

UNITED NATIONS HUMAN RIGHTS COMMITTEE

**EIGHTY-SEVENTH SESSION
JULY 2006**

GENEVA

**REPORT ON WOMEN'S HUMAN RIGHTS IN THE UNITED STATES
UNDER THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

In response to the

**SECOND AND THIRD PERIODIC REPORT
OF THE UNITED STATES OF AMERICA**

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REPORT ON WOMEN'S HUMAN RIGHTS UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

EXECUTIVE SUMMARY

INTRODUCTION

This report is submitted by a coalition of US NGOs that work on issues of gender equality in the United States. It focuses on several areas of concern in which the United States Government has failed to implement the International Covenant on Civil and Political Rights with respect to women's human rights and discrimination. These issues constitute violations under several articles of the Covenant in addition to indicating a lack of implementation of Article 3 and General Comment No. 28.

The Working Group acknowledges that some of these matters were not covered in the List of Issues prepared by the Committee in its eighty-sixth session in March 2006. We respectfully submit that it remains important to offer this record to the Committee, to the international community, and to the American public. Given the human rights record of the United States in recent years, it is understood that some of the concerns indicated in this report are not a priority for the Committee's review in this session. However, the Committee has indicated in its review of the first US report, in reviews of other States, and in General Comment No. 28 that matters such as violence against women and employment discrimination are within the ambit of the Covenant. We offer this information to keep the record up to date as well as to provide US constituencies with material to assist their growing understanding of the international context for their work and to provide them with additional advocacy material.

ARTICLE 2(2) Remedies

The United States' failure to guarantee an effective federal judicial remedy for gender-based violence is the result of two Supreme Court decisions. The absence of a federal remedy is exacerbated by evidence that state courts, as a result of statutory immunities and gender discrimination, often do not provide effective remedies. Notwithstanding the Supreme Court decisions, *we ask the Committee to explore with the U.S. the available legislative and executive action that would provide such remedies* and fulfill the preventive as well as compensatory role they should play.

ARTICLE 3, 2(1) Equality and Non-discrimination

The U.S. Constitution does not clearly prohibit sex discrimination. Efforts to add a sex equality amendment had been continuous since 1923, but by a Congressionally-imposed deadline in 1982, when 15 states failed to ratify, the Equal Rights Amendment was defeated.

In the Second and Third Periodic Reports of the United States to the UN Committee on Human Rights, the government asserts that the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution guarantee equality for men and women. However, the denial of equality under the Constitution, initially understood but unspoken, was made explicit when the Fourteenth Amendment was adopted in 1868 using the words “male citizens” in the second section. Although several decisions of the Supreme Court have overturned particular gender-biased laws based on the Constitution, sex discrimination *per se* is not explicitly unconstitutional in the making, interpreting, and enforcing of U.S. law. Women won the right to vote with passage of the Nineteenth Amendment in 1920 after an unprecedented seventy-two year campaign. Except for the right to vote, there has been no other area in which an amendment has guaranteed women’s right to legal parity with men.

The Fourteenth Amendment's equal protection provision has not been consistently interpreted as protecting women from sex discrimination, and it has not been interpreted to require strict scrutiny of sex-based classifications. Instead, the standard ranges from requiring a "rational basis" for sex-based distinctions to requiring an “exceedingly persuasive” justification. The Fourteenth Amendment has not been interpreted to apply to sexual orientation or gender identity discrimination. Nor does it protect women from discrimination on the basis of pregnancy or childbirth. Further, the amendment has been interpreted to require a demonstration of discriminatory intent; it is not sufficient that a law or policy has a disproportionate impact on one sex. Given this history, the recent additions of John Roberts and Samuel Alito to the Court, and the possibility of future Supreme Court appointments during President George W. Bush’s term, reliance on judicial interpretation of the Fourteenth Amendment to accord sex the recognition as a protected class that is accorded to race and national origin classes is not realistic.

U.S. ratification of the Convention on the Elimination of All Forms of Discrimination against Women would fully expose the inequality issue. The treaty was signed by President Jimmy Carter in 1980, but has not been ratified by the Senate in the more than twenty-five years since that time. This international 'Bill of Rights' for women was been ignored, delayed and ultimately blocked from a final floor vote in 1994 and again in 2002.

We request the Committee to recommend to the United States Government:

(1) that it initiate a national dialogue regarding the benefits of an equal rights amendment, including full and fair Congressional hearings on the intent and applicability of a Constitutional amendment assuring equal protection under the law for women and men.

(2) that the U.S. Senate move legislation to a floor vote that would provide for ratification of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), at the same time recommending removal of the Reservations, Declarations and Understandings that have been attached to CEDAW which would limit the application of most of the treaty's provisions.

Violence against women

Violence against women is a violation of Articles 6 (Right to Life), 7 (Torture and Cruel, Inhuman and Degrading Treatment), and 9 (Liberty and Security of Person), as well as of the fundamental principles of equality and nondiscrimination. The federal Violence Against Women Act (VAWA) is a valuable effort to support violence prevention as well as services for women who are survivors of violence. As government and nongovernmental service providers have gained experience, they have refined their understanding of both women's needs and effective approaches. Each round of VAWA renewal provides an opportunity to improve it in light of this experience.

We request that the Committee note the current limitations that remain to be addressed:

(1) The Department of Homeland Security must provide information on use of the self-petition and other processes available to immigrant women, and publicize the availability of those processes, in multiple languages.

(2) The Violence Against Women Act should be amended to provide for protection of battered women from discrimination in housing and employment.

Government institutions and information relating to equality

The substantive equality guaranteed by the ICCPR can be achieved only if governments are aware of, and take steps to remedy, sex-based discrimination. In recent years, the United States government has taken a number of actions to eliminate the official bodies established over a period of decades to monitor and ensure equality between the sexes and to gather information that can be used to examine progress and policy. With the elimination or modification of these offices, women have lost important avenues to enlist the government in ensuring equality and have lost access to valuable (and often otherwise unavailable) information that would enable them to take action themselves and through nongovernmental organizations to address inequality.

For example, the Department of Labor has abolished its Equal Pay Matters Initiative, removed information about narrowing the wage gap from its Web site, refused to use available tools to identify violations of equal pay laws, and adopted regulations that deprive millions of women the right to over time pay. In addition, efforts have been made to eliminate the Department's collection of data on working women, making it more difficult to identify sex

discrimination in employment and to measure women's progress – or lack of it – in the labor force. The Department also proposes to stop collecting data on discrimination by federal contractors.

We request that the Committee note:

(1) the fundamental lack of a national human rights institution or any other department or bureau with responsibility for monitoring and promoting women's human rights ;

(2) the dismantling and decommissioning of the bodies that existed, limited as they were, to ensure that equality between the sexes remained an element of government policy; and

(3) the elimination of data collection programs that illuminate discrimination issues.

Abstinence-only sex education

The U.S. government is in violation of Article 3 because of its practice of funding and promoting sexual education programs that sanction abstinence as the sole method of pregnancy and disease prevention. These programs censor truthful and practical information about sexuality, contraception and abortion, thereby impeding a young person's ability to protect against unintended pregnancy and sexually transmitted infections. This censorship particularly harms girls and women by subjecting them to the risks of unintended pregnancy and disease, including HIV/AIDS. Moreover, these programs overwhelmingly promote the imposition of damaging sex stereotypes.

We request the Committee to recommend that the U.S. Government take steps to ensure that any sexuality education program it funds does not perpetuate sexual stereotypes or stigmatize sexual conduct outside of heterosexual marriage and that the programs it funds provide accurate information about condom effectiveness, abortion and other matters related to sexuality.

ARTICLE 7 (Cruel, Inhuman or Degrading Treatment);

ARTICLE 10 (Conditions of Imprisonment)

Of the almost two million people confined in U.S. prisons and jails, about 200,000 are women, of whom 80% have committed non-violent crimes, such as shoplifting, prostitution, illicit drug use, and welfare fraud. Many have been egregiously abused throughout their lives, and they often end up with violent and abusive partners and suffer from a cycle of incarceration and recidivism due to continued drug usage or crimes related to their drug use. In short, these women are victims and continue to be victimized in prison.

Reproductive rights issues loom large for incarcerated women. Approximately five percent of women reportedly arrive pregnant in jail, and approximately 2,000 babies are annually born to U.S. prisoners. They often are shackled while being transported to the hospital, waiting to give birth, during labor and after birth. Female inmates frequently are not provided with the means to exercise their rights to abortion services. The consequences are extreme for both mother and child, as incarcerated women face, at best, uncertain futures, and in some cases the certainty of long prison sentences.

Prisons are patriarchal systems which attempt to restrict women's choices not only about their bodies but also their offspring. After incarcerated women bear children, these offspring are placed in either kinship or foster care. If a child is placed in foster care, mothers often irreversibly lose their children without due process. Even worse, reunification is often at the whim of individual case workers.

We urge the Committee to recommend that the United States Government:

(1) Mandate that all states comply with international standards for treatment of incarcerated women;

(2) Restrict the use of shackles except as a reasonable precaution against escape during a transfer; by order of medical personnel; or if other methods of control fail, in order to prevent a prisoner from injuring herself or others or from damaging property, and do not use them during the third trimester of pregnancy;

(3) Deliver adequate care for pregnant incarcerated women, including access to abortion services;

(4) Protect incarcerated women's reproductive rights, including the right to abortion;

(5) Provide funds for incarcerated women who cannot afford abortions from the Department of Corrections medical budgets in the same ways that the DOC covers prenatal, delivery and post-natal costs;

(6) Repeal the Hyde Amendment as discriminatory against minorities, low-income women and incarcerated women in Federal prisons;

(7) Inform women they can write to a judge and request to be present at any court hearings regarding a child's care, including foster care status hearings and parental termination proceedings.

ARTICLE 13 (Expulsion of Aliens)

U.S. asylum law and practice does not adequately consider or recognize the protection needs of women fleeing gender-specific persecution. By failing to specifically accommodate for

gender as a contributing persecution ground, the U.S. stands in violation of its obligations under ICCPR Articles 2(1), 7, 13, and 26, and Refugee Convention Articles 3, 31, and 33 at a minimum. Moreover, the US has increasingly limited previously available protections under its asylum law. Where gender-based violence resulting from conflict or personal situations is the cause of women's flight from persecution, the diminishing protections and harshness of the U.S. restrictions on asylum fall disproportionately on women.

The Bush Administration enacts or narrowly interprets laws in the name of fighting terrorism that has the effect of disproportionately denying asylum to female victims of sexual violence, the very victims of terrorists. U.S. imposition of a "material support" bar to asylum or refugee status adversely impacts women because of their status as women. "Material support" provided under threat of violence, physical harm and, *inter alia*, coercion denies them asylum protection. In conflicts, women become non-combatant victims. They are raped by invading forces for purposes of humiliating their men and their nation, for "ethnic cleansing," or for "recreation." They are compelled by captors to perform chores by day, suffering sexual indignities by night. Although they work under duress, women are denied asylum because the U.S. will not recognize the gender-specific vulnerability of rape or threat of rape as a duress defense.

The US requires that persons seeking protection from persecution file for asylum within one year of entering the United States. This filing bar, even with its narrow exceptions, contravenes U.S. treaty obligations and accepted international legal standards. By refusing to implement a firm rule excepting from the bar women who have experienced and are recovering from trauma-inducing gender-specific violence, the U.S. denies asylum to women who by virtue of their immutable characteristics as a person have been victimized as a group or for their opinion as women. Many of these women cannot immediately upon entry discuss and place in writing with strangers the traumatic gender-specific horrors they have suffered, frequently including sexual violence. The traumatic nature of this gender-specific persecution, causes women to be unable to confront their memories in a timely fashion in order to meet the one-year filing requirement. Failure to recognize that a disproportionate number of women require additional time to adequately deal with their memories and narrate their case, denies the reality of their unique situation and constitutes *de facto* discrimination. This contravenes ICCPR Articles 7, 13 and 26 and strips women of the *nonrefoulement* protections provided for in the ICCPR.

We request that Committee recommend the following to the U.S. Government:

(1) The Government must educate and sensitize immigration judges and asylum adjudicators on issues relating to women asylum seekers. U.S. adjudicators must continue to be educated about domestic violence as a threat to the life and safety of women just like other forms of violence that are recognized as persecution. Specifically:

- ***The government must provide a program of mandatory, training on the practices that give rise to gender-specific asylum claims (e.g., honor killings, rape and marital rape, forced marriage, etc.) and the effects post-traumatic***

stress disorder can play during the asylum interview or immigration court hearing.

- *Particular attention must also be paid to the special role of women in their societies and the life-threatening consequences of social opprobation and exclusion for women who transgress their society's practices.*
- *They must also be educated to understand that domestic violence occurring in a marital situation is not a private matter to be marginalized or dismissed as unworthy of international protection. A marital home need not be sanctioned as a torture chamber.*

(2) The United States must provide for a duress and de minimis defense or exception to the "material support" bar for refugees and asylum applicants who have involuntarily provided "material support" to alleged terrorist groups, especially as many of those excluded or deemed ineligible for protection are women who have been compelled to render simple aid to their captors under threat and reality of, inter alia, violent and repeated sexual assaults.

(3) The US Government must take immediate steps to remove restrictions and impediments to asylum claims based on the arbitrary one-year filing deadline, including providing gender-sensitive guidelines that recognize the impact and after-effects of gender-specific trauma that many female asylum applicants have suffered.

(4) The United States must more expansively and appropriately define and recognize in practice what the meaning/s of persecution are likely to be within the context of "social group," chiefly in the area of domestic violence occurring to women in what some consider personal conduct or action. In weighing the appropriateness of a "social group" definition the United States must look to the culture and practice of the society a woman is escaping from and consider that her actions may also constitute "political opinion."

ARTICLE 26 (with reference to ARTICLES 2.1 and 3) Equal Protection of the Law

The United States has maintained for many decades one of the strongest and most stable economies in the world, generating significant employment and income growth for much of the population. But despite the country's economic might and unparalleled wealth, gains have not been equitably shared. The confluence of embedded patterns of sex and race discrimination, together with a shift in income distribution, has meant that millions of women and their families bear the brunt of policies producing deep inequality.

Since U.S. ratification of the International Covenant on Civil and Political Rights (ICCPR) in 1992 when the U.S. became obligated to bring its laws and policies into conformance with the Covenant's sex equality provisions, little has been accomplished towards those ends. In fact, in recent years repeated efforts have been mounted by conservative

legislators and policy-makers to undermine and repeal laws and policies intended to promote sex equality.

The U.S. government has failed to adopt effective laws to address the problem of persistent and pervasive pay inequity. Both benign neglect and willful government actions have prevented the adoption of legislative and administrative remedies that would address broad-based wage and salary discrimination disproportionately harming women. Laws against sexual harassment and sex discrimination in employment and education are inadequate and poorly enforced, and there has been a steady stream of attacks on those laws and policies in an effort to further limit equality.

Family support policies are seriously lacking in the U.S., and their absence makes it nearly impossible for women to achieve equality in the workplace. Family and medical leave provisions affecting women and their families are among the most unfriendly of all developed nations, providing only unpaid leave and available to fewer than half of working women.

Lesbians are not protected from sexual-orientation bias in the workplace and suffer from a counter-productive policy of "Don't Ask; Don't Tell" in the military. Other restrictions on women regarding combat and combat-support positions constrain their military careers.

We request that the Committee recommend that the US Government:

(1) Adopt legislation that would strengthen and expand laws against sex-based employment discrimination, in particular addressing the problem of wage discrimination in various occupational categories that exists merely because they primarily employ women and people of color. Strengthen the Equal Pay Act to address comparable work, improving remedies and enforcement provisions.

(2) Provide more effective enforcement of Title VII of the Civil Rights Act of 1964 and other laws prohibiting sex discrimination in the workplace, including sexual harassment, discrimination in hiring and promotion, and pregnancy discrimination.

(3) Protect equal education goals of Title IX of the Education Amendments of 1972 from any regulations that would undermine its provisions; adopt an aggressive compliance review schedule for all educational institutions; restore funding and technical assistance to the Title IX coordinator network; restrict conditions under which single sex classes and schools that receive federal aid may operate to reflect the original intent of Title IX; and conduct vigorous enforcement activities, including prompt and thorough investigations of systemic discrimination, adopting sanctions against violators and assisting plaintiffs in Title IX violations litigation – both in the academic and athletic fields.

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Minnesota Advocates for Human Rights

National Organization for Women Foundation

This report has been endorsed by the National Council of Women's Organizations, representing over 200 groups throughout the United States.

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INTRODUCTION

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The Gender Working Group acknowledges that some of these matters were not covered in the List of Issues prepared by the Committee in its eighty-sixth session in March 2006. We respectfully submit that it remains important to offer this record to the Committee, to the international community, and to the American public. Given the human rights record of the United States in recent years, it is understood that some of the concerns indicated in this report are not a priority for the Committee's review in this session. However, the Committee has indicated in its review of the first U.S. report, in reviews of other States, and in General Comment No. 28 that matters such as violence against women and employment discrimination are within the ambit of the Covenant. We offer this information to keep the record up to date as well as to provide US constituencies with material to assist their growing understanding of the international context for their work and to provide them with additional advocacy material.

We do appreciate that the Committee views the U.S. government's record with respect to reproductive rights and reproductive education, as well as the treatment of female prisoners, with concern. The shadow report provided by the Center for Reproductive Rights addresses the reproductive rights issues specifically and in detail, and the Gender Working Group endorses that presentation. Similarly, the Gender Working Group refers the Committee to the report, "Conditions and Conduct in the California Criminal Justice System" for additional detailed information on the situation of women in prisons.

