

**Violence Against Women in the  
United States  
and the State's Obligation to Protect**

Civil Society briefing papers on community, military and custody

**2011**



**Violence Against Women in the  
United States  
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**submitted to the  
United Nations Special Rapporteur on Violence Against Women,  
Rashida Manjoo**

**in advance of her Mission to the United States of America  
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**[www.law.virginia.edu/vaw](http://www.law.virginia.edu/vaw)**

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Shirley Lanta Wang (*Duke University School of Law* JD'11)  
for the cover and publication design and layout

Katrina Anderson, *Human Rights Counsel, US Legal Program*  
*Center for Reproductive Rights*

*University of Virginia School of Law students:*  
Adrienne Boone (JD '10); Elisa Chen (JD '13); Rebecca Dalton (JD '13);  
Caitlin Gregg (JD '11); Elizabeth Horner (JD '11); Julia O'Halloran (JD '13);  
Emily Ponder (JD '14); Sarika Reuben (JD '13); Marina Warner (JD '11)

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University of Virginia Center for International Studies  
Dean Claudio Grossman and American University, Washington College of Law  
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National Organization for Women Foundation  
University of Virginia School of Law Human Rights Clinic  
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University of Miami School of Law Human Rights Clinic  
Dean Louis Bilionis and the University of Cincinnati College of Law Clinical Program  
Indian Law Resource Center  
Center for Reproductive Rights  
Stephanie Ortoleva / Women Enabled

## CHAPTER AUTHORS

*The authors do not necessarily endorse all of the positions expressed in other chapters.*

### **DUE DILIGENCE OBLIGATIONS**

Calleigh McRaith (JD '12); Clare Boronow (JD '12);  
Suzanne Bradley (JD '11); Vivian Kim (JD '12)  
Deena R. Hurwitz, Associate Professor of Law, Director,  
International Human Rights Law Clinic  
University of Virginia School of Law

Kirsten Matoy Carlson, Indian Law Resource Center;  
Assistant Professor of Law, Wayne State University Law  
School

### **DOMESTIC VIOLENCE**

Caroline Bettinger-Lopez, Assoc. Professor Clinical  
Legal Education, Director, Human Rights Clinic,  
University of Miami School of Law  
with the support of  
Farrah Elchahal (JD '12); Ana Romes (JD '12); Miraisy  
Rodriguez (JD '12); Monika Siwec (JD '11)

Christina Brandt-Young, New York Legal Assistance  
Group

Kirsten Matoy Carlson, Indian Law Resource Center;  
Assistant Professor of Law,  
Wayne State University Law School

Gabrielle Davis, Battered Women's Justice Project

Margaret Drew, Visiting Professor of Clinical Instruction;  
Acting Director, Domestic Violence Clinic,  
University of Alabama School of Law

Rebecca Landy, John Jay College of Criminal Justice\*  
\*for identification purposes only  
with the support of  
Adam Dubin, Pace University School of Law (JD '12)

Rachel Natelson, Nat'l Law Center on Homelessness and  
Poverty

Sandra Park, ACLU Women's Rights Project

Jessica Rubenstein, Center for Reproductive Rights  
(former legal intern), Legal Fellow, Law Students for  
Reproductive Justice, NYU School of Law (JD '10)

Cynthia Soohoo, US Legal Program, Center for  
Reproductive Rights (former director); Professor and

Director, International Women's Human Rights Clinic,  
CUNY School of Law

Cheryl Thomas, *The Advocates for Human Rights*  
with the support of  
Sandra Jezierski, Nilan Johnson Lewis, P.A.; Casey R.  
Schultz, Volunteer Atty, Advocates for Human Rights

### **ROLE OF GUNS**

Christina M. Vogt, Ph.D., Global Feminist Strategies Task  
Force, National Organization for Women

*Supplement on Gun Violence Against  
American Indian and Alaska Native Women*

Kirsten Matoy Carlson, Indian Law Resource Center;  
Assistant Professor of Law, Wayne State University Law  
School

Clare Boronow (JD '12)  
University of Virginia School of Law

### **WOMEN IN THE MILITARY**

Rachel Natelson, Legal Counsel and Board Member  
Brittany Stalsberg, Policy Associate  
Service Women's Action Network

### **WOMEN IN DETENTION**

Deborah LaBelle, Esq.

Robin Levi, *Justice Now*  
with the support of  
Virginia Taylor, U.C. Hastings School of Law (JD '12)

Brenda V. Smith, Professor and Acting Director of the  
Clinical Program, Community and Economic  
Development Law Clinic, Director, Project on Addressing  
Prison Rape, American University, Washington College of  
Law

with the support of  
Ashley Prather (JD '12); Jaime M. Yarussi, M.S.

Danielle Lang (JD '12); Caitlin Mitchell (JD '12)  
Hope Metcalf, Supervising Attorney, Allard K. Lowenstein  
International Human Rights Clinic at  
Yale Law School

## ORGANIZATIONAL CONTRIBUTORS

---

**Allard K. Lowenstein International Human Rights Clinic**

**Yale Law School**

P.O. Box 208215  
New Haven, CT 06520  
203.432.9404  
1

**American Civil Liberties Union**

**Women's Rights Project**

125 Broad Street, 18th Floor  
New York, NY 10004  
212.519.7871  
[www.aclu.org/womensrights](http://www.aclu.org/womensrights)

**American University, Washington College of Law  
Project on Addressing Prison Rape**

4801 Massachusetts Avenue, NW Room 442  
Washington, DC 20016  
202.274.4261  
[www.wcl.american.edu/nic](http://www.wcl.american.edu/nic)

**Battered Women's Justice Project**

1801 Nicollet Ave South, Suite 102  
Minneapolis, MN 55403  
800.903.0111 ext 1 / 612.824.8768  
[www.bwjp.org](http://www.bwjp.org)

**Center for Reproductive Rights**

120 Wall Street, 14th Floor  
New York, NY 10005  
917.637.3616  
[www.reproductiverights.org](http://www.reproductiverights.org)

**Indian Law Resource Center**

602 North Ewing Street  
Helena, MT 59601  
406.449.2006  
[www.indianlaw.org](http://www.indianlaw.org)

**Justice Now**

1322 Webster Street, Suite 210  
Oakland, CA 94612  
510.839.7654  
[www.inow.org](http://www.inow.org)

**National Law Center on Homelessness & Poverty**

1411 K Street NW, Suite 1400  
Washington, DC 20005  
202.638.2535  
[www.nlchp.org](http://www.nlchp.org)

**National Organization for Women**

1100 H Street NW, 3rd floor  
Washington, DC 20005  
202.628.8669  
[www.now.org](http://www.now.org)

**New York Legal Assistance Group**

7 Hanover Square, 18th Floor  
New York, NY 10004  
212.613.5086  
[www.nylag.org](http://www.nylag.org)

**Service Women's Action Network**

P.O. Box 1758  
New York, NY 10156  
212.683.0015  
[servicewomen.org](http://servicewomen.org)

**The Advocates for Human Rights**

330 Second Avenue South, Suite 800  
Minneapolis, MN 55401  
612.341.3302  
[www.theadvocatesforhumanrights.org](http://www.theadvocatesforhumanrights.org)

**University of Cincinnati College of Law**

**Domestic Violence and Civil Protection Order Clinic**

P.O. Box 210040  
Cincinnati, OH 45221  
513.556.1236  
[www.law.uc.edu/institutes-centers/rgsj/dvcpoc/about](http://www.law.uc.edu/institutes-centers/rgsj/dvcpoc/about)

**University of Miami School of Law**

**Human Rights Clinic**

1311 Miller Drive  
Coral Gables, FL 33146  
305.284.5923  
[law.miami.edu/hrc](http://law.miami.edu/hrc)

**University of Virginia School of Law**

**International Human Rights Law Clinic**

580 Massie Road  
Charlottesville, VA 22903  
434.924.4776  
[www.law.virginia.edu/humanrights](http://www.law.virginia.edu/humanrights)

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## ACRONYMS

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|       |   |
|-------|---|
| ABA   | American Bar Association  |
| ACLU  | American Civil Liberties Union  |
| ACOG  | American Congress of Obstetricians and Gynecologists  |
| APHA  | American Public Health Association  |
| ARRA  | American Recovery and Reinvestment Act of 2009  |
| ASFA  | Adoption and Safe Families Act  |
| ATF   | U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives                                      |
| BIA   | U.S. Bureau of Indian Affairs   |
| BJS   | U.S. Bureau of Justice Statistics   |
| CAPTA | Child Abuse Prevention and Treatment Act  |
| CAT   | U.N. Committee Against Torture  |
| CAT   | U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| CCPOA | California Correctional Peace Officers Association  |
| CCW   | Carrying of concealed weapons   |
| CCWF  | California Correctional Women's Facility  |
| CDC   | Centers for Disease Control and Prevention  |
| CDCR  | California Department of Corrections and Rehabilitation                                       |
| CEDAW | U.N. Committee on the Elimination of All Forms of Discrimination Against Women                |
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women                    |
| CERD  | U.N. Committee on the Elimination of All Forms of Racial Discrimination                       |
| CFR   | Senate Committee on Foreign Relations   |
| CIW   | California Institution for Women  |
| CLEO  | Chief Law Enforcement Officer   |
| CPMP  | Community Prisoner Mother Program (California)  |
| CPO   | Civilian protective order   |
| CPS   | Child Protective Services   |
| CRC   | Case Review Committee (within Family Advocacy Program of DoD)                                 |
| CRC   | U.N. Convention on the Rights of the Child  |
| CRIPA | Civil Rights of Institutionalized Persons Act   |
| DASH  | Discrimination and sexual harassment  |
| DEVAW | U.N. Declaration on the Elimination of Violence Against Women                                 |
| DOC   | Department of Corrections   |
| DoD   | U.S. Department of Defense  |
| DOJ   | U.S. Department of Justice  |
| DV    | Domestic violence   |
| DWCF  | Denver Women's Correctional Facility  |
| EEOC  | U.S. Equal Employment Opportunity Commission  |
| ELCRA | Elliott Larsen Civil Rights Act (Michigan)  |
| EO    | Equal Opportunity   |
| EPC   | Equal Protection Clause   |
| ERA   | Equal Rights Amendment  |
| ESL   | English as a Second Language  |

|          |   |
|----------|---|
| FAP      | Family Advocacy Program (of the DoD)  |
| FBI      | Federal Bureau of Investigation   |
| FBP      | Federal Bureau of Prisons   |
| FCI      | Federal Correctional Institution  |
| FFLs     | Federal firearms licensees  |
| FVO      | Family Violence Option (TANF)   |
| FVPSA    | Family Violence Prevention and Services Act                                       |
| FWA      | Fraud, Waste, and Abuse   |
| GAO      | U.S. Government Accountability Office   |
| GCA      | Gun Control Act of 1968   |
| GCMCA    | General court-martial convening authority   |
| HHS      | U.S. Department of Health and Human Services                                      |
| HRW      | Human Rights Watch  |
| HUD      | U.S. Department of Housing and Urban Development                                  |
| ICCPR    | U.N. International Covenant on Civil and Political Rights                         |
| ICE      | U.S. Immigration and Customs Enforcement  |
| ICERD    | International Convention on the Elimination of All Forms of Racial Discrimination |
| ICPD     | International Conference on Population and Development                            |
| ICRA     | Indian Civil Rights Act   |
| IET      | Initial Early Training  |
| IG       | Inspector General   |
| IHS      | Indian Health Service   |
| IPV      | Intimate partner violence   |
| JAG      | Judge Advocate General  |
| JTF-SAPR | Joint Task Force for Sexual Assault Prevention and Response                       |
| LGBT     | Lesbian, gay, bisexual, or transgender  |
| LGBTQ    | Lesbian, gay, bisexual, transgender, or queer (or questioning) individuals        |
| LIFETIME | Low Income Families' Empowerment through Education                                |
| LSRJ     | Law Students for Reproductive Justice   |
| MOU      | Memorandum of Understanding   |
| MPO      | Military protective order   |
| MST      | Military Sexual Trauma  |
| MWPA     | Military Whistleblower Protection Act   |
| NCCHC    | National Commission on Correctional Health Care                                   |
| NCHIP    | National Criminal History Improvement Program                                     |
| NCIC     | National Crime Information Center   |
| NCSC     | National Center for State Courts  |
| NCVS     | National Crime Victimization Survey   |
| NGO      | Non-governmental organization   |
| NICS     | National Instant Criminal Background Check System                                 |
| NIJ      | National Institute of Justice   |
| NPREC    | National Prison Rape Elimination Commission                                       |
| NRA      | National Rifle Association  |
| NTC      | National Tracing Center (of the ATF)  |
| NVAWS    | National Violence Against Women Survey  |
| OVW      | Federal Office on Violence Against Women  |
| PIO      | Public Information Officer  |

|         |   |
|---------|---|
| PLO     | Prison Law Office   |
| PLRA    | Prison Litigation Reform Act  |
| POC     | Point of contact  |
| PREA    | Prison Rape Elimination Act   |
| PRWORA  | Professional Responsibility and Work Opportunity Reconciliation Act |
| PTSD    | Post-traumatic stress disorder                                      |
| RDAP    | Residential Drug Abuse Program                                      |
| RUDs    | Reservations, understandings, and declarations                      |
| SAFE    | Survivors and Advocates for Empowerment                             |
| SALW    | Small arms and light weapons  |
| SAPR    | Sexual Assault Prevention and Response                              |
| SAPRO   | Sexual Assault Prevention and Response Office                       |
| SARC    | Sexual Assault Response Coordinator                                 |
| SH      | Sexual harassment   |
| SNF     | Skilled Nursing Facility  |
| STD     | Sexually transmitted disease  |
| STOP    | Services, Training, Officers, and Prosecutors                       |
| TANF    | Temporary Assistance to Needy Families                              |
| TCI     | Taycheedah Correctional Institution (Wisconsin)                     |
| TIP     | Trafficking in Persons  |
| TJAG    | The Judge Advocate General of the U.S. Army                         |
| TRAP    | Targeted Regulation of Abortion Providers                           |
| TVPRA   | Trafficking Victims Protection Reauthorization Act of 2008          |
| UCMJ    | Uniform Code of Military Justice                                    |
| UNHCR   | United Nations High Commissioner for Refugees                       |
| UNSCR   | U.N. Security Council Resolution                                    |
| USAOs   | United States Attorney's Offices                                    |
| USMS    | United States Marshall Service                                      |
| VA      | U.S. Department of Veterans Affairs                                 |
| VA      | Victim's advocate   |
| VAF     | Voluntary appeal file process (within NICS)                         |
| VAIW    | Violence against Indian women                                       |
| VAW     | Violence against women  |
| VAWA    | Violence Against Women Act  |
| VOCA    | Victims of Crime Act  |
| VPC     | Violence Policy Center  |
| VSPW    | Valley State Prison for Women (California)                          |
| WEAVE   | Women Empowered Against Violence                                    |
| WISQARS | Web-based Injury Statistics Query & Reporting System                |

[Type text]

*Violence against women is the most pervasive human rights violation which continues to challenge every country in the world, and the United States is no exception.*

— Rashida Manjoo, U.N. Special Rapporteur on VAW<sup>1</sup>

### BACKGROUND TO THE ADVOCACY

One weekend in early February 2010, while a historic blizzard brought the Eastern seaboard and mid-Atlantic states to a standstill, a small group of gender and human rights advocates from all over the United States were gathered in Charlottesville, Virginia. Thanks to a three week residency at the University of Virginia School of Law, the United Nations Special Rapporteur on Violence Against Women (SRVAW), Rashida Manjoo, was also present.

The Special Rapporteur had already submitted a formal request to the United States government for an official mission under her mandate.<sup>2</sup> Her interest in the United States, she explained, was triggered by the UN Human Rights Council's (and the UN in general's) shift to a more even-handed approach, which aims to ensure that scrutiny extends beyond the global South. "We must look at VAW through a global, universal lens—with some specificities, of course," Manjoo noted. Though some may feel that women in other countries face more dire conditions, violence against women in the United States is a social and legal epidemic that is preventable and should be systematically addressed.

In 1998, the first UN Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, undertook an official United States mission focusing on women in custodial settings.<sup>3</sup> In addition to following-up on the 1999 report, Manjoo wanted to expand the inquiry. Advocates at the February 2010 roundtable sought to identify critical issues that should be the focus of such a mission now. The group concluded that a contribution could be made by submitting to the Special Rapporteur a series of briefing papers on gaps and contradictions within national law and policy. In particular, the group acknowledged the

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<sup>1</sup> Press statement, *Special Rapporteur on violence against women finalizes fact finding mission to the United States of America*, Feb. 7, 2011, Washington D.C., available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10715&LangID=E>.

<sup>2</sup> Reporting to the UN Human Rights Council, the Special Rapporteur on VAW is requested to:

(a) Seek and receive information on violence against women, its causes and consequences from Governments, treaty bodies, specialized agencies, other special rapporteurs responsible for various human rights questions and intergovernmental and non-governmental organizations, including women's organizations, and to respond effectively to such information;

(b) Recommend measures, ways and means, at the national, regional and international levels, to eliminate violence against women and its causes, and to remedy its consequences;

(c) Work closely with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights – and since March 2006 of the Human Rights Council - and with the treaty bodies, taking into account the Commission's request that they all regularly and systematically include in their reports available information on human rights violations affecting women; and cooperate closely with the Commission on the Status of Women in the discharge of its functions.

In the discharge of the mandate the Special Rapporteur:

1. Transmits urgent appeals and communications to States regarding alleged cases of violence against women.
2. Undertakes fact-finding country visits.
3. Submits annual thematic reports.

See <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx>.

<sup>3</sup> Report of the UN Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1997/44, *Addendum, Report of the mission to the United States of America on the issue of violence against women in state and federal prisons*, UN Doc. E/CN.4/1999/68/Add.2, 4 January 1999, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/100/12/PDF/G9910012.pdf?OpenElement>.

importance of intersectionality (the focus of the SRVAW's 2011 thematic report)<sup>4</sup> and the due diligence standard with respect to violence against women (the subject of various prior reports, and the projected subject of a 2013 annual report).<sup>5</sup>

Over the course of the subsequent ten months, a significant national advocacy network worked by phone and email drafting five comprehensive papers we hoped would assist the SRVAW in preparing for her United States mission. The five topics were chosen collaboratively by some of the most engaged individuals and organizations in the country: the interpretation and implementation of the due diligence standard by the U.S. government; domestic violence, *writ large*; the role and impact of guns in violence against women; violence against women in the military; and violence against women in custodial settings. Coordinated and edited by the University of Virginia International Human Rights Law Clinic, the papers were submitted to the SRVAW in November 2010.

Those papers have been compiled here for the benefit of a wider audience. In publishing this volume and making it readily available online (<http://www.law.virginia.edu/vaw>), we aim to provide a comprehensive resource on the landscape of domestic violence-related problems and advocacy in the United States. By highlighting the intersectionality of these issues, the law and policy, effects and consequences, as well as the shortcomings and possible opportunities for reform, we hope to contribute to a more textured understanding of the current situation regarding violence against women.

## THE BRIEFING PAPERS

### *Due diligence*

From the outset of the mandate, the first SRVAW, Radhika Coomaraswamy, began exploring ways to articulate and strengthen the essential aspects of enforcement. Both of her successors have deepened that endeavor. Standards of due diligence have been developed in various areas of the law to provide a means by which to assess whether a State or other actor is meeting the obligations that they have assumed. Using the language of a rights-based approach, the due diligence standard serves as a tool for rights-holders to hold duty-bearers accountable. It provides a framework for ascertaining what constitutes effective fulfillment of the obligation, and for analyzing the actions or omissions of the duty-bearer. This is especially important where the potential infringement comes through a failure to act. Without some normative basis for the appraisal, it can be difficult to assess if an omission constituted a violation of one's right.<sup>6</sup>

Historically, VAW due diligence analysis has tended to focus on the State's response to acts of violence that have already occurred, using tools such as legislation reform, access to justice, and the provision of care services. In 2006, however, the previous Special Rapporteur on Violence against Women, Yakin Ertürk, published a report on using the due diligence standard as a tool for the elimination of violence against women.<sup>7</sup> Setting up a framework of analysis under the principles of (1) prevention, (2) protection, (3) punishment and (4) reparations, she detailed ways she believed the due diligence standard could be expanded to solidify obligations to prevent and compensate victims of VAW, and include non-State actors as duty-bearers in the due diligence framework.<sup>8</sup>

<sup>4</sup> Report of the UN Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo, UN Doc. A/HRC/17/26 (2 May 2011), see pp 6-21, section II on Multiple and intersecting forms of discrimination and violence against women, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/130/22/PDF/G1113022.pdf?OpenElement>.

<sup>5</sup> Special Rapporteur on Violence Against Women, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, ¶ 35, U.N. Doc. E/CN.4/2006/61 (2006), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/103/50/PDF/G0610350.pdf?OpenElement>; "Due diligence obligation to address violence against women," <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/VAW.aspx>.

<sup>6</sup> Rashida Manjoo, U.N. Special Rapporteur on VAW, *Summary, The Due Diligence Standard for Violence Against Women*, paper written with the assistance of Calleigh McRaith, University of Virginia School of Law (JD 2012), available at <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/VAW.aspx>.

<sup>7</sup> Yakin Ertürk, U.N. Special Rapporteur on VAW, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, U.N. Doc. E/CN.4/2006/61 (2006).

<sup>8</sup> *Id.*, c.f. Manjoo, *Summary paper*, *supra* note 6.

Non-discrimination is a fundamental principle in applying the due diligence standard. It requires States to use the same level of commitment in relation to preventing, investigating, punishing and providing remedies for acts of violence against women (VAW) as they do with other forms of violence.<sup>9</sup> Women of color, particularly Native American and African American women, face multiple, intersecting forms of discrimination. The unique socio-economic and cultural pressures that they experience contribute to higher rates of discrimination and violence than other women in the country. For these reasons, the United States has additional due diligence obligations to prevent, prosecute, and punish violence against these marginalized groups.

United States domestic law, including the Constitution and statutes, affects the country's ability to comply with its due diligence obligations with respect to eliminating discrimination and VAW. While the Constitution provides important protections for women, it also imposes limitations on Congress' ability to legislate against VAW. Those limitations are reflected in the controversies surrounding the Violence Against Women Act (VAWA) and the Supreme Court's decisions in *United States v. Morrison* and *Town of Castle Rock v. Gonzales*. The chapter on *Due Diligence in the United States* also discusses the problems presented by federalism, as well as the threshold dilemma of incorporating international law and standards into U.S. law.

### ***Domestic violence and the role of guns***

Despite legal and policy measures designed to protect victims, domestic violence remains a pervasive rights violation in the United States. Legal and policy developments in the criminal justice system over the past few decades have improved the protection scheme for victims of domestic violence, including the availability of civil protection orders, mandatory arrest laws for abusers and mandatory prosecution policies. However, these measures are not uniformly applied and can create additional problems for victims from marginalized populations. Domestic violence is greatly influenced by contextual factors such as poverty, legal status or residence. Some groups of women, such as African-Americans, Latinas, American Indians and Alaskan Natives, immigrants, and those with disabilities, are therefore more susceptible to abuse and its consequences.

The bottom line is that remedies for victims of gender-based violence are severely lacking. VAWA no longer provides a federal remedy for women who suffer gender-based violence, leaving a serious gap in available protection when states fail to provide it. States primarily use VAWA as a source of grants to provide training to law enforcement officials, fund shelters, or otherwise support programming to address domestic violence. However, state participation is voluntary and protections are therefore dependent upon the level of political will or resources available to seek out VAWA grants within a given jurisdiction. A significant number of states receive no VAWA funding at all. And, although VAWA's expiration in 2011 and the reauthorization process provide Congress with opportunities to improve funding levels, political and economic realities suggest that little will change in the near future.

According to the Violence Policy Center, 91% of murdered women were killed by someone they knew. Because guns increase the probability of death in incidents of domestic violence, the carrying of concealed weapons (CCW) is especially problematic. Federal law does not prohibit the carrying of concealed weapons by private citizens, nor does it provide rules for concealed weapons permits or licenses by private citizens. Like most gun laws, CCW policy is largely left to the states.

### ***VAW in the military***

Domestic violence in the military is an enormous problem that “transcends all ethnic, racial, gender, and socioeconomic boundaries.”<sup>10</sup> Yet, the culture of the military—which rewards machismo and is

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<sup>9</sup> *The Due Diligence Standard as a Tool for the Elimination of VAW*, ¶ 35.

<sup>10</sup> DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, FIRST ANNUAL REPORT (2001), available at <http://www.ncdsv.org/images/InitialReport2001.pdf>.

command-driven—is an impediment to the effective and consistent implementation of domestic violence prevention policies and procedures.

Military sexual trauma (MST), defined by the Department of Veterans Affairs (VA) as rape, sexual assault, and sexual harassment, plagues the U.S. military and is of epidemic proportion. While MST affects both men and women in uniform, servicewomen are at much higher risk for sexual assault and harassment, leading former California Congresswoman Jane Harman to remark, “Women serving in the U.S. military today are more likely to be raped by a fellow soldier than killed by enemy fire in Iraq.”<sup>11</sup>

When it comes to prosecuting sexual assault, the military justice system is “commander-driven,” with individual commanders exercising discretion in deciding whether to pursue criminal charges. Retaliation against those who report is common. According to the Department of Defense, 85% of sexual assaults go unreported and commanders send fewer than 1 in 4 reported cases to trial.<sup>12</sup> The military’s response to sexual assault over-emphasizes law enforcement while neglecting prevention and protection, although only 14% of military sexual assault investigations in FY2009 resulted in court-martial prosecution.<sup>13</sup> What is more, the Supreme Court has held that under the Federal Tort Claims Act, the federal government is not liable for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.

Under new VA regulations, post-traumatic stress disorder (PTSD) is presumed to be “service-connected” in cases where a VA provider supports the diagnosis and “the claimed stressor is related to the veteran’s fear of hostile military or terrorist activity.” This presumption, however, does not apply in cases where the stressor is sexual assault or harassment, which still require corroborating evidence in the form of law enforcement or counseling records, pregnancy or STD tests, and statements from fellow servicemembers. As a result, MST survivors are subject to a higher evidentiary standard than almost any other PTSD claimants.

### ***Women in Detention***

The abuses and hardships suffered by women in detention in the United States are pervasive. Women are often subject to conditions of confinement that inadequately protect them from sexual abuse at the hands of prison officials or other inmates. They endure grossly inadequate, negligent, and sometimes deadly health care services; and are effectively deprived of stable family relationships, often resulting in the permanent loss of parental rights. At the same time, the ability of prisoners to assert their rights and avail themselves of the legal process has been short-circuited by the Prison Litigation Reform Act of 1996 (PLRA), and an increasingly hostile court system.

These abuses occur within the context of a culture of over-incarceration in the United States, which affects violence in prison on multiple fronts. The punitive justifications for high rates of incarceration legitimize poor conditions and make prisoners’ individual claims for dignity invisible, while the overcrowding of prisons makes abuse all the more likely. Women of color and their communities, significantly over-represented in prisons, bear the long-term consequences—fractured families, long-term health concerns, untreated substance abuse problems, and cyclical recidivism—of this harsh system.

The PLRA exhaustion requirement forces prisoners to take their claims through the full applicable prison grievance process, complying with all technicalities, before they can gain access to the federal courts. The statute also contains a physical injury requirement that some courts have interpreted to bar judicial remedy for violations of constitutional non-physical rights, such as religion, speech, and due process rights. The physical injury requirement has also been interpreted to bar prisoners’ claims based on incidents of non-physically-injurious sexual abuse, such as sexual harassment, threats of assault, or groping.

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<sup>11</sup> *Sexual Assault in Military ‘Jaw-Dropping,’ Lawmaker Says*, CNN, Jul. 31, 2008, [http://articles.cnn.com/2008-07-31/us/military.sexabuse\\_1\\_sexual-assault-sexual-abuse-military-service?s=PM:US](http://articles.cnn.com/2008-07-31/us/military.sexabuse_1_sexual-assault-sexual-abuse-military-service?s=PM:US).

<sup>12</sup> Service Women’s Action Network, Press Release, *Department of Defense Appoints General to Head Sexual Assault Office*, Sept. 12, 2011, [http://servicewomen.org/wp-content/uploads/2011/01/SAPRO-Press-Release-9\\_12\\_11.pdf](http://servicewomen.org/wp-content/uploads/2011/01/SAPRO-Press-Release-9_12_11.pdf).

<sup>13</sup> See *Violence Against Women in the United States Military*, *infra*, ¶ 34.

The majority of cases of prisoner sexual abuse simply are not prosecuted. Sexual abuse claims rarely reach a prosecutor's office because (1) due to inadequate grievance systems and fear of retaliation, women may not report abuse; (2) any delay in reporting means that evidence that could corroborate a complaint of abuse may be compromised or lost; and (3) investigations by prisons of incidents of sexual abuse of prisoners are notoriously unreliable. Prosecutors are reluctant to pursue those cases that do reach their offices because of the relatively modest penalties involved and a lack of training in handling staff sexual abuse cases. Not only are prison staff who sexually abuse women prisoners rarely prosecuted, they often receive no punishment of any kind, such as being suspended or fired.

### THE UN SRVAW'S 2011 UNITED STATES MISSION AND REPORT

The U.S. Department of State communicated its formal approval of the UN SRVAW's request to visit the United States on December 21, 2010; and the mission took place January 24 through February 7, 2011. The SRVAW met in Washington D.C. with government representatives, and in North Carolina, Florida, California, Minnesota and New York with state officials and members of civil society. At the local level, Ms. Manjoo met with tribal authorities in the Eastern Band of Cherokee Indians, North Carolina; and with state and county authorities in St. Paul and Minneapolis, Minnesota. She visited three prisons and detention facilities managed by federal and state authorities, including the Glades County Detention Center in Florida; and two of the facilities visited by Radhika Coomaraswamy in 1998—the Federal Correctional Institution (FCI) in Dublin, California and the Central California Women's Facility (CCWF) in Chowchilla.

