The *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.

**Editor in Chief**
Justin McDevitt

**Managing Editor**
Sara Stiegel

**Executive Editor**
Tess Feldman

**Symposium Editor**
Lee Shevell

**Articles Editors**
Andrea Callow
Matthew Costello
Lindsey Johnson
Ilyas A. Lakada
Michael McClain
David Porreca

**Assistant Symposium Editors**
Andrew Bashir
Brian Prendergast
Janea Raines

**Staff Writers**
Graham Bowman
Caitlin Casey
Laughlin Cutler
Brittany Francois
Cynthia Herrera
Laura C. Hoffman
Ashley Jaconetti
Laura Knittle
Kathryn C. Kokoczka
Corinne Koopman

Norma E. Loza
Brenda McKinney
Natnael Moses
Ismael T. Salam
Sarah Sallen
Jessica Sanchez
Lynsey Stewart
Colleen Thomas
Michelle Yoder
James Zorilla

**Faculty Advisor**
Henry Rose, J.D., Professor of Law, Loyola University Chicago School of Law
# TABLE of CONTENTS

<table>
<thead>
<tr>
<th>Author</th>
<th>Page</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Laura Knittle</td>
<td>1</td>
<td>From Crayons to Handcuffs: An Investigation of Elementary School Discipline</td>
</tr>
<tr>
<td>Sarah Sallen</td>
<td>7</td>
<td>Spare the Rod? South Africa's Efforts Toward a Total Ban of Corporal Punishment</td>
</tr>
<tr>
<td>Laura C. Hoffman</td>
<td>14</td>
<td>FEATURE Sub-Minimum Wage or Sub-Human? The Potential Impact on the Civil Rights of People with Disabilities in Employment</td>
</tr>
<tr>
<td>Lynsey Stewart</td>
<td>22</td>
<td>Why Can't We Be “Friends”? Student-Teacher Relationships in the Facebook Age</td>
</tr>
<tr>
<td>Norma E. Loza</td>
<td>29</td>
<td>“Perrymandering”: A New Redistricting Plan in Texas Impacts the Latino Vote</td>
</tr>
<tr>
<td>Ismael T. Salam</td>
<td>35</td>
<td>FEATURE “Save Our State” Amendment: Dead on Arrival</td>
</tr>
<tr>
<td>Colleen Thomas</td>
<td>45</td>
<td>Working with a Blank Check: The Cost of Defense or the Death Penalty Industry?</td>
</tr>
<tr>
<td>Caitlin Casey</td>
<td>50</td>
<td>America's “Dirty Little Secret”: Domestic Sex Trafficking of Minors and a Call for State Action</td>
</tr>
<tr>
<td>Michelle Yoder</td>
<td>56</td>
<td>FEATURE Drug Tests for Welfare: Saving Taxpayer Money or Flushing It Down the Drain?</td>
</tr>
<tr>
<td>Jessica Sanchez</td>
<td>64</td>
<td>Ratifying CEDAW: Is the United States Falling Behind on Women's Rights?</td>
</tr>
</tbody>
</table>
Cynthia Herrera  70  FEATURE
Outsourcing Liability: Are the True Causes of Unemployment Hiding Behind the Corporate Veil?

Natnael Moges  78  Combating Hunger Home and Away: Tracing America's $600 Million Price Tag for Safeguarding the Right to Food in the Horn of Africa

Letter from the Editor

TIME Magazine turned more than a few heads earlier this year when it announced that it had chosen "The Protestor" as its Person of the Year for 2011. Undoubtedly, some of these heads turned because they contained images of protestors that were unruly, unkempt, uneducated and extreme. And, undoubtedly, some protestors are some or all of those things. But the point that TIME sought to emphasize is that never before has the voice of the average man or woman echoed around the world like it did in 2011.

At the same time, or perhaps giving volume to the voices, public trust in government dropped to equally unscen levels. In Egypt, Tunisia and Libya, autocrats that had ruled for decades fell. In Greece and Britain, massive protests shocked the public conscience, revealing problems at least as much as solving them. And in cities across the United States and beyond, the Occupy movement spread with the help of social media to affect cities as large as New York and as small as Everett, Washington.

At the Public Interest Law Reporter, we believe that every voice matters. Every issue matters. Every person matters. In this first issue, we have intentionally cast our net wide, covering a wide range of public interest issues touching those around the world. As John Donne famously penned, "No [person] is an island." But his aim was not to call introverts out of the shadows. If you read on, his message is that we are all connected. When one person suffers, so do we all.

On behalf of the entire staff of the Public Interest Law Reporter, I hope you read the words that follow not as an outsider, but as "a piece of the continent, a part of the main." These are our stories.

Gratefully,

Justin McDevitt
Editor in Chief
FROM CRAYONS TO HANDCUFFS: AN INVESTIGATION OF ELEMENTARY SCHOOL DISCIPLINE

by Laura Knittle

In March 2010, a first-grade student at Carver Primary School in Chicago's far South Side got in trouble for being disruptive. A school security guard handcuffed the 6-year-old boy and detained him for more than an hour. The guard then told him he would go to prison and would never see his parents again.
This elementary school student’s story is not unique. Elementary schools across the country are handcuffing students as a form of discipline, leaving many people wondering what effects these policies will have on the youngest members of society.

**History of Handcuffing in Schools**

The first case of school handcuffing to gain national attention occurred in the Kent (Wash.) School District in 2004. In response, the National Association for the Advancement of Colored People ("NAACP") filed suit on behalf of 14 African-American families. In its complaint, the NAACP contended that the security guards used excessive force when handcuffing the students. In 2005, the suit was dismissed.

Suits against school districts for use of excessive force relating to handcuffing have since continued. On June 8, 2011, the Southern Poverty Law Center ("SPLC") filed a federal class action lawsuit against the Jackson (Miss.) Public School District for allowing a school to handcuff students for hours at a time for "uniform violations and other minor infractions." The SPLC also filed a suit against the Louisiana Recovery School District in July 2010 for "repeatedly handcuffing and shackling" a 6-year-old boy for "minor offenses."

**Consequences to the Students**

Michael Carin is an attorney in Chicago representing the Carver student in his suit against Chicago Public Schools. Carin believes handcuffing in schools is a strictly legal question. "If we believe the law is designed to protect individuals’ rights and create a safe place to live, when there are facts such as these that are shocking, lawyers must take a stand and fight for something they believe in." According to Carin, the student and his family hope to reach a resolution with the school, realizing they cannot go back in time and change what happened.
What happened to Carin's client is part of a larger phenomenon. According to some social scientists, "Contact with police and incarceration not only fails to deter deviant acts, but increases an individual's exposure to some deviant subcultures." This contributes to what is known as the school-to-prison pipeline.

The school-to-prison pipeline refers to a trend wherein children are pushed out of public schools and into the juvenile and adult criminal justice systems. This so-called pipeline has "a disproportionate impact on poor and minority communities and has dramatically increased the number of juveniles that pass through the criminal justice system."

In a 1980 case before the Fourth Circuit Court of Appeals, the court effectively banned the use of corporal punishment in schools. It held that force is unconstitutional if it "shocks the conscience." When corporal punishment was eliminated, so was any kind of physical contact. Some theorize that in the absence of touch, a connection between students and teachers has disappeared and has been replaced with "a new found fear of children." This fear of children has led to the increased presence of police officers and security guards in elementary schools across the country.
THE ROLE OF SECURITY GUARDS IN SCHOOLS

In fulfilling this new role, it is not always clear exactly what security guards in elementary schools across the country are being trained to do.24 According to President Ken Trump of the National School Safety and Security Services, there are no national training requirements for school security officers.25 For the most part, the procedures that security staff follow tend to be consistent with school districts' policies and procedures.26

Jamal Henry, dean of students at an elementary school in Charlotte, N.C., stated that security officials in his school district will only use handcuffs to conduct a juvenile arrest when a high school or middle school student brings a knife or other weapon on campus.27 The officers conducting these arrests are retired police officers assigned to work in middle and high schools in the district.28

Henry made it clear, however, that such juvenile arrests do not occur in elementary schools in his district.29 Instead, elementary schools are assigned a resource officer that can be called in for severe incidents, such as those involving drugs, violence, weapons, threats and large sums of money.30

Henry's own school also has a behavior management technician ("BMT") charged with assisting in the discipline of students.31 The BMT is the first responder and only investigates behavioral difficulties reported by a staff member or another student.32 He has the ability to suspend students if needed, but he never uses handcuffs.33

Part of the problem in Illinois is that school districts are funded through wholesale block grants each year, and each district may choose how to spend its share.34 So there is no predicting how each district will approach hiring security personnel. According to Carin, if school districts want to have security guards discipline students, they need to ensure the guards receive adequate training.35 He added, "Whenever any institution, corporation, or entity decides it wants to empower an employee but fails to train this employee, and as a result of this failure, other individuals are hurt, those individuals' rights have been violated, and the corporation or entity should be held accountable."36
Even if these individuals are held accountable under the law, the psychological effect on a child that is handcuffed in schools is difficult to quantify. Studies have shown that students who feel connected to their schools and have strong relationships have more positive social values and greater academic success.

It remains to be seen whether the young student from Carver Primary School will be pushed into the school-to-prison pipeline as a result of his school’s disciplinary system. According to Carin, though, “When you have a violation of trust in authority, it’s difficult to say where that will affect someone who is 6 years old.” Until school districts gain better perspective on the effects of handcuffing elementary school students, and whether such punishment will lead to a rapid expansion of the school-to-prison pipeline, perhaps it is best to stick to crayons.

NOTES

2 Id.
3 Id.
5 Id.
6 Id.
11 Id.
12 Id.
13 Id.
16 Id., supra note 14.
18 Id.
19 *Hall v. Taumney*, 621 F.2d 607, 615 (4th Cir. 1980).
20 Id.
21 Curtis, supra note 4.
22 Id.
23 Id.
24 Id.
26 Id.
28 Id.
29 Id.
30 Id.
31 Id.
32 Id.
33 Id.
34 Carin, supra note 10.
35 Id.
36 Id.
37 Rabinowitz, supra note 15.
38 Id.
39 Id.
SPARE THE ROD? SOUTH AFRICA'S EFFORTS TOWARD A TOTAL BAN OF CORPORAL PUNISHMENT

by Sarah Sallen

"Spare the rod, spoil the child." This maxim has long influenced parenting philosophy in many parts of the world. Even so, few countries have gone so far as to adopt corporal punishment as a matter of public policy. In South Africa, however, corporal punishment is now the legal norm.

Under current South African law, corporal punishment in the home is firmly protected.¹ South Africa uses the definition of "corporal punishment" adopted by the United Nations Convention on the Rights of the Child ("UNCRC").²
The UNCRC defines corporal punishment as "any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light." The general rule is that parents have a right "to inflict moderate and reasonable chastisement on a child provided that this was not done in a manner offensive to good morals or for objects other than correction and admonition." It is up to South African courts to determine whether or not the punishment is "reasonable."

In 2007, despite the vigorous efforts of various advocacy groups, South Africa amended the Children’s Act. Parliament removed Clause 139, which would have prohibited corporal punishment in the home, before the amendment passed. Now, a year after the amendment has taken force, non-governmental organizations ("NGOs") in South Africa are giving a ban on corporal punishment within the home another attempt. This time, however, NGOs have acknowledged that they need a new approach.

**Cultural and Religious Roots**

Although South Africa abolished apartheid in 1994, several of its vestiges remain, including limitations on the rights of children. South Africa has ratified the UNCRC and the African Charter on the Rights and Welfare of the Child, both of which specifically call for governments to protect children from all forms of violence. Nevertheless, at least one study has shown that "not much has been done to end corporal punishment administered to children by their families, in their homes, where violence seems to be culturally accepted."

Why did the prohibition fail? The causes are deeply rooted in South African culture. The Afrikaans expression "Jy 'n goeie pakslaw, net soos brood en konfyt, nodig," may be loosely translated as "A good hiding is as necessary as jam and bread." This saying reflects the common South African belief that corporal punishment is both "morally necessary and 'good.'"

Notably, religious groups continue to support the use of corporal punishment. An association of 196 Christian schools unsuccessfully challenged the ban as it applies to schools. Also, many South Africans believe that the Bible requires the use of corporal punishment by parents in the "training" of their children.
The Working Group on Positive Discipline ("WGPD"), a network of South African NGOs committed to the "abolition of corporal and all other forms of humiliating punishment of children," is at the forefront of the movement. For WGPD activists, justifying corporal punishment as "part of my culture" is not acceptable.

As Joan van Niekerk, training and advocacy manager of Childline South Africa, notes, "Culture is also not static. We change cultural practices that are harmful for children – for example, South Africa has banned female genital mutilation which has been practiced in some of our cultures."

The statements of the children themselves are chilling.

"We were all sitting with my sisters, brothers and cousins. He asked how I am talking to him and he hit me. He hit me with a pipe that has wires inside. He hit me on whole the body."

A 2004 study illustrates the reality that many South African children face. The study of 410 children aged 6 to 18 revealed that corporal punishment is prevalent in all sections of society. Children of all ages and income levels experience corporal punishment.

"We see broken arms, legs, ribs, fractured skulls, burns, burst ear drums, etc.," reports Childline South Africa, which receives about 4,500 reports of physical abuse per year. The majority of these are the result of so-called discipline.

