Human Rights Violations In The United States

A report on U.S. compliance with The International Covenant on Civil and Political Rights

American Civil Liberties Union
Human Rights Watch

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Addresses for Human Rights Watch
485 Fifth Avenue
New York, NY 10017-6104

1522 K Street, N.W., #910
Washington, DC 20005

Tel: (212) 972-8400
Fax: (212) 972-0905
email: hrwatchnyc@igc.apc.org

Tel: (202) 371-6592
Fax: (202) 371-0124
email: hrwatchdc@igc.apc.org

10951 West Pico Blvd., #203
Los Angeles, CA 90064
Tel: (310) 475-3070
Fax: (310) 475-5613
email: hrwatchla@igc.apc.org

90 Borough High Street
London, UK SE1 1LL
Tel: (071) 378-8008
Fax: (071) 378-8029
email: hrwatchuk@gn.org

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ACLU Executive Staff: Ira Glasser, Executive Director; Laura Murphy Lee, Director, Washington Office; Alma Montclair, Director, Administration and Finance; Sandra Sedacca, Director, Development; Steven Shapiro, Legal Director; Loren Siegel, Director, Public Education; Barry Steinhardt, Associate Director.

ACLU Executive Committee: Nadine Strossen, President; Alice Bendheim, Gwen Thomas, Richard Zacks, Frank Askin, Vivian O. Berger, James E. Ferguson, Judith Bendich, Mary Ellen Gale, Susan N. Herman, Gara LaMarche, Micki Levin, Robert B. Remar and Philippa Strum.

Addresses for the ACLU:

132 West 43rd Street
New York, New York 10036
(212) 944-9800

122 Maryland Avenue, NE
Washington, DC 20002
(202) 544-1681

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This report reflects the work of many individuals. It was conceived and edited by a joint American Civil Liberties Union/Human Rights Watch team comprised of Steven R. Shapiro, ACLU National Legal Director; Paul Hoffman, Legal Director of the ACLU of Southern California; Kenneth Roth, Executive Director of Human Rights Watch; Gara LaMarche, Associate Director of Human Rights Watch and Executive Director of its Fund for Free Expression; and Lee Tucker, the W. Bradford Wiley Fellow at Human Rights Watch, who played a vital coordinating and editing role in the final stages of the process without which the report would not have been possible.

The authors of the individual chapters include:

- **Death Penalty:** Diann Y. Rust-Tierney, Chief Legislative Counsel of the ACLU, with assistance from Julio Martinez for initial research and drafting and Travia Cole, Administrator of the ACLU Capital Punishment Project;

- **Immigrants' Rights:** Lucas Guttentag, Director of the Immigrants' Rights Project of the ACLU, with assistance from Ann Parrent, volunteer staff attorney and Jinsoo Kim, Harvard Law School intern;

- **Race Discrimination:** Alice Brown, counsel with the NAACP Legal Defense and Education Fund, was the principal author, assisted by LDF staff members Elgin Clemmons, Charles Ralston, Gailon McGowen, Dennis Parker, Nina Pillard, Maya Wiley, Catherine Hinton, Olatunda Johnson, and Kim Field.

- **Sex Discrimination:** Isabelle Katz Pinzler, Director of the ACLU Women's Rights Project, and Deborah Blatt, NYU Law Fellow with the Human Rights Watch Women's Rights Project;

- **Prison Conditions:** Edward Koren, staff counsel with the ACLU National Prison Project, and Joanna Weschler, director of the Human Rights Watch Prisoners' Rights Project;

- **Police Brutality:** Paul Hoffman;

- **Language Rights:** Edward M. Chen, staff counsel with the ACLU of Northern California, and Antonio Califa, formerly Chief Legislative Counsel of the ACLU and now Director of the Office of Civil Rights of the U.S. Department of Transportation;

- **Freedom of Expression:** Jeanne M. Woods, formerly legislative counsel with the ACLU and now Professor of Law at Loyola University School of Law; and Gara LaMarche;

- **Religious Liberty:** Robert S. Peck, Legislative Counsel with the ACLU.

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Introduction

On September 8, 1992, the United States, after a delay of more than a quarter century, finally became a party to the leading treaty for the protection of civil and political rights, the International Covenant on Civil and Political Rights (ICCPR). The ICCPR is a central part of the International Bill of Human Rights created in the aftermath of World War Two and the Holocaust in an effort to eradicate human rights abuses that threaten international peace and security and undermine the ability of millions of people to live in freedom and dignity. The promotion and protection of human rights were established as central purposes of the United Nations in 1945 in the UN Charter.

The ICCPR enumerates a broad range of civil and political rights that must be respected by every government that becomes a party to the treaty. The basic obligation assumed by all governments that ratify the Covenant is to "respect" and "ensure to all individuals within its territory" the rights recognized in the Covenant.

Most of the rights enumerated in the ICCPR are similar to the rights included in the U.S. Constitution, state constitutions and federal, state and local civil rights legislation.[1] These rights include the right to be free from arbitrary discrimination of all kinds, the right to freedom of expression, conscience, religion and assembly, the right to privacy, and the right to be free from torture and other forms of cruel, inhuman or degrading treatment or punishment. Some of these rights extend freedoms beyond the protections in existing U.S. law. In some cases the rights embodied in the Covenant do not extend as far as existing U.S. law. In other cases, the rights in the ICCPR are identical to the rights protected under U.S. law. Where existing U.S. law is as protective or more protective of civil and political rights, people in this country may rely on those more extensive domestic rights. Where the Covenant bestows greater rights people in this country should have the benefit of these rights and all levels of government have an obligation to make these rights a reality.

After years of hostility among U.S. lawmakers, ratification of the treaty marked an important step toward embracing the international system for the protection of human rights, but it was only a half step. While ratification enhanced Washington's ability to criticize other governments for violating human rights, the

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[1] For an overview of the relationship between the ICCPR and U.S. law *see* Hurst Hannum & Dana Fischer, editors, *United States Ratification of the International Covenants on Human Rights*, American Society of International Law (1993). *See also* Louis Henkin, editor, *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981).

Bush administration took steps to ensure that the treaty would provide no added protection for the rights of Americans.[2] As the largest domestic civil liberties organization and the largest U.S.-based international human rights organization, the American Civil Liberties Union (ACLU) and Human Rights Watch (HRW) have joined together to issue this report in the hope of breaking this cynical view of international human rights law as a source of protection only for those outside U.S. borders.

The Bush administration used two devices to deny Americans the protection of international human rights law as a supplement and backstop to constitutional protections. First, through a series of reservations, declarations and understandings, it carved out every provision of the treaty that it believed would have granted expanded rights to Americans. Second, it declared the United States in full compliance with the remaining treaty provisions, in an effort to justify not granting Americans the right to invoke the treaty in U.S. courts. Americans would have been able to enforce the treaty in U.S. courts either if it had been declared to be self-executing or if implementing legislation had been enacted to create causes of action under the treaty. The Bush administration rejected both routes. The result was that ratification became an empty act for Americans: the endorsement of the most important treaty for the protection of civil rights yielded not a single additional enforceable right to citizens and residents of the United States.

We issue this report to demonstrate the inaccuracy of the view that Americans do not need the protection of the ICCPR. As we show, the Bush administration was wrong in its assessment that the United States is already complying with all the treaty's obligations, even after the administration nullified some of the rights through its reservations, declarations and understandings. In the areas of racial and gender discrimination, prison conditions, immigrants rights, language discrimination, the death penalty, police brutality, freedom of expression

[2] The ICCPR extends rights to all persons within the territory of the ratifying state. "Americans" as used in this report should therefore be read broadly, to include all persons within U.S. territory, whether they are U.S. citizens, residents, undocumented workers or refugees.

and religious freedom, we show that the United States is now violating the treaty in important respects. As a result, the Clinton administration is under an immediate legal obligation to remedy these human rights violations at home, through specific steps that we outline.

Moreover, to ensure that these remedies are sufficient, we believe the U.S. government is obligated to grant Americans the right to invoke the protections of the treaty in U.S. courts, at least through specific legislation enabling them to do so, but preferably through a formal declaration that the treaty is self-executing, and thus invocable in U.S. courts without further legislation. We also believe that the Clinton administration should break with the Bush administration's determination not to allow international human rights law to add to rights in the United States, by repealing the restrictive reservations, declarations and understandings.

We issue this report now because the Clinton administration is about to issue its own assessment of U.S. compliance with the ICCPR, as required by the treaty one year after ratification. The administration's report, the first time that the United States will have systematically reported on its own human rights record in an international forum, will be reviewed by a committee of international experts established by the ICCPR known as the Human Rights Committee. We hope that our report will encourage the administration to make an honest assessment of U.S. noncompliance with the treaty and, in turn, to take the steps necessary to correct violations.

The scope of this report

This report is not intended as a comprehensive examination of the human rights situation in the United States or of U.S. compliance with the ICCPR. The ACLU and HRW have identified nine substantive areas in which the United States human rights record falls short of international standards. We use these areas as examples of what should be done to bring the U.S. human rights record into compliance with those standards.

There are many areas not covered by this report and many issues in the areas we have addressed that are not covered or are covered only partially. For example, there are many forms of discrimination in the United States that are not covered by the chapters that follow, including discrimination against gay men and lesbians and people with disabilities. We do not mean to imply that the areas covered by this report are more important than areas we have been unable to cover in this first ACLU/HRW joint report on human rights practices in the United States.

This is not a comparative report. But we note that the strength of the U.S.

Bill of Rights, and the panoply of domestic organizations that work in the courts and in other forums to assure that the government adheres to its guarantees, has resulted in a high degree of U.S. compliance with the ICCPR in many areas, particularly freedom of expression and religious freedom. Even in the many other areas, such as race discrimination and prison conditions, where the U.S. record needs substantial improvement, there is reason for optimism that significant human rights advances are possible if the political will is mustered.

We assume and hope that the ratification of the ICCPR and the international examination of the first U.S. report will inspire a wide range of domestic and international human rights organizations to examine every aspect of the U.S. human rights record and to suggest improvements that should be made. The most important part of the enforcement mechanism set up under the ICCPR is the dialogue about human rights compliance it is intended to inspire, both at the international level and within each society that agrees to be bound by this international human rights protection system. The first U.S. report should be the beginning of that process and not the end of it.

If the United States is serious about its international obligations, new legislative proposals and actions on pending legislation should come out of this process. In each section of the Report we have attempted to identify at least some of the legislative or administrative steps that should be taken to achieve compliance with the international standards of the ICCPR.

This report is not intended to be an exercise in legal analysis either regarding existing U.S. law or the meaning of particular provisions of the ICCPR. The Report does contain legal analysis in each area, but the provisions of the ICCPR are still being defined at the international level. The re-examination of human rights issues that should be inspired by the first U.S. report under the ICCPR should go beyond such technical legal analyses and lead to an examination of whether this country has fulfilled the basic values safeguarded by our own laws and in international standards.

Has the United States eradicated all forms of arbitrary discrimination in our public life? Do the conditions in our prisons and jails comport with the guarantees of human dignity that are central to international human rights standards and the ICCPR? Must the United States continue to execute juvenile offenders when it is isolated from the rest of the world in doing so and at odds with a core obligation in the ICCPR?

These are some of the issues considered in this report and which ought to be the subject of real debate in the Clinton Administration and the Congress.

Major findings

Among our findings are the following:

- **Race Discrimination.** Although U.S. legal protection against race discrimination is generally adequate by ICCPR standards, in practice legal safeguards go largely unmet. Educational segregation and unequal conditions of schooling persist at all levels; public and private housing are rife with segregation and discrimination; and in employment, African Americans are three times less likely to be hired than whites with similar qualifications. By failing to adequately redress ongoing racial and ethnic discrimination, the United States stands in violation of Article 2, which requires an *effective* remedy for violation of Covenant rights, and Article 26, which requires "equal and effective protection [i.e., enforcement of the remedy] against discrimination on any ground."

- **Sex Discrimination.** Women in the U.S. face systemic and entrenched discrimination in the workplace in terms of occupational access, conditions of employment, and compensation. They are discriminated against through omission in government-funded medical research. In public schools and universities, girls and women continue to receive less attention and resources than do boys and men, despite Title IX's mandate for equal education. Article 26 not only forbids discrimination; it also requires States parties to provide "equal and effective protection" against discrimination. Even taking into account the limiting understanding imposed by the U.S. on Article 26, its failure to adequately protect against sex discrimination violates that provision.

- **Language Rights.** Minority language speakers in the U.S. face discrimination in health and social services, employment and education, as well as overt hostility as manifested by the "English-only" movement that emerged in the 1980's. Article 26 forbids discrimination based on language. In the U.S., by contrast, constitutional claims alleging such discrimination have received a relatively low level of judicial scrutiny. This low level of scrutiny is protected by the U.S. understanding to Article 26, which purports to allow discrimination when it is "rationally related to a legitimate governmental objective." Erasure of this understanding and implementation of the ICCPR would provide much-

needed protection to language minorities.

- **Immigrants and Refugees.** The interdiction and summary repatriation of Haitian boat people is a flagrant violation of Article 12, which states that "[e]veryone shall be free to leave any country, including his own." It also violates Article 26, which forbids discrimination on the basis of national origin (intercepted Cubans, for example, are not summarily repatriated). Human rights abuses by Border Patrol agents of the Immigration and Naturalization Service violate Article 7 (the right to be free from torture or cruel, inhuman or degrading treatment) and Article 9(1) (the right to liberty and security of the person).

- **Prison Conditions.** The United States routinely violates Article 10 of the ICCPR, which requires that all prisoners and detainees "be treated with humanity and with respect for the inherent dignity of the human person." The U.S. violates this provision by placing prisoners into extremely overcrowded facilities that strip them of their dignity and privacy and endanger their health and safety. Article 10 is also violated by many of the techniques and punishments of "supermaximum security" facilities, where, for example, prisoners may pass years without breathing the outside air or may be forced to eat their meals with their hands tied behind their backs. The anti-discrimination requirement of Article 26 is violated by the unequal treatment of women prisoners, who receive less recreational, vocational, and educational opportunities than their male counterparts.

- **Police Brutality.** The 1991 beating of Rodney King spotlighted police abuse in the United States as one of the most pressing human rights issues facing the U.S. The persistant use of excessive force, often exacerbated by racism, violates the Article 7 prohibition on "cruel, inhuman and degrading treatment or punishment" and the prohibition in Articles 2 and 26 against discrimination. The United States further violates Article 2 by failing to take "the necessary steps" to ensure respect for these basic rights.

- **The Death Penalty.** Article 6 of the ICCPR favors but does not require the abolition of the death penalty. It also limits the circumstances in which the death penalty may be imposed: arbitrary deprivation of life is

forbidden, as is the execution of juveniles; furthermore, the death penalty may be imposed "only for the most serious crimes." The U.S. entered a reservation to the ICCPR that allows it to use capital punishment to the extent permitted under the U.S. Constitution. But for this reservation, the United States would be in violation of all of the above conditions of Article 6.

- **Freedom of Expression.** Although by most measures the U.S. is a leader in the area of free expression, it has fallen short of meeting Article 19 of the ICCPR, which guarantees a right "to seek, receive and impart information . . . regardless of frontiers." The U.S. has violated this right by curtailing the flow of information both into and out of the country: visas have been denied to some controversial speakers; informational materials from certain countries have been excluded by economic embargo laws; and Americans have been restricted in their ability to travel abroad and seek and impart information independently. The U.S. also violated Article 19 by imposing severe and unjustified restrictions on the media during the Gulf War.

- **Religious Liberty.** A 1990 Supreme Court decision, *Employment Division v. Smith*, began a serious incursion by U.S. courts into First Amendment protection for the free exercise of religion. Fortunately, this incursion was halted by the recent passage of the Religious Freedom Restoration Act. The experience of the three intervening years, when protection for religious freedom dwindled in the U.S., underscores the potential importance of the ICCPR as an additional line of defense to this and other fundamental rights.

Race Discrimination

Articles 2 and 26 of the ICCPR provide broad protection against discrimination on a variety of grounds, including race. Article 2 protects all the rights set forth in the Covenant against discrimination, while Article 26 mandates that States parties afford equal protection of the law. In addition, Article 25 guarantees electoral rights on a non-discriminatory basis. In ratifying the ICCPR, the United States entered understandings to Articles 2 and 26 that effectively restrict its obligations under the Covenant to the already-existing and more restrictive contours of U.S. constitutional law. The ICCPR provides equal protection regardless of which of the many enumerated characteristics is being discriminated against. U.S. courts, in contrast, consider the target of the alleged discrimination and then impose one of three levels of judicial scrutiny: mere rationality, intermediate scrutiny, or strict scrutiny. Race discrimination receives strict scrutiny, the highest level of judicial protection available. In addition, federal statutes protect against race discrimination in a variety of specific contexts.

Article 26 prohibits discrimination in any field regulated and protected by the government. U.S. practice violates this provision in a number of areas, including education, housing, voting and employment. Public education in the United States is still largely segregated by race, with racially-isolated poor school districts enduring inferior conditions and materials and severe overcrowding; as a result, the educational achievements of African-American and Latino students fall well below those of white students. Segregation by race remains the norm in housing as well. The Fair Housing Act, which prohibits discrimination in the sale or rental of housing, has been inadequately enforced by the Department of Justice, and it remains more likely than not that a member of a racial minority will face discrimination when trying to buy or lease housing. In public housing, race discrimination takes the form of segregated and inferior housing developments and neighborhoods.

Introduction

Articles 2(1), 26, and 4(1) contain the broad anti-discrimination provisions of the International Covenant on Civil and Political Rights (ICCPR). Article 2(1) provides that the rights recognized in the ICCPR are to be ensured to all individuals "without distinction of any kind, such as race, colour, sex, language,

religion, political or other opinion, national or social origin, property, birth or other status." The extensive list of protected classifications contained in Article 2 are also referenced in Article 25, which guarantees every individual the right and opportunity to participate in the electoral process. Article 26, embracing the same classifications, guarantees to all persons "equal and effective protection" against discrimination "on any ground." Article 4(1) of the ICCPR prohibits any remedial measures, even in times of a public emergency where the very life of a nation may be threatened that would "involve discrimination solely on the ground of race, color, sex, language, religion or social origin." Together these articles represent the core of the anti-discrimination provisions under the ICCPR.

United States constitutional law provides extensive protections against discrimination based on classifications roughly parallel to those contained in the ICCPR. The critical difference between U.S. constitutional protection from discrimination and the protection that would be afforded under the ICCPR is that, whereas the ICCPR protects equally against all grounds of discrimination, U.S. constitutional jurisprudence applies varying levels of protection, depending on the characteristic that is being discriminated against. Three levels of review are used to determine constitutional violations under the Fourteenth Amendment's Equal Protection Clause:[1] (1) the mere rationality test (applied to economic status); (2) the mid-level or heightened scrutiny test (applied to gender, age, and birth status (illegitimacy)); and (3) the strict judicial scrutiny test (applied to race, religion, and national origin). In addition to constitutional protection, some of the individual rights ensured by the ICCPR's anti-discrimination provisions are granted by federal statutes.[2]

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[1] The Equal Protection Clause of the 14th Amendment, enacted in 1868, guarantees that "[n]o State shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws."

[2] Federal statutes addressing the issue of discrimination and civil rights include: 1) 42 U.S.C. § 1981, which is a general grant of civil rights that gives all persons the same rights "as is enjoyed by white citizens" to enforce contracts, use courts, etc; 2) 42 U.S.C. § 1982, which guarantees property rights regardless of race; 3) 42 U.S.C. § 1985, which prohibits people from conspiring to deprive anyone of equal protection or equal privileges and immunities under the law; 4) the Civil Rights Act of 1964, which guarantees access to public accommodations, services, etc. to all individuals; 5) the Voting Rights Act of 1965,

The U.S. government attached certain limiting understandings to Articles 2(1), 4(1), and 26 at the time of ratification of the ICCPR. With respect to the anti-discrimination provisions contained in Articles 2(1) and 26, the U.S. asserted an understanding that distinctions between individuals would be permitted under the ICCPR if they were, "at minimum, rationally related to a legitimate governmental objective". This reduces the U.S. obligation down to the lowest level of equal protection already afforded under the constitution, the mere rationality test. Additionally, the U.S. government asserted an understanding that the prohibition against discrimination in times of a public emergency contained in Article 4(1) of the ICCPR did not bar the U.S. from making "distinctions that may have a disproportionate effect upon persons of a particular status."

These understandings could promote a more restrictive interpretation of the ICCPR anti-discrimination provisions by U.S. courts than was intended by the drafters of the treaty, which by its plain language would not permit any discrimination on the enumerated grounds even in times of a national emergency. Nor does the ICCPR envision a hierarchical regime of rights, whereby some recieve greater protection than others. A legislative rescission of these understandings is necessary if the U.S. is to achieve a level of protection from discrimination that, in accordance with the spirit of the ICCPR, is both uniform and high.

Although formal protection from racial discrimination is quite high in the U.S., fulfillment of these legal rights and obligations has not been forthcoming. This is where implementation of the ICCPR would have its biggest impact, for, in addition to requiring that each State Party "give effect to the rights recognized in the . . . Covenant," Article 2 also mandates that each State party provide an effective remedy for violation of Covenant rights, and that these remedies be enforced.[3] In addition, Article 26, requires "equal and *effective* protection against discrimination on any ground." (Emphasis added.)

Thus, while U.S. laws on race discrimination are at least equal to the ICCPR, the Covenant provides a crucial legal obligation to fulfull the requirements

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which was designed to eliminate racial discrimination within this country's voting and electoral processes; and 6) the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (1982 & Supp. 1987), which protects citizens from race discrimination in the context of housing.

[3] *See* Appendix, ICCPR Article 2, paragraphs 2 and 3.

of the law and provide effective remedies to victims of discrimination. In order to enforce this obligation in U.S. courts, legislation implementing the ICCPR must by passed.

This chapter discusses four key arenas in which racial and ethnic minorities suffer from discrimination: education, housing, employment and voting. We rely upon numerous court cases, governmental reports and social science data to support and document our findings and observations.

Education

In its landmark decision, *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), the U.S. Supreme Court declared that "separate but equal" public schools were "inherently unequal" and therefore unconstitutional.[4] "An [educational] opportunity is a right which must be made available to all on equal terms," said the court. Sadly, the promise in *Brown* of an equal educational opportunity to all children has since been rendered an empty one under U.S. constitutional law; almost forty years after *Brown*, minority and poor children in this country continue to suffer the inequalities attendant to segregated public school systems.

Segregation and Resegregation in Public Schools

Most African-American children remain in schools that are separate and decidedly unequal.[5] Approximately two-thirds of all minority children in this country are enrolled in schools that are predominantly minority; more than 17 percent attend classes that are over 99 percent minority.[6] The most telling examples of racial isolation exist in the largest urban areas of the nation.[7] The 25 largest central city school districts in 1986 enrolled 27.5 percent of the nation's

[4] *Brown* at 494.

[5] Shirley M. McBay, "The Condition of African American Education: Changes and Challenges," in *The State of Black America* (B. Tidwell ed., 1992).

[6] *See Citizens' Commission on Civil Rights, One Nation Indivisible: The Civil Rights Challenge for the 1990s* 6 (Richard Govan & William L. Taylor eds., 1989).

[7] *See* Jonathan Kozol, *Savage Inequalities: Children in America's Schools* 4 (1991).

African-American students, but only 3.3 percent of the nation's white students.[8] Due to their increasing isolation in largely segregated school systems, and the continued resistance both to full integration and to adequate funding of all school districts,[9] many black and poor children continue to be deprived of training in even the most basic skills.[10]

Children attending school in racially-isolated poorer districts routinely endure classes that are badly overcrowded.[11] In these classes, both student and teacher are forced into an environment where keeping order in the classroom takes precedence over the interactive learning that takes place in wealthier school districts.[12] Given such conditions, it is not surprising that minority children are twice as likely to drop out of school as white children.[13] Moreover, disproportionate numbers of minority children continue to leave school functionally illiterate and unemployable.[14]

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[8] *Citizens' Commission on Civil Rights*, *supra* note 6, at 7. The report explains that many of these central cities are surrounded by suburban school districts that are predominantly white in enrollment.

[9] For example, annual per pupil expenditures in Massachusetts schools range from $5,013 to $1,637. In Texas, the top 100 school districts spend an average of $5,000 per child while the bottom 100 spend $1,800. *See National Coalition of Advocates for Students, Barriers to Excellence: Our Children At Risk* 73-74 (1985).

[10] *See* Chambers, *Adequate Education For All: A Right, An Achievable Goal, in Racism in Public Education* 5 (C. Lee 1993).

[11] *See* Jonathan Kozol, *supra* note 4 at 88. Kozol cites P.S. 79 in New York City as a typical example of an overcrowded inner-city school. The school was built to hold only 1000 students, but 1500 students attend regularly.

[12] *See* Quality Education For Minorities Project, at 13.

[13] *See* Citizens' Commission on Civil Rights, *supra* note 6 at 7.

[14] *See*, Chambers, *supra* note 7 at 6. As many as forty percent of minority youth are functionally illiterate.

Not surprisingly, black and Latino children, who comprise the majority of children living below the poverty line in this country,[15] fare far worse than their white counterparts at all levels of education. In 1989, both black and Latino 3- and 4-year-olds were less likely than white children to attend nursery classes.[16] At the elementary level, black and Latino children are generally more likely to be below the appropriate grade for their age than white children. At the secondary level, the graduation rates for black students have improved, but are still lower than rates for white students; Latino students, however, still lag far behind.[17] Lastly, in higher education the rate of college education among black and Latino high school graduates remains far lower than whites.[18]

The Court's Retreat From Brown

In 1973, the Supreme Court delivered an opinion in one of the most important equal educational opportunity decisions since *Brown*. In the case, *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), the Supreme Court declared that the use of property taxes for financing public school education was not violative of the equal protection clause, even though such a funding scheme resulted in grossly unequal per-pupil expenditures between school districts.[19]

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[15] In 1990, 44 percent of black children and 38 percent of Latino children compared to only 15 percent of white children lived in families with income below the poverty line. *See National Center for Education Statistics, The Condition of Education* 4 (1992).

[16] *Id.* at 7. Twenty percent of Latino children, thirty percent of black children, and forty percent of white children attended nursery classes.

[17] In 1991, 56 percent of Latino persons 25- to 29-years-old had completed high school, compared to 81 percent of blacks and 90 percent of whites.

[18] *Id.* at 6-8. In 1991, 41 percent of black high school graduates 25 to 29 years old had completed 1 or more years of college, compared to 55 percent of their white counterparts. The percentage of Latino high school graduates with at least some level of college education has stabilized at about 43 percent. Interestingly, Latino high school graduates who go on to college are more likely to enroll in a 2-year college than black and white graduates.

[19] For example, the Edgewood Independent School District, the poorest of the seven

The Court justified its action by holding, first, that no suspect classification had been presented (although race is a suspect classification, poverty is not),[20] and second, that education is not a fundamental right for the purpose of the Equal Protection Clause.[21] With this decision, the Supreme Court stripped equal protection analysis of much of its meaning in the context of public school education,[22] thereby turning its back on the commitment it made in *Brown* to ensure an equal educational opportunity to all children.[23]

The Supreme Court has continued to backslide in its commitment to eliminate the stigmatic harms of segregated public schools that it specifically identified in *Brown*. In *Board of Education of Oklahoma City Public Schools v.*

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school district in metropolitan San Antonio, had an assessed property value of $5,960 per student. By imposing a property tax of $1.05 per $100 of assessed property value---the highest rate in the metropolitan area---the district was able to raise only $26 per student in local funds. In contrast, the Alamo Heights Independent School district, the wealthiest school district in the area, had an assessed property value of $49,000 per student and with a tax rate of only 85 cents per $100 they were able to raise $333 per student.

[20] *See Rodriguez*, *supra* at 34.

[21] *Id.*

[22] *Id.* at 63 (White, Douglas, Brennan dissenting and stating that "[the majority's reasoning] makes equal protection analysis no more than an empty gesture".).

[23] *Id.* at 64 (Marshall, with whom Douglas concurred, dissenting and stating that "the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens.").

Notably, state courts have upheld claims that school financing disparities deny equal protection and the right to education under state constitutions. *See e.g.*, *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); and *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) *Harper v. Hunt*, 624 So.2d 107 (Ala. 1983). Additional cases are now pending.

Dowell, 498 U.S. 237, (1991), the Court ruled that a school district decree is not intended to operate in perpetuity, and that the purposes of a decree to desegregate have been achieved so long as a school district "[is now] being operated in compliance with the commands of the Equal Protection Clause" and "it [is] unlikely that the school board would return to its former ways."[24]

In creating this vague present-tense standard for lifting a desegregation decree, the Court ignored both the history of the Oklahoma City Board's unflagging resistance to judicial efforts to dismantle the City's dual education system[25] and the appellate court conclusion that "on the basis of the record it is clear that other feasible measures remained available to the [Oklahoma City] Board [to avoid racially identifiable schools]."[26] The Court clung to its reasoning, even though lifting the decree has left black children in Oklahoma City with virtually no remedy for their separate and unequal schools.

The *Dowell* decision not only makes it easier for school districts to abandon the needs of its poor and minority children, it also flies squarely in the face of the Court's jurisprudence in this area, which reflected a concern with avoiding the reemergence of the harm of segregation in schools. Prior to *Dowell*, the court had insisted that school districts be required to "make every effort to achieve the greatest possible degree of actual desegregation and [to] be concerned with the elimination of one race schools."[27]

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[24] *Dowell*, 498 U.S. at 247.

[25] *Id.* at 252 (Justice Marshall, with Blackmun and Stevens join dissenting).

[26] *Id. See also*, 890 F.2d. at 1505.

[27] *Id.* at 736 (dissenters citing *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Dayton Bd. of Education v. Brinkman*, 443 U.S. 526, 538, 61 L.Ed.2d 720, 99 S.Ct. 2971 (1979); *Columbus Bd. of Education v. Penick*, 443 U.S. 449, 460, 61 L.Ed.2d 666, 99 S.Ct. 2941 (1979); *Raney v. Board of Education of Gould School Dist*., 391 U.S. 443, 449, 20 L.Ed.2d 727, 88 S.Ct. 1697 (1968) (endorsing the "goal of a desegregated, non-racially operated school system [that] is rapidly and finally achieved," quoting *Kelley v. Altheimer*, 378 F.2d 483, 489 (CA8 1967) (emphasis added)). This focus on "achieving and preserving an integrated school system," *Keyes v. School Dist. No. 1*, Denver, Colo., 413 U.S. 189, 251, n.31, 37 L.Ed.2d 548, 93 S.Ct. 2686 (1973)(Powell, J., concurring in part and dissenting in part) (emphasis added), stems from the recognition that the reemergence of racial separation in such schools may

With the Supreme Court's cold stance on uneven local school funding formulas and its historically-blind standard for lifting desegregation decrees, poor and minority children are severely disadvantaged in their chance of obtaining an equal educational opportunity.[28] If implemented and enforced, the anti-discrimination provisions contained in the ICCPR, as well as the call in Article 26 for an "effective remedy" to denials of equal protection, would require U.S. courts to once again seriously address ongoing educational segregation and its pernicious effects.

Housing

As we approach the 21st century, residential segregation is alive and well and prevalent across the United States. Indeed, there is little debate that, despite nearly 30 years of congressional, executive, and judicial activities aimed at eliminating racial segregation and discrimination in housing, racial minorities continue to face discrimination in their attempts to secure minimally adequate and affordable housing in racially and ethnically-integrated communities. According to one analysis of the 1990 Census data, the majority of the nation's 30 million African-Americans were as segregated in 1991 as they were at the height of the civil rights movement in the 1960s. In particular, the survey of 219 major metropolitan areas found that African-Americans were highly segregated in 31 - or two-thirds - of the 47 metropolitan areas where they make up at least 20% of residents, including Detroit, Michigan, Chicago, Illinois, Miami, Florida, and Birmingham, Alabama.[29]

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revive the message of racial inferiority implicit in the former policy of state-enforced segregation.").

[28] *See generally*, *Dowell* at 731; *see also*, *Freeman v. Pitts*, 503 U.S. ___, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992) (Court upholding district court decision to relinquish some remedial control even though school district had not fully achieved unitary status.).

[29] *Segregation: Walls Between Us*, USA Today, November 11, 1991. That same analysis found that Latinos are highly segregated in two (New York and Los Angeles) of 33 metropolitan areas where they comprise at least 20% of the residents, and Asians are not highly segregated in any metropolitan area with a significant Asian population, including San Francisco, the only city with at least 20% Asians.

One piece of federal legislation created to address the problem of residential segregation and discrimination is Title VIII of the Civil Rights Act of 1968, or the Fair Housing Act.[30] Title VIII prohibits discrimination in the sale or rental of housing on a number of bases, including race, color, religion, national origin and sex. The statute bars both private and public discrimination; it also prohibits banks and other lending institutions from discriminating in issuing loans. In 1990, nearly a quarter of a century after the passage of the Act, Drew Days, then law professor at Yale Law School and presently Solicitor General of the United States, offered the following comments with regard to the Fair Housing Act:

> There is little doubt that the 1968 Act has made an important difference in the lives of the many who have benefitted from successful litigation to increase housing opportunities. It is also true that housing discrimination has proven far more intractable a national problem than the sponsors of the Fair Housing Act of 1968 anticipated. . . . Increased residential segregation has complicated efforts at school desegregation. Businesses have also followed the movement to the suburbs, leaving center city residents far from meaningful employment opportunities.
>
> To place major responsibility for this situation at the feet of the 1968 Act, however, would be unwarranted. Certainly no legislation can be expected to counteract entirely the complex forces that contribute to the creation and maintenance of residential segregation in the United States.[31]

Professor Days continued by noting that a major deficiency in the Act, the lack of an administrative enforcement mechanism within the Department of Housing and Urban Development (HUD), was cured in 1988 when, after several unsuccessful efforts, Congress established one of the most comprehensive

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[30] As enacted in 1968, Title VIII prohibited discrimination on the basis of race, color, religion, and national origin. Subsequent amendments to the Act added sex, handicap, and familial status to the illegal bases of discrimination. Sex discrimination was added to Title VIII as part of the Housing and Community Development Act of 1974, Publ. L. No. 93-383, §808, 88 Stat. 633, 729 (1974). The other prohibited criteria were added as part of the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

[31] *See* Schewemm's *Housing Discrimination: Law and Litigation*, p. viii.

governmental enforcement systems ever included in a federal civil rights law. Still, on many levels, discrimination in the sale and rental of housing remains as intractable as ever.