Two weeks prior to the mission, the SRVAW requested to visit a military base, and she reiterated the request upon commencement of the mission. She was informed that Department of Defense protocol was unable to accommodate the request on such short notice. The SRVAW cancelled a planned visit to the Monmouth County Correctional Institution in New Jersey because she was not granted full access to speak with inmates.

The final report on the UN SRVAW mission to the United States was delivered June 3, 2011 at the Human Rights Council session in Geneva. It "broadly examines the situation of violence against women in the country, including such issues as violence in custodial settings, domestic violence, violence against women in the military, and violence against women who face multiple, intersecting forms of discrimination, particularly Native-American, immigrant, and African-American women."<sup>14</sup> The report summary notes the "positive legislative and policy initiatives undertaken by the Government to reduce the prevalence of violence against women, including the enactment and subsequent reauthorizations of the Violence against Women Act, and the establishment of dedicated offices on violence against women at the highest level of the Executive."

Nevertheless, the Special Rapporteur calls attention to "a lack of legally binding federal provisions providing substantive protection against or prevention of acts of violence against women." This lacuna, "combined with inadequate implementation of some laws, policies and programmes, has resulted in the continued prevalence of violence against women and the discriminatory treatment of victims, with a particularly detrimental impact on poor, minority and immigrant women."<sup>15</sup>

The SRVAW's focus on the combined issues of race and class is critical to addressing the structural nature of the problem. For example, the report highlights the increasing number of immigrant and African American women in prisons and detention facilities, and calls upon the U.S. Government to address the root causes of this trend, paying attention to the intersectional challenges.

The Special Rapporteur called on the government to "consider alternatives to incarceration, particularly for women detainees who are primary care-givers of their children, given the non-violent nature of many of the crimes for which the women are incarcerated." Amendments to the Adoption and Safe Families Act ought to be considered "with a view to ensure that women in custodial settings do not easily or

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<sup>14</sup> Report of the Special Rapporteur on VAW, Rashida Manjoo, *Mission to the United States of America*, U.N. Doc. A/HRC/17/26/Add.5 (6 June 2011), ¶ 1, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/138/26/PDF/G1113826.pdf?OpenElement>.

<sup>15</sup> *Id.* ¶ 113.

arbitrarily lose their parental rights.”<sup>16</sup> Ms. Manjoo recommended amending the Prison Litigation Reform Act to ensure women prisoners and detainees equal protection before the law.

The Special Rapporteur recommended more uniform remedies for victims of domestic violence, sexual assault and stalking, and expanding federal causes of action under VAWA to mitigate discrimination and to increase uniformity and accountability at the state and local levels. She called on the government to “re-evaluate existing mechanisms at federal, state, local and tribal levels for protecting victims and punishing offenders, given that calls for help often do not result in either arrests or successful prosecutions.”<sup>17</sup>

## DEVELOPMENTS AND NEXT STEPS

Despite the often bleak outlook for systemic progress towards the elimination of violence against women in the United States, occasional victories give us reason to hope that with continued advocacy and attention to these issues the landscape will change. For example, in a landmark decision released August 17 2011, the Inter-American Commission on Human Rights found the United States responsible for human rights violations suffered more than a decade ago by Jessica (Gonzales) Lenahan. The decision in *Jessica Lenahan (Gonzales) v. United States*<sup>18</sup> called into question the enforcement of U.S. domestic violence laws and policies, making it clear that many are inadequate to protect the human rights of domestic violence victims. The decision recognized that the United States has an affirmative obligation to protect individuals from discriminatory violence; and the Inter-American Commission urged comprehensive reform at the local, state, and federal levels of U.S. law and policy respecting violence against women.<sup>19</sup>

The *Jessica Lenahan (Gonzales)* decision makes clear that domestic violence is a human rights violation, and places this point in the international sphere. It, thereby, creates an opportunity for advocacy with all governments to apply due diligence standards in re-evaluating their domestic violence laws and policies and making necessary changes and improvements.

Another small but noteworthy step—in September, the Department of Defense appointed for the first time a Major General as director of the Department of Defense’s Sexual Assault Prevention and Response Office (SAPRO). Major General Mary Kay Hertog, a Two-Star Air Force General, replaces a civilian DOD appointee and the first director of SAPRO. Service Women’s Action Network had repeatedly recommended to both the DOD and Congress that the person in charge of stopping rapes in the military should be a military General. “In practical terms, the appointment of General Hertog means that when SAPRO now speaks, commanders have to listen. When the military wants to get things done, it puts a General in charge.”<sup>20</sup>

Within days of her installation, the new SAPRO director listed among her priorities fostering a command climate that ensures victims of sexual assault feel confident enough to report and seek the help they need. Confidence in the system, General Hertog noted, is established through clear messaging that sexual assault is a crime and will not be ignored, excused or condoned; and by ensuring that allegations are quickly investigated and appropriate action taken. General Hertog suggested that an increase in the number of reports may indicate an increased level of confidence in the agency’s commitment to addressing sexual violence in the military. Additionally, Congress recently passed legislation to provide greater remedies to military contractors who were the victims of sexual abuse.<sup>21</sup> Unfortunately, Jamie Leigh Jones, the woman who raised this issue after alleging that she was sexually assaulted in Iraq by co-workers, was unsuccessful in

<sup>16</sup> *Id.*, at p. 29, Conclusions and Recommendations C (c).

<sup>17</sup> *Id.* at p. 27, Conclusions and Recommendations A(c).

<sup>18</sup> See <http://www.cidh.oas.org/Comunicados/English/2011/92-11eng.htm>; and [http://www.law.miami.edu/hrc/hrc\\_gonzalez\\_usa.php](http://www.law.miami.edu/hrc/hrc_gonzalez_usa.php).

<sup>19</sup> Caroline Bettinger-Lopez, *Inter-American ruling invites global rethink of state protection against domestic violence*, Intlawgrrls Blog, Sept. 4, 2011, available at <http://intlawgrrls.blogspot.com/2011/09/inter-american-ruling-invites-global.html>.

<sup>20</sup> Service Women’s Action Network, Press Release, *Department of Defense Appoints General to Head Sexual Assault Office*, Sept. 12, 2011, available at [http://servicewomen.org/wp-content/uploads/2011/01/SAPRO-Press-Release-9\\_12\\_11.pdf](http://servicewomen.org/wp-content/uploads/2011/01/SAPRO-Press-Release-9_12_11.pdf).

<sup>21</sup> See Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 8099 (2009); see also *Violence Against Women in the United States Military*, *infra*, ¶ 45.

vindicating her claim in federal court. So, while there are victories, these setbacks remind us that much work remains.

The SRVAW's report shines a spotlight on the impact of laws and policies on particularly marginalized groups, providing a framework for advocates to approach these issues from an intersectional perspective. For example, with the passage of healthcare reform, the federal government has identified violence prevention as a priority strategy for the first time. While this may help research and programs to address the correlation between violence against women and unintended pregnancy, healthcare reform does not address gaps in service provision for victims of violence—and may even exacerbate access problems. Another federal policy, the Hyde Amendment,<sup>22</sup> prevents low-income women victims of domestic violence enrolled in Medicaid from accessing key reproductive health services like abortion. Instead of repealing this discriminatory provision during the health care reform debate, Congress extended the federal funding ban on abortion into the private insurance market. This will undoubtedly make it harder for low-income women and women of color, who are disproportionately impacted by domestic violence, to access their fundamental right to reproductive healthcare.

Finally, there has been much progress on addressing violence against women in custody since the Special Rapporteur's report in 1999.<sup>23</sup> All 50 states have laws prohibiting the abuse of individuals in custodial settings;<sup>24</sup> the United States enacted the Prison Rape Elimination Act to address custodial abuse; and the Department of Justice will issue comprehensive standards that will apply immediately to the Federal Bureau of Prisons and that states must comply with or lose a portion of their federal funds.<sup>25</sup> We are hopeful that the standards will be strongly enforced and that they will have a positive impact of reducing the continued violence against women in custody.

These gains would not have been possible without the visibility they received in the 1999 report and the concerted advocacy efforts that preceded, intersected and succeeded that report. The current revisiting of those issues in this report is important and adds important accountability to the process of reviewing state efforts to address violence against women in custody. This practice of revisiting prior recommendations should be a part of the mandate of the Special Rapporteur. It adds credibility and gravitas to the mandates and creates accountability and benchmarks for states.<sup>26</sup>

Advocates came together across a variety of fields—criminal justice, immigration, domestic violence, reproductive rights, economic and racial justice—to produce these briefing papers. Our job now is to sustain the momentum from this process, work together to tackle the structural problems that are the causes and consequences of violence against women, and collaborate on targeted advocacy efforts to end the pandemic of violence against women in the United States.



<sup>22</sup> Pub. L. No. 111-8, sec. 507-508, 123 Stat. 524, 802-03 (2009).

<sup>23</sup> Report of the UN Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy, in accordance with Commission on Human Rights res.1997/44, *Addendum, Report of the mission to the United States of America on the issue of violence against women in state and federal prisons*, UN Doc. E/CN.4/1999/68/Add.2, 4 January 1999, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/100/12/PDF/G9910012.pdf?OpenElement>.

<sup>24</sup> Brenda V. Smith, *Fifty State Survey of Criminal Laws Prohibiting the Sexual Abuse of Individuals Under Custodial Supervision*, PROJECT ON ADDRESSING PRISON RAPE (2009), available at <http://www.wcl.american.edu/nic/documents/50StateSurveyofSSMLawsFINAL2009Update.pdf?rd=1>.

<sup>25</sup> The Prison Rape Elimination Act of 2003, 42 U.S.C. § 15604 (2003).

<sup>26</sup> Office of the Secretary of Defense, SAPRO, *Update* (Sept. 20 2011), Major General Mary Kay Hertog, Director, *powerpoint outline available at* <http://dacowits.defense.gov/Briefings/DACOWITS%20September%202011%20Committee%20Meeting/06%20SAPRO%20presentation.pdf> (last accessed Oct. 6 2011).





**D**ue Diligence Obligations of the  
United States in the case of  
Violence Against Women

**Calleigh McRaith** *(JD 2012)*

**Clare Boronow** *(JD 2012)*

**Suzanne Bradley** *(JD 2011)*

**Vivian Kim** *(JD 2012)*

**Deena R. Hurwitz**

*Associate Professor of Law*

*Director, International Human Rights Law Clinic*

*University of Virginia School of Law*

**Kirsten Matoy Carlson**

*Indian Law Resource Center*

*Assistant Professor of Law*

*Wayne State University Law School*

## I. INTRODUCTION

1. Although the United States has made progress in combating violence against women (“VAW”) in recent years, including passage of the Violence Against Women Act (VAWA) and President Obama’s campaign to have the Senate ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), VAW remains a serious problem. One of the primary means of assessing a State’s efforts to combat VAW is the due diligence standard articulated in the Declaration on the Elimination of Violence Against Women (DEVAW) and expanded upon by former UN Special Rapporteur on Violence Against Women Yakin Ertürk. The purpose of this chapter is to provide a brief assessment of the United States’ fulfillment of its due diligence obligations relating to VAW by analyzing the incorporation of international law and standards into United States law, the limitations to due diligence fulfillment imposed by the Constitution and existing statutes, and the inadequacy of available remedies for VAW. Possible cultural attitudes which may contribute to VAW and the United States’ failure to fulfill its due diligence obligations are noted throughout.

## II. THE DUE DILIGENCE STANDARD FOR VIOLENCE AGAINST WOMEN

2. While the ratification of particular treaties may impose additional obligations, all States have a general obligation to exercise due diligence to prevent, investigate, punish, and provide reparations for human rights abuses, including acts of VAW.<sup>27</sup> DEVAW lays out the due diligence standard for VAW in Article 4(c): states should “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons.”<sup>28</sup> Principles of non-discrimination require states “to use the same level of commitment in relation to prevention, investigation, punishment and provision of remedies for violence against women as they do with regards to the other forms of violence.”<sup>29</sup> The focus of due diligence assessment is analysis of results and effectiveness: States that merely go through the motions of fulfilling their duties without making a legitimate, good faith effort to prevent, punish, and provide remedies for VAW are violating their obligation to exercise due diligence.<sup>30</sup>
3. Historically, due diligence assessment has tended to focus on the State’s response to acts of violence that have already occurred, using metrics such as legislation reform, access to justice, and the provision of services to victims.<sup>31</sup> In 2006, however, then-Special Rapporteur on Violence Against Women, Yakin Ertürk, established a more comprehensive framework that requires States to: 1) prevent VAW, 2) protect women from violence, 3) punish those who commit acts of violence, and 4) provide reparations to victims of violence.<sup>32</sup> This framework obligates States “to transform the societal values and institutions that sustain gender inequality while at the same time effectively respond to violence against women when it occurs.”<sup>33</sup> Ertürk also noted that non-State actors share the responsibility to prevent and respond to VAW.<sup>34</sup> Among many other actions, Ertürk encouraged States to go beyond the adoption of specific legislation and address the underlying cultural attitudes that perpetuate VAW through transformative remedies.<sup>35</sup>

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<sup>27</sup> See CARIN BENNINGER-BUDEL, *DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE* 11 (2008) (“It is now generally accepted that international human rights instruments impose several layers of obligation for states and these obligations may be typified as obligations to *respect, protect* and *fulfil* human rights.”); Declaration on the Elimination of Violence Against Women (DEVAW), art. 4(c), U.N. Doc. A/RES/48/104 (Dec. 20, 1993); CEDAW Gen. Recommendation No. 19, ¶ 9, U.N. Doc. A/47/38 (Jan. 29, 1992).

<sup>28</sup> DEVAW, *supra* note 27, at art. 4(c).

<sup>29</sup> Special Rapporteur on Violence Against Women, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, ¶ 35, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) (by Yakin Ertürk) [hereinafter *Due Diligence Standard*].

<sup>30</sup> *Id.* ¶ 36.

<sup>31</sup> *Id.* ¶ 15.

<sup>32</sup> *Id.* ¶¶ 74, 103.

<sup>33</sup> *Id.* ¶ 17.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* ¶¶ 15, 17, 104-05.

### III. THE INCORPORATION OF INTERNATIONAL LAW AND STANDARDS INTO UNITED STATES LAW

4. Every State has obligations arising out of treaties and customary international law to exercise due diligence to respect, protect, and fulfill human rights.<sup>36</sup> Thus, even though the United States has not ratified CEDAW or any other treaty that expressly deals with VAW,<sup>37</sup> it nevertheless has obligations under international law to act with due diligence to prevent violations of women's rights, protect women from violence, investigate and punish acts of violence, and provide adequate redress for women victims of violence.<sup>38</sup> The United States has consistently failed to meet those obligations, most notably from the perspective of international human rights law by declining to ratify CEDAW.<sup>39</sup> This is due in part to the way the United States incorporates international law into its domestic legal system, and the way the United States views its relationship to the rest of the world.

#### A. Resistance to the harmonization of international and domestic law

5. The initial obstacle to the application of international law in the United States domestic legal system is the United States Constitution. In the domestic legal system, a provision of international law that is inconsistent with the Constitution cannot be given effect.<sup>40</sup> However, the United States remains bound by the provision internationally.<sup>41</sup> To avoid conflicts between treaty provisions and the Constitution, when Congress ratifies a treaty, it usually enters a reservation that the treaty only binds the United States to the extent that it is consistent with the Constitution.<sup>42</sup> Thus, even if the United States ratified CEDAW, it would only comply with those provisions that were deemed constitutional.<sup>43</sup>
6. International law occupies a somewhat stronger position in relation to federal statutes. The Constitution's Supremacy Clause designates treaties "the supreme Law of the Land," equivalent to federal law and binding on federal, state, and local governments.<sup>44</sup> Customary international law is also binding

<sup>36</sup> See BENNINGER-BUDEL, *supra* note 27, at 11. The respect, protect, fulfill framework grows out of the general obligation of States to protect human rights articulated in treaties, UN declarations, and other sources of international law. See Universal Declaration of Human Rights, art. 28, G.A. Res. 217A, U.N. Doc. A/810 (Dec. 10, 1948) ("Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."); Int'l Covenant on Civil & Political Rights (ICCPR), (1976) 999 U.N.T.S. 171, at art. 2 (Dec. 16, 1966) (State parties "undertake[] to respect and to ensure to all individuals within [their] territory and subject to [their] jurisdiction the rights recognized in the present Covenant."); Restatement (Third) of Foreign Relations Law § 702(g) & comment b (1987) [hereinafter Restatement] (A State violates customary international law if it "practices, encourages, or condones . . . a consistent pattern of gross violations of internationally recognized human rights."); see also CEDAW Gen. Recommendation No. 19, *supra* note 27, at ¶ 9 (noting that States' obligations to prevent, investigate, punish, and provide compensation for violence against women arise out of "general international law and specific human rights covenants"). One of the first to articulate the respect, protect, fulfill framework was the Special Rapporteur in his report on the right to adequate food as a human right. Asbjorn Eide, *The New International Economic Order and the Promotion of Human Rights*, ¶¶ 66-69, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987). The framework has since been adopted and extended throughout the human rights world to express state obligations with regard to human rights. See, e.g., Comm. on Econ., Social, and Cultural Rights, Gen. Comment No. 14, ¶ 33, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) (noting that "all human rights" impose on state parties the obligations to respect, protect, and fulfill and explaining what those obligations require of states); Velasquez Rodriguez v. Honduras, Inter-Am. Ct. H.R. (Ser. C) No. 4, at ¶ 172 (July 29, 1988) (noting that States party to the American Convention on Human Rights have a duty to exercise due diligence to prevent and respond to human rights violations).

<sup>37</sup> See, e.g., Inter-American Convention on the Prevention, Punishment & Eradication of Violence Against Women (Convention of Belem do Para), 33 I.L.M. 1534 (1994).

<sup>38</sup> *Due Diligence Standard*, *supra* note 29, at ¶ 29; DEVAW, *supra* note 27, at art. 4(c) (States should "[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."). The United States is also party to the ICCPR and thus has a duty to respect, protect, and provide remedies for violations of all rights guaranteed by that treaty. ICCPR, *supra* note 36, at art. 2.

<sup>39</sup> *The Due Diligence Standard*, *supra* note 29, ¶¶ 32, 89 (noting that ratification of human rights treaties is one of a State's due diligence obligations).

<sup>40</sup> *Boos v. Barry*, 485 U.S. 312, 324 (1988) ("[I]t is well-established that no agreement with a foreign nation can confer power on the Congress, or on any branch of Government, which is free from the restraints of the Constitution.") (quoting *Reid v. Covert*, 354 U.S. 1, 16 (1957)); Restatement, *supra* note 10, §§ 115(3), 111 comment a.

<sup>41</sup> Restatement, *supra* note 10, §§ 115 comment b, 111 comment a.

<sup>42</sup> See, e.g., Convention Against Torture (CAT), U.S. Declarations and Reservations, (1994) 1465 U.N.T.S. 85; ICCPR, *supra* note 10, U.S. Declarations and Reservations; Convention on the Elimination of All Forms of Racial Discrimination (Race Convention), U.S. Declarations and Reservations, (1969) 660 U.N.T.S. 195; Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), U.S. Declarations and Reservations, (1986) 78 U.N.T.S. 277.

<sup>43</sup> See S. REP. NO. 107-09, at 11 (2002).

<sup>44</sup> U.S. CONST. art. VI, cl. 2.

U.S. law,<sup>45</sup> although lower courts and scholars disagree whether the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*<sup>46</sup> requires that customary international law be affirmatively incorporated by Congress into United States law in order to be binding.<sup>47</sup>

7. Whenever possible, courts must construe domestic law so as not to violate international law.<sup>48</sup> If a conflict between a statute and a treaty is unavoidable, the later-in-time rule requires that whichever came into force most recently prevails.<sup>49</sup> A later-in-time statute supersedes customary international law,<sup>50</sup> but whether a new provision of customary law supersedes an earlier federal statute remains unclear.<sup>51</sup> Even if Congress supersedes a provision of international law by passing a contradictory statute, the United States remains bound by the provision internationally.<sup>52</sup> In reality, Congress rarely passes a law expressly superseding international law; it is more likely to simply ignore international law.

## B. Non-self-executing treaties and the federalist system

8. While the Constitution and domestic law limit the extent to which the United States can be bound by international law, the United States tends to shirk even those international obligations consistent with domestic law. For example, the United States often ratifies human rights treaties subject to the reservation that they are non-self-executing.<sup>53</sup> "Non-self-executing treaties are international obligations that the United States has accepted but that are not domestically judicially enforceable without legislative sanction."<sup>54</sup> They impose legal obligations on the United States, but they do not create domestically enforceable federal law unless and until Congress passes implementing legislation.<sup>55</sup> In many cases, Congress ratifies a non-self-executing treaty but either declines or fails to pass implementing legislation.<sup>56</sup> Often this is because Congress believes domestic law already complies with the treaty and that implementing new legislation is unnecessary.<sup>57</sup> A non-self-executing treaty may nevertheless have some domestic effect in that it "can be the basis for congressional implementing legislation, executive orders interpreting the treaty, or the construing of a statute to comport with the United States'

<sup>45</sup> Restatement, *supra* note 10, §§ 102(1)(a), 111(1) & comment d; *The Paquete Habana*, 175 U.S. 677, 700 (1900).

<sup>46</sup> 542 U.S. 692 (2004).

<sup>47</sup> *Compare* *Igartua-de la Rosa v. United States*, 417 F.3d 145, 178 (1st Cir. 2005) ("[T]he *Sosa* court did not foreclose the possibility of directly enforcing some customary international law claims through the federal common law when federal jurisdiction is based on other grounds."), and *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009); William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19 (2007), with *Al-Bihani v. Obama*, 619 F.3d 1, 19 (D.C. Cir. 2010) ("*Sosa* thus confirmed that international-law principles are not automatically part of domestic U.S. law and that those principles can enter into domestic U.S. law only through an affirmative act of the political branches."), and Curtis A. Bradley, Jack L. Goldsmith, & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 902-06 (2007).

<sup>48</sup> *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804)).

<sup>49</sup> *Whitney v. Robertson*, 124 U.S. 190, 193-94 (1888); *Medellin v. Texas*, 552 U.S. 491, 509 n.5 (2008). Scholars disagree whether non-self-executing treaties for which Congress has enacted no implementing legislation are an exception to the later in time rule, in that they do not supersede an inconsistent statute. See 74 Am. Jur. 2d *Treaties* § 14 (2010) (stating that only self-executing treaties supersede inconsistent statutes); David H. Moore, *Do U.S. Courts Discriminate Against Treaties?: Equivalence, Duality, and Non-self-execution*, 110 COLUM. L. REV. 2228, 2233 n.20 (2010) (noting both sides of disagreement).

<sup>50</sup> *Sosa*, 542 U.S. at 731 (noting that Congress may "shut the door to the law of nations entirely . . . explicitly, or implicitly by treaties or statutes that occupy the field").

<sup>51</sup> Restatement, *supra* note 10, § 115 comment d ("It has . . . not been authoritatively determined whether a rule of customary international law that developed after, and is inconsistent with, an earlier statute or international agreement of the United States should be given effect as the law of the United States."); cf. *United States v. Yousef*, 327 F.3d 56, 99 n.31 (2d Cir. 2003) (calling the Restatement's suggestion that customary international law might trump prior inconsistent statutes "without foundation or merit").

<sup>52</sup> Restatement, *supra* note 10, § 115(1)(b).

<sup>53</sup> See, e.g., CAT, *supra* note 16, U.S. Declarations and Reservations; ICCPR, *supra* note 10, U.S. Declarations and Reservations; Race Convention, *supra* note 16, U.S. Declarations and Reservations.

<sup>54</sup> Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 118 (2006).

<sup>55</sup> *Medellin*, 552 U.S. at 504-05 & n.2, 526-27; *Sosa*, 542 U.S. at 735 ("[A]lthough the [ICCPR] does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.>").

<sup>56</sup> See, e.g., *United States v. Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir. 2002) (holding ICCPR not judicially enforceable because Congress has not passed implementing legislation); *Johnson v. Quander*, 370 F. Supp. 2d 79, 101 (D.D.C. 2005) (finding Race Convention is non-self-executing and therefore does not create a private right of action).

<sup>57</sup> See Cleveland, *supra* note 54, at 118-19; S. REP. NO. 107-9, at 10 (2002) (noting that should the Senate ratify CEDAW, no implementing legislation will be necessary because U.S. law already adequately protects women).

international obligations.”<sup>58</sup> It may also have legal consequences under state law, since non-self-executing treaties are binding on states regardless of whether they have been implemented by Congress.<sup>59</sup>

9. When the Senate Committee on Foreign Relations (CFR) in 2002 recommended that Congress ratify CEDAW, it assumed the treaty would be non-self-executing, as are most international treaties in the American legal system.<sup>60</sup> Despite noting that existing U.S. law satisfied most but not all of CEDAW’s provisions, the CFR concluded that “there would be no need to establish additional legal causes of action in order to enforce the requirements of the Convention.”<sup>61</sup> Thus, if it ratified CEDAW, the Senate would likely decline to pass implementing legislation, rendering the Women’s Convention judicially unenforceable in domestic courts.<sup>62</sup>
10. The American federalist system can also impede full compliance with international obligations. Because neither the federal nor state governments have full responsibility for implementing international law, many international obligations are left to languish in the limbo between federal and state jurisdiction. Federal jurisdiction is limited by the Constitution: Congress can only pass laws within its Article I powers.<sup>63</sup> Indeed, Congress often ratifies treaties with the reservation that the federal government will implement the treaty to the extent it exercises jurisdiction over the relevant subject matter.<sup>64</sup>
11. State and local governments are bound by ratified treaties even absent federal implementing legislation.<sup>65</sup> Indeed, state and local governments may be best able to implement treaty provisions that touch on areas of traditional state jurisdiction, such as criminal law. In response to UN concerns that states are not aware of “the existence and substance” of human rights treaties, the State Department sent a memorandum to all state governors reminding them that the “implementation of [human rights] treaties may be carried out by officials at all levels of government (federal, state, insular, and local) under existing laws applicable in their jurisdictions.”<sup>66</sup> However, because the federal government cannot force states to take actions in areas within their sole jurisdiction, the practical effect of the federalist system is that many treaty provisions go unimplemented or are implemented inconsistently by different state and local governments. Some non-governmental organizations (“NGO”s) have suggested requiring state and local governments to report on the implementation and enforcement of human rights treaties as a way of encouraging and tracking compliance by state and local governments.<sup>67</sup> Such a requirement would have to be implemented by the federal government, since the federal government is party to the treaty and responsible for complying with it.
12. The federalist system is not without benefits. It means that state and local governments can comply with treaties even if the federal government has not yet ratified them. For example, San Francisco passed an ordinance adopting the principles of CEDAW in 1998.<sup>68</sup> It also means that state and local governments

<sup>58</sup> Cleveland, *supra* note 54, at 118; Ernest A. Young, *Treaties as “Part of Our Law”*, 88 TEX. L. REV. 91, 128-31 (2009); *see also* *Medellin*, 552 U.S. at 530 (noting that an unimplemented non-self-executing treaty only prevents the President from “unilaterally making the treaty binding on domestic courts. The President may comply with the treaty’s obligations by some other means, so long as they are consistent with the Constitution.”).

<sup>59</sup> Young, *supra* note 58, at 129.

<sup>60</sup> S. REP. NO. 107-9, at 10 (2002).

<sup>61</sup> *Id.*

<sup>62</sup> *See Women’s Rights Are Human Rights: U.S. Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Hearing Before the S. Subcomm. on Human Rights and the Law of the S. Judiciary Comm.*, 111th Cong. (2010) [hereinafter 2010 CEDAW hearing] (statement of Samuel R. Bagenstos, Principal Deputy Ass’t Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice).

<sup>63</sup> *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000) (striking down statute providing federal civil remedy for gender-motivated violence because the “regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States”).

<sup>64</sup> *See, e.g.*, CAT, *supra* note 16, U.S. Declarations and Reservations; ICCPR, *supra* note 10, U.S. Declarations and Reservations; Race Convention, *supra* note 16, U.S. Declarations and Reservations; Convention on the Rights of the Child, Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, U.S. Declarations and Reservations, (2002) 2171 U.N.T.S. 227.

<sup>65</sup> Young, *supra* note 58, at 128-29.

<sup>66</sup> U.S. State Dep’t Memorandum from Harold Hongju Koh, Legal Advisor, to State Governors, at 2 (Jan. 20, 2010).

<sup>67</sup> *See* Meiklejohn Civil Liberties Inst., *Submission to the United Nations Universal Periodic Review*, 3-4 (Apr. 2010).

<sup>68</sup> *Convention on the Elimination of All Forms of Discrimination Against Women: Hearing Before the S. Comm. on Foreign Relations*, 107th Cong. 38 n.20 (2002) [hereinafter 2002 CEDAW hearing] (statement of Prof. Harold Koh).

can tailor their implementation of international law to the specific demographics and problems within their jurisdiction.