**Will the Movement Work This Time?**

The last effort to pass a ban on corporal punishment taught members of WGPD an important lesson on civil engagement. "Different civil society groups need to be engaged . . . as well as certain religious leaders forums." Moreover, the law reform process needs to be coupled with specific tools and strategies for alternative forms of discipline. If corporal punishment is "taken away, something needs to be put in its place; otherwise, teachers and parents will feel incredibly disempowered by the process."
As one advocate relates, in South Africa "we do not allow any smacking or hitting between adults. This is termed assault. Why should children not be respected in the same way?" 34

To achieve a ban on corporal punishment, one critical step is to help parents understand that parenting "need not involve hitting, smacking." Therefore, the movement is not directed at punishing parents, but rather sending the message that "imposing physical punishment or other cruel and inhuman punishment on children is wrong . . . and an infringement of the child's right to dignity and physical integrity." 36

Instead, "positive discipline" is an approach that "actively promotes child participation, positive reinforcement, problem-solving and positive role modeling." The goal is to help parents understand the need to parent differently. 38 Kerry-Jane Coleman, research coordinator at Resources Aimed at the Prevention of Child Abuse and Neglect, notes that although corporal punishment is banned in schools, the ban is often ignored. 39

The law reform process for achieving a ban in school has revealed a significant message: if a ban is enacted "without an awareness raising within the population and consultation, then that becomes problematic. So the ban needs to be done on two levels: one would be the legal steps that need to be put in place, and at the same time an awareness needs to be brought to society about the harms that corporal punishment does to children." 40

WGPD members continue to reflect on lessons learned to make strides toward this two-step approach. 41 Only time will tell whether South Africa will heed Archbishop Desmond Tutu's famous saying: "If we really want a peaceful and compassionate world, we need to build communities of trust where all children are respected, where home and school are safe places to be and where discipline is taught by example." 42

Notes


2. General Comment No 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment ( arts. 19, 28, para. 2; and 37, inter alia), U.N.
COMM. ON THE RIGHTS OF THE CHILD (June 2006), http://stsg.violenceagainstchildren.org/sites/default/files/documents/docs/GRC-C-GC-8_EN.pdf ('Most involves hitting ['smacking', 'dabbling', 'spanking'] children, with the hand or with an implement – whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, burning, scalding or forced ingestion [for example, washing children's mouths out with soap or forcing them to swallow hot spices]. In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment which are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scars or ridicules the child.


5 The Legal Status of Corporal Punishment in South Africa, CHILDREN'S RIGHTS PROJECT, COMMUNITY LAW CENTRE (June 2005), http://www.communitylawcentre.org.za/clc-projects/childrens-rights/article-19/archives/Volume%202013%20Number%201.pdf ("In deciding whether or not the punishment falls within the boundaries of being moderate, reasonable, fair and equitable, the court will take various factors into account. These include the nature of the offence; the physical and mental condition of the child; the motive of the person administering the punishment; the severity of the punishment (i.e. the degree of force applied); the object used to administer the punishment and the age, sex and build of the child. Even with the presence of these factors to guide magistrates hearing the matter, in practice, different courts hearing a case with similar facts can reach different conclusions, thereby creating inconsistency within the judicial system.


7 Clause 139 explicitly prohibited all corporal punishment of children and abolished the common law defense of reasonable chastisement:

Discipline of Children

139. (1) A person who has care of a child, including a person who has parental responsibilities and rights in respect of the child, must respect, promote and protect the child’s right to physical and psychological integrity as conferred by section 12(1)(c), (d) and (e) of the Constitution.

(2) No child may be subjected to corporal punishment or be punished in a cruel, inhuman, or degrading way.

(3) The common law defense of reasonable chastisement available to persons referred to in subsection (1) in any court proceeding is hereby abolished.

(4) No person may administer corporal punishment to a child or subject a child to any form of cruel, inhuman or degrading punishment at a [any] child and youth care centre, partial care facility or shelter or drop-in centre.

(5) The Department must take all reasonable steps to ensure that –

(a) education and awareness-raising programmes concerning the effect of subsection (1), (2), (3) and (4) are implemented throughout the Republic; and
(b) programmes promoting appropriate discipline are available throughout the
Republic.

A parent, care-giver or any person holding parental responsibilities and rights in
respect of a child who is reported for subjecting such child to inappropriate forms of
punishment must be referred to an early intervention service as contemplated in sec-
section 144.

Prosecution of a parent or a person holding parental responsibilities and rights
referred to in subsection (6) may be instituted if the punishment constitutes abuse of
the child. See Id.

GLOBAL INITIATIVE, supra note 1.

Letter to Mathogonolo Sebopela, WORKING GROUP ON POSITIVE DISCIPLINE (Aug. 1 2011)
[hereinafter Letter].

Bower, supra note 6.

Ending Legalised Violence Against Children: All Africa Report 2010, GLOBAL INITIATIVE TO
END ALL CORPORAL PUNISHMENT OF CHILDREN, THE AFRICAN CHILD POLICY, SAVE THE
CHILDREN SWEDEN (2010), http://www.endcorporalpunishment.org/pages/pdfs/reports/All_Af-

Ending Legalised Violence Against Children: All Africa Special Report, GLOBAL INITIATIVE TO
Report].

Africans is one of the official languages of South Africa.

In this context, "hiding" is synonymous with "beating."

Christy Hemstreet & Keith Vermuelen, Religions, the Promotion of Positive Discipline and
the Abolition of Corporal Punishment: Frequently Asked Questions, http://www.communitylawcen-
tre.org.za/dl-projects/childrens-rights/article-19/archives/Volume%203%202013%20Number
%203.pdf.

Id.

Carol Bower, Banning Corporal Punishment: The South African Experience, RESOURCES
za/cp_docs/RAPCAN_Banning_Corporal_Punishment_WEB.pdf.


Id.; 2007 Report, supra note 12.

asp (last visited Nov. 14, 2011).

Email Interview with Joan van Niekerk Manager, Training and Advocacy, Childline South

Id.

Id.


Id.

Id.

Id.

van Niekerk, supra note 21.

Id.

Email Interview with Kerry-Jane Coleman, Research Coordinator, Resources Aimed at the

Id.
32 Id.
33 Id.
34 van Niekerk, supra note 21.
35 Id.
38 Letter, supra note 9; van Niekerk, supra note 21.
39 Coleman, supra note 30.
40 Id.
41 Id.
FEATURE ARTICLE

SUB-MINIMUM WAGE OR SUB-HUMAN? THE POTENTIAL IMPACT ON THE CIVIL RIGHTS OF PEOPLE WITH DISABILITIES IN EMPLOYMENT

by LAURA C. HOFFMAN

In Jan. 2011, the National Disability Rights Network ("NDRN") documented an investigation of several employment practices it found to be de-
structive to ensuring equality in employment for people with disabilities. Among these practices is the use of a sub-minimum wage. There is no set pay for the sub-minimum wage, but Section 14(c) of the Fair Labor Standards Act ("FLSA") allows employers to pay individuals with disabilities less than minimum wage in certain situations.

Not everyone disagrees with the use of a sub-minimum wage for the disabled. In fact, a recent proposal in Congress would perpetuate the sub-minimum wage for people with disabilities through the reauthorization of the Workforce Investment Act. This has ignited the debate on the use of sub-minimum wage, dividing even disability advocates.

A recent proclamation by President Barack Obama acknowledged the importance of employing the disabled. On the heels of this proclamation, a competing legislative proposal attempts to overrule the legal use of sub-minimum wage for the disabled.

Dr. Marc Mauer, President of the National Federation of the Blind, stated, "The Fair Wages for Workers with Disabilities Act is a long-overdue effort to correct an injustice written into a law meant to protect all American workers from abuse and exploitation. Workers with disabilities were excluded from the protections of the Fair Labor Standards Act because of the false belief that we cannot be as productive as Americans without disabilities."

**How Sub-Minimum Wage for the Disabled Has Evolved**

Today, paying employees with disabilities a sub-minimum wage is legal under the FLSA. The idea, however, originated as part of President Franklin D. Roosevelt’s New Deal. The practice was born into federal legislation through the National Industrial Recovery Act ("NIRA") of 1933-1935, the precursor to the FLSA. The NIRA provided people with disabilities limited wages that were proportional to their productivity through a certificate system without a wage floor. The U.S. Supreme Court in 1935 declared the NIRA unconstitutional, however, placing a moratorium on sub-minimum wage.

After some modifications, the FLSA essentially reestablished the practice of using sub-minimum wage for the disabled. Like the NIRA, the FLSA set the sub-minimum wage at 75 percent of the federal minimum wage.
Congress amended the FLSA and lowered the sub-minimum wage of people with disabilities to 50 percent.\textsuperscript{16} The hope was that employers would hire more disabled veterans if they could pay them less than the average worker.\textsuperscript{17} Generally, the FLSA considers an individual disabled when the individual's productivity is impaired by a physical or mental limitation with some exclusions.\textsuperscript{18} Because this reduces productivity, the law allows employers to pay these workers with disabilities a lower wage.\textsuperscript{19}

Although there have been changes to the FLSA, none of them has eliminated the use of sub-minimum wage.\textsuperscript{20} This is despite the fact that congressional hearings in 1994 determined the sub-minimum wage to be part of an ineffective system.\textsuperscript{21} Until recent challenges, the last attempt to change the FLSA occurred in 2001.\textsuperscript{22}

**Why Eliminate the Sub-Minimum Wage for the Disabled?**

Some disability advocates favor eliminating the sub-minimum wage and various other employment practices that single out workers with disabilities. They argue that these are contradictory to promoting and ensuring the equal employment opportunity of people with disabilities. These advocates contend that federal disability law after the FLSA has created greater protections in securing civil rights.\textsuperscript{23} By expanding federal disability rights in employment, it seems logical to eliminate the sub-minimum wage as well.\textsuperscript{24}

Among the advocates for eliminating the sub-minimum wage for people with disabilities is former New York Gov. David Patterson.\textsuperscript{25} Even with federal disability law protection, those supporting new legislation to eliminate the sub-minimum wage suggest that federal disability law has largely been an unfulfilled promise.\textsuperscript{26}

Sub-minimum wage for the disabled is often incredibly low.\textsuperscript{27} Disabled people earning sub-minimum wage can make as little as 10 percent of the standard minimum wage and up to 50 percent at the most.\textsuperscript{28} The total weekly earnings of those employed in sheltered workshops -- or workplaces that hire disabled workers exclusively or primarily -- is nearly one-third lower than those working in integrated work environments.\textsuperscript{29}
Another argument against the use of a sub-minimum wage is that individuals with disabilities cannot succeed in being financially independent because the sub-minimum wage fosters dependence.\textsuperscript{30} "The lack of a true minimum wage for many workers with disabilities keeps them in a life of perpetual poverty. It leaves them dependent on family or government programs just to meet their basic needs of food, shelter, and medical care."\textsuperscript{33} Because employers can pay people with disabilities below minimum wage, the disabled often become more dependent on the government for their needs.\textsuperscript{32}

**Eliminating the Sub-Minimum Wage May Be the Better Option**

The NDRN suggests that eliminating sub-minimum wage would lessen the dependency of the disabled.\textsuperscript{35} "Earning at least the minimum wage, if not a living wage, would allow workers with disabilities to support themselves and reduce the amount of aid they receive from government sources."\textsuperscript{34} Even when individuals with disabilities do receive some employment benefits, employers are often counting these benefits towards the wages of the disabled and minimizing their wages to reflect receipt of these benefits.\textsuperscript{35}

Technology has also enabled people with disabilities to overcome many of the challenges that previously prevented them from participating in traditional employment opportunities.\textsuperscript{36} Individuals with disabilities who are working in competitive or traditional environments are often making two to three times as much income compared to those working in sheltered workshops and earning sub-minimum wages.\textsuperscript{37} While supporters of the sub-minimum wage claim that individuals with disabilities placed in these working environments will eventually move up to become minimum wage workers, this rarely occurs.\textsuperscript{38}

**Favoring the Sub-Minimum Wage**

Despite the arguments against a sub-minimum wage for the disabled, there are several arguments for its continued use. To begin with, the number of individuals with disabilities impacted is actually minimal.\textsuperscript{39} According to the 2001 report by the U.S. Government Accountability Office, the majority of people with disabilities are earning regular wages, not the lower sub-minimum wage under the FLSA.\textsuperscript{40} Additionally, supporters of the sub-minimum wage argue for the autonomy of the disabled—that the FLSA gives them the right to de-
cide whether or not to engage in employment that pays less due to the nature of the services.\textsuperscript{41}

While a number of disability advocacy organizations strenuously oppose the use of a sub-minimum wage and seek its elimination, other organizations do not.\textsuperscript{42} One national disability organization, The Arc,\textsuperscript{43} worries that abolishing the sub-minimum wage "would entail multiple and comprehensive policy reforms and service delivery expansions."\textsuperscript{44}

Another argument raised is that, even though some individuals with disabilities are earning sub-minimum wages, they are at least being provided with gainful employment when they would otherwise be unemployed.\textsuperscript{45} It is also argued that the idea of employing individuals with disabilities in working environments where they receive sub-minimum wages is designed to allow them eventually to become removed from this system.\textsuperscript{46}

**Is a Sub-Minimum Wage the Problem or the Solution?**

Because it appears Congress may become embroiled in a policy battle between those advocating for the continuance of the sub-minimum wage and those seeking its elimination, the global reaction to this issue may be instructive. Several countries have taken legislative measures to eliminate sub-minimum wages.\textsuperscript{47} These countries have either increased wages, resulting in minimum wages in sheltered workshops, or completely abandoned the use of sheltered workshops as they currently function.\textsuperscript{48}

In 2006, the United Nations adopted the Convention on the Rights of Persons with Disabilities.\textsuperscript{49} Among the Convention's provisions for ensuring the rights of the disabled is Article 27, which specifies the protection of employment rights.\textsuperscript{50} Article 27(1) provides: "States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities."\textsuperscript{51}

Further, recent attention has surrounded the issue of sub-minimum wage in Canada. According to University of Ottawa law professor Ravi Malhotra, several provinces continue to perpetuate this employment practice, which can also
reinforce the stereotypes of the disabled.\textsuperscript{52} Professor Malhotra indicated that the time has come to change the framework by which we examine legal issues related to the disabled by embracing a "social model" of disability.\textsuperscript{53} The social model embraces removing physical barriers that exist in a structure as a hindrance to employment for the disabled.\textsuperscript{54} Examples of this include assistive technology and other structural modifications to a work environment.\textsuperscript{55} This differs from the widely accepted medical model.\textsuperscript{56} Unlike the social model, the medical model emphasizes the "physical or mental limitations" of an individual as the source of disability rather than environmental barriers.\textsuperscript{57}

The presence of opposing legislative proposals in the United States suggests that our nation continues to struggle over the meaning of employment rights for the disabled. However, a global perspective suggests that the elimination of the practice of sub-minimum wage and a change in the way Americans view disability. A sub-minimum wage can be classified in one of two ways: either a valiant attempt to provide equality or the extension of a history of discrimination.