Gender issues are fundamental to the equal enjoyment of human rights by all persons and present themselves in virtually all the thematic areas into which the U.S. NGO shadow reports are organized. Accordingly, some of the gender issues are integrated in thematic reports and are cross-referenced here.

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ARTICLES 2(2) and 2(3) Legislative measures; remedies

Articles 2(2) and 2(3) require legislative and other measures, and effective remedies, to ensure Covenant rights. This is an issue with particular resonance as to the treatment of violence against women. Despite the enactment of successive Violence Against Women Acts (VAWA) that include a number of commendable provisions and financial support for state-level programs dealing with violence against women, the remedies women may seek vary dramatically from state to state because no federal remedy or standard for remedies exists. State laws and practices vary as to definitions of domestic assault, sentencing and alternative dispositions, application of standards for restraining orders, and access to courts. A woman's enjoyment of her right to freedom from violence may be based largely on the accident of where she lives.

The United States' failure to guarantee an effective federal judicial remedy for gender-based violence is the result of two Supreme Court decisions where the obligation under article 2(3) was not argued by the Administration (which appeared before the Court in both cases), nor taken up by the Court.¹ The absence of a federal remedy is exacerbated by evidence that state courts, as a result of statutory immunities and gender discrimination, often do not provide effective remedies. Notwithstanding the Supreme Court decisions, we ask the Committee to explore with the U.S. the available legislative and executive action that would provide such remedies and fulfill the preventive as well as compensatory role they should play.

¹*U.S. v. Morrison*, 529 U.S. 598, 620 (2000); in *Town of Castle Rock, Colo. v. Gonzales*, 125 S. Ct. 2796 (2005).

ARTICLES 2(1) and 3 Equality and Nondiscrimination

Article 3 requires States to provide for equality between men and women in the enjoyment of all Covenant rights. This complements the undertaking provided in Article 2(1) to respect and ensure all rights without discrimination.

U.S. Constitution Does Not Clearly Prohibit Sex Discrimination

No full legal clarification of women's status has been made since the call was issued 43 years ago by the President's Commission on the Status of Women in a report requested by President John F. Kennedy's Executive Order 10980 that documented pervasive sex discrimination against women and made numerous recommendations for change.²

The United States Constitution does not have a guarantee of equal protection that unequivocally forbids discrimination on the basis of sex. Efforts to add a sex equality amendment had been ongoing since 1923, but by a Congressionally-imposed deadline in 1982 when 15 states failed to ratify, the ERA was defeated. A constitutional equality amendment that would assure equal protection under the law for women and men remains an unquestionably critical need to this day.

In the Second and Third Periodic Reports of the United States to the UN Committee on Human Rights, the government asserts that the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution guarantee equality for men and women³ – as required in Article 3 of the ICCPR. However, there is scant evidence that this is the case for women's equality protections in this country.

Fourteenth Amendment Does Not Consistently Assure Equal Protection for Women

As citizens under the U.S. Constitution, women have been consistently denied the guarantee of fully equal protection of the law, a guarantee that male citizens receive as a constitutional birthright. Initially, denial was understood but unspoken – the inclusion of the words “male citizens” in the second section of the Fourteenth Amendment, ratified in 1868, made it more explicit. Although several decisions of the Supreme Court have overturned

² Carabillo, T., Meuli, J. and Csida, J.B. (1993) *Feminist Chronicles, 1953 – 1993*. Los Angeles: Women's Graphics. 1993, p. 45 and retrieved April 23, 2006 from <http://www.lib.umich.edu/govdocs/jfkeo/eo/10980.htm>

³ U.S. Department of State. (2005) Second and Third Periodic Report of the United States to the U.N. Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, Article 3, #60.Oct. 21, 2005. Retrieved April 23, 2006 from <http://www.state.gov/g/drl/rls/55504.htm>

particular gender-biased laws based on the Constitution, sex discrimination *per se* is not explicitly unconstitutional in the making, interpreting, and enforcing of U.S. law. Women won the right to vote with passage of the Nineteenth Amendment in 1920 after an unprecedented seventy-two year campaign. Except for the right to vote, there has been no other area in which an amendment has guaranteed women's right to legal parity with men.

The Fourteenth Amendment's equal protection provision has not been consistently interpreted as protecting women from sex discrimination, and it has not been interpreted to require strict scrutiny of gender-based classifications. Instead, the standard ranges from requiring a "rational basis" for gender-based distinctions to requiring an "exceedingly persuasive" justification. *Craig v. Boren*, 429 U.S. 190 (1976); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court*, 450 U.S. 464 (1981); *Frontiero v. Richardson*, 411 U.S. 677, 684-87 (1973); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n. 9 (1982), *United States v. Virginia et al.*, 518 US 515 (1996).

The Fourteenth Amendment has not been interpreted to apply to sexual orientation or gender identity discrimination. Nor does it protect women from discrimination on the basis of pregnancy or childbirth. *Geduldig v. Aiello*, 417 US 484 (1974). Further, the amendment has been interpreted to require a demonstration of discriminatory intent; it is not sufficient that a law or policy has a disproportionate impact on one gender. *Personnel Administrator of Massachusetts v. Feeny*, 442 US 256 (1979). Given this history, the recent additions of John Roberts and Samuel Alito to the Court, and the possibility of future Supreme Court appointments during President George W. Bush's term, reliance on judicial interpretation of the Fourteenth Amendment to accord sex the recognition as a protected class that is accorded to race and national origin classes is not realistic.

U.S. Ratification of CEDAW Would Expose Women's Inequality

The failure of the United States to ratify the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is further indication of the depth of the problem of achieving sex equality in the United States. The treaty was signed by President Jimmy Carter in 1980, but has not been ratified by the Senate in the more than twenty-five years since then. This international 'Bill of Rights' for women was ignored, delayed and ultimately blocked from a final floor vote in 1994 and again in 2002. Conservatives in the Senate have continued to prevent ratification of CEDAW since its signing.

Even if it had been ratified, a series of Reservations, Understandings and Declarations (RUDs) have been attached to CEDAW which would limit the application of the Convention in the U.S. In 1994, the NOW Legal Defense and Education Fund (now called Legal Momentum) with the Lawyers Committee for Human Rights evaluated them and concluded that the RUD's are objectionable, undesirable and unnecessary.⁴ In effect, the Reservations, Understandings and

⁴ Legal Analysis of the Reservations, Declarations and Understandings concerning the CEDAW. (1994) Joint Position of the Lawyers Committee for Human Rights and the Now Legal Defense and Education Fund, September 26, 1994. Retrieved April 23, 2006 from http://www.now.org/issues/global/cedaw_analysis.htm

Declarations - should the U.S. ever ratify - would limit the meaning and intent of most provisions of the treaty. Because ratification of CEDAW requires legal equality for citizens in States Parties, the U.S. cannot ratify without exposing the inferior legal status of female U.S. citizens due to the lack of a constitutional guarantee of equality and the ambiguous nature of the Fourteenth Amendment.

Violence Against Women Protections Limited

Violence against women is a violation of Articles 6 (Right to Life), 7 (Torture and Cruel, Inhuman and Degrading Treatment), and 9 (Liberty and Security of Person), as well as of the fundamental principles of equality and nondiscrimination. The federal Violence Against Women Act (VAWA) is a valuable effort to support violence prevention as well as services for women who are survivors of violence. As government and nongovernmental service providers have gained experience, they have refined their understanding of both women's needs and effective approaches. Each round of VAWA renewal provides an opportunity to improve it in light of this experience. The current limitations that remain to be addressed are:

Immigrant women

Immigrant women who reside legally in the U.S. on the basis of their husband's legal status are at particular risk of domestic violence because of their high level of dependency. They may not speak English and may have limited contact with persons outside their community. Because of cultural background or experience in their home country, they may see authorities such as police or public agencies as threatening rather than potentially helpful. Many are from cultures in which family and clan are the sole resource for resolution of marital difficulties and discussing problems outside the family is seen as deeply shameful.

VAWA created a crucial preventive remedy for battered immigrant spouses, enabling them to self-petition for legal status without the consent of their spouses.⁵ However, implementation of this right falls short because non-English-speaking victims face considerable barriers to obtaining information and using the procedure.⁶ Compounding the women's own issues related to culture and resources, the Department of Homeland Security does not provide services or materials designed to reach them.

Discrimination in housing and employment

Women who are victims of domestic violence are more likely than other women to be unemployed, to suffer from health problems that can affect employability and job performance, to report lower personal income, and to rely on welfare. In addition, domestic violence is a leading cause of homelessness among women.⁷ Abusers frequently seek to control their partners

⁵ Immigration and Naturalization Act § 204(a); 8 CFR § 204.

⁶ Morgan, Deborah, *Access Denied: Barriers to Remedies Under the Violence Against Women Act for Limited English Proficient Battered Immigrant Women*, 54 AM. U. L. REV. 485, 493 n.42 (2004), citing U.S. Citizenship & Immigration Services, National Consumer Service Center, at <http://uscis.gov/graphics/services/NCSC.htm> (last modified May 6, 2004).

⁷ United States Conference of Mayors, "Hunger and Homelessness Survey: A Status Report on Hunger and Homelessness in America's Cities, A 24-City Survey," at 63 (Dec. 2005).

by actively interfering with their ability to work, including preventing their partners from going to work, harassing their partners at work, limiting the access of their partners to cash or transportation, and sabotaging the child care arrangements of their partners.⁸ In short, all too often domestic violence makes women poor and keeps them poor, unable to safely separate from a dangerous situation.

A proposed employment title in the recently renewed VAWA would have prohibited employers from discriminating against victims of domestic violence, sexual assault, and stalking by refusing to hire, demoting, firing, or otherwise denying victims and employment benefits. The proposed legislation also would have provided victims with 10 days of employment leave in a 12-month period to attend to the collateral effects of domestic violence that often have consequence for the workplace, such as needing medical attention, being involved with legal proceedings, seeking counseling, etc. However, Congress failed to reauthorize VAWA with these employment protections.

Domestic violence similarly affects victims' access to and the ability to maintain safe housing. A shocking 92 percent of homeless women have experienced severe physical or sexual abuse at some point in their lives,⁹ and 57 percent of homeless parents who had been living with a spouse or partner left their last home because of domestic violence.¹⁰ Most significantly, many women fleeing domestic violence face an additional barrier to obtaining and maintaining safe housing -- discrimination from landlords and sellers of property. Numerous women report being denied public, subsidized, and private housing outright, and others report being threatened with eviction due to the violent acts of their abusers or because they have sought protection from the police and/or courts. A 1999 study published by the National Resource Center on Domestic Violence indicated that 67 percent of domestic violence service providers identified housing discrimination as a barrier to women who are abused.¹¹ Even worse, victims are often evicted as a result of noise or disturbances caused by crimes committed against them.

In January 2006, VAWA was reauthorized with housing provisions that ensure that victims of domestic violence or stalking living in public housing or using federally-funded housing vouchers ("Section 8" vouchers) do not lose their housing based on the criminal acts against them. It also makes it illegal to deny access to public housing or to a subsidized housing voucher based on an applicant being a victim of domestic violence, dating violence, or stalking.

⁸ Jody Raphael & Richard M. Tolman, *Trapped In Poverty, Trapped By Abuse: New Evidence Documenting the Relationship Between Domestic Violence and Welfare* (1997).

⁹ Browne, A. & Bassuk, E. (1997). "Intimate Violence in the Lives of Homeless and Poor Housed Women: Prevalence and Patterns in an Ethnically Diverse Sample," *American Journal of Orthopsychiatry*, 67(2): 261-278; Bassuk, E., Melnick, S. & Browne, A. (1998). "Responding to the Needs of Low Income and Homeless Women Who are Survivors of Family Violence," *Journal of American Medical Women's Association*, 53(2): 57-64

¹⁰ Homes for the Homeless & Institute for Children and Poverty, *Homeless in America: A Children's Story*, Part One 23 (1999).

¹¹ Correia, A. *Housing and Battered Women: A Case Study of Domestic Violence Programs in Iowa*, at 7. Harrisburg, PA: National Resource Center on Domestic Violence (Mar. 1999).

These protections do not apply to victims renting private housing without federal housing subsidies or to victims facing discrimination in trying to buy a home. Also, the new provisions do not address many kinds of discriminatory acts, such as a refusal by a landlord to grant a victim's transfer request simply because she was a victim of domestic violence or for reasons related to the violence (such as property damage caused by the abuser). Three states have enacted laws specifically protecting domestic violence survivors from housing discrimination and others have adopted protections in certain circumstances. However, without a federal standard, the level of protection varies dramatically by location.

Government Institutions and Information Relating to Equality

The substantive equality guaranteed by the ICCPR can be achieved only if governments are aware of, and take steps to remedy, sex-based discrimination. In recent years, the United States government has taken a number of actions to eliminate the official bodies established over a period of decades to monitor and ensure equality between the sexes. With the elimination or modification of these offices, women have lost important avenues to enlist the government in ensuring equality, and have lost access to valuable (and often otherwise unavailable) information that would enable them to take action themselves and through nongovernmental organizations to address inequality.

The federal government created the Women's Bureau of the U.S. Department of Labor in 1920. This is the only federal agency with a mandate devoted exclusively to women's issues. Under the current administration its agenda has been narrowed and its mission statement tailored to eliminate any advocacy role.¹² Many Women's Bureau publications that provided data on women's earnings inequality have been eliminated entirely. Indeed, a researcher looking for this information, which was once readily available from the Women's Bureau, was informed by the regional office of the Women's Bureau that "no publications on workers' rights and fair pay per se were available at that time from the Bureau."¹³

In 2001, the White House Women's Office of Initiatives and Outreach was eliminated.¹⁴ The office served as a coordinating body for a number of federal programs and offices that focused on women's equality.¹⁵ With the closure of the White House Women's Office, these initiatives lost direct access to the President as well as a coordinating presence that could assist them in developing a collective agenda.

¹² See NCRW Report at p. 12 (comparing 1999 Women's Bureau Mission Statement with revised 2004 Mission Statement).

¹³ Id. at 13 (quoting account of Gwendolyn Beetham, Research Associate, National Council for Research on Women).

¹⁴ See Lyn Berry, "Women's Groups Blast Bush's Policies," *Denver Bus. J.*, Apr. 13, 2001, available at <http://denver.bizjournals.com/denver/stories/2001/04/16/story6.html?page=1>

¹⁵ See Betsy Myers, "A Short-sighted President Shortchanges Women," *Boston Globe*, Apr. 10, 2001, available at http://www.ksg.harvard.edu/news/opeds/2001/myers_women_bg041901.htm.

Further, some of the constituent bodies of the White House Women's Office have also been eliminated. The President's Interagency Council on Women, housed in the State Department and created by Executive Order in 1995, was eliminated in 2001. The Council was charged with implementing the United States' commitments under the Beijing Platform for Action.¹⁶

After being threatened with elimination, the Defense Advisory Committee on Women in the Services (DACOWITS) was substantially restructured to, in the words of one observer, "'purge the committee" after it reported on problems of sexism in the U.S. Marine Corps and "strip[] the committee of key investigative powers."¹⁷ The venerable committee was first established in 1951 and had made many recommendations instrumental in improving military conditions for women.

The Equal Employment Opportunity Commission is the federal agency charged with enforcing Title VII, the principal federal civil rights law providing redress for employment discrimination based on sex, race, national origin, religion, and color. Among other things, the agency investigates claims filed by individuals against both private and public employers. For the past decade, the number of charges filed with the agency has fluctuated from a low of 75,428 (FY 2005) to a high of 84,442 (FY 2002).¹⁸ A significant proportion of those charges arise from claims of sex discrimination, with an increasing number that concern pregnancy discrimination.¹⁹ However, since 2001, the EEOC has lost more than 20 percent of its workforce.²⁰ Further, at a time when the projected backlog of unprocessed claims is anticipated to rise to more than 47,000 in 2007, the 2007 budget request put forward for the EEOC is \$4.2 million less than the amount appropriated for 2006.²¹

In sum, far from aggressively pursuing its obligation under the ICCPR to take affirmative steps to ensure equality, the U.S. government seems to be dismantling many of the formal mechanisms that might have made such equality a reality.

Government Attempts to Limit Data Collection Pertaining to Women

The "Department of Labor has abolished its Equal Pay Matters Initiative, removed information about narrowing the wage gap from its Web site, refused to use available tools to identify violations of equal pay laws, and adopted regulations that deprive millions of women the

¹⁶ See National Council for Research on Women, *MISSING: INFORMATION ABOUT WOMEN'S LIVES* (2004), at p. 5 [hereinafter, NCRW Report].

¹⁷ E.J. Graff, "A Few Good Men?," *The American Prospect*, July 7, 2003.

¹⁸ Data available at www.eeoc.gov.

¹⁹ See generally National Partnership for Women and Families, *WOMEN AND WORK: LOOKING BEHIND THE NUMBERS 40 YEARS AFTER THE CIVIL RIGHTS ACT OF 1964* (July 2004).

²⁰ Daniel Pulliam, "Proposed EEOC Budget Cut Draws Congressional Scrutiny," *Daily Briefing: American Management Association*, March 24, 2006, available at www.gov.exec.com/dailyfed/0306/032406pl.html.

²¹ *Id.*

right to over time pay.²² Further, the Department revised regulations pertaining to overtime pay (to permit) reclassifying employees as “executive”, “administrative” or “professional” thereby removing them from overtime protections under the Fair Labor Standards Act of 1938 [29 U.S.C. 201-219]. The result is that about 3.7 million women have lost overtime protections. In addition, efforts have been made to stop the collection of data on working women, making it more difficult to identify sex discrimination in employment and to measure women’s progress – or lack of – in the labor force.