13. While the United States' reservations from a non-self-executing treaty might threaten to undermine the object and purpose of the treaty, their validity would have limited effect in the domestic legal system. An invalid reservation might affect State implementation of a treaty under State law, the construction of the treaty by the executive, or the construction of other statutes in light of the treaty. However, if Congress fails to pass implementing legislation, the treaty is not judicially enforceable federal law regardless of the validity of the United States' reservations.<sup>69</sup> And if Congress does pass implementing legislation, it will presumably only implement those parts of the treaty for which no reservations were entered. The sole reservation that might have an effect in the domestic legal system, should it be held invalid, is the non-self-execution reservation. If that reservation was found to be inconsistent with the object and purpose of the treaty and was therefore void, the treaty would become self-executing and United States courts would have to treat it as binding law. In practice, however, the United States' reservations have never been held invalid, despite numerous objections by other State parties and treaty committees.<sup>70</sup>

### C. United States exceptionalism

14. The United States' failure to fulfill its obligations under international law arises as much from its sense of exceptionalism as from the constraints of its domestic legal system. From John Winthrop's vision of a "shining city upon a hill" to Barack Obama's inaugural declaration that the United States "is ready to lead [the world] once more," throughout its history the United States has seen itself as superior to other nation-states. This vision has been bolstered by American military and economic supremacy, which throughout the twentieth century allowed the United States to be at the forefront of creating international law while avoiding being bound by its obligations.
15. This sense of exceptionalism is one of the reasons the United States has not ratified CEDAW, and thereby failed to fulfill one of its primary due diligence obligations in protecting women from violence. Opponents argue that American law already protects women as well as, if not better than, the Women's Convention.<sup>71</sup> The United States legal system "is so far superior to anything that exists at the United Nations in establishing the rule of law that it would be the sheerest folly to subordinate our right to legislate these purely domestic matters . . . to some international body."<sup>72</sup> Some conservatives believe that the United States dismantled the barriers to gender equality in the 1970s, and any remaining differences between the sexes have "innocent explanations" and are due to women's choices rather than discrimination.<sup>73</sup>
16. Opponents of CEDAW believe that the Women's Convention and other human rights treaties are intended for countries that have a history of human rights abuses and lack strong domestic protections, unlike the United States.<sup>74</sup> They point to the traditional cultural practices of other, non-western states such as child marriage, female genital mutilation, and honor killings, as evidence that those States need CEDAW.<sup>75</sup> When it comes to the United States, however, they either ignore the role of tradition and culture in

<sup>69</sup> See *Medellin*, 552 U.S. at 504-05 & n.2; Cleveland, *supra* note 54, at 118.

<sup>70</sup> See, e.g., ICCPR, *supra* note 10, Objections of Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain, and Sweden; CAT, *supra* note 16, Objections of Finland, Netherlands, Sweden; Human Rights Committee, *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant*, ¶¶ 38, 52, U.N. Doc. CCPR/C/SR.1401 (Apr. 17, 1995).

<sup>71</sup> 2002 CEDAW hearing, *supra* note 68, at 13 (statement of former Rep. Jo Ann Davis (R-VA)); Luisa Blanchfield, Congressional Research Serv., *The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Issues in the U.S. Ratification Debate* 11 (May 5, 2010).

<sup>72</sup> 2002 CEDAW hearing, *supra* note 68, at 40 (statement of Kathryn Ogden Balmforth, former director of the World Family Policy Ctr., Brigham Young Univ.).

<sup>73</sup> CHRISTINA HOFF SOMMERS, AM. ENTER. INST., *THE UN WOMEN'S TREATY: THE CASE AGAINST RATIFICATION* 19 (2010).

<sup>74</sup> Blanchfield, *supra* note 71, at 11; 2010 CEDAW hearing, *supra* note 62 (statement of Steven Groves, Heritage Found.).

<sup>75</sup> See Catherine Powell, *Lifting the Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331, 334 (2005).

gender inequality,<sup>76</sup> or argue that American gender norms embrace the biological differences between men and women.<sup>77</sup>

17. Critics also see CEDAW and other human rights treaties as an affront to U.S. sovereignty and democracy. They fear that ratification of the Women's Convention would give the CEDAW Committee the power to force the United States to take certain actions, even if those actions go against the will of the people.<sup>78</sup> In particular, critics argue that CEDAW would force the United States to legalize prostitution and same-sex marriage, to liberalize abortion laws, and undermine traditional family structures and religious practices.<sup>79</sup> Even worse, these pronouncements would come from "an international committee made up in part by representatives of nations with notoriously poor human rights records."<sup>80</sup>
18. These exceptionalist arguments apply not only to CEDAW; they underlie the United States' failure to meet its due diligence obligations with respect to VAW more generally. Federal and state governments feel that their laws already protect women against violence far better than those of other nation-states and, thus, they have met their domestic due diligence obligations. If changes to domestic legislation, policy, and programs are needed, they should arise internally through the democratic process rather than be imposed by fiat of an outside international body.<sup>81</sup>
19. This focus on the human rights records of other nations rather than examining its own is evident in recent American actions. In its submission on VAW for the ten-year review of implementation of the Beijing Platform for Action, the United States focused primarily on efforts to combat VAW abroad.<sup>82</sup> In 2010, former Representative Bill Delahunt (D-MA) and Senator John Kerry (D-MA) sponsored the International Violence Against Women Act in the House and Senate respectively.<sup>83</sup> Rather than address VAW within the United States, the Act would establish and fund government programs to combat VAW worldwide.<sup>84</sup>
20. The November 18, 2010 hearing before the Senate Judiciary Committee's Subcommittee on Human Rights and the Law on potential ratification of CEDAW reaffirmed these attitudes. While the hearing was dominated by supporters of ratification, they emphasized that the purpose of ratification would be to bolster the United States' moral authority throughout the world, rather than alter existing American laws and practices. As Senator Richard Durbin put it, "the United States does not need to ratify CEDAW to protect our own women and girls. . . . The robust women's rights protections in American law in many ways exceed the requirements of CEDAW . . . CEDAW is about giving women all over the world the chance to enjoy the same freedoms and opportunities that American women have struggled long and hard to achieve."<sup>85</sup>
21. Principal Deputy Assistant Attorney General Samuel Bagenstos, who testified on behalf of the Department of Justice (DOJ), noted that DOJ and other federal agencies are currently reviewing the reservations, understandings, and declarations ("RUDs") proposed by the Senate Committee on Foreign Relations in its 2002 recommendation of ratification to determine if they are all necessary. In answer to Senator Durbin's questioning, however, Mr. Bagenstos stated that CEDAW, if ratified, would be non-self-

<sup>76</sup> *Id.* at 333-35.

<sup>77</sup> 2002 CEDAW hearing, *supra* note 68, at 52-53 (statement of Christina Hoff Sommers, Am. Enter. Inst.); Patrick Fagan, *How U.N. Conventions on Women's and Children's Rights Undermine Family, Religion, and Sovereignty* (Feb. 5, 2001), available at <http://www.heritage.org/Research/Reports/2001/02/How-UN-Conventions-On-Womens>.

<sup>78</sup> 2002 CEDAW hearing, *supra* note 68, at 13 (statement of former Rep. Jo Ann Davis (R-VA)).

<sup>79</sup> *Id.* at 41-42 (statement of Kathryn Ogden Balmforth, former director of the World Family Policy Ctr., Brigham Young Univ.); Blanchfield, *supra* note 71, at 12-16, 19, 21; Fagan, *supra* note 77.

<sup>80</sup> 2002 CEDAW hearing, *supra* note 68, at 13 (statement of former Rep. Jo Ann Davis, R-VA); Blanchfield, *supra* note 71, at 8.

<sup>81</sup> *See, e.g.*, 2002 CEDAW hearing, *supra* note 68, at 13 (statement of former Rep. Jo Ann Davis (R-VA)) ("[W]e are a sovereign Nation with a representative democracy sufficient to address issues of gender discrimination and equality in our city councils, State legislatures, and Congress").

<sup>82</sup> *U.S. Submission of Information to the Questionnaire to Governments on Implementation of the Beijing Platform for Action and the Outcome of the Twenty-Third Special Session of the General Assembly* (2005).

<sup>83</sup> H.R. 4594, 111th Cong. (2010); S. 2982, 111th Cong. (2010).

<sup>84</sup> *Id.*

<sup>85</sup> 2010 CEDAW hearing, *supra* note 62 (statement of Senator Richard Durbin (D-IL)).

executing and would not require any changes to existing United States law. When pressed about whether existing American law meets all of the requirements of CEDAW, Bagenstos hedged saying that United States law protects “women and girls against violence in a wide variety of settings which touch on many issues that are not addressed specifically in the Convention.”<sup>86</sup>

22. While proponents focused on the importance of U.S. ratification of CEDAW to the rest of the world, in her closing statement, National Women’s Law Center president Marcia Greenberger acknowledged that “the kind of self-examination that CEDAW envisions . . . [is] allied with the tradition of the United States,” and has the potential to help improve the lives of women within this country. Thus the United States’ due diligence obligations need not be seen as international interference in our domestic system, but instead as part of our own “proud tradition to keep striving to do better and better here at home.”<sup>87</sup>

#### **IV. UNITED STATES CONSTITUTIONAL AND STATUTORY PROVISIONS AFFECTING VIOLENCE AGAINST WOMEN**

23. United States domestic law, including the Constitution and statutes, also affects the country’s ability to comply with its due diligence obligations for VAW. While the Constitution provides important protections for women, namely in the Fourteenth and Nineteenth Amendments, it also imposes limitations on Congress’ ability to legislate against VAW. Those limitations are best illustrated by the controversy surrounding VAWA and the Supreme Court cases of *United States v. Morrison* and *Town of Castle Rock v. Gonzales*.

##### **A. Constitutional protections and limitations**

24. The primacy of the Constitution in the legal scheme of the United States is beyond doubt. Its import for the protection of women, however, is less clear. Only the Nineteenth Amendment deals specifically with gender. While other portions of the Constitution have been construed to provide protections for women, the jurisprudence is often the subject of significant debate.
25. Perhaps the most contested provision of the Constitution with respect to non-discrimination is the Fourteenth Amendment, which provides that no state shall “deny to any person within its jurisdiction equal protection of the laws.”<sup>88</sup> Known as the Equal Protection Clause (“EPC”), this portion of the amendment has been the basis for key Supreme Court decisions enforcing civil rights protections.
26. Unlike race, gender is not considered a suspect class and acts of alleged sex discrimination therefore are not subject to strict scrutiny.<sup>89</sup> The Supreme Court first announced that sex-based classifications qualified for intermediate scrutiny under the EPC in the 1976 decision of *Craig v. Boren*.<sup>90</sup> While this standard of review is less rigorous than that given to race-based discrimination, it is more stringent than that for classifications based on poverty or age, which are upheld if merely rationally related to a legitimate government purpose. To withstand a constitutional challenge under the EPC, classifications based on gender must be found to serve an important governmental objective and be substantially related to the achievement of that objective.<sup>91</sup>
27. The Nineteenth Amendment provides that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.”<sup>92</sup> The amendment also states

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<sup>86</sup> *Id.* (statement of Samuel R. Bagenstos, Principal Deputy Ass’t Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice).

<sup>87</sup> *Id.* (statement of Marcia D. Greenberger, Nat’l Women’s Law Ctr.).

<sup>88</sup> U.S. CONST. amend XIV, § 1.

<sup>89</sup> *See, e.g.*, *Meloon v. Helgemoe*, 564 F.2d 602 (1st Cir. 1977); *Stevens v. Califano*, 448 F. Supp. 1313 (N.D. Ohio 1978), *aff’d*, 443 U.S. 901 (1979); *Lafler v. Athletic Bd. of Control*, 536 F. Supp. 104 (W.D. Mich. 1982).

<sup>90</sup> 429 U.S. 190 (1976).

<sup>91</sup> *Id.* at 197.

<sup>92</sup> U.S. CONST. amend XIX.

that Congress has the power to enforce the amendment through appropriate legislation.<sup>93</sup> Though its passage in 1920 involved a lengthy struggle by women’s rights activists, the Nineteenth Amendment is narrow in focus and has not generated the same level of constitutional debate as the Fourteenth Amendment.

*i. The Equal Rights Amendment*

28. In 1971, Barbara Brown, Thomas Emerson, Gail Falk, and Ann Freedman wrote that in the absence of a constitutional mandate, gender would never be accorded the same special status as race under the Fourteenth Amendment.<sup>94</sup> The next step for the women’s movement after the ratification of the Nineteenth Amendment was pursuit of a constitutional equality amendment.<sup>95</sup> The 1960s and 1970s saw a flurry of activity and debate over the hotly contested proposed Equal Rights Amendment (“ERA”). Congress passed the ERA by an overwhelming majority in 1972 and 35 states ratified it within a few years. Yet, by July 1982—the extended deadline for state ratification—the proposed amendment fell three states short of the three-fourths majority required to amend the Constitution.<sup>96</sup>
29. Despite the failure of the ERA, some scholars have referred to intermediate scrutiny equal protection analysis as a “de facto ERA.”<sup>97</sup> Though intermediate scrutiny clearly is not the same as a constitutional equality amendment, many gender-based governmental policies and actions have been held unconstitutional under the standard.<sup>98</sup> In addition, twenty-two states have adopted versions of the ERA in their own constitutions<sup>99</sup> that are often broader than the Fourteenth Amendment’s EPC, extending to private as well as governmental actors.<sup>100</sup> Given the successful use of the EPC to strike down gender-based classifications and the adoption of state ERAs, continuing to strive for a federal ERA might seem unnecessary.
30. A major distinction between state ERAs and the “de facto ERA” at the federal level, however, is the scrutiny applied to discrimination. Most states have adopted a strict scrutiny approach,<sup>101</sup> while the federal approach remains intermediate scrutiny. Professor Martha Davis believes that a federal equality amendment would likely be construed to require strict scrutiny.<sup>102</sup> She explains that there is much to recommend the application of strict scrutiny to sex-based classifications, especially since even conservative jurists agree that intermediate scrutiny is a confusing and ill-defined standard.<sup>103</sup> Strict scrutiny would provide consistency across identity-based classifications by bringing gender in line with race, and would provide more guidance for lower courts and policymakers.<sup>104</sup> Additionally, those who fear the unfettered exercise of judicial discretion in such a significant area of jurisprudence would certainly prefer strict scrutiny.

<sup>93</sup> *Id.*

<sup>94</sup> Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 875-82 (1971) [hereinafter Brown et al., *Equal Rights for Women*].

<sup>95</sup> Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419, 430 (2008).

<sup>96</sup> Allison L. Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 117 (1997).

<sup>97</sup> *Id.*

<sup>98</sup> See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (striking down the exclusion of men from a public nursing school); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding unconstitutional the use of sex as a ground for striking potential jurors); *United States v. Virginia*, 518 U.S. 515 (1996) (overturning the exclusion of women from a state-sponsored military academy).

<sup>99</sup> Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1202, 1288-93 (2005). The 22 states that have adopted versions of the ERA are Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, New Mexico, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming. *Id.*

<sup>100</sup> *Id.* at 1230-31 & nn.129-130 (noting that 14 state ERAs could be interpreted as applying to private actors: Alaska, California, Connecticut, Florida, Iowa, Maryland, Massachusetts, New Jersey, New Mexico, Pennsylvania, Texas, Utah, Washington, and Wyoming).

<sup>101</sup> *Id.* at 1240-41 & nn.179-180 (noting that California, Connecticut, Hawaii, Illinois, Massachusetts, New Hampshire, and Texas state courts apply strict scrutiny to gender classifications, while Pennsylvania, Colorado, Washington, Maryland, and New Mexico apply a standard even more rigorous than traditional strict scrutiny).

<sup>102</sup> Davis, *supra* note 95, at 435.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 437.

31. The absence of a federal ERA is particularly conspicuous in light of constitutional provisions adopted by major democratic nations such as Canada that expressly prohibit sex-based discrimination.<sup>105</sup> Former UN Special Rapporteurs on violence against women Radhika Coomaraswamy and Yakin Ertürk noted that constitutional guarantees of gender equality were a key factor in determining a State's compliance with its due diligence obligations.<sup>106</sup> The failure of the United States to explicitly ban discrimination based on gender through a constitutional amendment provides both a sword with which other nations can criticize the United States and a shield with which nations, such as China, can deflect United States criticism of their own human rights records.<sup>107</sup> Though the United States may continue to ignore international critiques, the failure to fully embrace gender equality in its own Constitution undermines its good faith efforts to provide leadership in protecting human rights worldwide.

*ii. The Commerce Clause*

32. Most of the anti-discrimination laws passed by Congress since the 1960s Civil Rights Era have been justified through use of the commerce power. Congress's power to regulate commerce "among the several states" as expressed in Article I of the Constitution<sup>108</sup> stems from the Framers' intent to have Congress legislate when states are separately incompetent, or when the interests of the country as a whole are threatened by unilateral or conflicting state action.<sup>109</sup> Thus, the Commerce Clause authorizes Congress to regulate problems or activities that produce effects between states.
33. Some argue that the commerce power should be interpreted narrowly to extend only to issues of business and trade, and that it is therefore not a suitable foundation for anti-discrimination laws. Others, notably Professor Jack Balkin, argue that the deeper purpose of the commerce power is to regulate interactions among states in the federal system, and that the idea of "commerce" should today be defined to include ideas of "sociality" and integration.<sup>110</sup> Balkin says that "because discrimination has multiple ripple effects in an integrated economy, it hinders the ability of minorities to compete fully and fairly in public life and discourages their use of the instrumentalities and networks of interstate commerce."<sup>111</sup> Thus, anti-discrimination statutes protect both the traditional, eighteenth century vision of freedom of commerce and the more modern notion of equality in commerce.<sup>112</sup>
34. The best-known example of a statute that invoked the Commerce Clause to provide a civil remedy for gender-based discrimination is VAWA.

**B. Statutory protections and limitations: the Violence Against Women Act**

35. In the federal system, Congress holds states accountable on issues of VAW through the creation of federal laws binding on the states. VAWA<sup>113</sup> was the "first and most comprehensive federal legislation to address VAW in the history of the United States."<sup>114</sup> Enacted as part of the Violent Crime Control and Law Enforcement Act of 1994,<sup>115</sup> VAWA significantly strengthened the criminal justice system's response to issues of VAW by, among other things, creating new felonies, compelling state and municipal jurisdictions to enforce protective orders, and helping immigrants who rely on abusers to establish citizenship.<sup>116</sup>

<sup>105</sup> See, e.g., Canadian Charter of Rights and Freedoms ¶ 15.

<sup>106</sup> *Due Diligence Standard*, *supra* note 29, at ¶¶ 32, 89.

<sup>107</sup> Davis, *supra* note 95, at 455-56. Davis describes the situation during the United Nations Fourth World Conference on Women in 1995 when the Chinese government responded to criticism of its human rights record by claiming women were better off in China than in the United States, highlighting that China's Constitution specifically provides equal rights for women, while the American Constitution does not. Seth Faison, *Beijing Says Women Have It Better in China than in U.S.*, N.Y. TIMES, Sept. 10, 1995, at A2.

<sup>108</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>109</sup> Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 6 (2010).

<sup>110</sup> *Id.* at 21.

<sup>111</sup> *Id.* at 39.

<sup>112</sup> *Id.*

<sup>113</sup> 42 U.S.C. § 13925 et seq.

<sup>114</sup> ENCYCLOPEDIA OF DOMESTIC VIOLENCE 718 (Nicky Ali Jackson ed. 2007).

<sup>115</sup> 42 U.S.C. § 13701 et seq.

<sup>116</sup> Robert F. Friedman, *Protecting Victims From Themselves, But Not Necessarily From Abusers: Issuing a No-Contact order Over the Objection of the Victim-Spouse*, 19 WM. & MARY BILL RTS. J. 235, 239 (2010).

VAWA included \$1.6 billion in federal funding to improve law enforcement, victim services, research, and other programs related to issues of VAW. The statute was reauthorized in 2000 and 2006, and will be reviewed for reauthorization again in the fall of 2011.

36. Though the civil rights remedy portion of VAWA was struck down by the Supreme Court in *United States v. Morrison*,<sup>117</sup> the provisions of the law providing program funding remain undisturbed. In a letter to the Senate during the 2005 reauthorization discussion, the American Civil Liberties Union (ACLU) commended VAWA as one of the most effective pieces of legislation enacted to end domestic violence (“DV”).<sup>118</sup> The ACLU stated that the law had “dramatically improved the law enforcement response to violence against women and . . . provided critical services necessary to support women and children.”<sup>119</sup> The letter also praised VAWA for improving housing solutions, economic security, privacy protections, outreach services, and immigration protection for victims of DV.<sup>120</sup>
37. In a June 2009 hearing, the Senate Judiciary Committee heard testimony from a variety of sources about the continued impact and importance of VAWA. Catherine Pierce, Acting Director of the DOJ’s Office on Violence Against Women, testified that while progress has been made since the passage of VAWA in 1994, challenges remain.<sup>121</sup> She suggested that the next version of VAWA should include more resources for victims in rural areas, programs for more effective homicide prevention, advances in child custody and the protection of children exposed to violence, and an expanded use of research to inform practice.<sup>122</sup> Pierce also highlighted the need for more focus on the plight of minority women, specifically women of color.<sup>123</sup> Despite these concerns, VAWA has been largely viewed in a positive light, and will likely be reauthorized this year.

*i. VAWA’s civil rights remedy: United States v. Morrison*

38. While VAWA is universally acknowledged as landmark legislation, concerns about its efficacy remain. When VAWA was first enacted in 1994, it included a civil rights cause of action that provided redress for victims of gender-based violence.<sup>124</sup> Congress based the remedy provision on its authority under both the Commerce Clause and the Fourteenth Amendment.<sup>125</sup> However, the Supreme Court declared that part of the statute unconstitutional in *United States v. Morrison*,<sup>126</sup> throwing into question Congress’ authority to legislate against gender-based violence.
39. Though the Court struck down the remedy in *Morrison*, Julie Goldscheid argues for an alternate Commerce Clause analysis not considered by the *Morrison* majority that could have provided a basis for upholding the law.<sup>127</sup> Goldscheid insists that the *Morrison* Court ignored the argument, supported by the legislative record, that Congress sought to regulate VAW as a civil rights issue, “an area in which the federal government has a strong historic and enduring interest.”<sup>128</sup> The Court’s Commerce Clause analysis was a “fundamental mischaracterization”<sup>129</sup> of the conduct Congress sought to regulate. The

<sup>117</sup> 529 U.S. 598 (2000).

<sup>118</sup> ACLU letter to the Senate Judiciary Committee Regarding the Violence Against Women Act of 2005, S. 1197 (July 27, 2005), available at <http://www.aclu.org/womens-rights/aclu-letter-senate-judiciary-committee-regarding-violence-against-women-act-2005-s-119>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *The Continued Importance of the Violence Against Women Act: Hearing Before S. Judiciary Comm.* 111th Cong. 1 (2009) (statement of Catherine Pierce, Acting Dir., Office on Violence Against Women, U.S. Dep’t of Justice).

<sup>122</sup> Family Violence Prevention Fund, *Features: Key Senate Committee Considers VAWA*, available at <http://www.endabuse.org/content/features/detail/1286/>.

<sup>123</sup> *Id.*

<sup>124</sup> Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 110 (2000). Goldscheid provides a detailed history of VAWA’s civil rights remedy as well as a thorough treatment of the Court’s analysis in *Morrison*.

<sup>125</sup> H.R. CONF. REP. NO. 103-711, at 385 (1994).

<sup>126</sup> 529 U.S. 598 (2000).

<sup>127</sup> Goldscheid, *supra* note 124, at 129-35.

<sup>128</sup> *Id.* at 129-30.

<sup>129</sup> *Id.* at 130.

traditional governmental interest in the uniform enforcement of civil rights for both race and sex discrimination weighs strongly in favor of upholding the civil rights remedy of the VAWA.<sup>130</sup>

40. Further, as Justice Souter pointed out in his dissent, the majority in *Morrison* seemed to ignore the legislative history that indicated that in creating the civil remedy Congress was responding to the effect of gender-based violence on women's full participation in commerce.<sup>131</sup> Congress concluded that gender-based crimes and associated fears restricted movement and reduced employment opportunities and consumer spending.<sup>132</sup> The *Morrison* majority's concern with limiting the reach of the Commerce Clause is misplaced; Congress intended for the VAWA civil rights remedy to create a uniform standard of redress for gender-based civil rights violations, similar to that provided—and upheld by the Court—for race-based violations.<sup>133</sup>
41. To avoid the elements that proved fatal to the VAWA remedy provision, future legislative reforms could include a jurisdictional element that limits the application of the law to cases involving interstate commercial activity.<sup>134</sup> Narrowing the remedy in this way would limit the number of women who could seek redress, but would ensure that the remedy itself could withstand constitutional scrutiny under the majority's reasoning in *Morrison*. Congress could also respond to the Court's Fourteenth Amendment analysis by authorizing federal intervention in cases of discriminatory enforcement by state and local officials in response to gender-based crimes, although any resulting remedy would again be limited in scope.<sup>135</sup>
42. Though the federal civil rights remedy of VAWA is no longer available, state and municipal laws present a potential avenue for those seeking civil redress from abusers.<sup>136</sup> As of 2005, eleven states and the District of Columbia included "sex" or "gender" as a category that can give rise to civil recovery under state bias crime frameworks.<sup>137</sup> However, like state civil rights laws enacted post-*Morrison*, these gender-specific laws are neither widely publicized nor widely utilized, despite the fact that they offer substantive relief similar to, if not broader than, that provided by VAWA.<sup>138</sup>

**ii. Town of Castle Rock v. Gonzales**

43. In addition to *United States v. Morrison*, a second Supreme Court decision with significant implications for the prevention of VAW is *Town of Castle Rock v. Gonzales*.<sup>139</sup> In that case, the Supreme Court held that police failure to enforce a DV protection order as required by a state's mandatory arrest law did not violate the Due Process Clause of the United States Constitution.<sup>140</sup> A court in Colorado had issued a protective order to Jessica Gonzales based on a finding that her estranged husband posed a threat to her and her children, and Colorado has a mandatory arrest law requiring police to arrest or seek a warrant

<sup>130</sup> *Id.* at 131-35; *see, e.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (discussing Supreme Court precedent highlighting the reasonableness of punishing bias-motivated crimes more severely because they are the most destructive of public safety and happiness); *Bray v. Alexandria*, 508 U.S. 263, 348 (1993) (O'Connor, J., dissenting) (recognizing the federal interest in vindicating violence perpetrated against individuals because of their class membership through federal civil rights redress).

<sup>131</sup> *See* S. REP. NO. 101-545, at 43 (1990); S. REP. NO. 102-197, at 38-39 (1991); S. REP. NO. 103-138, at 54 (1993).

<sup>132</sup> *Morrison*, 529 U.S. at 628-35 (Souter, J., dissenting).

<sup>133</sup> Goldscheid, *supra* note 124, at 133-35.

<sup>134</sup> *Id.* at 136.

<sup>135</sup> *Id.* Existing federal laws, including the Institutionalized Persons Act and the Voting Rights Act, provide models for such an approach. *Id.*

<sup>136</sup> Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down But Not Ruled Out*, 39 *FAM. L.Q.* 157, 166-67 (2005). Goldscheid describes the New York case of *Cadiz-Jones v. Zambetti*, in which a domestic violence survivor brought a claim against her former fiancé under New York City's recently enacted remedy statute after her VAWA remedy claim was dismissed in federal court pursuant to the *Morrison* decision. The New York court found that the City's remedy was intended to fill the void created by the Court's decision in *Morrison*, and that it could therefore give effect to the City's legislative purpose only by allowing her claim to proceed in state court since she could not litigate her claim in federal court. *Id.* Goldscheid suggests that while this decision stands alone, it represents the potential of state law for survivors of gender-based violence. *Id.*

<sup>137</sup> *Id.* at 167 & n.55 (noting that California, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, North Carolina, Vermont, and Washington provide a civil remedy for gender-based crime).

<sup>138</sup> *Id.* at 167-68.

<sup>139</sup> 545 U.S. 748 (2005).

<sup>140</sup> *Id.*

for the arrest of anyone who violates an order of protection. However, the Court found that Jessica Gonzales had no procedural due process right to police enforcement of her protective order.<sup>141</sup>

44. The holding of *Castle Rock*—that Jessica Gonzales had no personal entitlement to enforcement of her protective order—has significant implications for women seeking redress under VAWA and other statutes. As Lenora Lapidus, director of the ACLU Women’s Rights Project, has argued, it effectively denies any constitutional remedy for women who are harmed as a result of police failure to follow the law and adequately protect women from DV.<sup>142</sup> On July 21, 2011, the Inter-American Commission on Human Rights issued its decision in *Lenahan (Gonzales) v. United States*, finding that the United States failed to exercise due diligence.<sup>143</sup> “The state apparatus was not duly organized, coordinated, and ready to protect these victims from domestic violence by adequately and effectively implementing the restraining order at issue; failures to protect which constituted a form of discrimination in violation of Article II of the American Declaration.”<sup>144</sup> Ms. Gonzales and her attorneys hope the decision will force the United States to engage in dialogue about police accountability in the fight to prevent and adequately punish VAW.<sup>145</sup>

## V. REMEDIES AND REPARATIONS FOR VIOLENCE AGAINST WOMEN IN THE UNITED STATES

45. Former Special Rapporteur Yakin Ertürk stated in her 2006 report that reparation is one of the most underdeveloped areas of the VAW due diligence standard.<sup>146</sup> This is particularly apparent in the lack of reparation schemes that are based on lived-realities, as well as the lack of transformative remedies that seek to address the underlying inequalities and root causes of VAW, rather than just returning the victim to where she had been prior to the violation. The United States is no exception to the pattern of weak reparation schemes for victims of VAW. In many ways, American conceptions of justice create additional hindrances to achieving the transformative remedies and grassroots-developed reparations that would be most beneficial to victims. The following section addresses the role of remedies and reparations in the United States legal system and current remedial schemes for VAW victims.