\textbf{Notes}


3 Id.

4 Id.


6 The White House, Office of the Press Secretary, \textit{Presidential Proclamation—National Disability Employment Awareness Month}, (Oct. 3, 2011), http://www.whitehouse.gov/the-press-office/2011/10/03/presidential-proclamation-national-disability-employment-awareness-month ("During National Disability Employment Awareness Month, we recognize the skills that people with disabilities bring to our workforce, and we re dedicate ourselves to improving employment opportunities in both the public and private sectors for those living with disabilities.").

Loyola Public Interest Law Reporter

8  U.S. Representatives, supra note 7.
10 Segregated & Exploited, supra note 2, at 11 ("The use of sub-minimum wage as an employment practice for the disabled was introduced in President Roosevelt's Executive Order issued on February 17, 1934.").
12 Segregated & Exploited, supra note 2, at 11.
13 Id.
14 Id.
15 Id.
16 Id.
17 Id.
18 Whitaker, supra note 11, at 3.
19 Id. at Summary.
20 Id.
21 Id.
22 Id.
23 Segregated & Exploited, supra note 2, at 8.
24 Id.
25 Former Gov. David Paterson, Blind Community Fight Sub-Minimum Wage For Disabled Workers, HUFFINGTON POST (July 26, 2011), http://www.huffingtonpost.com/2011/07/26/disabled-workers-minimum-wage_n_909991.html ("On the eve of the twenty-first anniversary of the Americans with Disabilities Act, it is more than appropriate that we call for the language that would reauthorize the practice of paying sub-minimum wages to Americans with disabilities to be stricken from the Workforce Investment Act.").
26 U.S. Representatives, supra note 7 ("Courage and creativity are required to replace the misguided benevolence that has historically shaped policies toward people with disabilities with real opportunity for our equal employment and full participation in the workplace.").
27 Segregated & Exploited, supra note 2, at 8.
28 Id.
29 Id. at 28.
30 Id. ("Reports on sheltered workshops often show that workers take home about $175 each month, while those working in traditional jobs take home about $456 each week.").
31 Id.
32 Id. ("This forces them to continue to rely on federal benefits such as SSI and Medicaid which themselves require recipients to be poor.").
33 Id.
34 Id.
35 Id. at 29.
36 Id.
37 Id.
40 Id.
41 Callahan, supra note 38.
42 Diament, supra note 5.
45 Callahan, supra note 38.
46 Id.
47 Alberto Migliore, Sheltered Workshops, INT’L ENCYCLOPEDIA OF REHAB, (J.H. Stone & M. Blouin, eds., 2011), http://citric.buffalo.edu/encyclopedia/en/article/136/ ("In 1996 British Columbia (Canada) and in 2000 New Zealand repealed their respective legislation that allowed sheltered workshops to pay workers with disabilities below the minimum wage. As a result, sheltered workshops had to either increase the wages to at least minimum wage or to discontinue their work programs (Buttenworth et al. 2007).”).
48 Id.
51 Id.
53 Id.
54 Id.
55 Id.
57 Id.
WHY CAN'T WE BE "FRIENDS"? STUDENT-TEACHER RELATIONSHIPS IN THE FACEBOOK AGE

by Lynsey Stewart

In 2007, the Associated Press ("AP") launched a groundbreaking seven-month investigation into sexual abuse by teachers. The investigation revealed that, between 2001 and 2005, more than 2,500 educators nationwide had their teaching credentials revoked, denied, surrendered or sanctioned following allegations of sexual misconduct. Of those teachers sanctioned for sexual misconduct, the victims in at least 1,801 of the cases were young people, and more than 80 percent of those were students.
Understandably, these startling statistics caused widespread concern among parents, but they also got the attention of school boards and state legislators. While many of the instances of sexual abuse involved physical contact between the teacher and the student, other instances involved verbal harassment or online contact.

For example, a 56-year-old teacher in Illinois was recently found guilty on sexual abuse and assault charges involving a 17-year-old female student with whom he had exchanged more than 700 text messages. More recently, in Sacramento, a 37-year-old high school band director pleaded guilty to sexual misconduct stemming from his relationship with a 16-year-old female student, which involved more than 1,200 private messages sent to her Facebook account.

Reports of this type of teacher conduct have caused school districts nationwide to examine their teacher-student communication policies. However, two states — Louisiana and Missouri — decided the issue warranted legislative action.

Documentation and Dissuasion: The Louisiana Approach

Implemented on Nov. 15, 2009, the Louisiana law attempts to curb potentially inappropriate relationships between teachers and students by placing restrictions on electronic interactions. Under the new law, all teacher-student electronic communications must have a strictly educational purpose and must be channeled through school-provided means (such as school email accounts).

The law also contains a provision requiring teachers to maintain records and report any electronic communications made with students using non-school-provided means, including text messages and messages sent via personal email accounts or social networking sites.

While the law does not forbid the use of personal electronic devices, it requires documentation when electronic means are used to communicate directly with students. One of the hopes for the law is that the hassle of documentation will eventually dissuade educators from contacting students using personal
electronic devices. In accordance with this policy, employees who do not submit the proper documentation may be fired.

NO "FRIENDING" IN MISSOURI

Even more recently, Missouri made headlines when the Legislature passed Senate Bill 54, known as the Amy Hestir Student Protection Act. Named for a student who was molested by her junior high teacher, the stated purpose of the law is to protect students from sexual abuse. However, one of the law's methods for achieving that objective has sparked both national and local debate.

The law was drafted in response to the AP investigation, which determined that 87 Missouri teachers had their licenses revoked between 2001 and 2005 because of "sexual misconduct," much of which involved exchanging explicit or inappropriate online messages with students. The law required school districts to promulgate new policies barring teachers from using websites to gain "exclusive access" with current or former students who remain minors.

While the law ultimately left the task of defining "exclusive access" and "appropriate use" of electronic and social media up to the school districts, in general, the law held that any contact on Facebook or other social media sites must be done in public, prohibiting all forms of private messaging.
This so-called “Ban on Facebook” sparked diverse reactions from teachers across the state. While some teachers were supportive of the law and of clear demarcations between teacher and student, other teachers had more mixed reactions.22

When asked about his thoughts on the law, former teacher and Missouri resident Adrian Allen commented, “Limiting all electronic communication between students and teachers feels out of step with reality. When used appropriately, social media is a useful way to communicate with students.”23

Like Allen, other teachers have expressed that Facebook can serve legitimate educational purposes.24 Some also view Facebook’s online forum as a space where students may feel more comfortable confiding in a teacher or asking for help.25

In an interview with National Public Radio, Missouri State Rep. Chris Kelly, one of the sponsors of SB54, stated that the bill does not completely ban teachers from communicating with students on Facebook or other social media sites, but bans only private communication.26

“I want the parents and the schools to be able to see the communication,” said Kelly.27 While Kelly asserted that the bill’s intention was not to stifle the relationship between students and teachers, he also commented that if something is of importance, the Internet is not the appropriate place for that conversation.28

**DOES THE MISSOURI LAW GO TOO FAR?**

Following passage of the law, the Missouri State Teachers Association (“MSTA”) filed a lawsuit claiming that the law unconstitutionally violated teachers’ First Amendment rights to freedom of speech and freedom of association, in addition to being overly vague.29 The Circuit Court agreed with the MSTA, finding that the statute would have a “chilling effect on speech.”30

Consequently, the court entered a preliminary injunction enjoining the state from implementing the portion of SB54 pertaining to teacher-student communication.31 The court noted that the “breadth of the prohibition is stagger-
"ing" and found that if the MSTA proceeded with the case on the merits, it would likely succeed.32

Following the injunction, Missouri Gov. Jay Nixon called for a repeal of the law, stating, "In a digital world, we must recognize that social media can be an important tool for teaching and learning."33

In response, the Missouri Senate Education Committee unanimously passed Senate Bill 1, a bill that repealed the electronic media provision of SB54.34 In its place, it issued a mandate that all school districts write and put in place their own social media policies by March 1, 2012.35 The Legislature passed the bill, and on Oct. 21, 2011, Nixon signed SB1 into law.36

Under the revised law, Missouri now joins the majority of the country by placing the responsibility to design an appropriate teacher-student communication policy on the individual school districts.37 To some, however, this is where the responsibility has always belonged.

As Dr. Candace Thompson, assistant superintendent of School District 21 in Wheeling, Ill., stated, "I agree that it is important to have a policy addressing these types of issue, not only to protect our staff but also to protect our students."38

However, she felt that these policies were most appropriate when designed by school leaders at the district level rather than by the state legislature.39

MORE QUESTIONS THAN ANSWERS

While many feel that the task of designing electronic teacher-student communication policies is now properly in the hands of school officials, others are concerned that school districts lack the guidance to construct these policies.40 Following repeal of the law, Missouri State Rep. Jay Barnes questioned whether this approach would prompt school boards to adopt unconstitutional policies.41

"What I'm afraid that we're doing is we're taking one big unconstitutional law and we're telling 529 different school districts to act to adopt a policy," Barnes said.42 "Some of them are going to adopt constitutional policies. But some of them probably aren't."43
Echoing these concerns, the MSTA warns districts that while school boards can write their policies broadly, "that doesn’t mean the policy would withstand a challenge in the courts if it violates First Amendment rights." To address this concern, the MSTA announced, "We will work with individual districts and teachers to make sure that all district policies continue to give teachers their First Amendment rights, while at the same time allowing for proper use of technology." The Louisiana law, which requires teachers to record and report all electronic communications with students, may serve as an example for Missouri school districts looking to balance the need to protect students with the need to protect teachers' First Amendment rights. However, in an age where online communication is often the primary means of communication, finding the appropriate balance will likely be an ongoing task.

NOTES

2 Id.
3 Id.
5 Irvine & Tanner, supra note 1.
7 Id.
9 Id.
11 Id.
12 Ash, supra note 8.
13 Id.
14 Id.
16 Id.
17 Id.
19 Id.
20 Id.
23 Interview with Adrian Allen, former teacher (Oct. 15, 2011).
24 First Amendment Ctr., supra note 18.
25 Id.
26 Peralta, supra note 22.
27 Id.
28 Id.
29 Hill, supra note 21.
31 Id.
32 Id.
35 Id.
37 Peralta, supra note 22.
38 Interview with Dr. Candace Thompson, Assistant Superintendent of Supportive Services, Wheeling, IL, School District #21 (Sept. 25, 2011).
39 Id.
41 Id.
42 Id.
43 Id.
44 MTSA Blog, supra note 36.
45 Id.
"PERRYMANDERING": A NEW REDISTRICTING PLAN IN TEXAS IMPACTS THE LATINO VOTE

by Norma E. Loza

Much like the enfranchisement struggles of African-Americans in the South during the Jim Crow era, Latinos today are the new targets of electoral shenanigans. With a growing Hispanic population, the Hispanic vote is increasingly becoming a powerful voting bloc for some politicians and a danger for others. With that in mind and a new election nearing, redistricting is being used to disadvantage Latino voters.
Recently, the U.S. Department of Justice ("DOJ") objected to a Texas redistricting plan based on the 2010 census. The DOJ concluded that the plan — signed and endorsed by Republican Gov. Rick Perry — purposefully discriminates against Hispanic minorities by diluting their votes.

The U.S. Constitution requires that representatives be apportioned among the states according to population to ensure proportionate representation. As Prof. Justin Levitt, an expert on redistricting at Loyola Law School in Los Angeles, explains it, "Redistricting is the infrastructure of democracy [because] it determines which people choose which representatives and therefore which interests are represented."

Many federal, state and local legislators are elected from districts. Originally in the colonial era, districts were defined by borders of towns or counties. As time passed, towns and counties grew at different rates, creating a need for periodical redistricting outside these lines to ensure that one person's vote did not count more than another's.

Redistricting plans are usually created by state legislatures, which allows the party in power great control over congressional lines in their own state. Thus, according to Prof. Levitt, "There's a tremendous incentive for them to draw the lines primarily for personal benefit." Unfortunately, this can sometimes "lead to lines that impact others, including, but certainly not exclusively, Latinos."

Although periodic redistricting was designed to equalize voting power, it has also proved to be a useful tool to disenfranchise certain voters. As the U.S. Supreme Court affirmed, redistricting may be particularly harmful when it results in gerrymandering, or the manipulation of voting district lines to give a disproportionate advantage to the incumbent political party. This political tactic is "an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good."