OFCCP/ EO surveys – Executive Order 11246, issued by President Lyndon B. Johnson in 1965, banned pay discrimination by federal contractors and requires contractors to perform self-audits. The Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor published a new regulation in the Federal Register in January, 2006, that will abolish the Equal Opportunity Survey (EO Survey).²³ Current regulations require the thousands of federal contractors who do business with the federal government to complete this survey to help monitor personnel activity—applicants, incumbents, hires, promotions and terminations—and compensation practices by sex and race. This confidential survey is intended to identify which contractors might be engaging in discriminatory practices and which contractors should undergo a federal on-site compliance review. Should the survey be discontinued, the likely result will be reduced incentive on the part of contractors to hire and retain qualified female employees.

Working Women's Surveys – In 2004, the U.S. Department of Labor, Bureau of Labor Statistics (BLS) proposed that the collection of employment data on women workers be discontinued.²⁴ The information was obtained through the Current Employment Statistics Survey (CES), a monthly nationwide survey of payroll records that includes the "Women Worker Series," requesting that employers answer a question about the number of women they employ. The BLS data demonstrate women's important and growing influence on the nation's economy, providing the only accurate picture of whether women are gaining or losing jobs, and in which industries. Considered to be the most reliable data for tracking month-to-month changes in employment, it is often used by lawmakers in the formation of public policies that affect women. Despite thousands of messages from women's groups and the public, the BLS refused drop plans to stop the data collection. Only an amendment to the Senate Labor-Health and Human Services 2006 appropriations bill requiring the BLS to reinstate collection of the Women Worker data series saved the day. The appropriations measure passed Congress and was later signed into law in December, 2005.

²² National Women's Law Center (2004) Slip-Sliding Away: The Erosion of Hard-Won Gains for Women Under the Bush Administration and an Agenda for Moving Forward," April. 2004. p. 14

²³ Federal Register, Part III, Department of Labor. Office of Federal Contract Compliance Programs, 41 CFR Part 60-2, Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors, Equal Opportunity Survey; Proposed Rule

²⁴ Statement by IWPR on the BLS Decision to Discontinue Data Collection on Women's Employment (2004, Institute for Women's Policy Research, Dec. 7, 2004. Retrieved from <http://www.iwpr.org/pdf/iwprstatementonbls.pdf>

Abstinence-only Education

The U.S. government is in violation of Article 3 because of its practice of funding and promoting sexual education programs that sanction abstinence as the sole method of pregnancy and disease prevention. The federal statute authorizing funding requires a recipient program to be one which "has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity; . . . teaches that a mutually faithful monogamous relationship in [the] context of marriage is the expected standard of human sexual activity; [and] teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects." 42 U.S.C. § 710(b)(2).

First, it is well-documented that these programs censor truthful and practical information about sexuality, contraception and abortion, thereby impeding a young person's ability to protect against unintended pregnancy and sexually transmitted infections. (*See The Content of Federally Funded Abstinence-Only Education Programs*, Prepared for Rep. Henry A. Waxman, U.S. House of Representatives, Committee on Government Reform - Minority Staff, Special Investigations Division, December 2004). This censorship particularly harms girls and women by subjecting them to the risks of unintended pregnancy and disease, including HIV/AIDS. Moreover, these programs overwhelmingly promote the imposition of damaging sex stereotypes. Finally, these programs severely restrict the use of more effective, less discriminatory programs that teach comprehensive sexuality education. Government-sponsored programs should fully inform students not just about abstinence but must also teach sexual health and development and relationship skills to youths.

Recommendations

(1) With respect to constitutional protections, we request that the Committee require the U.S. Government to:

(a) Initiate a national dialogue regarding the benefits of an equal rights amendment, including full and fair Congressional hearings on the intent and applicability of a Constitutional amendment assuring equal protection under the law for women and men.

(b) The U.S. Senate should move legislation to a floor vote that would provide for ratification of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), at the same time recommending removal of the Reservations, Understandings and Declarations that have been attached to CEDAW which would limit the application of most of the treaty's provisions.

(2) With respect to monitoring and implementation of equality, we request that the Committee note:

(a) the fundamental lack of a national human rights institution or any other department or bureau with responsibility for monitoring and promoting women's human rights;

(b) the dismantling and decommissioning of the bodies that existed, limited as they were, to ensure that equality between the sexes remained an element of government policy; and,

(c) the elimination of data collection programs that illuminate discrimination issues.

(3) With respect to abstinence-only sex education, the U.S. Government should take steps to ensure that any sexuality education program it funds does not perpetuate sexual stereotypes or stigmatize sexual conduct outside of heterosexual marriage and that the programs it funds provide accurate information about condom effectiveness, abortion and other matters related to sexuality.

ARTICLE 7

Torture and Cruel, Inhuman and Degrading Treatment

ARTICLE 10

Treatment of Prisoners

Introduction

Of the almost two million people confined in U.S. prisons and jails, about 200,000 are women, of whom 80 percent have committed non-violent crimes such as shoplifting, prostitution, illicit drug use, and welfare fraud.²⁵ However, the majority of women incarcerated for non-drug crimes usually have resorted to additional criminal activity, such as burglary and grand theft, to support their drug addictions.²⁶

Women in prison have been egregiously abused throughout their lives. They have been molested as children, sexually assaulted and raped as teens and adults, and physically, emotionally and mentally abused throughout their lifespan.²⁷ Most turned to drugs because their

²⁵Beisler, V. (2001). How we got to two million. How did the 'Land of the Free' become the world's leading jailer? Retrieved March 12, 2003 from <http://www.motherjones.com/prisons/overview.html>; Heimer, K. (2000). Changes in the gender gap in crime and women's economic marginalization. *Criminal Justice 2000*. Retrieved May 1, 2003 from www.ncjrs.org/criminal_justice2000/vol_2/02j2.pdf

²⁶Prendergast, M., Wellisch and Falkin, G. (1995). Assessment of and services for substance-abusing women in community and correctional settings. *The Prison Journal* 75(2).

²⁷Liptak, A. (March 2, 2006) Prisons Often Shackle Pregnant Inmates in Labor: New York Times. http://www.nytimes.com/ads/nextag/nextagpopunder320_06.html; Roth, R. (2006) "Making Women Pay: The Hidden Costs of Fetal Rights" and "Abortion Funding: A Matter of Justice."

parents may have also been drug addicts or dually diagnosed (i.e., self-medicating).²⁸ These women often end up with violent and abusive partners and suffer from a cycle of incarceration and repeated recidivism due to continued drug usage or crimes related to their drug use. In short, these women are victims and continue to be victimized in prison.

Approximately five percent of women reportedly arrive at prison pregnant, and approximately 2,000 babies are born annually to U.S. prisoners.²⁹ These women are often shackled when being transported to the hospital, waiting to give birth, during labor and after birth.³⁰

Another abuse of grave concern is women inmates' restricted access to abortion. This forces these women to have children they might not otherwise. Women in jail and prison decide to have abortions for the same reasons that women everywhere do: because of the impact that having a child (or having another child) would have on their lives. The consequences are even greater for women who are facing either uncertain futures or the certainty of long prison sentences making denial of abortion a serious offense against an incarcerated woman.

Prisons are patriarchal systems which attempt to restrict women's choices not only about their bodies but also their offspring. After incarcerated women bear children, these offspring are placed in either kinship or foster care. If a child is placed in foster care, mothers often irreversibly lose custody of their children. Even worse, reunification is often at the whim of individual case workers. Cases such as that of "Denise," an incarcerated mother at MCI-Framingham (Massachusetts), are common. She was, like most women, convicted of a nonviolent drug offense. Denise's son was nine years old when she was arrested. By the time she was released, he had spent five years shuttling between foster homes and his abusive father, and was, finally, in prison himself.³¹ The cycle frequently is perpetuated from parent to child. In fact, many women in prison had parents or siblings who had also served sentences.³²

While women suffer numerous abuses in prisons and jails, this report covers three that are among the hardest on them: shackling of pregnant women prisoners before, during and after delivery; denial of inmates' choice to terminate a pregnancy; and a system in which women can lose their parental rights without their presence in a fair hearing.

²⁸ Liptak, A. (March 2, 2006) Prisons Often Shackle Pregnant Inmates in Labor: *New York Times*. http://www.nytimes.com/ads/nexttag/nextagpopunder320_06.html

²⁹ Liptak, A. (March 2, 2006) Prisons Often Shackle Pregnant Inmates in Labor: *New York Times*. http://www.nytimes.com/ads/nexttag/nextagpopunder320_06.html

³⁰ The U.N. Committee against Torture has indicated that this practice constitutes abuse. Committee Against Torture: Concluding Observations: United States of America (May 2006).

³¹ 8. Rathbone, C. (2006). *A World Apart*. New York, NY: Random House Trade Paperbacks: June 2006

³² Liptak, A. (March 2, 2006) Prisons Often Shackle Pregnant Inmates in Labor: *New York Times*. http://www.nytimes.com/ads/nexttag/nextagpopunder320_06.html

Shackling of Pregnant Women Before, During and Immediately after Labor

The endangerment of a woman's or her child's life by her being shackled before, during, or immediately after labor and delivery, is a clear violation of ICCPR Articles 7 and 10.1.

According to a recent account in the *New York Times*,³³ Shawanna Nelson, a prisoner at the McPherson Unit in Newport, Arkansas, had been in labor for more than 12 hours when she arrived at the hospital with her legs in shackles in September, 2003. Nelson was serving time for writing bad checks in a minimum security prison. She had been given nothing stronger than Tylenol all day. She "begged, according to court papers, to have the shackles removed," the *Times* said. "Though her doctor and two nurses joined in the request, her lawsuit says, the guard in charge of her refused." The experience of giving birth without anesthesia while largely immobilized has left Nelson with lasting back pain and damage to her sciatic nerve, as indicated in her lawsuit against prison officials and by a private medical provider.

The practice of shackling prisoners who are in labor is common, and only two states, California and Illinois, and the District of Columbia have explicit laws forbidding it.³⁴ At least one court has held that a prison cannot use any restraints on a woman during labor, delivery, or recovery from delivery, and cannot use any restraints while transporting a woman in her third trimester of pregnancy unless that woman has a history of escape or assault, in which case only handcuffs are allowed.³⁵

Prison officials rationalize this brutal practice by claiming that restraints are needed because the prisoners may try to escape during labor. "You can't convince me that it's ever really happened," Dee Ann Newell, who has taught parental care classes for women prisoners in Arkansas, told the *Times*. "You certainly wouldn't get far." One has to wonder why the use of shackles, which were initially designed for violent men, is necessary for pregnant women.

"Giving birth while incarcerated was one of the most horrifying experiences of my life. While enduring intense labour pains, I was handcuffed while being taken to the hospital, even though I was in a secured vehicle with a metal grating between the driver's and passenger's compartments and without interior door handles on the passenger doors. With the handcuffs on, I could not even hold my stomach to get some comfort from the pain...At the hospital I was shackled to a metal bed post by my right ankle throughout seven hours of labour, although a correctional officer was in the room with me at all times. The shackles were not removed until 30 minutes prior to my delivery...

³³ Liptak, A., "Prisons Often Shackle Pregnant Inmates in Labor." *New York Times* (March 2, 2006), http://www.nytimes.com/ads/nextag/nextagpopunder320_06.html

³⁴10. Amnesty International. (1999). "Not part of my sentence:" Violations of the human rights of women in custody. <http://www.amnestyusa.org/rightsfor all/women/report/women-101.html>.

³⁵ *Women Prisoners of the District of Columbia Dept. of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996).

Imagine being shackled to a metal bedpost, excruciating pains going through my body, and not being able to adjust myself to even try to feel any type of comfort, trying to move and with each turn having hard, cold metal restraining my movements. Not only was this painful, it was traumatizing, and very stressful for myself and also for my child...Even animals would not be shackled during labour, a household dog or a cow on a farm ...The birth of a child is supposed to be a joyous experience, and I was robbed of the joy of my daughter's birth ... Is it really necessary to handcuff and shackle mothers who are in labour? With all the other security measures that were in place, and with my minimum security status, did they really have to put me and my infant through that torture?" (Statement of Warnice Robinson, imprisoned in Illinois for shoplifting).³⁶

According to Amnesty International,³⁷ the use of restraints on women who are about to give birth endangers the woman and her child, as described by physician Dr. Patricia Garcia:

"Women in labour need to be mobile so that they can assume various positions as needed and so they can quickly be moved to an operating room. Having the woman in shackles compromises the ability to manipulate her legs into the proper position for necessary treatment. The mother and baby's health could be compromised if there were complications during delivery, such as haemorrhage or decrease in fetal heart tones. If there were a need for a caesarian delivery, the mother needs to be moved to an operating room immediately and a delay of even five minutes could result in permanent brain damage for the baby. The use of restraints creates a hazardous situation for the mother and the baby, compromises the mother's ability post-partum to care for her baby and keeps her from being able to breast-feed."

Amnesty International³⁸ noted that a growing number of corrections departments acknowledged the special attention required for pregnant prisoners. In a national survey, 20 of the 52 state, city and federal corrections departments that responded reported that they have specific policies or procedures for the physical control and transportation of pregnant inmates. In 38 systems, medical personnel are involved in evaluating individual cases prior to the restraint of pregnant women. However, Amnesty International reported that it had seen many policies that permit the routine use of restraints without consideration of their necessity.

In October 1998, Amnesty International³⁹ wrote to U.S. Attorney General, Janet Reno, requesting an inquiry into the use of restraints on pregnant women prisoners. The letter was referred for response to the section of the U.S. Department of Justice that is responsible for enforcing federal criminal civil rights laws. The chief officer of the section informed Amnesty

³⁶ Amnesty International. (1999). "Not part of my sentence:" Violations of the human rights of women in custody. <http://www.amnestyusa.org/rightsfor all/women/report/women-101.html>

³⁷ Amnesty International. (1999). "Not part of my sentence:" Violations of the human rights of women in custody. <http://www.amnestyusa.org/rightsfor all/women/report/women-101.html>

³⁸ Amnesty International. (1999). "Not part of my sentence:" Violations of the human rights of women in custody. <http://www.amnestyusa.org/rightsfor all/women/report/women-101.html>.

³⁹ Amnesty International. (1999). "Not part of my sentence:" Violations of the human rights of women in custody. <http://www.amnestyusa.org/rightsfor all/women/report/women-101.html>.

International that the section was unable to authorize an investigation because the information concerning shackling "does not disclose a prosecutable violation of federal criminal civil rights statutes." The federal policy of failure to prohibit shackling, particularly if a woman or her child's life is endangered because of the practice, presents a clear violation of the U.S. Constitution and ICCPR.

Recommendations

(1) Mandate that all states comply with international standards for treatment of incarcerated women;

(2) Restrict the use of shackles except as a reasonable precaution against escape during a transfer; by order of medical personnel; or if other methods of control fail, in order to prevent a prisoner from injuring herself or others or from damaging property, and do not use them during the third trimester of pregnancy;

(3) Deliver adequate care for pregnant incarcerated women, including access to abortion services;

(4) Protect incarcerated women's reproductive rights, including the right to abortion;

(5) Provide funds for incarcerated women who cannot afford abortions from the Department of Corrections (DOC) medical budgets in the same ways that the DOC covers prenatal, delivery and post-natal costs;

(6) Repeal the Hyde Amendment prohibiting use of federal funds for abortion services as discriminatory against minorities, low-income women and incarcerated women in Federal prisons; and,

(7) Inform women they can write to a judge and request to be present at any court hearings regarding a child's care, including foster care status hearings and parental termination proceedings.

Denial of Abortion Rights

The denial of abortion for women in prison violates ICCPR Articles 2.1, 2.2, 2.3a, 2.3b, 2.6, 7, 10.1 as well as U.S. Constitution, Articles 8 and 14.

Incarcerated women often face policies that violate their abortion rights. In 2005, in a challenge brought by the American Civil Liberties Union (ACLU), a U.S. judge found that an Arizona sheriff's unwritten policy requiring women to obtain a court order to be transported from jail to a clinic for an abortion violated their rights. Unfortunately, this type of restrictive abortion policy is in danger of becoming common. Across the country, correctional authorities routinely make it difficult for women to obtain abortions by refusing to pay for an abortion or

transport them to a clinic. According to the plaintiff who brought the lawsuit against the Arizona official, she decided early in her pregnancy to have an abortion and paid the clinic's fee in advance. However, she still spent eight weeks trying to get a court order before the jail personnel would take her to the clinic. She succeeded only when the ACLU represented her and had an abortion shortly before her 14th week of pregnancy. If she had waited much longer, she would have needed an expensive, complicated procedure.⁴⁰ Women in other prison and jail communities have experienced similar problems and have only succeeded in obtaining abortions because they had legal assistance.

Two important constitutional rights protect women's decisions about pregnancy and abortion. These are the right to choose abortion that applies to all American women and the right to adequate medical care that is guaranteed specifically to prisoners, as part of the right to be free from cruel and unusual punishment. However, this right can be overturned for women prisoners as the Supreme Court, in three related decisions, ruled that the states have neither a statutory nor a constitutional obligation to fund elective abortions or provide access to public facilities for such abortions (*Beal v. Doe*, 432 U. S. 438 (1977); *Maher v. Roe*, 432 U. S. 464 (1977); and *Poelker v. Doe*, 432 U. S. 519 (1977) (*per curiam*)).

Roe v. Wade, 410 U.S. 113 (1973) upheld a women's right to choose abortion (at least during the first trimester) under the Fourteenth Amendment, which protects certain fundamental rights to liberty and privacy. However, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U. S. 833 (1992), was decided by the Supreme Court on June 29, 1992. In a highly fractionated 5-4 decision, the Court reaffirmed the basic constitutional right to an abortion while simultaneously allowing some new restrictions. For example, states can require women to follow certain policies and procedures and as long as those limitations did not place an "undue burden" on a woman's right to choose abortion. States can make a woman wait at least 24 hours, require informed consent or demand a parent's permission for minors. The Court defined an "undue burden" as "a state regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion," (*Casey*, 505 U.S. at 877). Arguably, an incarcerated woman may be "unduly burdened" by forcing her to hire an attorney, appeal to a judge for a court order authorizing the abortion, and risk delays of such magnitude that she can no longer obtain an abortion.⁴¹ Moreover, refusal to pay for a woman's abortion also creates another burden.