### A. Remedies and reparations in the United States legal system

46. Remedies in United States law can arise out of a specific statute, a state or the federal Constitution, or the common law. They fall into four basic types: coercive, restitutive, declaratory, and damages. Coercive remedies and damages are the types most frequently employed for acts of VAW. Coercive remedies are those backed by State power, and include criminal penalties such as jail time and fines, as well as civil remedies such as restraining orders issued by the State. Damages are meant to compensate the victim for losses sustained in the violation of her rights, and can be either compensatory or punitive.
47. Compensatory damages in the United States tend to be limited by rules stating that the damages cannot be too remote from the harm; nor can they be speculative or uncertain. This sets up barriers to recovery for some of the harms suffered by VAW victims. For example, while pain and suffering damages are generally allowed under United States tort law, such damages are capped in some states, or may not be available without evidence of physical harm. Furthermore, other types of damages, such as the loss of educational and employment opportunities, are generally not recognized by the American legal system at all, as they have been found to be too speculative. This differs from international views of damages, which often encompass both physical and mental harm; lost opportunities such as employment, education, and

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<sup>141</sup> *Id.*

<sup>142</sup> Lenora M. Lapidus, *The Role of International Bodies in Influencing U.S. Policy to End Violence Against Women*, 77 *FORDHAM L. REV.* 529, 534 (2008).

<sup>143</sup> *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. C.H.R., Report No. 80/11, at ¶ 160 (2011).

<sup>144</sup> *Id.*

<sup>145</sup> For a full discussion of these efforts, see Lapidus, *supra* note 142, at 535; Caroline Bettinger Lopez, *Jessica Gonzales v. United States: An Emerging Model for Domestic Violence and Human Rights Advocacy in the United States*, 21 *HARV. HUM. RTS. J.* 183 (2008).

<sup>146</sup> *Due Diligence Standard*, *supra* note 29, ¶ 55.

social benefits; and material as well as moral harms.<sup>147</sup> In addition, damages awards are generally at the discretion of the jury. Yet, certain cultural attitudes towards VAW, such as viewing the woman as enabling the abuse, may cause juries to lower pain and suffering damages. Finally, the tort system in the United States was designed to address accidental harms to strangers, rather than the intentional harms involved in most VAW cases.<sup>148</sup> Thus, many broadly applied rules and procedures in tort litigation are a poor fit for intentional torts, especially those related to VAW.

## B. Remedies available for VAW in the United States

48. Under current state and federal law, several types of remedies are available for victims of VAW. It is questionable, however, if these remedies are successful in addressing the harm or solving the underlying root issues. The primary sources of remedies for VAW in the United States fall more closely in line with the State's obligations to protect and punish. VAW is often seen as a problem between two individuals, and the State's only role in reparations is to assist one individual in seeking redress from the other. Thus in criminal actions, the remedies generally involved are either obtaining a protective order or punishing the individual who caused the harm. While these actions could be thought of as "re-setting the balance" between the individuals, they often do little to help the victim recover from the harm suffered. The scope of reparations, such as monetary compensation or State assistance to victims, is limited and the costs of VAW, both financial and nonfinancial, continue to be borne not only by victims, but also by their children and employers.<sup>149</sup>

### i. Non-reparative remedies

49. Non-reparative remedies include all State actions to protect and punish. These remedies are by nature more focused on addressing the crime than they are on redressing the victim. The punishment of a perpetrator by the criminal justice system does not provide concrete reparation to the victim other than a sense of retribution and, possibly, security.

50. The United States relies heavily on punishment to address the problem of violent crime.<sup>150</sup> Its policies tend to overemphasize law enforcement and punishment, while neglecting prevention and protection.<sup>151</sup> In response to feminist critiques that the criminal justice system "re-victimizes" victims of domestic and sexual violence, the government has focused on reforming statutes and policies to facilitate victim participation in the criminal justice system.<sup>152</sup> Reforms include redefining rape by: eliminating requirements of victim resistance<sup>153</sup> and victim testimony corroboration,<sup>154</sup> creating rape shield laws that restrict the admission of evidence of the victim's prior sexual conduct,<sup>155</sup> instituting policies of mandatory arrest<sup>156</sup> and no-drop prosecution for DV,<sup>157</sup> and allowing expert testimony regarding self-

<sup>147</sup> Special Rapporteur on Violence Against Women, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, ¶ 17, U.N. Doc. A/HRC/14/22 (2010) (by Rashida Manjoo) [hereinafter *Report of the Special Rapporteur*].

<sup>148</sup> Jennifer Wriggens, *Toward a Feminist Revision of Torts*, 13 J. OF GENDER, SOC. POL'Y & THE L. 139, 153-54 (2001).

<sup>149</sup> *Id.* at 147.

<sup>150</sup> See generally Elaine R. Jones, *The Failure of the "Get Tough" Crime Policy*, 20 U. DAYTON L. REV. 803 (1995). Although most of the literature on crime and punishment relates to the intersection of race and the criminal justice system, many of the themes raised also apply to the issue of violence against women.

<sup>151</sup> Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 822-23 (2001).

<sup>152</sup> Julie Goldscheid, *Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches*, 28 T. JEFFERSON L. REV. 355, 366-69 (2006).

<sup>153</sup> See, e.g., ALASKA STAT. § 11.41.470(8)(A); FLA. STAT. ANN. § 794.011(1)(a); IOWA CODE ANN. § 709.5; KY. REV. ANN. § 510.010(2) (Michie 1996); ME. REV. STAT. ANN. Tit. 17-A § 251(E); OHIO REV. CODE ANN. § 2907.02(C).

<sup>154</sup> Only New York, Ohio, and Texas still require corroboration of the victim's testimony. N.Y. PENAL LAW § 130.16 (McKinney 2004); OHIO REV. CODE ANN. § 2907.06(B) (West 2004); TEX. CRIM. PROC. CODE ANN. § 38.07(a) (Vernon 2004); see also Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 652 (2010).

<sup>155</sup> See, e.g., FED. R. EVID. 412 (evidence relating to an alleged sex offense victim's past sexual behavior or alleged sexual predisposition is generally inadmissible).

<sup>156</sup> See Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1855 n.42 (2002) (cataloguing mandatory arrest statutes). The following states mandate arrest when there is probable cause to believe that a violation of a protective order has occurred: Alaska (ALASKA STAT. § 18.65.530(a)(2)); California (CAL. PENAL CODE § 836(c)); Colorado (COLO. REV. STAT. § 18-6-803.5); Kentucky (KY. REV. STAT. ANN. § 403.760(2)); Louisiana (LA. REV. STAT. ANN. § 14:79(E)); Maryland (MD.

defense arguments by battered women who kill their abusers.<sup>158</sup> While these reforms have generally been viewed as important in developing better legal options for victims of violence, they often emphasize the punishment of perpetrators at the expense of services for victims. In other words, they treat the victim's needs beyond criminal justice as secondary. For example, feminists are strongly divided on the efficacy and/or desirability of compulsory no-drop prosecution for DV. On the one hand, they welcome a strong legal response to DV. On the other hand, they are concerned about depriving victims of autonomy in deciding whether to press charges, especially when there is a high risk of retaliatory violence by the perpetrator.<sup>159</sup>

51. The overemphasis on punishment affects victims negatively in two respects: it overstates the efficacy of the criminal justice system to deter future incidents of violence, and it understates the social conditions, such as gender inequality, which underlie the violence. These underlying social conditions would be better addressed by broader prevention policies than by punishment. As a result, while incarceration rates continue to rise, policies that directly prevent and protect victims from violence are neglected.<sup>160</sup> The programs available to women threatened by or suffering from violence tend to view VAW from an individual rather than societal perspective.<sup>161</sup> This perspective leads to a greater emphasis on punishing individual perpetrators and adopting a purely service-based approach to protecting victims from future violence rather than confronting VAW as a societal problem motivated by underlying gender biases in American cultural attitudes. It thus runs counter to former Special Rapporteur Ertürk's exhortation that there must be "active State engagement in overall societal transformation to demystify prevailing gender biases or to provide support to civil society initiatives in this regard."<sup>162</sup>
52. Despite the questionable efficacy of the United States' emphasis on non-reparative remedies, the reality remains that these remedies are the most commonly available to women who suffer violence. Unfortunately, however, substantial barriers often prevent women from accessing these remedies. Most forms of VAW, especially DV, are widely under-reported—the FBI estimates that only one in ten DV incidents are reported.<sup>163</sup> In addition, many women find processes such as applying for a protective order difficult or intimidating, and therefore choose not to pursue these remedies.<sup>164</sup>
53. In her 2006 report, former Special Rapporteur Ertürk noted that due diligence includes encouraging women to report violence by protecting them from retaliation.<sup>165</sup> Although protective (restraining) orders are one of the most common remedies for first-time VAW offenders in the United States, in cases involving DV, stalking, or harassment, they tend to be unsuccessful. While protective orders are intended

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CODE ANN., FAM. LAW § 4-509(b)); Massachusetts (MASS. GEN. LAWS ANN. ch. 209A, § 6(7)); Maine (ME. REV. STAT. ANN. tit. 19-A, § 4012(5)); Minnesota (MINN. STAT. ANN. § 518B.01, subd. 14(e) and subd. 22(c)); Missouri (MO. REV. STAT. § 455.085(2)); Nevada (NEV. REV. STAT. ANN. § 33.070(1)); New Jersey (N.J. STAT. ANN. § 2C:25-21(a)(3)); New Mexico (N.M. STAT. ANN. § 40-13-6(C)); North Dakota (N.D. CENT. CODE § 14-07.1-11(1)); Ohio (OHIO REV. CODE ANN. § 2935.032); Oregon (OR. REV. STAT. § 133.310(3)); Pennsylvania (23 PA. CONS. STAT. ANN. § 6113(a)); Rhode Island (R.I. GEN. LAWS § 12-29-3(b)(1)); South Dakota (S.D. CODIFIED LAWS § 23A-3-2.1(1)); Tennessee (TENN. CODE ANN. § 36-3-611(a)(2)); Texas (TEX. CRIM. PROC. CODE ANN. § 14.03(b)); Utah (UTAH CODE ANN. § 30-6-8(1)); Washington (WASH. REV. CODE ANN. § 10.31.100(2)(a)); Wisconsin (WIS. STAT. ANN. § 813.12(7)(b)). The following states and jurisdictions mandate arrest when there is a finding of domestic violence regardless of whether a protection order has been violated: Alaska (ALASKA STAT. § 18.65.530(a)(1)); Arizona (ARIZ. REV. STAT. ANN. § 13-3601(B)); Colorado (COLO. REV. STAT. § 18-6-803.6); Connecticut (CONN. GEN. STAT. ANN. § 46b-38b(a)); District of Columbia (D.C. CODE ANN. § 16-1031); Illinois (IL. COMP. STAT. § 60/304(a)(1)); Iowa (IOWA CODE ANN. § 236.12(2)(b)); Louisiana (LA. REV. STAT. ANN. § 46:2140(1)); Maine (ME. REV. STAT. ANN. tit. 19-A, § 4012(5)); Nevada (NEV. REV. STAT. ANN. § 171.137(1)); New Jersey (N.J. STAT. ANN. § 2C:25-21(a)(1)); Ohio (OHIO REV. CODE ANN. § 2935.032); Oregon (OR. REV. STAT. § 133.310(6)); Rhode Island (R.I. GEN. LAWS § 12-29-3(b)); South Dakota (S.D. CODIFIED LAWS § 23A-3-2.1(2)); Utah (UTAH CODE ANN. § 30-6-8(2)); Washington (WASH. REV. CODE ANN. § 10.31.100(2)(c)); Wisconsin (WIS. STAT. ANN. § 968.075(2)).

<sup>157</sup> See, e.g., FLA. STAT. ANN. § 741.2901(2); HAW. REV. STAT. ANN. § 709-906(4); WIS. STAT. ANN. § 968.075(2)(a).

<sup>158</sup> ELIZABETH SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 23-24 (2000).

<sup>159</sup> See Sally F. Goldfarb, *The Legal Response to Violence against Women in the United States of America: Recent Reforms and Continuing Challenges*, U.N. Doc. No. EGM/GPLVAW/2008/EP.06, at 4 (July 20, 2008).

<sup>160</sup> Coker, *supra* note 151, at 826; see also LINDA G. MILLS, *THE HEART OF INTIMATE ABUSE: NEW INTERVENTIONS IN CHILD WELFARE, CRIMINAL JUSTICE, AND HEALTH SETTINGS* (1998).

<sup>161</sup> Goldscheid, *supra* note 152, at 370.

<sup>162</sup> *The Due Diligence Standard*, *supra* note 29, ¶ 46.

<sup>163</sup> Jenny Woodson, *Sanctioned Indifference: Addressing Domestic Violence in the Courts and Beyond*, 10 GEO. J. GENDER & L. 1037, 1038 (2009).

<sup>164</sup> Goldfarb, *supra* note 159, at 6.

<sup>165</sup> *The Due Diligence Standard*, *supra* note 29, ¶ 82.

to break cycles of abuse, several structural problems limit their effectiveness. First, protective orders generally require women to cease all contact with the abuser and completely sever the relationship. Many women looking to end abuse may not be willing to accept the “no-contact” terms of a protective order. Because of children, the need for financial support, or a host of other factors, they decline to pursue this remedy.<sup>166</sup> The Supreme Court held in *Town of Castle Rock v. Gonzales* that protective orders bestow no individual right on the victim, not even the right to have the order enforced.<sup>167</sup> Violations of a protective order can only result in charges against the individual, not against State agents who may have been complacent in allowing the violation to occur.<sup>168</sup>

54. In most cases, a woman’s only recourse if a protective order is violated is to call the police, who may or may not charge the perpetrator with violating the order. Thus, a protective order may not actually make a victim safer, as substantial harm can result from the first violation of the protective order. Given that a protective order may threaten the perpetrator’s sense of control and cause an increase in the severity of the abuse, it is a dangerous gamble to deny a victim additional protection until the order is violated.
55. Protective orders also tend to be unsuccessful in dissuading the most dangerous types of abusers. Since punishments for violations tend to be low, protective orders rely in large part on self-enforcement and a general respect for the law on the part of the perpetrator. As Gavin de Becker notes, “[r]estraining orders are most effective on the reasonable person who has a limited emotional investment. In other words, they work best on the person least likely to be violent anyway.”<sup>169</sup> Other academics agree: “Without enforcement, a protection order can do little to stop the persons against whom they are issued from committing further violence, and can even provoke further violence against those seeking them.”<sup>170</sup> Similarly, the American Bar Association has stated that,

Protective orders only reduce the risk of further violence if the restrained party is convinced they will be enforced. If protection orders are not enforced by law enforcement and the courts, they are nothing more than pieces of paper that actually increase the victim’s risk. Reliance on protection that does not actually exist places victims in even greater danger than if they’d never obtained a protective order.<sup>171</sup>

Despite awareness that protective orders are of little value without enforcement, it is widely acknowledged that police ignore mandatory arrest laws or are hesitant to become involved in domestic disputes. This may be due to gender-stereotyping and preconceptions about the role of law enforcement in domestic affairs.<sup>172</sup> It is no surprise, therefore, that a recent study reported that over half of abusers violate protection orders and commit further abuse against their victim.<sup>173</sup> Without additional reparations or protection methods, such as assistance in relocating, these protective “remedies” provide little relief to the victim, as they cannot even serve as a guarantee against future abuse.

## *ii.      Reparation schemes*

56. In addition to remedies based on protection and punishment, reparations are essential to breaking the cycle of VAW. Without reparations, including money damages or other forms of assistance, many women may feel trapped, especially if the abuser has control over the victim’s finances, or provides financial

<sup>166</sup> See Sally Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can the Law Help End the Abuse without Ending the Relationship?* 29 CARDOZO L. REV. 1487 (2008) (arguing for the development of protection order which allow continuing contact).

<sup>167</sup> See *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

<sup>168</sup> *Id.*

<sup>169</sup> GAVIN DE BECKER, *THE GIFT OF FEAR* 188 (1997).

<sup>170</sup> Amber Fink, *Every Reasonable Means: Due Process and the (Non)enforcement of a Restraining Order in Gonzales v. Castle Rock*, 24 L. & INEQUALITY 375, 379 (2006).

<sup>171</sup> Am. Bar Ass’n, Comm’n on Domestic Violence, Report No. 114 to the House of Delegates 2, 3 available at [http://www.abanet.org/adminlaw/annual2005/council\\_agenda/114Resolution.pdf](http://www.abanet.org/adminlaw/annual2005/council_agenda/114Resolution.pdf).

<sup>172</sup> See, e.g., Fink, *supra* note 170, at 379; Michael Mattis, *Protection Orders: A Procedural Pacifier or a Vigorously Enforced Protection Tool?*, 82 DENV. U. L. REV. 519, 520 (2005).

<sup>173</sup> Goldfarb, *supra* note 159, at 6.

support to the victim. Women may refuse to report an act of violence by or testify against an intimate partner because, without government assistance, they cannot afford to move to a new residence. They may anticipate retaliation for reporting. Women may also be reluctant to report an act of violence which might lead to their abuser serving jail time because, without the financial support provided by their partner's income or by money damages, they will be unable to provide for themselves (and often, their children) during the transition to a new job or living situation.

57. In addition to these material forms of reparations, recognition of the harm suffered is itself an important form of reparation. Such recognition empowers the victim by showing that society does not condone the violence committed, and can also be restorative for VAW victims. A Canadian study on sexual assault victims who pursued tort claims reported that “although victim claims were for monetary damages, the majority of claimants identified therapeutic, rather than monetary, motivations for filing them. Accordingly, victims measure their success or failure in therapeutic terms.”<sup>174</sup> Although a similar study has not yet been conducted in the United States, the similarities between the American and Canadian cultures and legal systems would suggest that American tort plaintiffs might have similar motivations.<sup>175</sup>
58. VAW victims may have access to reparations through the American civil litigation system, but limitations on pursuable damages, the cost and effort of litigating, and the prevalence of judgment-proof abusers create substantial barriers. Three primary forms of tort litigation are available for personal injury. The first is infliction of emotional distress, which is available when the defendant intentionally interfered with the plaintiff's peace of mind.<sup>176</sup> Generally, the defendant's conduct must have been “extreme and outrageous”—that is, outside the reasonable bounds of decency<sup>177</sup>—and must have caused a severe amount of distress to the plaintiff. Some courts, however, are reluctant to recognize emotional distress claims between intimate partners, believing that “emotional conflict between married couples is normal.”<sup>178</sup>
59. Separate torts are available for physical harms, with the tort of battery available for cases in which the defendant made physical contact, and assault when the defendant threatened to make physical contact.<sup>179</sup> While battery is primarily concerned with compensating women for actual physical harm, assault torts recognize that the threat of harm can have also a severe impact on the victim's mental peace and security. A new “tort of spousal abuse” has also been created by courts in some states, most notably by the New Jersey Supreme Court in *Giovine v. Giovine* in 1995.<sup>180</sup> The Court used expert medical testimony on Battered Women's Syndrome to fashion the contours of this tort, holding that the statute of limitations (a common barrier to the filing of VAW torts) will be tolled if the plaintiff can “establish pretrial, by medical, psychiatric or psychological evidence, that she suffers from battered woman's syndrome, which caused an inability to take any action to improve or alter the circumstances in her marriage unilaterally.”<sup>181</sup> While other courts have been reluctant to follow the New Jersey Supreme Court in the creation of a new tort, some courts<sup>182</sup> have used this model to modify their existing common law statute of limitation standards for other tort categories that often encompass spousal abuse.<sup>183</sup> Thus, the *Giovine* decision is a small step towards recognizing that remedies for spousal torts should be fashioned in light of the fact that “spousal torts are, with rare exception, torts against women, and the right of recovery is inextricably intertwined with the legal rights and status of women.”<sup>184</sup>

<sup>174</sup> Ellen Bublick, *Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils* 3 (Sept. 2009), available at [http://snow.vawnet.org/summary.php?doc\\_id=2150&find\\_type=web\\_desc\\_AR](http://snow.vawnet.org/summary.php?doc_id=2150&find_type=web_desc_AR).

<sup>175</sup> *Id.* at 3-4.

<sup>176</sup> Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 131 (2001).

<sup>177</sup> Restatement (Second) of Torts § 46 (1965).

<sup>178</sup> Goldfarb, *supra* note 159, at 7.

<sup>179</sup> Wriggins, *supra* note 176, at 130-31.

<sup>180</sup> *Giovine v. Giovine*, 663 A.2d 109 (N.J. Super. Ct. App. Div. 1995). For a discussion of the possibilities and challenges in using the New Jersey model, see Kathleen L. Daerr-Bannon, *The Tort of Spousal Abuse*, PRACTICAL LITIGATOR 27, 29 (July 2010).

<sup>181</sup> *Giovine*, 663 A.2d at 117.

<sup>182</sup> *Giovine*, 663 A.2d 109; cf. McCulloh v. Drake, 24 P.3d 1162 (Wyo. 2001); Curtis v. Firth, 850 P.2d 749 (Idaho 1993), *rehearing denied*, 869 P. 2d 229 (Idaho 1994); see also Jewitt v. Jewitt, No. 932 018465 (Wash. Sup. Ct., Spokane Co., April 21, 1993); cf. Ziegler v. Ziegler, 28 F. Supp. 2d 601 (E.D. Wash 1998).

<sup>183</sup> Daerr-Bannon, *supra* note 180, at 28.

<sup>184</sup> *Id.* (arguing that remedies addressing spousal torts should be created with the legal rights and status of women in mind).

60. Despite the availability of these remedies, scholars have noted that “civil actions for intentional torts such as battery, assault, and intentional infliction of emotional distress are rare, particularly in relation to the high rate of DV in our society.”<sup>185</sup> Several factors may present obstacles to successful tort litigation for VAW victims. Although former Special Rapporteur Ertürk urged states to compensate victims of VAW for loss of employment, educational opportunities, and social benefits,<sup>186</sup> tort damages in the United States generally do not include the loss of opportunities<sup>187</sup> or “unnecessary” costs, such as relocation expenses. Moreover, the damages award may not cover pain and suffering at all, or may provide an amount incommensurate to the mental and emotional harm suffered.<sup>188</sup>
61. Furthermore, many defendants are judgment-proof due to their lack of funds.<sup>189</sup> While most common types of harm, such as accidental injury on private property, theft, and automobile accidents, are now covered by liability insurance systems that compensate victims even when the defendant is personally unable to pay, no such insurance system exists for harms caused by VAW.<sup>190</sup> Advocates and academics point to this lack of insurance, coupled with the fact that defendants often have no attachable assets, as a significant barrier to VAW victims receiving compensation through tort litigation.<sup>191</sup> Victims also may risk reprisal from their abusers for filing a civil action.<sup>192</sup> Finally, the statute of limitations for most VAW-related torts begins at the time the injury was inflicted and is relatively short, often only between one and two years.<sup>193</sup> This presents a problem for victims who delay in seeking immediate help. A few courts have begun to treat torts based on DV or other abuse patterns as continuing torts, meaning that the statute of limitations is tolled so long as the abuse is ongoing, but many courts have not adopted this reform.<sup>194</sup> Such a reform would take into consideration the lived realities of victims of VAW. As an attorney experienced in bringing VAW civil actions has stated, “[t]he due process rights of defendants need to be appropriately balanced with the realities of domestic violence. One of the realities is that it takes years for many victims to safely break away from their abusers.”<sup>195</sup> This is another clear example that the American tort system is not well designed to handle VAW claims, because it is tailored toward addressing isolated events rather than ongoing patterns of harm.
62. In theory, federal civil rights litigation can also be brought against the State and its actors under 42 U.S.C. § 1983 for a failure to prevent or protect, but the limitations of this avenue were made clear by *Castle Rock v. Gonzales*.<sup>196</sup> In *Castle Rock*, a state court had issued a restraining order against Jessica Gonzales’s ex-husband, which required him to stay away from her and her children. Although this restraining order directed police to “use every reasonable means to enforce this restraining order,” when Ms. Gonzales

<sup>185</sup> Wriggins, *supra* note 176, at 133. Wriggins notes that of 2,600 reported state cases of battery or assault from 1981 to 1990, only 53 involved adult parties in domestic relationships, with similar numbers (18 out of 6,000 cases) for emotional distress claims arising out of a domestic violence situation. *Id.*

<sup>186</sup> *The Due Diligence Standard*, *supra* note 29, ¶ 84.

<sup>187</sup> While lost earning capacity, based on the job in which the plaintiff is actually engaged, may factor into the damages award, studies have shown that many women, in particular home-keepers, are likely to recover a substantially lower tort award than a man working outside the home would recover, due to juries undervaluing homemaker services and gender discrimination as pertains to workplace opportunities and earnings. See Jerry J. Phillips, *What is a Good Woman Worth? Tort Compensation for Domestic Violence*, 47 LOYOLA L. REV. 303, 310-11 (1998). Loss of opportunity, which would include loss of jobs or education which could have been obtained if the abuse had not occurred, is not generally recognized in the U.S. *Id.* at 311.

<sup>188</sup> See Daniel Atkins et al, *Striving for Justice with the Violence Against Women Act and Civil Tort Actions*, 14 WIS. WOMEN’S L.J. 69, 81-82 (1999) (discussing fears that a jury “may not know how to value [the victim’s] injuries, a large component of which were emotional trauma, pain and suffering”).

<sup>189</sup> Wriggins, *supra* note 176, at 135-37.

<sup>190</sup> See *id.* at 152-69 (discussing possible insurance reforms which would expand automobile liability insurance to cover domestic violence harms, thereby increasing the deterrence, recognition, and compensation functions of tort law).

<sup>191</sup> *Id.* at 137-39; see also Atkins, *supra* note 188, at 82 (voicing an attorney’s concern the defendant “did not have a very ‘deep pocket’ so collecting an extremely large sum was next to impossible”).

<sup>192</sup> Wriggins, *supra* note 176, at 139-40; see also Atkins, *supra* note 188, at 86 (“From the outset we were preoccupied with whether filing the civil suit might trigger even more violence from [the abuser]. . . . After several lengthy discussions, we felt reassured that we would not be risking [the victim’s] life by proceeding. Nevertheless, each of us worried that [the victim] had placed herself in danger by seeking the redress to which she was legally entitled.”).

<sup>193</sup> Wriggins, *supra* note 176, at 124.

<sup>194</sup> Phillips, *supra* note 187, at 308.

<sup>195</sup> Atkins, *supra* note 188, at 101-02.

<sup>196</sup> *Castle Rock*, 545 U.S. 748.

reported that her ex-husband had taken her three daughters from her home, the police replied that there was nothing they could do. The next morning the husband came to the police station and opened fire with an automatic weapon. He was killed by cross-fire, and the police found the bodies of the three daughters, whom he had murdered, in his truck. Ms. Gonzales brought a § 1983 Civil Rights Act suit against the town of Castle Rock, Colorado, claiming that the police had violated her right to have the restraining order enforced, thereby depriving her of her interest in that right without due process. The United States Supreme Court held, however, that the State's DV statute and the restraining order did not give Ms. Gonzales any rights enforceable against the State. The opinion asserted, "[w]e do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*."<sup>197</sup> The Court continued, "[e]ven if the statute could be said to have made enforcement of restraining orders 'mandatory' because of the domestic-violence context of the underlying statute, that would not necessarily mean that state law gave *respondent* an entitlement to *enforcement* of the mandate."<sup>198</sup>

63. It has been noted that in *Castle Rock* and other recent cases<sup>199</sup> "the judiciary disavowed the idea of positive social rights by finding that the Constitution affords no affirmative obligations, only negative liberties; government inaction is constitutionally immaterial, and government's failure to act brings no constitutional remedy."<sup>200</sup> While some advocates point to other avenues, such as state law, for pursuing failure to protect claims,<sup>201</sup> the "negative rights" interpretation of the United States Constitution is at odds with international human rights standards, including the VAW due diligence standard, which emphasize affirmative State duties. These recent holdings also call into question whether measures such as restraining orders truly satisfy state due diligence obligations, especially when enforcement is not mandatory and VAW victims have no redress when the state fails to protect them.
64. Specific legislation has been proposed to address these problems and create a federal civil remedy tailored to the unique situation of VAW victims. But, no such federal legislation currently exists. VAWA contained a provision that allowed victims of gender-motivated crimes to bring a civil action in either federal or state court for relief, including compensatory and punitive damages, attorney's fees, and other relief deemed appropriate by the court.<sup>202</sup> In 2000, however, the Supreme Court invalidated the civil remedy portion of VAWA in *United States v. Morrison*, on the ground that Congress lacked constitutional authority to pass such legislation and was infringing on the domain of the states.<sup>203</sup> Although some states have chosen to adopt similar legislation based on VAWA's civil remedy component, many have not.<sup>204</sup>
65. Recognizing the problems of civil litigation for VAW reparations, victim compensation funds have been developed by every American state as a means of providing some payment to victims.<sup>205</sup> In addition, Congress enacted the Victims of Crime Act (VOCA) to supplement these state programs.<sup>206</sup> These compensation funds avoid the problem of judgment-proof defendants, but they are still incredibly limited both in terms of the categories of VAW victims that have access to the funds and the types of damages they can be compensated for. Victim compensation funds operate under the principle of restitution; the goal is to put the victim back in the place where she was prior to the crime. This means that the damages usually address only concrete harms such as physical damage to the victim's body or property, and not

<sup>197</sup> *Id.* at 760.

<sup>198</sup> *Id.* at 764-65. For further discussion on the implications of *Castle Rock*, see Nicole Quester, *Refusing to Remove an Obstacle to the Remedy*, 40 AKRON L. REV. 391 (2007); Fink, *supra* note 170; Lynn A. Combs, *Between a Rock and a Hard Place: The Legacy of Castle Rock v. Gonzales*, 58 HASTINGS L.J. 387 (2006).

<sup>199</sup> See, e.g., *DeShaney v. Winnebago County Dep't of Social Serv.*, 49 U.S. 189 (2005) (holding that state social services were not responsible for failing to intervene in a case of severe child abuse); *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989) (holding that the Due Process Clause does not provide an affirmative duty to give assistance to women seeking abortions).