The most recent nationwide study of housing discrimination conducted by HUD found that African-Americans encountered discrimination 59 percent of the time when trying to buy a house and 56 percent of the time when seeking rental housing. Latinos suffered discrimination 56 percent of the time when they tried to purchase housing and 50 percent of the time when they tried to rent.[32]

HUD has responsibility for enforcing the Fair Housing Act and also is under a general mandate to combat housing discrimination through Secretary-initiated investigations and supervision of federally-sponsored and federally-funded programs. Yet HUD's own statistics reveal a huge gap between the known scope of discrimination and HUD's enforcement of claims. For example, while HUD's surveys show that African-Americans suffer discrimination over 50 percent of the time that they attempt to buy or rent a home, HUD found "cause" in less than one-half of one percent of all race discrimination cases filed in 1990.[33] Additionally, in the cases that HUD settles, it fails to obtain substantial remedies -- remedies important to compensate the victims and deter future discrimination.[34]

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[32] M. Turner, R. Struyk & J. Yinger, Housing Discrimination Study, Prepared for the Office of Policy Development and Research, U.S. Dept. of Housing and Urban Development (June, 1991). The study was conducted using 7600 African American, Latino and white testers who visited 3800 homes and apartments in 25 cities, posing as buyers and renters. The testers were alike in all characteristics, such as income levels, education and employment, except for race and national origin.

[33] In 1990, HUD found "no cause" in 310 cases alleging race discrimination and "cause" in only 15 race claims. U.S. Department of Housing and Urban Development, 1990, The State of Fair Housing, pp. 6, 7, (Nov. 4, 1991).

[34] For example, the average monetary damages in settled cases was only $826. In contrast, a HUD Administrative Law Judge awarded $65,592 in damages, and a civil penalty of $10,000, in the first racial discrimination case to go to administrative trial under the 1988 amendments. *See Secretary ex rel. Herron v. Blackwell*, 908 F.2d 864 (11th Cir. 1990). Moreover, private fair housing advocates routinely obtain six-figure damage awards in court cases. Indeed, a jury recently awarded $850,000 in compensatory damages to three plaintiffs in a housing advertising case.

The U.S. Department of Justice has also failed to enforce vigorously the Fair Housing Act. Because of its "superior nationwide resources and expertise,"[35] the 1988 amendments to the Fair Housing Act vest authority in the Justice Department for litigating civil actions in certain cases. Despite the fact that HUD estimates that nearly 2 million instances of racial discrimination in housing occur each year,[36] between March 1989 and June 1992, the Department of Justice had initiated a total of only 17 race discrimination cases nationwide -- that is, approximately 5 cases each year.[37]

Redlining

Discrimination in housing also takes the form of "redlining," a practice by which banks and other financial institutions discriminate against residents of minority neighborhoods by denying them mortgages or housing insurance. Recent studies show a large discrepancy between the mortgage application denial rates of whites and African-Americans, even when incomes are similar.[38] In addition to private banks and financial institutions, which have been instrumental in the perpetuation of redlining, the U.S. government has itself been a major offender. Indeed, as far back as the 1930s, the Federal Housing Authority "redlined black

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[35] Congressional Record S 10465 (Aug 1, 1988) (statement of Senator Karnes).

[36] During the consideration of the 1988 amendments to the Fair Housing Act, the estimate of 2 million incidents per year was cited frequently by both Democratic and Republican members of the House and Senate as a principal reason for strengthening the government's fair housing enforcement powers. (Statement of Senator Kennedy, Congressional Record S 10465 (Aug. 1, 1988).

[37] Department of Justice, DOJ Fair Housing Act Case Activity Since March 12, 1989 (June 1, 1992).

[38] *See*, *e.g.*, Wall Street Journal, Nov. 30, 1992, at A1; Wall Street Journal, March 31, 1992, at A1; *see also* National Association for the Advancement of Colored People, "Fair Lending: Implications of the Home Mortgage Disclosure Act Data," Statement before the Subcommittee on Consumer Affairs and Coinage and the Subcommittee on Housing and Community Development, House Committee on Banking, Finance and Urban Affairs (May 14, 1992).

neighborhoods and refused to insure mortgages within them."[39]

Today, fair housing regulations promulgated by HUD explicitly prohibit redlining,[40] and, over the last few decades, federal courts have recognized statutory claims where redlining was undertaken by (1) banks and savings and loans,[41] (2) insurance companies,[42] and (3) real estate appraisers.[43] Nonetheless, redlining persists and is particularly serious in the home mortgage area. Investigations show that mortgage applications of minorities were rejected up to three times more frequently than applications of whites, and even the wealthiest blacks were less likely to receive loans than the poorest whites.[44] A Federal Reserve Board study found that for the highest income applicant groups, denial rates nationally were 21.4 percent for African-Americans, 15.8 percent for Latinos, 11.2 percent for Asians and 8.5 percent for whites.[45]

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[39] Michael B. Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America* 244 (1986)

[40] *See* 24 C.F.R. 100.70(b)-(d).

[41] *Harrison v. Otto Heinzeroth Mortg. Co.*, 430 F. Supp. 893 (N.D. Ohio 1977); *Laufman v. Oakley Building & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976); *see Cartwright v. American Sav. & Loan Ass'n*, 880 F.2d 912 (7th Cir. 1989); *Southend Neighborhood Improvement Assn. v. County of St. Clair*, 743 F.2d 1207 (7th Cir. 1984).

[42] *See NAACP v. American Family Mutual Insurance Co.*, No. 91-1176 (7th Cir. October 20, 1992); *McDiarmid v. Economy Fire & Cas. Co.*, 604 F. Supp. 105 (S.D. Ohio 1984); *Dunn v. Midwestern Indemnity Mid-American Fire & Casualty Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979).

[43] *See United States v. American Institute of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977).

[44] *Housing Act Fails to Eliminate Bias Against Minorities*, USA Today, November 11, 1991.

[45] *See* ACLU, *Restoring Civil Liberties: A Blueprint For Action For the Clinton Administration* (1992) p. 46.

Public Housing

Federally funded housing created for low-income persons[46] is another area in which discriminatory practices are pervasive. When first developed, many housing projects were subject to explicit racially-segregated admission policies. In addition, poor African-Americans and other minorities receiving public housing or other federally assisted housing have been subjected to unit, project, and neighborhood conditions that are not only extremely segregated, but also vastly inferior to the unit, project and neighborhood conditions of white public housing recipients.[47] According to housing advocates Elizabeth Julian and Michael Daniel,

> [i]n addition to the inequality in the actual housing provided to low-income African-American families under the federal programs, the neighborhoods in which they receive assistance

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[46] Under the Housing Act of 1937, as amended, 42 U.S.C. §1437, et seq., HUD is authorized to make loans and annual contributions to public housing agencies to enable them to develop, operate and maintain low-income public housing projects. Approximately 3.5 million tenants who receive federally assisted public housing are very poor. According to a report entitled, "Multifamily Tenant Characteristics System, Lower Income Public Housing", prepared by the U.S. Department of Housing and Urban Development, Washington, D.C., February 1992, the average income of public housing tenants is $6,000, or less than 25% of the national average. These families cannot afford any other housing options and may have waited years to receive their public housing unit.

[47] During 1984, the *Dallas Morning News* conducted a 14-month investigation of the country's 60,000 federally subsidized housing developments and found that despite federal laws prohibiting racial discrimination, the nearly 10 million residents of federally assisted housing were mostly segregated by race. Moreover, during its visits to 47 cities across the U.S., the investigative team found that virtually every predominantly white-occupied housing development was significantly superior in condition, location, services and amenities to developments that house mostly African Americans and Latinos. In fact, the team did not find a single locality in which federal rent-subsidy housing was fully integrated or in which services and amenities were equal for whites and minority tenants living in separate projects. *See*, Craig Flournoy and George Rodrigue, "Separate and Unequal: Illegal Segregation Pervades Nation's Subsidized Housing," *The Dallas Morning News*, February 10, 1985.

> are usually subject to various adverse conditions not found in the neighborhoods surrounding the housing units in which whites receive the same assistance. These conditions include inferior city-provided facilities and services, little or no new or newer residential housing, large numbers of seriously substandard structures, noxious environmental conditions, substandard or completely absent neighborhood service facilities, high crime rates, inadequate access to job centers, and little or no investment of new capital in the area by public and private entities.[48]

In the context of housing, without vigorous enforcement of the anti-discrimination laws already on the books, the United States will continue to fail to meet the Article 26 guarantee that all persons shall be given "effective protection against discrimination." Instead, segregated housing patterns, and the social and racial inequities they foster, will continue.

Employment Discrimination

In 1991, 27 years after the passage of the employment discrimination provision of the Civil Rights Act of 1964[49], the Urban Institute concluded that

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[48] Elizabeth Julian & Michael Daniel, Separate and Unequal - The Root and Branch of Public Housing Segregation, 23 Clearinghouse Rev. 666 (Oct. 1989) at 667. *See also*, Discrimination in Federal Assisted Programs, Hearings Before the H. Comm. on Hous. & Community Dev., 99th Cong., 2d Sess. (1987), at 22-61.

[49] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides:

> (a) It shall be an unlawful employment practice for an employer -
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

racial discrimination in employment is still widespread in the U.S. According to the Institute's study, which presented "the strongest evidence ever developed on the extent of racial discrimination in hiring," African-Americans were three times as likely as whites to face discrimination when applying for entry-level positions.[50]

United States law prohibiting employment discrimination expanded dramatically during the 1960s, with the passage of Title VII.[51] The Reagan and Bush courts, however, contracted protections against on-the-job discrimination. The Supreme Court's 1988-89 Term was the most destructive, with five significant cases -- *Patterson*, *Wilks*, *Lorance*, *Price-Waterhouse*, and *Wards Cove* -- severely restricting Title VII and 42 U.S.C. §1981 as they had been interpreted in the previous three decades. As a consequence, meaningful civil rights enforcement has been severely undermined.

- *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), significantly narrowed the coverage of Section 1981. Until *Patterson*, the right to "make and enforce contracts" had generally been interpreted to prohibit discrimination in all aspects of contractual relations.[52] In *Patterson*, the

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[50] David Wessel, "Racial Bias Against Black Job Seekers Remains Pervasive, Broad Study Finds," *Wall Street Journal*, May 15, 1991. The researchers sent pairs of young black and white men to apply for 476 entry-level jobs, and in one of every five cases, the black applicant did not get as far as his equally qualified white counterpart. "The black did not get an application form when the white did, or he did not get an interview or job offer....Overall, 15% of the white applicants were offered a job when their black counterpart wasn't, and only 5% of the blacks were offered a job when their white counterpart wasn't. In an additional 13% of the cases, both men were offered the job."

[51] Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, has been another significant source of federal protection against employment discrimination since the 1976 decision in *Runyan v. McCrary*, 427 U.S. 160, interpreting §1981 to apply against discrimination by non-governmental employees. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.

[52] *See*, L.K. Larson, *Civil Rights Act of 1991: Analysis* (Matthew Bender & Co., New York, New York, 1992, to be reprinted as Release 30 of L.K. Larson, *Employment*

Court held that the right to "make" a contract referred only to contract formation, and the right to "enforce" a contract referred only to equal access to legal process in contract matters. Thus, Section 1981 after *Patterson* no longer protected individuals against racial harassment, racially discriminatory termination, or any other discrimination affecting the terms and conditions of the employment contract.

- The 1989 Supreme Court decision in *Martin v. Wilks*, 490 U.S. 755 (1989), broadened the situations in which challenges could be made to affirmative action plans[53]. *Wilks* involved white fire-fighters who had failed despite notice to intervene in earlier employment discrimination proceedings in which consent decrees were entered, but who subsequently sought to challenge employment decisions taken pursuant to those decrees. The Supreme Court in *Wilks* held, contrary to prior precedent, that such non-parties were free to challenge employment decisions mandated by the prior litigation's consent decree, even when their position was effectively represented in the prior litigation, with the result that the finality of consent decrees is impaired, and employers' willingness to enter such decrees is diminished. This case had broad significance, as consent decrees are often used to achieve or progress toward an integrated work force.

- *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900 (1989), narrowed the circumstances in which discriminatory seniority plans could be challenged. In *Lorance*, a group of women plaintiffs brought suit after being demoted by the defendant, claiming that their demotions were wrongful because they resulted from a seniority policy adopted with discriminatory intent by the employer five years earlier. The Supreme Court held that their claims would have been timely only if filed when the seniority policy was first adopted, notwithstanding that the plaintiffs had not yet been demoted at that time and therefore had no ripe claims. The

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Discrimination), at 13.

[53] Affirmative action is a "policy or program for correcting the effects of discrimination in the employment or education of members of certain groups, as women, blacks, etc." Webster's New Universal Unabridged Dictionary 33 (2d ed. 1983).

decision thus insulates from challenge intentionally discriminatory seniority rules, so long as employment decisions based on those rules take place after the time for filing a charge against the adoption of the system has run.

- *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989), made it difficult for employees to establish liability in cases where the employer's motivation for an allegedly discriminatory employment decision was a mixture of legitimate and discriminatory reasons. Prior to *Price-Waterhouse*, the lower courts had been divided over the standard to be applied in such mixed-motive cases. *Price-Waterhouse* resolved those divisions by holding that even where an employer's decision was tainted by discriminatory motives, such an employer can avoid liability by showing, by a preponderance of the evidence, that it would have made the same employment decision in the absence of the illegitimate discriminatory motive. Thus, under *Price-Waterhouse*, intentional discrimination by employers was left unpunished.

- *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), made it more difficult for plaintiffs to prevail in "disparate impact" claims. Prior to the *Wards Cove* decision, a violation of Title VII could be established if a complaining party demonstrated that a particular employment practice had a disparate impact upon a group protected by Title VII, and if the employer failed to demonstrate that the challenged practice was "job-related" for the position in question and consistent with "business necessity."[54]

  In *Wards Cove*, the Court held that the plaintiff must identify each specific employer practice that significantly caused the impact. The Court also retreated from the mandate that the practice had to be "job-related" and of "business necessity," saying that "there is no requirement that the challenged practice be `essential' or `indispensable' to the employer's

[54] This standard had been enunciated eighteen years earlier in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). Additionally, even if the employer demonstrated that the practice was "job related", the plaintiff could still prevail by showing that there was a viable non-discriminatory alternative. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

> business to pass muster." *Wards Cove*, 490 U.S. at 659. Next, the Court declared that the plaintiff maintains the burden of persuasion at all times; whereas prior to *Wards Cove*, the defendant had to demonstrate business justification as an affirmative defense. Lastly, the Court stated that any alternative, non-discriminatory practices asserted by the plaintiff must be equally effective in serving the employer's legitimate business goals as the prior practice, in terms of cost and other burdens.

After pressure from civil rights organizations and two years of intense debate in Congress, the pre-1989 standards relating to employment discrimination were restored and several new protections added by the Civil Rights Act of 1991 (CRA).

Section 1981, as amended by the CRA of 1991, now protects against discrimination in "the making, performance, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contract relationship,"[55] returning the law to its pre-*Patterson* interpretation.

Title VII, as amended by CRA of 1991, restores the law to its pre-*Wilks* state by providing that a judgment or consent decree cannot be challenged by a person who had actual notice of the proposed judgment or decree and had a reasonable opportunity to present objections, or by a person whose interests were adequately represented by someone else who put forth a challenge on the same legal grounds.[56]

The 1991 Act also makes it clear that a violation of Title VII occurs at any one of the following times: when a seniority system is adopted, when the employee becomes subject to the system, or when the employee is injured by the application of the system.[57] This restores the pre-*Lorance* standards.

In mixed-motive cases, the amended Title VII reverses *Price-Waterhouse*, providing that a violation of Title VII is established when discrimination was a motivating factor "even though other factors also motivated the practice."[58] If the employer establishes that it would have made the same

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[55] 42 U.S.C. § 1981(b), as added by CRA of 1991, § 101.

[56] Title VII § 703(n), 42 U.S.C. § 2000-2(n), as added by CRA of 1991, § 108.

[57] Title VII § 706(e)(2), 42 U.S.C. §2000e-5(e)(2), as amended by CRA of 1991, § 112.

[58] Title VII Section 703(m), 42 U.S.C. § 2000e-2(m), as added by CRA of 1991, §

employment decision absent the discriminatory motive, then the plaintiff is entitled to no back pay; however, she may still obtain injunctive and declaratory relief against the illegal discrimination, as well as attorney's fees and costs.[59]

Finally, Title VII, as amended by the 1991 Act, legislatively confirms the legitimacy of disparate impact theory and returns to the defendant the burden of proving that a challenged employment practice that has a disparate impact on a protected group is "job related for the position in question and required by business necessity."[60]

In addition to all of these restorative changes, the 1991 Act allows, for the first time, recovery of compensatory and punitive damages under Title VII (with maximum limits based on a sliding scale) in cases of intentional employment discrimination (but not disparate impact cases), and allows for such claims to be heard by juries.[61]

Since the passage of the CRA of 1991, several key provisions of the statute have been narrowly interpreted, causing concern for civil rights advocates. Of particular concern is the question of the Act's applicability to pending litigation. Most civil rights advocates had expected that the 1991 Act would apply, at a minimum, to all cases pending at the time of its enactment. This "retroactivity" issue has been vigorously fought, leading to a split in the appellate courts and a grant of certiorari by the Supreme Court.[62] The CRA's disparate impact provisions have left a similar host of conflicts. It is unclear how the courts will now interpret:

107(a).

[59] Title VII, § 706(g)(2)(B), 42 U.S.C. §2000e-5(g)(2)(B), as amended by CRA of 1991, § 107.

[60] Title VII, § 703(k) (1) (A) (i), 42 U.S.C. §2000e-2(k) (1) A) (i), as added by CRA of 1991, § 105(a).

[61] CRA of 1991, § 102, codified at 42 U.S.C. § 1981a. Damages and jury trials were available prior to the 1991 Act under §1981, but that statute prohibits only discrimination based on race.

[62] *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992) and *Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992), review granted, 61 USLW 3580 (U.S. Feb. 22, 1993).

(a) the issue of whether an employment policy that causes a disparate impact is "job related" and a "business necessity," (b) the issue of when an alternative, non-discriminatory employment practice must be adopted, and (c) to what degree of particularity the plaintiff must describe the specific employer practice and causation of the impact.

Currently, federal courts are in the process of interpreting the 1991 Act. Future litigation will determine whether these interpretations will serve to enhance, or diminish, the mandate of ICCPR's Article 26 that ". . . the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination. . . ."

Unfortunately, *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S. Ct. 2742, (1993), does not bode well for the future. Even after Congress in 1991 made clear that the Supreme Court had erred in its interpretation of Title VII, the Court again cut back on the statute's protections. *Hicks* held that even where a plaintiff who has presented a prima facie case of discrimination *and* has demonstrated that an employer's proffered non-discriminatory explanation of its conduct is false, the plaintiff will not prevail unless she can further prove that discrimination was the true motive. This decision dealt a blow to the accepted method of proof by circumstantial evidence that is used in the vast majority of intentional discrimination cases, and rewards employers who lie in court.

Voting

Article 25 of the ICCPR provides many of the protections against discrimination in voting and governance that the U.S. Constitution and statutes provide. Recently, however, the U.S. Supreme Court has weakened protective laws related to voting, and as a consequence, has failed to fulfill both domestic and international mandates for equality of access, freedom, and fairness in elections and governance.

Since the birth of the nation, various exclusionary measures have been undertaken to disenfranchise citizens of the United States who were not white, male and property-owners. Statutory prohibitions explicitly barred African-Americans from voting until passage in 1870 of the Fifteenth Amendment to the United States Constitution, and it was not until the passage of the Nineteenth Amendment in 1920 that women obtained the franchise.

Even after the legislative proclamation that "the right of citizens . . . to vote should not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude", there was nearly a

century of systematic resistance to the Fifteenth Amendment, including numerous de jure and de facto measures that effectively denied African-Americans the right to register and vote. These measures included physical violence, economic intimidation, literacy tests and poll taxes.[63]

Indeed, over the course of the twentieth century, voting discrimination in the U.S. has been a history of "unremitting and ingenious defiance of the Constitution."[64] U.S. Supreme Court cases prior to 1965 illustrate the variety and persistence of mechanisms used to deny minorities the right to vote; for each discriminatory voting scheme found to be unconstitutional, it appears, a new device was invented to take its place.[65] In response, the U.S. Congress enacted the Voting Rights Act of 1965,[66] which was designed to eliminate racial discrimination in voting by creating stringent new remedies where voting discrimination persists on a pervasive scale and strengthening existing remedies for pockets of voting discrimination elsewhere in the country.[67]

In 1975, the Voting Rights Act was amended to provide protections to those who are "member[s] of a language minority group."[68] Congress found that language minorities -- that is, Native Americans, Asian Americans, Native

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[63] *See* 115 Cong. Rec. 38509 (1969) (statement of Rep. Leggett).

[64] *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

[65] As indicated by the Supreme Court in *South Carolina v. Katzenbach*, 383 U.S. at 311, and n.11, grandfather clauses were invalidated in *Guinn v. United States*, 238 U.S. 347 (1915) and *Myers v. Anderson*, 238 U.S. 368 (1915). Procedural hurdles were invalidated in *Lane v. Wilson*, 307 U.S. 268 (1939). Discriminatory application of voting tests and qualifications was condemned in *Schnell v. Davis*, 336 U.S. 933 (1949). *See also*, *Alabama v. United States*, 371 U.S. 37 (1962); *Louisiana v. United States*, 380 U.S. 145 (1965). The white primary was outlawed in *Smith v. Allwright*, 321 U.S. 649 (1944). Improper challenges to voting status were nullified in *United States v. Thomas*, 362 U.S. 58 (1960). Racial gerrymandering was forbidden by *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

[66] 42 U.S.C. Section 1973.

[67] *Katzenbach*, 383 U.S. at 308.

[68] S. Rep. No. 97-417, 97th Cong., 2nd Sess. 9. [Section 4(f)(2)].

Alaskans and those of Spanish heritage -- were victims of voting discrimination that is "pervasive and national in scope."[69] This discrimination, Congress noted, resulted not only from the fact that language minorities "are from environments in which the dominant language is other than English," but also because of their status as ethnic minorities. Moreover, the statute indicates that the exclusion of language minorities from equal participation in the political process, like the exclusion of African-Americans, has been "aggravated by acts of physical, economic and political intimidation."[70]

Over time, the Voting Rights Act removed many disenfranchising measures, and the number of minority registered voters increased dramatically. But some jurisdictions created new discriminatory schemes to dilute or cancel the impact of the new minority vote. They made elective posts appointive; created racially gerrymandered election boundaries; instituted majority runoffs to prevent minority victories under prior plurality systems; and substituted at-large elections for elections by single-member districts.[71] Further, in response to the election of minority-sponsored officials, recalcitrant local officials have changed governmental rules to prevent minority-elected officials from participating equally in the governing process by extending the terms of offices held by white incumbents, abolishing offices sought by African-American candidates, making elective officers appointive in predominantly black counties,[72] and limiting or shifting to other bodies the responsibilities of offices held by African-Americans.[73]

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[69] 42 U.S.C. 1973 b(4)(f)(1).

[70] *Id.*

[71] *See* 115 Cong. Rec 38509 (1969) (statement of Rep. Leggett) Extension of the Voting Rights Act, 1975: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong. 1st Sess. 645-648 (1975) (statement of Armand Derfner).

[72] For an early documentation of these tactics see 116 Cong. Rec. 6357 (1970) (statement of Sen. Bayh) and 115 Cong. Rec. 38509 (1969) (statement of Rep. Leggett).

[73] *See Robinson v. Alabama State Department of Educationy*, 652 F. Supp. 484 (M.D. Ala. 1987) (transferring control of public schools after passage of the Voting Rights Acts from the Board of Education elected by a 65 percent African American county to a City Council elected by a 52 percent African American city); *Hardy v. Wallace*, 603 F. Supp. 174

Recent Supreme Court rulings have made it more difficult for every citizen ". . . to have the rights and the opportunity . . . (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage . . .; [and] (c) To have access, on general terms of equality, to public service in his country." The International Covenant on Civil and Political Rights, Article 25.

One such case is *Shaw v. Reno*,[74] which involved a challenge by five white voters to the creation of a majority black congressional district in the state of North Carolina. This district had been created in response to a Department of Justice Section 5 objection[75] to North Carolina's congressional redistricting plan.[76] The plaintiffs claimed that by intentionally creating this irregularly-shaped majority African-American district, the state had violated their "constitutional right to participate in a `color-blind' electoral process."[77] In *United Jewish Organizations of Williamsburgh v. Carey*,[78] the Supreme Court had held that race-conscious redistricting did not violate the constitutional rights of white voters unless the redistricting plan was adopted with the intent to, or had the effect of, unduly diluting white voting strength.[79] Despite this precedent, the Court in *Shaw* held that

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(N.D. Ala. 1985) (shifting authority of county legislative delegation after the election of two African Americans).

[74] 61 U.S.L.W. 4818 (U.S. June 28, 1993).

[75] Section 5 is the portion of the Voting Rights Act that provides for Department of Justice supervision of covered jurisdictions -- those jurisdictions that have been found to have a history of particularly egregious voting discrimination coupled with depressed minority voter registration and participation rates. Section 5 requires the Attorney General's approval of any change in voting practices or procedures before such changes can be implemented. 42 U.S.C. §1973c.

[76] *Shaw* at 4819.

[77] *Id.* at 4821.

[78] 430 U.S. 144 (1977).

[79] *Id.* 12 at 167.

a district that is so irregularly shaped that it "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race" may be found unconstitutional.[80] It remanded the case to the lower court to allow the state to provide a reason, other than race, for the creation of the district.[81] If the state cannot provide such a reason, the state can save the district only by showing that the creation of the district is narrowly tailored to further a "compelling" governmental interest.[82]

African-Americans make up 20 percent of the voting age population in North Carolina,[83] but until the state created this challenged districting plan, it had sent no African-American representative to the U.S. Congress since Reconstruction.[84] Thus, by re-writing the rules of the game for white claimants who challenge the creation of majority black districts, the Court elevates white citizens' "right to color-blindness" over the right of black voters to be meaningfully included in the political process.

In *Presley v. Etowah County*[85] and *Rojas v. Victoria Independent School District,*[86] the Supreme Court ratified decrees of majority white local governing bodies that changed the authority or operating rules of government in a manner that excluded newly elected minority officials from equal participation in the governing process. In *Presley*, the white majority stripped the first African-American county commissioner elected since Reconstruction of his authority to allocate and spend the budget. In *Rojas*, following the election of the first Latina member, the county school board voted to change the procedural rules to give the chair of the school board discretion to require two votes, rather than one, to place an item on the

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[80] *Shaw* at 4824.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 4819.

[84] *See Id.* at 4827 (White, J., dissenting).

[85] 117 L. Ed. 2d. 51 (1992).

[86] Civ. Act. No. V-87-16 (S.D. TX, Mar. 29, 1988), *aff'd,* 490 U.S. 1001 (1989).

agenda for discussion at school board meetings. This change effectively foreclosed the Latina school board member from having the issues of her constituents raised at school board meetings. In both cases, in an unprecedented narrowing of the scope of the statute, the Supreme Court stated that these actions were not violative of Section 5 of the Voting Rights Act.[87]

Article 25 of the ICCPR provides, among other things, that every citizen shall have the right and opportunity "to take part in the conduct of public affairs, directly or through freely chosen representatives", and "to have access, on general terms of equality, to public service". The Supreme Court's holdings in *Presley* and *Rojas* are in contravention of these mandates, and the discriminatory tactics used in those instances will likely increase as a result of the Court's rulings in those cases. Jurisdictions covered by the Voting Rights Act can be expected to try to do indirectly what they could not do directly: deny or abridge the power of the minority vote. To allow minorities the right to vote, yet deny them the equal right to govern, is to betray the broad vision of political equality contained not only in that statute, but also in Article 25 of the ICCPR.

Recommendations

1) Use federal grants-in-aid programs to require that states equalize educational spending among their districts and schools to ensure adequate education for all school children, regardless of race, residence or economic status.

2) Direct the Department of Education to adopt a policy of vigorous enforcement of the anti-discrimination requirements of the Civil Rights Act of 1964, Title VI, and its regulations.

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[87] Prior to *Presley*, the Voting Rights Act had been interpreted by the Supreme Court to cover *any* changes that affected "the power of a citizen's vote." *City of Lockhart v. United States*, 460 U.S. 125 (1983); *see also*, *Allen v. State Board of Elections*, 393 U.S. 544 (1969). In *City of Lockhart*, the Supreme Court had held that a change that expanded an elected council and thus reduced the power of an individual member of the council required preclearance by the Department of Justice. In addition, on several occasions, the Department of Justice had interpreted Section 5 of the Act to include changes in decisionmaking authority. *Presley*, at 69 (Stevens, J., dissenting). And, in its amicus brief to the Supreme Court in *Presley*, the Department urged the Court to hold that the challenged reallocation of authority was covered under Section 5.

3) Direct the Department of Justice to adopt a policy of aggressive enforcement of fair housing and fair lending laws with regard to housing financing.

4) Direct the Department of Housing and Urban Development and the Federal Housing Authority to take affirmative steps to end illegal segregation in federally subsidized housing.

5) Direct the Equal Employment Opportunity Commission to adopt a policy of forceful and effective enforcement of the anti-discrimination provisions provided in Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991.

6) Direct the Department of Justice to fully and effectively enforce the Voting Rights Act on behalf of those specially protected by the statute -- African-Americans, Native Americans, Asian-Americans, Native Alaskans and those of Spanish heritage.

Sex Discrimination

Articles 2 and 26 of the ICCPR explicitly provide broad protection against discrimination on the basis of sex. Article 2 mandates equal protection of the rights set forth in the Covenant, while Article 26 directs State Parties to provide equal protection of the law and guarantee "*equal and effective* protection against discrimination on any ground" (emphasis added). The United States, however, fails to provide women with full and equal protection from discrimination under the law.

The failings are particularly apparent in the areas of employment, education and health care. Women face systemic and entrenched discrimination in the workplace, including occupational segregation and significantly lower rates of pay -- on average, women still earn one-third less than similarly-educated men. Title IX's mandate for equal educational opportunities is not being met by U.S. schools and universities, which continue to allot more attention and resources to males in both academics and athletics. The government is also responsible for discrimination against women in health care and medical research.

United States law and practice violate Article 26's command of equal protection of the law and equal and effective protection against discrimination in a number of contexts. Under the U.S. Constitution, as interpreted by the Supreme Court, discrimination against women merits a lower degree of scrutiny than discrimination against other groups. States are permitted to enact laws that discriminate against women so long as such legislation meets an important government purpose. In contrast, states may not discriminate on the basis of race unless the legislation meets a compelling state interest. Women are also denied equal protection under U.S. statutory law: many U.S. statutes, which proscribe discrimination on a variety of grounds, do not prohibit discrimination on the basis of sex. As a result, public accommodations and certain educational institutions may discriminate against women, to the extent such behavior is not proscribed by state law. Women who have been discriminated against also do not enjoy the same remedial relief under federal law as that available to victims of racial discrimination. While employment discrimination on the basis of sex is prohibited, women who face such discrimination, including in the payment of wages and on the basis of pregnancy, lack an effective remedy. The burden of proof, costs of litigation and a cap on damage awards for intentional discrimination all work to

hamper a woman's ability to challenge discrimination and receive compensation. Further, girls and women continue to face discrimination at all levels of public education, both in terms of curriculum and resources. Pregnant teens are particularly at risk of discrimination, in violation of Title IX of the Education Amendments of 1972. Finally, women are not protected from discrimination in health care. The Food and Drug Administration continues to approve drugs for use by women that it does not test on women. Until recently, many women suffering from AIDS-induced ailments were denied Social Security and Medicaid because their conditions, specific to women, were not included on the Social Security Administration's list of AIDS-related disabilities and conditions.

The U.S. Constitution does not explicitly bar discrimination on the basis of sex. Rather, protection against discriminatory legislation has been read into the Constitution under the Fourteenth Amendment's equal protection clause.[1] The Supreme Court first relied on the Fourteenth Amendment to extend equal protection to women in 1971 in *Reed v. Reed*[2]. In *Reed*, the Court overturned an Idaho statute that required that males be preferred to females, if two persons were otherwise equally situated, to administer a decedent's estate. The Court stated that such a mandatory preference to members of one sex over members of the other was "the very kind of arbitrary legislative choice forbidden by [equal protection.]"[3]

The Fourteenth Amendment, however, has been interpreted to provide women with *less* protection under the Constitution than is extended to some other groups or in specific contexts. As interpreted by the Supreme Court, laws which discriminate on the basis of sex are permissible if substantially related to an important government purpose. In contrast, the government may not discriminate on the basis of race or interfere with a person's right to travel interstate, vote or even have access to a court in order to obtain a divorce, unless the law is narrowly tailored to meet a *compelling* state interest, a standard rarely met upon judicial

[1] The Fourteenth Amendment, in its relevant section, provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."

[2] 404 U.S. 71 (1971).

[3] 404 U.S. at 76.

review.[4]

Women also receive limited protection against discrimination, both from public and private actors, under U.S. statutory law. A number of federal statues bar discrimination on the basis of race and other grounds but do *not* prohibit discrimination on the basis of sex. The statutes discussed below illustrate the continued unequal protection of women under U.S. federal law; the list is not exhaustive.

First, Title II of the Civil Rights Act of 1964 (Title II) proscribes discrimination in public accomodations on the basis of race, religion, color and national origin, but not sex. The statute is directed at private enterprises and establishments which are open to the general public, including buses, trains, hotels and restaurants. While some states and cities have enacted non-discrimination provisions, women are not provided the protection from discrimination granted to others on a uniform, nationwide basis, since federal law does not prevent these private businesses from discriminating against women. A significant number of states and cities have not addressed the gap and permit continued discrimination against women.[5]

Second, Title VI of the Civil Rights Act of 1964 (Title VI) prohibits discrimination on the basis of race, color or national origin under any program or activity receiving federal grants.[6] It does not prohibit discrimination on the basis of sex. While many states again close the loophole left by federal law, women, particularly pregnant women, continue to be discriminated against by private and public agencies receiving federal funds. For example, some drug rehabilitation programs refuse to treat pregnant women, and emergency rooms receiving federal funds have turned away pregnant women in labor, forcing them to deliver elsewhere. In contrast, such programs may not refuse treatment on the basis of race or national origin.

Third, Title IX of the Education Amendments of 1972 (Title IX)

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[4] *Boddie v. Connecticut*, 401 U.S. 371 (1971) (divorce); *Loving v. Virginia*, 388 U.S. 1 (1967) (racial discrimination); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (interstate travel); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (voting).

[5] "In Some Cities, Women Still Battle Barriers to Membership in All-Male Clubs", *New York Times*, Dec. 8, 1991.

[6] Title VI, Sec. 601, 42 U.S.C. 2000d (1964).

mandates equal educational opportunities for all children, without regard to sex, and forbids discrimination in public and private schools receiving federal money. However, Title IX does not prohibit discriminatory admissions practices in preschool, elementary and secondary schools, whether private or public; private undergraduate colleges; public undergraduate colleges that have always been single-sex institutions; and military schools.[7] As such, Title IX does not prevent these schools from excluding women completely, setting up a quota system to limit their enrollment, or demanding that women meet higher admissions standards than men. Discriminatory admissions policies are prohibited in public and private vocational schools, public undergraduate colleges which are already integrated, and public and private graduate and professional schools.

Finally, the Hate Crimes Statistics Act[8] requires the Department of Justice to maintain statistics on crimes motivated by bias, such as religious or racial, but not crimes motivated by bias against women. Statistics on bias crimes against women, as a result, are largely unavailable, and few states require their own agencies to maintain such records.