Gerrymandering helped Texas Republicans as they were determined to remain in power after taking control of the Texas Legislature in 2003. For example, after a demographic shift left Republican Henry Bonilla with a Democratic-leaning majority Latino district, he was in danger of losing his seat in Congress. The Legislature, however, was able to protect Bonilla's seat by redraw-
ing the lines so that 100,000 Latinos were moved from that district, dismantling the Latino majority of the voting population.17

The same tactics seem to be in play for the 2012 elections as the Republican-controlled Texas Legislature again works to win Republican congressional and state assembly seats.18 The stakes are even higher this time, as Texas was awarded four more seats in the U.S. House of Representatives due to a population growth of over 4.2 million.19 Notably, Hispanics accounted for 65 percent of that growth.20

In the 2004 presidential election, 50 percent of Hispanic voters in Texas voted for Democratic nominee John Kerry, but in the 2008 elections, 63 percent voted for now-President Barack Obama.21 This suggests an increase in Democratic support within the Latino community that could be detrimental to Republican chances in Texas.22

Responding to this demographic shift, Tea Party activists sought to invalidate the 2010 census results for Texas.23 In *Teuber v. Texas*, filed in June 2011, Tea Party activists argued that census figures were inaccurate and should not be used to redistrict Texas as required by law, because the census counted illegal immigrants.24

The plaintiffs in *Teuber* sought to decrease the official Hispanic tally by the number of illegal immigrants reportedly living in Texas.25 They contended that, because illegal immigrants cannot vote, the votes of individuals in districts with a high number of illegal immigrants would be disproportionately powerful.26

However, the Tea Party activists voluntarily dropped their suit when the court granted a request by the Texas Latino Redistricting Task Force to join as a defendant.27 The group is a coalition of influential Hispanic organizations committed to ensuring that redistricting plans in Texas do not hurt the Latino vote.28

Using the 2010 census numbers, the Texas Legislature remapped congressional districts, which originally resulted in 25 Republican-leaning seats and 10 Democratic-leaning seats.29 The plan — nicknamed "Perrymandering" after Gov. Perry endorsed it — has created no small amount of controversy.30 Under the plan, Hispanics would lose two opportunity districts in the Texas Legislature,
and Hispanic "opportunity districts [in Congress] would fall from 22 percent to 19 percent of the congressional delegation."33

Due to various instances of past electoral discrimination, Texas is required to submit its redistricting plans to the DOJ or the D.C. District Court for preauthorization.32 The plan is then approved if it "is not intended to dilute minority votes and . . . does not cause retrogression in minority political opportunity."33

Although Texas decided to submit its redistricting plan to the D.C. District Court, the DOJ made its own investigation, which it filed in court.34 On Sept. 21, 2011, the Civil Rights Division of the DOJ concluded that the plan violated Section 5 of the Voting Rights Act35 because it would "diminish the ability of citizens of the United States, on account of race, color or membership in a language minority group, to elect their preferred candidates."36

The DOJ argued that the Texas Legislature had discriminated mainly by splitting the Hispanic vote among different counties, targeting politically organized Hispanic communities.37

On Nov. 8, the D.C. District Court concluded, "The state of Texas used an improper standard or methodology to determine which districts afford minority voters the ability to elect their preferred candidates of choice."38 The court then referred the matter to a panel of federal judges and commissioned the panel to redraw the maps in a non-discriminatory way.39

After the panel convened and redrew the maps, the district lines seemed to have switched to favor Hispanic candidates.40 As a result, the State of Texas filed a writ of certiorari to the U.S. Supreme Court to have the original maps reinstated.41 The Supreme Court granted the writ and will hear the case in January 2012.42

The impact of the final decision cannot be understated—for Hispanics, for other minorities, for Texans in general, and for any political party in any state, whether in or out of power. In the end, the districts—however they are drawn—will represent more than just the people living in them. They will likely represent the vote that tips the balance in the future.
NOTES

latinos-talk-jobs.
4. Id.
5. U.S. Const. art. I § 2, cl. 3.
6. Email interview with Justin Levitt, Associate Professor of Law, Loyola Law School Los Angeles (Oct. 27, 2011).
8. Id.
9. Id.
11. Id., supra note 6.
12. Id.
14. Id. at 244 (quoting LULAC v. Perry, 548 U.S. 399, 456 (2006)).
17. Id., supra note 15.
20. Id.
22. Id.
24. Id.
25. Id. at 7.
26 Id.
28 Id.
31 Redistricting, supra note 2.
32 Under Section 5, only certain states are required to submit redistricting plans for preclearance. This includes states that used tests “to screen would-be voters, and where fewer than half of the eligible voters either registered or voted in 1964, 1968, or 1972.” States can rid themselves of this requirement after taking steps to improve minority voting opportunities for ten years. Texas has not done so. Justin Levin, Where are the lines drawn? All About Redistricting, http://redistricting.law.edu/where.php (last visited Oct. 20, 2010).
33 Id.
35 42 U.S.C. §1973
36 Reilly, supra note 3.
37 Br. in Opp’n of Summ. J., supra note 34, at 37-38.
39 Id.
41 Id.
42 Id.
FEATURE ARTICLE

"SAVE OUR STATE" AMENDMENT: DEAD ON ARRIVAL

by ISMAEL T. SALAM

Since Sept. 11, 2001, a spotlight has been cast on one of the Abrahamic religions in particular: Islam. This attention has taken various forms, from hate crimes at one end of the spectrum to community outreach programs at the other, programs at which Jewish, Christian and Islamic leaders attempt to find common ground.
The recent focus on Muslim Americans has sparked a discussion about the place of Sharia, or Islamic, law in U.S. courts.\(^3\) Reacting to fears that judges are considering Sharia law in their decisions, state legislatures have proposed statutes and amendments to their state constitutions to prohibit state courts from considering Sharia law -- or any foreign law, for that matter.\(^4\)

On Nov. 2, 2010, State Question 755, also known as the “Save Our State” amendment (“SOS”), was put to public vote in Oklahoma.\(^5\) SOS would amend Oklahoma’s constitution to limit the sources of law that courts could use in their decisions.\(^6\) The amendment would prohibish state courts from upholding and adhering to the law of another state in the United States if that law “include[s] Sharia Law in making judicial decisions.”\(^7\) Oklahoma courts shall specifically “not consider international law or Sharia Law.”\(^8\) The SOS defines Sharia as Islamic law “based on two principal sources: the Koran and the teaching of Mohammed.”\(^9\)

The Oklahoma Legislature passed the authorizing resolution with an overwhelming bipartisan margin: 82–10 in the House\(^10\) and 41–2 in the Senate.\(^11\) Similarly, more than 70 percent of Oklahoma voters voted in favor of SOS.\(^12\)

“Oklahomans should not have to worry that their rights could be undermined by foreign court rulings in countries that do not have our respect for individual liberty and justice for all,” said resolution co-author Rep. Rex Duncan.\(^13\)

“Oklahoma court decisions should be based on . . . our state and national laws — period.”\(^14\)

PRIOR SHARIA CASES

Behind this “preemptive strike”\(^15\) are court decisions in other states that have allowed cases to proceed under Sharia law.\(^16\) On March 3, 2011, Florida Circuit Judge Richard Nielsen ruled that a dispute relating to the corporate governance of a Florida mosque “should proceed under Ecclesiastical Islamic Law.”\(^17\) During the dispute, but prior to trial, the parties agreed to arbitrate their dispute in accordance with Islamic law.\(^18\)

Similarly, in July 2010 a New Jersey trial court judge held that a husband did not have the criminal intent necessary for the court to find him guilty of the sexual assault of his wife.\(^19\) The court ruled that the man, a Moroccan Muslim, “was operating under his belief . . . as the husband, his desire to have sex when
and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited. Though Sharia was not the basis for the ruling, it was considered evidence to help defeat the mens rea for the crime.

However, an appellate court later reversed the decision. It held that the man's "conduct in engaging in nonconsensual sexual intercourse was unquestionably knowing [as required by the statute], regardless of his view that his religion permitted him to act as he did."

Additionally, in May 2003 a Texas appellate court reversed a trial court's decision that denied a motion to compel arbitration between a Muslim couple. The couple had agreed to settle disputes surrounding their divorce—including custody of their two children—according to Islamic law in the Texas Islamic Court, a private arbitration institution. The appellate court held that the agreement was valid, and disputes arising under the agreement should be submitted to the Texas Islamic Court.
DEAD ON ARRIVAL

In their misguided attempt to protect their constitution, Duncan and Oklahoma voters may have violated the U.S. Constitution, “the fundamental document that binds us a people,” says Prof. Alan Raphael, an expert on constitutional law at Loyola University Chicago School of Law. On Nov. 29, 2010, and in response to SOS, a federal judge granted Muneer Awad a preliminary injunction preventing the Oklahoma State Board of Elections from certifying the voting results and amending the constitution.

The defendant in the injunction suit, Paul Ziriax, agency head of the Oklahoma State Board of Elections, argued that SOS was simply a choice-of-law provision limiting what laws a court could use. The court, however, stated that SOS’s “primary effect inhibits religion and that the amendment fosters an excessive government entanglement with religion.”

In rejecting the argument that the law was not aimed at any one religion, the court stated that a more reasonable construction of the amendment’s actual language found that it singled out Sharia law and, by extension, Muslims in general. Therefore, the court held that there was a substantial likelihood that SOS violated the Establishment and Free Exercise Clauses of the First Amendment.

Notably, the court also found that Sharia law “lacks a legal character” because “Sharia law is a set of religious traditions that differs depending upon the country in which the individual Muslim resides.”

Sheik Kifah Mustapha of the Mosque Foundation in Bridgeview, Ill., offers a broader definition. He describes Sharia as “all that which God initiated of rulings through revelation to His Prophets and Messengers. The Torah revealed to Moses is Sharia, the Psalms revealed to David is Sharia, the [Evangel] revealed to Jesus is Sharia and the Quran revealed to Mohammad is Sharia. It includes the belief and the practice. In simple terms, all that which God told to do or not to do is Sharia in all areas of life.”

According to Sheik Mustapha, any Muslim residing in a non-Muslim state like the United States “should respect the law of the land” because “being a citizen or a resident or a visitor means you have agreed to go with the law of the land.
you accepted to be a part of.”35 While Islam requires that Muslims practice their religion, if there is a conflict between Islam and the law of the land then Muslims must adhere to the law of the land or immigrate to a country where they can practice freely.36

As a result of its permissive stance towards Sharia law, the Awad decision has been heavily criticized.37 For example, during a televised debate in New Hampshire, Republican presidential candidate Herman Cain mistakenly referred to Awad as an attempt by Muslims “to influence court decisions with Sharia law.”38 In addition, one Oklahoma legislator has introduced a resolution calling for the impeachment of the judge that decided Awad, though no vote has taken place as of the writing of this article.39

However, SOS and its proponents have their critics as well. “Laws such as these are the product of misled xenophobic legislators who foist their equally misguided ideas on a public unnecessarily fearful of a person who belongs to a particular religion,” said Michael Salem, counsel for Awad.40

NEW DEVELOPMENTS

Ziriax has since appealed Awad to the Tenth Circuit Court of Appeals, where a decision awaits.41 Awad and the American Civil Liberties Union filed a response on May 9, 2011, urging the court to uphold the lower court’s preliminary injunction.42 In addition, the American Jewish Committee has also filed a brief calling SOS “flagrantly unconstitutional for violating the core nondiscrimination command of the Establishment Clause.”43

On Sept. 12, 2011, the parties presented oral arguments before a three-judge panel of the Tenth Circuit in Denver.44 Judge Scott Matheson, a member of the panel, asked why SOS was written to apply to just one religion.45 “To avoid confusion,” replied Oklahoma Solicitor General Patrick Wyrick.46 During his questioning, however, Salem responded, “It will only take 50 percent plus one to ban the next religion.”47

After oral argument, the court ordered the parties to file supplemental briefs by the first week in November on the possible application of 1982 U.S. Supreme Court case Larson v. Valente.48 In Larson, the Supreme Court ruled 5-4 that a Minnesota statute violated the Establishment Clause because it singled out cer-
tain religious organizations that solicit more than 50 percent of their funds from non-members.49

INTERNATIONAL IMPLICATIONS

Aside from the First Amendment issues, SOS may be unconstitutional because of its conflict with international law and the Supremacy Clause. SOS prohibits state courts from using international law and defines it as the "law of nations" that "deals with the conduct of international organizations and independent nations [and] their relationships with each other."50 Included in the law of nations are "international agreements, as well as treaties."51

Salem argued in his appellate brief that SOS would violate the Supremacy Clause. In effect, SOS would not recognize, for example, the New York Convention or the Convention on the International Sale of Goods.52 However, the court did not need to address this issue because the issue was not before it.53

Nonetheless, the U.S. Constitution provides that "all Treaties made ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby" regardless of any state law.54 Simply put, "treaties preempt state law," said Prof. Margaret Moses, director of the International Law and Practice Program at Loyola University Chicago School of Law.55

Generally, a court would apply foreign law in only two circumstances. One is when the parties have chosen a body of foreign law to govern their contract.56 Alternatively, "in a case in which no law was chosen, the court would follow its own state's conflicts-of-laws rules and determine that the foreign state's relationship to the transaction was more reasonable than the law of a U.S. state," said Moses.57

Even if SOS only limited the application of foreign law -- another nation's law -- the implications may be profound. Telling other nations that state courts will not recognize their law "sounds pretty isolationist," said Moses.58 Many foreign courts will only recognize judgments if the issuing jurisdiction would recognize a similar judgment should it have been granted from the foreign court.59
CONCLUSION

It is unclear whether SOS was intended to violate the U.S. Constitution or just narrow its interpretation. A willful violation of the Constitution "is very disturbing," said Prof. Raphael. Most of the comments by SOS's co-authors suggest a genuine concern about Sharia law. Sykes, SOS co-author, stated that "Sharia law coming to the U.S. is a scary concept" and "hopefully the passage of this constitutional amendment will prevent it in Oklahoma."

Likewise, another SOS co-author stated that SOS is a pre-emptive strike against Sharia law. Sharia is a "cancer" in the United Kingdom, observed Duncan, where Sharia has been used in rulings in religious tribunals. In response to the question of how Sharia is a threat in Oklahoma when only 1 percent of Oklahoma's population is Muslim, Duncan said, "It's a growing threat . . . a war for the survival of America."

If SOS is found to violate the Constitution, what would its proponents gain? One answer is political support among their constituencies. Joseph Ignagni, a political science scholar at the University of Texas at Arlington, noted, "The literature in political science clearly indicates that the number one concern or goal of the vast majority of legislators is reelection. Therefore, it is not surprising that a legislator would vote for such a bill if he or she believed it would be popular with his or her constituents."