<sup>200</sup> Lawrence O. Gostin, *The Negative Constitution: The Duty to Protect*, HASTINGS CTR. REP., 10, 11 (Oct. 2005).

<sup>201</sup> See Jim Ferguson, *Law Enforcement Liability in the Wake of Castle Rock v. Gonzales*, THE SOURCE (Winter 2006), available at <http://www.ncvc.org/SRC/AGP.Net/Components/DocumentViewer/Download.aspx?DocumentID=46616>.

<sup>202</sup> Goldfarb, *supra* note 159, at 1.

<sup>203</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>204</sup> Goldfarb, *supra* note 159, at 2.

<sup>205</sup> Desmond S. Greer, *Criminal Law: A Transatlantic Perspective on the Compensation of Crime Victims in the United States*, 85 J. CRIM. L & CRIMINOLOGY 333, 334 (1994) (stating that South Dakota (1991) and Maine (1992) became the final states to enact victim compensation funds, and all states' funds except for Nevada are in compliance with VOCA requirements).

<sup>206</sup> *Id.*

psychological or emotional harms. They also do not compensate for consequential expenses such as relocation costs and loss of employment and educational opportunities, nor harm to reputation and dignity.<sup>207</sup>

66. These limitations are a major problem, as VAW victims commonly suffer extreme harm during the course of the abuse, but may lack physical evidence to prove or measure the harm. For example, a victim of stalking would likely not be able to receive compensation through a victim compensation fund since the primary harms are emotional and psychological. Even attempts to measure these types of mental harms concretely, such as the relatively easy to prove cost of counseling, are often met with resistance. In addition, while victim compensation funds are typically open to all victims of “criminal violence,” including DV<sup>208</sup> and assault, courts have discretion in granting compensation when the victim is a family member of or in a continuing relationship with the abuser, and thus the number of DV claims has remained very low.<sup>209</sup> Most state programs also limit the amount of damages available, with separate caps for death and injury.<sup>210</sup> While the limits may be anywhere from a few thousand dollars to \$40,000, most courts tend to award compensation conservatively, recognizing that funding is limited and must cover a wide range of injuries and a large number of claimants. Thus, in 2009, the average VOCA compensation award nationwide was only \$2,223<sup>211</sup> a tragically low amount considering that this might be the only compensation a victim receives to cover all medical, relocation, and property damage expenses, as well as lost earnings.
67. VAW victims would be well-served by the development of a separate victim compensation fund that could take into account the unique needs of VAW victims, such as mental healthcare, relocation, and legal support. Such funds could also serve as a separate source of compensation so that VAW victims do not have to compete with all other criminal violence victims for the limited resources available through the VOCA and state compensation funds. Reforms of victim compensation funds would also bring the United States closer to providing the sort of comprehensive reparations needed to fulfill the nation’s due diligence obligations.<sup>212</sup>

### iii. Transformative remedies

68. To be truly effective, remedial measures need to address both individual reparation and the wider structural factors that enable violations of rights. Therefore, VAW remedies should be transformative, seeking to subvert existing patterns of subordination, gender hierarchies, and systematic marginalization and structural inequalities, rather than merely restoring victims to the situation they were in before the violence.<sup>213</sup> However, as Sally Goldfarb noted in her expert report to the UN Division for the Advancement of Women, “the U.S. legal system is more focused on negative rights (such as the right to be free from government interference with certain freedoms) than positive rights (affirmative government obligations to fulfill basic socioeconomic needs).”<sup>214</sup> It is no surprise, then, that American remedies such as damages focus more on righting the immediate consequences of a harm (thereby vindicating the negative right), rather than applying transformative remedies. New avenues for reparation and remedy must be created, and standards within current remedies should be expanded to take into account the

<sup>207</sup> *Id.* at 373 (noting that compensation is primarily for net lost earnings and medical and other reasonable expenses, with only a minority of courts considering payment for mental health counseling, relocation expenses, or childcare).

<sup>208</sup> Domestic violence claims were originally barred from compensation through VOCA based on a fear of fraud resulting from intimate partner claims. However, as public concern over domestic violence began to grow, the Attorney General’s Task Force on Family Violence concluded that “this blanket exclusion [of victims of domestic violence] is unwarranted and blatantly unfair,” and in 1988 Congress passed an amendment which allowed claims based on abuse by a family member or intimate partners. *Id.* at 346-47.

<sup>209</sup> *Id.* at 348.

<sup>210</sup> *Id.* at 375.

<sup>211</sup> 2009 *Victims of Crime Act Performance Report*, Office for Victims of Crime, DOJ (Sept. 17, 2010), available at [http://www.ojp.usdoj.gov/ovc/grants/vocanpr\\_vc09.html](http://www.ojp.usdoj.gov/ovc/grants/vocanpr_vc09.html) (total compensation paid in all categories of crimes (\$452,121,845) divided by total number of claims paid during the reporting period (203,424)). While the VOCA report does not indicate how many of the claims relate to violence against women, it does specify that 21% of all claims were related to domestic violence and 8% involved sexual assault. Notably, 39% of all assault claims were related to domestic violence.

<sup>212</sup> See *Due Diligence Standard*, *supra* note 29, ¶ 84.

<sup>213</sup> *Report of the Special Rapporteur*, *supra* note 147, ¶ 31.

<sup>214</sup> Goldfarb, *supra* note 159, at 15.

unique challenges and realities VAW victims face. For example, women need assistance finding employment, financial support, and childcare to overcome the impact of violence and attain independence.<sup>215</sup>

69. Some advocates have also called for insurance reform or other ways of increasing the availability of liability insurance through the current tort system as a means of transformative remedy. Such reform could be done either through expanding the coverage of homeowner and renter insurance to include DV claims, or by attaching a DV insurance clause to existing mandatory automobile insurance schemes.<sup>216</sup> Advocates argue that fixing the American tort system will send a societal message that acts of VAW are serious and deserving of compensation. As Jennifer Wriggens explains,

The basic idea behind [liability insurance] plans is that the social harm of not having the plan outweighs the burden of having the plan. Yet, for domestic violence victims and victims of other intentional torts there is no meaningful, let alone comparable, compensation system. This disparity sends the message that some injuries are more worthy of compensation than others. There is no reason why, in a society with a “civilized system of justice,” the injuries of a person who is hurt in a car accident should be treated as more worthy of compensation than the injuries of a person who is hurt by a spouse or intimate partner.<sup>217</sup>

70. There have also been calls to expand the tort compensation system for VAW torts to include loss-of-opportunity costs.<sup>218</sup> Such reform would provide women—in particular those who have been unemployed due to the abuse—a form of reparation which is closer to their actual, “lived-reality” harm by acknowledging that patterns of abuse may have had an impact on the entire shape of the victim’s life, far beyond the immediate medical costs. In order to truly restore the victim and enable her to move forward, a victim’s reparations must take into account lost opportunities, especially economic disadvantages. Court-mandated attorney’s fees for VAW torts, available for civil rights litigation, could help make these suits more attractive to private attorneys, thereby making it easier for a woman to find and secure effective counsel.<sup>219</sup>
71. Another transformative remedy is education. Jerry Phillips believes that the prospects for educating batterers are low, but he recommends educating women to leave an abusive situation as soon as possible.<sup>220</sup> Phillips suggests promoting standards of unacceptability by educating the population that certain acts, such as striking a pregnant woman or causing a black eye or broken bone, are always unacceptable no matter what the situation. These standards might break patterns of self-blame, in which the victim believes she has done something to deserve the abuse, and help victims realize that there is recourse against such behavior.<sup>221</sup>
72. Some advocates have also suggested restructuring VAW claims to strengthen restorative justice, such as incorporating the victim’s narrative into the legal proceeding. As noted by Regina Graycar, “women’s stories about the violence in their lives remain rarely (and barely) acknowledged in legal discourse. They have difficulty being told and heard.”<sup>222</sup> Voicing such stories, Graycar argues, not only will help to develop

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<sup>215</sup> *Id.* at 14.

<sup>216</sup> For further explanation of a proposed insurance scheme involving attaching domestic violence clauses to existing automobile mandatory insurance, see Wriggens, *supra* note 176, at 152-69.

<sup>217</sup> *Id.* at 151.

<sup>218</sup> See Phillips, *supra* note 187, at 311-12.

<sup>219</sup> *Id.* at 315. Phillips also notes the importance of educating lawyers about the moral importance of VAW tort cases, as emphasizing the moral importance of a case may increase an attorney’s likelihood of taking it despite low or uncertain financial gains. *Id.* at 314-15.

<sup>220</sup> *Id.* at 313.

<sup>221</sup> *Id.*

<sup>222</sup> Regina Graycar, *Telling Tales: Legal Stories about Violence Against Women*, 8 CARDOZO STUDIES L. & LITERATURE 297, 297 (1996).

more effective remedies based on lived-realities, but will also challenge the assumptions that currently shape our legal system and cultural views on the forms and effects of VAW.<sup>223</sup>

73. Restorative justice processes such as civil proceedings, victim-offender reparation through mediation, and community conferencing, have also been suggested to combat the inability of the criminal justice system to provide true relief to the victim, or to lower recidivism rates of abusers.<sup>224</sup> Given the limitations of the civil system described above, and the inability of mediation to balance the structural inequalities between the victim and the offender, community conferencing may serve as an alternative.<sup>225</sup> Community conferencing, which has already been applied to problems such as drunk driving, juvenile justice, and child abuse, “brings together victims, offenders, and their supporters for a face-to-face meeting in the presence of a facilitator, where they are encouraged to discuss the effects of the incident on the various people involved, and to make a plan to repair the damage done and minimize the likelihood of further harm.”<sup>226</sup> This approach emphasizes accountability by focusing on accepting responsibility, making things right, fixing what is broken, and earning redemption.<sup>227</sup> This method has the benefit of empowering the victim by giving her a voice, and of basing the remedy on the victim’s articulated needs rather than the justice system’s expectation of her needs. Studies have shown that 90% of restitution agreements reached through community conferencing are completed within one year, as opposed to the 20 to 30% compliance rate for court-ordered restitution plans.<sup>228</sup>

## **VI. THE UNITED STATES’ DUE DILIGENCE OBLIGATIONS FOR VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN**

74. Because of the unique position of American Indian and Alaska Native nations in domestic and international law, the United States has additional due diligence obligations to prevent, prosecute, and punish violence against Indian women. In the domestic sphere, these obligations arise out of the trust relationship between Indian and Alaska Native nations and the U.S. federal government and its treaties with Indian nations. Internationally, the United States has all the same obligations to protect Indian women from violence and discrimination as it does for other women. Additionally, the UN Declaration on the Rights of Indigenous Peoples and the International Convention on the Elimination of All Forms of Racial Discrimination place special obligations on the United States to protect Indian women from violence and discrimination. The United States has consistently failed to meet these obligations.

### **A. The relationship between the United States government and American Indian and Alaska Native nations**

75. There are 565 federally-recognized Indian nations in the United States, including more than 200 Alaska Native villages. Indian and Alaska Native nations are independent governments with the inherent right of self-government. Their right of self-government does not come from the United States; it is based on the existence of Indian and Alaska Native nations as separate and distinct peoples long before European contact and the creation of the United States.<sup>229</sup> Indian and Alaska Native nations have formed their own governments, enacted and followed their own laws, and created their own dispute resolution systems for centuries.

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<sup>223</sup> *Id.* at 298-300 (exploring legal stories which challenge assumptions that VAW only pertains to criminal law and reveal connections between VAW and a number of other legal problems, including forfeiture, contract unconscionability, personal injury damages, and family law).

<sup>224</sup> Mary. P. Koss et al, *Restorative Justice for Sexual Violence*, 989 ANN. N.Y. ACAD. SCI. 384, 388 (2003).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 389. For more details on proposed community conferencing plans, see *id.*

<sup>229</sup> Indian tribes do not fit squarely within the United States constitutional or federal system, but exist as separate sovereigns apart from these systems. For a fuller discussion of the constitutional status of tribes, see VINE DELORIA, JR. & DAVID E. WILKINS, *TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS* (1999).

76. The United States has always treated Indian tribes as separate governments.<sup>230</sup> The United States originally recognized Indian tribes as separate governments by entering into hundreds of treaties with different Indian nations. For many Indian nations, treaties are the basis of the government-to-government relationship that exists between all Indian nations and the United States. Federal laws and court decisions have consistently reaffirmed the government-to-government relationship between all Indian nations and the United States government, whether or not a treaty was ever concluded with any particular nation.<sup>231</sup>
77. Under federal law today, Indian nations possess the inherent power “necessary to protect tribal self-government [and] to control internal relations.”<sup>232</sup> Tribes have inherent authority to determine tribal citizenship, to regulate relations among their citizens, and to legislate and tax activities on Indian lands, including certain activities by non-citizens.<sup>233</sup> Indian nations also possess such additional authority as Congress may expressly delegate.<sup>234</sup>
78. In general, tribes have exclusive and full authority over their members and territories unless such power has been expressly and specifically limited by treaty, statute, agreement, or court decision. A tribe may voluntarily limit its own powers in a treaty or government-to-government agreement, or in its constitution.
79. The United States Supreme Court has both affirmed and limited the governmental powers of Native nations. The Supreme Court has recognized the self-governing status of Native nations and reaffirmed their exclusive power over their members and their territory since the early nineteenth century. In *Cherokee Nation v. Georgia*, the Court described Indian tribes as “domestic dependent nations” because they were independent governments limited only in their ability to convey their lands and deal with foreign nations.<sup>235</sup>
80. The Court has limited tribal powers when it has concluded that the power is inconsistent with the tribe’s status as a domestic dependent nation.<sup>236</sup> The Supreme Court has limited tribal powers over non-Indians committing crimes within the reservation’s boundaries,<sup>237</sup> over liquor sales on their reservations,<sup>238</sup> over the regulation of fishing and hunting by non-Indians on non-Indian owned land within the reservation,<sup>239</sup> and over taxation of non-Indian activities on non-Indian lands within the reservation.<sup>240</sup>
81. The United States Congress may limit tribal powers when it expresses a clear intent to do so, but how far it can go in limiting tribal authority is unclear. The United States Constitution gives Congress the power to regulate commerce with Indian tribes<sup>241</sup> and to approve treaties.<sup>242</sup> This federal congressional authority over affairs with Indian nations is often referred to as plenary power, because the Constitution does not reserve any power over Indian nations to the states. Congress has used this power to limit tribal powers in the past.
82. Congress has limited tribal powers by extending federal criminal jurisdiction over Indian lands,<sup>243</sup> placing restrictions on the alienation of tribal lands without federal consent,<sup>244</sup> terminating the special

<sup>230</sup> *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983) (“Indian tribes have long been recognized as sovereign entities, ‘possessing attributes of sovereignty over both their members and their territory.’”) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)); see also *Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

<sup>231</sup> 25 U.S.C. § 3601; *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998).

<sup>232</sup> *Montana v. United States*, 450 U.S. 544, 564 (1981).

<sup>233</sup> *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.* 554 U.S. 316 (2008).

<sup>234</sup> *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

<sup>235</sup> 30 U.S. 1 (1831).

<sup>236</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

<sup>237</sup> *Id.* at 191.

<sup>238</sup> *Rice v. Rehner*, 463 U.S. 713, 726 (1983).

<sup>239</sup> *Montana v. United States*, 450 U.S. 544 (1981).

<sup>240</sup> *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

<sup>241</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>242</sup> *Id.* at art. II, § 2, cl. 2.

<sup>243</sup> Major Crimes Act, 18 U.S.C. § 1153; General Crimes Act, 18 U.S.C. § 1152.

relationship between the federal government and specific tribes,<sup>245</sup> and imposing many of the provisions of the Bill of Rights on tribal governments.<sup>246</sup> Congress may restore or reaffirm tribal powers that the courts have found to be limited.<sup>247</sup> Like all congressional authority, this power of Congress over Indian affairs is limited by the Constitution, including the Fifth Amendment's limitation on the taking of property, the equal protection clause, and the due process clause.

**B. International laws and standards that create due diligence obligations for the United States on behalf of American Indians and Alaska Natives**

83. In addition to the international obligations on the United States discussed above in Part III, the United States has special international legal obligations to respect the human rights of indigenous peoples, especially Indian women. The United States has yet to meet these obligations.
84. The United States government has primary authority over Indian affairs and domestic legal obligations to Indian and Alaska Native nations, so the federal government, and not the state governments, is responsible for fulfilling the international legal obligations on Indian lands. For a fuller discussion of the United States' domestic legal obligations to Indian and Alaska Native nations, see section C below. The federal government is bound by and should comply with existing and emerging international law regarding indigenous peoples' human rights.<sup>248</sup>
85. It is not clear whether the United States can bind Indian and Alaska Native nations by entering into international treaties. However, as separate sovereigns within the United States, Indian and Alaska Native nations can endorse and undertake their own efforts to comply with international treaties even if the federal government has not yet ratified them. For example, the Salt River Pima-Maricopa Indian Community of Arizona endorsed the UN Declaration on the Rights of Indigenous Peoples long before the United States government did.<sup>249</sup>

*i. UN Declaration on the Rights of Indigenous Peoples*

86. The United States has endorsed the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration), which specifically addresses violence against indigenous women and children. The Declaration is a non-binding instrument, meaning that States are not, strictly speaking, legally bound to recognize the rights it affirms.<sup>250</sup> Nevertheless, the Declaration is an official statement by most member States of the United Nations that these are the legal rights of indigenous peoples in international law.<sup>251</sup> This gives the Declaration considerable political and moral force, providing the basis for it to become customary international law.<sup>252</sup> Some nation-states have already put some of the standards in the Declaration into practice, thereby contributing to the emergence of customary law.
87. Some provisions of the Declaration reinforce rights recognized and protected in international treaties ratified by the United States government and are already part of international human rights law. For example, the International Convention on the Elimination of All Forms of Racial Discrimination (Race

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<sup>244</sup> See, e.g., Trade and Intercourse Act, 25 U.S.C. § 177.

<sup>245</sup> See, e.g., Menominee Indian Termination Act, 25 U.S.C. §§ 891-902, *repealed by* Menominee Restoration Act, 25 U.S.C. § 903.

<sup>246</sup> Indian Civil Rights Act, 25 U.S.C. §§ 1301-03.

<sup>247</sup> *United States v. Lara*, 541 U.S. 193 (2004).

<sup>248</sup> For a fuller discussion of the existing and emerging international law relating to the rights of indigenous peoples and the U.S.'s obligation to comply with it, see Indian Law Resource Center, *Draft General Principles of Law Relating to Native Lands and Natural Resources*, Ch. 15 (2010) (copy available upon request).

<sup>249</sup> Salt River Pima-Maricopa Indian Community Council Resolution SR-2550-2007 (Mar. 7, 2007) (A Resolution to Proclaim March 12, 2007 as Indigenous Peoples Day and to Affirm the United Nations Declaration on the Rights of Indigenous Peoples Adopted by the United Nations Human Rights Council).

<sup>250</sup> Press Release, General Assembly, *General Assembly Adopts Declaration on Rights of Indigenous Peoples: 'Major Step Forward' Towards Human Rights for All, Says President*, U.N. Doc. GA/10612 (Sept. 13, 2007), available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

<sup>251</sup> See generally JOHN H. CURRIE ET AL., *INTERNATIONAL LAW* 225 (2007).

<sup>252</sup> Franklin & Eleanor Roosevelt Inst., *What Makes the Universal Declaration of Human Rights So Important?*, available at <http://www.udhr.org/Introduction/question6.htm>.

Convention) and the International Covenant on Civil and Political Rights (ICCPR) ensure the right to non-discrimination in Article 2 of the Declaration. Genocide, prohibited in Article 7 of the Declaration, is prohibited under international human rights law by the Convention on the Prevention and Punishment of the Crime of Genocide. The United States is clearly bound by these provisions, being a party to all three conventions.

88. The Declaration establishes the rights of Native women both as individuals and as members of indigenous communities. It recognizes many of the most important individual rights for Indian and Alaska Native women within the United States, including the rights to gender equality, security of the person, and access to justice.
89. Article 2 of the Declaration extends to indigenous peoples the principle of equality for all, a fundamental principle under United States law, by declaring that indigenous peoples are “free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination . . . in particular that based on their indigenous origin or identity.” Article 44 broadly recognizes the equal rights of Native women, including their rights, inter alia, to political participation, education, and employment.
90. Article 22(2) specifically addresses the epidemic of violence against Native women and children: “States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.”
91. The Declaration also helps end violence against Indian women by providing a fuller right of self-determination to Indian and Alaska Native nations.<sup>253</sup> A key aspect of the right of self-determination under the Declaration is the right of indigenous peoples to develop, promote, and maintain their institutional structures, including their judicial, public safety, and law enforcement systems. The promotion and maintenance of tribal institutional structures helps tribal governments to increase public safety and deter violence in their communities. This aspect of the right of self-determination ensures that Indian and Alaska Native nations can exercise their self-determination to protect women within their communities from violence.
92. While the United States government endorsed the Declaration on December 16, 2010, it noted that the Declaration is “not legally binding or a statement of current international law.”<sup>254</sup> The United States has yet to implement its provisions.

**ii. International Convention on the Elimination of All Forms of Racial Discrimination**

93. The UN Committee on the Elimination of Racial Discrimination (CERD) has criticized the United States for its failure to meet its obligations under the Race Convention to prevent and punish violence against Indian women.
94. In 2008, the CERD condemned the United States for its inadequate response to violence against Indian women. In its Concluding Observations and Report, the Committee stated,

The Committee . . . notes with concern that the alleged insufficient will of federal and state authorities to take action with regard to such violence and abuse often deprives victims belonging to racial, ethnic and national minorities, and in particular Native American women, of their right to access to justice and the right to obtain adequate reparation or satisfaction for damages suffered. (Articles 5(b) and 6).<sup>255</sup>

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<sup>253</sup> United Nations Declaration on the Rights of Indigenous Peoples, adopted by G.A. Res. A/Res/61/295, at arts. 3-4, 34 (Oct. 2, 2007).

<sup>254</sup> U.S. State Dep’t, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010), available at <http://www.state.gov/documents/organization/153223.pdf>.

<sup>255</sup> Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008) at ¶ 26, available at <http://www.indianlaw.org/sites/indianlaw.org/files/CERD-recommendations.pdf>.

95. It also recommended that the United States increase its efforts to prevent and prosecute perpetrators of violence against Indian women.<sup>256</sup> The United States has yet to comply with the Committee's recommendations.

**C. United States domestic legal obligations affecting violence against Indian women**

96. The United States government has unique legal obligations to American Indian and Alaska Native tribes and their members. These domestic legal obligations overlap with and affect the United States' ability to comply with its international due diligence obligations for violence against Indian women. These legal obligations arise from treaties with Indian nations, the trust relationship between the United States and tribes, and statutory and decisional law.

**i. Treaties between Indian nations and the United States**

97. The United States originally recognized Indian tribes as separate, sovereign governments by establishing formal, peaceful relationships with them through treaties. Treaty-making was the cornerstone of United States Indian policy for almost 100 years, and during that time the United States entered into over 400 treaties with Indian tribes. The United States is also the successor-in-interest to some treaties made between European nations and tribes. Some tribes, however, never entered into treaties with the United States government. In 1871, the United States ended its policy of making treaties with Indian tribes. Previously contracted treaties remain legally valid and are still the basis of the government-to-government relationship between many tribes and the federal government.
98. Federal law regards treaties with Native nations much like treaties with foreign countries. The United States Constitution states that treaties, along with other federal laws, are "the supreme Law of the land."<sup>257</sup> Like the Constitution itself and the laws of the United States, Indian treaties are binding on the federal government, the states, and their courts.
99. Some treaties include provisions that obligate the United States to provide health care services to Indian nations or protect Indian peoples and their property. For example, the 1868 Treaty of Fort Laramie includes a "bad man clause," which provides that if "bad men" among the whites commit "any wrong" upon the person or property of any Indian, the United States will reimburse the injured person for the loss sustained. The Federal Claims Court recently held that Sioux women can use the "bad man clause" of the Fort Laramie Treaty to recover for damages incurred as a result of sexual assault in *Elk v. United States*.<sup>258</sup> The *Elk* case is a rare victory for Indian treaty rights and Indian women.
100. More often than not, the United States has violated its treaty responsibilities to Indian nations. While American law generally suggests that the United States must adhere to its treaty obligations, several barriers exist to the enforcement of treaties, including treaties with Indian nations, under American law. Some of these barriers are discussed above in Part III.
101. The Supreme Court has also upheld congressional actions to diminish treaty obligations to Indian tribes and to entirely abrogate its treaties with tribes.<sup>259</sup> Under the last-in-time rule, treaties, like any other federal law, can be modified or abrogated by a later act of Congress, so long as it acts clearly and unambiguously.<sup>260</sup>

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<sup>256</sup> *Id.*

<sup>257</sup> U.S. Const. art. VI, cl. 2.

<sup>258</sup> 87 Fed. Cl. 70, No. 05-186L (2009); *see also*, ¶ 113, *infra*. Other individual members of the Indian tribes that signed the 1868 Treaty of Fort Laramie should also be able to use this provision to recover damages incurred as a result of violence committed against them, as should individual members of Indian tribes that are signatories to treaties with similar "bad man" clauses.

<sup>259</sup> *See, e.g.*, *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-87 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

<sup>260</sup> *South Dakota v. Bourland*, 508 U.S. at 687.

102. Additionally, legal obstacles often make it impossible for Indian nations to bring cognizable claims for the enforcement of their treaty rights in United States courts.<sup>261</sup> These barriers include the sovereign immunity of the United States and the states, failure of treaties to provide rights of action, and equitable doctrines (e.g. laches), among others.
103. The United States cannot fully meet its due diligence obligations to Indian women as long as it fails to recognize and fulfill its treaty responsibilities to Indian nations.

**ii. Trust relationship**

104. The United States has a unique kind of trust relationship with Indian and Alaska Native nations. This trust relationship is said to arise from treaties and the history of dealings by the United States with Indian nations.<sup>262</sup>
105. The trust relationship establishes the duties, including obligations to safeguard the health and welfare of Indian women, that the United States owes to Native nations.<sup>263</sup> Under the trust relationship, the United States has a moral obligation of the highest responsibility and trust towards tribes and is committed to protect Native lands. In all its dealings with tribes, the United States must act with the most exacting standards of honesty, loyalty, and scrupulousness.<sup>264</sup> The trust relationship often is said to guide the relationship between the United States and Native nations. It does not place Natives or Native nations in any kind of ward-guardian relationship.
106. Federal courts have used the trust relationship as a standard for measuring the conduct of the federal government towards Indian and Alaska Native peoples. For more than 65 years, United States courts have repeatedly stated that the federal government's actions with respect to Indian nations must be "judged by the most exacting fiduciary standards."<sup>265</sup> Courts have applied this heightened standard of conduct in evaluating federal administrative actions, but not in cases challenging congressional actions.<sup>266</sup>
107. Courts have not regarded the trust relationship as the source of specific, enforceable obligations on the part of the United States.<sup>267</sup> Federal courts have only recognized trust claims when a treaty, statute, or agreement has created a trust over specific Indian lands and natural resources.<sup>268</sup> The limited interpretation of the trust relationship by the federal courts has greatly diminished the trust responsibility and made it very difficult, if not impossible, for Indian nations to enforce the trust relationship.
108. The epidemic of violence against Indian women is an example of the United States' failure to meet its trust responsibility to Indian nations and Indian women.

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<sup>261</sup> A cognizable claim against the United States requires a cause of action, subject matter jurisdiction, and a waiver of the federal government's sovereign immunity. Similarly, claims against non-parties to a treaty require subject matter jurisdiction, a cause of action, and, in the case of the states, a waiver by the state or Congress of state sovereign immunity.

<sup>262</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[4][a] (Nell Newton ed. 2005).

<sup>263</sup> *Id.*; see generally Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 (1994).

<sup>264</sup> *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

<sup>265</sup> *Id.* at 297.

<sup>266</sup> Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1224 (1975).

<sup>267</sup> See, e.g., *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003); *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006), cert. denied, 128 S. Ct. 176 (2007).

<sup>268</sup> See, e.g., *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474-75 (2003); *United States v. Mitchell*, 463 U.S. 206, 224-26 (1983); *United States v. Mitchell*, 445 U.S. 535, 542-46 (1980).

**iii. Statutes and federal case law**

109. The United States government has willingly assumed criminal authority over Indian territories through statutes and case law.<sup>269</sup> This assumption of jurisdiction places additional legal obligations on the United States government to end violence against Indian women because in many instances it is the only government with the authority to prevent, prosecute, and punish felony crimes on Indian lands.
110. As part of the upcoming reauthorization of VAWA, DOJ has begun government-to-government consultations with tribes on potential federal legislation to fill jurisdictional gaps in the U.S. and tribal criminal justice systems.<sup>270</sup> The legislation would recognize concurrent tribal criminal jurisdiction over domestic violence cases regardless of whether the offender is Indian or non-Indian.<sup>271</sup> It would also clarify that tribes have full civil jurisdiction to issue and enforce protection orders involving both Indians and non-Indians.<sup>272</sup> DOJ is also considering recommending legislation that would allow federal prosecutors to seek longer sentences for non-Indians who assault native women.<sup>273</sup>
111. As described in detail in Part VII of the Domestic Violence chapter, the United States has failed to meet its international due diligence obligations to prevent, prosecute, punish, and remedy violence against Indian women. This failure is reflected in the low rates of prosecution of violent offenders by the United States Attorney's Office, and the extremely high rates of violence against Indian women on Indian lands.