Employment

Title VII

Title VII of the Civil Rights Act of 1964 makes discrimination on the basis of sex illegal. Under Title VII, employers may not discriminate against women when hiring or firing employees or with respect to compensation, terms, conditions or privileges of employment.[9] In addition, employers may not limit, segregate or classify employees or applicants for employment in any manner which might deprive a women of employment opportunities or adversely affect their

[7] Military schools are defined as schools training individuals for the U.S. military services or the merchant marines. While women were admitted to military academies by amendment to the Defense Appropriation Authorization Act of 1976, the number of women has been severely restricted "consistent with the needs of the services." 10 U.S.C. Sec. 4342 (Supp. V. 1975).

[8] 28 U.S.C. §534.

[9] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1).

status as employees.[10] Title VII also bars discrimination on the basis of race; the holdings in race discrimination cases litigated under Title VII therefore apply to sex discrimination cases as well, and vice versa.[11]

In *Lorance v. AT&T Technologies*,[12] the Supreme Court held that the operation of a facially-nondiscriminatory seniority system having a disparate impact on women and men is not unlawful unless the female employees proved the discriminatory intent of the employer. The women, however, were not even permitted to challenge the seniority system, because it was enacted five years earlier and their time for filing the suit had expired. The Court reached this decision even though the women were not adversely affected at the time the seniority system was enacted and did not have ripe claims which could be litigated. In *Price Waterhouse v. Hopkins,*[13] the Supreme Court concluded that an employer who unlawfully considered a woman's gender in making a hiring or firing decision can avoid liability if it proves by a preponderance of the evidence that it would have made the same decision had it not taken her gender into account.

The Civil Rights Restoration Act of 1991 (CRA), which amended Title VII, superseded the Supreme Court's narrow interpretation in the cases above and other cases falling under Title VII and returned the burden of proof to the defendant in disparate impact cases. Despite these legislative improvements, however, the courts have continued to read Title VII narrowly. Earlier this year, despite the CRA's clear readjustment of the burden of proof, the Supreme Court held that where a plaintiff has demonstrated a prima facie case of disparate treatment or intentional discrimination, and her employer has forwarded a non-discriminatory reason for her dismissal, she will not win her suit unless *she* proves that the discrimination was the employer's true motive.[14]

Occupational Segregation and Pay Equity

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[10] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(2).

[11] For a full review of the relevant caselaw under Title VII, see chapter one.

[12] 490 U.S. 900 (1989). For a more complete discussion of the case, see chapter one.

[13] 490 U.S. 228 (1989).

[14] *St.Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993).

Equal employment opportunities for women, a stated objective of Title VII, continues to remain illusory for most women. Over thirty years after the enactment of Title VII, national statistics show that entrenched patterns of sex discrimination in employment continue to hamper women workers. While women comprise forty-five percent of the nation's workforce[15], they are heavily concentrated in a narrow range of occupations traditionally categorized as "women's work." Sixty percent of women who work outside the home are working in clerical, service or professional positions. More than sixty percent of all professional women are employed in female-intensive fields, such as school teaching and nursing.[16] In 1988, women constituted 99% of all secretaries, 99% of all dental assistants, 97% of all child-care workers, 95% of all nurses and 90% of telephone operators.[17] The same statistics revealed that men were 99% of all auto mechanics and carpenters, 98% of all firefighters, 97% of all pilots and 95% of all welders.[18] Women, with some exceptions, also tend to be excluded from upper-level, white collar positions in administration and business management. Occupational segregation among women of color is even more dramatic. Forty-one percent of African-American women working in the service industries are employed as chambermaids, welfare service aides, cleaners or nurse's aides.[19] Latinas are disproportionately represented in low-level factory jobs, many of which

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[15] H. Fullerton, Jr. "New Labor Force Projections Spanning 1988 to 2000," Monthly Labor Review 112 (November 1989): 2, Table 1.

[16] C. Taeuber, ed. Statistical Handbook on Women in America (Phoenix: Oryx Press, 1991), p. 128, Table B5-1.

[17] *The American Woman, 1990-1991: A Status Report*, edited by Sara E. Rix for the Women's Research and Education Institute (W.W. Norton & Co., New York, 1990), Table 19. Source: U.S. Bureau of Labor Statistics, January 1976, Table 2 and January 1989, Table 22.

[18] *Id*.

[19] J. Malveaux, "The Economic Status of Black Families," in H. McAdoo, ed. Black Families (Newbury Park: Sage Publications, 1988).

are in industries hardest hit by the ongoing contraction in the economy.[20]

Continued occupational segregation has also lead to sex-based wage disparities, another form of discrimination against women. Where women and men share the same educational background and work a comparable full-time, year-round schedule, women's wages are lower than men's. Women with eight or less years of education earn only 66% percent of the wages of their male counterparts, while women with five or more years of college earn only 69% of their male counterparts' earnings. Women also earn less than men *even where they hold identical jobs*. U.S. Department of Commerce Statistics reveal that female lawyers, university professors, secretaries and machine operators earn less than their male colleagues in the same position.[21]

Another difficult hurdle facing many working women is the ability to receive a salary commensurate with the skills and experience required for a position. Many employers under-pay positions traditionally filled by women while paying higher salaries for positions filled by men, even where the positions traditionally filled by women are of equal or greater value to the employer. The Supreme Court concluded in *County of Washington v. Gunther*[22], that Title VII reached cases of wage disparities even when the jobs are not identical. The plaintiffs in *Gunther* were female prison guards segregated into different positions than male guards. An evaluation conducted by the county of all guard jobs showed that women should be paid approximately 95% of the male rate; the women, who were paid only 70% of the rate, successfully argued that the failure to pay them full value was based on their sex.

Unfortunately, *Gunther* has had little impact on the problem of wage disparities. Two appellate courts, which reviewed similar though not identical wage disparity lawsuits, refused to apply *Gunther*. In *American Nurses*

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[20] M. Escutia and M. Prieto, Hispanics in the Workforce, Part II: Hispanic Women (Washington D.C.: National Council of La Raza, Policy Analysis Center, Office of Research, Advocacy, and Legislation, 1988).

[21] U.S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States: 1990, 100th ed. (Washington D.C.: U.S. Government Printing Office, 1990), p.409, Table 671.

[22] 452 U.S. 161 (1981).

Association v. Illinois[23], nurses associations brought a sex discrimination suit against the state of Illinois, charging that Illinois paid workers in male-dominated job classifications a higher wage than nurses, a job classification dominated by women, and this wage differential was not justified by any difference in relative worth, according to a comparable worth study that had recently been completed. The Seventh Circuit determined that a case of sex discrimination based upon a employer's payment of what it termed "market wages" is not actionable under Title VII, even if the employer was informed that the disparity in wages contradicts the principle of comparable worth so as to disadvantage women. The Ninth Circuit, in *AFSCME v. Washington*[24], reached a similar conclusion, holding that an employer's decision to base compensation on the "competitive market" did not discriminate against women.

Discrimination on the basis of pregnancy2

The Supreme Court has concluded that discrimination against women on the basis of pregnancy does not violate the Constitution. In two separate decisions, the Supreme Court upheld health care schemes which failed to provide health benefits for pregnant women, including paid leave for pregnant women and new mothers under a disability plan. In *Geduldig v. Aiello*[25], the Supreme Court found that health plans which excluded pregnancy did not violate the equal protection clause since the plan did not exclude anyone from coverage based on gender. The Court stated that it found no specific correlation between pregnancy and gender. Rather, it determined that the program merely:

> divide[d] potential recipients into two groups -- pregnant woman and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."[26]

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[23] 783 F.2d 716 (7th Cir. 1986).

[24] 770 F.2d 1401 (9th Cir. 1985).

[25] 417 U.S. 484 (1974).

[26] 417 U.S. 483, 496-7 n.20.

This analysis was extended to Title VII in *General Electric v. Gilbert*[27], even though the Equal Employment Opportunity Commission guidelines and all the Circuit Courts that addressed the question had interpreted Title VII to mandate coverage of pregnancy.

In response to the Court's narrow interpretation of equal protection for women, Congress passed the Pregnancy Discrimination Act (PDA) in 1978 to amend Title VII. The Act expanded the definition of discrimination against women to proscribe discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."[28] As such, pregnant workers who are able to work must be treated like other able workers, and women disabled by childbirth or related medical conditions must be treated no different than other disabled workers. The law does not require employers to provide any special benefits to pregnant workers. Subsequent to this decision, the U.S. Supreme Court upheld state provisions providing broader coverage and protections for women than those required by the PDA.[29]

The problem in this area is not so much the stated principles, but how the law has been applied. Despite PDA's clear mandate, women continue to be dismissed, demoted or otherwise discriminated against when they become pregnant or when they return from disability leave. Employers in these cases proffer others reasons for the discriminatory treatment, such as down-sizing or job-performance, to conceal their true motive.

Women face a number of hurdles in challenging such dismissals. First, if a woman elects to sue her former employer, in most cases she must rely on her own financial resources to hire an attorney.[30] The financial costs of a lawsuit, together with the costs associated with a new child and many other financial considerations,

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[27] 429 U.S. 125 (1976).

[28] 42 U.S.C. §2000(e)(k) (1978).

[29] *Calfornia Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

[30] To enforce rights under Title VII, one must first file a complaint and fill out a Charge of Discrimination form with the Equal Employment Opportunity Commission (EEOC). The EEOC then launches an investigation, which results in a Letter of Determination, and may decide to sue on the complainant's behalf. In most cases, the complainant retains the right to sue on her own behalf even if the EEOC does not proceed with the case.

are impossible for many women, and they are forced either to drop the lawsuit or not sue at all. Second, should a woman sue, she must demonstrate that the employer proffered a false reason for her dismissal and show that her pregnancy was the true motive. Women who take disability leave either preceding or following childbirth must often show that they were treated worse than employees with other disabilities. Given these obstacles, discrimination against women on the basis of pregnancy often goes unchallenged.

The Family Medical Leave Act signed by President Clinton earlier this year was designed to ameliorate some of the problems facing both women and men who need time off from work. The law, which went into effect in July 1993, provides a period of time for employees to take an *unpaid* leave of absence in a number of circumstances, such as following childbirth, the adoption of a child or in case of a family member's illness. The Department of Labor recently issued regulations under the law; it is still too early to assess the impact of the law on women.

Damages for intentional discrimination

Fewer remedies have been available to victims of sex discrimination than those available to victims of race discrimination. The Civil Rights Act of 1866, known as "Section 1981,"[31] provides broad remedial relief to victims of intentional race discrimination, including the right to receive compensatory damages beyond back pay, punitive damages, and the right to a trial by jury. The existence of such a mechanism has been an important incentive for employers to obey the law, since they otherwise risk incurring serious financial damages. Until very recently, no such mechanism existed for victims of intentional sex discrimination; employers, therefore, had less incentive to obey provisions prohibiting sex discrimination.

The Civil Rights Act of 1991 (CRA) introduced the right to trial by jury and damages for discrimination on the basis of sex. Prior to the CRA, a woman could receive only injunctive relief from discrimination, which meant that she needed to remain in her job while her suit was pending and could not receive punitive damages or compensation for pain and suffering to cover possible medical costs incurred as a result of the discrimination. While the Act addressed a needed remedial problem for victims of sex discrimination, it continues the general trend of discrimination against women. The CRA restricts the amount of damages a woman

[31] 42 U.S.C. §1981.

may receive in these cases, based on the number of employees employed by the defendant. No such cap exists under Section 1981 for victims of intentional racial discrimination or discrimination on the basis of national origin.

Education

As mentioned above, Congress enacted Title IX in 1972 in an effort to ensure that equal educational opportunities were not denied on the basis of sex. Congressional reaffirmed its support for gender equality in 1987 when it passed the Civil Rights Restoration Act to reverse a 1984 Supreme Court ruling which limited the scope of Title IX to reach only particular federally funded programs. As interpreted, Title IX provides a private right of action for persons harmed by a violation of the statute,[32] and plaintiffs may sue for damages in cases of intentional discrimination, such as sexual harassment and other forms of sex discrimination.[33]

Despite these broad legal protections, women and girls continue to face unequal educational opportunities and discrimination in the classroom and in the allocation of resources. A 1993 report, *How Schools Shortchange Girls*, compiled by the American Association of University Women (AAUW), found that "girls are not receiving the same quality, or even the same quantity education as their brothers."[34] From preschool through college, girls do not receive their fair share of attention or resources; they are passively, if not actively, discouraged from pursuing courses of study in math and science; and they are steered away from vocational education in better paying, traditionally male trades and occupations. School curriculums continue to be biased against women and girls, though some changes have been noted in recent years. Textbooks include little material on women, and the material included rarely provides a balanced and dual treatment of men and women, focusing instead on women as the exception, such as famous women or women in protest movements.[35] In addition, "the lists of most frequently required books and authors are dominated by white males, with little change in

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[32] *Cannon v. University of Chicago*, 441 U.S. 677 (1978).

[33] *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992).

[34] *The AAUW Report: How Schools Shortchange Girls*, at p.*v.* (1992).

[35] *Id*. at 62.

overall balance from similar lists 25 or 80 years ago."[36]

Discrimination also occurs against pregnant teenagers. Teen pregnancy is a serious issue in U.S. schools: in 1988, just under one-half million babies were born to women under the age of twenty,[37] and teen pregnancy and parenting is the leading cause of school drop-outs among young women. The Center for Disease Control found that only "54% of young mothers aged eighteen and nineteen - the traditional age for high school completion - had completed high school education in 1988."[38] A 1987 survey of schools across the country revealed that seventy-five percent of schools violate Title IX in some manner in their treatment of pregnant and parenting students.[39] While most schools halted blatant discrimination against pregnant teenagers following the enactment of Title IX, subtle discrimination in violation of the statute continues. Pregnant teenagers are often denied access to extra-curricular activities, such as cheerleading and the honor society. In some school districts, pregnant teenagers and female teen parents are pressured to attend special schools which offer fewer options and poorer resources, both in terms of curriculum and activities, in violation of Title IX's clear mandate of school equality. While attendance at these schools is voluntary, girls are often induced to attend since programs designed to meet their needs are often offered only at the special schools. Schools also generally fail to accomodate the needs of pregnant teens in the same or similar manner as they treat students with medical disabilities, by providing small items, such as extra time to walk between classes or a larger desk. A number of studies have repeatedly documented that the effect of this sort of discrimination, and the failure of U.S. schools to address the issue of teen pregnancy in a realistic manner, has had a devastating effect.[40]

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[36] *Id*.

[37] *Id.* at 37.

[38] *Id*. at 41.

[39] Nash and Dunkle, *The Need for a Warming Trend* 3 (May 1989).

[40] *See, e.g.,* National Collaboration for Youth, *Making the Grade: A Report Card on American Youth-Participant's Workbook* II-65 (1989); Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981); and, Marx, et al, *Childcare for the Children of Adolescent Parents: Findings from a National; Survey and Case Studies* 3 (Working Paper No. 184, Wellesley College Center for Research on Women, 1989).

Girls and women also face pervasive and persistent discrimination in athletics, a major source of scholarship money and an opportunity to develop important leadership skills, self-esteem and physical health. The participation opportunities, scholarships, equipment and other support are disproportionately lower for female athletes in post-secondary athletics.[41] While women constitute over half of all enrolled students in undergraduate institutions, women comprise only thirty percent of all college athletes. Female athletes receive less than one in three of all athletic scholarship dollars.[42] The allocation of non-scholarship support is even less equitable: some schools provide only one in five operating dollars to female athletes and only seventeen percent of recruiting dollars.[43] Some post-secondary schools also refuse to create varsity athletic teams for women in sports such as ice hockey, basketball and gymnastics, despite a demonstrated interest by women and disproportionate opportunities for men. As a result, many qualified young women are denied the opportunity to participate in competitive varsity athletics and/or receive athletic scholarships. Finally, women athletes are often relegated inferior equipment and supplies, receive less favorable competition and practice times, are allocated less favorable modes of travel and travel accomodation, and their coaches are paid less than coaches of male teams.[44]

Health

The United States has no law to protect women from discrimination in health care. In the U.S., women continue to face an entrenched pattern of discrimination in the distribution of health care resources, including funds to research causes of medical conditions specific to women, and in the definition of diseases. In addition, women are routinely excluded from broad-based studies, and

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[41] Testimony of Ellen Vargyas, Senior Counsel for Education and Employment, the National Women's Law Center, Before the House of Representatives, Committee on Energy and Commerce, Subcommittee on Commerce, Consumer Protection and Competitiveness, April 9, 1992, *citing* NCAA Gender-Equity Survey.

[42] *Id*.

[43] *Id*.

[44] *Id*.

clinical drug trials.

First, according to a 1990 General Accounting Office study, women are frequently excluded from clinical drug trials. These trials test drugs prior to their approval by the Food and Drug Administration (FDA) and release for use by both women and men. The FDA excludes women from most "Phase 1" trials that initially assess a drug's safety and dose "because of concerns of causing birth defects."[45] In practice, women are often excluded at later drug-testing phases as well. As a result, drugs are often approved by the FDA, for use by both men and women, which have never been tested on women and without reliable, statistical information on possible sex-related effects. Women, therefore, have been and continue to be prescribed drugs where gender-related side effects are unknown, including the effect of the drug on a woman's reproductive system or the drug's interaction with medication specific to women such as birth control pills. The underrepresentation and exclusion of women from such studies has resulted in negative effects of drug treatments for women, and gender-related effects of prescription drugs have been reported for a broad range of drugs and drug types, including drugs as common as insulin or anti-depressants, such as lithium.[46] Furthermore, the failure to grant women access to drug trials deprives women of access to potentially beneficial, albeit experimental, drug treatments which are available to men with similar medical conditions.

Second, women who are HIV-positive face discrimination in a number of areas. The National Institute of Health conditions the participation of HIV-positive women of reproductive age in experimental drug trials. To participate, such women must submit proof that they are using a "reliable" birth control method, which often means sterilization. No similar condition exists for men. Next, many female-specific symptoms and conditions induced by AIDS were until recently excluded from the Social Security Administration's (SSA) list of AIDS-related disabilities and conditions. Following years of litigation, the list was expanded in July 1993 to include many female-specific "opportunistic" AIDS-related ailments, such as cervical cancer. Until this list was expanded, women who suffered from these conditions could not get the treatment and benefits, such as Medicaid and Social

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[45] *Inquiry Sought on Drug Tests That Exclude Women*, *The New York Times*, Feb. 28, 1991.

[46] Forging a Women's Health Research Agenda (Symposia sponsored by the National Women's Health Resource Center), Clinical Pharmacology Panel Report.

Security, available to other AIDS sufferers. (Medicaid and Social Security provide AIDS sufferers with health care coverage and a disability stipend for living expenses, including food.) The Center for Disease Control also expanded its list of AIDS-related conditions in 1993 to include many female-specific illnesses. This list is used to determine where funds will be devoted for AIDS-related research; until its expansion, little if any money was earmarked for illnesses suffered only by women.

Third, women of all ages have been either excluded or underrepresented in federally-funded studies, clinical trials and community demonstration projects examining diseases related to the heart. A 1991 study found that men are twice as likely as women to receive newer, life-saving treatments for heart attacks.[47] This discriminatory practice occurs even though diseases of the heart are the leading cause of death among women in the United States and account for twenty-eight percent of all deaths of women.[48] Women constitute approximately 48% of the 500,000 Americans who die of heart attacks each year. Despite these statistics, the majority of research and resources have been dedicated to studying conditions, such as coronary heart disease, in men. At present, gender-specific conditions or practices, such as the use of oral contraceptives, hysterectomies, menopause and the use of hormones following menopause, which may contribute to heart disease, remain unstudied. In addition, the effect of smoking and diet has been studied in men but little, if any, information is available on their impact on women. The few clinical trials and community demonstration projects which have included women are of little assistance, and the statistics flawed, since women were either not studied at each stage of the process or an adequate number of women were not included to reach accurate conclusions as to risk factors or determinants of change.[49]

Recommendations

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[47] *Study Finds a Gender Gap in the Treatment of Heart Attacks*, *The New York Times*, Nov. 13, 1991. The study was conducted by researchers from the University of Washington and reported at a meeting of the American Heart Association.

[48] *Forging a Woman's Helath Research Agenda, supra* note 46. at Cardiovascular Panel Report.

[49] *Id.* at 4.

1) Urge Congress to enact legislation on behalf of women that would ensure wage comparability, pension security, meaningful access to health benefits, protection for part-time workers and education and training to ensure women's access to traditional male occupations.

2) Urge Congress to enact legislation that provides increased services to pregnant and childbearing teens, to ensure their equal access to education, and vigorously enforce the existing provisions of Title IX.

3) Ensure that any comprehensive program of health care reform adequately protects the health concerns of women; in particular, support passage of the Women's Health Equity Act, a series of legislative proposals that address gender-related issues in the research and delivery of health care and prevention services.

4) Urge Congress to enact legislation amending Title II and Title VI to forbid discrimination on the basis of sex.

Language Rights

Article 2 of the ICCPR requires that the rights of the Covenant be recognized "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Similarly, Article 26 forbids discrimination on the basis of any of these grounds. In addition to this unequivocal protection, the ICCPR extends an affirmative right of language use in Article 27, which declares that persons belonging to ethnic, religious or linguistic minorities "shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion or to use their own language."

In contrast to the broad language rights of the ICCPR, U.S. law provides only small pockets of protection against language discrimination, the result of piecemeal legislation rather than a comprehensive policy. Federal courts have refused to equate language discrimination with national origin discrimination, which, like race and religion, warrants the highest level of judicial scrutiny; in the three-tier system of evaluating discrimination claims, language-based claims have been slotted into the lowest level, where the government must show only a "rational basis" for discriminatory government action. Meanwhile, attacks continue against minority language use in the schools, workplace and voting booth. The ICCPR should influence the development of U.S. case law toward a heightened judicial scrutiny of language-based discrimination, an approach that recognizes its connection to national origin discrimination and affords it the highest level of legal protection available.

Introduction

Language minorities have always been and continue to be a substantial part of America, a nation largely of immigrants. According to the 1990 census, there are over 30 million Americans who speak a language other than English in their homes.[1] In California, 2.4 million people do not speak English.[2]

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[1] Vol. 3, No. 4, Numbers & Needs, Ethnic & Linguistic Minorities in the United States, p. 1., (July, 1993).

[2] McKeod & Schreiner, "One in 11 Have Trouble Speaking California's Official Language," San Francisco Chronicle, p. A4 (5/13/92).

The plight of language minorities is a difficult one. Language presents a substantial barrier to socio-economic mobility in a society that is geared almost exclusively to English speakers. In many localities, there are tremendous barriers to employment, health care, social services, and political participation. It is not uncommon for police departments not to have officers bilingual in languages spoken by a substantial population such as Chinese or Vietnamese. Although criminal defendants have a right to a translator in proceedings, defendants in civil lawsuits and administrative proceedings generally do not. Thousands of language minorities have limited access to health care; in many communities there are few if any health care and mental health workers who speak, for instance, Farsi, Vietnamese, or other major foreign languages. And although federal law requires that non-English speaking students be afforded an education comprehensible to them, there is a tremendous shortage of bilingual teachers available to meet that mandate. Thus, it is not surprising that the high school drop-out rate for those with no or limited English proficiency is more than double the rate for English speakers. Likewise, the unemployment and poverty rates of limited English proficient adults greatly exceeds that of English speakers.

The socio-economic deprivation of language minorities is exacerbated by active discrimination against speakers of foreign languages and those who speak with "foreign" accents, particularly in a climate of rising hostilities against immigrants, as is now occurring.

The International Covenant on Civil & Political Rights (ICCPR) provides significantly more protection for the rights of language minorities than current United States law. Under existing constitutional jurisprudence, language minorities (*i.e.* those who speak a language other than English) have no explicit protection against discrimination on the basis of language. The Bill of Rights to the United States Constitution does not address language rights, and judicial interpretation of constitutional protections have not articulated a coherent theory under which language minorities are afforded meaningful protection. While legislation affords limited rights to language minorities, it is not comprehensive; currently laws provide only isolated legal protections in narrowly defined circumstances. By explicitly recognizing language rights, the ICCPR provides protection currently absent from American law.

Language rights in the United States

A Historical Perspective

Social attitudes and public policy towards language minorities in the United States have been and continue to be ambivalent and subject to social and economic vicissitudes. Until the late 1800's, our nation was tolerant towards linguistic diversity. Bilingualism in government and education was prevalent in many areas. The German language, for instance, was prevalent in schools throughout the midwest. The influx of Eastern and Southern Europeans and Asians gave rise to nativist movements and restrictionist language laws in the late 1800's and early 1900's, as evidenced by a report issued in 1911 by the Federal Immigration Commission contrasting the "old" and "new" immigrant. The report argued that the "old" immigrants had mingled quickly with native-born Americans and became assimilated, while "new" immigrants from Italy, Russia, Hungary, and other countries were less intelligent, less willing to learn English, had intentions of not settling permanently in the United States, and were more susceptible to political subversion.

The English language became the *sine qua non* of Americanism, the ticket to assimilation into the American "melting pot". Accordingly, English literacy requirements were erected as conditions for public employment, naturalization, immigration, and suffrage in order to "Americanize" these "new" immigrants and exclude those perceived to be lower class and "ignorant of our laws and language."

Language restrictions were employed as a means of social control and exclusion. For instance, the New York Constitution was amended to disenfranchise over one million Yiddish-speaking citizens by a Republican administration fearful of Jewish voters. The California Constitution was similarly amended to disenfranchise Chinese voters who were seen as a threat to the "purity of the ballot box." World War I gave rise to intense anti-German sentiment. A number of states, previously tolerant of bilingual schools, enacted extreme English-only laws. For instance, Nebraska and Ohio passed laws in 1919 and 1923 prohibiting the teaching of any language other than English until the student passed the eighth grade.[3]

Native Americans were also subject to federal English-only policies in the late 1800's and early 1900's. Native American children were separated from their families and forced to attend English language boarding schools, where they were punished for speaking their native language.[4]

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[3] *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[4] For a more detailed description of America's historical policy on language and the use of language as a means of controlling and discriminating against immigrants and minorities,

Tolerance of language diversity emerged as part of the civil rights movement of the 1960's. Major civil rights legislation benefitted language minorities. As discussed in greater detail below, Title VII of the Civil Rights Act of 1964 afforded workers some degree of protection against discrimination on the basis of language; Title VI of that same Act was successfully employed to require schools receiving federal funding to provide a meaningful and comprehensible education to non English-speaking students; and the Voting Rights Act of 1965 was amended in 1975 to explicitly require certain jurisdictions to provide language assistance to language minority voters. Moreover, some states enacted laws or policies providing language assistance to non-English speakers in certain defined situations. For instance, under California law

> all state agencies that provide information or render services to the public, if a substantial proportion of their clients are non-English speakers, are required to employ a sufficient number of qualified bilingual persons in public contact positions. Further, any materials explaining the agency's services must be translated into languages spoken by a substantial number of clients. For these provisions to become effective, non-English speakers must represent at least 5 percent of those served by any local office of facility.
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> Cal. Gov't Code § 7290.

Concurrently with a revitalized tolerance of linguistic diversity came an emerging movement towards multi-culturalism. Both the civil rights movement

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see Liebowitz, "English Literacy: Legal Sanction for Discrimination," 45 *Notre Dame Lawyer* 7 (1969); Comment, "Official English: Federal Courts on Efforts to Curtail Bilingual Services in the United States," 100 *Harv. L. Rev*. 1345 (1987); Califa, "Declaring English the Official Language: Prejudice Spoken Here," 24 *Harv. Civil Rights-Civil Liberties L. Rev*. 293 (1989); S.B. Heath & C.A. Ferguson (eds.), "English in Our Language Heritage," in *Language in the U.S.A.*, p.6 (Cambridge Univ. Press 1981); Liebowitz, "The Official Character of Language in the United States: Literacy Requirements for Immigration, Citizenship, and Entrance into American Life," 15 *Aztlan* 25 (1984); Liebowitz, "The Proposed English Language Amendment: Shield or Sword," 3 *Yale Law and Policy Review* 519 (1985); J. Crawford (ed.), *Language Loyalties: A Source Book on the Official English Controversy* (Univ. of Chicago Press 1992).

and efforts to foster multi-culturalism, however, have suffered a backlash over the last decade. Increasing hostility to claims to civil rights and entitlements by racial minorities has been exacerbated by a rise in anti-immigrant sentiment, fueled by economic downturn and the substantial influx of immigrants to the United States. In the 1980's, an English-only movement emerged, initially in local areas (such as Miami, Florida) and later organized by several nationally-based organizations. The English-only movement, tapping the fear that America is being overrun by immigrants who don't speak English and are unwilling to assimilate, seeks to establish English as the "official" language and to restrict or terminate the use of languages other than English by the government and, in some cases, private businesses. Thus, local laws have been passed limiting the amount of foreign languages that can appear on private business signs.[5] Until its recent repeal, Dade County had a law prohibiting county funds from being expended on activities which use a foreign language or promote a culture other than "American" culture.[6] Numerous states have passed laws or constitutional amendments declaring English the state's "official" language; some of these laws appear to impose restrictions on the use of foreign languages by the government.[7] Reports of workplace discrimination against employees with an accent and workplace rules prohibiting language minority workers from speaking in their native languages are escalating.[8] Bilingual education and voting rights are constantly under political fire.

The recent retrenchment on civil rights, and attacks upon the rights of language minorities in particular, underscores the importance of legal protections against language-based discrimination. However, current law fails to provide any coherent scheme of protection.

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[5] *See, e.g.*, *Asian American Business Group v. City of Pomona*, 716 F.Supp. 1328 (C.D. Cal. 1989).

[6] *See* J. Crawford (ed.), *Language Loyalties: A Source Book On the Official English Controversy*, p.131 (Univ. of Chicago Press 1992).

[7] *See EPIC Events*, March/April 1991. *EPIC Events* is a publication of the English Plus Information Clearinghouse, a project of the National Immigration Forum and the Joint National Committee for Languages.

[8] *See* Henry, "Fighting Words," *Los Angeles Times Magazine*, p. 10 (June 10, 1990); Yang, "In Any Language, It's Unfair," *Business Week*, pp.110-111 (June 21, 1993).

American Jurisprudence and Language Rights

The United States Constitution neither makes reference to an "official" language nor expressly addresses the rights of language minorities. Constitutional litigation challenging language discrimination has been relatively sparse, and virtually always turns on more general constitutional rights, such as the right to due process or the right to be free from racial or national origin discrimination. The United States Supreme Court has yet to rule on a claim of language discrimination *per se*; lower federal courts have generally refused to establish a constitutionally-based right to be free from language discrimination.

The United States Supreme Court has addressed the rights of language minorities on just four occasions. In *Meyer v. Nebraska*, the Supreme Court invalidated a state law, passed during the rash of anti-German sentiment engendered by the First World War, that prohibited the teaching of German in private and public schools to students below the ninth grade. The U.S. Supreme Court eloquently affirmed the fact that non-English speakers are not excluded from the Constitution:

> "The protection of the Constitution extends to all, -- to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had real understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution -- a desirable end cannot be promoted by prohibited means."
>
> 262 U.S. 390 (1923).

Most scholars agree, however, that *Meyer* was based primarily on the due process right of the parents to rear their children without state interference. Others have read the case as primarily involving religious rights, since the law affected private religious institutions and interfered with the free exercise of religion. The Court did not expressly hold that language-based discrimination violated the right to equal protection.

Three years later, in *Yu Cong Eng v. Trinidad*, the Supreme Court invalidated an ordinance requiring that accounting records of businesses be kept in English, Spanish, or local dialects of the Philippines, but not in Chinese. The Court found that the ordinance was a form of national origin discrimination against Chinese merchants, since they were singled out for unequal treatment, and was thus

unconstitutional. Again, the Court did not articulate a constitutional right to use of native language *per se*.[9]

In *Lau v. Nichols*, the Court held that placing non-English speaking students in a classroom with no special assistance and providing them with instruction in a language that was not comprehensible to them deprived them of an equal educational opportunity and thus violated Title VI of the federal Civil Rights Act of 1964.[10] Although the Civil Rights Act did not expressly bar language discrimination, it prohibited national origin discrimination, and the Court assumed that denial of a meaningful education to non-English speakers constituted national origin discrimination. While the case is significant in holding that the concept of national origin discrimination is broad enough to encompass discrimination on the basis of language fluency, the Court refused to rule on constitutional grounds.

In *Hernandez v. New York*, the Supreme Court held that the prosecutor's exclusion of Spanish-speaking Latinos from a jury on the ground that they seemed uncertain whether they would accept the court interpreter's translation of Spanish-speaking witnesses rather than their own translation did not violate equal protection.[11] The Court found there was no intentional attempt to exclude Latinos from the jury; rather, their exclusion was based on a race-neutral ground. Although the Court ignored the obvious effect of such a practice upon Latinos generally and Spanish speakers in particular, it did state that the case might have been analyzed differently had the prosecutor summarily excluded all Spanish speakers as a matter of policy. In *dicta*, the Court exhibited some sensitivity to the social significance of language:

> Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. . . .
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> Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a

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[9] 271 U.S. 500 (1926).

[10] 414 U.S. 563 (1974).

[11] 114 L.Ed.2d 395 (1991).

> response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis. . . .[12]

The lower federal courts have generally rejected constitutionally-based claims of language discrimination. They have refused to hold that language is synonymous with national origin and have refused to closely scrutinize constitutional claims brought by non-English speaking litigants. Typical of the courts' holdings is the Second Circuit's opinion in *Soberal-Perez v. Heckler*, which rejected an equal protection challenge to the failure to provide information in Spanish to Social Security recipients and applicants:

> The Secretary's failure to provide forms and services in the Spanish language, does not on its face make any classification with respect to Hispanics as an ethnic group. The classification is implicitly made, but it is on the basis of language, i.e., English-speaking v. non-English-speaking individuals, and not on the basis of race, religion, or national origin. Language, by itself, does not identify members of a suspect class. [Citations omitted.][13]

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[12] 114 L.Ed.2d at 413.

[13] 717 F.2d 36, 41 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984). *See also Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975) (Court applies rational basis test in upholding English-only civil service exams); *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978) (no constitutional right to bilingual/biculturaleducation where adequate remedial programs are provided to

The few cases which have found violations of the constitutional rights of non-English speakers have been based on some independent fundamental or constitutional right, such as the right of parents to rear their children without state interference (*Meyer v. Nebraska*, *supra*), the right to basic due process protections, including a translator, in a criminal prosecution (*e.g. United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970), or the right of free expression. *See Asian American Business Group v. City of Pomona*, *supra*, 716 F.Supp. 1328; *Yniguez v. Mofford*, 730 F.Supp. 309 (D. Ariz. 1990), *app. pending* (striking down Arizona state constitutional amendment that made English the official language and prevented state officials and employees from using foreign languages in the performance of their duties, on the grounds that it was overbroad and violative of officers' and employees' First Amendment rights).

Federal Legislation and Language Rights

Congress has not recognized any comprehensive right to use a language other than English, nor has it established any coherent protection against language discrimination. The government's response to deprivation suffered by language minorities has been sporadic, limited and reactive, usually to a situation where prohibiting use of a language other than English would have impinged on other important rights, such as the right to a fair trial.