Most Muslim Americans are content with their lives, despite measures like SOS that contribute to the difficulty of being a Muslim in a post-9/11 America. "I am fairly content with my community," said Hanna Barakat, a sophomore at the University of Texas at Arlington. "As a female who wears the hijab, or head covering, I have not had any encounters with intolerance."

The Tenth Circuit has not yet rendered an opinion in Awad. When it does, Wyrrick may file a petition for rehearing to try and present his case before the entire Tenth Circuit. Otherwise, his only option is to appeal to the United States Supreme Court. While the SOS may have been dead on arrival and never became part of the Oklahoma Constitution, its proposal is evidence of continued misunderstanding of Islam and its place in America under the U.S. Constitution.
NOTES

3 Did judge cite Islamic law in his decision?, NAPLES DAILY NEWS (Fla.), May 12, 2011, at A3 (referring to a speech by Republican Senate Candidate, Adam Hasner, characterizing a Florida judge’s decision to base a ruling on Islamic law as “not supporting the U.S. Constitution or the Constitution of the State of Florida”); William R. Levesque, Judge Explains Use of Islamic Law, ST. PETERSBURG TIMES (Fla.), Mar. 23, 2011, at B8 (discussing Florida judge who used Sharia law to decide arbitration issue); A.G. Sulzberger, Voters Face Decisions on a Mix of Issues, N.Y. TIMES, Oct. 6, 2010, at 1A (mentioning a New Jersey case in which the judge “cited a man’s Islamic faith in denying a restraining order to a woman who said she had been raped by her husband”); Maxim Lott, Advocates of Anti-Shariah Measures Alarmed by Judge’s Ruling, FOXNEWS.COM (Aug. 5, 2010), http://www.foxnews.com/us/2010/08/05/advocates-anti-shariah-measures-alarmed-judges-ruling/ (discussing a New Jersey case and Texas case).
7 Save Our State Amendment, supra note 5.
8 Id.
9 Edmondson, supra note 6.
14 Id.
15 Sean Hannity Interview with Rex Duncan, http://www.youtube.com/watch?v=UMmRXdDgFqI (FoxNews broadcast) (discussing how “SOS is a pre-emptive strike”).
16 See infra notes 17-25 and accompanying text.
17 Moscow v. Islamic Educ. Cr. of Tampa, No. 08-CA-3497, slip at 4 (Fla. Cir. Ct. signed Mar. 22, 2011) (The case involved trustees suing a mosque for being improperly removed and control of $2.2 million received from the state after the state used some of the mosque’s property in a road project); William R. Levesque, supra note 3.
18 Mansoor, supra note 17, slip at 2-4.
20 Id.
21 Id.
22 Id. at 432.
24 Id. at 408.
25 Id. at 413.
26 Email interview with Alan Raphael, professor of constitutional law, Loyola University Chicago School of Law (Oct. 13, 2011).
27 Muneer Awad is an executive director of the Oklahoma division of the Council on American-Islamic Relations ("CAIR").
29 Id.
30 Id. at 1306.
31 Id.
32 Id. at 1306-07.
33 Id. at 1306.
35 Mustapha, supra note 34.
37 See infra notes 38-39 and accompanying text.
38 Willoughby Mariano, Cain's Claims About Sharia Law Barely True, ATLANTA J. CONST., June 20, 2011, at B1 (Cain was alluding to the New Jersey case as discussed supra in notes 19-22 and accompanying text).
40 Email interview with Michael Salem, co-counsel for Awad (Oct. 17, 2011).
41 Awad v. Zirias, No. 10-6273 (10th Cir., May 9, 2011).
44 Robert Bockelwitz, 10th Circuit Court of Appeals Takes Up Oklahoma’s Islamic Law Case – Judges question state’s reason to ban Sharia law, OKLAHOMAN, Sept. 13, 2011, at 2A; Salem, supra note 40.
46 Id.
47 Id.
48 Salem, supra note 40.
50 Edmondson, supra note 6.
51 Id.
52 Salem, supra note 40; see also Comm. on Foreign & Comparative, N.Y.C. Bar Ass'n., The Unconstitutionality of Oklahoma Referendum 755 – The "Save Our State Amendment" 4–6 (Dec. 2011) (discussing how Save Our State would violate the Supremacy Clause because the United States is a signatory to the Convention on the International Sale of Goods).
53 Asim, 754 F.Supp. at 1301.
54 U.S. CONST. art. 6 § 1 cl. 2.
55 Email interview with Margaret Moses, director of International Law and Practice Program, Loyola University Chicago School of Law (Oct. 12, 2011).
56 Id.
57 Id.
58 Id.
59 See Vishali Singal, Preserving Power Without Sacrificing Justice: Creating an Effective Reciprocity Regime for the Recognition and Enforcement of Foreign Judgments, 59 Hastings L.J. 943 (Mar. 2008) ("Given the magnitude of interaction between countries, either through private commerce, foreign relations between governments, or the treatment of one nation's citizens by another nation, the world's legal systems have become interconnected as well. Whether the laws of one nation dispense justice in accordance with that nation's standards is now, in many circumstances, dependent upon whether the laws of another nation will recognize and enforce foreign judgments. As such, the strength of the American legal system is predicated in part upon the world's receptivity to American judgments, which in turn is influenced by America's receptivity to foreign judgments.").
60 Raphael, supra note 26.
62 Hannity, supra note 15.
63 Id. (discussing how the United Kingdom has allowed Islamic tribunals to decide on matters relating to issues arising under family law and arbitration).
64 MSNBC Interview with Rex Duncan (2010), http://www.youtube.com/watch?v=yb3vrfm_MH10&feature=relmfu.
65 Email interview with Joseph Ignagni, professor of political science at the University of Texas at Arlington (Oct. 17, 2011).
67 Id. at 43.
68 Email interview with Hanna Basakat, sophomore at the University of Texas at Arlington (Oct. 17, 2011).
69 Id.
WORKING WITH A BLANK CHECK: THE COST OF DEFENSE OR THE DEATH PENALTY INDUSTRY?

by Colleen Thomas

The debate over capital punishment is – literally – a matter of life and death. The arguments on both sides are typically moral in substance, but more and more detractors are also introducing economics into the picture. Because the stakes in capital trials are at their highest, the costs for both the prosecution and the defense are equally high. But is every penny spent really necessary?
In recent years, many states have taken a closer look at the exorbitant costs associated with capital punishment. From the cost of the original criminal trial to the subsequent years of litigation at both the state and federal levels to the cost of the actual execution, the expenses add up. In fact, states like New Jersey and Illinois have abolished the death penalty altogether, due in no small part to the costs of capital punishment. Other states are making a cost-benefit analysis part of the discussion as well.

**BY THE NUMBERS**

While it is not surprising that a death penalty trial is more costly than a non-capital trial, the actual numbers are staggering. In 2007, New Jersey became the first state to abolish the death penalty after a state-appointed commission deemed the cost of capital punishment too high—both emotionally and financially. In fact, New Jersey was spending more than $11 million each year on death penalty cases alone.

In 2011, Illinois followed suit and abolished the death penalty, which had been previously reinstated in 1977. Although the Illinois House of Representatives initially voted against abolition, the $20 million annual cost of death penalty cases helped push the measure forward. The Illinois Capital Punishment Reform Study Committee concluded that the amount of money spent on murder cases designated for capital punishment significantly exceeded the amount the state would have expended had the cases been non-capital.

The death penalty law in California has also recently faced legislative scrutiny. California has spent an estimated $1.94 billion since 1978 on costs associated with capital punishment cases. While the ultimate outcome remains to be seen, one thing is certain: abolitionists are determined and persistent.

Finally, while Maryland has yet to take any official action, abolition remains the recommendation of its Commission on Capital Punishment. The Commission noted that capital cases are more expensive and exploit more resources than non-capital cases. In fact, adjudication costs for capital cases in Maryland are more than three times greater—about $850,000 more per case—than they are for cases in which prosecutors do not seek the death penalty.
THE DEATH PENALTY INDUSTRY

Given the significant costs of capital cases, it is not unreasonable to consider where all the money goes. The answer is simple. It goes everywhere. Every stage of a capital case is more time-consuming and expensive than a typical criminal case. Capital cases, by their high-stakes nature, cost an extraordinary amount of money to conduct, money that some argue is intentionally wasted just to make the argument that capital punishment is too costly. This, says King County (Wash.) prosecutor Dan Satterberg, is the "death penalty industry."

One of the largest costs comes from the use of expert witnesses. Some of the more common types of experts that attorneys call in criminal cases specialize in areas such as DNA, mental health, toxicology and ballistics. However, in a capital case, the scope far exceeds these well-known areas. During capital trials, mitigation specialists are often called to investigate the defendant's past. These experts look for explanations behind behavior in an attempt to rationalize or even humanize the person charged with such an inhumane act. Additionally, experts in fields such as human vision, institutional adjustment, hypnosis and social history are called to courts to give their opinions.

Given the laundry list of uncommon (and sometimes unheard of) fields in which experts are called to testify at capital trials, Satterberg's remarks are hard to ignore — especially when such expert testimony comes at a great cost. First, the majority of experts require an up-front retainer, often totaling close to $1,500. For their in-court testimony, the average hourly rate of both medical and non-medical experts reaches upward of $380, with the testimony of some medical experts reaching upward of $550 per hour. In addition, experts make approximately $250 per hour for the time spent reviewing files and otherwise preparing for trial.

While these numbers seem excessive, defense and prosecution attorneys alike have come to the defense of attorneys using whatever resources available. Defense attorneys maintain that what is done is necessary when defending death row clients, despite the extraordinary cost.

Former Cook County State's Attorney Richard A. Devine understands these sentiments. "Defense attorneys will err on the side of inclusion when consider-
ing experts,” he said.30 “You never know what will have an impact on a jury, so many attorneys will utilize anything that comes along.”31

Nevertheless, recent criticism that defense attorneys have been running up their bills32 suggests that Satterberg’s theory of the death penalty industry may not be entirely unfounded or without need of further consideration. Regardless, one thing is for sure. As more and more states are rethinking their stance on capital punishment, its significant costs will certainly remain a focal point of their discussions.

NOTES

3 Sullivan, supra note 1.
9 Sullivan, supra note 1.
12 Williams, supra note 10.
14 Id. at 45.


17 Id.


19 Id.

20 Alarcon & Mitchell, supra note 11.

21 Id.

22 Springer, supra note 18.

23 Id.

24 Alarcon & Mitchell, supra note 11.


26 Id.

27 Id.


29 Springer, supra note 18.


31 Id.

32 Id.
AMERICA’S "DIRTY LITTLE SECRET": DOMESTIC SEX TRAFFICKING OF MINORS & A CALL FOR STATE ACTION

by Caitlin Casey

Carissa Phelps became a victim of sex trafficking at the age of 12. After running away from a group home where her mother abandoned her a few years earlier, Phelps "befriended" an older man. Trolling the streets for homeless girls, he would offer them food, clothing and a place to stay. However, food and shelter came with a condition: Phelps was forced to sell her adolescent body for sex and to give all of her earnings to her "provider."
While the exact number is unknown, it is estimated that Phelps is one of thousands of American children exploited for sex. In the domestic sex trafficking of minors, children are commercially and sexually exploited within U.S. borders. It has been called America's "dirty little secret," as most Americans are unaware that it infects suburbs, towns, and cities across the nation. While sex trafficking is a fast-growing criminal enterprise globally, the United States is a particularly active and profitable venue.

Over the past several decades, sex trafficking of minors has become an increasingly popular organized crime operation. Runaway and homeless children are easily accessible, the demand is high (and therefore extremely profitable for traffickers), and the risk of repercussions is fairly minimal, especially compared to drug and weapon trafficking. Due to the covert nature of the crime and the frequency of underreporting, the total number of victims in the United States is not exact. While current figures are speculative, all research clearly demonstrates the significance of the problem. The U.S. Department of Justice, for example, estimates that roughly 100,000 to 300,000 minors are victimized by child sex trafficking each year, with the average age of entry at 13.

CURRENT & FEDERAL STATE LEGISLATION

The federal government has only within the past decade formally acknowledged the epidemic scope of child sex trafficking. In 2000, Congress passed the Trafficking Victims Protection Act ("TVPA"), the first federal law specifically enacted to prevent victimization of both children and adults and to prosecute perpetrators of human trafficking. The TVPA explicitly defined domestic minor sex trafficking. Critically, this legislation emphasized that, when prosecuting a trafficker, prosecutors need not prove that a perpetrator took the victim by force, fraud, or coercion. Even if the child claims to engage in prostitution "voluntarily," proof that the victim is under the age of 18 is sufficient to constitute sex trafficking of a child.