Policies and laws governing prisoners in the U.S. are often poorly implemented, subjecting women to the whims of jail and prison authorities and corrections officers. However, a woman in prison may challenge an official's failure to provide her access to abortion in one of two ways. First, she can claim a violation of her Eighth Amendment right to medical care, using a two-part test: serious medical need and deliberate indifference by prison officials. Second, she

⁴⁰ Roth, R. (2006) "Making Women Pay: The Hidden Costs of Fetal Rights" and "Abortion Funding: A Matter of Justice."

⁴¹ Roth, R. (2006) "Making Women Pay: The Hidden Costs of Fetal Rights" and "Abortion Funding: A Matter of Justice"

can claim a violation of her fundamental right to privacy under the Fourteenth Amendment. Both of these approaches have been successful, but they can also be challenging and difficult to argue. Under an Eighth Amendment claim, proving both a serious medical need and deliberate indifference can be very difficult because of the escalating controversy surrounding the abortion issue both inside and outside of U.S. prisons. First, is abortion a serious medical need? Some courts do not believe that pregnancy, notwithstanding abortion, constitutes a serious medical need. The debate among courts centers on abortions that are elective (i.e., abortions that are not medically necessary to save the mother's life).

However, some women have won these cases. In the landmark Monmouth case, (*Monmouth County Correctional Institution Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987)),⁴² a Court of Appeals determined that abortions, whether they are medically necessary to protect the health of the mother or not, constitute a serious medical need. The court rejected the argument that only a painful or serious injury counts as a serious medical need. Even when an abortion is elective, the court argued, it is always a serious medical need because delaying an abortion or denying one altogether is an irreversible. In another case, in 1999, Judge Edwin Kosik ruled that a Pennsylvania prison must permit a pregnant prisoner to have an abortion if that was her choice. The prison had no facilities for performing an abortion, so she requested that she be released to have an abortion at a local abortion center. The prison refused, pointing to a policy that prisoners were only permitted to have abortions if they were "medically necessary". In the judge's decision, he said that a prisoner's decision to have an abortion, regardless of the circumstances, automatically makes it "medically necessary". He further mandated that the prison transport her to the abortion facility and if she were unable, the government must pay for it. Finally, in 1996, a Colorado case was won for Plaintiff M.M. who was pregnant, indigent, and wanted an abortion. Attorneys argued that "by taking M.M. into custody, the Department of Corrections (DOC) deprived her of the opportunity to earn enough money to pay for her own medical needs," according to the Center for Reproductive Law & Policy. Plaintiffs argued that the United States Constitution requires DOC officials to provide medical services to prisoners who cannot afford them. But like several states, an amendment to the Colorado Constitution does not allocate public funds to pay, either directly or indirectly, for abortions. M. M.'s attorneys argued that the United States Constitution is the supreme law of the land. If that conflicts with a state's constitution, state prison officials are obligated to fulfill their responsibilities under the federal Constitution.

Unfortunately, not all courts have agreed with the *Monmouth* decision, and the case law on whether an elective abortion is a serious medical need differs from state to state. For example, a Fifth Circuit case, *Victoria W. v. Larpen*, ___ F.3d ___, 2004 WL 928682 (5th Cir. 2004), disagreed with the *Monmouth* argument that elective abortions are a serious medical need because of the unique nature of pregnancy, and upheld the denial of an inmate's request for an abortion. Victoria W. first entered the Terrebonne Parish jail on July 28, 1999 and as a result of a routine

⁴² Accessed via LSU Law Center's Medical [Public Health and Health Care In Prisons Case Compliments of Versus law](http://biotech.law.lsu.edu/cases/prisons/Lanzaro.htm). Retrieved May 10, 2006 from <http://biotech.law.lsu.edu/cases/prisons/Lanzaro.htm>

physical, for the first time learned she was pregnant. Victoria W. immediately informed prison personnel that she wished to terminate the pregnancy. Eventually, she was informed in writing that she could not be released for an abortion unless she hired an attorney and received a court order authorizing the procedure. Though she attempted to comply with the jail's policy, she was unable to obtain the court order. Victoria W. was released from prison on October 13, 1999, 25 weeks pregnant and no longer able to have an abortion in Louisiana.

Because the majority of incarcerated women are poor, jails and prisons can deny abortion funding, leaving pregnant women without recourse. Since *Roe v. Wade*, Congress has attached abortion funding restrictions to numerous appropriations measures. The greatest focus has been on restricting Medicaid abortions under the annual appropriations for the U.S. Department of Health and Human Services. This series of restrictions is popularly known as the "Hyde-type Amendments." Restrictions on the use of appropriated funds affect numerous federal entities, including the Department of Justice, where federal funds may not be used to perform abortions in the federal prison system except in cases of rape or endangerment of the mother, and the District of Columbia, where neither federal nor local funds may not be used to perform abortions except in cases of rape, incest or endangerment of the mother. Moreover, according to the Bureau of Prisons (BOP) Web site, the BOP *may* expend funds to escort the inmate to a facility outside the institution to receive the procedure—rather than indicating that that these facilities *must* escort the woman to an abortion provider. Finally, the BOP policy provides that employees may decline to participate in the provision of abortion counseling or services.

The second argument under the Eighth Amendment to the Constitution, indifference, has also created a potential obstacle for women who want to obtain abortions. Cases have mostly been centered on timing for medical intervention. When does this failure to provide access to abortion account for deliberate indifference? Some women have lost their legal battles, or won them, but after prevailing in court, their pregnancies were too advanced to terminate.

Courts seem to disagree about the standard for deliberate indifference when it comes to abortion. Some courts have found only negligence (which is not a violation of a constitutional right) even when it was probable that a prison official knew of a prisoner's request for and right to an abortion. For example, in *Bryant v. Maffuci*, 923 F.2d 979 (2d. Cir. 1991), the court held that prison officials had been negligent in failing to schedule an abortion for a pregnant prisoner until it was too late for her to have one under New York law, even though, as the dissent noted, the prisoner requested an abortion upon her arrival to prison and every day thereafter. The prison medical staff had measured the duration of her pregnancy and marked her file: EMERGENCY.⁴³

It can be even more problematic to prove deliberate indifference when the actions of many officials are involved. In the example of *Gibson v. Matthews*, 926 F.2d 532 (6th Cir. 1991) a

⁴³ *The Jailhouse Lawyers' Handbook* Published by the Center for Constitutional Rights and the National Lawyers Guild Updated: January 2005 Edition of Appendix for Women Prisoners Appendix for Women Prisoners by Maissa Boulos, Alicia D'Addario, and Rachel Meeropol. Special thanks to: Dori Lewis, John Boston, Ian Head, Marc Krupanski, and Jeff Fogel. Retrieved April 19, 2006 from <http://www.jailouselaw.org/http://www.jailouselaw.org> or <http://www.ccr-ny.org/www.ccr-ny.org>

federal judge sentenced a pregnant woman to prison and, based on the prisoner's repeated requests for an abortion, requested that she be provided with an abortion as soon as possible. After several days of travel, the prisoner Gibson reached her assigned facility and learned that abortions were not performed there. When she finally arrived at a facility that did perform abortions, she was told that it was too late in her pregnancy to arrange an abortion. The court held that the denial of Gibson's abortion could not be attributed to any particular officials, and was therefore, only negligence, not deliberate indifference.⁴⁴ Where medical care has been contracted out to private companies, non-governmental employees might also be in a position to obstruct women's access by adding another layer of bureaucracy⁴⁵ where indifference may be difficult to pin on any one individual or system.

However, not all courts reject claims of deliberate indifference, but it can be difficult to prove. In the *Monmouth* case, a group of women prisoners sought to overturn a prison policy that required women seeking elective abortions to apply for and receive a court order allowing them to seek an abortion outside of the prison. The court held that the policy placed inappropriate, or undue, burdens upon pregnant prisoners seeking abortion. The court relied on the fact that prison officials didn't even try to act quickly in following this policy, which caused serious delay problems. For this reason, the court held that the officials responsible for the policy acted with deliberate indifference.

While it appears that a woman's right to choose may be guaranteed under the Constitution, it is not necessarily secured for inmates. Therefore, inmates may also have to file a suit under a Fourteenth Amendment claim. The landmark *Monmouth* case found that the prison's policy requiring either a determination of medical necessity by the prison physician or a court order before a pregnant prisoner could seek an abortion violated not only the Eighth Amendment, but also the Fourteenth Amendment. The Fourteenth Amendment protects certain rights that the Supreme Court has said are "fundamental." Unfortunately, fundamental rights to privacy in prison are neither absolute nor always guaranteed.

As with other constitutional rights, abortion rights must be weighed against the prison's interests in security. The *Monmouth* court applied the four-part "reasonableness test" from *Turner v. Safley* to the prison policy and determined that the women prisoners' Fourteenth Amendment rights outweighed the security restrictions in the prison's policy. The court addressed each part of the test as follows:⁴⁶

⁴⁴ *The Jailhouse Lawyers' Handbook* Published by the Center for Constitutional Rights and the National Lawyers Guild Updated: January 2005 Edition of Appendix for Women Prisoners Appendix for Women Prisoners by Maissa Boulos, Alicia D'Addario, and Rachel Meeropol. Special thanks to: Dori Lewis, John Boston, Ian Head, Marc Krupanski, and Jeff Fogel. Retrieved April 19, 2006 from <http://www.jailhouselaw.org/http://www.jailhouselaw.org> or <http://www.ccr-ny.org/www.ccr-ny.org>

⁴⁵7. Roth, R. (2006) "Making Women Pay: The Hidden Costs of Fetal Rights" and "Abortion Funding: A Matter of Justice."

⁴⁶ From *The Jailhouse Lawyers' Handbook*, Published by the Center for Constitutional Rights and the National Lawyers Guild Updated: January 2005 Edition of Appendix for Women Prisoners Appendix for Women Prisoners by Maissa Boulos, Alicia D'Addario, and Rachel Meeropol. Special thanks to: Dori Lewis, John Boston, Ian Head, Marc Krupanski, and Jeff Fogel. Retrieved April 19, 2006 from <http://www.jailhouselaw.org/http://www.jailhouselaw.org> or <http://www.ccr-ny.org/www.ccr-ny.org>

1. Is there a valid, reasonable connection between the prison regulation and a legitimate, neutral state interest used to justify the regulation? The court found that the regulation had no valid relationship to a legitimate security interest. It pointed out that maximum and minimum security prisoners could receive “medically necessary” services without a court order, but that even minimum-security prisoners had to receive a court order to seek an abortion.

2. Is there another way for prisoners to exercise the constitutional right being limited under the regulation? The court found no other way for prisoners to exercise their right to abortion under the prison regulation. It argued that maximum security prisoners would be unlikely to be released for an abortion by court order and might not get an abortion in the prison. While minimum security prisoners might receive the release order for an abortion, the court argued that the likelihood of delay in the process was too large a risk, since women are unable to have abortions legally past a certain point in their pregnancy.

3. How would eliminating the court ordered release requirement for prisoner abortions impact prison resources, administrators, and other prisoners? While the court noted that allowing prisoners access to abortion imposed minor costs on the prison, giving prisoners proper prenatal care and access to hospitals for delivery imposes greater costs. Therefore, this was not a legitimate argument -- that eliminating the court order requirement would not be too costly for the prison. The court also noted here that while a prison must help fund abortions for prisoners who cannot afford them, it is not obligated to pay for all abortion services.

4. Are there less restrictive ways for the government to promote its interests? In other words, is the regulation an exaggerated response to the government’s interests? Finally, the court ruled that the regulation was an exaggerated response to questionable financial and administrative burdens because it had nothing to do with prison security and because it simply asked the prison to accommodate the medical needs of all pregnant prisoners, not just those who wished to give birth.

While non-incarcerated women may have financial obstacles to their obtaining an abortion, incarcerated women may have numerous undue burdens placed upon them. One of the most common is the denial of funds or transport for abortions. The fact that a prisoner has to litigate to achieve the same reproductive choices as free citizens constitutes cruel, inhuman and degrading treatment.

Recommendations

Because women in prison can arbitrarily have their abortions delayed or denied we recommend that the U.S. Government:

(1) Deliver adequate standards of care for pregnant incarcerated women including access to abortion services;

(2) Mandate that the Eighth and Fourteenth Amendments adequately protect incarcerated women’s reproductive rights. Under the Eighth Amendment, require that abortions are a “medical necessity” and failure to comply with a woman’s request automatically constitutes “indifference”;

(3) Provide funds for incarcerated women who cannot afford abortions from the DOC medical budgets in the same ways that the DOC covers prenatal, delivery and post-natal costs;

(4) Provide transport to and from clinics/hospitals for abortion services and follow-up medical visits related to the procedure;

(5) Repeal the Hyde Amendment which prohibits the use of federal funds in most cases to pay for abortions because it is discriminatory against minorities, low-income women and incarcerated women in Federal prisons;

(6) Streamline procedures for access to abortion providers so the pregnancy can be terminated in a timely manner and not cause any undue psychological or emotional stress to inmates; provide redress for mental and emotional suffering if inmates’ rights are violated.

Family Reunification and Right to a Fair Hearing

In violation of ICCPR Articles 2.3a, 2.3b, 10.1, 17 and 23, incarcerated women who must place their children in foster care risk losing them forever because federal and state laws that impose strict time limits on foster care have no exceptions for incarcerated parents. According to the Federal Adoption and Safe Families Act of 1997 (ASFA), from the moment a prison-born infant is placed in the foster care system, the mother’s parental rights begin to be in termination process. ASFA requires that when a child is under the responsibility of the state for 15 of the most recent 22 months, a “termination of parental rights,” or “TPR,” must be filed, freeing the child for adoption.⁴⁷ After delivery, if a family member does not claim the child within a very short timeframe (i.e., often 48 hours), the child is placed in long-term foster care, where it is often adopted before the mother is released from prison. In many states, a pregnant woman with a state prison term outlasting the term of her pregnancy can expect to lose her child almost immediately after delivery, especially if she has a history of children being placed in the child welfare system.

State social workers often prefer adoption to long term foster care because the latter is costly and burdens their already swollen caseloads. Social workers and prison officials can use bureaucratic processes to block incarcerated mothers from attending court hearings when their child is being placed into long term foster care or adoption. Moreover, child welfare agencies

⁴⁷ Hemmett-Stern, A. (2004). Information Packet: Babies Born to Incarcerated Mothers. CUNY Hunter School of Social Work.

may not bring children to visit or provide mandated reunification services when a parent is incarcerated, on the assumption that parental rights will be terminated. While not all mothers are fit to be a parent, they at deserve a fair hearing and legal representation in family court. Many times, this does not happen because the women do not have the support or knowledge to navigate the legal or child welfare system.

The Adoption and Safe Families Act does have exceptions: if the child is being cared for by a relative (kinship care) or there is a valid reason why termination is not “in the best interests of the child” (42 U.S.C. § 675(5)(E)). Moreover, the Supreme Court held in *Santosky v. Kramer*, 455 U.S. 745 (1982), that in order to terminate parental rights, the state must prove that a woman is unfit by clear and convincing evidence.

According to the Center for Constitutional Rights, what it means to be an unfit parent varies by state. Many states have maintained that prisoners are not necessarily unfit. Examples of some of these cases are the following: *In re B.W.*, 498 So. 2d 946 (Fla. 1986); *In re Stat*, 287 Minn. 501, 178 N.W.2d 709 (Minn. 1970); *In re J.D.*, 512 So. 2d 684 (Miss. 1987); *In re Sego*, 513 P.2d 831 (Wash. 1973); *In re Adoption of McCray*, 331 A.2d 652, 655 (Pa. 1975).

Additionally, according to the Center for Constitutional Rights and the Lawyers’ Guild. although in *Lassiter v. Department of Social Services of Durham County North Carolina*, 453 U.S. 927 (1981), the Supreme Court held that there is no constitutional right to a lawyer at parental termination proceedings, most states do guarantee a lawyer, but many women are not aware they can request one. For some examples, see *Tex. Family. Code Ann.* 107.013(a)(1); *Ark. Code Ann.* 9-27- 316(h)(1) (Supp.2003); *In re B.*, 285 N.E.2d 288 (N.Y. 1972).⁴⁸

While not all women are fit for motherhood, we maintain that incarcerated women deserve to be present in a court hearing with legal counsel provided by the State if she cannot afford the cost.

⁴⁸ The Jailhouse Lawyers’ Handbook. Published by the Center for Constitutional Rights and the National Lawyers Guild Updated: January 2005 Edition of Appendix for Women Prisoners Appendix for Women Prisoners by Maissa Boulos, Alicia D’Addario, and Rachel Meeropol. Special thanks to: Dori Lewis, John Boston, Ian Head, Marc Krupanski, and Jeff Fogel. Retrieved April 19, 2006 from <http://www.jailouselaw.org/http://www.jailouselaw.org> or <http://www.ccr-ny.org/www.ccr-ny.org>

Recommendations

The U.S. Government should :

(1) Inform incarcerated women they can write to a judge and request to be present at any court hearings regarding a child's care, including foster care status hearings and parental termination proceedings; and,

(2) Inform incarcerated women that they can request a lawyer for their hearings as above.