The federal government presently requires use of a foreign language in various defined circumstances. Interpreters are used in the physical and mental examination of alien immigrants who want to enter the United States.[14] Service of

non-English-speaking children); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (failure to provide information in Spanish regarding unemployment insurance benefits not violative of equal protection under rational basis test); *Pabon v. MacIntosh*, 546 F.Supp. 1328, 1340-41 (E.D. Pa. 1982) (English-only classes provided to Spanish-speaking prisoners not violation of equal protection in absence of suspect classification or fundamental right). *But see Asian American Business Group v. City of Pomona*, 716 F.Supp. 1328, 1332 (C.D. Cal. 1989) (holding city ordinance limiting proportion of business signs that can be in a foreign language violates First Amendment and equal protection since "the use of foreign languages is clearly an expression of national origin").

[14] 8 U.S.C. § 1224.

process on a foreign nation must be accompanied by a translation into the foreign language.[15] Where there is a substantial number of non-English speakers, federally funded migrant and community healthy centers[16] and alcohol abuse and treatment programs[17] have to employ people who can communicate with the non-English speaking clients. Additionally, many agencies of the Federal government, including the Department of Health and Human Services and the Internal Revenue Service provide information in languages other than English.

The most vital areas affecting the lives of language minorities are voting, education and employment discrimination. In the area of voting, minorities have suffered discrimination on the basis of language. English literacy requirements presented a substantial barrier to voting. In California, for instance, a state constitutional literacy requirement barred citizens with limited English proficiency from voting until that provision was held violative of the federal constitution in 1970.[18] The lack of bilingual assistance has also impeded the exercise of the franchise by limited English proficient citizens, many of whom are poor and elderly. Congress has found that elderly citizens, who are least likely to learn English as a second language,[19] are the ones most likely to need bilingual assistance. A 1982 study for the Mexican American Legal Defense Fund and Educational Fund found that seventy percent of monolingual Spanish-speaking citizens would be less likely to register to vote if bilingual assistance were

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[15] 28 U.S.C. § 1827.

[16] 42 U.S.C. § 254 (b) and (c).

[17] 42 U.S.C. § 4577 (b).

[18] *Castro v. State of California*, 2 Cal.3d 223 (1970).

[19] J. Crawford, Bilingual Education: History, Politics, Theory and Practice 52-69 (1989) (describing history of the English-only movement). Veltman found that approximately 80% of those aged 15 through 24 at time of arrival will come to speak English on a regular basis. This figure declines in inverse correlation with the age of the immigrant at the time of arrival. Thus, of those aged 25-34 at time of arrival, 70% will become regular English speakers. Fifty percent of those aged 35-44 and 30% of those aged 45 and over will come to speak English on a regular basis. C. Veltman, The Future of the Spanish Language in the United States (1988).

eliminated.[20] If bilingual ballots were unavailable, 72% of the monolingual Spanish-speakers would be less likely to cast a vote.[21]

In 1975, Congress declared that language discrimination was "pervasive and national in scope" and added bilingual provisions to the Voting Rights Act.[22] The bilingual provisions required a jurisdiction to provide assistance in a language other than English if the jurisdiction met two conditions. First, over five percent of voting-age citizens must belong to a single minority group.[23] Second, either the jurisdiction-wide or state-wide illiteracy rate must exceed the national rate.[24] In 1982, the bilingual provisions of the Voting Rights Act were extended until 1992, although its reach was considerably narrowed.[25]

In 1992, the Voting Rights Act was once again amended. The Voting Rights Act of 1992 extended the bilingual assistance provisions to the year 2007.[26] In addition, it expanded the provisions to encompass a greater number of non-English speaking voters.[27] Bilingual services are now to be provided even if the non-English speaking group does not make up 5% of the total population, provided there are at least 10,000 members of the particular language group in the jurisdiction.

The rights accorded to language minorities under the Voting Rights Act is

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[20] R. Brischetto, "Bilingual Elections at Work in the Southwest" 68, 100 (1982).

[21] *Id.*

[22] Pub. L. No. 94-73, 1975 U.S. Code Cong. & Admin. News (89 Stat.) 401 (codified as amended at 42 U.S.C. § 1973b(f)(1) (1982).

[23] 2 U.S.C. § 1973aa-1a(b) (1983).

[24] *Id.*

[25] Pub. L. No. 97-205, S. 4, 1982 U.S. Code Cong. & Admin. News (96 Stat.) 134. The 1982 amendment imposed the additional requirement that the five percent be comprised of members of a single minority group who were not English proficient.

[26] 1992 Congressional Quarterly Almanac 329, 330.

[27] *Id.*

perhaps the most successful language rights legislation enacted by Congress thus far. Nonetheless, its provisions have been subject to political attack -- it has been the target of English-only advocates, and is the issue which appears to strike a consistent chord of discontent among Americans. The voters of California, for example, overwhelmingly passed an initiative in 1983 that urged the elimination of bilingual ballots.[28]

The rights of language minority students to an equal education is addressed primarily by the Equal Educational Opportunities and Transportation Act (EEOA) which essentially codified the Supreme Court's ruling in *Lau v. Nichols*, mentioned above. In *Lau*, non-English speaking Chinese students sued the San Francisco Unified School District for its failure to provide them with meaningful English language instruction and the same educational opportunities as provided to their English speaking counterparts. The Court ruled for the students and succinctly framed the issue when it stated:

> [T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.[29]

Section 1703(f) of the EEOA was adopted by Congress in direct response to the *Lau* decision. Section 1703(f) sets forth the legal standard upon which to judge whether a school district is meeting its obligations under federal law to its limited English proficient students. It states that:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

Nonetheless, the general nature of the statutory mandate of §1703(f) makes enforcement difficult. The statute does not define what is "equal participation" for

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[28] California Proposition 38 appeared on the November 1993 ballot.

[29] 414 U.S. 563, 566 (1974).

students or the obligation to take "appropriate action" to achieve equal participation. There is virtually no legislative history regarding this provision, and the law's ambiguity has been problematic in attempting to establish clear rights for language minority students. A number of federal courts have held that *Lau* and § 1703(f) do not mandate bilingual education as the sole means of satisfying federal law.[30]

The ill-defined nature of federal law has created inconsistencies and inadequacies in the quality of education afforded to minority language students. Moreover, bilingual education, like bilingual voting assistance, has been targeted for attack by English-only advocates. Federal funding for bilingual education has been weakened over the last ten years.

In the area of employment, language minorities have been and continue to be subject to discrimination on the basis of language. Such discrimination is typically embodied in three kinds of employment practices: (1) requiring employees to have a degree of fluency in English beyond that necessary for the job; (2) refusal to hire or promote individuals with a "foreign" accent; and (3) prohibiting language minorities from conversing with their co-workers in their native languages. With both increasing ethnic diversity in the American workplace and emerging anti-immigrant sentiment, complaints about these forms of employment discrimination appear to be on the rise.

Employment discrimination is addressed by Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, sex and national origin.[31] Although Title VII does not explicitly address language discrimination, the Equal Employment Opportunity Commission (EEOC), the administrative agency charged with its enforcement, has issued guidelines which define national origin

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[30] *See United States v. State of Texas*, 680 F.2d 356 (5th Cir. 1982); *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981); *Guadalupe Organization, Inc. v. Tempe Elementary School*, 587 F.2d 1022 (9th Cir. 1978); *Terese P. v. Berkeley Unified School District*, 724 F.Supp. 698 (N.D. Cal. 1989). Compliance with § 1703(f) is satisfied merely if three elements are met: (1) the theory underlying the school's program must be "sound"; (2) the program must be "reasonably calculated" to implement the chosen theory; and (3) the program must actually be adequate in overcoming language barriers. *Castaneda v. Pickard* at 1009-10.

[31] 42 U.S.C. § 2000e to 2000e-17 (1982).

> broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or *linguistic characteristics* of a national origin group.[32]

The courts have generally accepted the theory that discrimination on the basis of one's accent is unlawful under Title VII unless the accent "interferes materially with job performance."[33] Of course, whether an accent or lack of English fluency materially impairs job performance is ill-defined and capable of inconsistent and unfair application, particularly since the evaluation of accents is subjective and vulnerable to subtle biases. This is especially true in regard to accents indicative of languages or ethnic groups that are devalued in our society.[34]

The right of language minority workers to converse with their co-workers in their native languages, a phenomenon that occurs frequently in low paying industries where language minorities are heavily concentrated, is even more problematic. The courts have thus far been inhospitable to claims of discrimination that challenge rules restricting bilingual employees from conversing in their primary and native languages. In upholding a speak-English-only rule imposed on Latino workers in a lumberyard, the Fifth Circuit found that, despite the importance of one's language to self identity and ethnic heritage, and the disproportionate impact such a rule would have on national origin minorities, an "English-only" rule as applied to a bilingual worker did not constitute discrimination on the basis of national origin, since a bilingual worker could readily comply with the rule.[35]

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[32] 29 C.F.R. § 1606.1 (emphasis added).

[33] *See Fragante v. City and County of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989); *Carino v. University of Oklahoma Board of Regents*, 750 F.2d 815, 819 (10th Cir. 1984); *Berke v. Ohio Dept. of Public Welfare*, 628 F.2d 980, 981 (6th Cir. 1980) (per curiam). Likewise, an English fluency requirement must be demonstrably job related. *Mejia v. New York Sheraton Hotel*, 459 F.Supp. 375, 377 (S.D.N.Y. 1978).

[34] *See* Matsuda, "Voices of America: Accent, Anti-Discrimination Law, and A Jurisprudence for the Last Reconstruction," 100 *Yale L. J.* 1329 (1991).

[35] *Garcia v. Gloor*, 618 F.2d 264, 269-70 (5th Cir. 1980), *cert. denied*, 449 U.S. 113 (1981).

In 1980, the EEOC issued a guideline specifically addressing English-only rules. It provides in pertinent part:

> (a) *When Applied at all Times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.
>
> (b) *When Applied Only at Certain Times*. An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.[36]

In *Gutierrez v. Municipal Court*, the Ninth Circuit invalidated a speak-English-only rule imposed upon bilingual court clerks, agreeing with the EEOC that English-only rules generally have an adverse impact on protected groups and that they should be closely scrutinized.[37] The court further agreed with the EEOC that English-only rules can create an atmosphere of "inferiority, isolation and intimidation," since language use is closely intertwined with ethnic identity and serves as an affirmation of one's cultural heritage.[38] However, the case has no precedential value because it was vacated on grounds of mootness.

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[36] 29 C.F.R. § 1606.7. The guideline was affirmed by the Ninth Circuit in *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), *vacated on grounds of mootness*, 490 U.S. 1016 (1989).

[37] *Guttierez*, *supra* note 28, at 1040.

[38] *Id*. (*quoting* 29 C.F.R. § 1606.7 (1987)).

The Ninth Circuit subsequently issued a ruling completely contrary to *Gutierrez*. In *Garcia v. Spun Steak Company*, the court invalidated the EEOC guideline, holding that nothing in the legislative text or history allowed the EEOC to promulgate guidelines that presumed all English-only rules to be discriminatory.[39] The court held there is no right to express one's cultural heritage in the workplace, and embraced the reasoning that, if one is bilingual, he or she can readily comply with an English-only requirement and thus is not substantially affected by the rule. The court discounted the effect of such rules of suppressing a central aspect of ethnic identity and creating an atmosphere of inferiority and intimidation for language minorities.

The importance of the ICCPR

The lack of any explicit constitutional protection against language discrimination in the Constitution and the vagaries of statutory law make implementation of the ICCPR particularly important. The ICCPR expressly refers to the rights of language minorities. Article 2 provides that "the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" will be respected and ensured. Article 26 states:

> "All persons are equal before the law and are entitled without any distinct discrimination to the equal protection of the law. To this respect, the law shall prohibit any discrimination and guarantee all persons equal and effective protection against discrimination on any grounds such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."

Article 27 further provides:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own

[39] 998 F. 2d 1480 (9th Cir. 1993).

religion or to use their own language."[40]

To be sure, there is ambiguity about the precise effect these provisions would have upon the laws in the United States; the reservations, declarations, and understandings imposed by the United States Senate upon ratification state that "the United States understands distinction based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status -- as those terms are used in Article II, paragraph 1 and Article XXVI -- to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective." The understanding does not state that only the rational basis test would apply to all such forms of discrimination. Obviously this is not the case, since, under existing constitutional jurisprudence, intentional governmental discrimination on the basis of race is subject to strict scrutiny rather than the weaker rational basis test.

As previously noted, the Supreme Court has not resolved the question whether language-based discrimination constitutes a "suspect" classification which warrants heightened judicial scrutiny. It did not have to address the issue in *Yu Cong Eng*, *Meyer*, *Lau*, or *Hernandez*. A number of legal commentators have argued that language-based discrimination should be afforded close scrutiny because of its intimate relationship to national origin discrimination and the fact that non-English speakers as a class have suffered a history of discrimination, are politically powerless, suffer economic and social disadvantage, and are readily identifiable -- all traditional indicators of "suspectness" which justify special judicial protection.[41] By expressly incorporating linguistic discrimination into the

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[40] Article XIV assures that all persons "shall be equal before the courts and tribunals", and expressly provides that in criminal matters, every person is entitled to "be informed properly and in detail in a language in which he understands of the nature and cause of the charge against him."

[41] *See* Note, "Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model", 90 Yale Law Journal 912 (1981); Comment, "`Official English': Federal Limits on Efforts to Curtail Bilingual Services in the States," 100 Harvard Law Review 1345 (1987); Califa, "Declaring English the Official Language: Prejudice Spoken Here," Harvard Civil Rights - Civil Liberties Law Review 293 24 (1989). *Cf. Olagues v. Russonielle*, 797 F.2d 1511 (9th Cir. 1986) (*en banc*), *vacated on grounds of mootness*, 484 U.S. 806 (1987) (foreign-born, recently registered, and bilingual ballot voters possessed sufficient indicia of suspectness to warrant heightened scrutiny under equal protection analysis).

fabric of American legal rights, the ICCPR would greatly strengthen the argument that language discrimination should be afforded heightened scrutiny by the courts as a suspect or quasi-suspect classification in equal protection challenges.

Furthermore, establishing the principle of language rights in the ICCPR may give guidance to the judiciary in matters of statutory interpretation. In particular, Article 27's articulation of the rights of language minorities "in community with other members of their group, to enjoy their own culture . . . or use their own language" establishes an important human rights principle that should inform the analysis of Title VII as applied to speak-English-only rules. This would further a greater respect for the rights of language minorities than that reached by the courts to date.

Recommendations

1) Reject attempts to amend the constitution to make English the official language or otherwise restrict the power and duty of the government to utilize languages other than English in serving and communicating with the public.

2) Urge Congress to amend federal anti-discrimination laws, including Title VI (discrimination in federally funded programs), Title VII (employment discrimination), and Title VIII (housing discrimination) to make explicit the prohibition on language discrimination in the absence of business necessity and compelling justification.

3) Urge Congress to pass federal legislation requiring federal, state and local governmental agencies to employ sufficient numbers of qualified bilingual staff persons and provide bilingual written materials where a substantial number of their clients belong to particular language minority groups.

4) Urge Congress to pass federal legislation ensuring the availability of certified translators for litigants who cannot afford them in all criminal and civil proceedings and all administrative proceedings where liberty or other important rights are at stake, including asylum proceedings before the INS.

Immigrants' Rights

United States treatment of immigrants and refugees violates several articles of the ICCPR. The policy of interdicting and repatriating Haitian and Chinese boat people violates Article 12, which states that "[e]veryone shall be free to leave any country, including his own." The indefinite detention of HIV-positive Haitian asylum-seekers at Guantanamo Bay Naval Base, a practice discontinued in the summer of 1993 by court order, violated Article 7, which forbids cruel inhuman or degrading treatment, and Article 9, which requires a statutory basis for detention. It also violated Article 10, which forbids inhumane conditions of confinement, and Article 26, which forbids discrimination on the basis of national origin (only Haitians were subject to medical screening and detention based on HIV status; intercepted Cubans, for example, were not medically screened and were transported directly to the United States). The practice of indefinitely detaining all undocumented people, including children, violates Article 9's prohibition of arbitrary detention -- people are detained regardless of whether they pose a flight risk or a threat to the community; children are detained even when a responsible adult or group is willing to assume custody.

Other violations are also common, as Border Patrol agents of the Immigration and Naturalization Service (INS) subject immigrants to beatings, rough physical treatment, and racist verbal abuse. Torture, sexual abuse, and shootings by Border Patrol agents have also been documented. These human rights abuses violate Article 7 (the right to be free from torture or cruel, inhuman or degrading treatment) and Article 9(1) (the right to liberty and security of the person).

This chapter addresses compliance of United States immigration law and policy with the ICCPR. Because the most serious violations in recent years have occurred in connection with the treatment of refugees, in particular Haitian refugees, the chapter devotes disproportionate space to those issues.

Haitian refugees policy and treatment of unadmitted or excludable aliens[1]

The most recent and illustrative example of U.S. refugee policy is its treatment of Haitian refugees. An analysis of this policy's compliance with the ICCPR also provides significant insight into U.S. immigration policy generally.

Two aspects of the U.S. government's policy toward Haitian refugees have been challenged in the federal courts in recent years: (1) the indefinite detention of legitimate asylum-seekers in prison-like conditions at Guantanamo Bay, Cuba because of their HIV status; and (2) the summary return directly to Haiti of all Haitians interdicted on the high seas.

Background

The Haitian Interdiction Operation was created by President Ronald Reagan in 1981. By Executive Order, President Reagan authorized the Coast Guard to interdict on the high seas and to return to Haiti any Haitians seeking to come to the U.S. in violation of Haitian or U.S. immigration laws.[2] The Executive Order recognized, however, that international legal obligations under the U.N. Convention Relating to the Status of Refugees (Refugee Convention) barred the return of political refugees to Haiti against their will.[3] As a result, the U.S. implemented a "screening" process to identify political refugees and permit them to enter the U.S. to apply for asylum. To be "screened-in," Haitian refugees were required to demonstrate a "credible fear of persecution."[4] During the first ten years of the interdiction program, the Coast Guard interdicted and returned to Haiti approximately 28,000 Haitians; only 28 (or 0.1%) were screened-in to the U.S. to be permitted to apply for political asylum.[5]

After the September 1991 coup that ousted Haiti's first democratically-elected President, Jean-Bertrand Aristide, the number of Haitians fleeing in boats from renewed persecution increased dramatically.[6] Nonetheless, the Bush Administration continued the interdiction and screening of fleeing Haitians by conducting interviews on board Coast Guard cutters on the high seas. In November 1991, Haitian advocates filed suit challenging the adequacy and competency of the screening process and alleging that bona fide refugees were being returned to Haiti in violation of U.S. obligations under the Refugee Convention and the domestic Refugee Act of 1980.[7]

That suit was ultimately dismissed on the grounds that the plaintiffs had no rights outside the territories of the United States under U.S. law[8] and that the Refugee Convention was not self-executing.[9] However, the litigation resulted in the screening process being moved from the decks of Coast Guard cutters to the

U.S. Naval Base at Guantanamo Bay, Cuba. Over the course of the next seven months, approximately 35,000 Haitians were interdicted by the Coast Guard; approximately 11,000 were screened-in by INS Asylum Officers. Initially, all the screened-in Haitians were transported from Guantanamo to the U.S. to pursue their asylum claims and to receive formal adjudications.

In February 1992, the INS announced a new policy for screened-in Haitians. An internal legal memorandum by the then INS General Counsel dictated that Haitians who met the "credible fear of persecution" standard would no longer be brought directly to the U.S. as a matter of course. Instead, any who tested HIV-positive would remain at Guantanamo for a final determination of their asylum claim under the stricter "well-founded fear of persecution" standard. That determination would be final, and all who failed would be returned immediately to Haiti. Even those who established a "well-founded fear of persecution" would be kept at Guantanamo for further processing to determine whether they were eligibile for an HIV "waiver" to allow them to enter the U.S. However, the criteria for the HIV waiver were never articulated or, it appears, ever determined.[10] Under the new policy, both adjudications would be conducted without any assistance of counsel, the opportunity for judicial review, or reference to any statutory or procedural framework. In the meantime, these screened-in Guantanamo Haitians would remain detained in a prison camp of tents and plywood huts, fenced in by coils of barbed wire and under military guard.

The Guantanamo Detention Camp

In March 1992, Haitian advocates filed the *Haitian Centers Council v. McNary* (*HCC*) suit in federal court in Brooklyn to challenge the discrimination against HIV-positive Haitians and to enjoin the further processing of their asylum claims at Guantanamo without counsel. Judge Sterling M. Johnson, Jr. issued a preliminary injunction in April 1992 enforcing the Haitians' right to counsel under the Due Process Clause of the Fifth Amendment and prohibiting any further processing of their claims without the assistance of lawyers. The Second Circuit affirmed the injunction, agreeing with Judge Johnson that the Due Process Clause applied to the Haitians at Guantanamo, on the ground that they had been screened-in and were in the custody and control of the U.S. at a naval base, over which the U.S. exercised exclusive jurisdiction.[11] Thus, the INS was prohibited from conducting any further processing of the approximately 300 Haitians at Guantanamo without affording them legal assistance. In response, the government suspended all processing.

The trial in the case began before Judge Johnson in March 1993. By then, approximately 250 screened-in Haitians remained at Guantanamo, many of whom had been imprisoned for as long as 18 months.[12] While the case initially focused simply on the right to legal counsel, by the time of trial it had evolved into a much broader challenge. The evidence presented at trial fell into several broad categories: (1) inadequate medical care for the HIV-positive population; (2) inhumane living conditions at the camp; (3) the indefiniteness of the detention; (4) the absence of any statutory basis for establishing an adjudication process that comports with neither the overseas refugee system[13] nor the domestic asylum system[14]; (5) the discriminatory treatment of Haitians as compared to other nationalities, particularly Cubans; (6) the discriminatory exclusion of lawyers from access to the detained Haitians; and (7) the feasibility and reasonableness of affording Guantanamo Haitians the procedural protections attendant to asylum adjudications in the U.S.

As before, the government's principal response was that the Constitution and laws of the U.S. do not apply outside of U.S. territory. It further contended that the Coast Guard had "rescued" the interdicted Haitians from unseaworthy boats and that the detained Haitians were "free" to go anywhere but the U.S.

On June 3, 1993, Judge Johnson ordered that the Haitians be released immediately. In a 50-page opinion he condemned the camp, stressing that "[t]he Haitian camp at Guantanamo is the only known refugee camp in the world composed entirely of HIV+ refugees. The Haitians' plight is a tragedy of immense proportion and their continued detainment is totally unacceptable to this Court."[15] In response to a remark by an INS official that the medical treatment was adequate because "they're going to die anyway, aren't they?" Judge Johnson decried the government's attitude. "It is outrageous, callous and reprehensible that defendant INS finds no value in providing adequate medical care even when a patient's illness is fatal."[16] He condemned the indefinite detention of persons who "are merely the unfortunate victims of a fatal disease."

> [T]he detained Haitians are neither criminals nor national security risks. Some are pregnant mothers and others are children.... The Government has failed to demonstrate to this Court's satisfaction that the detainees' illness warrants the kind of indefinite detention usually reserved for spies and murderers. Where detention no longer serves a legitimate purpose, the detainees must be released.[17]

Finally, Judge Johnson found that the processing of well-founded-fear

claims at Guantanamo had no statutory basis, that providing access to attorneys and to the procedural rights available to asylum applicants in the U.S. provided a significant benefit to the applicant and no burden on defendants, and that the government's refusal to release the Haitians from detention constituted an abuse of discretion.[18]

The Clinton Administration decided not to seek a stay of the court-ordered release. By July 18, 1993, all the Guantanamo Haitians had been brought to the U.S. and the camp was closed.

Interdiction and Summary Repatriation: The "Kennebunkport Order"

While the Guantanamo issues were being litigated, President Bush drastically altered the interdiction policy with a new Executive Order, issued on May 24, 1992 from his vacation home at Kennebunkport, Maine. The Kennebunkport Order authorized the immediate repatriation of *all* interdicted Haitians without any screening.[19] After the Kennebunkport Order, the Coast Guard returned all interdicted Haitians directly to Haiti without any inquiry into the possibility of persecution. This occurred despite the INS's own findings that approximately one-third of the earlier interdicted Haitians should be screened-in based on their "credible fear of persecution."

The plaintiffs in *HCC* sought a further injunction to enjoin this forced repatriation. The primary ground for challenging the Kennebunkport Order was its violation of the "*non-refoulement*" obligation embodied in Article 33 of the Refugee Convention and incorporated into domestic law by the Refugee Act of 1980. Under Article 33, "[n]o contracting state shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion." The 1980 Refugee Act specifically amended INA §243(h) to provide that "the Attorney General shall not deport or return any alien . . . if the Attorney General determines that such alien's life or freedom would be threatened" on account of any of the five grounds enumerated in the Refugee Convention. The *HCC* plaintiffs argued that these dual proscriptions impose an absolute prohibition against returning a refugee to his or her persecutors and constitute the most bedrock principle of refugee protection.[20]

The government's primary defense was that the prohibitions and protections against *non-refoulement* apply only when the government is acting within the physical territory of the U.S. It argued that the conduct of the Coast

Guard in international waters is not governed by the Refugee Act and is not addressed by the Refugee Convention.[21] Under the government's view, the affirmative action of the U.S. on the high seas, which purposefully prevents fleeing Haitians from reaching U.S. territory (where the protections of the Refugee Act indisputably apply), imposed no commensurate duties. It argued that interdicted Haitians are no different than refugee applicants or others who voluntarily encounter U.S. officials anywhere else in the world. In essence, the government contended that the U.S. could effectively move its border far out to sea for the purpose of exercising *control* over immigration, while ignoring the commensurate protection of individual rights applicable when the government acts within its borders. The U.S. denies fleeing Haitians the rights they would have at U.S. shores by preventing them from getting there.

The district court was bound by Second Circuit precedent to permit the forced repatriations. On appeal, the Second Circuit declared that the Kennebunkport Order violated the plain language of the Refugee Act of 1980 and enjoined the policy. It held that interdicted Haitians were encompassed in the term "any alien" and that their summary repatriation by the Coast Guard constituted a "return" within the prohibition of INA § 243(h). The court also found that the President's emergency powers under the INA to control the *entry* of aliens did not support an interdiction operation that prevented foreign nationals from *leaving* their own country for any destination. The Second Circuit emphasized that the case did not present a non-justiciable political question since the issue was whether executive agency action complied with express legislative enactments.[22]

The Bush Administration immediately sought and received a stay from the Supreme Court pending review of the case. Despite campaign and pre-inauguration statements condemning the Kennebunkport Order, the Clinton Administration pursued the Supreme Court appeal and did nothing to alter the policy or the arguments presented to the Court.[23] On March 2, 1993, the Court heard the case; on June 21, 1993, it upheld the legality of the interdiction policy, ruling that neither Article 33 nor § 243(h) apply outside U.S. territorial limits.[24]

Writing for the majority, Justice Stevens found that § 243(h) does not apply to action outside the U.S. because (1) the statute's language is limited to the "Attorney General," (2) the dual prohibition of "deport or return" signifies only the statute's applicability to the technically-different exclusion and deportation proceedings, (3) deletion in 1980 of the language that the protection applies solely to aliens "within the United States" only expanded the statute to apply to exclusion proceedings, and (4) the legislative history is not sufficient to overcome the presumption that statutes do not apply extraterritorially. The Court also held that

Article 33 does not apply outside the territorial limits of a contracting state because (1) the *limitation* on Article 33's applicability (contained in Art. 33.2) refers to aliens within a country and that the entire provision should be read as so limited, (2) the French "*refouler*" is a limited term that implies a defensive act of resistance "at the border," and (3) the negotiating history does not reflect a clear extraterritorial intent.

At the same time, the Court conceded that its begrudging and hyper-technical reading of the statute and Refugee Convention it also acknowledged the "moral weight" of the Haitians' argument.

> The drafters of the Convention and the parties to the Protocol . . . may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33. . . . [25]

In short, the Court appears to agree that the United States' action is contrary to the purpose and spirit of the *non-refoulement* principle and that interdiction and forcible repatriation were never anticipated by the drafters of these safeguards.

In a sole dissenting opinion, Justice Blackmun argued that the duty not to return refugees is expressed clearly in both Article 33 and the statute. He criticized the majority for "strain[ing] to sanction" the conduct of "tak[ing] to the seas to intercept fleeing refugees and force them back to their persecutors."[26] He also argued that since the statute regulates a distinctively international subject matter, the Court should have applied the "well-settled rule that 'an act of congress ought never to be construed to violate the law of nations if any other possible construction remains'" and prohibited *refoulement*.[27]

U.S. arrangements with Mexico and Honduras have employed the same technique of implementing immigration policy beyond U.S. borders for the purpose of avoiding the effect of domestic law. For several years, the Bush Administration funded the Mexican authorities' interception of asylum seekers bound for the U.S. through Mexico.[28]

In the past, the U.S.-Mexico arrangement mainly affected individuals from Central American countries who were intercepted on Mexican soil. Recently, however, the U.S. has arranged with both Mexico and Honduras to effectuate the interdiction of Chinese immigrants. In April 1993, the U.S. funded the return of approximately 300 Chinese asylum seekers who had landed on the Mexico coastline. The U.S. also arranged with Honduras to return a boatload of Chinese asylum seekers, 45 of whom the INS reportedly determined to have credible

asylum claims. In July 1993, the U.S. pressured the Mexican authorities to accept and deport approximately 650 Chinese passengers in three vessels that had been intercepted by the U.S. Coast Guard in international waters.

Covenant Provisions

Article 12: Interference With The Right To Leave Any Country, Including One's Own

ICCPR Article 12(2) provides that "[e]veryone shall be free to leave any country, including his own." The U.S. interdiction and return of Haitians and Chinese attempting to flee their country by boat flagrantly violates this right. While a number of other states have prohibited their *own* citizens from exiting their borders, we know of no other instance in which the government of one nation has reached out far beyond its territorial limits to prevent citizens of *another nation* from escaping their own country.

While the present U.S. policy has entailed the *refoulement* of several thousand Haitians since its inception, it has denied *the right to leave the country* to many thousands more who, knowing that flight by sea is futile (and indeed may increase their risk of persecution by identifying them as would-be refugees), no longer attempt to escape political persecution.

Article 9: Indefinite Detention

The U.S. internment of hundreds of Haitian asylum-seekers in a military detention facility at Guantanamo Bay violated ICCPR Article 9's prohibition of arbitrary and unlawful detention. Article 9(1) provides that "[n]o one shall be subjected to arbitrary arrest and detention" and "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Without a statutory basis, detention of any length of time is improper as a matter of due process. U.S. law authorizes the Attorney General to detain aliens only pending inspection, exclusion, or deportation, none of which applied to the Haitians at Guantanamo.[29] The HIV exclusion did not provide legal justification for the detention because the exclusion is not applicable to the political asylum program, is not a basis for denying asylum to a refugee in the U.S., and is not a bar to "screening" persons into the country.

Articles 7 and 10: Cruel, Inhuman or Degrading Treatment and Inhumane Conditions of Confinement

The circumstances in which the Guantanamo Haitians were confined also violated ICCPR Article 10, which provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Individuals who had committed no offense other than fleeing Haiti based on (at least) a credible fear of persecution and being infected with an ultimately fatal virus were treated, in the words of Judge Johnson, "in a manner worse than the treatment which would be afforded to a criminal defendant. They are defenseless against any abuse, exploitation or neglect to which the officials at Guantanamo may subject them."[30]

According to both government employees working at the base and the refugees themselves, the Haitians were subjected to beatings and other summary punishment, such as confinement at the "brig" or "Camp 7," an internal prison within a prison. Punishable "offenses" included such things as removing the plastic bar-coded I.D. bracelet which all detainees were made to wear, or moving a cot in the barracks without permission. Haitian leaders in the camp were also sentenced to indefinite terms in Camp 7 for organizing peaceful marches and a hunger strike to protest their continued incarceration.

Moreover, the conditions at the Guantanamo camp were inherently dangerous for persons with deficient immune systems. Doctors for the Centers for Disease Control warned that congregating so many immune-suppressed people in a single location was "a potential public health disaster."[31] Against the urging of the government's own doctors, the Justice Department refused to approve medical evacuation for many refugees in need of treatment that could not be provided at the base, despite the fact that persons in government custody are entitled as a matter of due process to adequate medical care and to be confined in safe conditions.[32]

Article 26: National Origin Discrimination

The denial of parole to HIV-positive interdicted Haitians and their indefinite detention at Guantanamo also constituted discrimination based on national origin, which is prohibited by ICCPR Article 26. The best illustration of this discrimination is that Cubans intercepted in the same location as Haitian refugees, even by the same boats (or who made their way onto the U.S. base at Guantanamo), were *not* medically screened, but rather were transported

immediately to the U.S., where they were free to apply for asylum regardless of what their HIV status might be.

Haitians alone were picked up before they could make their way to U.S. shores, where they would be eligible to apply for asylum under standard procedures with established legal protections. Only Haitians were detained indefinitely and subjected to INS screening which is inferior in every way to the asylum processing afforded members of other national groups. And only Haitians were denied release from INS detention because of their medical status.

HIV exclusion

Background

In June 1987, Congress enacted the Helms Amendment, directing that HIV-infection be added to the list of "dangerous contagious diseases" for which aliens may be excluded from the U.S.[33] Responding in part to this mandate, in August 1987 the Public Health Service (PHS) promulgated a new rule adding HIV-infection to the exclusion list.[34] The new rule became effective December 1, 1987.

Since then, all applicants for "immigrant" visas (*i.e.*, legal permanent resident status) have been subject to mandatory HIV testing as part of their required medical examination. If they test positive, their applications are automatically denied, unless they qualify for a "waiver" of the HIV exclusion. Many of the individuals who are denied legal status have lived in the U.S. for many years and were exposed to the HIV virus here.

The HIV exclusion also applies to "nonimmigrants" (*i.e.*, aliens visiting the United States temporarily, such as students). Nonimmigrants are not required to undergo mandatory HIV testing. However, if HIV positive, they must apply for a "waiver" of the exclusion in order to temporarily enter the U.S. If no waiver is obtained, and they are suspected of being HIV positive, they can be refused entry or detained by INS and forced to submit to an HIV test.