**iv. Reparations and remedies**

112. American Indian and Alaska Native women face all of the same challenges to receiving remedies and reparations for the violence committed against them as other women in the United States. For a full discussion of these challenges, see Part V *supra*.
113. In a rare victory for Indian women, the United States Federal Court of Claims awarded Lavetta Elk, a member of the Oglala Sioux Tribe, nearly \$600,000 in damages for a sexual assault.<sup>274</sup> The court found that Ms. Elk was entitled to damages because the United States had an obligation under the 1868 Fort Laramie Treaty to reimburse individual Indians for wrongs committed against them by "bad men." The *Elk* decision suggests that some Indian women may have treaty claims against the United States when they are assaulted by non-Indians on Indian lands.

**VII. CONCLUSION**

114. Despite recent efforts to address VAW, there remain significant legal, social, and cultural barriers to the United States' fulfillment of its due diligence obligations to prevent, protect, punish, and provide reparations. Although the United States prides itself on being a leader in human rights, such leadership requires the United States to recognize the ongoing problem of VAW within its own borders and to continue striving to achieve fuller compliance with its due diligence obligations. By incorporating international standards into domestic law, drafting new legislation to close gaps in current VAW laws, re-designing remedy systems to allow for more appropriate and accessible reparations, and transforming underlying cultural attitudes that perpetuate or tolerate VAW, the United States can both improve the lives of American women and provide an example for the rest of the world.

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<sup>269</sup> For a full discussion of these statutes and decisions, see section VII, Violence Against Indian Women, in chapter on *Domestic Violence in the United States*.

<sup>270</sup> Letter from Thomas J. Perrelli, Assoc. Attorney Gen., DOJ, to Tribal Leaders (May 20, 2011) [hereinafter, *DOJ letter to Tribal Leaders*], available at <http://www.tribaljusticeandsafety.gov/inv-ltr-framing-paper.pdf>.

<sup>271</sup> Proposed Federal Legislation to Help Tribal Communities Combat Violence Against Native Women 3, attached to *DOJ letter to Tribal Leaders, id.*

<sup>272</sup> *Id.* at 4.

<sup>273</sup> *Id.* at 5.

<sup>274</sup> *Elk v. United States*, 87 Fed. Cl. 70, No. 05-1861 (2009).

# **D**omestic Violence in the United States

**Caroline Bettinger-Lopez**

*Associate Professor of Clinical Legal Education  
Director, Human Rights Clinic  
University of Miami School of Law  
with the support of*

**Farrah Elchahal (JD 2012)**

**Ana Romes (JD 2012)**

**Miraisy Rodriguez (JD 2012)**

**Monika Siwiec (JD 2011)**

**Christina Brandt-Young**

*New York Legal Assistance Group*

**Kirsten Matoy Carlson**

*Indian Law Resource Center  
Assistant Professor of Law, Wayne State University Law School*

**Gabrielle Davis**

*Battered Women's Justice Project*

**Margaret Drew**

*Visiting Professor of Clinical Instruction & Acting Director  
Domestic Violence Clinic, University of Alabama School of Law*

**Rebecca Landy**

*John Jay College of Criminal Justice\**

*\*for identification purposes only*

*with the support of*

**Adam Dubin**

*Pace University School of Law (JD 2012)*

**Rachel Natelson**

*National Law Center on Homelessness & Poverty*

**Sandra Park**

*ACLU Women's Rights Project*

**Jessica Rubenstein**

*Center for Reproductive Rights (former legal intern)*

*Legal Fellow, Law Students for Reproductive Justice*

*NYU School of Law (JD 2010)*

**Cynthia Soohoo**

*Professor & Director, International Women's Human Rights Clinic, CUNY School of Law  
Former director, US Legal Program, Center for Reproductive Rights*

**Cheryl Thomas**

*The Advocates for Human Rights*

*with the support of*

**Sandra Jezierski**

*Nilan Johnson Lewis, P.A.*

**Casey R. Schultz**

*Volunteer attorney, Advocates for Human Rights*

## I. INTRODUCTION

1. Domestic violence is a distinctive and complex type of violence. The intimate relationship between the victim and the perpetrator is historically construed as private and therefore beyond the reach of law. The often hidden site of the violence buttresses this conceptualization. The victim is often financially dependent on her abuser, and other economic and familial factors complicate the victim's response to abuse. Moreover, women who complain of domestic violence frequently face intimidation, retaliation, and stigmatization, and thus incidents of domestic violence are notoriously under-reported and under-prosecuted throughout the world, including the United States.
2. Any meaningful analysis of the nature and content of the United States' obligations with respect to domestic violence must flow from a comprehensive understanding of the reality that States are obliged to address.<sup>1</sup> Until the United States enacts effective preventative and remedial measures to eradicate violence against women within its borders, the promise of women's rights in the United States will remain a deferred dream.
3. Each year, between one and five million women in the United States suffer nonfatal violence at the hands of an intimate partner.<sup>2</sup> Domestic violence affects individuals in every racial, ethnic, religious, and age group; at every income level; and in rural, suburban, and urban communities. Notwithstanding the prevalence of domestic violence across demographic categories, it is overwhelmingly a crime perpetrated against women. Women are five to eight times more likely than men to be the victims of domestic violence.<sup>3</sup> The Department of Justice reports that between 1998 and 2002 in the United States, 73% of family violence victims were female, 84% of spouse abuse victims were female, and 86% of victims of violence committed by an intimate partner were female.<sup>4</sup>
4. Not only are women more likely than men to experience domestic violence, but they also represent an even greater percentage of victims in the most serious of the assault cases by an intimate partner.<sup>5</sup> In 2008 alone, women experienced approximately 552,000 violent crimes (rape/sexual assault, robbery, or aggravated or simple assault) by an intimate partner, while men experienced 101,000 of these types of crimes.<sup>6</sup> Additionally, in the United States, more than three women are murdered by their husbands or boyfriends every day, and approximately one-third of women murdered each year are killed by an intimate partner.<sup>7</sup> Women are also far more likely than men to be the victims of battering resulting in death at the hands of an intimate partner.<sup>8</sup> In 2007, the rate of intimate partner homicide for women was 1.07 per 100,000, while the rate for male victims was 0.47 per 100,000.<sup>9</sup>

<sup>1</sup> See *Report of the Secretary-General: In Depth Study on All Forms of Violence Against Women*, §§ 112-113, delivered to the General Assembly, U.N. Doc. A/61/122/Add.1 (July 6, 2006) (The Secretary General's Report defines domestic violence as including a spectrum of sexually, psychologically and physically coercive acts used against women by a current or former intimate partner without her consent.).

<sup>2</sup> CTRS. FOR DISEASE CONTROL AND PREVENTION (CDC), COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 18 (2003) [hereinafter CDC, COSTS] (estimating fifty-three million intimate partner assaults against women in the United States each year); PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN STUDY 26 (2000).

<sup>3</sup> LAWRENCE A. GREENFELD ET AL., VIOLENCE BY INTIMATES 38 (1998).

<sup>4</sup> MATTHEW R. DUROSE ET AL., FAMILY VIOLENCE STATISTICS 1, 10 (2005) (Family violence is defined as any crime in which the victim or offender is related by blood, marriage, or adoption. It thus includes violence by parents against children, violence between siblings, violence by a husband against his wife, etc.; but does not include violence between unmarried partners.). See also Petition Alleging Violations of the Human Rights of Jessica Gonzales by the United States of America and the State of Colorado, with request for an investigation and hearing of the merits, at 21 n. 53, *Gonzales v. USA*, Petition P-1490-05, Inter-Am. Ct. H.R. (Dec. 23, 2005) available at <http://www.aclu.org/files/pdfs/petitionallegingviolationsofthehumanrightsofjessicagonzales.pdf> [hereinafter *Gonzales Petition*].

<sup>5</sup> *Gonzales Petition*, *supra* note 4, at 21-22.

<sup>6</sup> Shannan Catalano et al., U.S. Dep't of Justice, *Bureau of Justice Statistics Selected Findings: Female Victims of Violence* 1, NCJ 228356 (Sept. 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fvv.pdf>.

<sup>7</sup> SENATOR JOSEPH R. BIDEN, JR., TEN YEARS OF EXTRAORDINARY PROGRESS: THE VIOLENCE AGAINST WOMEN ACT (2004).

<sup>8</sup> See COLORADO COALITION AGAINST DOMESTIC VIOLENCE, LAW ENFORCEMENT TRAINING MANUAL 1-5 (2d ed. 2003) (reporting that 42% of all female homicide victims were killed by an intimate partner); CDC, SURVEILLANCE FOR HOMICIDE AMONG INTIMATE PARTNERS (2001) (finding that domestic violence murders account for 33% of all female murder victims and only 5% of male murder victims).

<sup>9</sup> Catalano, *supra* note 6, at 3.

5. Government sources indicate that one-third of women in the United States experience at least one physical assault at the hands of an intimate partner during the course of adulthood.<sup>10</sup> Due to feelings of shame and fear of retribution that prevent women from reporting assault, this statistic may significantly underestimate the incidence of domestic violence in the United States. The historical characterization of domestic violence as a “private” or family matter may also contribute to the under-reporting of domestic violence.<sup>11</sup>
6. Not all women in the United States experience domestic violence with the same frequency. The data suggests that although the domestic violence epidemic cuts across the lines of gender, race, and immigration status—affecting women and men, African Americans, Latinas, American Indians, Alaska Natives, and whites, and immigrants and United States citizens—it has a particularly pernicious effect on groups that lie at the intersection of these categories: poor ethnic minorities, immigrants, and American Indian and Alaska Native women.
7. While poor minority and immigrant battered women in the United States are among those most in need of governmental support and services, including domestic violence services, these groups are chronically underserved.<sup>12</sup> This greater need for an effective government response is due, in large part, to the social, familial, and financial isolation experienced by many minority and immigrant women.<sup>13</sup> Nationwide, African American women report their victimization to the police at a higher rate (67%) than white women (50%), African American men (48%), and white men (45%).<sup>14</sup> African American women account for 16% of the women reported to have been physically abused by a husband or partner in the last five years but were the victims in more than 53% of the violent deaths that occurred in 1997.<sup>15</sup> A recent study found that 51% of intimate partner homicide victims in New York City were foreign-born.<sup>16</sup> Another study determined that 48% of Latinas reported that their partners’ violence against them had increased since they immigrated to the United States.<sup>17</sup>
8. The greater level of reported domestic violence among African American, Hispanic, American Indian, and Alaska Native women and immigrants is attributable, in large part, to the extreme levels of poverty in minority and immigrant communities.<sup>18</sup> African Americans and Hispanics make up 22.8% of the population but account for 47.8% of those living in poverty.<sup>19</sup> Poor women experience victimization by intimate partners at much higher rates than women with higher household incomes; in the United States between 1993 and 1998, women with annual household incomes of less than \$7,500 were nearly seven

<sup>10</sup> BIDEN, *supra* note 7, at 30. According to the National Institute of Justice and the Centers for Disease Control, 26% of women, compared to 8% of men, report having been assaulted by an intimate partner in their lifetime. TJADEN & THOENNES, *supra* note 2, at 9.

<sup>11</sup> See KERRY MURPHY HEALEY & CHRISTINE SMITH, RESEARCH IN ACTION, BATTERER PROGRAMS: WHAT CRIMINAL JUSTICE AGENCIES NEED TO KNOW 1-2 (1998) (noting that some researchers estimate that “as many as six in seven domestic assaults go unreported”).

<sup>12</sup> See Committee on the Elimination of Racial Discrimination, Concluding Observations, CERD/C/USA/CO/6 ¶ 26 (Mar. 7, 2008) (“not[ing] with concern that the alleged insufficient will of federal and state authorities to take action with regard to [gender-based] violence and abuse often deprives victims belonging to racial, ethnic and national minorities . . . of their right to access to justice and the right to obtain adequate reparation or satisfaction for damages suffered”).

<sup>13</sup> The vast majority of New York City’s Family Court’s litigants are minority and immigrant individuals. Leah A. Hill, *Do You See What I See?*, 40 COLUM. J.L. & SOC. PROBS 527, 530 n.4 (2007) (“While there are no reliable data on the demographics of Family Court users, an informal survey of self-represented Family Court litigants in all five boroughs provides a powerful depiction: of the 1857 respondents surveyed, 48% identified themselves as African-American, 4% Asian, 31% Hispanic . . .”) (citing Off. of the Deputy Chief Adm’r for Justice Initiatives, *Self-Represented Litigants: Characteristics, Needs, Services* 3 (Dec. 2005), available at [http://nycourts.gov/reports/AJJI\\_SelfRep06.pdf](http://nycourts.gov/reports/AJJI_SelfRep06.pdf)). Significantly, none of the users identified themselves as white. See *id.*

<sup>14</sup> C.M. RENNISON & S. WELCHANS, A SPECIAL REPORT OF THE BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE (MAY 2000).

<sup>15</sup> WOMEN’S INST. FOR LEADERSHIP DEV. FOR HUMAN RIGHTS, THE TREATMENT OF WOMEN OF COLOR UNDER U.S. LAW 1 (2001) (quoting 147 CONG. REC. H 1 s003 (Mar. 20, 2001)).

<sup>16</sup> N.Y. CITY DEP’T OF HEALTH & MENTAL HYGIENE, FEMICIDE IN NEW YORK CITY: 1995-2002 (2004), available at [http://www.nyc.gov/html/doh/downloads/pdf/ip/femicide1995-2002\\_report.pdf](http://www.nyc.gov/html/doh/downloads/pdf/ip/femicide1995-2002_report.pdf).

<sup>17</sup> Mary Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources, and Services Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL’Y 245 (2000).

<sup>18</sup> Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities*, 11 VIOLENCE AGAINST WOMEN 38, 48 (2005), available at <http://vaw.sagepub.com/cgi/content/abstract/11/1/38>.

<sup>19</sup> ANANNYA BHATTACHARJEE, WHOSE SAFETY? WOMEN OF COLOR AND THE VIOLENCE OF LAW ENFORCEMENT 18 (2001) available at <http://www.afsc.org/community/WhoseSafety.pdf> (citing CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS (1999)).

times as likely as women with annual household incomes over \$75,000 to experience domestic violence.<sup>20</sup> Data also indicates that women are at much greater risk of domestic violence when their partners experience job instability or when the couple reports financial strain.<sup>21</sup> Abuse has also been found to be more common among young, unemployed urban residents—a large percentage of whom are racial minorities and immigrants.<sup>22</sup> The majority of homeless women were once victims of domestic violence,<sup>23</sup> and more than half of all women receiving public assistance were once victims of domestic violence.<sup>24</sup> Although accurate statistics on the intersection of race and gender in the homeless population and the population of those receiving public assistance in the United States are not available, statistics do demonstrate that racial minorities make up the majority of the homeless population<sup>25</sup> and that the majority of women receiving public assistance are racial minorities.<sup>26</sup>

9. Thus, combinations of poverty, age, employment status, residence, and social position—not race or culture, per se—may explain the higher rates of abuse within certain ethnic communities.<sup>27</sup> Yet race remains salient because of its inextricable connection with these other factors. Race also plays a significant role in the victimization of at least one group: American Indian and Alaska Native women. Unlike other groups, the majority of American Indian and Alaska Native women reporting intimate partner violence (“IPV”) identify their abuser as non-Indian. American Indian and Alaska Native women face unique barriers to accessing justice because determining which government (federal, state, or tribal) is responsible for the investigation and prosecution of violent crimes on Indian lands depends on the race of the perpetrator and the race of the victim.
10. In 1992, the Supreme Court recognized that a staggering four million women in the United States suffered severe assaults at the hands of their male partners each year and that between one-fifth and one-third of all women will be the victims of domestic violence in their lifetime.<sup>28</sup> Since then, the United States government has been well aware of the scope and severity of domestic assault. Two years later, the United States Congress passed the Violence Against Women Act, reauthorizing and expanding it in 2000 and again in 2005 (collectively VAWA). VAWA funds a wide variety of important programs and victim services aiming to address domestic violence in the United States.<sup>29</sup>
11. In the years prior to VAWA, Congress brought together a significant body of research through hearings, testimony, and reports on violence against women and its societal effects in the United States. This research found that up to 50% of homeless women and children are homeless because they are fleeing domestic violence and that “battering is the single largest cause of injury to women in the United

<sup>20</sup> TJADEN & THOENNES, *supra* note 2; *see also* SOKOLOFF & DUPONT, *supra* note 18, at 44 (citing BENSON & FOX, *infra* note 21; Browne & Bassuk, *infra* note 23; Hampton et al., *infra* note 22; Raphael, *infra* note 331; and others); NATALIE SOKOLOFF, DOMESTIC VIOLENCE AT THE MARGINS: A READER AT THE INTERSECTIONS OF RACE, CLASS, GENDER, AND CULTURE 157-73 (2005) (discussing how the most severe and lethal domestic violence occurs disproportionately among low-income women of color).

<sup>21</sup> MICHAEL L. BENSON & GREER LITTON FOX, U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, WHEN VIOLENCE HITS HOME: HOW ECONOMICS AND NEIGHBORHOOD PLAY A ROLE 2 (2004).

<sup>22</sup> R. Hampton et al., *Violence in Communities of Color*, in FAMILY VIOLENCE AND MEN OF COLOR: HEALING THE WOUNDED MALE SPIRIT 1-30 (Richard Carrillo & Jerry Tello eds., 1998); C. M. West, *Domestic Violence in Ethnically and Racially Diverse Families: The “Political Gag Order” Has Been Lifted*, in NATALIE SOKOLOFF, *supra* note 20.

<sup>23</sup> A. Browne & S. Bassuk, *Intimate Violence in the Lives of Homeless and Poor Housed Women: Prevalence and Patterns in an Ethnically Diverse Sample*, 67 AM. J. OF ORTHOPSYCHIATRY 261-278 (1997).

<sup>24</sup> ELEANOR LYON, POVERTY, WELFARE AND BATTERED WOMEN: WHAT DOES THE RESEARCH TELL US? (1998), *available at* <http://www.mincava.umn.edu/documents/welfare/welfare.pdf>.

<sup>25</sup> NATIONAL COALITION FOR THE HOMELESS, WHO IS HOMELESS?: FACT SHEET, *available at* <http://www.nationalhomeless.org/publications/facts.html> (stating that the homeless population was 49% African-American, 35% Caucasian, 13% Hispanic, 2% Native American, and 1% Asian in 2004.)

<sup>26</sup> Poverty and Welfare Fact File, [http://www.publicagenda.org/issues/factfiles\\_detail.cfm?issue\\_type=welfare&list=13](http://www.publicagenda.org/issues/factfiles_detail.cfm?issue_type=welfare&list=13) (last visited Nov. 10, 2007) (citing U.S. DEP’T OF HEALTH & HUMAN SERV., ADMINISTRATION FOR CHILDREN AND FAMILIES, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES’ FIFTH ANNUAL REPORT TO CONGRESS (Feb. 2004)) (reporting that, of recipients of Temporary Assistance for Needy Families, 38.3% are African-American, and 24.9% are Hispanic); U.S. DEP’T OF HEALTH & HUMAN SERV., INDICATORS OF WELFARE DEPENDENCE: ANNUAL REPORT TO CONGRESS 2007 (2007), *available at* <http://aspe.hhs.gov/hsp/indicators07/ch2.htm>.

<sup>27</sup> Sokoloff & Dupont, *supra* note 18, at 48.

<sup>28</sup> Planned Parenthood v. Casey, 505 U.S. 833, 891 (1992).

<sup>29</sup> Gonzales Petition, *supra* note 4, at 24.

States.”<sup>30</sup> Congress further noted that “arrest rates may be as low as 1 for every 100 domestic assaults.”<sup>31</sup> More recently, in 2002, President George W. Bush noted that in 2000 “almost 700,000 incidents of violence between partners were documented in our Nation, and thousands more [went] unreported. And in the past quarter century, almost 57,000 Americans were murdered by a partner.”<sup>32</sup> Before and after the passage of VAWA, United States officials and agencies have reiterated the grievousness of domestic violence and the heavy toll it inflicts on the country.

12. Unfortunately, in spite of the passage of legislation such as VAWA, the domestic violence epidemic has continued to rage in the United States. The most recent National Crime Victimization Survey (NCVS) reports that incidents of domestic violence increased by 42% and sexual violence by 25% from 2005-2007, and women made up the vast majority of these victims.<sup>33</sup> While it is not clear whether these increased numbers result from increased incidents or increased reporting (or both), the numbers are indeed staggering.
13. The purpose of this chapter is to provide a general sense of the key issues that advocates have identified related to domestic violence in the United States. Section II of the chapter lays out important federal legal and legislative developments in the area of domestic violence and violence against women. Section III discusses issues related to domestic violence and the criminal justice system, focusing specifically on the role of law enforcement, prosecutors, and the courts. Section IV explores issues related to domestic violence, custody, and economic considerations in family law litigation. Section V discusses intersections between domestic violence and reproductive rights and reproductive/sexual health. Section VI examines issues concerning economic security, employment, and housing as it relates to domestic violence. Section VII examines violence against Indian women, including the particular challenges Indian victims and survivors of domestic violence encounter in accessing justice and ensuring safety. Section VIII examines issues of trafficking as they relate to domestic violence. Moreover, throughout this chapter, we have attempted to address how particular marginalized populations (including racial/ethnic immigrants and minorities) are disproportionately negatively affected by current domestic violence laws, policies, and practices. Finally, we emphasize that many of the issues reflected in this chapter intersect and overlap with issues presented in the other chapters on violence against women in detention, violence against women in the military, and gun violence.

## II. FEDERAL LEGAL AND LEGISLATIVE DEVELOPMENTS

14. As noted above, VAWA is a comprehensive legislative package first enacted in 1994<sup>34</sup> and reauthorized with new provisions in 2000<sup>35</sup> and 2005.<sup>36</sup> As described below, VAWA will be reauthorized in 2011. The passage of VAWA was unquestionably a bellwether moment in the fight against domestic violence in the United States, but on its own VAWA does not and cannot fulfill the United States’ obligation to prevent, investigate, and punish violations of women’s rights to be physically safe. Nor does it provide compensation for damages resulting from failures of the United States to do so.
15. VAWA seeks to provide funding for training of police, prosecutors, and advocates in dealing with domestic violence,<sup>37</sup> to fund shelters, civil legal services, and other services for domestic violence victims,

<sup>30</sup> S. REP. NO. 101-545, at 37 (1990) (quoting Van Hightower & McManus, *Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies*, 49 PUB. ADMIN. REV. 269 (1989)).

<sup>31</sup> *Id.* at 38 (citing D.G. Dutton, *Profiling of Wife Assaulters: Preliminary Evidence for Trifocal Analysis*, 3 VIOLENCE & VICTIMS 5-30 (1988)).

<sup>32</sup> Proclamation No. 7601, 67 Fed. Reg. 62,169 (Oct. 1, 2002); see also Proclamation No. 7717, 68 Fed. Reg. 59,079 (Oct. 8, 2003).

<sup>33</sup> See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY, CRIMINAL VICTIMIZATION (2007), available at <http://www.ojp.usdoj.gov/bjs/abstract/cv07.htm>.

<sup>34</sup> Pub. L. No. 103-322, Tit. IV, 108 Stat. 1796 (1994).

<sup>35</sup> Pub. L. No. 106-386, 114 Stat. 1464 (2000).

<sup>36</sup> Pub. L. No. 109-162, 119 Stat. 2960 (2005).

<sup>37</sup> Pub. L. No. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. No. 106-386, § 1103, 114 Stat. 1464, 1495-97 (2000); Pub. L. No. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

especially in “demonstration” projects that can be replicated by other organizations,<sup>38</sup> and to encourage best practices by states by conditioning receipt of funding on, among other things, states’ use of mandatory arrest policies when domestic violence is reported and the removal of fees for applying for protective orders.<sup>39</sup> VAWA further criminalizes certain acts of domestic violence that cross state lines, making them federal criminal matters,<sup>40</sup> and it requires states, territories, and Indian tribes to give full faith and credit to protective orders made by other states, territories, and tribes.<sup>41</sup> Portions of VAWA, which will be discussed in other sections of this briefing, also provide immigration relief to battered immigrants and seek to prevent discrimination against domestic violence victims who live in certain types of federally funded housing.

16. Yet VAWA fails to accomplish three crucial objectives: (1) it does not provide any direct remedy when abusers or police officers violate victims’ rights, (2) it does not require participation by all states or monitor their progress, and (3) it does not fully or adequately fund all the services that are needed for victim safety.

**A. VAWA does not provide a federal court remedy for victims of gender-based violence**

17. The 1994 version of VAWA authorized lawsuits in federal court against those who “commit a crime of violence motivated by gender.”<sup>42</sup> The Attorneys General of thirty-eight of the fifty states supported this measure on the grounds that the state courts were incapable of addressing gender-based violence adequately.<sup>43</sup> In other words, VAWA as originally passed attempted to provide battered women with a federal remedy against perpetrators of violence. Unfortunately, in 2000 the Supreme Court invalidated this portion of VAWA in *United States v. Morrison*, holding that Congress did not have the authority to create such a cause of action as part of its power to regulate interstate commerce under the United States Constitution or its general police power.<sup>44</sup> Thus, the Supreme Court struck down the United States’s first, and so far only, effort to provide a federal venue for punishing private violations of women’s right to be free from gender-based violence.
18. In 2005, in *Town of Castle Rock v. Gonzales*, the Supreme Court also ruled that the U.S. Constitution provides no remedy for a state’s failure to enforce a domestic violence restraining order, and thus protect victims of gender-based violence.<sup>45</sup> *Castle Rock* was preceded by *DeShaney v. Winnebago Department of Social Services*,<sup>46</sup> where the Supreme Court found that the Due Process Clause of the Fourteenth Amendment does not provide a remedy when state actors fail to take reasonable measures to protect and ensure a citizen’s rights against violation by private actors. No one expects that first responders can prevent every act of private violence, but the effect of the *DeShaney*, *Morrison*, and *Castle Rock* cases is that even where local and state police are grossly negligent in their duties to protect women’s right to physical security, and even where they fail to respond to an urgent call due to negative stereotypes they harbor about victims of domestic violence or about women in general, there is no federal constitutional or statutory remedy.

<sup>38</sup> Pub. L. No. 103-322, § 40221, 108 Stat. 1796, 1926-32 (1994); Pub. L. No. 106-386, §§ 1201-1202, 114 Stat 1464, 1504-06 (2000); Pub. L. No. 109-162, § 103, 119 Stat. 2960, 2978 (2005).

<sup>39</sup> Pub. L. No. 103-322, § 40231, 108 Stat. 1796, 1932-34 (1994); Pub. L. No. 106-386, § 1104, 114 Stat 1464, 1497 (2000); Pub. L. No. 109-162, § 102, 119 Stat. 2960, 2975-78 (2005).

<sup>40</sup> 18 U.S.C. § 2261 (interstate domestic violence); 18 U.S.C. § 2261A (interstate stalking); 18 U.S.C. § 2262 (interstate violation of a protection order). A recent opinion of the Attorney General clarifies that these provisions apply to same-sex as well as opposite-sex violence. Whether The Criminal Provisions of the Violence Against Women Act Apply to Otherwise Covered Conduct When the Offender and Victim are the Same Sex, Op. Off. Legal Counsel (Apr. 27, 2010).

<sup>41</sup> 18 U.S.C. § 2265.

<sup>42</sup> 42 U.S.C. § 13981.

<sup>43</sup> See *United States v. Morrison*, 529 U.S. 598, 653 (2000) (Souter, J. dissenting) (citing *Crimes of Violence Motivated by Gender: Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 103d Cong., 1st Sess., 34-36 (1993)).

<sup>44</sup> 529 U.S. 598 (2000).

<sup>45</sup> *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

<sup>46</sup> *DeShaney v. Winnebago Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

## B. VAWA is non-binding on states and is primarily a source of grants

19. In the absence of any substantive federal remedy for failure to protect women's rights, VAWA's role in preventing and punishing violence against women is limited primarily to making grants to state and local police and advocacy organizations who seek to implement training or programming,<sup>47</sup> funding domestic violence service provision and training,<sup>48</sup> providing immigration relief to non-citizen victims of violence,<sup>49</sup> and coordinating interstate recognition of protective orders.<sup>50</sup> VAWA also issues grants to support domestic violence shelters,<sup>51</sup> rape prevention courses,<sup>52</sup> domestic violence prevention and intervention programs,<sup>53</sup> and programs aimed at strengthening law enforcement, victim services, and prosecutorial/judicial responses domestic violence.<sup>54</sup> The Federal Office on Violence Against Women (OVW) was established to administer VAWA grants for projects targeted at improving the issuance and enforcement of Protection Orders, including "STOP" (Services, Training, Officers, and Prosecutors) grants,<sup>55</sup> ARREST grants to encourage arrest policies and enforcement of protection orders,<sup>56</sup> and other programs aimed at training professionals to improve their responses to violence against women.<sup>57</sup>
20. However, application for and participation in these grants is entirely voluntary on the part of states and stakeholders within the states. For instance, VAWA "conditions state receipt of sizable federal funding on the creation of systems that: (1) ensure that protection orders are given full faith and credit by all sister states; (2) provide government assistance with service of process in protection order cases; and (3) criminalize violations of protection orders,"<sup>58</sup> as well as those which adopt mandatory arrest requirements in domestic violence situations.<sup>59</sup> If a state or locality chooses not to apply for the funding, however, VAWA has no impact at all.
21. Indeed, many states do not receive VAWA funding. In 2007, no ARREST grants were made in nineteen of the fifty-six participating states and United States territories.<sup>60</sup> Further, in 2007, the median total of grants made by OVW to programs within a single state or territory was approximately \$4.5 million.<sup>61</sup> Alaska, a state with a population of 683,478, received \$15.9 million in funding from OVW; New York, population 19,297,729, received \$18.8 million; and Wyoming, population 522,830, received \$2.3 million.<sup>62</sup> It should be noted that because many VAWA grants are given to localities and local nonprofit organizations rather than to states, VAWA coverage within each state varies. For example, West Virginia

<sup>47</sup> Pub. L. No. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. No. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. No. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

<sup>48</sup> Pub. L. No. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. No. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. No. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

<sup>49</sup> Pub. L. No. 103-322, § 40701, 108 Stat. 1796, 1953-54 (1994); Pub. L. No. 106-386, § 1503, 114 Stat 1464, 1518-22 (2000); Pub. L. No. 109-162, Title VII, 119 Stat. 2960, 3053-78 (2005).