ARTICLE 13

Expulsion of Aliens; *Non-refoulement*

Introduction

U.S. asylum law and practice does not adequately consider or recognize the protection needs of women fleeing gender-specific persecution. By failing to specifically accommodate for gender as a contributing persecution ground, the United States stands in violation of its obligations under ICCPR Articles 2(1), 7, 13, and 26, and Refugee Convention Articles 3, 31, and 33 at a minimum. Women fleeing various forms of gender-specific discrimination and/or persecution cannot rely for their protection on U.S. adherence to these international treaties and conventions. Moreover, the U.S. has increasingly limited previously available protections under its asylum law. Where gender-based violence resulting from conflict or personal situations are the causes of women's flight from persecution, the diminishing protections and harshness of the U.S. restrictions on asylum fall disproportionately on women.

The International Protection System : Background

The 1951 U.N. Convention relating to the Status of Refugees and the 1967 Protocol⁴⁹ are the basis for international refugee protection jurisprudence and practice, including the current United States asylum program. In 1980, the U.S. Congress enacted legislation to bring U.S. law into compliance with international obligations it assumed when it ratified the 1967 Protocol, incorporating verbatim into U.S. domestic law⁵⁰ the Article 33 non-refoulement protections.⁵¹

⁴⁹ 1951 United Nations Convention relating to the Status of Refugees, Art. I.A(2), United Nations Treaty Series No. 2545, Vol. 189, p. 137; 1967 United Nations Protocol Relating to the Status of Refugees, Art. I.2, United Nations Treaty Series No. 8791, Vol. 606, p. 267.

⁵⁰ Public Law 96-212; 8 U.S.C.1158, Amending Immigration and Nationality Act (INA) of 1952, 8 U.S.C. 1101-1105.

⁵¹ Article 33 of the Refugee Convention prohibits a State party from expelling or returning a refugee to a country where his or her life or freedom would be threatened on account of a protected characteristic in the refugee definition ("*non-refoulement*"). A "refugee" is defined as any person who "*owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is*

The U.S. definition of refugee, as in the Convention, derives from two broad categories, *the protection of difference* and the *protection of thought*. Initially, the typical asylum seeker was thought to be a male dissident, tortured or imprisoned by the State for political involvement. This narrow interpretation of an asylum seeker as a man serves to marginalize women. The *protection of difference* was limited to race, religion, particular social group, and national origin. The *protection of thought* was limited to political opinion. This early silence on gender as a protected class has placed severe limitations on women's equal access to the protections of the U.S. asylum system. Although gender is not an enumerated statutory ground, the United States did attempt in 1995 to provide some guidance to asylum officers on the consideration of gender in the determination process⁵². These guidelines have been of little help, however, in educating interviewers that violence against women is linked to long-standing gender inequality that contributes to exploitation and their need for protection.

The protections afforded to persons under ICCPR Article 13 protections become even more important for asylum-seekers who are women than the 1951 Refugee Convention that stands silent on gender *per se*. The ICCPR emphasis must be on the asylum seeker in lieu of the "recognized" or "legally determined" refugee or asylee. It is only in the practice of States that the asylum seeker must be afforded proper recognition if *s/he* is to have protection from expulsion or unfair and discriminatory treatment that enables expulsion. ICCPR General Comment 15⁵³ ensures fair treatment to an alien in pursuit of protection within the borders of a State and augments Article 13 protections to cover aliens in disputed legal status while pursuing protection.

Admittedly, many draconian provisions of U.S. immigration law and procedure, made all the worse since 9/11, are gender-blind as written. However, in daily practice, the interpretation and application of these laws fall harshly and disproportionately on women and girls. This rigid lack of discretion to correct for the extreme degree to which women and girls are treated, strips them of the protections guaranteed them by the ICCPR as persons in pursuit of protection from persecution and unfairly exposes them to expulsion by and from the United States.

The United States must recognize the different position of women entering the refugee determination process. Many male-dominated societies condone or perpetuate gender-based violence and place restrictions on the public roles women are allowed to play within the society. Because of the way women are treated, they are less likely than men to be publicly active in political or other groups, the activities that are the criteria used to determine asylum. The need, therefore, for a comprehensive gender policy aimed at refugee processes goes beyond merely adding gender persecution to traditional definitions of persecution, or of even changing asylum laws. And a blanket statement that the U.S. does not discriminate in its asylum and refugee

outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country..."

⁵² U.S. Dep't of Justice, Memo from the Department of Justice to All INS Asylum Officers & HQASM Coordinators, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women*, 18 (May 26, 1995).

⁵³ "An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one." General Comment No. 15: The Position of Aliens under the Covenant (11/04/1986).

processes does not meet the requirement of examining the sites of discrimination and eliminating it.

To provide a long list of laws discriminating against women in a way that opens them to uniquely different degrees of protection than that of men is to insult the knowledge of this Committee. That said, however, it is critical to highlight specific laws enacted by the U.S. that are not readily seen as discriminatory but on examination are just that and deprive women of protection from expulsion.

The Material Support Bar Adversely Impacts Women

The Bush Administration enacts or narrowly interprets laws in the name of fighting terrorism that has the effect of disproportionately denying asylum to female victims of sexual violence, the very victims of terrorists. U.S. imposition of a material support bar to asylum or refugee status adversely impacts on women because of their status as women. Material support provided under threat of violence, physical harm and, *inter-alia*, coercion denies them asylum protection. In conflicts, women become non-combatant victims. They are raped by invading forces for purposes of humiliating their men and their nation, for “ethnic cleansing,” or for “recreation.” They are compelled by captors to perform chores by day, suffering sexual indignities by night. Although they work under duress, women are denied asylum because the U.S. will not recognize the gender-specific vulnerability of rape or threat of rape as a duress defense. For example, a Liberian woman who was kidnapped, gang-raped, and kept hostage by a rebel group known as LURD (“Liberians United for Reconciliation and Democracy”) was compelled against her will to perform household tasks, including laundry and cooking chores. Her case is in jeopardy of denial because the U.S. (Department of Homeland Security or “DHS”) considers her acts “material support” to a terrorist organization.⁵⁴ Put in stark terms, the Bush Administration, without care for a woman’s special circumstances brands her and others as “engaging in terrorist activities.”⁵⁵

While the United States immigration laws have always contained a prohibition on assisting terrorists⁵⁶, the anti-terrorism legislation adopted under the USA PATRIOT Act of 2001⁵⁷ and the REAL ID Act of 2005⁵⁸ amended the Immigration and Nationality Act (INA) to expand the class of individuals considered inadmissible to the United States for having “*engaged in terrorist activity*,” including by providing “material support” to “terrorists” or “terrorist organizations.”

The amended terrorism provisions in the INA create the justification for inadmissibility under a newly interpreted “material support bar.” Because of its extreme amended language and lack of a duress exception, the material support bar prevents thousands of refugees from

⁵⁴ Editorial, “Terrorists or Victims?,” *The New York Times* (April 3, 2006), p. A16,

⁵⁵ 8 U.S.C § 1182(a)(3)(B)(iv)(VI) 2005.

⁵⁶ Immigration Act of 1990, P.L. 101-649, 1990, Title VI, § 601; 8 U.S.C. § 1182 (a)(3)(B)(iv)(VI) 2005.

⁵⁷ United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT of 2001, P.L. 107-56. 115 Stat. 272 § 411 (a).

⁵⁸ REAL ID Act of 2005, P.L. 109-13, Div. B §§ 103 (a)(c).

obtaining asylum relief in the United States. Although this legislation is said to have imposed a major barrier to terrorists trying to enter through the U.S. refugee program, it has the perverse effect of denying protection to thousands of asylum seekers with meritorious claims who are the very victims of terrorism. Women victims of kidnappings, rape and beatings to force cooperation with their abusers or captors, are being denied protection for rendering “material support” to terrorists. Mothers attempting to spare harm to their family by cooperating under duress even in minor ways are denied.

The application of the immigration material support bar fails to consider that women are victimized in gender-specific ways in order to compel or intimidate them into taking certain actions.⁵⁹ Failure to consider unique gender-specific ways women are used in conflict or to grant a duress exception where the need for such is clear on its face contravenes, *inter alia*, ICCPR Article 26 as well as Article 13 and treats women as unequals before the law in the consideration of their protection needs. Additionally, interpretations of the material support bar that ignore application or even consideration of a duress exception or defense violate United States obligations under Article 33 of the 1951 Refugee Convention with respect to *non-refoulement*.⁶⁰

One-Year Bar Contravenes International Standards

In 1996, the U.S. Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which amended numerous sections of the INA. In doing so, it implemented draconian changes in the refugee protection system in the United States and placed the United States in violation of its obligations under international law.⁶¹

The imposition of a one-year filing deadline for asylum applicants seeking protection from persecution on reaching the United States prevents persons who have been in the United States for more than one year from having their asylum claims considered on the merits, if considered at all, except in very narrow and arbitrary circumstances.⁶² The imposition of this filing bar, even with its narrow exceptions, contravenes U.S. treaty obligations and accepted international legal standards. The bar is inconsistent with international refugee protections accepted by the international community, which provides that asylum seekers should not be prevented from fair and equal consideration of non-frivolous applications because of failure to meet an arbitrary time limit or formal requirements.⁶³

⁵⁹ Georgetown Univ. Law Center Human Rights Inst, "Unintended Consequences: Refugee Victims of the War on Terror" (May 1, 2006).

⁶⁰ Article 33 binds the U.S. to not expel or return a refugee to a country where s/he will face persecution unless “reasonable grounds exist to consider the refugee as a danger to the security of the U.S.” See 1951 United Nations Convention relating to the Status of Refugees, July 28, 1951, Article 33 (1-2), 19 U.S.T. 6259, 189 U.N.T.S. 137.

⁶¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, (codified in scattered sections of Title 8 and 18 U.S.C.), cited popularly as IIRIRA.

⁶² INA §208(a)(2)(B), 8 U.S.C. §1158(a)(2)(B) (2002); INA §208(a)(2)(D), 8 U.S.C. §1158(a)(2)(D)

⁶³ United Nations High Commissioner for Refugees, Comments on Proposed Rules on Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens: Conduct on Removal Proceedings and Asylum Procedures (February 1997).

This filing bar unfairly denies to women seeking protection fair and equal treatment of their applications. By refusing to implement a firm rule excepting from the bar women who have experienced and are recovering from trauma-inducing gender-specific violence, the U.S. denies asylum to women who by virtue of their immutable characteristics as a person have been victimized as a group or for their opinion as women. Their inability to immediately upon entry discuss and place in writing with strangers these traumatic gender-specific horrors, which frequently include sexual violence, should not be allowed to bar them from bringing their claims under existing statutory grounds for asylum. The traumatic nature of these gender-specific persecutory events causes women to be unable to confront their memories in a timely fashion in order to meet the one-year filing requirement. Failure to recognize that a disproportionate number of women require additional time to adequately deal with their memories and narrate their case, denies the reality of their unique situation and constitutes *de facto* discrimination. This contravenes ICCPR Articles 7, 13 and 26 and strips women of the *nonrefoulement* protections provided for in the ICCPR, for being female.⁶⁴

The ICCPR, as indicated, also prohibits *refoulement*. General Comment 20 highlights the implicit *nonrefoulement* provision of Article 7: “In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”⁶⁵ The General Comment prohibits *refoulement* with regard to all Article 7 treatment, including cruel, inhuman or degrading treatment or punishment as well as official torture.⁶⁶

The United States will likely claim that it does not purposefully discriminate or treat women unfairly in the asylum process, as there is no *per se* discriminatory intent. The United States can establish this as policy by refining, finalizing as formal policy and insisting on asylum officers and Immigration Judges adhering to the 1995 guidelines on the interviewing, training on, and adjudication of gender-based asylum claims, as spelled out in the INS document, “*Considerations for Asylum Officers Adjudicating Asylum Claims from Women*”⁶⁷ Among other gender-sensitive advice, this document highlights the special needs of women suffering from trauma and an inability to relate traumatic sexual events. Understanding of this as well as other gender-specific issues that bear on the asylum adjudication process will be a positive step in

⁶⁴ See, e.g., Leena Khandwala, Karen Musalo, Stephen Knight and Maria Anna K. Hreshchyshyn, *The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, 05-08 IMMIGR. BRIEFINGS 1 (2005) (discussing how the one-year time limit to apply for asylum works to deny asylum to women who have suffered sexual and other gender-based violence and whose abuse related trauma makes it difficult for them at first to discuss the events which are the basis for their application).

⁶⁵ United Nations Human Rights Committee, General Comment No. 20.

⁶⁶ Like CAT and the Refugee Convention, the ICCPR is non-self-executing. Unlike the former treaties, the Covenant has not been given domestic teeth through implementing legislation. This does not mean that the United States has no obligation of *nonrefoulement* under the ICCPR, but it does mean that individuals do not have a private right of action under the ICCPR and cannot seek relief in a U.S. court.

⁶⁷ U.S. Dep’t of Justice, Memorandum from the Department of Justice to All INS Asylum Officers & HQASM Coordinators, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women*, 18 (May 26, 1995)[hereinafter “INS Gender Considerations”]. While the title refers to asylum officers, aliens seeking article 3 withholding are interviewed by the same officers and subject to the same procedures.

treating women equally and correcting gender inequality in the asylum laws of the United States. Interviewers must clearly be made to understand the relationship between gender and refugee experiences. Specifically, adjudicators of asylum and refugee claims must grasp the difference between the experience of persecution *as a woman* and the experience of persecution *because women are women*; for example, in the first category women who are raped because of their political beliefs, in the second category, women who are raped because they are women.

Violence against Women and Asylum

In spite of the above-cited failings, positive strides have been made toward protecting women fleeing violence within the home in all forms, specifically inflicted on them because they are women. However, a false division between the "public and private spheres" continues to obscure and narrow the analysis of who should merit United States protection from violence.

Admittedly, women may fear persecution in similar circumstances to men. However, a number of forms of persecution chiefly impact women. For example, women are more likely than men to be persecuted because of kinship, that is, because of the status, activities or views of their spouse or male relative. They may be sexually harassed to obtain information about or, a confession from, a male relative. They may have political opinions imputed to them based on the activities of members of their families. Women may have to flee because the authorities are unwilling or unable to protect them from sexual violence, by public officials or private citizens.

The most difficult circumstances for women to establish persecution and the need for international protection have been those in which the instruments of persecution are coterminous with traditional practices, such as forced marriage, spousal abuse, genital mutilation, honor killings, etc. These are deeply persecutory acts but frequently are viewed as within the private sphere rather than as abuses of human rights. The United States fails in its duty to protect women from such violence chiefly when it is within a family or community setting and/or based on a community perception that the woman has transgressed social norms. Because the U.S. has failed to ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which directly addresses gender stereotyping, traditional practices, and violence against women as discriminatory and requiring state action,⁶⁸ fair and equal treatment of women within the asylum process relies on underscoring U.S. obligations under ICCPR Article 2(1).

With the enactment of the REAL ID Act of 2005,⁶⁹ the avenues of protection for women who flee violence threaten to be significantly narrowed or even closed. The REAL ID Act of 2005 would permit immigration judges to deny asylum relief to victims who cannot produce corroborating evidence of the domestic abuse, who provide inconsistent testimony on minor facts irrelevant to the domestic abuse claim, or whose demeanor is inconsistent with a judge's

⁶⁸ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34//80, 34 U.N. GAOR Supp. (No. 46) at 193 U.N. Doc. A/34/46 entered into force Sept. 3, 1981, Article 5; General Recommendation No. 19 (1992).

⁶⁹ REAL ID Act of 2005, P.L. 109-13, Div. B §§ 103 (a)(c); See also note 12.

preconceived expectations. In addition, asylum applicants would have to prove that the *central motive* of the persecutor was related to one of the five protected grounds. Women fleeing violent homes, speaking little or no English, could be denied immigration relief because they did not or, more likely, could not recount in detail the horrors of the violence to an immigration adjudicator upon first entering the United States or thereafter. In the context of women's applications for asylum protection, it must be understood by adjudicators that rape and sexual assault are systematically used as a form of persecution against women by armies, police, and torturers around the world.

We hope that the U.S. will rise to the occasion afforded to it by this debate and provide leadership in the development of progressive gender-based international and domestic asylum jurisprudence. By so doing, the false public-private distinction will diminish and women will gain more just and equitable access to protection from persecution in all forms.

Recommendations

(1) The United States must educate and sensitize immigration judges and asylum adjudicators on issues relating to women asylum seekers. U.S. adjudicators must continue to be educated about domestic violence as a threat to the life and safety of women just like other forms of violence that are recognized as persecution Specifically:

- ***The government must provide a program of mandatory training on the practices that give rise to gender-specific asylum claims (e.g., honor killings, rape and marital rape, forced marriage, etc.) and the effects post-traumatic stress disorder can play during the asylum interview or immigration court hearing.***
- ***Particular attention must also be paid to the special role of women in their societies and the life-threatening consequences of social opprobation and exclusion for women who transgress their society's practices.***
- ***They must also be educated to understand that domestic violence occurring in a marital situation is not a private matter to be marginalized or dismissed as unworthy of international protection. A marital home need not be sanctioned as a torture chamber.***

(2) The U.S. Government must take immediate steps to remove restrictions and impediments to asylum claims based on the arbitrary one-year filing deadline, including providing gender-sensitive guidelines that recognize the impact and after-effects of gender-specific trauma that many female asylum applicants have suffered.

(3) The United States must provide for a duress and de minimis defense or exception to the "material support" bar for refugees and asylum applicants who have involuntarily provided "material support" to alleged terrorist groups, especially as many of those excluded

or deemed ineligible for protection are women who have been compelled to render simple aid to their captors under threat and reality of, inter alia, violent and repeated sexual assaults.

(4) The United States must more expansively and appropriately define and recognize in practice what the meaning/s of persecution are likely to be within the context of “social group”, chiefly in the area of domestic violence occurring to women in what some consider personal conduct or action. Acknowledging marital rape and rape per se as a tool of power and a way to achieve, inter-alia, a political end and/or a form of control will be a major step forward in redefining persecution of women.