In November 1990, Congress directed the Secretary of Health and Human Services (HHS) to promulgate a new list of "communicable diseases of public health significance."[35] The new exclusion list was to be based solely on "epidemiological principles and medical standards" and limited to those diseases "for which admission of such aliens would pose a public health risk to the United States."[36] Responding to its new mandate, HHS Secretary Louis Sullivan proposed regulations in January 1991 to remove HIV-infection from the list of excludable diseases.[37] Secretary Sullivan cited the consensus among major medical and public

health authorities that there was no medical basis for the exclusion. Under pressure, however, HHS instead promulgated an "interim rule" that continued the HIV exclusion.[38] In May 1993, Congress passed a bill which amended the Immigration and Nationality Act by authorizing the exclusion of HIV-infected aliens on health-related grounds.[39]

Covenant Provisions

Article 26: Discrimination based on status

The U.S. policy of excluding HIV-infected aliens violates ICCPR Article 26, which prohibits discrimination based on "status." The HIV exclusion rule has been an international embarrassment for the U.S. and has drawn sharp criticism from the public health community, including the World Health Organization. Experts agree that the exclusion serves no public health purpose and only fuels discrimination and hostility against people who are HIV-positive.[40]

INS detention

Background

The number of people in INS detention increased dramatically over the past decade, with the INS detention budget growing from $15.7 million in 1981 to over $149 million in 1990.[41] In part, this growth was due to a policy decision made in 1982 by the Reagan Administration to detain all aliens who arrive in the U.S. without documents, regardless of whether they pose a danger or are likely to abscond.[42] In addition, bonds that are routinely as high as $10,000 or $20,000 make it impossible for many aliens to obtain release from detention.

Indigent aliens have no right to appointed counsel in deportation proceedings. Thus, even though many INS detainees are eligible for relief from deportation -- for example, they are refugees from persecution or are long-time legal permanent residents of the U.S. eligible for various forms of discretionary relief -- they are often unable to obtain the relief to which they are statutorily entitled.

Indefinite Detention of Cuban "Marielitos"

In 1980, some 125,000 Cubans came to the U.S. from the Cuban port of

Mariel. Those suspected of having criminal records in Cuba were held in custody upon their arrival. Eventually, most were released into U.S. society, but some only after spending years detained indefinitely in maximum security prisons, even though they had committed no crime in this country.

Today, thirteen years after the arrival of the "Freedom Flotilla," over 1,800 Cubans remain in indefinite detention under the legal fiction that they were never "admitted" into the U.S. and are, therefore, "excludable" aliens.[43] About 2,500 more are currently serving sentences in federal, state and local prisons, after which they too will be detained indefinitely by the INS.[44] Many came to the U.S. in 1980 as children and have spent most of their lives in this country.

Detention of Juvenile Aliens

Pursuant to 8 U.S.C. § 1962, INS each year arrests thousands of children suspected of being in the country illegally and places them in deportation proceedings. Many of these children, primarily 13-17 years in age, are kept in detention centers pending the outcome of the proceedings, which often last years. This is true even if they pose no danger to the community and no risk of absconding.

Under current INS policy, a child may be released only to one of the following listed individuals: a parent, legal guardian or adult brother, sister, aunt, uncle or grandparent.[45] If one of the listed individuals is not available, INS automatically and indefinitely detains the child regardless of whether a responsible adult or group is willing to assume custody (*e.g.*, church group, godparent, cousin, family friend, foster home).[46] The one exception is where "unusual and compelling circumstances" exist, but INS has applied this provision in only a handful of cases in which the child had a medical problem.[47]

Covenant Provisions

The indefinite detention of Cubans violates ICCPR Article 9's prohibition against arbitrary or unlawful imprisonment in both criminal and non-criminal contexts.

The 1982 regulation mandating INS detention of virtually all excludable aliens also violates Article 9's prohibition of arbitrary detention. The conditions of detention in particular cases may also violate Article 7, prohibiting cruel, inhuman and degrading treatment, and Article 10, prohibiting inhumane conditions of

confinement.[48]

The detention of juveniles further violates ICCPR Article 24, which provides that "[e]very child shall have, without any discrimination as to . . . national or social origin . . . or birth, the right to such measures of protection as are required by his status as a minor, on the part of . . . the State." The prevailing child welfare doctrine requires that children be placed in an institutional setting only as a last resort, and that they generally be housed in a manner least restrictive of their liberty.[49] Failure of INS detention policy to follow this doctrine with respect to juvenile aliens violates ICCPR Article 24.

Immigration law enforcement

Abuse and Misconduct

Independent investigations of INS border agents report widespread agent abuse of immigrants. Two major reports released in 1992 by the American Friends Service Committee and Human Rights Watch document what the latter describes as "appalling" findings that "beatings, rough physical treatment and racially motivated verbal abuse are routine," and that "unjustified shootings, torture and sexual abuse occur."[50] The federal government has not taken adequate steps to establish rules and procedures concerning the use of force.

Reports of INS misconduct have increased substantially in recent years as a result of expanded authority given to INS enforcement agents. In 1986, the Immigration Reform and Control Act (IRCA) doubled the number of Border Patrol officers. That same year, the Anti-Drug Abuse Act of 1986 gave INS officers the power to arrest drug smugglers and the responsibility of interdicting drugs. INS agents' enforcement authority was expanded again in 1990 with enactment of the Immigration Act of 1990 (IMMACT). Section 503 of IMMACT permits specified INS officers and employees to carry firearms and gives them broad criminal arrest powers. Recognizing the concerns about INS misconduct, however, Congress specifically conditioned this enhanced authority on the issuance of INS regulations regarding (1) use of force; (2) standards for enforcement activities; (3) the certification and training of officers; and (4) an expedited complaint process.[51]

The draft regulations issued by the INS in late 1992 fail to adequately address Congressional concerns.[52] For example, the regulations lack guidelines for minimizing the use of force, despite a September 1991 Justice Department audit that criticized INS for its firearms policy and subsequent INS assurances that these issues would be addressed in the forthcoming regulations. With regard to a

complaint process, the only change in the draft regulations is to refer complaints "promptly for investigation" under an "expedited internal review process."

Nor do these regulations address the problems stemming from the dual role of the INS as a law enforcement and service agency. Many of the victims of INS abuse are immigrants or have family members who are immigrants. They fear that lodging complaints against the INS may jeopardize their immigration status or trigger retaliatory action.

Covenant Provisions

Acts of beating, unjustified shooting, torture and sexual abuse by government officials violate ICCPR Article 7's right to be free from "torture or [from] cruel, inhuman or degrading treatment or punishment." Such actions also violate ICCPR Article 9(1)'s "right to liberty and security of person." Furthermore, ICCPR Article 17 recognizes the right of an individual to the protection of the law against "arbitrary or unlawful interference with his privacy, family, home or correspondence."

Alienage discrimination and employer sanctions

Background

Widespread discrimination against aliens in a variety of contexts, both public and private, violates domestic civil rights law. Many localities condition important benefits that are needed for everyday life, such as a driver's license, on proof of citizenship, while private entities, such as insurance companies and credit institutions, withhold important services from aliens.

Aliens have also experienced increasing employment-related discrimination as a result of the Congressional passage of an employer sanctions provision in the Immigration Reform and Control Act of 1986 (IRCA), which requires employers to verify the work eligibility of all job applicants and new employees and penalizes employers for knowingly hiring unauthorized aliens.

Although IRCA contains anti-discrimination provisions, the employer sanctions have led to widespread discrimination based on national origin and citizenship status. The General Accounting Office, in a 1990 report, found that almost 20 percent of U.S. employers initiated discriminatory hiring practices as a result of IRCA.[53] Moreover, aggressive enforcement of the anti-discrimination provisions of IRCA has been hindered by inadequate funding and by the Reagan

Administration's limiting interpretation that IRCA's anti-discrimination regulations, 28 C.F.R. § 44.200(a)(1), unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e, require proof of discriminatory intent.[54]

Proponents of sanctions ignore the discriminatory effect of the law, instead blaming the problems caused by employer sanctions on the work eligibility verification system, which allows a job applicant to use a wide range of documents to prove identity and work eligibility. As a result, several proposals have been made to modify the verification system. One of those, put forth in a report recently prepared by the Senate Subcommittee on Immigration and Refugee Affairs, proposes the designation of the Social Security card as the sole document for identity and employment verification and comes perilously close to calling for the establishment of a national identification card. The report also recommends requiring state motor vehicle departments to verify Social Security numbers with the Social Security Administration (SSA) before issuing a driver's license and recommends sharing databases.[55]

Covenant Provisions

ICCPR Article 26 prohibits "discrimination on any ground such as race, colour, language, . . . national or social origin . . . or other status" (such as citizenship status). The U.S. government's failure to enforce aggressively existing civil rights laws that prohibit discrimination against aliens violates the mandate of Article 2.[56] Its failure to repeal employer sanctions as the most effective way to prevent the kind of discrimination prohibited in Article 26 also contravenes its obligation under Article 2. Furthermore, any efforts to create a *de facto* national identity card and to expand the use of Social Security numbers will violate Article 17(1), which provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy."

Recommendations

U.S. policy toward Haitian refugees

1) Rescind Executive Order No. 12,807 (Kennebunkport Order).

2) Direct the Attorney General to grant temporary protected status to all Haitians in the U.S.

HIV exclusion

4) Urge Congress to repeal the HIV exclusion.

5) Direct the Department of Health and Human Services to remove HIV-infection from the list of excludable diseases.

6) Direct the Public Health Service to issue revised technical instructions to designated civil surgeons reflecting that HIV-infection is no longer an excludable condition and that applicants for immigration status are no longer subject to mandatory testing for HIV.

INS detention

7) Repeal the 1982 Reagan Administration regulation mandating detention of virtually all excludable aliens, and apply the same policy as is applicable to deportable aliens -- authorizing detention of only those who are likely to abscond or are a threat to the community.

8) Explore alternatives to detention that would ensure detainees' appearance at hearings without prejudicing their ability to pursue their legal claims, such as lower bonds, as well as other forms of supervised release.

9) Urge Congess to repeal the prohibition on the Legal Services Corporation's use of federal funds to provide representation to most aliens and enact legislation that would entitle all detained aliens to representation at government expense.

Immigration law enforcement

10) Direct the Immigration and Naturalization Service to: withdraw the proposed rules implementing §503 of the Immigration Act of 1990 and draft new rules that set strict limitations on the use of force, particularly deadly force; adopt stricter enforcement standards consistent with INS employees' expanded criminal arrest authority; require that INS employees receive training in these standards; and establish a meaningful internal review process that addresses the critical importance of outreach and intake procedures, protection against retaliation and confidentiality.

11) Urge Congress to enact legislation that establishes an independent Immigration Enforcement Review Commission to receive and investigate complaints of misconduct filed against the Border Patrol, U.S. Customs Service and any other federal officers designated to enforce immigration laws. The Commission should have:

a. subpoena power and sufficient investigatory staff to ensure thorough investigations of complaints;

b. the authority to recommend disciplinary action against officers responsible for abusive conduct and policy changes regarding immigration law enforcement practices; and

c. the authority to establish community outreach task forces for improving the working relationship between immigration officials and local community organizations, and to ensure that victims of misconduct are informed of their right to file complaints.

12) Separate the law enforcement and service branches of INS. As long as these branches are linked, victims of INS abuse will be fearful that lodging complaints will jeopardize their immigration status or result in retaliatory action.

Alienage discrimination and employer sanctions

13) Urge Congress to repeal employer sanctions.

14) Oppose efforts to create a *de facto* identity card and to expand the use of Social Security numbers.

Prison Conditions

Article 7 of the ICCPR prohibits torture and cruel, inhuman or degrading treatment or punishment. This is more protective of prisoners than the Eighth Amendment to the U.S. Constitution, which bars only "cruel and unusual punishments" and has been interpreted in an increasingly narrow fashion by U.S. courts. In adopting the Covenant, however, the U.S. entered a reservation to Article 7, restricting its reach to that already provided by U.S. constitutional law. Article 10 was not restricted by a U.S. reservation; its three paragraphs provide significant new protections. Article 10(1) requires that all persons deprived of their liberty "be treated with humanity and with respect for the inherent dignity of the human person." Conditions of confinement in the U.S. increasingly violate this mandate, with extreme overcrowding stripping prisoners of dignity and privacy and endangering their health and safety. The brutal treatment of the new "maxi maxi" high security prisons also contravene this provision. Article 10(2) stipulates that pretrial detainees should be separated from convicted persons and accorded treatment "appropriate to their status as unconvicted persons." Pretrial detainees are generally held separately in the U.S., but often in facilities which are in fact inferior to regular prisons, being older, more crowded and more dangerous. Finally, Article 10(3) states that prisoners must be given treatment that aims for "reformation and social rehabilitation." This stands in marked contrast to current U.S. law and practice, which rejects an affirmative right to rehabilitation.

Introduction

Notwithstanding the limiting reservations imposed by the U.S. Senate upon its ratification, enforcement of the International Covenant on Civil and Political Rights (ICCPR) in U.S. courts would have a significant positive impact in the longstanding struggle to protect U.S. prisoners from human rights abuses.[1] Developments in U.S. law since the 1960's provide a firm foundation upon which to build. Enforcement of the ICCPR would expand and strengthen the protections already afforded under the U.S. Constitution.

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[1] For the purposes of this report "U.S. prisoners" refers to all prisoners confined to federal, state and local prisons and jails in the U.S. The term "prisons" refers to those facilities housing sentenced prisoners. "Jails" are local facilities housing prisoners awaiting trial and short-term sentenced prisoners.

Articles 7 and 10 of the ICCPR are the relevant provisions in terms of this expansion of rights for U.S. prisoners. Article 7 is more expansive than its U.S. counterpart, the Eighth Amendment to the U.S. Constitution; whereas the Eighth Amendment bars "cruel and unusual punishments," Article 7 prohibits "torture, or cruel, inhuman or degrading treatment or punishment." In addition to providing broader protection on its face, Article 7 is clearly stronger than the Supreme Court's current interpretation of the Eighth Amendment, which requires a prisoner to demonstrate that prison officials acted with "deliberate indifference" in subjecting him to abusive conditions of confinement.[2] Moreover, if prison officials are physically abusive, the prisoner must meet an even more difficult burden, by proving that the offending official acted "maliciously and sadistically."[3] This line of Eighth Amendment jurisprudence puts serious legal obstacles in the path of U.S. prisoners seeking to present claims under U.S. law, and underscores the potential significance of Article 7 in affording a more generous avenue of redress. One of the reservations to the ICCPR, however, limits the U.S. obligation under Article 7 to the obligation already recognized under the U.S. Constitution.[4] In order to guarantee prisoners' rights through Article 7, this reservation must be lifted.

Article 10, however, was not limited by the United States, and its enforcement would represent a significant advance for the rights of U.S. prisoners. Article 10, paragraph 1 states that "All persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person."

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[2] *Wilson v. Seiter*, 501 U.S. ____, 111 S. Ct. 2321, 2326-27 (1991).

[3] *Hudson v. McMillian*, 503 U.S. ____, 112 S. Ct. 995, 999 (1992); *Whitley v. Albers*, 475 U.S. 312, 320, 106 S. Ct. 1078 (1986).

[4] This reservation reads:

> "The United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."

Clearly, references to humane treatment and "respect for inherent dignity" are subject to a considerable breadth of interpretation. Nonetheless, this language provides a significant layer of protection for prisoners, particularly given the narrow and stingy interpretation currently imposed on the "cruel and unusual punishments" prohibition of the Eighth Amendment.

Article 10, paragraph 3 is another provision which would, if enforced by U.S. courts, expand the legal protections and rights of all persons confined in U.S. prisons. Such prisoners would be entitled under this provision to a system that provides programming to assist in the individual's "reformation and social rehabilitation."[5] In other words, the custodial authority must provide an organized means of assisting the prisoner's social and community reintegration. This provision may entitle U.S. prisoners to substance abuse and job training programs, for example. Current U.S. constitutional law does not recognize this as a legitimate affirmative governmental obligation and indeed specifically rejects it.[6]

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[5] The U.S. Senate, however, did add an "understanding" related to Article 10, para. 3. when it ratified the Covenant in 1992. This provision states that the U.S., by acknowledging "rehabilitation" as a goal of its penal system, does not "diminish" other established goals of "punishment, deterrence and incapacitation."

[6] Rehabilitation of offenders has always been an established purpose of the U.S. criminal justice and penal systems. The Supreme Court has recognized that rehabilitation is a legitimate penological goal. *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974). Indeed, the federal statute which sets out the duties of the Federal Bureau of Prisons requires the "safekeeping" and "care" of federal prisoners. Title 18 U.S.C. 4042(2). Until the 1970s, the federal system and, to some degree, the states attempted to provide treatment, education and training programs that reflected a rehabilitation goal. However, social science studies appeared at that time which were interpreted by the U.S. criminal justice leadership as meaning that "nothing works." See Peter Kerr: "The Detoxing of Prisoner 88A0802," *New York Times Magazine* June 27, 1993, 23, 58. "Deterrence," "incapacitation," and even "punishment" became the exclusive legitimate purposes of the penal system. U.S. constitutional case law now reflects this prevailing doctrine and explicitly holds that there is no legal right for a prisoner to be afforded rehabilitation programming. See, e.g., *Fredericks v. Huggins*, 711 F.2d 31 (4th Cir. 1983); *Hoptowit v. Ray*, 682 F.2d 1237, 1254 (9th Cir. 1982); *French v. Heyne*, 547 F.2d 994, 1002 (7th Cir. 1976); *Morales Feliciano v. Romero Barcelo*, 672 F. Supp. 591, 619-20 (D.P.R. 1986); and *Termunde v. Cook*, 684 F. Supp. 255, 259 (D. Utah 1988).

This chapter discusses several of the chief forms of human rights abuses in U.S. prisons. We use our own findings, resulting from on-site visits, and borrow from numerous court cases to illustrate and further support points made.[7]

Conditions of Confinement in U.S. Prisons

The most significant human rights abuses in the U.S. stem from its exploding prison population. Since 1973, the nation's prison population has tripled. In an attempt to control crime, the nation embarked on a vast effort to confine offenders in prison facilities whenever identified, arrested and sentenced. Currently, about 1.3 million men and women are confined to prison and jail facilities at any given time, and perhaps ten times as many in the course of a year.[8] As a result, U.S. incarceration rates are among the highest in the world.[9] The Justice Department's latest reports show that in 1992 there was a 6.8 percent increase in the states' prison population and a 12.1 growth in the number of federal inmates.[10] This means that every week about 1,200 more inmates than the week before had to be housed, fed and clothed in the nation's prison facilities. Despite on-going prison construction all over the country, its pace has not kept up with the steady increase in prison population.[11]

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[7] Prison litigation is one of the chief methods in challenging prison conditions and seeking relief for abuses. In many instances, however, the U.S. law places substantial obstacles in way of presenting a claim or providing an effective remedy. In those circumstances the enforcement of the ICCPR utilizing the U.S. courts may make a difference in terms of preventing or providing relief for an identified abuse.

[8] In 1990, the number of jail admissions was 10,649,270. (Bureau of Justice Statistics, Dept. of Justice, "Correctional Populations in the U.S., 1990," July 1992.)

[9] Sentencing Project, *Americans Behind Bars: One Year Later*, February 1992. In 1989, the incarceration rate stood at 426 for every 100,000 people. In 1990, it increased to 455, "the highest reported rate in any sizable country in the world." Human Rights Watch, *The Human Rights Watch Global Report on Prisons* (New York: Human Rights Watch, 1993), p. xxxi.

[10] "Nation Prison Population Rises 7.2%," *Washington Post*, May 10, 1993.

[11] On November 4, 1993, the U.S. Senate passed the Byrd Amendment. Intended to be

The predictable consequence of this vast influx into U.S. prisons is extensive overcrowding. "Double-bunking" is the order of the day. Facilities built to single-cell the population have instead assigned two prisoners to the same cell; more beds have been crammed into open dormitory space; triple-bunking in these dorms is not unknown. Facilities never designed for housing people are opened overnight for prisoner occupancy. When fifty or sometimes a hundred or more people are housed in one gigantic room, it is difficult to dream of complying with the provision of the Covenant that mandates respect to prisoners' dignity. Thus, for example, in one section of the Rikers Island jail complex in New York City, particularly dangerous inmates who are housed fifty to a room must use bathrooms that for security reasons cannot have doors or even curtains. As a result, inmates have to use the toilet in full view of a guard, who is positioned behind a glass partition a few feet away; the guards are often female.

Lack of privacy and space is only one result of overcrowded prison facilities. Common sense dictates that when prison authorities decide to double or triple-bunk in an open dormitory setting, guards' ability to monitor and observe the prisoners is greatly reduced. Overcrowding also means deteriorating physical conditions and sanitation, as well as reduced levels of basic necessities such as staff supervision and the delivery of health care services. Moreover, crowding is directly linked to the spread of airborne diseases such as tuberculosis. U.S. prisoners are therefore subjected to a regime which endangers their basic human rights to a safe and healthy custodial environment. These aspects and results of overcrowding violate the Article 10 right to be treated with humanity and respect.

Article 10, paragraph 2 of the ICCPR mandates separate treatment for pre-trial detainees, who, in the U.S. and many other countries, are innocent under the law until proven guilty. Thus, under the Covenant, accused prisoners should

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part of the Violent Crime Control and Law Enforcement Act of 1993, the amendment appropriates three billion dollars to build ten new regional prisons, to be operated by the federal government. Seventy-five percent of the new cell space would be allocated for state and local prisoners, on condition that those state and local governments enact new and harsher sentencing laws.

Despite the enormous amount of money allocated, these new facilities will not have the capacity to house safely and humanely the numbers of prisoners this statute would generate were it to pass. The impact of this legislation would aggravate an already dangerous situation.

receive treatment which is better, or at least not worse than, the conditions for sentenced prisoners.[12] Most pre-trial detainees in the U.S. are held in local jails, facilities which are often in much worse shape than state and federal prisons. These jails tend to be older, more crowded, more dilapidated and sometimes more dangerous than the prisons. In fact, jailed detainees are more apt to suffer abuse than are sentenced inmates in prison facilities.[13] These conditions violate Article 10, paragraph 2.

Violence and Personal Safety

Related to overcrowding is the endemic violence and threat of violence that pervades U.S. prisons. Both inmate-on-inmate violence and assaults by the staff are extremely serious problems. These facilities are dangerous places. In addition to prisoners being forced to live with other offenders who have committed serious and often violent crimes, prison conditions, policies and practices make these facilities into more dangerous places than they need be.

Racial hostility and animosity aggravate the situation. Prison gangs organized on racial and ethnic lines compete with one another for resources and control, with a frequent result of tension and then violence. Supervision by an underpaid and undertrained largely white rural guard force does not help matters.[14]

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[12] See Paul R. Williams, *Treatment of Detainees: Examination of Issues Relevant to Detention by the United Nations Human Rights Committee*, Geneva: Henry Dunant Institute, 1990, p. 76.

[13] *See The Human Rights Watch Global Report on Prisons* (New York: Human Rights Watch, 1993).

[14] African-American prisoners are confined in numbers that are significantly disproportionate to their numbers in the general population of the U.S. In 1990 approximately 50% of the population of U.S. prisons was reported as "Black" although the African-American population constitutes approximately 12% of the overall population of the nation. BJS, DOJ, *Correctional Populations in the United States, 1990*, Table 5-6, p. 83. Marc Mauer of the Sentencing Project authored a 1990 report concluding that one in every four African-American males between the ages of 20-29 is under some penal supervision on any given day. Marc Mauer, Sentencing Project, *Young Black Men and the Criminal Justice System: A Growing National Problem* (February 1990) p. 3.

Published court cases over the last decade document the abusive treatment at the hands of other prisoners and government officials. Illustrative of these opinions is *Fisher v. Koehler*, which concerned violence at one facility in New York City's Rikers Island complex.[15] A federal district judge found that "inmate-inmate violence . . . is a substantial and widespread problem. In 1986, there were roughly 1,300 reported violent incidents in an institution with a daily population of 2,500-2,600, a figure which does not account for the phenomenon of underreporting because of fear of reprisal . . . Furthermore, looking beyond statistics, the testimony heard and evidence received at trial show that serious violence has become almost a feature of institutional life . . . Aggressive inmates with a propensity to violence, some of whom gang together in "posses," have not been kept apart from the general population, even after repeated acts of violence . . . [other] inmates have suffered slashings, burnings and other forms of violent injuries with chilling regularity . . . the attacks have taken place not only in general population dormitories, but also in protective custody, where inmates who fear for their personal safety are housed for protection . . ." With respect to staff assaults the court asserted that "the record is replete with incidents in many cases substantially undisputed by the defendants [government officials], where the use of force by [prison] correction officers was far in excess to the need for force, with serious injuries resulting. In numerous incidents the officers acted, if not 'maliciously and sadistically,' with at least a viciousness going beyond 'a good faith effort' to maintain or restore discipline . . ."[16]

Another federal judge found pervasive violent conditions in the State Correctional Institution at Pittsburgh. Writing an opinion in the 1989 case of *Tillery v. Owens*, he wrote that 69 to 138 assaults and 30 to 65 disciplinary charges for assault occurred in a one year period for a prison population of up to 1,800.[17] He noted that these numbers were in reality far higher, as many inmates failed to report assaults for fear of retaliation. Inadequate staffing, failure to search inmates leaving industries buildings, failure to adequately monitor shower areas, and permitting different categories of prisoners (the weak and the strong) to be housed together were described in this opinion.

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[15] 692 F.Supp. 1519 (S.D.N.Y. 1988).

[16] *Id*. at 1560, 1561, 1563.

[17] 719 F.Supp. 1256 (W.D. Pa. 1989).

Violence at a Florida prison was the subject of a 1987 opinion upholding jury awards in favor of eight prisoners and imposing injunctive relief.[18] The opinion describes unchecked abuse, sexual assault and torture. It finds that, while prison officials did not directly participate in these abuses, they failed to take necessary measures to protect weaker prisoners in their custody.

There are numerous further examples from the published cases where U.S. prison authorities have failed to isolate prisoners who are obviously targets; other cases describe how prisoners have been placed in situations of danger from someone who is known to be aggressive and violent.[19]

The failure to protect prisoners' personal safety is directly related to the pervasive overcrowding situation discussed above. The lack of space and privacy increases tension and stress. Overcrowding also depletes resources necessary to keep prisoners occupied and to maintain adequate staff supervision and control. In spite of these problems, U.S. prison authorities are continuing to provide dormitory housing for increasing numbers of more dangerous prisoners, because of the great

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[18] *LaMarca v. Turner*, 662 F.Supp. 647 (S.D. Fla. 1987).

[19] *Cortes-Quinones v. Jiminez-Nettleship*, 842 F.2d 556, 559-60 (1st Cir. 1988) (transferring a mentally disturbed inmate to an overcrowded general population with no psychiatric care), *cert. denied*, 488 U.S. 823 (1988); *Stokes v. Delcambre*, 710 F.2d 1120, 1125 (5th Cir. 1983) (failure to separate young white males); *Gullate v. Potts*, 654 F.2d 1007, 1013 (5th Cir. 1981) (releasing a known informant to a high security general population); *Bellamy v. McMickens*, 692 F.Supp. 205, 211 (S.D.N.Y. 1988) (permitting another inmate access to the cell of a prisoner known to be at risk of being murdered); *Blizzard v. Quillen*, 579 F.Supp. 1446, 1449-50 (D.Del. 1984) (transfer of known "snitch" into general population). *Redman v. City of San Diego*, 942 F.2d 1435, 1444 (9th Cir. 1991) (*en banc*) (double celling an "aggressive homosexual" with another inmate), *cert. denied*, 112 S.Ct. 972 (1992); *Frett v. Government of Virgin Islands*, 839 F.2d 968, 978 (3d Cir. 1988); *Saunders v. Chatham County Board of Commissioners*, 728 F.2d 1367, 1368 (11th Cir. 1984) (failure to segregate an inmate who displayed a "violent pattern of behavior"); *Wade v. Haynes*, 663 F.2d 778, 780-82 (8th Cir. 1981) (putting a violent inmate in a segregation cell with a young and small inmate), *aff'd on other grounds sub nom. Smith v. Wade*, 461 U.S. 30 (1983); *Harris v. Roberts*, 719 F.Supp. 879, 880 (N.D.Cal. 1989); *Ryan v. Burlington County*, 708 F.Supp. 623, 633-35 (D.N.J. 1989), *aff'd on other grounds*, 889 F.2d 1286 (3d Cir. 1989); *McCaw v. Frame*, 499 F.Supp. 424, 425 (E.D.Pa. 1980) (plaintiff placed in a cell with a known rapist).

cost savings involved.[20]

Staff assaults on prisoners have also been amply documented in published opinions of U.S. courts. Relief has been granted to prisoners when they are able to prove a widespread pattern of such abuses. Findings containing such evidence have been published in cases from prisons and jails located in Washington, Arkansas, New York, New York City and Texas.[21]

Still other cases document brutal beatings by police in police station "holding areas." In *U.S. v. Cobb*, for example, the prisoner was handcuffed and hit in the head with a "slapjack."[22] Further beatings were administrated over the next two hours. The prisoner suffered head, eye and lip injures that necessitated reconstructive surgery.[23]

The use of weapons and even deadly force on unarmed sentenced

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[20] As part of this trend, in 1991 the American Correctional Association, the professional trade association of correctional administrators, adopted a standard which would allow prison authorities to house medium security offenders in open dorm settings under certain circumstances. Prior to this, the ACA barred such prisoners from these facilities. This change came as the direct result of government need for less expensive housing space. The Government Accounting Office (GAO) has also issued reports recommending this action. GAO, *Federal Prisons: Revised Design Standards Could Save Expansion Funds*, GAO/GGD 91-54, March 14, 1991. Also see GAO, *Federal Jail Bedspace: Cost Savings...Possible in Capacity Expansion Plan* GAO/GGD 92-141 September 1992.

[21] Injunctive relief can be granted only when prisoners prove a widespread pattern or practice of unconstitutional use of force in jails and prisons. *See Hoptowit v. Ray*, 682 F.2d 1237, 1249-51 (9th Cir. 1982); *Finney v. Arkansas Board of Correction*, 505 F.2d 194, 205 (8th Cir. 1974); *Inmates of Attica v. Rockefeller*, 453 F.2d 12, 22-23 (2d Cir. 1971); *Fisher v. Koehler*, 692 F.Supp. 1519, 1562-65 (S.D.N.Y. 1988), *injunction entered*, 718 F.Supp. 1111 (S.D.N.Y. 1989), *aff'd*, 902 F.2d 2 (2d Cir. 1990); *Ruiz v. Estelle*, 503 F.Supp. 1265, 1299-1307 (S.D.Tex. 1980), *aff'd in pertinent part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 458 U.S. 1121 (1982).

[22] 905 F.2d 784, 785-786 (4th Cir. 1990).

[23] Other illustrative cases include *Powell v. Gardner*, 89 F.2d 1039 (2d Cir. 1989) and *Meade v. Grubbs*, 841 F.2d 1512 (10th Cir. 1988); and *White v. Whiddon*, 747 F.Supp. 694 (M.D.Ga. 1990).

prisoners is a frequent occurrence in prisons across the country. Excessive use of force has been found in many cases. In *Wilson v. Lambert*, a prisoner was beaten by guards when he refused to return to a housing unit where he was threatened with sexual assault. He won on his Eighth Amendment claim and damages were awarded.[24] *Brown v. Triche*, involved a handcuffed inmate who was pushed against a wall, hit several times in the face and hit or kicked in the neck when he failed to sit down as ordered by a staff member.[25]

Finally, a large number of cases involve death threats against prisoners or other extremely brutal treatment. In *Burton v. Livingston*, for example, a death threat was made at gunpoint by a prison guard. This conduct was characterized by an appellate judge as "a wanton act of cruelty which . . . was brutal despite the fact that it resulted in no measurable physical injury.[26]

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[24] 789 F.2d 656 (8th Cir. 1986).

[25] 660 F.Supp. 281 (N.D.Ill. 1987). See also *Musgrove v. Broglin*, 651 F.Supp. 769, 773-76 (N.D.Ind. 1986), in which a prisoner failed to get out of bed and the officer dumped him onto the floor, injuring him substantially; the court found an Eighth Amendment violation. *Patzner v. Burkett*, 779 F.2d 1363, 1371 (8th Cir. 1985) (jury question presented where legless man had been dragged out of his house without asking whether he had artificial legs or a wheelchair); *Lewis v. Downs*, 774 F.2d 711, 714-15 (6th Cir. 1985) (some force was justified but striking and kicking handcuffed persons was not); *Martinez v. Rosado*, 614 F.2d 829, 830-32 (2d Cir. 1980) (prisoners' refusal of orders did not justify an assault by officers); *Smith v. Dooley*, 591 F.Supp. 1157, 1168-69 (W.D.La. 1984) (it was reasonable to use force to get an armed inmate out of his cell, but not to continue after he was disarmed and handcuffed); *Bush v. Ware*, 589 F.Supp. 1454, 1461-62 (D.D.Wis. 1984) (guards were justified in trying to take a metal object from prisoner locked in his cell, but not in striking him with a flashlight and restraints).

[26] 791 F.2d 97, 100 (8th Cir. 1986). See also *Davis v. Locke*, 936 F.2d 1208, 1212 (11th Cir. 1991 (dropping a shackled inmate so he hit his head violated the Fourteenth Amendment); *Jackson v. Crews*, 873 F.2d 1105, 1108 (8th Cir. 1989) (threat to break the plaintiff's neck could violate the Fourth Amendment); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (interrogation at gunpoint may deny due process), *cert. denied*, 110 S.Ct. 733 (1990); *Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986) (verbal threats and waving of knife violated the Eighth Amendment; damages awarded); *Black v. Stephens*, 662 F.2d 181, 189 (3d Cir. 1981) (damages awarded against officer who brandished loaded gun at point-blank range), *cert. denied*, 455 U.S. 1008 (1982); *Oses v. Fair*, 739 F.Supp. 707,

Human rights abuses in "supermax" facilities

Perhaps one of the most troubling aspects of the human rights situation in U.S. prisons is a trend that could be labelled "Marionization." In 1983, the federal prison at Marion, Illinois implemented a series of extraordinary security measures in order to stem the tide of violence, injury and death that occurred at that facility.[27] Since then, at least 36 states have followed suit in establishing similar facilities, dubbed "super-maxs" or "maxi-maxis." They have been established in Southport, New York; Pelican Bay, California; Florence, Arizona; and Ely, Nevada, among other places. The federal system is also constructing a new maxi-max in Florence, Colorado. All of these facilities purport to house the most feared and dangerous prisoners of their state.

Conditions in these prisons are particularly harsh and security is exceptionally strict. Placement can often amount to solitary confinement for years on end.

> As a result of the permanent lockdown, each inmate at Marion is confined to a one-man cell . . . round the clock, except for brief periods outside the cell for recreation (between 7 and 11 hours a week), for a shower, for a visit to the infirmary, to the law library, etc. . . . Recreation means pacing in a small enclosure -- sometimes just in the corridor between the rows of cells. The inmate is fed in his cell, on a tray shoved in between the bars. The cells are modern and roomy and contain a television set as well as a bed, toilet, and sink, but there is no other furniture and when an inmate is outside his cell he is handcuffed and a box is placed over the handcuffs to prevent the lock from being picked;

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709 (D.Mass. 1990) (Eighth Amendment was violated when an officer struck inmate with a gun, stuck gun barrel into his mouth, and made him kiss the officer's wife's shoes); *Parker v. Asher*, 701 F.Supp. 192, 194-95 (D.Nev. 1988) (threatening a prisoner with a taser gun solely to inflict fear stated an Eighth Amendment claim); *Douglas v. Marino*, 684 F.Supp. 395, 398 (D.N.J. 1988) (similar to *Parrish* above.

[27] The violence which led to imposition of these measures is described in *Bruscino v. Carlson*, 854 F.2d 162, 165 (7th Cir. 1988) *cert. den.* 491 U.S. 907 (1989).

