds. American Bar Association (ABA) President H. Thomas Wells Jr. states, “Proper reauthorization of LSC is decades overdue, and antiquated rules severely limit LSCs effort to help people in need.”

In order to ensure its passage, the CAJ Act maintains the prohibition on abortion-related litigation. It also limits who LSC-funded attorneys can represent, including prisoners challenging prison conditions and people convicted of illegal drug possession in public housing eviction proceedings.
Supporters of lifting the restrictions particularly criticize the restriction on representing clients in class action lawsuits due to the recent home foreclosure crisis. Helaine M. Barnett, President of the LSC, says “[m]any of the 137 nonprofit programs funded by LSC are increasingly involved in foreclosure cases, and they frequently involve allegations of predatory lending.” Supporters of lifting this restriction believe that class actions can be a powerful tool for challenging practices, such as predatory lending, that affect large numbers of homeowners. Diana White, Executive Director of Legal Assistance Foundation, notes, “We were better able to help people when our hands weren’t tied.”

But some members of Congress are not convinced by these arguments. Critics of the CAJ Act argue that recipients often use federal funds to advance activist agendas, and that broad limitations are necessary to ensure that LSC funds are spent to meet the basic legal needs of the poor. According to Rep. Trent Franks, R-Ariz., “[f]unding of a Legal Services outreach shouldn’t be allowed to try to make partisan legal battles. . .they should primarily focus on helping the underserved, those who can’t afford legal representation for themselves.”

Additionally, Congress prohibited the use of non-LSC funds received from other sources such as federal, state, local and private funding. Critics argue that the prohibition against the use of non-LSC funds is necessary to avoid misuse of LSC funds. For example, in New Jersey, where only 13 percent of the financing for legal services programs comes from the LSC, federal restrictions dictate how the remaining 87 percent of funding received from other sources may be spent. Supporters of this restriction believe it is necessary in order to avoid the possibility of legal aid offices skirting LSC funding conditions by simply transferring the funds to non-LSC accounts.

Why Change Is Necessary

Individuals on both sides of the debate remain focused on how low-income individuals will be affected if some of the restrictions are lifted. While some restrictions were enacted to keep the LSC out of the political arena and to allow the LSC to focus on its mission of providing legal aid to the poor, other
restrictions tie the hands of legal aid offices as they attempt to help those most in need. Congress must weigh these concerns on each side of the debate when deciding whether the CAJ Act will have an overall benefit for low-income persons seeking legal assistance.

NOTES

2 Rhonda McMillion, Congress Looks to Bolster the LSC as the Recession Raises Legal Worries for the Poor, 95 A.B.A.J. 66, 66 (2009).
4 NEWS RELEASE, supra note 1.
5 Id.
6 Id.
7 McMillion, supra note 2.
8 Id.
11 Id.
12 Id.
13 McMillion, supra note 2.
14 NEWS RELEASE, supra note 1.
15 Id.
16 Editorial, Another Kind of Foreclosure Crisis, N.Y. TIMES, October 9, 2009.
18 Editorial, supra note 16.
19 Telephone Interview with Diana White, Executive Director, Legal Assistance Found. of Metro. Chi. (Oct. 20, 2009).
20 Petition for Writ of Certiorari, supra note 9, at 48a.
22 Legal Servs. Corp, supra note 3.
23 Petition for Writ of Certiorari, supra note 9, at 52a.
25 Petition for Writ of Certiorari, supra note 9, at 52a.
"I’ve faced a lifetime of incongruence and there’s this piece of paper that is... wrong. It says I’m someone I’m not," stated Karissa Rothkopf, after Illinois refused to amend her birth certificate when she received sex reassignment surgery.¹

KIRK V. ARNOLD: THE TRANSFORMATION OF TRANSGENDER BIRTH CERTIFICATE REQUIREMENTS IN ILLINOIS

by BRITTANY KUBES
For Karissa Rothkopf and other transgender individuals, a birth certificate is more than just a piece of paper. Throughout the past 40 years, Illinois has permitted individuals who have sex reassignment surgery to change the gender marker, or status, on their original birth certificates. In 2004, however, the Illinois State Registrar of Vital Records (Registrar) changed its interpretation of the law to allow an individual to change his or her birth certificate only if: (1) a U.S. licensed physician performs the sex reassignment surgery, and (2) a female-to-male transsexual has a specific surgery attaching a viable penis.

Victoria Kirk, Karissa Rothkopf and Riley Johnson filed a lawsuit in January 2009 seeking to suppress the Registrar’s new interpretation of the law. The future of gender identity for transgender individuals may rely on the outcome of this case.

OVERVIEW OF KIRK v. ARNOLD

Prior to 2004, the Registrar altered the gender marker on an individual’s birth certificate when it received an affidavit from any physician confirming the completion of any gender reassignment surgery. However, after an Illinois case, In re Marriage of Simmons (Simmons), the Registrar began to interpret the surgical requirements in a more stringent manner. In 2004, the Registrar only accepted a surgery that attempted to “create, attach or form a viable penis” for female-to-male transgender individuals, such as Johnson, and only accepted affidavits from doctors licensed in the U.S.