Since the TVPA's enactment, numerous public interest and victims advocacy groups have formed to generate awareness and inspire action. As a result, the U.S. Department of Justice has encouraged law enforcement agencies to move away from viewing prostitution among juveniles as a form of delinquency engaged in by runaways, and instead to view these youth as victims of commercial sexual exploitation.
Federal law continued to expand with the Trafficking Victims Protections Reauthorization Act in 2003, 2005 and 2008.\textsuperscript{20} And, encouragingly, the Domestic Minor Sex Trafficking Deterrence and Victims Support Act of 2011, a bill currently pending in the Senate, is poised to provide more than $2 million per year for victim shelters and services such as counseling, legal assistance, education and job training.\textsuperscript{21}

While there has been progress throughout the past decade, significant strides must still be made, particularly at the state level. State legislation, in addition to greater mobilization and coordination among state-level entities, is imperative in combating sex trafficking.\textsuperscript{22} Federal law, while crucial, is not sufficient alone.\textsuperscript{23} State and local law enforcement officers encounter minors that are victims of domestic sex trafficking more routinely and must apply state law, not just federal law, when charging traffickers.\textsuperscript{24}

Further, even when reports of trafficking are brought to federal attention, it is often difficult to get federal prosecutors to take these cases, as their focus is primarily on prosecuting larger, high-impact organized crime ventures.\textsuperscript{25} Therefore, in addition to federal law, "each state should have a complete legal package that includes adequate penalties for traffickers, as well as definitions of these crimes that mirror the federal statutes," Prof. Jody Raphael of DePaul University College of Law argues.\textsuperscript{26}

A recent study by the Polaris Project, the leading U.S. human trafficking advocacy organization, analyzed the legal frameworks in place in each state and compared the states' current legislation with a comprehensive anti-trafficking legal framework formulated by its policy committee.\textsuperscript{27} The comprehensive framework established 10 "must-have" legislative categories to effectively investigate trafficking networks, prosecute offenders and aid victims.\textsuperscript{28}

The study revealed that while 45 states have sex trafficking statutes, fewer than a dozen states come close to meeting the 10 required categories.\textsuperscript{29} What is more, nine states — Alaska, Arkansas, Colorado, Massachusetts, Montana, South Carolina, South Dakota, West Virginia and Wyoming — are lagging significantly in enacting legislation.\textsuperscript{30} These states have either failed to enact basic human trafficking provisions at all or the minimal provisions that they have adopted are inadequate to address the problem present within their states.\textsuperscript{31}
A Call to Action

The disconcerting results of the Polaris Project study signal the broad lack of awareness and inaction at the state level. Many states continue to address sex trafficking as a form of sex crime, yet this approach has proved ineffective for the past several years.\textsuperscript{32} Sex trafficking is much more than an isolated sex crime against one individual.\textsuperscript{33} It is a form of both reoccurring domestic violence and organized crime, and it requires separate laws and a dedicated focus from law enforcement and prosecutors.\textsuperscript{34}

To fight trafficking within their communities, states must not only expand criminal statutes and make sentences more stringent but must also implement tools to better effectuate arrests and prosecute traffickers.\textsuperscript{35} Louis Longitano, supervisor of the Human Trafficking Unit at the Cook County State's Attorney's Office, stresses that "law enforcement needs access to the tools used to investigate other forms of organized crime such as wiretaps and other forms of electronic surveillance."\textsuperscript{36} Further, arrests must be made frequently and should be highly publicized, in an effort to deter others from continuing to recruit young girls.\textsuperscript{37}

In addition to expanding criminal statutes to prosecute traffickers, legislatures must place a renewed emphasis on curbing demand. While the purchase of sexual acts is a crime in most states, the penalties imposed have been insufficient to deter customers, or "johns."\textsuperscript{38} Raphael notes, "As long as there is a demand for children's bodies, traffickers will work to meet those demands."\textsuperscript{39} Thus, instituting severe penalties against "johns," in addition to the trafficker, will discourage them from seeking out and exploiting minors and thus diminish the financial return to traffickers.\textsuperscript{40} As Raphael emphasizes, "Those who take advantage of children sexually must be a part of the equation."\textsuperscript{41} States must make an impact on both the demand and supply side of exploitation.\textsuperscript{42}

While state legislation is not the only tool in combating sex trafficking of minors, it is a critical component that serves as a building block for cooperation and coordination between law enforcement, prosecutors and victim advocacy organizations. Despite advances in federal law, child sex trafficking continues to flourish because of inadequate state legislative action and inability to deter both traffickers and "johns" with consistent local prosecution.
For far too long, many states have either ineffectively addressed or simply ignored the presence of sex trafficking of minors and victims like Carissa Phelps. Domestic sex trafficking of minors is an epidemic, and states must act now before it spreads.

NOTES

2 Id.
3 Id.
4 Id.
5 Id. (The exact number of American children exploited for sex today is not known. Best estimates are based anecdotal information and on research by advocacy groups and the U.S. Department of Justice.)
7 Whitehead, supra note 1.
9 Id.
10 Id.
11 Email interview with Jody Rafael, Senior Research Fellow and Visiting Professor of Law, DePaul University College of Law (Oct. 12, 2011).
12 Id.
13 Richter, supra note 8.
14 Shared Hope Int’l, supra note 6.
15 Id.; see TVPA, 22 USC §7101 (2000).
16 Id.
17 Id.
18 Id.
20 Id.
22 Rafael, supra note 11.
23 Id.
24 Id.
25 Id.
26 Id.
27 RATED STATE LAWS 2011, POLARIS PROJECT (Aug. 2011), available at http://www.polarisproject.org/what-we-do/policy-advocacy/state-policy/current-laws. (The anti-trafficking legal framework includes statutes: 1) defining sex trafficking and labor trafficking and providing criminal sanctions; 2) establishing asset forfeiture and instituting investigative tools; 3) providing training on human trafficking to a wide variety of professionals - including law enforcement, judges, public defenders, prosecutors, child protective services, probation officers, and social service outreach workers - and/or establishing a human trafficking task force, commission, or advisory committee; 4) posting a human trafficking hotline; 5) protecting sex trafficked minors through Safe Harbor programs; 7) lowering the burden of proof for sex trafficking of minors; 8) providing for victim assistance and 9) access to civil damages; and 10) vacating convictions for sex trafficking victims).
28 Id.
29 Id.
31 Id.
32 Interview with Louis Longitano, Supervisor, Human Trafficking Unit, Cook County State’s Attorney’s Office (Oct. 14, 2011).
33 Id.
34 Id.
35 Id. (Illinois and New York were among the first states to expand their criminal laws and institute comprehensive statutes specifically aimed at combating minor sex trafficking. Illinois recently passed the Illinois Safe Children’s Act of 2010, making all children under the age of 18 immune from prosecution for prostitution under any circumstance. If law enforcement encounters a child exploited in prostitution, the child may be taken into temporary protective custody. Law enforcement must notify the Department of Child and Family Services, which in turn must initiate an investigation into child abuse within 24 hours. The law also raises penalties, limits the availability of affirmative defenses for those exploiting minors, and provides the possibility of additional funding for services to survivors of human trafficking and prostitution through expanded vehicle impoundment fees. Additionally, the law expanded law enforcement’s ability to engage in wiretapping during investigations into human trafficking crimes; see Governor Quinn Signs Law to Protect Children from Sexual Exploitation, ILL. GOV’T NEWS NET. (Aug. 20, 2010), http://www.illinois.gov/pressreleases/ShowPressRelease.cfm?SubjectID=3&RecNum=8790.)
36 Id. (Electronic surveillance includes officer safety overheard, consensual overhears, vehicle tracking devices and non-audio surveillance by pole-cameras).
37 Raphael, supra note 11.
38 Richter, supra note 8.
39 Raphael, supra note 11.
40 Richter, supra note 8.
41 Raphael, supra note 11.
42 Richter, supra note 8.
FEATURE ARTICLE

DRUG TESTS FOR WELFARE:
SAVING TAXPAYER MONEY OR
FLUSHING IT DOWN
THE DRAIN?

by Michelle Yoder

For the person depending on welfare, $40 is a lot of money to "piss away." On July 1, 2011, Florida Statute 414.0652 went into effect. The new Florida law requires all applicants for Temporary Assistance for Needy Families ("TANF") to pass a drug test — $40 each, paid by the state — in order to receive benefits.
Fewer than nine weeks after its passage, the American Civil Liberties Union ("ACLU") of Florida filed a class action lawsuit challenging the law, claiming it violated applicants' Fourth Amendment rights.4

Less than two months later, District Court Judge Mary Scriven issued an injunction against the state that temporarily blocked the law.5 "The constitutional rights of a class of citizens are at stake," wrote Scriven in her 37-page order.6 The judge based her decision on the real possibility that the law violates the Fourth Amendment to the Constitution prohibiting illegal searches.7

Legal standards governing searches and seizures have a history of arousing public concern. Attempts by governments to mandate drug testing as a prerequisite for welfare benefits are nothing new.8 In 2003, the Sixth Circuit Court of Appeals invalidated such a law in Michigan.9

As of October 2011, 36 states have considered enacting laws requiring drug testing for recipients of cash assistance programs like TANF, 12 states have considered it for unemployment insurance, and still more have considered it as a requirement for food stamps, home heating assistance, and other benefit programs.10
Republican Sen. David Vitter of Louisiana has now introduced the Drug Free Families Act of 2011, which, if passed, would mandate drug testing for welfare recipients in all 50 states. While there are valid, passionate arguments both for and against such a law, without a thoughtful discussion of its likely consequences, public aid recipients and taxpayers alike will feel the pain.

"Tight budgets force tough choices," says North Carolina House Speaker Thom Tillis, an advocate for a similar law in his state. Tillis's concerns have echoed throughout the country, as in the past few years the United States has seen difficult financial times. By the end of 2009, the unemployment rate in America had risen to more than 10 percent.

In light of the economic downturn, it is necessary to find a long-term solution. But this solution must be one that accounts for the unique needs of economically vulnerable groups.

**Policy Implications**

As with any hot-button issue, public policy will be a driving force as both legislation and litigation unfold. The U.S. Supreme Court has consistently held that a drug test requiring a urine sample is a "search" warranting a constitutional analysis. Further, while the Supreme Court has outlined several exceptions that allow for suspicionless, non-consensual searches, the trouble comes in trying to place laws like Florida's into the proper legal context.

"I don't think the taxpayers should have to help fund somebody's drug habit," Alabama State Rep. Kerry Rich commented. At the core of Rich's argument is the assumption that drug users on welfare are using Americans' hard-earned money to support illegal activity. Essentially, there are two inherently conflicting views. Is drug use a disease or an illegal habit? On the one hand, there is the desire to eliminate illegal misuse of tax dollars, while on the other hand there is the risk of "discriminating based on whether people are good."

By enacting Florida's controversial law, Gov. Rick Scott and the Florida Legislature sought to "increase personal accountability and prevent Florida's tax dollars from subsidizing drug addiction, while still providing for needy children." Scott touts the law as helping "to prevent the misuse of tax dollars."
The effect on the children of welfare recipients is one focus of the Florida law. Gov. Scott, who made a campaign promise to pass such a law, clarified one important point: “To me it’s real simple. Money is going to the benefit of children, not to a parent who is using drugs.” Under the law, if a parent were to fail a drug test, an immediate family member or other approved individual can still collect the child’s benefits on the child’s behalf.

From a legal perspective, supporters view such a law as “nothing more than an additional eligibility criteria” for the receipt of public benefits. Advocates are quick to point out that participating in public assistance programs is voluntary. This is critical to their position because, viewed in this light, the legal rules concerning suspicionless testing differ.

The legal effect of the argument is that, if participation is voluntary, participants effectively consent to the search of their bodies. It is well established that a search, otherwise invalid, will be constitutional with the appropriate consent or waiver. For example, in Skinner v. Ry. Labor Exec. Ass’n, the Supreme Court held that because employees’ participation in an inherently dangerous line of work was voluntary in nature, mandatory drug testing was not unconstitutional.

The Supreme Court has held that a suspicionless search in the form of a drug test will be constitutional so long as it is warranted by substantial public safety concerns, such as those cases involving student athletes and railroad workers. Opponents of the law have suggested that allowing suspicionless testing for welfare benefits would create a “poverty exception” in the application of the Fourth Amendment.

Some of those opposed to a drug testing requirement, like Ohio State Sen. Nina Turner, have called such laws “a witch hunt against poor people.” This is a direct reproach to proponents of laws that link poverty with drug use. Advocates for welfare recipients claim that such policies “vilify victims of the recession.” They argue that such laws perpetuate “the stereotype that low-income people are lazy, shiftless drug addicts and if all they did was pick themselves up by the bootstraps then the country wouldn’t be in the mess it’s in.”

In addition, those opposed to such laws hold that, from a financial standpoint, mandatory drug tests may do more harm than good. If such a law does have its intended effect, it may very well deny benefits to substance abusers that
need assistance the most.\textsuperscript{39} Unfortunately, restricting access to basic assistance may aggravate substance abuse and lead to a higher demand for treatment.\textsuperscript{40}

**Facing the Reality of the Situation**

The situation “really speaks to how the politics of the moment are dominating the policy conversation in the virtual absences of any evidence,” one University of Chicago researcher noted.\textsuperscript{41} While public policy is a powerful weapon in the law, especially when human rights are at stake, policy without thoughtful consideration of its likely consequences has the real likelihood of doing more harm than good.

Since the Florida law took effect in July, enrollment in the TANF program has declined.\textsuperscript{42} Almost 1,600 applicants have refused to submit to the drug testing requirement, while only 7,028 applicants have taken it and passed.\textsuperscript{43} After a few months, the number of Florida residents receiving aid was lower than it was before the start of the recession.\textsuperscript{44} Preliminary data showed that, as of October 2011, fewer than one percent had tested positive, with the majority of those failures attributed to marijuana use.\textsuperscript{45}

The danger lies in the interpretation of the resulting data. Parties on each side of this issue consider the data supportive of their position.\textsuperscript{46} Those opposed to the law argue that the law will cost more in the long run because the number of welfare recipients using illegal drugs is in reality quite low.\textsuperscript{47} Supporters of the law are quick to respond that the low numbers of applicants that tested positive is simply evidence of a “weeding out” effect.\textsuperscript{48} A more scientific study of the results will best shed light on the true reasons for the reaction.\textsuperscript{49}

Nevertheless, serious and financially draining unintended consequences may result from mandatory drug testing.\textsuperscript{50} Stacey Dembo, a Social Security disability attorney in Chicago, is skeptical that drug testing will actually save the government money. She notes that the law is “not going to stop them from using drugs, it’s just going to stop [people] from getting welfare. That’s going to cause a huge new societal issue.”\textsuperscript{51}

She predicts such laws will simply shift expenses from one budget area to another.\textsuperscript{52} “If you are going to cut off someone’s food stamps because they tested positive for drugs, they are going to end up stealing or doing something else to
eat, and they are going to end up in jail instead of the welfare rolls. It's a lot more expensive to incarcerate someone than it is to give them a Link card for $200."^53

WHAT SHOULD BE DONE?