(5) In weighing the appropriateness of a “social group” definition the United States must look to the culture and practice of the society a woman is escaping from and consider that her actions may also constitute “political opinion.” A woman’s private expressions of resistance to State sanctioned gendered oppression by her husband or discrimination by society can be political acts and her persecution for expressing her beliefs, or refusing, alone or with others similarly placed, to accept an inferior role can place “political opinion” based persecution within “social group.”

ARTICLE 26

Equal Protection of the Law

The material in this section refers to Articles 2.1 (discrimination on the basis of sex) and 3 (equality between men and women) as well as Article 26.

Introduction

The United States has maintained for many decades one of the strongest and most stable economies in the world, generating significant employment and income growth for much of the population. But despite the country’s economic might and unparalleled wealth, gains have not been equitably shared. The gulf between the top-most income earners and low- and moderate-income earners is well-documented and has expanded considerably in recent years. The confluence of embedded patterns of sex and race discrimination with the shift in income distribution has meant that millions of women and their families bear the brunt of policies producing deep inequality.

Since U.S. ratification of the International Covenant on Civil and Political Rights (ICCPR) in 1992 when the U.S. became obligated to bring its laws and policies into conformance with the Covenant's sex equality provisions, little has been accomplished towards those ends. In fact, in recent years repeated efforts have been mounted by conservative legislators and policy-makers to undermine and repeal laws and policies intended to promote sex equality.

It is self-evident that the U.S. government has failed to adopt effective laws to address the problem of persistent and pervasive pay inequity. The slow pace in closing the wage gap between men and women – less than a half percent per year since passage of the Equal Pay Act in 1963 – speaks for itself. A high number of occupational categories segregated by both sex and race pay less simply because they are dominated by women and people of color. Despite women's gains in educational attainment, there are still significant differences in pay between men and women of similar education and experience.

Concerning sex-based discrimination in employment, both benign neglect and willful government actions have prevented the adoption of legislative and administrative remedies that would address broad-based wage and salary discrimination disproportionately harming women. As will be documented in this report, sex-based discrimination that constrains and penalizes women is pervasive in the United States. And not only are laws against sexual harassment and sex discrimination in employment and education inadequate and poorly enforced, there has been a steady stream of attacks on those laws and policies which, if successful, would make conditions even more unequal.

Women are far more likely than men to be poor. Government policies affecting low-income workers have made it difficult for women to earn a fair wage that will support themselves and their children. Welfare "reform" legislation and policies have restricted poor women's ability to attain additional education and job skills in order to move out of poverty.

Several of the more notable factors that have promoted inequality are: poor enforcement of existing laws against sex-based discrimination, refusal to adjust the federal minimum wage to reflect the ravaging effects of inflation, inadequacy of penurious family leave policies, persistent under-funding of subsidized child care programs for low-income families and the resulting high cost of child care for low- and moderate-income families together with multiple attempts – some successful – to dismantle government programs that help women as mothers, students, trainees, employees, care-givers and retirees. Other factors that disadvantage women workers include: lack of health insurance coverage, restrictions on eligibility for Unemployment Insurance compensation, limited pension coverage and out-of-date Social Security policies that penalize women as caregivers.

But many other factors, described below, add to an overall picture that characterizes the U.S. workplace as one of the least supportive employment environments for women of any developed nation.

Family support policies are seriously lacking in the U.S. and their absence makes it nearly impossible for women to achieve equality in the workplace. Family and medical leave provisions affecting women and their families are among the most unfriendly of all developed nations, providing only unpaid leave and available to fewer than half of working women.

Lesbians are not protected from sexual-orientation bias in the workplace and suffer from a counter-productive policy of "Don't Ask; Don't Tell" in the military. Other restrictions on women regarding combat and combat-support positions constrain their military careers.

Nearly all conditions described in this report could be addressed by legislative and policy changes that would bring the U.S. into conformity with provisions of the International Covenant on Civil and Political Rights – yet 14 years after U.S. ratification of the ICCPR very little positive action has been taken.

Sex-Based Wage Gap Exact Tolls on Employed Women, Families

Women have made great advances in terms of participation in the paid labor force. In 1950, only 34 percent of women 16 years and older were employed, but by 2004, that figure had climbed to 59.2 percent, or 46 percent of the total U.S. labor force. Out of a total population of 116 million women 16 years and over, some 68 million women were either working or looking for work that year, according to the U.S. Department of Labor. African American women have a slightly higher rate of labor participation at 61.5 percent, with Asian women at 57.6 percent and Latinas at 56.1 percent. About 38 percent of women work in management, professional and related occupations, while 35 percent working in sales and office occupations. The remaining numbers are found in the service occupations, at 20 percent, followed by 6 percent in production, transportation and agriculture and 1 percent in material moving, construction, maintenance and natural resources.⁷⁰

Currently, labor sectors employing more women than men are limited, compared to those dominated by men, both in terms of number and the average salaries in each field. Because training opportunities for women are fewer and more difficult to access, there are over 12 times more male than female skilled laborers. As a result, women tend to be tracked into lower-paying occupations. The number of female clerical and secretarial workers is four times the number of their male counterparts. Following with general stereotypes, female hospital workers also outnumber their male counterparts by more than 300 percent.⁷¹ In addition, because of the “glass ceiling” effect where qualified women are often not hired for management positions and are frequently “pigeonholed” in certain occupations, lower-paying jobs are disproportionately held by women as compared to men.⁷²

A comprehensive Government Accountability Office (GAO) examination of the wage gap in 2003 found a 20 percent earnings gap between women and men that could not be explained, even after controlling for demographic and work-related factors such as occupation, industry, race, marital status and job tenure.⁷³ It can only be concluded that this gap is

⁷⁰ Women's Bureau, Statistics and Data, Quick Stats 2004, U.S. Department of Labor. Retrieved on April 24, 2006 from <http://www.dol.gov/wb/stats/main.htm>

⁷¹ Davis, C. "Female Participation in the Labor Force." Swarthmore College Women's Studies. Retrieved April 7, 2006, from <http://fubini.swarthmore.edu/~WS30/CDfinal.html.p.2>, (Employment Statistics and specific job descriptions provided by the U.S. Equal Employment Opportunity Commission and <http://www.bls.gov/eas/srch/blssearch.idq>)

⁷² Ibid.

⁷³ Government Accountability Office. (2003) Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings, Oct 2003, GAO-04035, pp. 2, 29

attributable to discrimination: certain jobs pay less simply because they are held by women and people of color. Inadequate enforcement of anti-discrimination laws and the failure of Congress to pass more stringent and enforceable legislation are major factors in the decades-long persistence of sex-based wage discrimination.

In 2004, median annual earnings for U.S. women working full-time year-round were \$31,223. Men working full-time, year-round, had median earnings of \$40,798.⁷⁴

The sex-based wage gap persists, moving slowly from women earning 59 percent as much as men (median earnings of women working full-time, year-round, compared to median earnings of men working full-time, year round) in 1963 to 77 percent in 2005.⁷⁵ The gap's closing in recent years is due in part to a larger decline in men's wages compared to a smaller decline in women's pay. The sex-based wage disparities among women of color are even more dramatic. In 2004, median earnings for African American women were 68 percent of men's earnings; Latinas at 57 percent of men's earnings; and Asian American women's median earnings were 88 percent of men's median earnings.⁷⁶ Such disparity in compensation between the sexes requires government intervention.

If the wage gap were eliminated, annual family incomes would increase, on average, by more than \$4,000 and the poverty rate would be cut in half. Working families in the U.S. lose \$200 billion of income annually to the wage gap.⁷⁷ The wage gap measured over time has a much larger impact: in a study of a 15 year period, the average woman in the study sample was paid only \$273,592 (in 1999 dollars), while the average man received \$722,693 – with the woman being paid only 38% of what the average man was paid.⁷⁸

The 2003 GAO (above) study of the wage gap showed that the same nearly 20 percent difference has persisted over almost two decades, from 1983 through 2000 – evidence that the closing of the wage gap has been stalled for some time.⁷⁹ In addition, from 2003 to 2004, women's median earnings declined slightly by 1.0 percent – a development that should be viewed with alarm.

⁷⁴ Institute for Women's Policy Research.(2006) The Gender Wage Ratio: Women's and Men's Earnings. Fact Sheet, IWPR #C350, Updated April 2006, Retrieved May 22, 2006 http://www.iwpr.org/pdf/Updated2006_C350.pdf (U.S. Bureau of Labor Statistics, Employment & Earnings, January 2005/January 2006.)

⁷⁵ National Committee on Pay Equity. (2006) Wage Gap Remains. Retrieved April 5, 2006 from <http://www.pay-equity.org/>

⁷⁶ Ibid.

⁷⁷ American Association of University Women. (2006) AAUW Position Paper – Pay Equity. The Wage Gap Persists. Retrieved by AAUW February 17, 2006 from AFL-CIO Department for Professional Employees. (2005) Fact Sheet 2005: Professional Women: Vital Statistics.

http://www.dpeaflcio.org/policy/factsheets/fs_2005_Professional_Women.htm

⁷⁸ Rose, S. and Hartmann, H. (2004) Still a Man's Labor Market: The Long-Term Earnings Gap, "Career Earnings, Work Hours and Persistent Low Earnings," P. 21. Washington, D.C. Institute for Women's Policy Research.

⁷⁹ Government Accountability Office. (2003) Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings. Oct 2003, GAO-040-35. p. 15

The fact that women are paid significantly less than men has collateral effects on choices women make in choosing and preparing for career. “[T]he presence of discrimination likely causes women to under-invest in themselves and reduce their educational attainment and skill development.”⁸⁰ While the time and money costs of investing in educational pursuits and job training are equal among the sexes, the payoff in terms of salary is significantly less for women. Hence, the financial incentive to pursue higher educational degrees and other training in order to obtain these jobs is lower in women.

The impact on employed mothers is even greater than these statistics indicate. According to the GAO, women with children receive wages 2.5 percent less than women without children. Men with children also exacerbate the wage gap, netting a 2 percent *increase* in pay compared to men without children.⁸¹

This “side-effect” of the wage gap becomes even more powerful when it comes to married women with children. The opportunity-cost of leaving work to care for children is higher for men than for women, ultimately causing a significant number of women to handle childrearing duties by limiting their weekly paid work hours. This is true to a greater extent than just the traditional stereotypes of the female-dominant role in child care, as basic cost-benefit analysis would steer even neutral families (neutral in terms of predispositions to child care responsibilities) to opt more often for females to take the time off.⁸²

General Comment No. 28 points out that Articles 2 and 3 of the ICCPR mandate that States parties take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions, both in the public and private sectors, which impair the equal enjoyment of rights (4.). The market forces that many assume will ultimately solve the wage gap have yet to make any serious gains in closing the gap since 1983. Discrimination is becoming increasingly difficult to identify and eliminate because “it has gotten more subtle and...unconscious on the part of people who perpetuate it.”⁸³ Laws requiring equal pay for work of equal (or comparable) value across occupations do not exist at the national level. Current laws, the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, do not provide a broad-based solution to discrimination in wages, as their interpretations in federal courts have been mixed. The clandestine nature of discrimination necessitates comprehensive government action based on constitutional principle to provide appropriate redress and to deter future discrimination.

⁸⁰ Hartmann, H. (2000) “New and Stronger Remedies are Needed to Reduce Gender Based Wage Discrimination.” Testimony before the United States Senate Committee on Health, Education, Labor and Pensions. June 8, 2000, p. 12

⁸¹ Government Accountability Office. Op.cit (2003) GAO-040-35, p. 32.

⁸² Government Accountability Office. Op. cit. (2003) pp. 59-61

⁸³ Hartmann, H, (2001) Economic Security for Women and Children, What Will It Take?" The Next Agenda, February 28, 2001.

Poor Enforcement of Sex Discrimination Laws

The U.S. Department of Justice (DOJ) has scaled back enforcement of the law against discrimination in the workplace by pursuing far fewer cases and abandoning pending sex discrimination cases.⁸⁴ The Civil Rights Division of the DOJ, during the Bush Administration, has initiated fewer employment discrimination cases than in past administrations and a relatively few of those cases are “pattern or practice” cases that would have an impact on large numbers of employees. In addition, the Department without notice withdrew from several major sex discriminations cases, including one that would have affected large numbers of women in cases brought against the Philadelphia transit system and a pending settlement with New York City schools concerning custodial jobs.⁸⁵ Reportedly, experienced employment discrimination attorneys have been involuntarily removed from their positions and a political litmus test has been applied for new attorney hires – actions that are in line with the recent record of reduced enforcement of Title VII cases.

The **Equal Pay Act of 1963** [29 U.S.C. 206(d)] requires that men and women be given equal pay for equal work or substantially equal in the same establishment. The law is too narrow to address wage inequality in an economy characterized by a large number of occupational categories highly segregated by both sex and race. Efforts to prohibit pay discrimination in *comparable* job situations in all occupational categories across all employment sectors, by and large, have not been successful.

Title VII of the Civil Rights Act of 1964 [42 U.S.C. Sect. 2000(e)] prohibits private employers with fifteen or more employees from discriminating on the basis of sex, race, color, religion, or national origin – and it is broader than the Equal Pay Act because it forbids discrimination in hiring, firing, and compensation, as well as the terms, conditions, and privileges of employment. Also, an amendment to Title VII prohibits discrimination on the basis of pregnancy, childbirth or related medical conditions. Like the Fourteenth Amendment, Title VII has not been interpreted to apply to sexual orientation discrimination, and has been inconsistently applied to gender identity discrimination.

Both the Equal Pay Act and Title VII are poorly enforced by the federal government, and for many victims of sex discrimination the hurdles to mount in pressing an Equal Employment Opportunity Commission (EEOC) claim or pursuing private lawsuits are protracted and expensive. Additionally, there is usually an unequal set of resources between employee plaintiffs and corporate defendants that make decisions in favor of plaintiffs less likely.

The EEOC lacks the authority to sue state or local governments for discrimination, so the agency’s scope is considerably limited; however, the Department of Justice does have this authority but apparently has little interest in pursuing Title VII cases.

⁸⁴ National Women's Law Center (2004) "Slip-Sliding Away: The Erosion of Hard-Won Gains for Women Under the Bush Administration and an Agenda for Moving Forward." April, 2004. p. 13

⁸⁵ *Ibid.* National Women's Law Center (2004). pp. 13-14

Workplace sexual harassment, illegal under Title VII as a form of discrimination, is also addressed by complaints to the EEOC. While the number of sexual harassment complaints grew during the 1990s, there has been a decline in recent years, according to EEOC statistics.⁸⁶ Some 75,428 filings at EEOC offices were made in 2005, with about 63 percent of those based on alleged race or sex (including sexual harassment) discrimination. – down from 91,189 charges filed in 1994 when figures soared due to increased awareness of sexual harassment problems in the workplace. Many women's rights advocates believe that only a fraction of the actual incidence of sexual harassment in the workplace is ever reported to the EEOC and that most of the instances of sexual harassment result in women simply leaving their place of employment, a result suggesting anti-competitive motives for harassment.

In 2005, the EEOC filed 383 lawsuits, resulting in \$107.7 million for victims; another \$271.6 million was attained for victims without going to trial, through settlements or mediation.⁸⁷ Pregnancy discrimination claims filed with the EEOC have risen 31 percent over the last decade, from 3,385 in 1992 to 4,449 in 2005. The EEOC has seen a tripling of pre-litigation settlements, rising from \$3.7 million to \$11.6 million, and an increased filing of lawsuits: 30 cases in 2005.

Historically, EEOC enforcement has been under-funded. A recent reorganization of EEOC district offices downgraded eight of the 23 offices and reduced the number of senior attorneys in the field -- a move some interpreted as intending to constrain the agency's effectiveness. But even if they had greater resources, their cumbersome complaint, investigatory and resolution process could not rectify the systemic, industry-wide patterns of sex discrimination in the U.S.

No Workplace Protections for Lesbians, Transgender Persons

At the federal level, lesbians have no protection from discrimination in the workplace: Title VII of the Civil Rights Act does not include sexual orientation. Efforts in Congress have not been successful in recent years to pass legislation that would prohibit discrimination in employment based on bias against lesbians, gay men, bisexual and transgender (LGBT) persons. Sixteen states and the District of Columbia have laws prohibiting sexual orientation discrimination in both public and private employment.