> his legs may also be shackled. Inmates are forbidden to socialize with each other or to participate in group religious services. Inmates who throw food or otherwise misbehave in their cells are sometimes tied spread-eagled on their beds, often for hours at a stretch, while inmates returning to their cells are often (inmates of the control unit, always) subjected to a rectal search: a paramedic inserts a gloved finger into the inmate's rectum and feels around for a knife or other weapon or contraband.
>
> *Bruscino v. Carlson*, 845 F.2d at 164.

In the "supermax" located at the Florida State Prison at Starke, some inmates are held in windowless cells from which they are allowed out only three times a week, for ten minutes, to shower. The rest of the time they are alone in the cell. This situation may last for a few years. Some of the inmates interviewed by Human Rights Watch had not been outdoors for several years. In the Maximum Control Complex in Westville, Indiana, inmates are locked in their cells for between twenty-two and a half and twenty-four hours a day, never see anyone except their guards, and are often punished with the loss of access to reading materials, among other measures.

An observer from the ACLU's National Prison Project gave this description of living conditions at California's version of the "supermax":

> Twenty-two-and-a-half hours a day are spent in the cells. The "free" hour and a half is spent in an "exercise yard" which is essentially a small bare concrete room with high ceilings. Handcuffed and in waist chains, prisoners are put under double escort when they go to the "yard," and once there, they are continually monitored by cameras while they exercise in solitude. Officers communicate with prisoners through disembodied speakers in the walls. The ceiling is covered with heavy mesh on one side and heavy plastic on the other, and the resulting filtered light allowed through the screen is the closest the prisoners in the SHU [special housing unit] ever get to feeling the sunlight. Every move is monitored by a closed-circuit camera. Activity is severely limited. There are no training programs for prisoners, no correspondence courses, and

> no vocational training.
>
> Inside the SHU, four 500-foot long corridors are monitored by video cameras. Every 100 feet there are "crash gates" which can be closed during an emergency. All staff carry pocket alarms, which if activated, set off red lights in the hallways. Each set of four corridors is overseen from a control room where all cameras are monitored.
>
> Each concrete cell contains a concrete stool, concrete bed, concrete writing table, and a toilet and sink made of heavy stainless steel. Nothing is allowed on the walls. The cells of SHU prisoners are lined with opaque materials, so that prisoners cannot see out. Prisoners never walk freely, they never emerge from their cells without being handcuffed and in chains. They shuffle to the law library single file, chained to each other at the ankles. Prisoners eat on tray of food which are passed through a slot in the cell door. Toothpaste is removed from the tube. There is no unread mail.[28]

A lawsuit concerning these conditions alleges:

> "Pelican Bay disciplines VCU [violence control unit] prisoners by denying them basic necessities. Prison officials, for example, put VCU prisoners on 'sheet restriction,' by which prisoners receive no bedding, or 'cup restriction,' by which prisoners are denied cups to drink from. Pelican Bay officials may also deny VCU prisoners eating utensils; or leave prisoners handcuffed or hogtied (with hands tied behind their backs), forcing them to lap their food from their plates as best they can. Pelican Bay officials also put VCU prisoners on 'paper gown' status....Over time the gown becomes shredded and may not be replaced."
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> *Madrid v. Gomez*, #C-90-3094

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[28] Jan Elvin, "Isolation, Excessive Force Under Attack at California's Supermax," *NPP Journal* 5 (Fall 1992) at 21.

(U.S.D.C. N.D.Ca.)

U.S. law justifies this brutal treatment by pointing to the dangerous violence-prone nature of the prisoners confined to these prisons. The judge hearing the appeal in the Marion case, discussed above, considered the conditions "sordid and horrible" and "depressing in the extreme," but refused to condemn them as violative of the Eighth Amendment and therefore unconstitutional. He came very close, but in the end held that because these prisoners are deemed "the nation's least corrigible" and "[persons who] cannot be deterred by threat of punishment" they do not enjoy the protection of the nation's proscription of "cruel and unusual punishment."[29] In other words, human rights may be suspended if the authorities cannot prepare humane alternatives. The ACLU and Human Rights Watch have argued that no matter how dangerous a prisoner may be, certain basic rights must be guaranteed in the course of an inmate's confinement.[30] In addition, because the decision to confine in "maxi-maxis" is done by the prison administration and without independent supervision, such confinement has been applied with unnecessary frequency.

Women Prisoners

Women account for about 6% of total state prison inmates and about 7% of total federal prison inmates. Since 1980, however, the number of female inmates has been growing at a faster rate than that of men.[31]

Because of the relatively low number of women inmates, the number of female prisons is low. Consequently, many women are housed far from their homes and, as a result, receive few visits. This is a particularly serious problem for women serving sentences in the federal system, because there are only ten federal prisons

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[29] *Bruscino v. Carlson*, 854 F.2d at 164, 166.

[30] The application of Article 7's ban on "inhuman or degrading treatment" would be critical here, since it goes well beyond the narrowly-construed Eighth Amendment ban on "cruel and unusual punishments." See above p. 2.

[31] *See* U.S. Bureau of the Census, *Statistical Abstract of the United States, 1992* (Washington D.C., 1992), p. 198, table no. 331. The percentage of female inmates grew from four percent of all state and federal inmates in 1988 to six percent in 1990.

in the entire country that house women convicts. Women prisoners from Washington, D.C. are confined to federal facilities located in other states, hundreds or even thousands of miles from their homes; male inmates, in contrast, are housed within a 15-mile radius of Washington, DC.[32]

Female prisoners generally have fewer educational, recreational, and vocational opportunities than their male counterparts. On-site visits by Human Rights Watch confirm this assessment.[33] In the federal camp in Danbury, which is adjacent to a larger male prison, women get the lower-paying, less-skilled jobs. In a plant making equipment for the Department of Defense, men perform a variety of electronic jobs, while women do the packing. In the federal institution in Marianna, Florida, female inmates in a prison that held eighty-four prisoners at the time of our visit informed us that they had fewer educational opportunities and recreational facilities than the male prisoners held in a larger institution next door. In *Glover v. Johnson*, the court found that vocational programs were more numerous for men and provided men with more marketable skills than programs for women.[34] These gender inequalities in prison facilities and programs violate U.S. antidiscrimination law[35] as well as Article 26, the ICCPR's broad anti-discrimination provision. The failure to adequately enforce these laws violates Article 26, which requires "effective protection agains discrimination," and Article 2, which requires effective remedies for violations of Covenant rights, as well as enforcement of those remedies.

Recommendations

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[32] See *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989).

[33] *See Prison Conditions in the United States*, Human Rights Watch (New York: Human Rights Watch, 1991).

[34] 478 F.Supp. 1075 (E.D.Mich. 1979). See also *Canterino v. Wilson*, 546 F.Supp. 174 (W.D.Ky. 1982); *Klinger v. Lofgren*, No. CV88-L-399 (D. Neb. Memorandum Opinion, June 21, 1993).

[35] Discrimination in educational and vocational opportunities violates Title IX of the Civil Rights Act of 1964, 20 USC §1681 (1988); discrimination in prisons generally violates the due process clauses of the Fifth and Fourteenth Amendments.

1. Remove the reservations and understandings that present obstacles to the application of ICCPR Article 7 in U.S. courts.

2. Seek ways of reducing present prison and jail populations to more manageable and safe levels.

3. Direct the Justice Department to conduct an investigation of conditions in super-maximum facilities and to review its penal policies establishing these facilities, with a view toward finding alternate and humane means of confining its more dangerous offenders.

4. Strictly enforce U.S. laws with respect to the rights of prisoners to equal access to resources, programming and services.

Police Abuse

As spotlighted by the 1991 beating of Rodney King, police abuse is one of the most pressing human rights issues facing the United States. The persistent use of excessive force, often exacerbated by racism, violates the Article 7 prohibition on "cruel, inhuman and degrading treatment or punishment." These continuing abuses by state and local law enforcement agencies violate Article 7, notwithstanding the reservation attached to this article at the time the United States ratified the ICCPR.

The discriminatory impact of police abuse on members of minority groups, particularly African Americans, violates the Article 2 and Article 26 prohibitions on discrimination. This is true regardless of whether discriminatory policies and acts are intentionally motivated by race or not. Under Article 2 of the ICCPR the United States must take "the necessary steps" to "ensure" that the rights guaranteed in Article 7 are respected by all law enforcement agencies in the United States. Those steps must include legislation giving the federal government the necessary authority to intervene to prevent and remedy police abuse by state and local law enforcement authorities.

Since the March 3, 1991, beating of motorist Rodney King by Los Angeles Police Department (LAPD) officers the issue of police brutality and other forms of abuse by law enforcement officers has gained a new prominence in the United States. In the aftermath of the King beating a number of inquiries into police abuse were undertaken in Los Angeles and at the national level.[1] In

[1] These inquiries include the Report of the Independent Commission on the Los Angeles Police Department (1991) (Christopher Commission Report). The Independent Commission was chaired by Secretary of State Warren Christopher and is commonly referred to as the Christopher Commission. *See also* "Beyond the Rodney King Story: NAACP Report on Police Conduct and Community Relations" (1993) (Beyond Rodney King); "On The Line: Police Brutality and its Remedies," American Civil Liberties Union (1991)(On The Line); Paul Hoffman. *The Feds, Lies and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 So. Cal. L. Rev. 1453 (1993); Jerome Skolnick & James Fyfe, *Above the Law: Police & the Execessive Use of Force* (1993).

addition, international human rights monitoring organizations, including Human Rights Watch, reported on the problem of police abuse in the United States in the context of the events in Los Angeles.[2]

[2] Human Rights Watch, "Police Brutality in the United States: A Policy Statement on the Need for Federal Oversight" (1991); Amnesty International, "United States of America: Torture, Ill Treatment and Excessive Force by Police in Los Angeles, California" (1992).

These investigations found that the problem of police abuse is a serious human rights problem in modern American society. As the police chiefs from ten major American cities stated at a summit conference after the King beating, "the problem of excessive force in American policing is real."[3]

This chapter provides a general description of the problem of police abuse in America. This description is drawn from many of the recent investigations into police abuse in Los Angeles and other parts of the country and is based on the ACLU's historical experience in responding to police abuse throughout the country.

The chapter also recommends some of the steps that should be taken by the federal government to respond to the reality of police abuse in America to fulfill this country's obligations under the ICCPR.

Article 7 is the main provision of the Covenant bearing on the problem of police abuse in the United States.[4] The prohibition against "cruel, inhuman and degrading treatment or punishment" is broader than the provisions of the U.S. Constitution restraining police abuse. This is because Article 7 prohibits a range of "inhuman" or "degrading" treatment or punishment that goes beyond U.S. constitutional standards. These terms have not been defined comprehensively by the Human Rights Committee created under the ICCPR,[5] but it is likely that at least some forms of police harassment would fall within these broader international standards.[6] As noted in chapter five concerning prison conditions, the United

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[3] This chapter focuses on police abuse by state and local law enforcement agencies. There have been many instances of abuse by federal law enforcement agencies, including, for example, the Border Patrol abuses discussed in chapter four. Under the ICCPR, the federal government must address these abuses and create the legal and administrative framework necessary to ensure that such abuses are prevented and redressed.

[4] Other provisions of the ICCPR are also violated by the police abuse that occurs in the United States each year. In particular, the articles in the ICCPR providing for equal rights and freedom from discrimination are violated by police practices that discriminate against racial minorities, especially the African-American community in the country.

[5] *See generally* Dominic McGoldrick, *The Human Rights Committee*, at 367-380 (1991).

[6] An example would be the practice of "proning out" young minority youths. This practice involves stopping young minority males for minor infractions and forcing them to kneel on the street for long periods of time in uncomfortable positions, often in full view of passersby. A pattern of police conduct of this kind might well be considered "degrading"

States has submitted a reservation to Article 7 limiting the binding nature of Article 7 to the cruel and unusual punishment prohibited by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. The ACLU and Human Rights Watch urge the Clinton Administration to remove this reservation so that all persons in the United States are protected from all forms of cruel, inhuman and degrading treatment or punishment prohibited under the ICCPR.

Whether or not the United States withdraws its reservation to Article 7, this country has assumed an international obligation to eliminate the police abuse in violation of Article 7 as the United States has accepted it. The United States has agreed in Article 2 of the ICCPR to "ensure" that all of the rights recognized in the ICCPR, including the protections embodied in Article 7, are respected without discrimination of any kind. If existing U.S. law is not sufficient to "ensure" these rights the United States has agreed to take "the necessary steps" to give effect to these rights. These obligations have been assumed by the United States without reservation and must be fulfilled without delay.

The nature of the problem

The problem of police abuse in the United States is not a new phenomenon. Police abuse has been a feature of the American civil liberties landscape for much of the country's history.[7] In this century thousands of African-Americans were lynched by or with the support or acquiescence of law enforcement officials in many parts of the country.[8]

Though the United States has largely overcome this particularly egregious form of repression, the problem of racially-discriminatory violence against members of minority communities and other vulnerable groups by law enforcement officials and private hate groups remains a significant problem in America.

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under Article 7.

[7] *See*, *e.g.*, Gunnar Myrdal, "An American Dilemma 535-46 (1944); U.S. Commission on Civil Rights, "Justice" 26 (1961)("police brutality is a serious and continuing problem in many parts of the country."); and National Advisory Commission on Civil Disorders, "Report of the National Advisory Commission on Civil Disorders 293-307 (1968).

[8] Between 1889 and 1940, 3,833 lynchings took place in the United States; 80% of these lynchings were of African-Americans. Myrdal at 560.

Today, the problem of police abuse, especially in minority communities, is one of the most pressing civil liberties issues in this country. The reality of this problem was brought into the living rooms of tens of millions of Americans by the videotape of the Rodney King beating. The Rodney King beating was not an aberration. The use of excessive force[9] by state and local police agencies has become a common feature of American policing.

It is impossible to provide a comprehensive account of police abuse in this context; however, some intractable problems may be identified.

Excessive Force

On the streets of inner cities in America excessive police force goes by a variety of names. Often it is called "street justice" or "attitude adjustments." The common feature of these practices is that police inflict physical beatings, varying in severity, to impose a form of punishment beyond the minimum amount of force necessary to subdue a suspect.

The public investigations into police abuse in Los Angeles after the Rodney King beating revealed the depth of the problem of excessive force in the LAPD.[10] A study of police abuse by the NAACP confirmed that the problem of police abuse is national in scope.[11] As Hubert Williams, the President of the Police Foundation and former Chief of Police of Newark, stated "police use of excessive force is a significant problem in this country, particularly in our inner cities."

Often, the routine use of excessive force is part of a "hardnosed," military style of policing fostered by the management of the police department in the "wars"

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[9] "Excessive force" in U.S. constitutional terms is force that exceeds what is objectively reasonable in the circumstances confronting the officer to subdue a person. *Graham v Connor*, 490 U.S. 386 (1989).

[10] A similar investigation was conducted in 1991 and 1992 by retired Los Angeles Superior Court Judge Kolts concerning claims that the Los Angeles County Sheriff's Department (LASD) engaged in systematic abuses. Judge Kolts report, issued in 1992, made findings very similar to the findings of the Christopher Commission.

[11] *See generally Beyond Rodney King*, *supra*.

against drugs, crime and gangs.[12] As the Christopher Commission was told by a high-ranking LAPD officer, excessive force was treated leniently by LAPD managers because it did not violate the internal LAPD "moral code" that permits "some thumping" as a matter of course.[13]

The Christopher Commission identified some common patterns of excessive force in the LAPD, patterns that are common in many other police departments. Many of the incidents involved "contempt of cop," where beatings occurred because suspects did not obey police commands, or did not obey them rapidly enough, or because a suspect insulted the officer in the course of an arrest. Another common scenario for excessive force was the context of the Rodney King beating: "street justice" imposed after a high speed chase or other form of police pursuit. The investigations into LAPD and LASD (Los Angeles County Sheriff's Department) abuse both found that beatings, or in some cases police shootings, often occurred at the end of pursuits.[14] The most extreme form of excessive force, of course, are police shootings, and there is substantial evidence of numerous unjustified police shootings, often resulting in death or serious injury to the suspects.[15]

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[12] Christopher Commission Report, at 97-100.

[13] *Id.* at 166.

[14] A radio transcript recorded a police dispatcher referring to Rodney King in a way that not only suggested that King was beaten for this reason but that this practice was widespread: "He pissed us off, so I guess he needs an ambulance." Richard Serrano, "Officers Beat King Out of Anger, Transcript Suggests," *Los Angeles Times*, January 24, 1992, at A1, A23. Christopher Commission Report at 56; Kolts Report at 35-50.

[15] One investigation into shootings by the LASD published in October 1990 by the Los Angeles Daily News found that there were fifty-six questionable shootings by LASD deputies in the period from January 1, 1985, to August 27, 1990. David Parrish & Beth Barrett, "The Sheriff's Shootings: Minorities Are a Majority," *Daily News*, Oct. 7, 1990, at 1. In 87% of these shootings the victims were African-American, Latino, Asian or Pacific Islander. Twenty-six of the fifty-six people died as a result of the shooting. In none of the cases did the suspects shoot a gun at deputies or anyone else. In only four cases did the suspect have a weapon of any kind and these were a knife, a push broom brush, a sauce pan and a metal pipe. *Id.* at 12. Though this investigation was not conclusive the study raised serious concerns that the LASD had committed what amount to extra-judicial executions.

In Los Angeles, the independent investigations into LAPD and LASD abuse found that the internal discipline systems had not responded effectively to the existence of widespread use of excessive force. The investigations found that in each department there were dozens of "problem" officers with numerous complaints of misconduct who had not been trained, supervised or disciplined in a way that would restrain their abusive conduct.[16]

Moreover, the "code of silence" in both departments made it very difficult to hold disciplinary charges or criminal charges against officers for misconduct. The widespread refusal of officers to testify against other officers accused of misconduct makes it very difficult to make officers accountable to constitutional commands.[17] Moreover, the "code of silence" is enforced by threats of retaliation against officers who complain or testify about the misconduct of other officers.[18] The result is that police officers too often act with impunity toward the people they come into contact with, knowing that there is little chance that they will be sanctioned effectively for the use of excessive force.

Race and Police Abuse

The importance of race as a factor in police abuse in the United States is central.[19] Racial minorities are disproportionately represented as victims of

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LASD Sheriff Sherman Block declined to disclose if any of the deputies had been disciplined as a result of these shootings; none of the deputies involved faced criminal charges.

[16] These problems are also national in scope. *See generally Beyond Rodney King*, *supra*.

[17] *Beyond Rodney King*, at 114.

[18] *Beyond Rodney King*, at 122-127. The forms of retaliation include the filing of trumped up charges against officers who break the "code of silence" or the failure to get back-up assistance from fellow officers in the course of duty.

[19] *Beyond Rodney King*, at 10-23. Of course, the problem of police abuse is not limited to minority communities or to urban American. The focus of this chapter is on police abuse in the inner city because this appears to be the most prevalent form of abuse at this time.

excessive force and other forms of police abuse.[20] This is attributable to the continuing effects of racism in American society and also to the fact that minority communities in the inner city are the forums in which the "wars" against drugs, crime and gangs are waged.

The racial dimensions of police abuse in America extend beyond the issue of excessive force. Police harassment of young minority men in the inner city is endemic. Race is the key factor leading to police suspicion, stops and searches in a significant percentage of police encounters with members of minority communities. As a Catholic priest testified before the Christopher Commission in Los Angeles: "I don't feel I could find a single person who couldn't tell you a story of police abuse, of humiliation, of degradation at the hands of the [local] Police Division - not a single one."[21]

Perhaps the most graphic illustration of racially-motivated policing is the common LAPD practice of stopping young African-American males for pretextual reasons. Before the Rodney King beating, former Los Angeles Laker basketball star Jamaal Wilkes was stopped and handcuffed by the LAPD not far from downtown Los Angeles on the pretext that his registration was **about** to expire. The real reason was that he was a young African-American male driving a late model car - the prime target of the "war on drugs." The same thing happened to African-American film star Wesley Snipes less than one month after the Rodney King beating in the same area of Los Angeles. Baseball Hall of Famer Joe Morgan won a jury award of $540,000 for the beating he received by LAPD officers at Los Angeles airport after he was stopped because he fit a "drug courier" profile.[22] Even the most prominent members of the African-American community are presumptively suspected of being potential or actual criminals in urban American. The majority of young minority males are the constant targets of police attention and often this attention comes in the form of harassment or illegal stops and searches.

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[20] Racial minorities, especially young African-American men, are also overrepresented in the criminal justice system generally. *Beyond Rodney King*, at 30-34.

[21] Christopher Commission Report, at 75.

[22] *Morgan v Woessner*, 975 F. 2d 629 (9th Cir. 1992). The Ninth Circuit Court of Appeals sent the case back down for reconsideration of the size of the award but the City of Los Angeles recently agreed to settle the case.

These Los Angeles examples reflect the broader pattern of police abuse and harassment against members of minority communities throughout the United States.[23] This is not to suggest that all or even a majority of police-community interactions amount to harassment or improper conduct. The challenges facing modern law enforcement agencies in urban America are daunting to say the least. However, there are widespread violations of the Covenant's anti-discrimination norms on a daily basis by police departments across the country.

The Covenant's requirements and existing U.S. law

The kinds of police abuse described above fall squarely within the core meaning of ICCPR provisions fully accepted as binding by the United States when it ratified the ICCPR. Excessive force violates not only the Fourth and Fourteenth Amendments; it is also a violation of Article 7 of the ICCPR. In addition, racially-discriminatory police abuse violates the anti-discrimination norms of the Covenant. None of the reservations, declarations or understandings that limit the U.S. ratification of the ICCPR affect the international obligations the United States has assumed to eradicate these forms of police abuse in order to "ensure" to all persons within U.S. territory the rights provided for in the Covenant.

The primary remedy against police abuse in U.S. law is 42 U.S.C. section 1983. This Reconstruction-era civil rights statute allows for civil rights lawsuits for violations of the Constitution and statutes of the United States and it has been the main weapon against police abuse in U.S. courts.[24] The availability of section 1983 remedies goes a long way toward fulfilling the obligation in Article 2(3) of the ICCPR to provide any person whose rights under the Covenant have been violated to "have an effective remedy."

Nevertheless, these civil rights remedies are limited in important respects that undermine their effectiveness in providing a remedy for past violations and in providing protection against future police abuse.[25] Under section 1983 a victim of

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[23] *Beyond Rodney King*, at 35-58.

[24] Most states also provide remedies for police misconduct. These remedies are generally not as generous to civil rights plaintiffs as section 1983.

[25] These limitations are discussed in more detail in *Feds, Lies and Videotape*, at 1502-1514. *See also* Testimony of Drew Days III, "Police Brutality," Hearings Before the SubComm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102nd

police abuse may not win a damage judgment against a police department unless it can be shown that the injury was caused by a municipal "policy" or "custom."[26] This requirement creates a difficult hurdle for any section 1983 plaintiff to meet.

In addition, individual police officers have a qualified good faith immunity from section 1983 liability unless it can be shown that their conduct violated "clearly established" constitutional norms.[27] Whatever the alleged policy justifications for these court-created limitations on section 1983 liability, the net effect is that there are cases in which police conduct violates the provisions of the ICCPR in which no remedy is available under section 1983, or any other civil rights statute, because of these limitations. This is in conflict with the obligations of Article 2(3) that impose a requirement that violations of the Covenant be remedied.

The effectiveness of section 1983 is furthered undermined by the sharp limits on the use of civil rights actions to restrain future constitutional violations, especially in the area of police abuse. The *Lyons, v City of Los Angeles*[28] case best illustrates this problem.

In *Lyons,* the Supreme Court overturned an injunction issued by a lower federal court prohibiting the use of chokeholds by the LAPD. The use of chokeholds was extremely controversial in large part because more than a dozen people died as a result of the use of chokeholds, most of them African-Americans, between 1975 and 1980.[29] The Supreme Court reasoned that Lyons had no

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Cong., 1st Sess. (1991) (Police Brutality Hearings); Testimony of Judge Jon Newman, "Federal Response to Police Misconduct," Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102nd Cong., 2nd Sess. (1992).

[26] *Monell v Department of Social Services*, 436 U.S. 658 (1978). Punitive damages may not be awarded against municipalities. *City of Newport v Fact Concerts*, 453 U.S. 247 (1981).

[27] *Anderson v Creighton*, 483 U.S. 635 (1987).

[28] 461 U.S. 95 (1983). *See also Rizzo v Goode*, 423 U.S. 362 (1976)(overturning an injunction issued against the Philadelphia police department).

[29] LAPD Chief Daryl Gates created an uproar when he expressed the view that the reason so many African-Americans had died was that they had different necks from "normal" people. Christopher Commission Report, at 203.

"standing" to bring a claim for injunctive relief against future uses of the chokehold because he could not allege that he was likely to be stopped by the LAPD again and subjected to a chokehold for insufficient reasons. Because it would always be difficult for almost any person claiming relief from future police abuse to make such a showing the *Lyons* case has been an insuperable barrier to many suits seeking to challenge ongoing police practices. The damage caused by this ruling was best described by former Justice Thurgood Marshall in his *Lyons* dissent:

> Under the view expressed by the majority today, if the police adopt a "shoot to kill" policy or a policy of shooting one one out of every ten suspects, the federal courts will be powerless to enjoin its continuation...The federal judicial power is now limited to levying a [money damage] toll for such a systematic constitutional violation.[30]

In some other areas of U.S. civil rights law this gap would be filled by injunctive suits filed by the federal government to ensure that federal civil rights are vindicated. However, the courts have ruled that the federal government has no statutory or inherent constitutional authority to bring suits even to challenge ongoing patterns of police abuse that violates the U.S. Constitution.[31]

As a result of these rulings, there is a serious gap in U.S. civil rights law that makes it nearly impossible to bring legal action to prevent many ongoing or threatened violations of the Constitution or violations of the ICCPR in the context of police abuse by state and local law enforcement agencies.[32] Under existing U.S. law the federal government is powerless to intervene in response to ongoing patterns of police abuse even if the abuse would constitute a violation of the U.S. Constitution or the ICCPR.

The only form of federal intervention now authorized in U.S. law in response to police brutality is contained in federal criminal civil rights statutes that

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[30] 461 U.S. at 137.

[31] The main case for this proposition is *United States v City of Philadelphia*, 644 F. 2d 187 (3d Cir. 1980). *Feds, Lies and Videotape*, at 1502-1503.

[32] An examination of state and local remedies in response to police abuse is beyond the scope of this chapter. However, these remedies are not sufficient to "ensure" the rights guaranteed by the ICCPR in many cases.

enable the Justice Department to bring criminal charges against law enforcement officials who "wilfully" deprive people of their constitutional rights.[33] The most prominent example of such prosecutions is the recent case brought against the four LAPD officers for the beating of Rodney King.[34]

The Justice Department brings a small number of civil rights prosecutions each year and the resources devoted to these cases has not increased very much since the 1970s.[35] In part, this is due to the "specific intent" requirement in the criminal civil rights statutes that make it very difficult to secure convictions of abusive officers, unless the abuse is egregious.[36]

Recommendations[37]

1) Urge Congress to provide the statutory authority for the Justice Department to bring pattern and practice civil suits against state and local law enforcement agencies or officers for violations of the Constitution and the ICCPR.

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[33] The main federal statutes are 18 U.S.C. sections 241 and 242. Section 241 is used primarily against private conspiracies to violate constitutional rights. Section 242 is the main statutory basis for federal criminal civil rights prosecutions.

[34] In April 1993, defendants Koon and Powell were convicted of violating federal civil rights laws and they are now serving their sentences. Defendants Wind and Briseno were acquitted. In a previous state prosecution, Koon and Powell were acquitted as well.

[35] "Police Brutality Hearings," at 31. The personnel responsible for enforcing the criminal civil rights laws remained essentially the same during the 1980s, at a time when the personnel of the Justice Department increased by 55%. *See also Above the Law*, at 211 (noting that only 44 of the 80,747 Justice Department employees are civil rights prosecutors).

[36] *See, e.g.*, Edward F. Malone, *Legacy of the Reconstruction: The Vagueness of Federal Criminal Civil Rights Statutes*, 38 UCLA L.Rev. 163 (1990); Frederick M. Laurence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 Tulane L. Rev. 2113 (1993).

[37] Many of these recommendations are discussed in more detail in *Feds, Lies and Videotape*, at 1523-1531.

2) Urge Congress to authorize the Justice Department to intervene on behalf of individual victims of police abuse, with their consent, in pending civil rights actions and to bring individual civil rights actions on behalf of victims of police abuse in appropriate cases.

3) Urge Congress to amend the existing federal criminal civil rights statutes to make law enforcement officers criminally liable whenever they act under color of law to subject any person to force exceeding that which is reasonably necessary to carry out a law enforcement duty.

4) Collect data about the incidence of police abuse at the federal, state and local level and monitor patterns of abuse for the purpose of directing federal resources toward redressing these patterns of abuse.

5) Use the federal spending power to insist on adequate accountability procedures at the state and local level to ensure compliance with the ICCPR. These procedures should include the creation of "early warning systems" to identify abusive police officers and provide them with the proper discipline and training; the existence of adequate civilian complaint procedures and internal discipline systems; adequate training programs; and the collection of data concerning civilian complaints and incidents of abuse.

6) Provide resources and technical assistance to state and local law enforcement agencies to improve their complaint procedures, internal discipline and training programs.

Death Penalty

In contrast to the abolitionist trend in much of the rest of the world, the United States continues to expand its use of the death penalty. It has one of the highest death row populations in the world, and thirty-four of the fifty states allow for capital punishment.

Article 6 of the ICCPR favors but does not require the abolition of the death penalty. It also limits the circumstances in which the death penalty may be imposed: arbitrary deprivation of life is forbidden, as is the execution of juveniles; furthermore, the death penalty may be imposed "only for the most serious crimes." The U.S. entered a reservation to the ICCPR that allows it to use capital punishment to the extent permitted under the U.S. Constitution. Without this reservation, which the ACLU and HRW oppose, the United States would be in violation of all of the above requirements of Article 6.

In addition, both governmental and nongovernmental studies have shown that the death penalty in the U.S. is applied in a racially-discriminatory manner. This racism in application and the failure of the U.S. government to remedy it violate the anti-discrimination provisions of Articles 2 and 26.

Introduction

The provision in the International Covenant on Civil and Political Rights pertaining to capital punishment is found in Article 6, which states:

> 1) Every Human Being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2) In countries which have not abolished the death penalty, sentences of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

> 3) When deprivation of life constitutes the crime of Genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
>
> 4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
>
> 5) Sentence of death shall not be imposed for crimes committed by persons below the age of eighteen years of age and shall not be carried out on pregnant women.
>
> 6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Notwithstanding the reservations to the ICCPR by the United States, discussed below, the U.S. is currently in violation of subsection (1) prohibiting the arbitrary deprivation of life; and subsection (2) requiring that the death penalty be limited to only the most serious of offenses. In addition, the trend in the United States, particularly at the federal level, toward expansion of the death penalty violates the spirit of subsection (6) of Article 6.

Although international law does not require countries to immediately abolish the death penalty, a strong abolitionist trend has developed within the international community. In the past few years an increasing number of countries have done away with the death penalty. The trend has been particularly strong in western Europe, where no countries have a death penalty for ordinary crimes, and in South America, where only Suriname and Chile retain the use of the death penalty for ordinary crimes. Worldwide,[1] 18 countries have abolished the death penalty for all offenses since 1987, while Nepal abolished it for "ordinary crimes" in 1990 ("ordinary crimes" refers to peacetime offenses; the death penalty may still be imposed for "exceptional offenses," such as wartime crimes of treason or

[1] Figures come from "The Death Penalty: List of Abolitionist and Retentionist Countries (February 1993)," Amnesty International, London, February 1993.

espionage). As of February 1993, 48 countries had abolished the death penalty for all offenses, while 16 countries had abolished it for ordinary crimes. In addition, 20 countries still retain the death penalty for ordinary crimes, but have not executed anyone in the past 10 years. Although 106 countries retain and use the death penalty, this represents a decrease of 24 countries since 1985.

At the highest level in the international community,[2] the United Nations has steadily moved from a neutral position to an abolitionist one. In numerous documents, the United Nations has deemed the death penalty to be a violation of the fundamental right to life,[3] and to be "cruel, inhuman or degrading punishment."[4] In 1971, the UN General Assembly declared its desire that "this form of punishment [be abolished] in all countries."[5] By 1985, support for abolition within the United Nations was sufficiently strong that the Economic and Social Council authorized the appointment of a Special Rapporteur to draft a second optional protocol that would aim to abolish the death penalty.[6]

While the ICCPR does not prohibit capital punishment, it does seek to move signatories to it in the direction of abolition.[7] Article (6)6 of the Covenant

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[2] At a regional level, a number of bodies have expressed themselves against the death penalty. In December 1982, the Council of Europe's Committee of Ministers adopted Protocol No. 6 to the European Convention on Human Rights Concerning the Abolition of the Death Penalty. Article 1 of the Protocol abolished the death penalty. Council of Europe Doc. H(83)3. In addition, the General Assembly of the Organization of American States adopted by Resolution 1042 of June 8, 1990, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty. The Protocol provides that the death penalty shall not be applied in the territory of any ratifying government.

[3] Report of the Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders, UN Doc. A/CONF.87/14/Rev. 1 (1981).

[4] UN Doc. A/CONF.87/9, para. 98 (1980).

[5] GA Res. 2857, 26 GAOR Supp. No. 29, at 94, UN Doc. A/8429 (1971).

[6] Second Optional Protocol Aimed at the Abolition of the Death Penalty (1990) G.A. Res. 44/128.

[7] Quigley, "Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights," 6 Harvard Human

states that "nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party." The unmistakable tilt in favor of abolition is consistent with the developing international sentiment on capital punishment.

In addition to making it clear that abolition is the ultimate goal, the Covenant specifically limits the death penalty to "only the most serious crimes"[8] and prohibits the execution of minors, individuals under the age of 18 at the time of the crime or pregnant women.[9]

The United States entered a reservation to the Covenant which reserved the prerogative to use capital punishment to the extent that it is permitted under the United States Constitution.[10] The U.S. did allow, however, that it would not seek to execute pregnant women as proscribed by the ICCPR.[11]

Background and status of the death penalty in the United States

The so−called "modern era" of capital punishment began in 1976 when the United States Supreme Court approved a Georgia death penalty statute in the case of *Gregg v. Georgia*.[12] The death penalty statute at issue was enacted in

Rights Journal 59, 72−77 (1993).

[8] *See id.*

[9] *Id.*

[10] The reservation reads: "[t]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person(other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."