Viewing the issue on a holistic level, the law may fall short of reaching its intended effect. There are legitimate arguments that the new law could potentially waste more taxpayer dollars than if the law did not go into effect. Florida should conduct a cost-benefit analysis comparing the total money spent on the negative drug tests – at $40 each – with the money it is saving by not providing benefits to those applicants that test negative. Attacking the financial soundness of the law could undermine its basic intent: saving taxpayer money.

Lawmakers and advocates must confront their own biases and preconceptions in order to better understand the implications of their proposals long-term and wide-scale. America can ill afford policy “test-runs” that both waste taxpayer resources and potentially violate the Constitution.

NOTES

2 Fla. STAT. §414.0652.
3 Id.
6 Id.
7 Id.
10 Sulzberger, supra note 1.
15 Id.
17 Vermont Sch. Dist. v. Acton, 515 U.S. at 667-68 (Suspicionless drug testing of student athletes is reasonable and therefore does not violate the Fourth Amendment); Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006) (Reasonable exceptions to search warrant requirement).
18 Cohen, supra note 8.
19 Morrill & Frank, supra note 12.
20 Id.
21 Id.
23 Id.
25 Sulberger, supra note 1.
26 Id.
27 Id.
30 Id.
32 Skinner, 489 U.S. at 602; see also Vermont Sch. Dist. v. Acton, 515 U.S. at 646.
36 Sulberger, supra note 1.
37 Id.
38 E-mail interview with Stacey Dembo, Associate Attorney at Beth Apler & Associates (Oct. 17, 2011); Cohen, supra note 8.
39 Sulberger, supra note 1.
40 Id.
41 Id.
43 Id.
44 Id.
46 Sulzberger, supra note 1.
49 Dembo, supra note 40, Sulzberger, supra note 1.
50 Sulzberger, supra note 1.
51 Dembo, supra note 38.
52 Id.
53 Id.
54 Cohen, supra note 8.
55 Id.
RATIFYING CEDAW: IS THE UNITED STATES FALLING BEHIND ON WOMEN’S RIGHTS?

by JESSICA SANCHEZ

As a leader in promoting civil freedoms, the United States is a heavyweight in the advancement of women’s rights. And now, after President Barack Obama deemed the U.N. Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") an “important priority” for his administration, ratification of the convention is once again a possibility.¹

An international agreement, CEDAW is the most comprehensive instrument addressing women’s rights to date.² On the global scale, CEDAW is a step
forward in the progression of gender issues, including the legal and civil status of women, their reproductive rights, as well as their cultural and traditional influences.\(^3\)

Adopted by the U.N. General Assembly on Dec. 18, 1979, CEDAW entered into effect on Sept. 3, 1981.\(^4\) In 1995, noting the importance of the agreement, the United States committed to ratifying CEDAW by the year 2000 at the U.N. Fourth World Conference on Women in Beijing, China.\(^5\) But at the end of 2011, the United States remains the only democracy in the world yet to sign on.\(^6\)

**FORGOING FORMAL RECOGNITION**

Somewhat ironically, the United States played an integral role in drafting CEDAW.\(^7\) Upon its adoption by the United Nations, President Jimmy Carter signed the treaty, but it was never ratified.\(^8\) Thirteen years on, during the presidency of Bill Clinton, 68 senators asked to continue the ratification process, to no avail.\(^9\) President George W. Bush's administration also agreed the treaty was "generally desirable and something that should be approved," but took no action.\(^10\)

In Congress, though the Senate Foreign Relations Committee voted favorably in 1994 and 2002 to send CEDAW to the Senate floor, political opposition blocked the ratification process.\(^11\) As chair of the committee in 1995, Sen. Jesse Helms did not allow CEDAW to be considered over concerns that it would infringe upon U.S. sovereignty.\(^12\)

Meanwhile, others in opposition of CEDAW, such as Concerned Women for America, warn ratification could actually deny American women their basic freedoms and rights.\(^13\) One advocate notes, "A privilege of our American system is that we, the people, decide what our laws will be and who will represent us. Advocates of CEDAW intend to use the treaty, and its interpretations dreamed up by the CEDAW Committee, to formulate legislation and challenge existing laws."\(^14\)

More recently, President Obama has identified himself as a "strong supporter" of CEDAW.\(^15\) In a 2010 interview, the President stated, "If it was simply up
to me, it would have already been ratified . . . It is currently pending in the Senate, and we want the Senate to pass it."16

Other advocates of CEDAW view non-ratification as an obstacle to effective U.S. foreign policy.17 "The failure to ratify this treaty for the rights of women undercuts the credibility of our nation’s stated intention to engage as a global partner, and weakens the effectiveness of our advocacy for human rights," testified the President and CEO of the Leadership Conference on Civil and Human Rights, before the Senate Subcommittee on Human Rights and the Law.18

Linda Tarr-Whelan, current co-chair for the National Advisory Committee for CEDAW, expresses unease. "I was Jimmy Carter’s Director of Women’s Concerns in the White House, and when his term of office was over, a White House office that had anything to do with women disappeared until Obama won."19 She added, "With CEDAW, the U.S. could have a permanent international voice for women."20 This concern has been echoed in recent news as the U.S. government’s human rights obligations have come under international criticism.21

HAS CEDAW PROVED EFFECTIVE IN OTHER COUNTRIES?

International organizations report on the concrete impact of CEDAW in ratifying nations.22 For example, in preventing sex trafficking, the Netherlands has adopted new legislation on human trafficking in response to queries by the CEDAW Committee.23 In improving women’s economic opportunity, the High Court of Tanzania used CEDAW to rule in favor of a female plaintiff challenging customary law forbidding her to sell land bequeathed to her.24 And CEDAW has been used in Malaysia and other pluralistic societies with different legal codes, so that citizens have the choice to “opt out” of a system of personal law that might discriminate against them.25

A separate study by the International Women’s Rights Project further notes, "[I]n countries where there has not been the political will to implement CEDAW to date, women are beginning to use the Convention to organize activist strategies."26
WHAT WOULD RATIFICATION MEAN TO THE UNITED STATES?

First, ratification would create an opportunity for the United States to nominate an expert to the CEDAW committee and call attention to women’s rights violations. Nominating an expert would allow the United States to exercise political leadership, influence the progress of women’s rights and build accords with foreign governments for improved standards.

Second, ratification of CEDAW would strengthen other treaties already ratified by the United States by sending a signal of American commitment. In 1992, for example, ratification of the International Covenant on Civil and Political Rights obligated the United States to promote gender equality. Ratification of CEDAW would reinforce that agreement and would help meet those obligations.

Finally, ratification would solidify the United States’ position as a leader in human rights. As one scholar states, “The United States is obviously a major political force in the world, and what the United States does has an impact far beyond the U.S. itself. When the United States is taking a strong rhetorical stand in favor of human rights and yet chooses to opt out of the international system, it delegitimizes the overall value of the international human rights system.”

Is the United States falling behind on women’s rights? Ratifying CEDAW would be one powerful answer to that question.

NOTES


8 Goldsworthy, supra note 4, at 4.

9 Id at 7.

10 Id.


12 Id.


16 Id.

17 CRR, supra note 5.


19 Telephone interview with Linda Tarr-Whelan, Co-Chair for the National Advisory Committee for CEDAW (Oct. 10, 2011).

20 Id.


23 Id at 7.

24 Id. at 10.

25 Id. at 15.
27 *Id.*, supra note 5.
28 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*, supra note 5.
33 Telephone interview with Daniel Rothenberg, Executive Director of the Center for Law and Global Affairs, Sandra Day O'Connor College of Law (Oct. 14, 2011).
FEATURE ARTICLE

OUTSOURCING LIABILITY: ARE THE TRUE CAUSES OF UNEMPLOYMENT HIDING BEHIND THE CORPORATE VEIL?

by Cynthia Herrera

Chronic unemployment in the United States is at its highest level since the Great Depression.¹ In the past decade, more than 5.5 million manufacturing jobs have been lost, and nearly 50,000 manufacturers have folded.²
These circumstances, troubling byproducts of automation and globalization, have devastated many Americans.\(^4\)

Foreclosure rates, debt and bankruptcy rates have all reached historic peaks in recent years.\(^5\) The wealth gap between white and black Americans is the widest since the U.S. census began tracking this data.\(^6\) The employment-based system of health insurance has left many Americans without medical coverage and facing staggering hospital bills.\(^7\) Vast numbers of Americans are losing their jobs and falling out of the middle class, and they are acutely aware that globalization has played a part in creating this epidemic.\(^8\)

Globalization's role is complex, but it is clear that, with the rapid growth of this new structure, workers have suffered.\(^9\) Transnational corporations ("TNCs") have disenfranchised workers for the sake of profit by effectively exploiting certain mechanisms within the legal system.\(^10\)

First, international trade agreements ("ITAs") have provided the setting for TNCs to move business operations offshore more easily.\(^11\) Because the United States leaves enforcement of labor and employment law to the countries in which business operations are conducted,\(^12\) the relaxed or non-existent labor laws of developing countries\(^13\) make offshore operations attractive to TNCs.

Next, existing laws shield TNCs from liability for their offshore activity and that of their subsidiaries.\(^14\) Referred to as the "corporate veil," this current legal scheme encourages the lowering of labor standards.\(^15\) The immunity afforded patent corporations\(^16\) incentivizes these TNCs to cut corners abroad and remain complicit in their subsidiaries' labor abuses, while still reaping the resulting profits.\(^17\)

Congress and U.S. labor unions should utilize the models and legal avenues available to reign in this exploitation of regulatory labor law. Unions and corporations should explore the benefits of the international framework agreement ("IHA") model currently gaining popularity in Europe. And Congress, which has the power to act extraterritorially,\(^18\) should enact legislation that would hold TNCs responsible for their actions and those of their subsidiaries here and abroad.
INTERNATIONAL TRADE AGREEMENTS ALLOW COMPANIES TO MOVE ABROAD

ITAs, also known as free trade agreements, result not only in the less restrained movement of products, but in greater flexibility for TNCs to move business operations abroad. This "reduction of national barriers to global trade and investment" has made it easier for TNCs to relocate business operations offshore.

Since the North American Free Trade Agreement ("NAFTA") took effect in 1994, for example, 879,280 U.S. jobs have been offshored. According to one scholar, "NAFTA has also contributed to rising income inequality, suppressed real wages for production workers, weakened workers' collective bargaining powers and ability to organize unions, and reduced fringe benefits."

Free trade can offer economy-wide benefits, but only when the gains of the "winners" exceed the losses of the "losers." With statistics confirming that the top 1 percent of the U.S. population continues to reap most of these benefits, it is clear that the "losers" are those comprising the majority of the American public.

The United States currently has free trade agreements in force with 17 countries, and Congress has recently added three more countries to the list: South Korea, Colombia and Panama. While some contend that such dealings benefit the United States by opening up new markets to domestic goods, others attribute job losses directly to such agreements. For example, the Economic Policy Institute predicts that the trade deal with South Korea could cost nearly 160,000 American jobs.

The free movement component of ITAs allows TNCs to outsource various business functions to cheaper locations. "Low total labor costs -- wages, benefits and other labor standards that apply -- play a significant role in making [these] decisions." Because labor costs in developing countries are often a fraction of what they would be in the United States, offshoring previously U.S.-held jobs is an attractive and often irresistible prospect for TNCs.
THE CORPORATE VEIL IS HIDING UNFAIR LABOR PRACTICES

The United States leaves enforcement of labor and employment law to the countries where business operations are conducted. 34 This means that U.S. employment laws—those governing workplace safety, discriminatory practices and sexual harassment, for example—do not cover the overseas employees of U.S. companies. 35

These workers, though employees of American companies, are instead subject to the employment laws of the countries in which they work, which are often less protective. 36 This policy can allow U.S. corporations to engage in labor practices, such as child labor, 37 that do not comport with American political and moral standards.

The result is that foreign workers in these offshored jobs receive significantly lower wages and have few, if any, of the safeguards that workers in the United States have. 38 These workers are also less likely to bring legal claims against employers, 39 presenting TNCs with the attractive prospect of avoiding high legal costs often associated with doing business in the United States. 40

Because labor standards in developing countries are “less strict” 41 or “non-existent,” 42 offshoring allows TNCs to increase profit margins by avoiding the costs of complying with the stricter regulations and legal obligations found in the United States. 43 Ultimately, U.S. workers are unable to compete with these unfairly low labor standards to which foreign workers are subjected. 44

TNCs further encourage the lowering of labor standards through the use of subsidiaries. In the United States, “labor and employment laws generally only apply to employers, and the employees of independent contractors are not considered employees of the TNC at the top of the supply chain.” 45

U.S. courts have found that in order for an entity to be considered an employer, it must be shown to “possess the right to control and direct activities of [the employee] or manner and method in which work is performed.” 46 This requires a “day-to-day authority over employment decisions.” 47 Also, U.S. courts often do not hold TNCs liable for their actions or their subsidiaries’ actions abroad, out of respect for the sovereignty of foreign nations. 48
As Prof. Mike Zimmer, an expert on international labor and employment law at Loyola University Chicago School of Law, explains, “They effectively insulate themselves from the enforcement of the labor and employment laws of the countries where they operate.” The current legal foundation also allows TNCs to avoid liability for claims of labor abuses by exploiting the immunity they enjoy from their subsidiaries' actions.

The practice of shifting labor and employment law enforcement to developing countries is unsound because TNCs often have more resources and international clout than the countries in which they operate. Through their intricate corporate organization, TNCs can often avoid the jurisdiction of the countries in which they operate.

When TNCs are allowed to reap profits from the unfair labor practices of their subsidiaries without fear of reprisal, they are encouraged to remain complacent in the disconcerting practices of their subsidiaries and are discouraged from regulating or guiding their practices.

The Prospect of International Framework Agreements

One promising model for designating more accountability to TNCs has come in the form of IFAs, a practice that has developed over the last two decades, primarily in Europe. An IFA is an agreement between TNCs and global unions to ensure that companies act in accordance with the core labor rights set by the International Labour Organization in every country in which they operate. Some agreements go further to guarantee rights beyond these.