<sup>50</sup> Pub. L. No. 103-322, § 40221, 108 Stat. 1796, 1926-32 (1994); Pub. L. No. 106-386, § 1101, 114 Stat 1464, 1492-94 (2000); Pub. L. No. 109-162, § 106, 119 Stat. 2960, 2981-83 (2005).

<sup>51</sup> Pub. L. No. 103-322, § 40241, 108 Stat. 1796, 1932 (1994); Pub. L. No. 106-386, § 1202, 114 Stat 1464, 1505-06 (2000). By 2005, shelter grants were being administered through the Family Violence Prevention and Services Act rather than VAWA.

<sup>52</sup> Pub. L. No. 103-322, § 40151, 108 Stat. 1796, 1920-21 (1994); Pub. L. No. 106-386, § 1401, 114 Stat 1464, 1512-13 (2000); Pub. L. No. 109-162, § 302, 119 Stat. 2960, 3004 (2005).

<sup>53</sup> Pub. L. No. 103-322, § 40271, 108 Stat. 1796, 1937-38 (1994); Pub. L. No. 106-386, § 1106, 114 Stat 1464, 1497 (2000); Pub. L. No. 109-162, § 401, 119 Stat. 2960, 3017-23 (2005).

<sup>54</sup> Pub. L. No. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. No. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. No. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

<sup>55</sup> Pub. L. No. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. No. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. No. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

<sup>56</sup> Pub. L. No. 103-322, § 40231, 108 Stat. 1796, 1932-34 (1994); Pub. L. No. 106-386, § 1104, 114 Stat 1464, 1497 (2000); Pub. L. No. 109-162, § 102, 119 Stat. 2960, 2975-78 (2005).

<sup>57</sup> See Pub. L. No. 103-322, §§ 40152, 40412, 40421, 40607, 108 Stat. 1796 (1994); Pub. L. No. 106-386, §§ 1401, 1402, 1405, 1406, 114 Stat. 1464 (2000); Pub. L. No. 109-162, § 111, 204, 205, 503, 119 Stat. 2960 (2005).

<sup>58</sup> Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J. L. & FEMINISM 3, 12 (1999).

<sup>59</sup> Ryan C. Hasanbasic, *Town of Castle Rock v. Gonzales: The Supreme Court Goes to Great Lengths to Ensure Police Discretion, But at What Cost?*, 36 STETSON L. REV. 881, 913 (2007).

<sup>60</sup> See FY 2007 Office on Violence Against Women Grant Activity by State (with State Totals), OFFICE ON VIOLENCE AGAINST WOMEN, <http://www.ovw.usdoj.gov/grant-activities2007.htm> (last visited Sept. 26, 2011).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*; see also census figures taken from <http://www.census.gov>.

was given \$3,617,063 in various VAWA grants in 2007, but \$2.6 million of this funding was granted to local foundations rather than divisions of the state government. The YMCA of Wheeling, West Virginia alone received \$255,000. Similarly, in 2007, only \$2.9 million of the \$5,880,026 total grant money that Georgia received was to state-run domestic violence programs.<sup>63</sup> Without a national scheme mandating legislation and training programs, the level of protection afforded to domestic violence victims varies across jurisdictions, leaving women in many parts of the country suffering from inadequate levels of protection and services.

22. Yet another problem with the VAWA grant programs is that grants are not adequately monitored. “The National Center for State Courts (NCSC) reviewed surveys provided by state court administrators and found a ‘significant number of administrative offices noted that the courts were not receiving all of [a] 5 percent set-aside.’ . . . Delays in spending also continue to plague the efficacy of the funds.”<sup>64</sup> Failure to monitor implementation of the grants greatly diminishes VAWA’s effectiveness.
23. VAWA is a significant funding source for services for victims of domestic violence and their advocates. However, providing funding to encourage states, localities, and agencies to act on a voluntary basis does not by itself fulfill the United States’ duty to provide comprehensive human rights protections for domestic violence victims.<sup>65</sup> The voluntary nature of VAWA grants means that money often fails to reach persons most in need, who live in jurisdictions that lack the political will or the resources to navigate the complex terrain of the funding process.

**C. VAWA grants, while laudable, do not fulfill the critical needs of domestic violence victims**

24. The diverse grants made under VAWA are a tremendous help to domestic violence victims around the country, but the grant amounts do not come close to meeting the total need. This gap is demonstrated by three basic types of needed funding: shelter for battered women and their families, supervisors to monitor batterers who have visitation rights with their children, and legal counsel to assist with the various civil legal matters that arise from violence within the family.
25. Before the 1970s, there were few, if any, domestic violence shelters for abused women in the United States.<sup>66</sup> Presently there are shelters in every state, but there are still not enough emergency shelters to cover all of the women and children fleeing abusive relationships. Since its inception, VAWA has helped to fund shelter services for battered women and their children.<sup>67</sup> Yet these efforts are still outstripped by the need for more shelter for domestic violence victims and their families.<sup>68</sup> In 2006, 1,898 families were turned away from domestic violence shelters in Virginia,<sup>69</sup> and in the greater Richmond area, population 775,000, there were only 4 domestic violence shelters with a total of 56 beds.<sup>70</sup>
26. Another important problem is the lack of availability of supervisors for batterers’ visitation with their children. When a victim of domestic violence flees an abusive home, her abuser is usually eligible for visitation rights with children they have in common. One form of visitation designed to protect women and children from violence or stalking is visitation supervised by social work or mental health professionals at a specially designated center. “Supervised visitation, previously mandated most often in cases of child abuse and neglect, has become much more common in domestic violence cases. Judges may

<sup>63</sup> See FY 2007 Office on Violence Against Women Grant Activity by State, *supra* note 60.

<sup>64</sup> Leila Abolfazli, *Criminal Law: Violence Against Women Act (VAWA)*, 7 GEO. J. GENDER & L. 863, 865-66 (2006).

<sup>65</sup> See, e.g., Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 166, 174, 176 (1988).

<sup>66</sup> *Housing First: A Special Report: Women/Children Fleeing Abuse*, NAT’L PUBLIC RADIO, <http://www.npr.org/news/specials/housingfirst/whoneeds/abuse.html> (last visited Sept. 26, 2011).

<sup>67</sup> See Pub. L. No. 103-322 § 40241; Pub. L. No. 106-386 § 1202. By 2005, shelter grants were being administered through the Family Violence Prevention and Services Act rather than VAWA.

<sup>68</sup> In fact, the Humane Society of America estimates there are three times the number of shelters for homeless animals as for abuse victims. See Hay El Nasser, *American Journal: “No Kill” Pet Shelters Grow in Popularity*, DETROIT NEWS, Sept. 15, 1997, at A2 (stating that there are approximately 5,000 animal shelters in the United States).

<sup>69</sup> *Id.*

<sup>70</sup> Bill Wasson, *Abused Who Leave Find Few Safe Places*, TIMES-DISPATCH, Oct. 27, 2007, <http://www.timesdispatch.com/cva/ric/news>.

see it as the only responsible arrangement in cases with a history of domestic violence.”<sup>71</sup> However, paying supervisors and funding their facilities is expensive, and many poor families cannot afford it. “The most pressing issue with supervised visitation centers is simply an undersupply to meet the demand for centers that can handle domestic violence cases, with the appropriate safety protocols. The undersupply is directly linked to a lack of funding and intermittent funding.”<sup>72</sup> Although VAWA began funding supervised visitation centers in 2000 and continued in 2005,<sup>73</sup> these monies have decreased each year since 2003, as Congress fails time and again to approve the funding amount it previously authorized.<sup>74</sup>

27. A victim’s ability to obtain a civil order of protection may be further hampered by her lack of access to counsel. The Supreme Court, in *Gideon v. Wainwright*,<sup>75</sup> established the right of an indigent defendant to state-provided counsel in criminal cases, but the right to counsel has not been extended to civil cases.<sup>76</sup> Although some states have chosen to expand a civil right to counsel, nowhere in the United States is the right to counsel in civil cases comprehensive.
28. The civil legal matters that entangle the lives of domestic violence victims often involve a person’s interests in “shelter, sustenance, safety, health and child custody,” which are deemed “fundamental economic and social rights . . . in many of the world’s constitutions and in international human rights treaties, but which are not explicitly protected by the federal United States Constitution.”<sup>77</sup> Funding has been allocated under VAWA since 1998 for civil legal assistance for domestic violence victims,<sup>78</sup> especially for the purpose of obtaining protective orders, but once again the need vastly outstrips the funding available.

#### D. VAWA will be reauthorized in 2011

29. The provisions of VAWA that provide funding for services and projects will expire in 2011 and will need to be reauthorized by Congress at that time. This provides opportunities to improve funding and encourage funding of projects that will meet emergent needs. The United States Senate Judiciary Committee has already held hearings, including on June 10, 2009 and May 5, 2010 (emphasizing the importance of VAWA during times of economic crisis), to report on how VAWA is currently being used and which topics should be addressed in the near future.<sup>79</sup> A hearing on the importance of VAWA’s transitional housing provisions has been postponed.<sup>80</sup>

<sup>71</sup> CHRIS O’SULLIVAN ET AL., SUPERVISED AND UNSUPERVISED PARENTAL ACCESS IN DOMESTIC VIOLENCE CASES: COURT ORDERS AND CONSEQUENCES 33 (Mar. 2006), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/213712.pdf>.

<sup>72</sup> *Id.*

<sup>73</sup> Pub. L. No. 106-386 § 1301; Pub. L. No. 109-162 § 306.

<sup>74</sup> *Assistance for 16.527: Supervised Visitation, Safe Havens for Children (FY 2000-2006)*, FEDSPENDING.ORG, [http://www.fedspending.org/faads/faads.php?&sortby=r&record\\_num=all&detail=-1&datatype=T&reptype=a&database=faads&cfda\\_program\\_num=16.527](http://www.fedspending.org/faads/faads.php?&sortby=r&record_num=all&detail=-1&datatype=T&reptype=a&database=faads&cfda_program_num=16.527). “Funding for the provisions of VAWA is subject to congressional review every fiscal year, a power which Congress has, sadly, sought to wield freely. For example, in 2004, funding for VAWA’s supervised visitation centers, educational and training programs, rural and campus violence prevention initiatives, and grants to encourage arrests was less than the authorized amounts, and successive decreases are projected for fiscal years 2005 and 2006.” *Defense of Others and Defenseless “Others,”* 17 YALE J.L. & FEMINISM 327, 330 n.107 (2005).

<sup>75</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>76</sup> See *Lassiter v. Dep’t of Soc. Servs. of Durham County*, 452 U.S. 18 (1981) (no automatic right to civil counsel in termination of parental rights case). In comparison, “[i]n approximately two-thirds of the [Council of Europe] countries, the right to counsel covers a wide spectrum of civil matters [including] family law, housing, consumer and debt cases, personal injury claims, public benefits, [and] employment and labor law” as a result of the European Court of Human Rights’ ruling in *Airey v. Ireland*, 32 Eur. Ct. HR (ser. A) (1979). Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World?*, 15 TEMP. POL. & CIV. RATS. L. REV. 769, 779 (2006).

<sup>77</sup> NORTHEASTERN UNIV. SCH. OF LAW, PROGRAM ON HUMAN RIGHTS AND THE GLOBAL ECONOMY, IN THE INTERESTS OF JUSTICE: HUMAN RIGHTS AND THE RIGHT TO COUNSEL IN CIVIL CASES (Dec. 2006) [hereinafter IN THE INTERESTS OF JUSTICE], available at <http://www.slaw.neu.edu/clinics/RightToCounsel.pdf>.

<sup>78</sup> See, e.g., Pub. L. No. 106-36 § 1201; Pub. L. No. 109-162 § 103.

<sup>79</sup> See *The Continued Importance of the Violence Against Women Act: Hearing Before the Committee on the Judiciary*, 111th Cong. (June 10, 2009), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg56212/pdf/CHRG-111shrg56212.pdf>; *The Increased Importance of Violence Against Women Act in a Time of Economic Crisis: Hearing Before the Committee on the Judiciary*, 111th Cong. (May 5, 2010), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66328/html/CHRG-111shrg66328.htm>.

<sup>80</sup> See *POSTPONEMENT—The Importance of VAWA’s Transitional Housing Programs to Victims of Domestic and Sexual Violence*, <http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da16492bc>.

30. The priorities of the United States Department of Justice Office on Violence Against Women in the 2011 reauthorization are to provide more resources to programs on violence prevention (especially exposure of children to violence, teen dating violence, homicide prevention, and bystander intervention training) and sexual assault (especially criminal justice).

### III. DOMESTIC VIOLENCE AND THE CRIMINAL JUSTICE SYSTEM

#### A. Background

31. In recent decades, the public attitude in the United States toward state intervention in the home has undergone a significant change. As a result, federal, state, and local legislation has introduced certain legal remedies to domestic violence victims and, in many instances, introduced policies and structures in police agencies designed to respond to the domestic violence epidemic.<sup>81</sup>
32. Legal remedies, however, generally remain restricted to state and local courts. Recent Supreme Court rulings have dramatically limited the federal causes of action available to survivors of domestic violence.<sup>82</sup> At the local level, however, victims may turn to the judicial system and law enforcement officials with an expectation that the state will act to protect them from violence. State and local officials are expected to rely on civil protection orders, mandatory arrest policies, and criminal prosecutions to ensure victims' safety (though, as discussed below, such mechanisms are often not used or used inappropriately by such officials).
33. Civil protection orders are an essential means of protecting battered women. In an effort to require police to effectively respond to domestic violence, states across the country began as early as 1970 to adopt legislation authorizing judges to issue civil restraining orders (also known as orders of protection) to victims of domestic violence who demonstrate that they fear future physical harm from their abuser.<sup>83</sup> Today, all fifty states have passed such legislation.<sup>84</sup> Civil protection orders, which vary from state to state, often order the respondent to stay away from the petitioner, not contact her, move out of the petitioner's residence, follow custody and visitation orders, and pay child support if children are involved. Violators of such orders are subject to civil contempt as well as criminal penalties.
34. Additionally, twenty-one states and the District of Columbia have enacted legislation that requires police officers to make an arrest when there is probable cause to believe that someone has engaged in specified

<sup>81</sup> "According to the 1990 Law Enforcement Management and Administrative Statistics Survey (LEMAS), 93% of the large local police agencies (agencies with more than 100 officers) and 77% of the sheriffs' departments have written policies concerning domestic disturbances. In addition, 45% of the large local police agencies and 40% of the sheriffs' departments have special units to deal with domestic violence." MARIANNE W. SAWPITS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE SELECTED FINDINGS: DOMESTIC VIOLENCE: VIOLENCE BETWEEN INTIMATES 5, NCJ-149259 (Nov. 1994), available at [bjs.ojp.usdoj.gov/content/pub/pdf/vbi.pdf](http://bjs.ojp.usdoj.gov/content/pub/pdf/vbi.pdf).

<sup>82</sup> In addition to the *Gonzales* decision, in *United States v. Morrison*, 529 U.S. 598, 627 (2000), the Supreme Court struck down a narrow portion of the Violence Against Women Act that would have allowed for a federal civil rights cause of action to remedy domestic violence. In *DeShaney v. Winnebago Dep't of Soc. Servs.*, 489 U.S. 189 (1989), the Supreme Court found that the Due Process Clause of the Fourteenth Amendment does not provide a remedy when state actors fail to take reasonable measures to protect and ensure a citizen's rights against violation by private actors. See the Brief for New York Legal Assistance Group, et al. as Amici Curiae Supporting Jessica Gonzales, *Jessica Gonzales v. The United States*, Case No. 12-626, Inter-Am. Ct. H.R. (Oct. 22, 2008) [hereinafter Brief for New York Legal Assistance Group], for a full discussion of VAWA's implications.

<sup>83</sup> Carolyn N. Kop, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy,"* 11 S. CAL. INTERDIS. L. J. 361, 362 (2002) (clarifying that even though there are other reform policies such as implementing mandatory arrests or pro-arrest police procedures, creating domestic violence units in prosecutors' offices, and setting up treatment programs for abusive spouses, most states have adopted civil restraining orders as the remedy). See generally Leigh Goodmark, *Law Is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. NO. REV. 7, 10-11 (2004). Protective orders typically enjoin a respondent from harming or contacting the holder of the order and can also address child custody and visitation, possession of a joint residence, payment of child or spousal support, etc.

<sup>84</sup> Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1858 (2002); ABA COMM'N ON DOMESTIC VIOLENCE, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOS) BY STATE (June 2007), available at <http://www.abanet.org/domviol/docs/DVCPChartJune07.pdf>.

domestic violence crimes or has violated a restraining order.<sup>85</sup> These “mandatory arrest laws” (also sometimes referred to as “pro-arrest laws”) were intended to reduce police discretion in responding to domestic violence.<sup>86</sup> Some of these mandatory and pro-arrest policies were adopted in response to VAWA, which specifically required these policies as a condition for various grants to state and local governments.<sup>87</sup> They also illustrate public frustration with the inadequacy of police response and encourage police to treat domestic violence as a crime.

35. Criminal prosecution constitutes another tool for ensuring victims’ safety. Many state prosecutors follow no-drop or mandatory prosecution policies in an effort to increase the prosecution of domestic violence offenders.<sup>88</sup> These policies appear to result in an increase in prosecution and conviction rates and a decrease in prosecutorial diversion and deferred adjudication.<sup>89</sup> If permitted to proceed in court, however, domestic violence case dispositions often fall far short of a conviction, instead opting for unproven treatment programs instead of sanctions for the criminal conduct.<sup>90</sup> Some batterers are sent to diversion programs, meaning charges will be dismissed and they will not be found guilty if they comply with minimal restrictions.<sup>91</sup> Since there is usually no monitoring to determine batterer compliance with court mandates, absent arrest, the batterer can flaunt to the victim his disobedience of court orders.<sup>92</sup>
36. While mandatory arrest laws and the criminal justice system are important tools in many respects for preventing domestic violence and protecting victims, they are also viewed by many advocates – particularly those from minority and immigrant communities – with skepticism. Many women of color, including African Americans, Hispanics, and other racial minorities, are particularly reluctant to turn to the police and courts as a source of protection from violence because these institutions have traditionally been viewed as oppressive rather than protective of minorities and immigrants.<sup>93</sup> Law enforcement’s historic relationship with poor communities of color has been characterized by excessive use of force and brutality against men, women, and children, mass incarceration of young men of color, and growing numbers of incarcerated women of color.<sup>94</sup> Minority women are also arrested more often than white women when the police arrive at the scene of a domestic violence incident.<sup>95</sup> In particular, police are

<sup>85</sup> ANDREW R. KLEIN, *THE CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE* 95 (2003); *see also* NEAL MILLER, INST. FOR LAW & JUSTICE, *DOMESTIC VIOLENCE: A REVIEW OF STATE LEGISLATION DEFINING POLICE AND PROSECUTION DUTIES AND POWERS* 28 n.86 (June 2004), *available at* <http://www.ilj.org/publications> (citing ALASKA STAT. § 18.65.530; ARIZ. STAT. ANN. § 13-3601(B); COLO. REV. STAT. § 18-6-803.6; CONN. GEN. STAT. ANN. § 6b-38b(a); D.C. CODE ANN. § 16-1031; IOWA CODE ANN. §§ 236.12(2); KANS. STAT. ANN. § 22-307(b)(1); LA. REV. STAT. ANN. § 46-2140; MISS CODE ANN. § 99-3-7 (3); NEV. REV. STAT. § 171.137; N.J. STAT. ANN. 2C: 25-21; N.Y. CRIM. PROC. LAW § 140.10(4)(c); OHIO REV. CODE ANN. §§ 2935.032(A)(1)(a), 2935.03 (B)(1) (discretionary); OR. REV. STAT. § 133.055(2)(a); R.I. GEN. LAWS §12-29-3; S.C. CODE ANN. § 16-25-70(B); S.D. CODIFIED LAWS ANN. § 23A-3-2.1; UTAH CODE ANN. § 77-36-2.2(2); VA. CODE ANN. §19.2-81.3; WASH. REV. CODE ANN. §10.31.100(2)(c); WIS. STAT. ANN. § 968.075(2); MO. REV. STAT. § 455.085.1).

<sup>86</sup> Some research shows that, in practice, these laws do not curb police discretion entirely. Despite a clear call from many state legislatures that police must arrest the abuser when responding to a report of domestic violence, judicial interpretation of these statutes has tended to tolerate police discretion. *See* Carole Kennedy Chaney & Grace Hall Saltzstein, *Democratic Control and Bureaucratic Responsiveness: The Police and Domestic Violence*, 42 AM. J. POL. SCI. 745, 749 (1998) (citing research findings that, despite mandatory arrest policies, police departments and officers enjoy considerable discretion in responding to domestic violence complaints). For example, in *Donaldson v. City of Seattle*, the court held that police do not need to seek out and arrest an abuser if he has already fled the scene of the abuse by the time the police arrive. 831 P.2d. 1098, 1104 (Wash. Ct. App. 1992); *see also* ANDREW R. KLEIN, *THE CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE* 95 (2004).

<sup>87</sup> *See generally* Goodmark, *supra* note 83.

<sup>88</sup> ERICA L. SMITH ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT STATE COURT PROCESSING OF DOMESTIC VIOLENCE CASES, NCJ 214993, at 3 (Feb. 2008), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/scpdvc.pdf>.

<sup>89</sup> *Id.*

<sup>90</sup> *See* Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1526 (1998) (noting batterer’s counseling programs are more typical).

<sup>91</sup> Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. REV. 79, 104 (1994).

<sup>92</sup> Emily J. Stack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1726 (2004).

<sup>93</sup> Natalie J. Sokoloff & Ida Dupont, *Understanding Violence Against Marginalized Women in Diverse Communities*, in *DOMESTIC VIOLENCE AT THE INTERSECTIONS OF RACE, CLASS, AND GENDER: CHALLENGES AND CONTRIBUTIONS TO UNDERSTANDING VIOLENCE AGAINST MARGINALIZED WOMEN IN DIVERSE COMMUNITIES* 48 (2005), *available at* <http://vaw.sagepub.com/cgi/content/abstract/11/1/38>; *see also* URBAN JUSTICE CTR., *RACE REALITIES IN NEW YORK CITY* (2007).

<sup>94</sup> *Id.*

<sup>95</sup> Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J. L. & FEMINISM 75 (2008); Donna Coker, *Special Issue Feminism And The Criminal Law: Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF.

more likely to arrest African American women due to stereotypes of them as overly aggressive.<sup>96</sup> Unfortunately, many advocates argue, “many of the women most in need of government aid are made more vulnerable by these very interventions.”<sup>97</sup>

37. The experiences of immigrant women of color are further complicated by their realities as immigrants in the United States. Many immigrant women are unaware of governmental services available to victims of domestic violence. The government has done little to communicate about domestic violence or the remedies available to immigrant communities and individuals. Moreover, due to the rising anti-immigrant sentiment in the country, the historic deportations of Latinos, Latinas, Haitians, and other immigrants of color, and the government’s post-9/11 targeting of South Asians, Arabs, and Muslims, many immigrant women fear that they or their family members will be deported or will suffer criminal consequences as a result of reporting domestic violence to the police or the courts. This fear is especially acute when the batterer is the primary breadwinner for a family or couple and where the victim has children. Finally, even when immigrant women seek to access governmental services, the police and the court system often do not provide sufficiently multilingual services that would allow them to communicate meaningfully with police and judges. Batterers, who often speak English with greater proficiency than their female partners, frequently exploit the government’s failure to provide multilingual police services by framing the victim as the batterer to law enforcement, resulting in the victim’s inability to file a police report against her batterer, and sometimes resulting in her arrest.<sup>98</sup>

## B. Prevalence, effects, and consequences

38. Most domestic violence victims do not report the abuse and do not seek police assistance. According to a 2000 Department of Justice study, only about one-quarter of women who were physically assaulted by an intimate partner reported the incident to the police.<sup>99</sup> Fifty-two percent of women who were stalked by an intimate partner reported the stalking to the police.<sup>100</sup> Less than one-fifth of women raped by an intimate partner reported their rape to the police.<sup>101</sup> Women who do not report IPV to the police commonly list three main reasons for keeping silent: the private nature of the relationship, their fear of retaliation from their abuser, and their feeling that the police would not respond adequately to the abuse.<sup>102</sup>
39. While judicial orders of protection do not eliminate the risk of continuing abuse or homicide, they may decrease it.<sup>103</sup> Reports indicate some 86% of the women who receive protection orders state the abuse either stopped or was greatly reduced.<sup>104</sup> One study found, however, that among sixty-five abused women applying and qualifying for a protection order against a sexual intimate, only half of the women actually received the order.<sup>105</sup> Another study found that 60% of protective orders were violated in the

CRIM. L. REV. 801, 810-811 (2001); E. Assata Wright, *Not a Black and White Issue: For Battered and Abused Latinas and Black Women, Dialing 911 May Be Risky Business*, ON THE ISSUES, Jan. 31, 1998, at 42.

<sup>96</sup> Goodmark, *supra* note 95. See generally Wright, *supra* note 95, at 42.

<sup>97</sup> See *id.* at 42.

<sup>98</sup> As described in section VII, Indian domestic violence victims also have a complicated relationship with the criminal justice system and limited legal remedies. For a full discussion of the impact of recent Supreme Court rulings on American Indian and Alaska Native women, see Brief for Amicus Curiae Sacred Circle, National Resource Center to End Violence Against Native Women et al. supporting Jessica Gonzales, *Jessica Gonzales v. The United States*, Case No. 12.626, Inter-Am. Ct. H.R. (Oct. 22, 2008) [hereinafter Brief for Amici Curiae Sacred Circle].

<sup>99</sup> TJADEN & THOENNES, *supra* note 2; LAWRENCE A. GREENFELD ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS FACTBOOK: VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 38 NCJ 167237 (Mar. 1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf>.

<sup>100</sup> TJADEN AND THOENNES, *supra* note 2.

<sup>101</sup> *Id.*

<sup>102</sup> GREENFELD ET AL., *supra* note 99.

<sup>103</sup> ABA COMM’N ON DOMESTIC VIOLENCE, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES (2007), available at <http://www.abanet.org/domviol/docs/StandardsCommentary.pdf>.

<sup>104</sup> James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Response*, 35(4) CRIME, LAW & SOCIAL CHANGE 363 (2001).

<sup>105</sup> J. Gist et al., *Women in Danger: Intimate Partner Violence Experienced by Women That Qualify and Do Not Qualify for a Protection Order*, 19 BEHAV. SCI. & L. 1 (2001); see also REPORT TO THE CALIFORNIA ATTORNEY GENERAL, KEEPING THE PROMISE: VICTIM SAFETY AND BATTERER ACCOUNTABILITY 35-36 (2005); Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U.J. GENDER SOC. POL’Y & L. 499, 509 (2003).

year after issue and nearly a third of women with protective orders reported violations involving severe violence and injury to themselves.<sup>106</sup>

40. The inadequate treatment of domestic violence cases in court begins in the pleading stage. Battered women who come to courthouses seeking a judicial remedy are often asked to fill out standardized forms, sometimes with the help of a clerk or lay advocate. While these forms may increase efficiency and make the court experience less frightening, they also limit the ability of women to tell their full story with specificity. Many immigrant survivors face an additional disadvantage in the pleading stage because they must rely on translators and interpreters to tell their stories, and even the best interpreters can make mistakes that affect the survivors' credibility.<sup>107</sup>
41. Hearings on petitions for protection orders are too often cursory and curtailed by courts.<sup>108</sup> These quick summary proceedings have mixed consequences for survivors and are also controversial from a due process/defendants' rights perspective. On the one hand, they allow petitioners to access judicial remedies without the time and expense of a full trial.<sup>109</sup> On the other, such quick hearings do not permit petitioners to fully describe the incidents that brought them to court.<sup>110</sup> During these truncated proceedings, judges sometimes refuse to hear crucial evidence.<sup>111</sup> Courts may categorically refuse to hear some issues central to a petitioner's case, like child support, or may issue a boilerplate order without considering the unique facts of the case.<sup>112</sup> Such truncated hearings are especially difficult for victims who need interpreters (often immigrant women), as the process of interpreting itself takes up time, eating away the precious few minutes that a victim may have to tell her story. Survivors also face judicial pressures to resolve their issues outside of the protection order process. Judges have sometimes asked that battered women file separate protection order, divorce, and custody actions, further confusing and frustrating petitioners, many of whom appear *pro se*.<sup>113</sup> In addition, judges often encourage survivors to negotiate with their batterers, even though many studies have documented the ways in which it is undesirable—and perhaps even damaging—for the parties to mediate in domestic violence cases.<sup>114</sup>

<sup>106</sup> U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS NCJ 171666, at 50 (July 1998), available at [www.ncjrs.gov/pdffiles/171666.pdf](http://www.ncjrs.gov/pdffiles/171666.pdf).

<sup>107</sup> Women Empowered Against Violence (WEAVE) clients have worked with interpreters who interpolate what they think would be helpful, whether or not the survivor has said something, so petitions end up bearing little resemblance to the petitioner's experience.

<sup>108</sup> For example, the average time in New Jersey for hearings was five minutes and forty-five seconds. Lisa Memoli & Gina Plotino, *Enforcement or Pretense: The Courts and the Domestic Violence Act*, 15 WOMEN'S RTS. L. REP. 39, 47 (1993). In Massachusetts, courts allotted as little as an average of two minutes for a hearing. Ptacek, *supra* note 104 (reporting that in some courts studied in Massachusetts, a judge disposed of eight consecutive civil protection order hearings in less than eighteen minutes).