[11] *Id.*

[12] 428 U.S. 153 (1976); *Jurek v. Texas*, 482 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

response to the Supreme Court decision of *Furman v. Georgia* in 1972.[13] In *Furman v. Georgia*, the Supreme Court held that the death penalty was unconstitutional because then−existing statutes failed to provide adequate guidance to the sentencer to prevent death sentences that were the result of arbitrary and discriminatory decision-making. In *Gregg v. Georgia*, the Court was asked to review a revised Georgia statute to determine whether it provided adequate protection against the risks of arbitrariness and discrimination that the Court identified in *Furman v. Georgia*. After first rejecting the claim that the death penalty was under all circumstances a violation of the Constitution, the Court concluded that the Georgia statute before it appeared to provide the protection necessary to permit the death penalty to be imposed. The court expressly left open the question of whether the statute was unconstitutional in its application. To date, 36 states authorize the death penalty for murder.[14] In addition, the U.S. government and the U.S. military have capital punishment statutes, and there is now a bill before Congress that would increase the number of capital offenses to more than fifty.[15]

Since the *Furman* decision in 1972, the American death row population has grown to one of the largest in the world. As of October 1993, there were 2,785 prisoners on death row. The three states with the largest death row populations accounted for 1,071 inmates, or 38 percent of the total death row population.[16]

The racial make-up of the American death row is: 50 percent white; 39 percent Black; 7 percent Latino/Latina; nearly 2 percent Native American; and 0.73

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[13] 408 U.S. 238 (1972).

[14] States with capital punishment statutes are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

[15] The Omnibus Crime Bill, passed by the Senate on November 19, 1993, contained the largest ever expansion of the federal death penalty, to over fifty crimes.

[16] These states were: Texas (365), California (375), and Florida (331). NAACP Legal Defense and Educational Fund, Inc., *Death Row U.S.A.* (Fall, 1993).

percent Asian.

The growth in the death row population has been accompanied by an accelerated rate of executions. As of September 14, 1993, 220 people have been executed since the first post-Furman execution in 1977. From 1984 through 1992, the rates of executions fluctuated, but never returned to their pre-1984, single-digit levels. The 31 executions carried out in 1992 represented the highest post-Furman yearly rate yet.

The racial breakdown of those who have been executed is as follows: 54 percent white; 39 percent Black; 6 percent Latino; .45 percent Native American. Eighty-four percent of the executions that have taken place have been for the murders of white victims.[17]

As with the accelerated growth of the death row population, the increasing rate of executions is attributable to a few states. The five states with the highest number of executions account for 157 or 71 percent of the 220 executions since 1977.[18] The top ten states account for 191 executions or 87% of all executions.

Methods of execution

The most widely use method of execution is lethal injection, which is the sole method of execution in 14 jurisdictions.[19] In addition, four jurisdictions are phasing in lethal injection and phasing out another method of execution.[20] Six jurisdictions provide for another method of execution in addition to lethal injection.[21] Electrocution remains the sole method of execution in 11

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[17] NAACP Legal Defense and Educational Fund, Inc., Execution Update (September 14, 1993).

[18] The states with the five highest number of executions are: Texas (68), Florida (32), Louisiana (21), Virginia (20), Georgia (16).

[19] These jurisdictions are: Colorado, Illinois, Louisiana, Missouri, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, U.S. Military and the U.S. Government.

[20] These jurisdictions are: Arizona, Arkansas, Delaware and Mississippi.

[21] These jurisdictions are: California, Idaho, Montana, North Carolina, Utah and

jurisdictions.[22]

Who may be punished by death

Under state and federal laws, participants in a felony that results in death may be executed even though they did not kill the victim. The only limitation is that the person must have been a major participant in a serious felony where there was a likelihood of the use of lethal force.[23] In fact, at least ten persons have been executed in instances where the defendant was not the "trigger man," and may not have been directly involved in the murder.[24]

At the federal level, the death penalty is available for murders committed in the course of illicit activity (drug dealing)[25] and for peacetime espionage.[26]

Race discrimination and the death penalty

Washington.

[22] These jurisdictions are: Alabama, Connecticut, Florida, Georgia, Indiana, Kentucky, Nebraska, Ohio, South Carolina, Tennessee and Virginia.

[23] *See Tison v. Arizona*, 481 U.S. 137 (1987). If a court finds that the defendant killed, intended to kill, attempted to kill or intended that lethal force be used against the victim or that the defendant was a major participant in a felony that results in murder, the death penalty may be imposed without violating the United States Constitution. For instance, in a gas station robbery an accomplice serving as the "lookout" outside of the service station may be responsible for a murder committed by his accomplice inside the service station.

[24] *Death Row U.S.A.*, NAACP Legal Defense and Educational Fund, Inc., Spring 1993, at 1.

[25] *See*, U.S.C. Section 848(e), (g)-(r).

[26] Due to the procedural requirements outlined by the United States Supreme Court in *Furman v. Georgia*, however, most federal statutes would fail to meet constitutional muster if challenged, *see*, Elizabeth B. Bazan, "Present Civilian Federal Death Penalty Statutes," CRS Report for Congress, May 30, 1989; revised March 14, 1991.

Article 26 of the ICCPR bars governments from discriminating on the basis of race.[27] It has been extensively shown that in the United States the death penalty is applied in a manner that is racially discriminatory.

Evidence of racial discrimination in the imposition of the death penalty played a key role in the 1972 *Furman* decision which invalidated virtually all death penalty statutes in 1972.[28] Even though post-*Furman* statutes were meant to eliminate discrimination in the application of the death penalty, studies show that race continues to be an important factor in the process of determining who will be sentenced to death in this country.

In 1990, the General Accounting Office analyzed 28 studies that investigated racial disparities in capital cases[29] and found that in 82 percent of the studies race of the victim was found to influence sentencing in capital cases. The GAO report noted that the studies it had reviewed had found racism at all stages of the criminal justice system in capital cases.

One study by Jim Henderson and Jack Taylor found that the killer of a white victim was three times more likely to be sentenced to death than the killer of a black.[30] The same study found that in certain states the likelihood was higher: in Maryland, killers of whites were 8 times more likely to be sentenced to death than killers of blacks; in Arkansas, killers of whites were six times more likely to be sentenced to death than killers of blacks; and in Texas, killers of whites were five times more likely to be sentenced to death than killers of blacks.

Professor David Baldus of the University of Iowa found the same race of the victim bias.[31] The Baldus study, one of the most statistically sophisticated of its

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[27] *See*, United Nations Charter, signed June 26, 1946, *entered into force* Oct. 24, 1945, 59 Stat. 1031, T.S. 993, Art. 55(c). *See also*, OAS Charter, signed April 30, 1948, *entered into force* Per. B., 1951, 2 U.S.T. 2394, T.I.A.S. 2361, Art. 3(j).

[28] *See* footnote 13 and accompanying text.

[29] *U.S. General Accounting Office, Death Penalty Sentencing, Research Indicates Pattern of Racial Disparities* (February 1990).

[30] Henderson, Jim, and Jack Taylor, "Killers of Dallas Blacks Escape the Death Penalty," *Dallas Times Herald*, Nov. 17, 1985, at 1.

[31] David Baldus, G. Woodworth, and C. Pulaski, *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (1990).

kind, found that killers of whites in Georgia were 4.3 times more likely to be sentenced to death than killers of blacks. This conclusion was drawn after considering 230 other non-racial variables leaving race as the sole explanation for the disparity.

The track record of the federal government in seeking and imposing death sentences raises similar concerns. Overall, the Reagan, Bush and now Clinton Administrations have sought the death penalty against a total of 30 defendants. Twenty-two (73 percent) of the federal death penalty prosecutions have been sought against African−American defendants. Half of the remaining eight federal prosecutions have been against Hispanic defendants. Four federal capital defendants have been white. The United States military now has a total of eight people on death row: six are African American, one is Filipino and one is white.

In 1987, the Supreme Court was asked in *McCleskey v. Kemp* to review compelling evidence that racial considerations influenced death sentences in Georgia. In that case, an African-American defendant, Warren McCleskey, claimed that his death sentence violated the 14th and 8th amendments of the constitution. He based his claim on substantial evidence that race, as much or more than any single legitimate sentencing factor, influenced the decision to sentence him to death. Although the Court did not challenge McCleskey's proof of a pattern of death of defendants whose victims were white more frequently than others, particularly African-American defendants, it refused to find a constitutional violation unless McCleskey could show that he had been the victim of intentional discrimination by individual decision-makers in his case. That difficult standard of proof virtually ensures that most death sentences that result from system-wide bias will not be remedied. Only in rare cases when the defendant can prove bias in the minds of a prosecutor, a judge or a juror would a capital defendant or his or her victim be protected against race discrimination. In light of the *McCleskey* decision, prospects for curbing one of the most egregious aspects of the death penalty in the United States are slim.

The death penalty and juveniles

Contrary to provisions of international human rights instruments that prohibit the execution of persons who were juveniles at the time the crime was committed,[32] juveniles continue to be sentenced to death and executed in the

[32] The International Covenant states in Article 6(5) that: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age. . ." In addition, the

United States. Notwithstanding the reservation taken by the United States to the ICCPR prohibition against executing juveniles, the practice stands as a gross violation of human rights.[33]

As of May 1, 1993, 36 juveniles sat on death row in the United States.[34] Of these, 29 were 17 years old when the crime was committed; six were 16 years old; and one was 15 years old. Once again the United States is at odds with the international community: many countries that still sentence juveniles to death do not sentence anyone who is younger than 17 years old.

Since the beginning of the modern era of capital punishment, the United States has executed five juveniles through May 1, 1993.[35] All indicators are that juveniles will continue to be executed in the next few years as they exhaust their appeals. On November 8, 1993, the Senate tabled by a vote of 52 to 41 an amendment by Senator Simon that would have required those states that have capital punishment to limit the death penalty to those persons who were over 18 at the time of their crime.[36]

Mental illness and the death penalty

American Convention on Human Rights states in Article 4(5): "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age. . ."

[33] In *Thompson v. Oklahoma*, a plurality of the Court concluded that the Eighth Amendment bars the execution of a person who was under 16 at the time of his or her crime. Justice O'Connor did not accept that proposition, finding that there was insufficient evidence of an evolving consensus against executing juveniles. She concluded, however, that the absence of a minimum age in the Oklahoma death penalty statute renders the practice of imposing the death penalty unconstitutional under the circumstances. *See also*; *Stanford v. Kentucky*; 492 U.S.361 (1989) where the Court held that the death penalty may be applied to individuals who were 16 or 17 at the time of the crime.

[34] *See*, NAACP Legal Defense and Educational Fund, Inc., *supra* footnote 17.

[35] *Id.*

[36] *See* Cong. Rec. S15277-80 (November 8, 1993).

International human rights law prohibits the execution of anyone who is mentally ill.[37] In addition, countries that retain the use of the death penalty have generally created this exemption for the insane.[38] In *Ford v. Wainwright*, the Supreme Court held that the constitution forbids the execution of a person whose mental illness prevents him or her from comprehending the reasons for the penalty or its implications. The Court ruled further that states that seek to impose the death penalty must provide adequate procedures to reliably determine whether a condemned prisoner is so disabled that his or her execution would violate the constitution.[39]

Notwithstanding the well-established norm against executing people who are mentally ill, severely mentally disabled people have been executed in the United States. For example, Arthur Goode was executed on April 5, 1984, for the rape and murder of a boy. Goode had a history of mental illness from the age of three, and had taken medication for years. When Goode committed the murder, he had escaped from a mental hospital.[40]

Before his trial, a psychiatrist found Goode to be incompetent. However, three court-appointed psychiatrists declared him competent. During his trial,

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[37] Resolution 1984/50 on Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted in ECOSOC resolution 1984/50, states in *Annex* (3): ". . .nor shall the death sentence be carried out . . . on persons who have become insane." In 1988, the Economic and Social Council strengthened these protections by passing a resolution specifically prohibiting the execution of the mentally handicapped. E.S.C. Resolution 1989/64.

[38] Report of the Secretary-General of the United Nations on Capital Punishment, First Regular Session of 1985, at 14.

[39] *See Ford v. Wainwright, 477 U.S. 399 (1986)*; *United States of America: The Death Penalty*, Amnesty International, London (1987), at 76. Note that the U.S. Constitution does not prohibit the execution of a person who is mental retarded. *See Penry v. Lynaugh*, 492 U. S. 302 (1989). The Court ruled in *Penry* that, while the constitution did not bar the execution of Johnny Paul Penry, a person with an IQ of 54 and the abilities of a 6 1/2 year old, mental retardation is a mitigating factor that the sentencer must be given an opportunity to consider as a justification for not imposing the death penalty.

[40] Amnesty International, *supra* footnote 39, at 81.

Goode represented himself and did everything possible to ensure that he would be sentenced to death.[41]

On June 26, 1985, Morris Odell Mason was executed in Virginia for the murder of an elderly white woman. Mason had a long history of mental illness, and had spent time at three separate mental institutions. Mason had been diagnosed as having paranoid schizophrenia and mental retardation. At his trial, the judge denied him a psychiatrist for an evaluation, and his counsel did not have sufficient funds to hire one. Mason was found to be competent to stand trial, and was subsequently sentenced to death.[42]

In January 1992, at the height of the presidential election campaign, the state of Arkansas executed Ricky Ray Rector. Mr. Rector had tried to commit suicide by shooting himself in the head after committing his crime. To save his life, doctors removed massive amounts of tissue from the front of his brain, leaving Mr. Rector with little if any memory of the crime and no capacity to appreciate the punishment that was ultimately imposed on him. One of the most telling examples of the true state of Mr. Rector's mind was that he saved the pie that came as dessert for his last meal, to be eaten when he return from the execution chamber.

Adequacy of legal representation

There is a representation crisis with respect to death penalty cases; this crisis leads to "arbitrary" deprivations of life, prohibited by Article 6 of the ICCPR. In addition, according to paragraph 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty:

> (c)apital punishment may only be carried out pursuant to a final judgement by a competent court after legal process *which gives all possible safeguards to ensure a fair trial* . . . including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed *to adequate legal assistance at all stages of the*

[41] *Id*.

[42] Amnesty International, *supra* footnote 39, at 82.

proceedings (emphasis added).[43]

The disparity in resources available to the prosecution and to the defense for capital cases in the United States ensure that capital trials are unfair, in direct violation of paragraph 5 of the Safeguards. A study prepared by the American Bar Association on the resources available to prosecution as compared to resources available to defense concluded:

> . . .there is an imbalance nationwide favoring prosecution over defense at all stages of capital litigation. While this imbalance appears to exist at all stages of capital litigation, it appears to be greatest at the state post conviction level followed by the trial level, direct appeal and federal habeas corpus.[44]

National figures show that expenditures for prosecution far outpaced expenditures for defense: $4.3 billion to $1.4 billion.[45] In addition, while public defenders must use their limited budgets to cover administrative costs, investigative services, etc., prosecutors rely on the services of other official agencies that provide labs, data banks, investigative equipment, etc.

This problem was not addressed by the United States Supreme Court

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[43] Resolution 1984/50 on Safeguards Guaranteeing Protections of the Rights of Those Facing the Death Penalty, states in *Annex* (3):

> ". . .nor shall the death sentence be carried out . . . on persons who have become insane."

The resolution was adopted in ECOSOC resolution 1984/50 of May 1984.

[44] "A Comparison of Prosecution and Defense Resources For Capital Litigation," a study prepared by the American Bar Association for the Subcommittee on Civil and Constitutional Rights, Committee of the Judiciary, U.S. House of Representatives (September 1991), at 2.

[45] *Id.*, at 5.

decision in *Murray v. Giarratano*,[46] in which defendants in capital cases were denied the constitutional right to counsel in state post-conviction proceedings. The effect of *Murray v. Giarratano* has been a greater reliance on services provided by volunteer counsel, who are minimally compensated, if they are compensated at all.

In an attempt to meet the needs of indigent death row prisoners who lacked counsel to challenge constitutional violations in their cases, Congress created over a dozen Resource Centers to recruit and train volunteer attorneys and to provide direct representation when necessary. In addition, federal law allows for the appointment of counsel under the Criminal Justice Act (CJA). Twenty-one death penalty states do not have Resource Centers and largely rely on CJA and/or pro bono work. Furthermore, there is no consistent compensation scheme for attorneys under CJA.[47]

Due largely to the lack of funding received by capital defense teams, financial disincentives practically ensure capital defendants will receive incompetent and inexperienced counsel.[48] At least six states have maximum caps for appointed counsel of $1,500 per case; Mississippi had a maximum cap of $1,000.[49]

The quality of expertise that $1,000 or $1,500 will buy is shown by a recent survey of death penalty defense attorneys in the South: over fifty percent were dealing with their first death penalty case.[50] The same survey showed that in Alabama, Georgia, Florida, Mississippi, Texas and Louisiana capital defense counsel have been disbarred or otherwise disciplined at a rate of three to 46 times higher than the state average.[51]

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[46] 492 U.S. 1 (1989).

[47] *See* American Bar Association, *supra* footnote 44, at 9-10.

[48] Remarks of Justice Thurgood Marshall at Judicial Conference of Second District in Hershey, Pennsylvania (Friday, September 6, 1985) at 2.

[49] Marcia Coyle, Fred Strasser, and Marianne Lavelle, "Fatal Defense: Trial and Error in the Nation's Death Belt," *The National Law Journal* (Monday June 11, 1990), at 2.

[50] *Id.* at 2.

[51] *Id.* at 2.

Many attorneys are wholly unfamiliar with the special procedures of capital punishment cases, to the extent that some have not even read the states' capital punishment statutes.[52] In many instances, attorneys are unaware that a capital punishment trial is bifurcated into an initial proceeding to establish guilt and a subsequent proceeding to determine the penalty. The result is that attorneys fail to prepare for the crucial

sentencing phase of the trial, where it will be determined whether the defendant will receive a life sentence without parole or be sentenced to death.

In certain southern states the sentencing phase lasts an average of 3.1 hours, with no introduction of witnesses, no cross-examination, and little or no mitigating circumstances introduced against the imposition of the death penalty.[53] Furthermore, lack of preparation for the sentencing phase means that defense counsel may fail to present crucial evidence and arguments that could save a client's life.

Partly as a result of incompetent and inexperienced counsel at the trial level, one-third to one-half of the death penalty convictions are overturned by the state courts. In addition, about forty percent of capital cases are overturned by the federal courts upon habeas corpus proceedings.[54]

The case of Earl Washington illustrates this high vulnerability to error and the tragic consequences that result. A mentally retarded man from Virginia, Washington was initially arrested for breaking in and assaulting his brother.[55] Washington was interrogated about a rape, to which he confessed. Charges were dropped later as he did not meet the description of the rapist. But a confession was extracted from Mr. Washington on a murder rape of a woman he described as black, short, and that he had stabbed one or two times. In fact, the woman was white, 5 feet 8 inches, and had 38 stab wounds. No physical evidence tied

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[52] Vivian Berger, "The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases," *New York University Review of Law and Social Change* (1990-1991), at 247.

[53] Coyle, Strasser and Lavelle, *supra* footnote 49, at 3.

[54] *Id.* at 2.

[55] Clare Regan, "Justicia: On Extracting a Pound of Flesh" (May 1993), at 2.

Washington to the scene of the crime, and there was no incriminating evidence. The semen and hair found at the scene of the crime did not match Washington's. However, his court appointed counsel failed to bring any of these facts up on trial, and now Washington now awaits execution.[56]

Habeas corpus

Here, as in the representation crisis, U.S. practice violates both Article 6 of the ICCPR and Paragraph 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, which states that "[c]apital punishment may only be carried out . . . after legal process which gives all possible safeguards to ensure a fair trial." However, in recent years, the United States Supreme Court has acted to limit the right to appeal a conviction at the federal level after a trial and post-conviction appeal(s) at the state level, thereby eroding a fundamental safeguard in ensuring a fair trial.

The overriding concern of the United States Supreme Court has been to make the trial level the primary area where federal constitutional questions are litigated and where defendants' rights are protected. The Court's position is particularly disturbing in light of the fact that the trial court has never been the "main event." The lack of adequate counsel at the state level ensures that defendants' constitutional rights will not be thoroughly litigated at the state trial level, and it is an undue burden on defendants to make a unreformed and flawed state trial the "main event."

The Supreme Court has limited access to federal habeas corpus review by creating a number of exemptions. One of the most pernicious of these is the increased deference federal courts have shown to state courts when defendant failed to bring up a question at the state level in the manner or at the time required under state law.[57]

In *Coleman v. Thompson*,[58] the Supreme Court overruled a previous case

[56] *Id.* at 2.

[57] Ira P. Robbins, "Recent Supreme Court Restrictions on Habeas Corpus" (February 23, 1993), at 3-4.

[58] 111 S.Ct. 2546 (1991).

and established that "(i)n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate *cause for the default* and *actual prejudice* as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice" (emphasis added). Coleman was denied an opportunity for federal review of his claims because he missed by three days a filing deadline in state court. He was executed in May 1992 despite widely publicized doubts surrounding his guilt.

Arguments for cause focus on ineffective counsel assistance which is difficult to satisfy.[59] Arguments for actual prejudice are analyzed by looking at a combination of actual innocence, plain error, and non-harmless constitutional error—a procedural test that is extremely difficult to overcome.[60]

The writ of habeas corpus has also been limited according to the constitutional rights the Supreme Court feels are protected by habeas corpus proceedings. This creates a hierarchy of constitutional rights with certain rights receiving more protection than others.[61] In *Stone v. Powell*,[62] the Supreme Court held that a federal court need not grant a writ of habeas corpus for a Fourth Amendment search and seizure claim without a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review.

A further limitation on the right to appeal at the federal habeas corpus

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[59] The Supreme Court ruled in *Burger v. Kemp*, 483 (U.S. 776 (1987) that it was not ineffective assistance of counsel when lawyers for Christopher Burger did not present *one word* of evidence regarding mitigation, for example, evidence that Christopher Burger was 17 years old at the time of his crime and that he had an extensive history of extraordinary abuse. Christopher Burger was executed in December 1993. The court's reluctance to "second guess" the decisions of lawyers in this and other cases demonstrates that the "ineffective assistance of counsel" standard is nearly impossible to satisfy.

[60] Ira P. Robbins, "Recent Supreme Court Restrictions on Habeas Corpus" (February 23, 1993), at 4.

[61] *Id.* at 1.

[62] 428 U.S. 465 (1976).

level is the nonretroactivity principle, which refuses to apply federal habeas corpus remedy to newly developed rules of constitutional criminal law or procedure to the petitioner's case after his or her conviction becomes final.[63] The exceptions to the rule are so narrow that very few appeals for habeas corpus may be brought up under this rule.

Substantial evidence exists to show the importance of the writ of habeas corpus. Most significant is the fact that approximately forty percent of death penalty cases granted habeas corpus review are overturned by the federal courts.[64] In one case, Walter McMillan was sentenced by a jury to life in prison.[65] Though no credible physical evidence linked McMillan to the crime, the trial judge overrode the jury and sentenced McMillan to death. After sitting on Alabama's death row for six years, McMillan received habeas corpus relief from the federal courts and is now free.

Another case involved the death sentence imposed on William Riley Jent and Earnest Lee Miller for the murder of a woman.[66] The two came very close to execution, but were granted a stay of execution. Responding to evidence that emerged in the years following the stay of execution, a federal judge said that the evidence showed a "`callous and deliberate disregard for the fundamental principles of truth and fairness' by police and prosecutors."

The U.S. Court of Appeals for Eleventh Circuit granted a new trial, and the grand jury testimony of witnesses was opened. Serious inconsistencies in the evidence emerged. One key witness had told the police that she might have dreamt seeing the murder. The names of six witnesses who would have helped the defendants came to light. After extensive evidence emerged showing inadequate

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[63] Robbins, *supra* footnote 57, at 2.

[64] Coyle, Strasser, and Lavelle, *supra* footnote 49, at 2.

[65] Statement of Walter McMillan to the Congress of the United States House Subcommittee on Civil and Constitutional Rights (July 23, 1993).

[66] The information on this case was gathered from Kathleen A. Behan, Michele J. Brace, Leigh McAfee, and Ronni Fuchs, "Why We Need the Great Writ: The Role of Federal Habeas Corpus in Protecting Life and Liberty." This pamphlet contains a number of anecdotes of cases where habeas corpus has been used to reverse wrong convictions (unpublished).

police procedures and further undermining the state's case, the district court granted the writ of habeas corpus, and the two defendants were freed after agreeing to a plea bargain.

Any step to limit the right to the writ of habeas corpus implicates Article 6 of the ICCPR and jeopardizes the ability of the criminal justice system to uncover the type of mistakes that led to the unjust sentencing to death of Walter McMillan, William Riley Jent, Earnest Lee Miller and many other innocent persons. It is also a violation of the Article 14 right to all the possible safeguards to ensure a fair trial.

Conclusion

Despite attempts to insulate itself from the scrutiny of international human rights law regarding capital punishment, the United States is one of a dwindling number of nations that clings to the use of the death penalty. There are particular problems with racial bias and the execution of juveniles and those with significant mental disabilities. Moreover, the current administration of the punishment violates basic international standards of fairness.

Recommendations

1) Abolish the death penalty in the United States at both the federal and state levels.

Short of such abolishment, steps should be taken to:

2) Support state and federal legislation to bar the execution of persons under the age of 18 at the time of the crime, persons with mental retardation and other mental disabilities.

3) Support legislation that provides a meaningful remedy for race discrimination in capital cases.

4) Support legislation to require states that continue to maintain capital punishment to provide competent counsel and adequate resources to provide for an effective defense in capital cases at every state of the process.

5) Support legislation that restores and preserves the full complement of rights of condemned prisoners to challenge their death sentences and executions by

writ of habeas corpus.

6) Appoint a national commission to study the death penalty in the United States and the degree to which civil and human rights abuses, evaluated by international standards, are inherent in the practice of capital punishment in the United States. Propose and support legislation that imposes a moratorium on federal death sentences and executions, pending the commission's report. Support efforts to encourage states to impose their own moratoriums on executions, pending the commission's report.

7) Repeal the reservations regarding capital punishment in the International Covenant of Civil and Political Rights.

Freedom of Expression

Article 19 of the ICCPR provides that everyone has the right to free expression, a right that includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers . . ." The U.S. violates this right by curtailing the flow of information both into and out of the country. For example, despite recent statutory modifications intended to limit or halt the practice, visas to foreign visitors are still denied for ideological reasons, thereby curtailing Americans' access to a variety of political views and opinions. In the same manner, restrictions on international travel interfere with the right of Americans to seek information abroad, share information with residents of other countries, and carry information from those countries home to the United States.

Restrictions on press coverage of the 1991 Gulf War also violated Article 19. These restrictions included severely limited press access, harassment of journalists, and censorship of war-related news reports. Although Article 19 permits speech restrictions where necessary "for the protection of national security," the breadth of the restrictions imposed by the U.S. military went far beyond any legitimate demands of national security.

Introduction

The United States has perhaps the strongest legal protection for free speech in the world, thanks to the unequivocal wording of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." Article 19 of the International Covenant on Civil and Political Rights (ICCPR) is simultaneously more equivocal and more expansive in its approach to free expression. On the one hand, Article 19 expressly allows governmental restrictions on free expression under a precariously elastic variety of circumstances.[1] On the

[1] Under paragraph 3 of Article 19, the right to freedom of expression may be "subject to certain restrictions . . . such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals."

other hand, Article 19 goes beyond the First Amendment's reference to free speech and expressly protects the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [one's] choice."

As construed by the Supreme Court, the First Amendment has traditionally been less generous than Article 19 suggests in protecting the right "to seek, receive and impart information and ideas of all kinds, regardless of frontiers." Both Democratic and Republican Administrations in this country have historically utilized their power over immigration and foreign policy to restrict the "free trade in ideas." Despite recent changes in the law, foreign visitors to this country may still, in practice, find their visa applications denied on ideological grounds, and those already in the U.S. may be excluded or deported based on their political activities. Informational materials may be barred from entry under economic embargo laws, or prejudicially labelled as "political propaganda." In addition, government prohibitions on travel to other countries, including Cuba and North Korea, restrict speech activities that are explicitly protected by Article 19.

By contrast, Article 20 of the ICCPR imposes limitations on free speech that are not found in the First Amendment and have not been recognized by the Supreme Court. Specifically, Article 20 states:

> 1) Any propaganda of war shall be prohibited by law.
>
> 2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Because much of the speech prohibited by this language is protected by the First Amendment, the United States entered a reservation to Article 20 stating that it "does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."[2] The ACLU and Human Rights Watch support this reservation.

Despite the strength of the First Amendment, the U.S. has many

[2] 138 Cong. Rec. S4783-84 (daily ed. Apr. 2, 1992).

freedom of expression problems. In recent years, these have included efforts by local school boards and government bodies to remove books and magazines from school and public libraries; legislative restrictions on the content of publicly funded art projects; the unprecedented, and ultimately unsuccessful, criminal prosecutions on "obscenity" charges of a museum director in Cincinnati and a rap music group in Florida; and the policy of the Health and Human Services Department, recently overturned by the Clinton Administration, restricting doctors in federally-funded health clinics from providing information about abortion.

These and many other freedom of expression problems in the United States are not covered in this chapter. Instead, we focus on two issues of free expression that have an international dimension: U.S. laws and policies that curb "free trade in ideas" through such means as travel restrictions and embargos, and restrictions on press coverage of military operations.

Free trade in ideas

A major impediment to free speech in the United States is the government's regulation of the flow of information and ideas across the American border. Although frequently defended on foreign policy grounds, such restrictions impair the ability of Americans to gather information and to form independent opinions about world affairs.

Prior to recent legal reforms the government had the authority to deny visas to foreign visitors, or to deport them, solely because of their political beliefs or associations; trade embargoes were used to control the import or export of information and ideas; and the government asserted the authority to revoke or restrict a citizen's passport on First Amendment grounds. There now appears to be broad public support for the premise that such restrictions unnecessarily impair the ability of U.S. citizens to form their own opinions. While much progress has been made, significant legal barriers remain to the free trade in ideas, most prominently the authority to restrict travel abroad.

Visa denials

The U.S. government's practice of denying visas to foreign visitors on ideological grounds has long been the object of international condemnation. The 1952 McCarran-Walter Act barred communists and others holding controversial

views from admission to the United States, either as visitors or as permanent immigrants. Under this law, thousands of foreign citizens have been barred from entering the United States, deported, interrogated about their political beliefs, or subjected to lengthy delays in obtaining visas. Based on this decades-long practice, the government compiled a "look-out" list containing almost 345,000 listings of "suspect" foreigners based largely upon political considerations.[3]

In 1987, 35 years after the McCarran-Walter Act was adopted, Congress stipulated for the first time that no visa could be denied because of the political beliefs, associations, or public statements of a person invited to the United States, thereby establishing a First Amendment standard to govern visa determinations. The provision was originally enacted for one year only.[4] In 1988, it was extended for two more years. Finally, in 1990, it became a permanent part of American law, as the 101st Congress expressly repealed the McCarran-Walter Act's ideological exclusions for temporary visitors and substantially modified them for permanent immigrants.[5] The new law also repealed the exclusion of homosexuals, and, although the 1990 law specifically authorizes the denial of visas on terrorism or foreign policy grounds, it circumscribes that authority by providing that visas may not be denied on the basis of activity that would be protected by the First Amendment in the United States. Nevertheless, the Administration maintained a restrictive interpretation of this provision and continued to assert that it had broad authority to deny visas on foreign policy grounds.

In 1991, Congress enacted a package of Free Trade in Ideas amendments as part of the Foreign Relations Authorization Act, FY 1992-93. One provision requires the Secretary of State to report to Congress whenever a visa is denied on terrorist or foreign policy grounds. These reports must not only identify such persons and cite the statutory grounds for the denial, but must also disclose the factual basis for the determination that the person is excludable. This reporting requirement is designed to allow Congress to monitor the use of this new authority in order to ensure that the government does not resume its

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[3] *The Alien Blacklist: A Dangerous Legacy of the Military Era*, Lawyers Committee for Human Rights (New York: June 1990) at 6.

[4] Publ.L. No. 100-204, §901 (1988).

[5] Immigration Act of 1990, 101st Cong., 2nd Session, §§ 601-602, October 26, 1990.

practice of denying visas to vocal critics of U.S. policy, under the rubric of terrorism or foreign policy.

A related provision requires the Department of State to purge the "alien lookout list" of the names of foreigners who are no longer excludable under the amended Immigration Act. Thus, all the names that were previously listed on the basis of the individuals' beliefs must be removed within three years. However, the McCarran-Walter provisions excluding communists from residing permanently in the United States were not repealed; ideology, therefore, remains a bar to immigration. Under another section that was not amended, the President retains the power to exclude any class of aliens deemed "detrimental to the interests of the United States." Most Cubans are currently barred from the U.S. under this provision.

Furthermore, Congress has granted the government new powers to exclude foreigners based on an extremely broad definition of terrorism, one that includes financial support to any group that has ever engaged in terrorist activities.[6] As interpreted by the Justice Department, there is no requirement that the financial support was intended or used for terrorist activities. In their view, any support for any reason of any group that is later deemed "terrorist" can lead to someone's exclusion or deportation from the United States under the statute.

Nor is this concern fanciful. Seven Palestinians and one Kenyan residing in Los Angeles are now in deportation proceedings, charged with "engaging in terrorism," although the government has admitted that they committed no unlawful acts, and alleges merely that they raised funds for a constituent group of the Palestine Liberation Organization, which the government deems a terrorist organization. In effect, the U.S. has taken the position in this case that, at least in the context of deportation proceedings, non-citizens do not possess the same First Amendment rights as do citizens.

Flow of information

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[6] Under the 1991 law, the government can exclude any alien who "has engaged in a terrorist activity." 8 U.S.C. § 1182 (a)(3)(B)(i). "Terrorist activity" is defined to include "[t]he soliciting of funds . . . for any terrorist organization." 8 U.S.C. § 1182 (a)(3)(B)(iii). The 1991 Act also broadly provides for the exclusion of any "alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States. . . ." 8 U.S.C. § 1182 (a)(3)(C)(i).

Government barriers to the import and export of information have been erected under various authorities, including: the economic embargo laws; regulations implementing the Beirut Agreement, a treaty designed to facilitate the international circulation of educational films; and the Foreign Agents Registration Act (FARA), which permits pejorative government labeling of informational materials from abroad. Congress has now revoked the Executive's authority to regulate the flow of informational materials through trade embargoes, although the Administration has maintained some restrictions. Congress has also made clear that government agencies may not make content-based judgements that burden the export of documentary films. The Foreign Agents Registration Act, however, is still in force.

Economic embargo laws

Prior to 1988, trade embargoes declared under the Trading With the Enemy Act (TWEA) and the International Emergency Economic Powers Act (IEEPA) extended to informational materials, as well as to such items as spare parts for trucks and machinery for plants. Thus, for many years, Americans had great difficulty subscribing[7] to Chinese books and periodicals, and stores could not easily offer such materials, because of the trade embargo against the People's Republic of China. More recently, Americans have not been able to sell books or newspapers to Cuba, and American stores could not easily carry Cuban publications.

There is now a general consensus that trade embargoes should not include informational materials. This consensus is reflected in the 1988 amendment of TWEA and IEEPA (Berman Amendment) prohibiting the President from including informational materials in trade embargoes declared under these statutes.[8] In certain important respects, however, the regulations promulgated by the Treasury Department to implement the Berman Amendment contravened the letter and spirit of the law. For example, although it is now legal to import books and posters from Cuba, it is still illegal to travel there to make the necessary arrangements to do so.