By signing IFAs, companies improve their image in regard to ethical standards and bolster their competitiveness in the global marketplace. In addition, unions are able to organize more freely with little threat of managerial hostility.

These agreements primarily establish core principles, such as freedom of association and the abolition of child labor, forced labor and discrimination. Their success, however, indicates the potential for more encompassing agreements. Ultimately, IFAs can help reduce some of the negative attention TNCs face when offshoring jobs to countries with more lax labor standards, because the company will be bound by an IFA to respect the same core labor rights in all countries.
POWER TO ACT EXTRATERRITORIALLY

In the absence of voluntary measures, the United States has the ability to act in order to dampen these unfair labor practices. The U.S. Supreme Court has warned TNCs that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."60

Unfortunately, Congress has yet to choose to exercise this power. As a result, U.S. courts continue to assert that TNCs are not liable for acts committed by their subsidiaries.61

Proposed legislation introduced in May 2011 aims to change this stance by extending the definition of "United States person" to "foreign subsidiaries, foreign affiliates or foreign joint ventures controlled in fact by any companies or any entities operating in the U.S., or organized under the law of, the U.S."62 If passed, the U.S. government would be empowered to more directly regulate and influence the activities of those subsidiaries "controlled in fact" by American TNCs.63

Given the power of Congress, it appears the only thing needed to effect change on this topic is political will. This may not bring back every job lost in recent years, but it would go a long way to stemming the flow of American jobs overseas.

NOTES

3 Interview with Mike Zimmer, Professor of Law, Loyola University Chicago School of Law, (Sept. 20, 2011).

8 See Lori G. Kleter, Globalization and Job Loss, from Manufacturing to Services, ECON. POL. INST., March 2005.

9 See generally Nash-Hoff, supra note 2 (discussing the loss of U.S. jobs and revenues in relation to international trade agreements).

10 Id.; Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009) (discussing the reasoning for the court's refusal to hold parent corporations liable for their subsidiaries' actions).

11 Zimmer, supra note 3.


13 Id.

14 See Doe I, 572 F.3d 677.

15 See Armou, supra note 12.

16 See Doe I, 572 F.3d 677.


19 Zimmer, supra note 3.

20 Id.


22 Id.

23 Kleter, supra note 8.

24 Censky, supra note 4.


28 See Nash-Hoff, supra note 2.


30 Zimmer, supra note 3.

31 Id.


33 See generally It is cheaper to offshore jobs, THE HINDU, (Jan. 29, 2011, 1:03 PM), http://www.thehindu.com/business/article964872.ece (noting that IT engineer costs in India and China are about half that of the United States).

34 Armou, supra note 12.
35. Id.
36. Id.
37. McLoughlin, supra note 17, at 170.
38. Armou, supra note 12.
39. Id.
41. Id.
42. Id.
44. See generally It is cheaper to offshore jobs, supra note 33.
45. Zimmers, supra note 3; see Doe I, 572 F.3d 677 (in which the term "employer" is defined as "an entity possessing the right to control and direct activities of person rendering service, or manner and method in which work is performed; and where finding of right to control employment requires comprehensive and immediate level of day-to-day authority over employment decisions").
46. Doe I, 572 F.3d at 682.
47. Id.
48. McLoughlin, supra note 17, at 170.
49. Zimmers, supra note 3.
50. See Doe I, 572 F.3d at 682.
51. Id.
52. McLoughlin, supra note 37.
54. Id.
55. Id.
56. Id.
57. Id.
58. Id.
59. Coleman, supra note 53.
61. See Doe I, 572 F.3d 677.
63. Id.
Combating Hunger Home and Away: Tracing America's $600 Million Price Tag for Safeguarding the Right to Food in the Horn of Africa

by Natnael Moges

Hunger in the Horn

In July 2011, the worst drought in over half a century spread across the Horn of Africa. As a result of repeated failed rains, the crisis has now touched upwards of 11 million people. To date, the United States Agency for Interna-
tional Development ("USAID") has pledged over $600 million in aid to relief efforts. Creating a greater humanitarian need than Hurricane Katrina, the Indonesian tsunami, and the Japanese earthquake combined, the food crisis in the Horn is being called a "warning to the world."4

The fact that the disaster is developing in a setting that will exacerbate its devastating effects has caused widespread global concern. Labeled a "vulnerable region" by Prof. Jeffrey Sachs, Special Advisor to the U.N. Secretary-General, the Horn is home to extreme poverty, hunger and the negative effects of global climate change. As a result, efforts to combat the crisis have been especially strenuous.

Since the 1960s, the United States has actively worked to draft legislation developing the scope of its foreign aid contributions. The Foreign Assistance Act of 1961 ("FAA") marked America's mission to advance its interests by "assisting people of the world."8 The FAA reflected Congress's belief that the security of the American people would best be sustained and enhanced through a commitment to assist developing countries through foreign aid.

With a clear balancing intent, the legislation sought to address domestic concerns at the same time as international ones. Showing a similar intent, Sens. Dick Lugar and Bob Casey introduced the Global Food Security Act ("GFSA") in 2009, which built on the goals of the FAA.9 If reintroduced in the current Congress, the GFSA would hold the United States even more accountable for its foreign aid, particularly in cases requiring an emergency response to a food crisis.10

Hunger in America

According to a 2010 survey, 61 percent of Americans believe the United States spends too much on foreign aid, raising questions about the nation's domestic policy toward its food insecure.12 In 2009, the Department of Agriculture announced that U.S. food insecurity was higher than it had been in the previous 14 years.13 According to statements, the shift accounted for an additional 13 million Americans in need of food assistance.14 The flux has placed the total number of Americans with food security issues at 49 million.15
President Barack Obama addressed this very issue during his presidential campaign when he pledged to end childhood hunger by 2015.\textsuperscript{16} During an interview, the President said, "We've got rising food prices here in the United States. My top priority is making sure that people are able to get enough to eat."\textsuperscript{17} Following his election, President Obama increased funding to the Department of Agriculture’s food and nutrition programs.\textsuperscript{18} Yet despite such action, the President has failed to deliver on his campaign promise.

Analysts attribute the uncharacteristically large increase in the number of food insecure to the recent economic downturn.\textsuperscript{19} A recent Gallup poll indicates that fewer Americans have access to basic life necessities in the aftermath of the economic recession.\textsuperscript{20} Only 80 percent of those surveyed said they have enough money to buy food for their family.\textsuperscript{21}

Further compounding the problem is a rise in the national poverty level brought about by a rise in unemployment. In 2010, the U.S. poverty rate was 15.1 percent.\textsuperscript{22} Despite the implementation of recovery programs, this rate has steadily increased since 2007.\textsuperscript{23} As a consequence, many Americans are finding it more and more challenging to meet their food and shelter needs.\textsuperscript{24}

Global comparisons show how deeply the economic decline has affected the United States. In a recent study, the number of Americans struggling with
food insecurity was far more, for example, than the number of similarly situ-
ated Chinese. This is even more astounding when noting that the United
States has over 10 times the per capita income level than China.

TRACING THE COST

In light of the domestic needs currently facing the United States, there is a
public interest in ensuring government spending is appropriated responsibly,
particularly when the balancing goals of the FAA seem unattainable.

Pursuant to federal government mandates, USAID maintains full transparency
throughout its aid process. According to the agency, in 2011 it has spent a
total of $648,687,925 towards relief work in the Horn. These funds were
distributed to 32 non-governmental organizations (“NGOs”) in Kenya, 23 in
Ethiopia, 2 in Somalia, and 2 in Djibouti.

However, the amount of aid spent on NGOs in the Horn is minimal when
compared to the U.S. government’s annual expenditure tackling domestic food
access issues. The U.S. Department of Agriculture is the leading government
agency tasked with this responsibility. For 2012, the Department’s projected
budget is $145 billion. Of this, only $28 billion is apportioned specifically
for food and supplemental nutrition programs.

The United States directs only a little more than 0.1 percent of its gross na-
tional product, or approximately 0.5 percent of the national budget, towards
foreign aid spending. Thus, concerns that U.S. foreign aid spending is in
contention with domestic food policy are unfounded. In line with the FAA,
the U.S. is well equipped to continue its foreign aid policies while ensuring
that domestic food security needs are met.

All in all, even with a struggling economy, the United States is still the fore-
most member of the international community best suited to balance these two
interests.
NOTES


2 Id.


5 Id.

6 Id.

7 Id.


9 Id.


11 Id.


14 Id.

15 Id.


18 Id.


21 Id.


23 Id.

24 Mendes, supra note 20.

29 USAID, supra note 3.
30 Id.
32 Id.
33 Id.
SECRET SHOPPERS IN ILLINOIS: UNCOVERING STARTLING TRENDS IN ACCESS TO HEALTHCARE

by Kathryn C. Kokoczka

Lisa Hannum received quite a shock recently when she took her daughter to their local urgent-care clinic with a dog bite wound.¹ Hannum thought she was doing what any conscientious, responsible parent would do: seeking medical help.² Instead of giving her urgent care, however, the clinic refused to treat the girl.³ The facility, its administrators told her, did not accept Medicaid.⁴
Hannum’s story is not unique. In fact, researchers in Cook County, Ill., found that over half of their sample of those seeking doctors appointments in 2010 with only Medicaid were turned away. Clearly, those with Medicaid rather than private insurance have reason to feel unsettled.

**PRIVATE INSURANCE TRUMPS MEDICAID**

Medicaid is an expansive public insurance program that serves more than 56 million Americans. Along with the State Children’s Health Insurance Program (“S-CHIP”), Medicaid provides critical healthcare coverage for children in many low-income families. Created in 1997, S-CHIP is responsible for decreasing the rate of uninsured children by nearly one-third. Taken together, the programs have made major strides in covering children in Illinois.

However, having coverage and actually receiving medical care are two different things. The 2010 study showed that children are routinely denied appointments because many healthcare providers are unwilling to accept Medicaid. Furthermore, Medicaid beneficiaries often experience longer waiting periods before treatment and have more expensive co-pays for their care.

In 2005, a class action lawsuit was filed against the State of Illinois on behalf of over 600,000 children in Cook County covered by Medicaid. Though ultimately settled, the suit resulted in a court order that led to the startling revelations in the 2010 study. As part of the settlement agreement, the district court required the State to complete a study of children’s access to specialty care. To do this, state officials commissioned a “secret shopper” study in which researchers would pose as prospective patients calling primary care practices to schedule appointments.

Dr. Karin V. Rhodes was chosen to conduct the research. She noted that prior to the class action suit there had never been a study this “comprehensive or rigorous that actually measured access to specialty care, let alone children’s access.”

The study uncovered discrepancies in access to care for children with Medicaid and demonstrated “a failure to care for our most vulnerable children.” Researchers determined that lower and slower Medicaid payments caused most of the disparities in patient care access.
Prof. John Blum of Loyola University Chicago School of Law also cites shortages of primary care physicians and pediatricians as contributing to difficulties in medical care access. But, as Dr. Rhodes believes, the number or quality of doctors does not necessarily create these difficulties. Rather, it is a "system-wide problem."

In fact, a large segment of providers want to treat patients insured by Medicaid. Unfortunately, many doctors work in healthcare systems that stress "payer status," or optimizing profit based on the type of payment utilized by the patient. To reduce disparities in doctor reimbursement, the medical community may best serve patients by focusing on restructuring the reimbursement schemes in the healthcare system.

**Strategies for Improving Health Care Access**

The 2010 class action settlement sparked positive changes in the landscape of Illinois healthcare. Primary care access improved, and the state established a case management system for primary care physicians. However, certain areas still need progress.

In particular, access to specialty care in the fields of behavioral health, dentistry and orthopedics needs improvement. For example, Dr. Rhodes's research also revealed that "children with an acute oral injury seeking dental treatment were significantly less likely to be able to access dental care if they had public versus private insurance."

Looking to successful international healthcare models may be a valuable resource in cultivating positive growth in the American healthcare system. Dr. Rhodes recommends studying models in places like the United Kingdom, where primary care doctors are paid higher salaries and specialists are more efficiently utilized than in the United States. Because many medical students show interest in specialty care due to higher pay and more favorable work schedules, incentives like forgiving student loans may spark interest in the field of primary care.

Reprioritizing the healthcare of American children will take work. As Dr. Rhodes stated, "We can fix this problem, but it will not happen unless we are
willing to make the health of American children a national priority." She believes that every state would benefit from a similar study.

Dr. Rhodes also takes care to note that the impetus for the research was the persistence of the public interest attorneys who represented the 600,000 children on Medicaid. With the help of government resources, research specialists, and medical professionals, the legal community is perfectly situated to help ensure that children like Hannum’s are no longer turned away.

NOTES

2 Id.
3 Id.
4 Id.
6 Grady, supra note 1.
9 Id.
11 Grady, supra note 1.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id.
18 ALL KIDS FINAL REPORT, supra note 10.
19 Grady, supra note 1.
20 Id.
22 Grady, supra note 1.
23 Interview with John Blum, Professor of Law, Loyola Univ. Chicago Sch. of Law (Oct. 6, 2011).
24 Telephone interview with Karin Rhodes, M.D., M.S., Director of Emergency Medicine, Univ. of Pa. (Oct. 7, 2011).
25 Id.
26 Id.
27 Blum, supra note 23.
30 Rhodes, supra note 17.
31 Id.
32 Id.
33 Id.
35 Rhodes, supra note 17.
36 Id.
37 Id.; see also Weigh Medical Student Debt, Specialty Choice, U.S. NEWS, June 20, 2011, http://www.usnews.com/education/blogs/medical-school-admissions-doctor/2011/06/20/weigh-medical-student-debt-specialty-choice (The American Association of Medical Colleges compiled statistics that show the average debt of a medical student in 2010 was almost $160,000. Moreover, the income gap between primary care doctors and specialists continues to grow by an average of over $100,000 annually, making primary care less appealing to cash-strapped students).
38 Id.; supra note 17.
39 Id.
40 Id.