Surveys have documented the prevalence of discrimination against LGBT people in employment. One study found that “51 percent of lesbians and gay men in Pennsylvania reported experiencing discrimination in their lifetime” and another that “54 percent of respondents in a 2001 statewide survey of lesbian, gay, and bisexual New Yorkers had experienced discrimination

⁸⁶ U.S. Equal Employment Opportunity Commission (2006) EEOC Litigation, Charge, Sex, Equal Pay Act, Sexual Harassment, and Pregnancy Discrimination Statistics, FY 1992-FY 2005, Retrieved April 14, 2006 from <http://www.eeoc.gov/stats/>

⁸⁷ Lee, C. (2006) "Job Police or Not, The EEOC Is Busy with Discrimination; Agency Press the Private Sector to Treat Workers Equally." The Washington Post, March 27, 2006. A13

in employment, housing, or public accommodation since 1996.”⁸⁸ In 2004, the National Gay and Lesbian Task Force, a national advocacy organization for LGBT people, conducted a survey in Topeka, Kansas, and 35 percent of those surveyed reported “receiving harassing letters, e-mails, or faxes at work because of their sexual orientation, and 29 percent had observed discrimination based on sexual orientation seeking social or government services.”⁸⁹

In September of 2002 a national study found that two out of five gay and lesbian adults in the U.S. faced hostility or harassment on the job. The online survey reached over 2,000 individuals and found that when “asked which groups of people in society they perceive experience discrimination in the workplace, such as being fired, harassed or denied a promotion, almost three quarters (73 percent) answered ‘gays and lesbians.’ It was the second highest survey response, just behind ‘older adults aged 65 and older’ (78 percent). Other groups mentioned as vulnerable to workplace discrimination included ‘people with disabilities’ (68 percent), ‘women’ (65 percent), ‘African-Americans’ (61 percent), ‘Hispanic Americans’ (60 percent), ‘Muslims’ (60 percent), ‘Asian Americans’ (44 percent) and ‘Jews’ (39 percent).”⁹⁰

Low Federal Minimum Wage Keeps Many Women Poor

The federal minimum wage [29 U.S.C. Sect. 206] has remained at \$5.15 an hour for the last nine years.⁹¹ While a living wage helps keep working families above the poverty level, the low level of the current federal minimum wage does not keep workers out of poverty, paying only \$10,712 a year for full-time workers. Women continue to hold a majority of these minimum wage jobs, with women constituting 62.5 percent of the minimum wage workforce in 2004.⁹² Of women paid minimum wage, about a third are supporting children and 35 percent are sole earners.⁹³

Unlike most other taxes and Social Security, the federal minimum wage is not adjusted automatically for inflation. As a result, the purchasing power of the minimum wage has declined significantly. If the minimum wage had merely kept pace with inflation since its 1968 figure, the 2005 minimum wage would be nearly 60 percent more than its current figure or \$8.88 in 2005.⁹⁴ Efforts in Congress have repeatedly failed to increase the wage threshold to \$7.25 an hour.

⁸⁸ National Gay and Lesbian Task Force. (2005) The Issues: Nondiscrimination; Facts and Statistics. Retrieved April 8, 2006 from

<http://www.thetaskforce.org/theissues/issue.cfm?issueID=18>

⁸⁹ Ibid. (2005)

⁹⁰ Harrisinteractive. (2002) Gays and Lesbians Face Persistent Workplace Discrimination and Hostility Despite Improved Policies and Attitudes in Corporate America, September, 2002. Retrieved April 8, 2006 from

<http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=503>

⁹¹ AFL-CIO. (2006) " What's The Difference Between a Living Wage and Minimum Wage?" p.1. Retrieved April 8, 2006 from <http://www.aflcio.org/issues/jobseconomy/livingwages/>

⁹² U.S. Department of Labor. (2004) Characteristics of Minimum Wage Workers: 2004. Table 10. Employed wage and salary workers paid hourly rates with earnings at or below the prevailing minimum wage by sex, 1979 – 2004 annual averages. Retrieved April 23, 2006 from <http://www.bls.gov/cps/minwage2004tbls.htm>

⁹³ United Food and Commercial Workers, " Fair Minimum Wage Act of 2005." Retrieved April 10, 2006 from http://www.ufcw.org/worker_political_agenda/minimum_wage/min_wage_facts.cfm

⁹⁴ AFL-CIO. Op.cit. (2006) p. 1

The U.S. Department of Health and Human Services (DHHS) annually establishes the “federal poverty guidelines,” a measure of the minimum amount of pre-tax income a family must earn in order to be considered as living “above the poverty line.”⁹⁵ The federal poverty guidelines are important because they are used to determine eligibility for a myriad of government subsidies. The guidelines are adjusted based upon the number of persons in the family, and are modified annually to account for inflation.

A single mother with two children, being paid minimum wage and working 40 hours a week for an entire year, is paid \$5,378 less than the 2005 federal poverty guidelines.⁹⁶ In addition, critics of the federal poverty guidelines note that the levels are relatively conservative in terms of necessary expenditures by families, and that the guidelines do not account for vast differences in living costs in urban versus rural areas of the country.⁹⁷ Minimum family budgets in high cost areas of the United States (such as New York or Boston) are generally understood to be much higher than in rural areas, as evidenced by the Economic Policy Institute’s Basic Family Budget Calculator.⁹⁸ The failure to adjust the minimum wage for inflation is especially harmful to women's lifetime earnings and is major factor in old-age poverty among women.⁹⁹

Despite Gains in Education, Experienced Women Not Promoted

Over recent decades, women have made considerable progress in educational attainment. One in four adults 25 years and older have college degrees and a little more than half of both men and women, ages 25 years and old, have completed at least some college. Among young adults, 25 – 29, women are more likely to have a college education, 31 percent as compared to 26 percent for men.¹⁰⁰ Though for all age groups, men are slightly more likely to have a college degree.¹⁰¹ Even with a four-year college degree, women were paid \$44,400 as compared to the \$61,800 paid to men in 1999 (calculated in 2003 dollars) at an earnings ratio of 71.5.¹⁰²

⁹⁵ U.S. Department of Health and Human Services (2006) Poverty Guidelines, Research and Measurement, Retrieved April 2, 2006 from <http://www.aspe.hhs.gov/poverty/>

⁹⁶ U.S. Department of Health and Human Services. (2006) 2006 HHS Poverty Guidelines. Retrieved April 2, 2006 from <http://www.aspe.hhs.gov/poverty/05poverty.shtml>

⁹⁷ Allegretto, S. (2005) Basic Family Budgets – Working families incomes often fail to meet living expenses around the U.S. p. 1. Retrieved April 10, 2006 from <http://www.epi.org/content.cfm/bp165>

⁹⁸ Economic Policy Institute. (2005) Basic family budget Calculator. Retrieved April 10, 2006 from http://www.epi.org/content.cfm/datazone_fambud_budget

⁹⁹ Women's Institute for A Secure Retirement. Women & Pensions – An Overview. (Not dated) p.1. Retrieved April 2, 2006 from http://www.wiser.heinz.org/pensions_overview.html

¹⁰⁰ Hill, C. (2005) Five Frequently Asked Questions. American Association of University Women. Retrieved April 10, 2006 from <http://www.aauw.org/research/statedata.faq.cfm> and Census Bureau, Educational Attainment in the United States: 2003. Current Population Reports P20-550. 2-3 (Washington, D.C. 2004) Retrieved Nov. 8, 2004 from <http://www.census.gov/prod/2004pubs/p20-550.pdf>

¹⁰¹ Ibid.

¹⁰² U.S. Department of Labor (2004) Women in the Labor Force: A Databook. Statistical Tables, #8 & 14. Retrieved April 12, 2006 from <http://www.bls.gov/cps/wlf-databook.htm>

The “glass ceiling” phenomenon, the pervasive problem of women shut out of the most prestigious and highest paying jobs, continues to play itself out in the United States. Perhaps the most glaring example of this is in the corporate world. Women account for 46.5 percent of the nation’s workforce, yet only 8 percent of the nation’s top managers.¹⁰³ In addition, female managers are paid 72 percent of what their male counterparts are paid.¹⁰⁴ According to Booz Allen Hamilton, women made up less than 1 percent of chief executive officers in 2004 and notes that this figure is “very low and not getting higher”.¹⁰⁵

In addition, the perception of a “glass ceiling” has collateral effects not measured in the myriad of statistics regarding female employment and wages. A 1993 survey found that 37 percent of women who left their jobs “were tired of battling the glass ceiling.”¹⁰⁶ If this attitude persists, women may not view the investment of extra education as beneficial to them and ultimately choose different careers. Some evidence of this exists in the continued lack of women in certain fields where they may not seem to have the best career prospects, continued to opt for so-called “pink collar” jobs such as nursing.¹⁰⁷

Glass Ceiling in Education Professions Keeps Women from Top Positions

A similar “glass ceiling” exists for women academics on the faculties of many of the nation's colleges and universities, particularly at top research universities and especially in the science, mathematics and engineering departments. A 2004 study found that there are far fewer women on these faculties, even in disciplines where females outnumber male Ph.D. recipients.¹⁰⁸ For example, there are markedly fewer female full professors in engineering and science; the percentage of women who are full professor ranges from 3 percent to 15 percent—even though the percentages of Ph.D.s awarded to women is much higher. In the top 50 computer science departments, there are no African-American, Hispanic or Native American women in tenured or tenure-track positions. The dearth of women full professors and assistant professors ranges across all disciplines of the 'hard' sciences as well as in the fields of political science, sociology and psychology.

The lack of women in ranking faculty slots as mentors and role models contributes to the female student attrition. Many studies have shown that the mere presence of female faculty

¹⁰³ The Economist. (2005) "The conundrum of the glass ceiling – why are women so persistently absent from top corporate jobs?" July 21, 2005 print edition. P. 1. Retrieved April 10, 2006 from http://www.economist.com/business/PrinterFriendly.cfm?story_id=4197626

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Feldman, Gayle (1997) *Breaking the Glass Ceiling: Women Have Had a Long Hard Struggle to Reach their Current Status in the Industry*, Publishers Weekly. V 244, n31 p. 82. Retrieved from <http://www.stfrancis.edu/ba/ghkickul/stuwebs/btopics/works/glass.htm>

¹⁰⁷ American Association of University Women Foundation. (2003) *Women At Work*. Retrieved April 11, 2006 from <http://www.aauw.org/research/womenatwork.cfm>

¹⁰⁸ Nelson, D. J. and Rogers, D.C. (2004) *A National Analysis of Diversity in Science and Engineering Faculties at Research Universities*, Jan. 15, 2004, http://www.now.org/issues/diverse/diversity_report.pdf

encourages female students. Stubborn patterns of sexual harassment are also a factor in both student attrition and failure to hire and promote women for top faculty positions.¹⁰⁹

Attrition of female students in the science, math, engineering and information technology fields can be attributed to persistent sex bias and to the failure of higher education institutions to inculcate the equal education opportunities objectives of Title IX of the Education Amendments of 1972. [20 U.S.C. Sect. 1681-1688] Educational institutions that receive federal funds are required to demonstrate by using any one prong of a three-pronged test to show that they are in compliance with the act. A 2004 study by the Government Accountability Office (GAO) on gender issues in the sciences concluded that Title IX-required compliance reviews at education institutions have been largely neglected.¹¹⁰ Additionally, a number of lawsuits have challenged the constitutionality of Title IX, but none have been successful to date.

Nonetheless, conservative political leaders are attempting to turn the clock back on equal education for girls and young women. A provision was adopted in the No Child Left Behind Act of 2001 (P.L. 107-110) to allow single-sex classrooms and schools in public education systems so long as they comply with applicable civil rights laws, including Title IX (which allows single-sex education in limited situations such as physical education, human sexuality education classes and choirs). The U.S. Department of Education issued in May, 2002, a set of vague guidelines and in March, 2004, a proposed rule change in Title IX regulations that would "provide flexibility for educators to establish single-sex classes and schools at the elementary and secondary levels."¹¹¹ The proposed regulatory change is seen by women's rights advocates as yet another attempt to weaken Title IX equal education objectives, since there is little evidence that single-sex education produces better outcomes than co-education – and for the few studies which have shown some gains for girls in single-sex schools, the gains became slight or disappeared entirely when controlled for socio-economic and other variables.¹¹²

Affirmative Action Programs Attacked, Scaled Back

Affirmative action, defined by the Merriam Webster dictionary as "an active effort to improve the employment or educational opportunities of members of minority groups and women," has been of critical importance in helping qualified women be recruited, hired and promoted. Federal affirmative action programs originally called for in the 1960s under Executive

¹⁰⁹ American Association of University Professors. (2005) "Sexual Harassment in Higher Education: Current Issues and Trends." November 18, 2005. Retrieved April 5, 2006 from

<http://www.aaup.org/Legal/info%20outlines/05sexharass.htm>

¹¹⁰ Government Accountability Office. (2004) Gender Issues – Women's Participation in the Sciences Has Increased, but Agencies Need to Do More to Ensure Compliance with Title IX. Education, GAO-04-639. July 2004, Results in Brief and Recommendations, p. 33. Retrieved April 5, 2006 from

<http://www.gao.gov/new.items/d04639.pdf>

¹¹¹ American Association of University Women. (2004) Single-sex education. Changes to Single-Sex Policy in Public Schools. Retrieved April 8, 2006 from

http://www.aauw.org/issue_advocacy/actionpages/positionpapers/singlesex.cfm

¹¹² American Association of University Women. (2004) Single-sex education. AAUW Findings on Single-Sex Education. Retrieved April 8, 2006 from

http://www.aauw.org/issue_advocacy/actionpages/positionpapers/singlesex.cfm

Order 11246, including initiatives that aided companies, organizations and educational institutions that receive federal assistance to evaluate candidates fairly and equally based on candidates' qualifications, helped to spur significant progress for women and people of color.¹¹³ But in recent years, affirmative action programs – primarily those targeting racial diversity goals – have been under attack. A series of court decisions [*Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), *Texas v. Hopwood*, 518 U.S. 1033 (1996), *Gratz v. Bollinger*, 539 U.S. 244, among others] have required affirmative action programs to be more narrowly tailored and require that the programs be limited to situations in which there is a compelling government interest.

Opponents of affirmative action are pushing a ballot measure in Michigan to end affirmative action programs for women and people of color in public employment, education and contracting. A recent analysis has suggested that gender-specific health programs, education and training programs and other programs that improve women's educational attainment, job skills and ability to win government contracts, will be threatened if the Michigan initiative is adopted.¹¹⁴ Similar ballot measures in other states will follow, no doubt. Among states that have restricted affirmative action programs in recent years are California, Texas, Florida and Washington. Women's equality advocates fear that with the federal judiciary becoming increasingly conservative, the remaining affirmative action programs may be imperiled as well.

Lack of Affordable Child Care a Major Constraint

At the federal level, the United States has few policies that address the burdens on working parents, especially on mothers of young children. Annual costs for day care for one child range from \$4,000 to \$10,000.¹¹⁵ The number of places available at subsidized day care, pre-school, and Head Start centers are limited, and are far below the need. The Fiscal Year 2007 federal budget significantly reduces funding that aids low-income families in paying for child care.

The lack of a national policy that supports child-rearing and effectively assists low and moderate income families contributes to the difficulties facing employed mothers. The high cost of day care shuts out low-income families most in need of two-parent incomes, and is responsible for much of the disparity in child care quality and affordability between the U.S. and other nations. This disparity in quality exists even as the costs of such care are many times greater in the United States than abroad. This pattern is replicated in terms of pre-school

¹¹³ U.S. Department of Labor (2006) Executive Order 11246. Employment Standards Administration. Office of Federal Contract Compliance Programs. Retrieved April 12, 2006 from <http://www.dol.gov/esa/regs/statutes/ofccp/eo11246/htm>

¹¹⁴ Lewis. T. (2006) Michigan Anti-Affirmative Action Ballot Language Approved. January 25, 2006 Americans for a Fair Chance, Leadership Conference for Civil Rights. Retrieved April 10, 2006 from http://fairchance.civilrights.org/research_center/details.cfm?id=39872

¹¹⁵ NOW Legal Defense and Education Fund.(Not dated) Family Initiative: Better Child Care, Preschool and Afterschool. Retrieved April 3, 2006 from <http://www.legalmomentum.org/fi/pubs/ChildCareFactSheetfor 2.pdf>

programs, where parents pay around 60 percent of the costs associated with sending their children to these programs, far more than their European and Australian counterparts. This is also a serious problem for low-income families, who end up paying a disproportionate amount of their income for child care and pre-school programs.¹¹⁶ Even though a majority of women with school-age children are in the paid workforce, availability of after-school care and summer programs is modest in most communities. A further disadvantage relates to the scarcity of on-site child care at the workplace and a bias against flex-time and job-sharing positions that would benefit parents with small children.

The Work, Family and Equity Index of the Project on Global Working Families ranks the United States low on its global scale, particularly evaluating working conditions that make it possible to care effectively for children and other family members. The U.S. lags far behind on a dozen measures, including paid family leave and sick leave, breastfeeding protections, evening and night wage premiums, mandatory day of rest, maximum length of work week, and leave for major family events.¹¹⁷ Without a comprehensive system of adequate family supports, women in the U.S. cannot attain equality in the workplace.

Lack of Family Leave Coverage and Paid Leave a Workforce Deterrent

The federal **Family and Medical Leave Act (FMLA)**, enacted in 1993 is inadequate for many women in that it applies only to employers who have 50 or more employees, does not require that employees on leave be paid any portion of their salary, and has other strict limitations. Only four in 10 workers – men and women -- qualify for coverage under the FMLA, plus a large proportion of women workers are employed at firms with fewer than 50 employees. A national survey has shown that few workers can afford to lose wages by taking the unpaid FMLA leave and therefore either do not take advantage of the act or greatly limit their leave time.¹¹⁸ In a study conducted by Harvard University of nations around the world, 163 countries offer paid leave for women related to childbirth. The United States is not one of them.¹¹⁹

In 2003, the Department of Labor (DOL) repealed a rule adopted by a previous administration that allowed states to use their Unemployment Insurance (UI) funds to compensate workers taking leave for the birth or adoption of a child under the FMLA. At about the same time, the U.S. Supreme Court ruled that state employees are entitled to damages when a state agency violates the FMLA, *Nevada Department of Human Resources v. Hibbs*, 538 U.S.