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[7] 50 U.S.C. App.5 and 50 U.S.C. §1701-6.

[8] 50 U.S.C. App.5 (b)(1)(B) and 50 U.S.C. §1702 (a)(1)(b).

Another way in which the Treasury regulations failed to effectuate the new law was by narrowly defining "informational materials." For example, Treasury took the position that, while photographs are clearly protected, paintings are not covered by the statute. In May 1989, armed Customs agents broke into the home of a Miami art dealer and seized 259 Cuban paintings. The art dealer sued for the return of the paintings, and the federal district court in Miami repudiated Treasury's position excluding paintings from the scope of the Berman Amendment, ruling that it was an unreasonable interpretation of the law.[9] The government did not appeal this ruling, but maintained that it is applicable "only in Miami." Subsequently, as part of the settlement of a lawsuit brought on behalf of American art dealers, Treasury amended the regulations to permit the importation of paintings from Cuba. However, the restrictions still apply to other embargoed countries, such as Vietnam.

The Treasury Department regulations also exclude intangible items, such as telecommunications transmissions, from the definition of informational materials.[10] Treasury has settled several lawsuits challenging this regulation, but has not amended it.[11] Moreover, the recent trade embargo against Iraq did not exclude any informational materials, because it was declared, in part, under the authority of the United Nations Participation Act, to which the Berman Act Amendment does not apply.

The Beirut Agreement

The Foreign Relations Authorization Act of fiscal year 1992-93 also

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[9] The court also found that the Treasury Department official in charge of enforcing the embargo behaved in an "arbitrary and capricious" manner in this case. Judge Kenneth Ryskamp found that shortly before the raid the "OFAC's director delivered a speech to a group of Cuban Americans who had criticized Cernuda and the Cuban Museum pledging to work with those who opposed the museum's activities." *Cernuda v. Heavey*, 720 F. Supp. 1544, 1552 (S.P. Fla. 1989).

[10] 31 C.F.R. §515.332 (b)(2).

[11] *See, e.g.*, *Ashtov v. Newcomb*, 90 Civ. 3700 (S.D.N.Y. June 5, 1990) (Cuban painting) and *Capital Cities/ABC, Inc. v. Brady*, No. 89-8006 (S.D.N.Y. June 29, 1990) (ABC Sports not permitted to televise 1991 Pan-Am Games held in Cuba).

implements the Beirut Agreement, a treaty designed to facilitate the international circulation of educational and scientific films. Under the Agreement, participating countries, including the United States, grant valuable exemptions from customs duties to qualifying documentary films. The U.S. Information Agency frustrated the goal of this Agreement, however, by promulgating regulations that permit subjective, content-based criteria to be used to determine whether a film is "educational," and denying certification to films whose political points of view were at variance with those of the U.S. Administration.[12] The regulations were struck down in federal court as unconstitutional.[13] New regulations are being promulgated.[14]

Foreign Agents Registration Act

The Foreign Agents Registration Act (FARA) serves as another impediment to the free flow of ideas into the United States.[15] Under FARA, informational materials from abroad can be designated "political propaganda" if "reasonably adapted to ... influence a recipient or any section of the public" concerning a foreign policy matter. This infringes and chills First Amendment rights. In 1987, however, the Supreme Court rejected a constitutional challenge to the FARA requirement brought by distributors of three award-winning Canadian films, ruling that the term "propaganda" was not a pejorative label but was a "neutral" designation.[16] The court expressly delegated to Congress the task of vindicating the First Amendment interests at stake. Legislation to amend

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[12] 22. C.F.R. §502.6(b)(3).

[13] *Bullfrom Films v. Wick*, 646 F.Supp. 492 (C.D. Col. 1986), *aff'd* 847 F.2d 502 (9th Cir. 1988).

[14] The proposed regulations appear in 58 Fed. Reg. 42,896 (Aug. 12, 1993) (to be codified at 22 C.F.R. §502).

[15] 22 U.S.C. §611(j)(1).

[16] *Meese v. Keene*, 481 U.S. 465, 107 S.Ct. 1862 (1987).

this provision is currently pending.[17]

Restrictions on international travel by Americans

The third major infringement on free speech in this area is government regulation of the right of Americans to travel abroad. The right of Americans to visit other countries is a fundamental human right, and is critical to their ability to participate fully in the public debate on foreign policy and international security matters.

Most significantly, the Supreme Court has upheld the Administration's use of its trade embargo authority to impose currency restrictions that effectively ban travel to "enemy" countries, such as Cuba and Libya.[18] Thus, a Quaker teacher was denied permission to take a group of high school students to Cuba for the purpose of visiting fellow Quakers. Americans seeking to monitor human rights violations in Cuba have been forced to travel as guests of the Cuban government to avoid the travel ban.[19] Ongoing scientific activities of the American Psychological Association were impeded in July 1987 when the Treasury Department refused to grant a group license for professional research for members who wished to attend the XXI Congress of the InterAmerican Society of Psychology in Havana.

The Treasury Department has also promulgated regulations making it illegal to "arrange, promote, or facilitate" travel to Vietnam, Cambodia, and North Korea, even though it is legal for individual Americans to travel to these countries.[20]

These regulations directly restrict speech activities of U.S. citizens in the United States on the basis of its content, criminalizing even the distribution

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[17] The Lobbying Disclosure Act of 1993, HR 823, 103rd Congress, 1st Session.

[18] *Regan v. Wold*, 468 U.S. 222, 224 (1984).

[19] The government now provides a general license that permits Americans to travel to Cuba for educational purposes. Under the current interpretation, however, Americans who simply wish to inform themselves about conditions in Cuba do not qualify for the exemption.

[20] 31 C.F.R. §500.563 (d)(2).

of information to individual travelers. In 1989, the Department sent a letter to two Vietnam veterans who had been taking groups of veterans back to Vietnam, ordering them to "immediately terminate" their activities or be subjected to a $50,000 fine or ten year's imprisonment. The Department also took the position that the organization of academic study tours to Vietnam and Cambodia was "against U.S. government policy." The Cambodian embargo has now been lifted in its entirety, and in October 1991, upon the signing of the Cambodian peace pact, the Treasury Department lifted the ban on organizing travel to Vietnam. This ban, however, is still in effect as to North Korea.

The right to travel is the last major frontier in the battle for the free trade in ideas. It is a right that the United States has steadfastly championed for the peoples of Eastern Europe and other countries. It is indeed ironic that in the name of promoting individual liberty abroad, the United States is restricting individual liberty at home.

Curbs on press coverage of military operations

The decision to wage and conduct war must be subject to the continuing scrutiny of a well-informed public. But in recent U.S. military operations, culminating in the 1991 war in the Persian Gulf, the government has treated the press as an inconvenience and an obstacle to its efforts, rather than respecting its role as an independent means of presenting information to the American public.

"Operation Desert Storm" and the preparations for it institutionalized curbs on the right of the news media to cover military operations:

- Only reporters who were members of a "pool" selected by military officials were permitted to cover hostilities.
- Reporters were required to stay with a military affairs "escort" at all times.
- Reporters' dispatches were subject to a "security review" by military officials before release.[21]

Each of these rules hampered the ability of the news media to cover military

[21] Guidelines for News Media, U.S. Department of Defense, January 14, 1991.

operations, and obstructed the American public's right to know what is being done in its name. The "pool" requirement, employed during the U.S. invasion of Panama,[22] makes it much easier for the military to exclude the media from any coverage at all of certain operations, and generally works to exclude all but the "mainstream" and established media. It should be used, if at all, for surprise operations where unlimited physical access for all reporters is not possible.[23] The escort requirement has a chilling effect on the willingness of soldiers in the field to speak freely to the news media.

The pool requirement

At the height of the war, there were approximately 1,400 journalists in the Persian Gulf. Only 192 of them, including technicians and photographers, were placed in press pools with combat forces. Enforcement of the pool requirement during the war was characterized, in the words of Associated Press reporter Mort Rosenblum, who was detained for three hours for reporting without an escort,[24] by "strong-arm" tactics on the part of the military:

- A wire service photographer working outside the military pool system

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[22] Following the Panama invasion, the Department of Defense commissioned a report by one of its former officials, Fred S. Hoffman. It concluded that "excessive concern for secrecy prevented the Defense Department's media pool from reporting the critical opening battles" and that the pool produced stories and pictures of essentially secondary value" and emphasized the need for the Pentagon to render assistance to the pool to cover combat from the start of operations.

[23] With limited exceptions, however, such as D-Day (when 27 reporters went ashore with the first wave of forces), pools were not used in any U.S. war until the 1983 invasion of Grenada. The Defense Department commission appointed after widespread criticism of press restraints during the Grenada invasion called for limited use of pools only if necessary to assure early press access to a military operation, and then only for "the minimum time possible."

[24] "Journalists Say `Pools' Don't Work," Howard Kurtz, *The Washington Post*, February 11, 1991.

was held for six hours by U.S. marines who threatened to shoot him if he left his car. "We have orders from above to make this pool system work," an officer told him.[25]

- *New York Times* reporter Chris Hedges had been interviewing shopkeepers in Saudi Arabia when he was picked up on February 10 by U.S. military authorities, detained for five hours and sent back to his hotel in Dhahran without press credentials. When two days later Hedges went to the press center in Dhahran to retrieve his press credentials, officials refused to admit him for half an hour, telling him he had an "attitude problem." [26]

- A French TV crew was forced at gunpoint by U.S. marines to give up videotape it had shot of U.S. soldiers wounded in the battle to retake the Saudi town of Khafji.[27]

- Other journalists apprehended, detained or threatened with detention include Eric Schmitt and John Kifner of The New York Times, Guy Gugliotta of The Washington Post, John King and Fred Bayles of the Associated Press, and Joseph Albright of Cox Newspapers.[28]

Security review

Although the Pentagon's rules provided that "material will be examined solely for its conformance to ... ground rules, not for its potential to express criticism or cause embarrassment," [29] there is evidence that so-called "security reviews" went beyond any legitimate military needs.

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[25] *Times* of London, Christopher Walker, February 8, 1991.

[26] "Correspondents Protest Pool System," R. W. Apple, Jr., *The New York Times*, February 12, 1991.

[27] "Jumping Out of the Pool," *Newsweek*, February 18, 1991.

[28] Apple; *supra* note 11.

[29] "Guidelines for News Media," U.S. Department of Defense, January 14, 1991.

- When *New York Times* reporter James LeMoyne quoted Army enlisted personnel who criticized President Bush and questioned the purpose of the war, press officials cancelled a scheduled interview with General H. Norman Schwarzkopf, commander of the American forces, and did not reschedule it for one and a half months. According to LeMoyne, for six weeks after the article, almost all print news reporters were denied access to Army units.[30]

- Pilots aboard the USS John F. Kennedy told an Associated Press reporter they had been watching pornographic movies before flying bombing missions. A military censor deleted the information as "too embarrassing," and deleted one pilot's use of an obscenity.[31]

- When a *Detroit Free Press* reporter filed a story describing returning pilots as "giddy," a censor changed it to "proud."[32]

Apart from direct orders to change the wording of articles, Pentagon officials also exercised control over information about the war by withholding approval until material is no longer newsworthy. Scripps-Howard reporter Peter Copeland asserts that military officials delayed his reporting with Saudi pilots for 53 hours. Military officials also referred a *New York Times* pool dispatch on reported "stealth" bomber attacks on Baghdad to "stealth" headquarters in Nevada for review. The material was not cleared until the next day.[33]

Legal challenges

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[30] "Pentagon's Strategy for the Press: Good News or No News," James LeMoyne, *The New York Times*, February 17, 1991.

[31] "Correspondents Chafe Over Curbs on News," Howard Kurtz, *The Washington Post*, January 26, 1991.

[32] *Id*.

[33] *Id.*

While the issue of press access to military operations has not been the direct subject of any Supreme Court decision, a host of other cases have invalidated restrictions on the ability of the press to act as a surrogate for the general public and have required the government to prove, even where there exist legitimate and compelling reasons for restricting access, that the means chosen be narrowly drawn to serve those ends. See, for example, *Matter of Express News Corp.*, 695 F 2d 807, 810, holding that any limitation on access to jurors must be "narrowly tailored to prevent a substantial threat," and *Sherrill v. Knight*, 569 F. 2d 124, 129-30 (D.C. Cir. 1977), holding that a reporter may not be barred from White House press facilities "for less than compelling reasons."

A lawsuit raising a First Amendment challenge to the rules was filed in January 1991 by the Center for Constitutional Rights on behalf of nine magazines and news agencies and four writers. The suit claimed that the rules "continue and intensify patterns and practices of conduct to prevent, obstruct and delay plaintiffs from gathering news of activities of United States armed forces, including overt combat, which are of interest to the press and people of the United States."[34]

This suit was the only significant legal challenge to the Department of Defense rules. Despite the core First Amendment values at stake, however, it was dismissed on April 16, 1991 by Judge Leonard Sand of U.S. District Court in Manhattan. In dismissing the lawsuit, Judge Sand described the issues as "too abstract and conjectural" to decide, since the war had ended; he chose instead to leave the constitutional issues "for another day when the controversy is more sharply focused."

While Article 19's protection for "the freedom to seek, receive and impart information and ideas" is qualified, unlike the First Amendment, by an exception "for the protection of national security," it is not sufficient for a government merely to invoke such a claim. Indeed, as we have demonstrated, the Pentagon's rules for press coverage were most often invoked to shield officials from political or military embarrassment, and no serious assertion was ever made that the safety of military operations was at stake.

Recommendations

1) Reject the use of visa determinations to make foreign policy

[34] *Nation v. U.S. Department of Defense*, 91 civ. 0238 (S.D.N.Y.).

"statements."

2) Limit exclusions of visitors to instances where the visitor's proposed activities in the United States -- other than speech -- would cause tangible harm.

3) Purge the Justice Department's "alien look-out list" (NAILS) of all names listed on the basis of the person's beliefs or associations.

4) Amend the Treasury Department's Foreign Assets Control Regulations to exempt from trade restrictions: all individual and group travel; exchanges of information; scientific, educational, religious and cultural exchanges, and the opening of permanent news bureaus with embargoed countries.

5) Support legislation to permanently prohibit such restrictions under the trade embargo statutes. Such legislation has been introduced in the last three Congresses and enjoyed bipartisan support.

6) Suspend enforcement of 50 U.S.C. §3504 to the extent that it bans importation of "subversive" publications, and urge Congress to enact legislation repealing that provision.

7) Regulations governing press coverage of future military operations should limit the use of press pools to surprise operations where unlimited physical access is not practical, and restrict "security" reviews to matters involving the safety of military operations.

Religious Liberty

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." As traditionally interpreted, this strong language is more protective of religious rights than Article 18 of the ICCPR, which allows for limitations on religious freedom under a variety of circumstances. In the 1990 case of *Employment Division v. Smith*, however, the Supreme Court adopted a new and alarmingly invasive interpretation of the Free Exercise Clause. *Smith* held that a valid and neutral law of general applicability must be complied with, regardless of its effect on the exercise of religious beliefs. *Smith* rendered the First Amendment less protective of religious practice than Article 18(3), which allows legal limitations on religious freedom only where "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." *Smith*, which provoked strong protests from religious and civil liberties groups, was largely overturned in November 1993, when President Clinton signed into law the Religious Freedom Restoration Act. The legislative and executive branches are to be commended for their action in restoring religious freedom. The fact that this freedom was vulnerable to serious erosion under the U.S. Constitution, however, underscores the need for implementation of the ICCPR, which will provide an additional layer of protection to this and other fundamental rights.

Introduction

With the ratification of the Bill of Rights in 1791, the United States began an experiment in liberty that promised revolutionary legal protection to those whose religious beliefs proved unpopular or different from that of the majority. This commitment to religious liberty has not always been realized in practice, but the ideal it represents has achieved near-universal support. Article 18 of the International Covenant on Civil and Political Rights reflects this worldwide acceptance and adopts protections for religious liberty that are similar, although not entirely equivalent to, those memorialized in the First Amendment to the U.S. Constitution.

The First Amendment states that government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first part of this guarantee, the Establishment Clause, has been understood, in

Thomas Jefferson's words, to build "a wall of separation between Church and State."[1] Underlying this conception is the idea that the machinery of government should not be available for use by sectarian factions to advantage their own beliefs or disadvantage those they find heretical. Any system that allowed government to take sides in theological debates or appear to sponsor or endorse one or more "preferred" religions would surely infringe on the religious freedom of those who lost that contest. This would be true for those who had different belief systems, as well as those who did not believe in any theological system.

[1] Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (quoting Reynolds v. United States, 98 U.S. (8 Otto) 145, 164 (1879)).

At the same time, it is easily recognized that, where church and state can be viewed as one, there is a significant danger that the church can be subjugated to the service of those who control the state. Thus, the Establishment Clause is intended to assure that neither government nor religion can become a handmaiden to the other. Though there is no explicit counterpart to the First Amendment's Establishment Clause in the International Covenant, Article 18, section 2[2] adopts a non-coercion standard that in some ways approaches, even though it does not duplicate, the anti-establishment guarantee of the First Amendment.

The idea of church-state separation, however, is not the sole concern of the First Amendment's religion clauses. The amendment also explicitly protects the free exercise of religion, giving protection to both religious belief and practice. By its very nature as an additional guarantee of religious liberty, this protection recognizes that government, in the exercise of its general authority, may at times prescribe rules that conflict with the practice of one's religion. In those instances, the First Amendment has traditionally been understood to require government to meet a heavy burden to prevail over contrary religiously motivated conduct. As described more fully below, a recent Supreme Court decision has now cast doubt on the scope of that protection, and, although Congress has responded by enacting the Religious Freedom Restoration Act of 1993, the Constitution's role in safeguarding religious liberty is less certain than before.

The guarantees of Article 18 are generally analogous to those of the Free Exercise Clause.[3] This chapter briefly discusses problems in recent U.S.

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[2] Article 18, section 2 provides in pertinent part:

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

[3] Article 18 provides in pertinent part:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually, or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. . . .

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Establishment Clause jurisprudence, including the debate over whether a coercion standard is a sufficient guarantor of religious liberty. It also provides more extensive findings concerning U.S. compliance with the protection of religious practice under the Free Exercise Clause.

Protecting against coerced religious practice

Despite the many disputes about the breadth of the Constitution's Establishment Clause protections, there is no question that it at least duplicates Article 18's non-coercion guarantee. In 1992, the Court declared once again that, "*at a minimum*, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[4]

Though the current justices of the U.S. Supreme Court remain divided about whether coercion should mark the upper limit of the Establishment Clause's reach, earlier Courts were clear that constitutional protection goes beyond coercion. In 1962, for example, the Supreme Court reflected decades-old judicial and scholarly agreement in stating that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct government compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[5] The justices also observed that the Constitution's framers knew that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services."[6]

The Court has repeatedly and properly not limited the constitutional non-

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4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[4] Lee v. Weisman, 120 L.Ed 2d 467, 480-81 (1992) (citation omitted).

[5] Engel v. Vitale, 370 U.S. 421, 430 (1962).

[6] *Id*., at 429.

establishment protection to coercive circumstances. For example, the Court has struck down voluntary religious instruction in public schools,[7] a law that required the posting of the Ten Commandments in public schools,[8] voluntary Bible reading,[9] and the display of a Christmas nativity scene in a county courthouse.[10] This broader protection against official sponsorship of religion prevents the government, in James Madison's words, from taking on authority as "a competent Judge of Religious Truth,"[11] capable of denying the legitimacy of some religions without necessarily forcing adherents to abandon their faiths. Because government wields considerable authority and prestige, the use of this power to persuade citizens to adopt certain religious views or practices is at least as offensive to liberty of conscience as coercion would be.

Breaches in the wall of separation

Despite the First Amendment's broad protections against government involvement in the religious sphere, two recent judicial decisions demonstrate that practice has not always coincided with principle.

In *Zobrest v. Catalina Foothills School District*,[12] a sharply divided Court held that providing a state-employed sign language interpreter to a hearing disabled child so that he might receive instruction along with religious messages at a parochial school did not violate the Establishment Clause. The Court's decision marked the first time that judicial approval was accorded to the use of public employees for theological indoctrination in a religious setting. The 5-4 majority reasoned that neutral programs that benefit broad classes of people without regard

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[7] Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948).

[8] Stone v. Graham, 449 U.S. 39 (1980) (per curiam).

[9] Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

[10] County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).

[11] Madison, "Memorial and Remonstrance," in The Mind of the Founder 9 (M. Meyer ed. 1981).

[12] 509 U.S. ___, 125 L. Ed 2d 1 (1993).

to religion do not impermissibly advance religion, even where sectarian institutions derive incidental benefits from the public assistance.

The decision runs counter to the previously prevailing notion that the First Amendment is violated when government benefits are provided that afford "the opportunity for the transmission of sectarian views."[13] The majority's justification, that the assignment of the benefit goes to the parent and student who, in turn, chooses where the benefit is used, had in earlier cases been rejected as a "fiction" that would encourage legislators to enact unconstitutional programs "by masking it as aid to individual students."[14]

By permitting tax dollars to be allocated for the communication of religious messages and worship services, the Court abandoned the lessons learned from one of the pillars upon which the First Amendment was conceived: the 1786 Virginia Statute of Religious Freedom. Authored by Thomas Jefferson, the statute's preamble stated that "to compel a man to furnish contributions of money for the propagation of opinions which he believes and abhors, is sinful and tyrannical: that even . . . forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor [he favors]." The Court's rejection of the limitation placed by the First Amendment on tax expenditures results in the coerced taxation of citizens for the promotion of religious doctrine, a consequence anathema to any theory of religious liberty.

Another case, decided by the U.S. Court of Appeals for the Fifth Circuit in 1992, contains the seeds of future church-state battles. Like so many disputes in this area, it is being fought out in the public school arena. In *Jones v. Clear Creek Ind. School Dist.*,[15] a federal appellate court ruled that a school district could permit public high school seniors to elect student volunteers to deliver nonsectarian, nonproselytizing invocations at their graduation ceremonies. The decision conflicts with the Supreme Court's ruling earlier that year in *Lee v.*

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[13] Wolman v. Walter, 433 U.S. 229, 244 (1977).

[14] Grand Rapids School Dist. v. Ball, 473 U.S. 373, 395 (1985). *See also*, Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481, 487 (1986) ("Aid may have [an unconstitutional] effect even though it takes the form of aid to students or parents.").

[15] 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 124 L.Ed 2d 697 (1993).

Weisman,[16] which held that state sponsorship of religious exercises such as graduation prayers violate the Establishment Clause.

Importantly, *Jones* suggests that the generic nature of certain prayers and their support by majority sentiment are sufficient to overcome constitutional objections. However, the *Lee* Court, as well as numerous earlier rulings, rejected these approaches. Prayers of any kind constitute a religious exercise that the state cannot endorse.[17] The *Jones* court conceded that denominational prayers would impermissibly advance religion. Its approved alternative -- nonsectarian, nonproselytizing prayer -- also fails that constitutional test because such a prayer would still amount to religious worship and would further involve the state by holding it responsible for guaranteeing its nonsectarian nature. The First Amendment absolutely bars "control, support or influence [over] the kinds of prayer the American people can say."[18] Thus, neither a state-approved generic prayer or a student-led religious prayer meet First Amendment requirements.

The *Jones* court also ignored precedent in finding that a student election removes the specter of state sponsorship from the graduation prayer. The Supreme Court in *Lee* had specifically reaffirmed the idea that majority wishes may not prevail over the clear commands of the First Amendment.[19] It remains axiomatic that the Establishment Clause does not permit government to sponsor "a religious exercise even with the consent of the majority of those affected" and "has never meant that a majority could use the machinery of the State to practice its beliefs."[20]

The Establishment Clause provides an important bulwark for religious liberty. It prohibits government from coercing taxpayer support of religion, as well as from assisting or endorsing religion in any way. The retrenchment that has taken place in the courts recently and the campaign to change the law that has been underway by some extremists in the religious community has heightened concerns about future U.S. compliance with this ideal.

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[16] 120 L. Ed 2d 467 (1992).

[17] *Id*. at 482-83; *see also id*. at 497-500 (Souter, J., concurring).

[18] Engel, 370 U.S. at 429.

[19] Lee, 120 L. Ed 2d at 486.

[20] School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225-26 (1963).

The free exercise of religion

At the same time that it has trimmed back the protections against a government establishment of religion, the Supreme Court has also abandoned the strict legal protections it previously afforded religious exercise. In a sweeping 1990 decision, the Court ruled that generally applicable laws that do not on their face discriminate against religious practice would no longer receive strict judicial scrutiny under the Free Exercise Clause, even if those laws in practice substantially burden religious freedom.

The decision, *Employment Division v. Smith*, began as a relatively simple unemployment compensation case. Alfred Smith and Galen Black, Native Americans and members of the Native American Church, were employed at a private drug and alcohol rehabilitation facility, but fired after they admitted ingesting peyote as a sacrament in a religious ceremony while off-duty. Eating peyote is considered an act of worship and communion that dates back at least 1400 years for members of the Native American Church. Peyote is also a controlled substance, generally illegal to ingest. The church regards the non-ritual use of peyote as a sacrilege. Because of its fundamental importance to the Native American religion and despite its hallucinogenic qualities, the federal government and at least 24 states exempted Native Americans who use peyote in religious ceremonies from criminal drug laws. Oregon did not at the time; it now does.

After being fired, Smith and Black sought unemployment benefits and were approved for compensation by the state hearing officer. The state statute disallowed benefits when the applicant was discharged for "misconduct," but the officer decided that following one's religious beliefs could not be regarded as misconduct. In doing so, the hearing officer relied upon the landmark Supreme Court decision *Sherbert v. Verner*,[21] which held that the State could not "force [an applicant for unemployment benefits] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the

[21] 374 U.S. 98 (1963). Adele Sherbert, a Seventh-Day Adventist, had refused to work on Saturdays, the Sabbath of her faith, and had been fired from her job. The Supreme Court ruled that the state could not condition her eligibility for unemployment benefits on giving up a tenet of her religious faith unless the government could prove that "any incidental burden on the free exercise of [her] religion may be justified by a compelling state interest."

benefits of her religion in order to accept work, on the other hand."[22]

In Smith's and Black's cases, the administrative appeals board reversed the hearing officer's decision and denied approval of the benefits. They too applied the *Sherbert* test but determined that peyote use did constitute misconduct. The board found that the state had a compelling interest in proscribing the use of illegal drugs, sufficient to overcome any religious objections. Smith and Black successfully appealed to the courts. The Oregon Supreme Court found that whatever compelling interest may exist for the State to enforce its criminal laws does not apply with respect to unemployment benefits. On remand from the U.S. Supreme Court, the Oregon Supreme Court reached the same result, holding that the First Amendment guarantee of religious freedom required an exemption for religious use even if the Oregon criminal law did not explicitly provide one.

The Supreme Court's decision in *Employment Division v. Smith*,[23] stunned advocates of religious liberty. In a concurring opinion, Justice Sandra Day O'Connor accurately stated that "today's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty."[24] Three justices dissented from the court's ruling.

The court's central holding in *Smith* found that an individual's religious beliefs do not relieve that person from compliance with an otherwise valid and neutral law of general applicability.[25] In so ruling, the Court consciously echoed the 1940 decision in *Minersville School Dist. v. Gobitis*,[26] where the Court had held that school boards had the authority to require students to participate in flag-salute ceremonies even if the students had sincere religious objections. In *Gobitis*, the Court wrote: "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not

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[22] *Id*. at 404.

[23] 494 U.S. 872 (1990).

[24] *Id*. at 891 (O'Connor, J., concurring).

[25] *Id*. at 879.

[26] 310 U.S. 586 (1940), *overruled*, West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

aimed at the promotion or restriction of religious beliefs."[27] The *Smith* Court quoted that statement from *Gobitis* with approval. The Court failed, however, to note that *Gobitis* was the subject of unprecedented scholarly and editorial criticism when it was issued and was expressly overruled in three short years in *West Virginia State Board of Educ. v. Barnette*,[28] one of the most celebrated constitutional decisions in American history.

Justice Scalia's majority opinion in *Smith* recognized the difficult position the decision placed those whose religious beliefs were outside their community's mainstream:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[29]

He went on to describe application of the compelling-interest test to religious freedom claims as a "luxury" that today's pluralistic society could ill afford.[30]

Interestingly, *Barnette*, the case that overruled *Gobitis*, provides a complete answer to Justice Scalia. In *Barnette*, Justice Jackson eloquently wrote:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the

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[27] 310 U.S. at 594.

[28] 319 U.S. 624 (1943).

[29] 494 U.S. at 890.

[30] *Id*.

outcome of no elections.[31]

In the aftermath of the *Smith* decision, more than 65 cases were decided against religious claimants. The rationale of these cases cast doubt, for the first time, on the protection of such familiar practices as the sacramental use of wine, kosher slaughter, the sanctity of the confessional, religious preferences in church hiring, establishing places of worship in areas zoned for other use, sex segregation during worship, exemptions from mandatory retirement laws, and the inapplicability of certain educational requirements to parochial schools. Before *Smith*, it was widely assumed that these religious practices were constitutionally protected. *Smith*, as one court noted, brought "the free exercise rights of private citizens closer to those of prisoners [who had already been accorded lesser rights]."[32]

Perhaps one of the best examples of *Smith*'s negative impact on religious freedom is *You Vang Yang v. Sturner*,[33] where the state performed an autopsy over the religious objections of a Hmong family. Prior to the Court's *Smith* decision, a federal court ruled in favor of the family, finding that the state had violated the First Amendment. The *Smith* decision intervened before the damages portion of the case, forcing the judge to reverse himself. In a highly unusual statement, however,

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[31] 319 U.S. at 638.

[32] Salaam v. Lockhart, 905 F.2d 1168, 1171 n. 7 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 677 (1991). In another prisoner case, the Ninth Circuit suggested that *Smith* might even have lowered the religious rights of everyone to a lower standard than that which prevails in the prison context. *See* Friend v. Kolodzieczak, 923 F.2d 126, 128 n. 1 (9th Cir. 1991).

The Supreme Court lowered the scrutiny given to prisoners' religious claims in 1987, adopting a standard that approves of prison regulations that burden religious exercise as long as they are "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987). This extraordinarily permissive standard largely obviates any religious rights that prisoners have. *Turner* was used recently by the Seventh Circuit to justify a prison rule that permitted inmates to wear baseball caps, but still prohibited Jewish prisoners from wearing yarmulkas because of alleged security concerns. Young v. Lane, 922 F.2d 370 (7th Cir. 1991).

[33] 750 F. Supp. 558 (D.R.I. 1990).

he noted that he could not "do this without expressing my profound regret and my own agreement with Justice Blackmun's forceful dissent,"[34] quoting liberally from the Blackmun opinion. A similar autopsy issue was resolved against a Jewish family in Michigan.[35]

In another case, members of the Amish religion challenged a state traffic law that required orange triangles on slow moving vehicles. The Amish eschew modern ways and use horse-drawn buggies; they also may not wear bright colors. As an alternative the Amish offered to hang lanterns from the vehicles, but state authorities did not accept this offer. In light of *Smith*, the U.S. Supreme Court sent the case back to Minnesota's high court after the Amish had won a favorable decision under the compelling-interest test.[36] The Minnesota Supreme Court, recognizing that the federal Constitution no longer provided the needed level of protection, held that the state constitution still required compelling-interest analysis and ruled in favor of the Amish.[37]

Unless the Court revisits the question and overrules *Smith*, the provisions of the International Covenant at Article 18, paragraph 3, provide greater rights than the First Amendment as presently interpreted.

Congress, though, has not waited for the Court to reconsider this question. On November 16, 1993, President Clinton signed into law the Religious Freedom Restoration Act (P.L. 103-141), which forbids government from substantially burdening religious exercise unless it demonstrates a compelling state interest and effectuates its interest in the least restrictive manner. The law creates a statutory standard that largely tracks the pre-*Smith* test used by the courts. It remains to be seen how effective it will be in restoring religious freedom to its preeminent place in American law.

Remaining issues

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[34] *Id*. at 559.

[35] Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd mem*., 940 F.2d 661 (6th Cir. 1991).

[36] State v. Hershberger, 495 U.S. 901 (1990), *vacating and remanding*, 444 N.W.2d 282 (Minn. 1989).

[37] State v. Hershberger, 462 N.W.2d 393 (Minn. 1990).

In some respects, the International Covenant recognizes limitations on the free exercise of religion that go beyond any that have been recognized in U.S. courts. For example, Article 18, section 3 states that religious exercise should be "subject only to such limitations as are prescribed by law and are necessary to protect . . . morals." Yet, a concern for morals, apparently defined by a community, could manifest itself in laws that find certain religious practices so abhorrent that they might be prohibited, even where there is no health or safety justification for the regulation. The Supreme Court properly rejected this kind of assertion of a greater moral interest on the part of the state in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[38] There, Hialeah, Florida found the practice of the Santeria religion, which involves the ritual sacrifice of animals, to be so abhorrent that it prohibited this central practice of that faith.

The Court held that the ordinances unconstitutionally targeted members of a particular faith and their religious practices for criminal treatment. While the Court recognized "legitimate governmental interests in protecting the public health and preventing cruelty to animals," it also stated that these concerns "could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice."[39] Mere moral approbation should not be sufficient alone to outlaw religious practices.

Another difference between the International Covenant's guarantee and U.S. jurisprudence is found in Article 18, section 4, acknowledging the state's obligation to respect parental choices concerning the "religious and moral education of their children in conformity with their own convictions." While at one level U.S. decisions follow this axiom,[40] the parental rights recognized do not extend to attempts to remove "objectionable" material from the public schools[41] or

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[38] 124 L. Ed 2d 472 (1993).

[39] *Id*. at 494 (footnote omitted).

[40] *See, e.g.,* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that a statute that required students to attend public rather than private schools violated parental rights to choose a parochial education for their children). *See also*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that parents, asserting religious scruples, could not be forced to send their children to publicly approved schools past the eighth grade).

[41] Smith v. Board of School Comm'nrs, 827 F.2d 684 (11th Cir. 1987).

to require that public schools create alternative curricula to accommodate religious beliefs.[42] While schools cannot compel a child to express allegiance to a belief at odds with his or her religious upbringing,[43] mere exposure to disagreeable ideas has never been thought to pose an interference with the free exercise of religion.

Conclusion

New judicial decisions continue to chip away at the wall of separation between church and state, ignoring its importance as a bulwark for religion. The result, even more so than when Justice Wiley Rutledge penned these words, is that the wall is "[n]either so high nor so impregnable today as yesterday."[44]

Simultaneously, the *Smith* decision and the years of its reign have weakened the guarantee of religious liberty in the United States. Although the Religious Freedom Restoration Act attempts to remedy this, the fact that our courts have cut back the scope of First Amendment protection remains a cause for concern and alertness. Although the ICCPR does not go so far as the First Amendment properly interpreted and applied, the *Smith* experience demonstrates its importance as another line of defense.

Recommendation

Direct the Department of Justice to adopt a policy of vigorous enforcement of the Religious Freedom Restoration Act.

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[42] Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).

[43] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

[44] Everson v. Board of Educ., 330 U.S. 1, 29 (Rutledge, J., dissenting).