Following Simmons, the three Kirk plaintiffs asked the state of Illinois to amend their birth certificates according to their new gender identities in 2008. These requests, however, were initially denied because Kirk and Rothkopf received their surgeries from non-U.S. licensed physicians and Johnson did not obtain genital surgery at all.

On Nov. 18, 2009, the Registrar partially amended the policy it created in 2004 to permit surgeries received from foreign physicians as long as an applicant could verify the surgery’s completion via a U.S. physician’s affidavit. Though two of the Kirk plaintiffs did not comply with this policy restriction, the state of Illinois agreed to amend their birth certificates according to their appropriate gender identities because of the pending lawsuit.
The plaintiffs considered this change in policy, permitting foreign doctors to perform the requisite surgery, a success. Still, Kirk and Rothkopf are proceeding with their suit in order to change the Registrar's surgical requirement and ensure that other transgender individuals can receive altered birth certificates. According to the plaintiffs, “[c]hanging the name and gender on a person’s identity documents is another important aspect of sex reassignment, since those documents are crucial to that person’s ability to function successfully in the new gender.”

Presently, the Registrar continues to call for the completion of a gender reassignment surgery in order to alter the gender marker on a birth certificate. Johnson, a female-to-male transgender individual, initially contested the requirement that the requisite surgery be one that attempts to “create, attach or form a viable penis,” because Johnson wants his birth certificate to reflect his male identification but does not desire genital surgery.

In 2009, however, the Registrar changed its policy yet again. The definition for gender reassignment surgery now states: “If you have a question as to whether you have completed gender reassignment surgery, contact your physician for clarification.” Although Johnson received an altered birth certificate without genital surgery, he is pursuing the lawsuit to clarify what gender reassignment surgery means. Johnson does not think gender reassignment surgery is only completed by the creation of a viable penis, but rather should include the medical treatment most appropriate for each individual.

Pursuant to the plaintiffs’ requests, the Registrar recently announced that it will prepare new standards for determining “how much surgery” will be required if an individual wants to receive a gender-altered birth certificate. The plaintiffs want to ensure these new standards give transgender individuals the freedom to choose the surgery most appropriate for them.

THE VALUE OF BIRTH CERTIFICATES IN ILLINOIS: KIRK’S POTENTIAL IMPACT

Gender is the first designation an individual receives when entering the world. Most people will be satisfied with this initial assessment, but others may be uncomfortable with their assigned gender. Kirk, Rothkopf and Johnson contend that individuals may need birth certificates for a variety of reasons: to
marry, to prove employment eligibility, to obtain other identity documents allowing them to vote, to travel, to enter a building or to gain access to government services or benefits.25

Accordingly, they believe that an authoritative determination by the court defining the specific surgical requirements for an individual seeking to alter a birth certificate would benefit the larger transsexual community, as well as the state of Illinois in establishing a uniform standard.26

The plaintiffs continue to argue against requiring a single surgical procedure for all transgender individuals.27 Instead, the plaintiffs want Illinois to allow the medical treatment most appropriate for each individual, whether that entails surgery or not.28 In contrast, the Registrar is attempting to abide by the Illinois Appellate Court’s instructive reasoning in Simmons that they conduct a more thorough investigation to discern whether an individual has in fact assumed a new gender.29

It remains to be seen whether the Kirk plaintiffs will prevail on their claim that seeks to abolish or broaden the scope of the surgical requirement or whether the Registrar will answer the court’s call for strict surgical requirements in Simmons.30 One thing is for certain: the Kirk plaintiffs maintain that this is “not the end of the story.”31 They pledge to guarantee that the Registrar’s new regulation is in compliance with the Constitution.32

NOTES

3 Id.
4 Amended Complaint at 4, Kirk v. Arnold, No. 09-CH-3226 (Circuit Court of Cook County, April 7, 2009).
5 American Civil Liberties Union, supra note 2.
7 Telephone interview with John Knight, Plaintiffs’ Attorney, ACLU (Nov. 19, 2009).
8 Amended Complaint, supra note 4, at 2.
9 Id. at 3.
10 American Civil Liberties Union, supra note 2.
12 Knight, supra note 7.
13 Id.
14 Response to Defendant’s Section 2-619 Motion to Dismiss Plaintiffs’ First Amended Complaint at 2, Kirk v. Arnold, No. 09 CH 3226 (Circuit Court of Cook County, Aug. 3, 2009).
15 Amended Complaint, supra note 4, at 2.
16 Illinois Department of Public Health, supra note 11.
17 Amended Complaint, supra note 4, at 2.
18 Knight, supra note 7.
19 Illinois Department of Public Health, supra note 11.
20 Response, supra note 14.
21 Amended Complaint, supra note 4.
23 See Dean Spade, Resisting Medicine, Re/modeling Gender, 18 BERKELEY WOMEN’S L.J. 15, 18 (2003).
25 Response, supra note 14, at 12.
26 Id. at 11.
27 Spade, supra note 23, at 19.
28 Amended Complaint, supra note 4, at 4.
30 Reversing Two Restrictive Policies, supra note 22.
31 Knight, supra note 7.
32 Id.
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