¹¹⁶ Blau, D. (2002) Rethinking U.S. Child Care Policy, Issues in Science and Technology, The University of Texas at Dallas, Jan 9, 2002, <http://issues.org/18.2/blau.html#>

¹¹⁷ Heymann, J., Earle, A., Simmons, S., Breslow, S. and Kuehnhoff, A. (2004) "The Work, Family and Equity Index: Where Does the United States Stand Globally?" The Project on Global Working Families, p. 1. Harvard University. June 16, 2004. Retrieved April 10, 2006 from <http://www.hsph.harvard.edu/globalworkingfamilies/images/report.pdf>

¹¹⁸ Casta, N., Editor. (2000) "Highlights of the 2000 U.S. Department of Labor Report. Balancing the needs of Families and Employers: Family and Medical Leave Surveys." National Partnership for Women and Families. Retrieved April 10, 2006 from <http://www.nationalpartnership.org/portals/p.3/library/FamilyMedicalLeave/2000DOLLaborReportHighlights.pdf>

¹¹⁹ Heymann, J. et.al. Op.cit. p. 1

721 (203).¹²⁰ What remains unclear is the statutory authority states may rely on if they tap UI funds to pay for leave under the FMLA. The DOL has also proposed to further revise FMLA regulations in a manner that would scale back dramatically the scope of the law, such as requiring employees to take unpaid leave in half-day increments, redefining “serious illness” to exclude such conditions as acute appendicitis, pneumonia, certain kinds of heart attacks and other conditions. The proposed revision of the FMLA regulation is expected to be announced in June, 2006.

Breastfeeding Constraints Penalize Employed Mothers, Babies

As a corollary to the lack of child care protections, the United States similarly lacks any federal laws or policies affording working women the opportunity to breastfeed their infants while at work. Women have a biologically unique role as provider of breast milk for their children, yet the rights of mothers to participate in breastfeeding at work is very limited in the U.S. At least 76 countries protect the rights of working mothers to breastfeed their children, as breastfeeding is recognized as an important element in preventing infant mortality.¹²¹ Outside of the office setting, at the national level, the government has not passed any law protecting breastfeeding in public areas. This has forced individual states to enact a patchwork of protections, giving their residents the ability to breastfeed their children without being forced into restrooms or inconvenient places. This myriad of state laws has left millions of mothers, many of them employed, without any provisions for breastfeeding their babies outside of the home.

Unemployment Insurance Often Denied to Women

The Unemployment Insurance (UI) system is supposed to assist workers who become unemployed through no fault of their own by providing temporary income. However, because individual states set eligibility criteria (such as a minimum earnings standard), many low-income, part-time, seasonal, and temporary workers do not qualify for UI assistance. The result is that while 35 percent of unemployed men are supported by the UI system, only 23 percent of unemployed women are supported by that system. Because women represent 60 percent of low-wage workers, the lack of access to UI assistance falls disproportionately on their sex.¹²² Additionally, the scarcity of affordable child care means that many women must accept less-than full time employment – that factor lead to disqualifying from UI many women single heads of households.

Discriminatory Limitations on Women in Armed Forces

¹²⁰ U.S. Supreme Court. (2001) Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (203). Retrieved from <http://www.supremecourtus.gov/opinions/02pdf/01-1368.pdf>

¹²¹ Heymann, J., et.al. Op.cit. p. 1

¹²² Lovell, V. and Hill, C. (2001) Fact Sheet. Today's Women Workers: Shut Out of Yesterday's Unemployment Insurance System. Institute for Women's Policy Research. IWPR Publication #A127. p. 1 May 2001.

The various branches of the U.S. Armed Forces continue to maintain policies based on sex and presumed sex differences that constrain opportunities for women to distinguish themselves and to gain promotion. In recent decades, women have challenged age-old stereotypes about women not being effective members of the armed forces. Self-serving stereotypical thinking by military rule-makers has resulted in a *de facto* combat ban in the Navy and the Marine Corps, which has ensured that nearly half of all Navy positions and eighty percent of Marine Corps positions are not open to women.¹²³ Furthermore, recent efforts in Congress to restrict women from combat support positions may further reduce Army women's progress. These limitations generate an artificial obstacle to the advancement of women in the military, affecting rank, pay and lifetime career expectations.

Sexual assault against servicewomen in all branches – particularly in armed conflict areas – and in the service academies has been recognized recently as a critical problem. Procedures are still evolving for reporting incidents, protecting victims' privacy and providing effective medical and psychological services, but the ever-present threat of assault is a deterrent to women's military careers that serves to advantage men's military careers and ambitions. Inadequate or inappropriate treatment for victims has sometimes resulted in women leaving the service, giving up their aspirations for a military career and frequently experiencing difficulties recovering from the trauma.

One glaring example of systemic sexual harassment of women involves United States military regulations regarding sexual orientation. Since 1993, the United States Armed Forces has maintained a “Don’t Ask, Don’t Tell” policy regarding gay and lesbian servicemembers, who are not permitted to disclose their sexual orientation while enlisted in the military. However, many servicewomen report that they have been threatened by fellow soldiers – men who say that if the woman doesn't have sex with him, he will start a rumor that she is a lesbian, thus prompting a full-scale investigation of her and possibly a dishonorable discharge. Since the inception of “Don’t Ask, Don’t Tell,” women have been discharged at a rate that is more than double their percentage presence in the military.¹²⁴

Poverty Rates of Women Historically Higher

The number of people in poverty has increased by 4.3 million since 2000. Nearly 36 million individuals live in poverty, including 13 million children. In the United States, poverty (as defined by the U.S. Census Bureau) in terms of percentage of population has been relatively stable over the past 40 years. However, the number and percentage of women living in poverty in the United States has continuously been higher than that of men.¹²⁵ In every year since the poverty standard was

¹²³ National Women's Law Center. (1992) Women in Combat. Retrieved April 9, 2006 from <http://www.nwlc.org/pdf/Combat.pdf>

¹²⁴ Servicemembers Legal Defense Network (2005) Ten Years of Don't Ask, Don't Tell." A Disservice to the Nation. Timeline and Summary, Table IV. Retrieved April 2, 2006 from http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1453.pdf

¹²⁵ Legal Momentum. (2004) Reading Between the Lines: Women's Poverty in the United States, 2003. October, 2004. Retrieved April 14, 2006 from <http://www.legalmomentum.org/womeninpoverty.pdf> Data from Income,

created in the 1960's, there has been a large gender gap. In 2003, of all adults 18 or older, 12.4 percent of women were poor compared to 8.9 percent of men – in other words, women are 39 percent more likely than men to be poor. Women are 34 percent more likely than men to be *extremely* poor; about one of every twenty women is extremely poor.

For women age 65 and older, they are 71 percent more likely to be poor than elderly men. African-American women are far more likely to live in poverty than are white women, with 26.5 percent of African-American women, and 9.1 percent of white women living in poverty, according to 2003 Census data.¹²⁶ It is important to note that the U.S. Census Bureau's annual report provides poverty rates by age and race, but does not provide differences based on gender – thus distorting public perception of poverty in this country.¹²⁷

Welfare reforms made in the mid-1990s greatly restricted opportunities for poor women to attain additional education and job skills in order to move out of poverty, even though a lack of skills and inadequate educational attainment has been repeatedly identified as a core reason for women's poverty. Additionally, welfare program changes under the Temporary Assistance to Needy Families (TANF) Act under-funded critical supports like subsidized child care programs, transportation assistance, substance abuse aid and family violence screening and counseling.¹²⁸

Social Security System Penalizes Women and Care-Givers

General Comment 28, #31 stipulates that "Discrimination against women in areas such as social security laws...violates article 26 [of the ICCPR]. The nation's retirement security program, Social Security, contains several of out-of-date features that have discriminatory impacts on women. Perhaps the most important element is the failure to recognize that women are the primary unpaid caregivers of the nation. Women are more likely than men to take time out of the paid workforce to raise children or take care of elderly parents. The typical woman is in the workforce for 32 years, compared to 44 years for men.¹²⁹ Reasons that many women are forced to leave the paid workforce can be traced back to unaffordable child care and restrictive family leave policies.

Because of the way that benefits are calculated over a 35 year period, each year out of the paid workforce counts against women who plan to take worker benefits (not spousal benefits), including never-married and divorced women. The benefit formula compensates

Poverty and Health Insurance Coverage in the United States, 2003, U.S. Census Bureau, P60-226 (2004), available at <http://www.census.gov/prod/2004pubs/p60-226.pdf>

¹²⁶ Legal Momentum (2004) Op.Cit. Data retrieved from Historical Poverty Tables, Table 7. Poverty of People, by Sex: 1966 to 2004 at <http://www.census.gov/hhes/www/poverty/histpov/hstpov24.html>

¹²⁷ Legal Momentum. (2004) Op. Cit. Data from Historical Poverty Tables. Table 24. Number in Poverty and Poverty Rate by Race and Hispanic Origin Using 3-Year Averages: 1987 – 2004.

<http://www.census.gov/hhes/www/poverty/histpov/hstpov15.html>

¹²⁸ National Women's Law Center. (2004) Op. Cit. pp.19-20

¹²⁹ Anzick, M. and Weaver, D. (2001) "Reducing Poverty Among Elderly Women" Social Security Administration. Office of Policy, Office of Research, Evaluation and Statistics. Retrieved April 10, 2006 from <http://www.ssa.gov/policy/docs/workingpapers.wp87.pdf>

somewhat in that benefit amounts are based on a worker's 35 highest-earning years, but if years out of the workforce resulted in fewer than 35 years of paid employment, then additional years (up to 35) are treated as \$0 earnings. There is a compensating factor when determining retirement benefits for low-income earners, in that workers with low wages receive proportionally more benefits (relative to their wages) than higher-waged workers, but this compensating factor also could make employers feel it is more acceptable to maintain low wages and forego pensions for employees.

According to the Center on Budget and Policy Priorities, “unmarried women are at greater risk financially largely because they are less likely to receive income from pensions, earnings, or investments than married women”.¹³⁰ Since 1959, Social Security has brought poverty among U.S. elderly to the lowest level ever (9.3 percent).¹³¹ However, many extremely elderly women rely almost exclusively on their modest Social Security retirement checks because they have exhausted their personal savings, placing them among the poorest of the poor.

Women, both married and unmarried, are less likely than men to have pensions and other savings. According to the Institute for Women's Policy Research, only 38 percent of women today participate in an employer pension plan, compared with 51 percent of men.¹³² Moreover, when a woman does have a pension, it is likely to be smaller than a man's, for precisely the same reasons that their Social Security benefits are likely to be lower than a man's – they have lower lifetime earnings (due to wage discrimination, job segregation, and care-giving) and are more likely to work in jobs that do not offer pensions.

The Social Security Administration notes that women are more likely than men to depend upon Social Security to avoid poverty, due to cumulative effects of the wage gap, relative lack of pension coverage, and the consistency with which some females outlive their male counterparts.¹³³ If Social Security becomes unable to maintain the level of benefits it has historically paid out to beneficiaries, cuts in benefits or other policy reforms may disproportionately disadvantage elderly women.

Lack of Health Care Benefits Harms Working Women

¹³⁰ Kijakazi, K. (2001) "Women's Retirement Income: The Case for Improving Supplemental Security Income." June 8, 2001. Center on Budget and Policy Priorities. Retrieved April 10, 2006 from <http://www.cbpp.org/6-8-01socsec.htm>

¹³¹ Kijakazi, K. (2001) "The Importance of Social Security to People of Color and Women." Revised July 18, 2001. Center on Budget and Policy Priorities. Retrieved April 10, 2006 from <http://www.cbpp.org/4-18-01socsec.htm>

¹³² Shaw, L. and Hill, C. (2001) "The Gender Gap in Pension Coverage: Women Working Full-Time are Catching Up, But Part-Time Workers Have Been Left Behind." IWPR Publication #E506. April 2001. Retrieved April 10, 2006 from <http://www.iwpr.org/pdf/ribgender-gape506.pdf>

¹³³ Social Security Administration. (2001) Op.Cit.

The lack of health insurance is a serious barrier in the low-income workforce that falls disproportionately on women. Roughly, 46 million people under age 65 in the U.S. were in 2004 without health insurance coverage – an increase of 6 million persons since 2000.¹³⁴

Increasingly, jobs in the U.S. offer no health insurance coverage for employees, particularly in the service sector where pay is low. Even when benefits are offered, there is usually a high deductible (out-of-pocket) payment which few low-income workers can afford. Lack of coverage, less stable coverage, and higher out-of-pocket costs are all difficulties that fall disproportionately on women and especially on women of color, who constitute a majority of low-income workers. Approximately one-third (35 percent) of non-elderly women (ages 18-64) are in low-income families, defined as families with incomes below 200 percent of the poverty level (which was \$28,510 for a family of three in 2001).¹³⁵ Low-income women are twice as likely as upper income women to report being in fair or poor health. And among middle-aged women (ages 45-64), low-income women consistently have higher rates of physician-diagnosed chronic health conditions.¹³⁶

Medicaid, the federal-state cost-sharing health insurance program for poor and low-income people, plays a critically-important role in providing coverage for women. It is the back-up plan for women in the low-wage workforce who do not receive health insurance coverage from their employers. Women comprise nearly 70 percent of the Medicaid population over age 15 and the program insures nearly one in ten of all U.S. women, including 40 percent of single mothers.¹³⁷ Repeatedly, efforts have been made to expand Medicaid coverage to more low-income women, but millions are still uninsured. Recent federal budgets have cut back on the federal share of Medicaid funds, placing more of the burden on less well-financed state governments which, in turn, are raising eligibility standards and cutting benefits.¹³⁸

¹³⁴The Henry J. Kaiser Family Foundation. (2006) *The Uninsured: A Primer, Key Facts About Americans Without Health Insurance*. January, 2006. Kaiser Commission on Medicaid and the Uninsured. Overview, p. 1. Retrieved April 12, 2006 from <http://kff.org/uninsured/upload/745/>

¹³⁵ The Henry J. Kaiser Family Foundation. (2004) Fact Sheet: Women's Health Policy Facts. June 2004. Women's Health Insurance Coverage. Retrieved April 12, 2006 from <http://www.kff.org>

¹³⁶ The Henry J. Kaiser Family Foundation. (2006) Issue Briefs, An Update on Women's Health Policy, May 2006. Medicaid's Role for Women, page 1. Retrieved May 1, 2006 from <http://www.kff.org/womenshealth/upload/Medicar-s-Role-for-Women-May-2006.pdf>

¹³⁷ Ibid.

¹³⁸ The Henry J. Kaiser Family Foundation. (2005) "Underlying Growth in State Tax Revenue Compared with Average Medicaid Spending Growth, 1997 – 2005 from State Medicaid Prescription Drug Policies: Findings from a National Survey, 2005." Retrieved from <http://www.kff.org/medicaid/kcmu101905nr.cfm>

Recommendations:

The United States Government should:

(1) Immediately pass legislation that would increase the federal minimum wage to bring its value closer to a "living wage" – that is, a wage that would bring minimum wage workers above the poverty level and be sufficient to pay for basic living costs and reflect the effects of inflation and regional variations.

(2) Adopt legislation that would strengthen and expand laws against sex-based employment discrimination, in particular addressing the problem of wage discrimination in various occupational categories that exists merely because they primarily employ women and people of color. Strengthen the Equal Pay Act to address comparable work, improving remedies and enforcement provisions. Improve collection of data on employed women.

(3) Provide more effective enforcement of Title VII of the Civil Rights Act of 1964 and other laws prohibiting sex discrimination in the workplace, including sexual harassment, discrimination in hiring and promotion, and pregnancy discrimination. Increase funding for Departments of Justice, Labor and other agencies concerned with employment discrimination. Fully fund the Equal Employment Opportunity Commission (EEOC) and establish it as an independent agency. Legislatively expand protections against retaliation by employers against individuals who file complaints. Fund aggressive enforcement activities that would thoroughly investigate all complaints, initiate reviews of alleged discriminatory practices, heighten use of litigation and focus on "pattern or practice" violations that go beyond individual complaints.

(4) Restore provisions under the Fair Labor Standards Act that mandated overtime pay for certain occupations prior to the restrictive regulations adopted in 2004. Broaden – not restrict -- the Family and Medical Leave Act to apply to nearly all workplaces, covering more conditions under which employees are allowed to take leave, and mandating paid leave. Expand coverage of Unemployment Insurance (UI) to include part-time, seasonal and temporary workers, providing additional federal financial assistance to state UI funds.

(5) Protect equal education goals of Title IX of the Education Amendments of 1972 from any regulations that would undermine its provisions; adopt an aggressive compliance review schedule for all educational institutions; restore funding and technical assistance to the Title IX coordinator network; restrict conditions under which single sex classes and schools that receive federal aid may operate to reflect the original intent of Title IX; and, conduct vigorous enforcement activities, including prompt and thorough investigations of systemic discrimination, adopting sanctions against violators and assisting plaintiffs in Title IX violations litigation – both in the academic and athletic fields.

(6) Expand federal government efforts to assist women in the math, science, engineering and information technology fields in order to promote their presence in graduate schools, on faculties, in the labs and research institutions. Additionally, the effort should

promote equal pay for women professors, teachers and researchers at institutions receiving federal financial assistance.

(7) Adopt legislation that would prohibit workplace discrimination against lesbians, gay men, bisexual and transgender persons.

(8) Abandon punitive welfare policy measures that restrict public assistance without regard to need and which limit poor women's ability to attain further education and training; increase funding for child care available to low-income and welfare-to-work programs; mandate domestic violence screening and assistance programs; adopt counseling, rehabilitation treatment and federal assistance programs for women who have used illegal substances, particularly for pregnant women, and provide for more flexibility and other essential supports such as transportation and health care coverage for women in the welfare-to-work process.

(9) Expand policies and programs that assist employed parents, such as increasing government subsidies to child care, early learning, pre-K, kindergarten, after-school and summer programs. Special emphasis should be made for increasing staff salaries and education, improving program quality and greatly improving access to programs by low- and moderate-income parents. Similarly, Head Start and Early Head Start programs funding should be greatly increased to support unmet needs.

(10) Increase -- rather than reduce -- federal and state government funding for the Medicaid program so that all low-income women and their families have health care coverage under this program. Assure that all employed women have access to affordable health insurance.

(11) Update and strengthen the existing Social Security system to address out-of-date and discriminatory provisions, especially those that penalize women who take time out of the paid workforce to care for family members.

* * *