<sup>109</sup> Deborah M. Weismann, *Gender-Based Violence as Judicial Anomaly: Between "The Truly Nation and the Truly Local,"* 42 B.C. L. REV. 1081 (2001).

<sup>110</sup> See Symposium, *Women, Children, and Domestic Violence: Current Tensions and Emerging Issues*, 27 FORDHAM URB. L.J. 567, 590 (2000) (comments from Leah Hill describing the "quieting of violence" where judges refused to allow domestic violence victims to describe the incidents fully). Indeed, these summary proceedings create controversy regarding the defendant's due process rights.

<sup>111</sup> See Memoli & Plotino, *supra* note 108; Ptacek, *supra* note 104, at 161.

<sup>112</sup> See, e.g., *V.C. v. H.C., Sr.*, 257 A.D.2d 27, 31 (N.Y. App. Div. 1999) (trial court refusing to consider exclusive use of the residence in a protection order hearing); see also Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: an Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 195, 206 (1993) (noting that judges believe that women should be satisfied with relief limited to prohibiting further acts of violence and that other issues, including custody, can be taken care of in a divorce proceeding); Bernadette Dunn Sewell, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 1011 (1989) (noting that judges often believe that domestic violence is an isolated event best handled by another court or social service agency).

<sup>113</sup> Catherine F. Klein & Leslye E. Roof, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993). These separate proceedings are unnecessary hurdles for any petitioner. *Pro se* litigants have particular difficulty negotiating these separate proceedings, compounded by the fact that many of them fear facing their batterer face-to-face in court. *Id.*

<sup>114</sup> See generally Kelly Rowe, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855 (1985). Although summary proceedings and judicial emphasis on out-of-court resolutions have allowed crowded state dockets to meet the increasing demand for protection orders, this judicial treatment of domestic violence cases may add to the damaging perception that these claims are not worthy of the courts' attention. Weismann, *supra* note 109, at 1091-93. Especially for women of color and immigrant women, this perception leaves survivors feeling increasingly helpless and unable to access remedies against their batterers. Courts' current treatment of domestic violence cases also misses an opportunity for judicial education about the complications surrounding domestic violence, as well as an opportunity for appropriate and uniquely tailored relief.

42. Moreover, police often fail to respond to reports of domestic violence and/or restraining order violations, further hindering a battered woman's search for protection and justice. Nationally, victims of domestic violence report that in 75% of cases law enforcement takes longer than five minutes from the time of the call for service.<sup>115</sup> In 10% of cases nationwide, police failed to respond at all to reports of domestic violence.<sup>116</sup> One New York City woman, for instance, reported the violation of her protective order thirteen times before the police finally came and arrested her abuser.<sup>117</sup>
43. Even police officers who do respond to a victim's call often fail to treat the abuse as criminal and thus often do not arrest perpetrators. Thirty percent of cases where victims request police assistance fail to result in an official report.<sup>118</sup> The National Violence Against Women Survey examined arrest rates by offense and found consistently that domestic violence assailants were arrested or detained less than half the time: in 47% of rape cases, 36% of physical assault cases, and 28% of stalking cases.<sup>119</sup> Indeed, police are still less likely to make an arrest when a husband feloniously assaults his wife than in other felony assault cases.<sup>120</sup> The police are also less likely to arrest in cases involving poor, non-white, and urban-resident battered women than in cases involving white, wealthier, and suburban-resident battered women.<sup>121</sup> Indeed, these low arrest rates might exacerbate the prevalence of domestic violence, given that available data indicates men arrested for assaulting their female partners are approximately 30% less likely to assault their partners again than men who are not arrested.<sup>122</sup>
44. Additionally, many officers encourage informal resolution between the parties, urging the victim to "work it out" with the abuser.<sup>123</sup> In one study, 40% of police departments explicitly encouraged mediation, and one half had no formal policy on domestic violence.<sup>124</sup> A national survey shows that police attempts at mediation or separation of the parties so they can "cool off" is also common.<sup>125</sup> Statistics show that when police do respond to a violation of a protective order by arresting the offender, they reduce the risk of re-offense.<sup>126</sup>
45. Mandatory arrest laws have increased the rates of arrests. For example, before the District of Columbia adopted a mandatory arrest policy, police arrested abusers in only 5% of domestic violence cases.<sup>127</sup> After adoption of a mandatory arrest policy, police arrested abusers in 41% of cases.<sup>128</sup> After the adoption of a mandatory arrest policy in New York City, felony domestic violence arrests increased by 33% and arrests for violation of protection orders increased by 76%.<sup>129</sup> Nonetheless, not every jurisdiction has a mandatory arrest policy, and even those with such a law on the books do not always yield effective, consistent practices. Despite a mandatory arrest policy in the District of Columbia, in the above-mentioned 2004 survey, 62% of victims surveyed reported that responding police officers took reports; 7% of victims were arrested with the batterer; 4% were arrested while their abusers were not;

<sup>115</sup> GREENFELD ET AL., *supra* note 99.

<sup>116</sup> *Id.*

<sup>117</sup> MARY HAVILAND ET AL., URBAN JUSTICE CTR., THE FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1995: EXAMINING THE EFFECTS OF MANDATORY ARREST IN NEW YORK CITY 36 (2001), available at [www.urbanjustice.org/pdf/publications/FamilyViolence/fvpreport.pdf](http://www.urbanjustice.org/pdf/publications/FamilyViolence/fvpreport.pdf).

<sup>118</sup> GREENFELD ET AL., *supra* note 99, at 20.

<sup>119</sup> TADEN AND THOENNES, *supra* note 2.

<sup>120</sup> Edem F. Avakame & James J. Fyfe, *Differential Police Treatment of Male-on-Female Spousal Violence*, 7 VIOLENCE AGAINST WOMEN 22, 35-6 (2001).

<sup>121</sup> *Id.*

<sup>122</sup> CHRISTOPHER MAXWELL ET AL., NAT'L INST. FOR JUSTICE, RESEARCH IN BRIEF, THE EFFECT OF ARREST ON INTIMATE PARTNER VIOLENCE: NEW EVIDENCE FROM THE SPOUSE ASSAULT REPLICATION PROGRAM 9 (July 2001).

<sup>123</sup> Machaela M. Hector, Comment, *Domestic Violence As a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 650 (1997).

<sup>124</sup> *Id.*

<sup>125</sup> See Hector, *supra* note 123, at 649; Donaldson, 831 P.2d at 1105 (Wash. Ct. App. 1992) ("[A] common police response to domestic violence calls was to treat the matter as a family quarrel, try to mediate the situation and walk the abuser around so he could 'cool off.'").

<sup>126</sup> Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1854 (2002); SUSAN L. KIBITZ ET AL., NATIONAL CTR. FOR STATE COURTS, CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE (1997).

<sup>127</sup> U.S. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, U.S. DEP'T OF JUSTICE FINAL REPORT 10-26 (1984).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

and 29% reported the police were reluctant to arrest the batterer.<sup>130</sup> In one California jurisdiction, where the police department has a policy requiring arrest, officers failed to make arrests in at least 30% of cases where visible injuries were present.<sup>131</sup>

46. Many advocates have expressed concerns about mandatory arrest laws. Apart from the low arrest rate of abusers following a police report of domestic violence, another troubling trend is the practice of “dual arrest,” whereby the victim is arrested alone or alongside her abuser. In jurisdictions with mandatory arrest policies, police will often “either throw up their hands, arrest both parties and leave it to the courts to sort out, or choose to arrest the woman because she may appear to be the aggressor to the untrained eye.”<sup>132</sup> Research shows that most of the women who were arrested following reports of domestic abuse were acting in self-defense.<sup>133</sup> One study suggests the dual arrest rate for IPV is only about 2%,<sup>134</sup> but other sources indicate that in some areas women make up almost a quarter of domestic violence arrestees.<sup>135</sup> These practices are particularly harmful to battered women.
47. Problems for the battered woman do not end with the arrest; she also faces the prospect of having her children removed by child protective services, being charged inappropriately, being pressured to plea bargain, being wrongfully convicted, having her arrest and conviction history used against her in subsequent custody proceedings, losing her job, and having the batterer use the threat of criminal prosecution to continue to control her.<sup>136</sup> These prospects can be daunting to all women, but particularly to women of color and immigrant women, who are already disproportionately affected by domestic abuse. Police, therefore, must respond appropriately to domestic violence calls and follow mandatory arrest policies by arresting the abuser, both to ensure public safety and to avoid exposing the victim to additional harm.
48. Another problem exists where police officers technically do respond, but fail to conduct adequate investigations or keep appropriate records, thereby harming the victim’s chances of obtaining meaningful protection. Although the police do take official reports in the majority of reported incidents, nationally they are more likely to take reports when an incident involves strangers and not intimate partners.<sup>137</sup> As reported in a 2002 survey of survivors in Santa Rosa, California, in one-third of the cases, the officers did not ask victims about the presence of firearms.<sup>138</sup> In almost half of the cases, officers did not take photographs, even though victims had visible injuries.<sup>139</sup> In 27% of the cases, officers did not ask victims about the perpetrator’s history of abuse.<sup>140</sup> In no case in which the victim needed an interpreter did the officer provide one.<sup>141</sup> A victim’s inability to communicate with the police officers clearly impedes evidence gathering and the creation of records. Failing to create and maintain records and gather evidence has obvious implications for holding abusers accountable and permitting survivors to access legal remedies.

<sup>130</sup> Survey conducted by Survivors and Advocates for Empowerment (SAFE), Washington, DC (2004).

<sup>131</sup> *Online Handbook: Advocating for Women in the Criminal Justice System in Cases of Rape, Domestic Violence and Child Abuse*, WOMEN’S JUSTICE CTR., [http://www.justicewomen.com/handbook/part1\\_problem.html](http://www.justicewomen.com/handbook/part1_problem.html) (last visited Jan. 13, 2011).

<sup>132</sup> Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1680 (2004); accord Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN’S L.J. 339, 344 (1995); see also Goodmark, *supra* note 83, at 23.

<sup>133</sup> Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 831 (2001); Joan Zorza, *Must We Stop Arresting Batterers? Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 980 (1994).

<sup>134</sup> DAVID HIRSCHTEL ET AL., EXPLAINING THE PREVALENCE, CONTEXT, AND CONSEQUENCES OF DUAL ARREST IN INTIMATE PARTNER CASES (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf>.

<sup>135</sup> Holly Maguigan, *Wading Into Professor Schneider’s “Murky Middle Ground” Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL’Y & L. 426, 442 (2003).

<sup>136</sup> Goodmark, *supra* note 83, at 23.

<sup>137</sup> Sawpits, *supra* note 81.

<sup>138</sup> Women’s Justice Center, *supra* note 131.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

49. Inadequate recordkeeping and reporting of domestic violence-related crimes are also commonplace within police departments.<sup>142</sup> Accurate statistics on police response to domestic violence are difficult to obtain, if they exist at all. An open records request involving a representative sample of police departments across the United States has revealed that very few police departments keep specific or disaggregated data on domestic violence arrests or complaints.<sup>143</sup> Domestic violence crimes are also consistently miscategorized or undercategorized by officers responding to calls for service.<sup>144</sup>
50. Criminal prosecution statistics reveal a disturbing trend whereby alleged abusers are rarely prosecuted. In a 2002 Department of Justice study of sixteen large urban counties, about half of domestic violence offenders facing prosecution were convicted; of those convicted, 80% were sentenced to jail or prison.<sup>145</sup> Even so, only 18% of those defendants were convicted of felonies.<sup>146</sup> Conviction rates vary drastically depending on the location, however, with some counties reporting a 17% conviction rate, and others reporting an 89% conviction rate.<sup>147</sup> Such statistics create a belief among domestic violence victims that no recourse exists for them and that there will be no punishment for their abusers.
51. The phenomena discussed above concerning the inadequate response to domestic violence by our criminal justice system has particularly harmful effects on minority and immigrant populations. Women of color may be reluctant to report domestic violence or sexual assault because of negative and discriminatory interactions with law enforcement and the court system, or due to sexually discriminatory treatment in their communities by law enforcement and the courts.<sup>148</sup> Immigrant women may also fear deportation as a consequence of calling the police. One study in Arizona found African Americans were more likely to be sentenced to prison than whites, even where general statistics revealed that domestic violence perpetrators were generally less likely to be convicted than those charged with the same crime without a domestic violence designation.<sup>149</sup> Another study found that 66% of domestic violence survivors arrested along with abusers (dual arrest cases) or arrested as a result of a complaint lodged by their abuser (retaliatory arrest cases) were African American or Latina.<sup>150</sup>
52. Given the potentially grim consequences of inadequate assistance to abuse victims and prosecutors' monopoly on access to remedies in criminal court, it is unconscionable to condone the dearth of safety-enhancing sentences. Yet, sentences—even for recidivist batterers—remain relatively lenient.<sup>151</sup> The results of those light dispositions may greatly endanger victims.<sup>152</sup> Problematic judges disregard precedent, misuse evidentiary rules, and block admissible expert testimony, among other troublesome practices.<sup>153</sup>

<sup>142</sup> See, e.g., BETTY CAPONERA, INCIDENCE AND NATURE OF DOMESTIC VIOLENCE IN NEW MEXICO V: AN ANALYSIS OF 2004 DATA FROM THE NEW MEXICO INTERPERSONAL VIOLENCE DATA CENTRAL REPOSITORY (June 2005).

<sup>143</sup> In November 2005, the American Civil Liberties Union submitted open records requests to thirteen representative police departments across the United States asking for data and statistics pertaining to domestic violence crimes committed in the departments' jurisdictions during the years 1999-2005. To date, eight police departments have responded.

<sup>144</sup> Telephone Conversation between Counsel for Petitioner and Kim Brooks, Legal Advisor to the Baton Rouge Police Department (Nov. 29, 2005).

<sup>145</sup> ERICA L. SMITH & DONALD J. FAROLE, JR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT STATE COURT PROCESSING STATISTICS: PROFILE OF INTIMATE PARTNER VIOLENCE CASES IN LARGE URBAN COUNTIES NCJ 228193, at 1 (Oct. 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pipvcluc.pdf>.

<sup>146</sup> *Id.* at 2.

<sup>147</sup> *Id.* at 6.

<sup>148</sup> Coker, *supra* note 133, at 831; see THE PA. SUPREME COURT COMM. ON RACIAL & GENDER BIAS IN THE JUSTICE SYSTEM, REPORT ON ELIMINATING RACIAL AND GENDER BIAS FROM PENNSYLVANIA'S COURTS 548 (Mar. 3, 2003), available at <http://216.104.174.12/bias.shtml> [hereinafter PA Court Report]; see also Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 819-20 (2000).

<sup>149</sup> DAVID WELLS, ARIZ. COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE PROSECUTIONS: INEQUALITIES BY GENDER AND RACE PERPETUATED IN ARIZONA 1 (Sept. 2003), available at <http://www.asu.edu/news/research/ACADVReport.PDF>. Imprisonment as remedy is not the position advocated for in this report. In fact, with recidivism rates as high as 32%, incarceration is clearly inadequate and often inappropriate. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DOMESTIC AND SEXUAL VIOLENCE DATA COLLECTION: A REPORT TO CONGRESS UNDER VIOLENCE AGAINST WOMEN ACT (July 1996), available at <http://www.ncjrs.gov/pdffiles/allodom.pdf>.

<sup>150</sup> Mary Haviland et al., *supra* note 117, at 28-29.

<sup>151</sup> Cynthia D. Cook, *Triggered: Targeting Domestic Violence Offenders in California*, 31 MCGEORGE L. REV. 328, 333 (2000).

<sup>152</sup> See Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 234 (2003).

<sup>153</sup> See Erica Beecher-Monas, *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 LOY. L. REV. 81 (2001).

### C. Law and policy problems

53. Although IPV is now proscribed by criminal law, the legal system's indifference is characterized by low prosecution and conviction rates.<sup>154</sup> One factor contributing to low conviction rates is anachronistic evidentiary rules that exclude prior domestic violence acts within the same relationship.<sup>155</sup> Because prosecutors are not permitted to introduce key relevant evidence at trial, securing a conviction has become even more difficult.

#### i. Confrontation Clause problems

54. Another evidentiary problem emerges in the recent practice of evidence-based prosecution.<sup>156</sup> For those jurisdictions that adopted the practice, evidence-based prosecution had improved the state's ability to hold perpetrators responsible for their family violence crimes<sup>157</sup> while taking victims out of the danger loop. However, in the 2004 case of *Crawford v. Washington*, the United States Supreme Court decided that if testimonial statements are to be admitted at trial without the in-court testimony of the declarant, the accused must have a prior opportunity to confront the declarant *and* that witness must be unavailable to testify.<sup>158</sup> Therefore, if a woman refuses to testify because she is afraid of seeing her abuser in the courtroom, the case might be dismissed on the grounds of the abuser's right to confront witnesses. As a result of *Crawford* and its progeny, *Davis v. Washington* and *Hammon v. Indiana* (decided together)<sup>159</sup> and *Giles v. California*,<sup>160</sup> domestic violence offenders have increased their witness tampering and intimidation because they are often rewarded with case dismissal due to the victim's refusal to testify in court.<sup>161</sup> No category of prosecutions has been more severely hampered by the *Crawford*, *Davis* and *Giles* cases than those involving domestic violence.<sup>162</sup> Because they receive so little state assistance to combat prolific witness tampering, 80–90% of abuse victims are unwilling to testify at trial and may have their cases dismissed on the grounds of the Confrontation Clause.<sup>163</sup>

55. Criminal prosecutions rarely lead to felony sanctions against batterers, creating a culture of impunity that further imperils domestic violence victims. The *Crawford-Davis-Giles* cases increase victim danger on many fronts.<sup>164</sup> First, the primacy of live witness testimony provides heightened incentive for batterers

<sup>154</sup> See Hanna, *supra* note 90, at 1523–24.

<sup>155</sup> Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1465 (1996) (footnote omitted). As Professor Myrna Raeder has noted, "our criminal laws and evidentiary rules carry with them gender-biased views originating at a time when women's lives were devalued and the typical male perspective on domestic femicide was that the victim provoked her husband by her words or deeds."

<sup>156</sup> In response to the high numbers of domestic violence victims who are understandably afraid to take part in the court process, prosecutors in the early 1990s began focusing on comprehensive evidence collection to facilitate the trial going forward even without direct victim testimony. See Goodmark, *supra* note 83, at 17–18. Known as "evidence-based prosecution," this effort was premised on law enforcement officers procuring sufficient evidence in the course of their investigation to focus the court's attention on the batterer's criminal conduct, rather than the victim's absence, minimization, or recantation. In some jurisdictions, the practice emerged as the primary means by which prosecutors brought domestic violence cases forward, using hearsay exceptions such as excited utterances (Most states model their excited utterance statutes after the Federal Rule of Evidence 803(2), see, e.g., IND. R. EVID. 803(2) (defining "excited utterance" as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition")), or statements as to physical or mental condition, when the victim was not available to testify for the state. See FED. R. EVID. 803(3).

<sup>157</sup> See Goodmark, *supra* note 83, at 18.

<sup>158</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>159</sup> *Davis v. Washington*, *Hammon v. Indiana*, 547 U.S. 813, 832–33 (2006) ("This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall.")

<sup>160</sup> *Giles v. California*, 554 U.S. 353 (2008).

<sup>161</sup> Tom Lining, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857 (2009).

<sup>162</sup> Jeanine Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. CAL. L. REV. 213, 215 (2005); Tom Lining, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 281 (2006).

<sup>163</sup> Lining, *supra* note 162, at 281. ("Approximately eighty percent of accusers in domestic violence cases refuse to cooperate with the government at some point in the prosecution"); Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 3 (2002) (citing figure that 90% of domestic violence victims do not cooperate with prosecutors); Lisa Marie DeSancitis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 370 n.64 (1996).

<sup>164</sup> Lining, *supra* note 162, at 284–85.

to obstruct victim access to prosecutors and courts. Second, because *Davis* imposes a stringent “emergency only” standard of admissibility for victim statements, government agents may attempt to protract initial investigations. Third, in *Giles*, the Supreme Court held that, even if a batterer kills his victim, he can still keep her past statements out of the trial, pursuant to his confrontation rights, unless the state can prove his intent was to prevent her testimony.<sup>165</sup> Finally, some misguided prosecutors are now using material witness warrants to jail victims as a means of ensuring they will be present at trial.<sup>166</sup> These trends present ever-increasing obstacles that are often overwhelming enough to prevent victims from filing charges even when facing grave danger.<sup>167</sup>

56. Domestic violence victims thus face greater peril as a result of recent Supreme Court jurisprudence, and many of their hard won gains have been diminished. With new testimonial and cross-examination paradigms on the admissibility of hearsay statements in criminal cases, well-intentioned prosecutors are greatly hampered in their efforts to go forward when victims are too frightened to testify.<sup>168</sup>

## ii. Police discretion and immunity problems

57. This judicial accommodation of police discretion contradicts research showing that mandatory arrest policies benefit women fleeing domestic violence. In addition to contravening public support for policies that protect survivors, such accommodation dramatically weakens the protective capacity of civil protection orders and renders them a weak tool for remedying domestic violence. As discussed *supra*, without mandatory arrest policies (and sometimes, even with them), police fail to make arrests consistently. A purely local—as opposed to federal—judicial response to domestic violence contributes to the misperception of domestic violence as a strictly isolated occurrence.<sup>169</sup> Such responses “divest violence against women of its systemic character, and belie a common view that claims of gender-based violence are more anecdotal than structural, more idiosyncratic than institutional.”<sup>170</sup>
58. Immunity protections can also limit the judicial remedies available to survivors of domestic violence. Although widely criticized, the doctrine of inter-spousal tort immunity still exists in some jurisdictions. For example, in Georgia and Louisiana, an abused spouse is barred from bringing a tort claim against her abusive spouse.<sup>171</sup> Qualified immunity of state actors also poses a barrier: the governing statute, 42 U.S.C. § 1983, is applicable in all jurisdictions and prevents a survivor of domestic violence from bringing a suit against a governmental actor who made a mistake in enforcing or refusing to enforce her restraining

<sup>165</sup> *Giles*, 554 U.S. at 2687–88 (holding that the theory of forfeiture by wrongdoing is not an exception to the Sixth Amendment’s confrontation requirement because it was not an exception established by the Founders).

<sup>166</sup> See Tom Lining, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 787 (2005) (discussing the regrettable practice of jailing victims; one respondent to a recent survey of district attorneys’ offices noted, “[u]nfortunately, some of the victims have had to remain in custody until the trial, which is a terrible message we are sending to the victim, her children, the defendant and society” (internal quotation marks omitted)); Percival, *supra* note 162, at 241 (discussing harm to the accuser when prosecutor jails her to assure her attendance at the trial of the alleged batterer).

<sup>167</sup> See Tom Lining, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1366 (2005) (arguing that difficulties created by the Supreme Court’s new confrontation jurisprudence dissuade some victims from participating in criminal cases); Percival, *supra* note 162, at 241 (“Victims, particularly those already familiar with the criminal justice system, will begin to distrust prosecutors and the system and will be less likely to report future crime. Fear of prosecutors taking extreme measures could cause domestic violence advocates and shelters to advise victims against coming forward.”).

<sup>168</sup> See, e.g., David Feign, *Domestic Silence: The Supreme Court Kills Evidence-Based Prosecution*, SLATE (Mar. 12, 2004), <http://www.slate.com/id/2097041> (“The *Crawford* decision, by insisting on the right of an accused to confront the witness, rather than just a tape recording or police report, wipes away a judge’s ability to admit any of this evidence without the actual witness being subject to cross-examination.”).

<sup>169</sup> Weismann, *supra* note 109, at 1091–93.

<sup>170</sup> *Id.*

<sup>171</sup> See *Boblitz v. Boblitz*, 462 A.2d 506, 510 (Md. Ct. App. 1983) (noting that it was not until 1965 that courts began to depart from the rule stated in *Thompson*). Those still adhering to the rule include Georgia (see *Larkin v. Larkin*, 601 S.E.2d 487 (Ga. Ct. App. 2004)) and Louisiana (see *Hamilton v. Hamilton*, 522 So.2d 1356, 1359 (La. Ct. App. 1988)). Today, the doctrine is widely criticized. See *Bozman v. Bozman*, 830 A.2d 450, 466 (Md. 2003) (stating “[t]he majority of the States, we discovered, were of the view that the doctrine was outdated and served no useful purpose, that ‘there presently exists no cogent or logical reason why the doctrine of interpositional tort immunity should be continued’”).

order.<sup>172</sup> In order to bring a successful § 1983 claim, an abused woman would have to show that a state actor denied her a constitutional right.<sup>173</sup>

**iii. Lack of federal remedies and state bias**

59. Finally, the absence of federal judicial remedies may have a disparate impact on the development of standards affecting immigrant survivors seeking protection. In recent years, anti-immigrant rhetoric has increased so sharply throughout the United States that many people, including some in law enforcement, believe immigrants' access to the courts should be sharply limited.<sup>174</sup> As one scholar notes, "Judges who discriminate on the basis of immigration status reflect acceptance, consciously or otherwise, of a pervasive societal narrative that constructs an expanding notion of unworthiness and 'illegality' regarding undocumented immigrants. . . . Deeply ingrained and consistently reinforced conceptions of undocumented immigrants as 'illegal' shape the way they are perceived and treated."<sup>175</sup>
60. Congressional findings suggest a pervasive bias in various state justice systems against victims of gender-motivated violence<sup>176</sup> such that a woman victimized by domestic violence seeking judicial remedy faces further injustice. A Massachusetts study and New Jersey task force both found that racial, ethnic, and sexual preference biases were obstacles to seeking and receiving justice for survivors of domestic violence.<sup>177</sup> African American women victims of domestic violence are less likely to be believed by judges and jurors.<sup>178</sup> One study found that "women of color are often not seen as victims and thus do not receive appropriate attention" from judges and advocates involved in their cases, resulting in minimization and dismissal of their allegations of domestic abuse.<sup>179</sup>
61. Without federal causes of action available to survivors of domestic violence, these cases are being confined to over-burdened and underfunded state dockets, further discriminating against domestic violence victims and limiting the access of women of color and immigrant women to appropriate judicial remedies. Relegating domestic violence disputes to state dockets has logistical implications: state dockets have tighter schedules and less funding than do federal courts.<sup>180</sup> Litigating domestic violence disputes at the state level also has an important impact on judicial understanding of domestic violence; each jurisdiction adopts its own method of judicial education, as well as its own remedy.<sup>181</sup>

<sup>172</sup> See *Visconti & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1115 (10th Cir. 1991).

<sup>173</sup> *Id.* The holding in *Castle Rock* demonstrated how difficult it is to bring a cause of action successfully against a defendant acting under the color of state law. Nicole M. Queded, *Refusing to Remove an Obstacle to the Remedy: The Supreme Court's Decision in Town of Castle Rock v. Gonzales Continues to Deny Domestic Violence Victims Meaningful Recourse*, 40 AKRON L. REV. 391 (2007).

<sup>174</sup> See generally David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J. L. & POL'Y 45 (2005).

<sup>175</sup> *Id.* at 57.

<sup>176</sup> *United States v. Morrison*, 529 U.S. 598, 666 (2000) (citing S. Rep. No. 103-138, at 38, 41-42, 44-47 (1993); S. Rep. No. 102-197, at 39, 44-49 (1991); H. R. Conf. Rep. No. 103-711, at 385 (1994)).

<sup>177</sup> *Id.*

<sup>178</sup> Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 100 (2008).

<sup>179</sup> C. CUTHBERT ET AL., WELLESLEY CTR. FOR WOMEN, BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS 37 (2002). Study participants noted that low-income African American women are stereotyped as being aggressive, drug-abusing, and lacking in credibility.

<sup>180</sup> Weismann, *supra* note 102, at 1091-93.

<sup>181</sup> *Id.* This approach means that, for a battered woman in Connecticut, the only "long-term" protection order available to her lasts for just six months, while in neighboring New York, a protection order may be issued for up to five years. ABA COMM'N ON DOMESTIC VIOLENCE, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOS) BY STATE, (June 2007), available at <http://www.abanet.org/domviol/docs/DVCPOChartJune07.pdf>. In Maryland, the survivor may have her hearing before a judge who has not been trained in the unique dynamics of domestic violence. See, e.g., Raymond McCaffrey, Dan Morse & Daniel de Vise, *Slaying Suspect's Wife Warned of Risk to Children: Md. Courts Found Insufficient Threat*, WASH. POST, Apr. 1, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/31/AR2008033100887.html>. A few miles away, in the District of Columbia, a battered woman's case will be heard by a judge sitting on a special domestic violence bench and may result in a year-long protection order. *District of Columbia: Restraining Orders*, WOMENSLAW.ORG, [http://www.womenslaw.org/laws\\_state\\_type.php?statelaw\\_name=Restraining%20Orders&state\\_code=DC](http://www.womenslaw.org/laws_state_type.php?statelaw_name=Restraining%20Orders&state_code=DC) (last visited Oct. 15, 2008). These few miles may mean the arbitrary difference between meaningful protection and none at all.

**D. Recommendations**

62. The United States should be encouraged:
  - a. To explore more uniform remedies for victims of domestic violence. The lack of federal causes of action under VAWA inhibits the United States from meeting its obligations to prevent, investigate, and punish those who violate women's rights to physical safety and to provide victims with a court remedy. Providing for federal causes of action under VAWA would promote greater accountability and more even implementation of VAWA within the states, as opposed to utilizing VAWA primarily as a voluntary funding source. Federal causes of action would also mitigate current discrimination and allow women—regardless of location or race—to seek judicial protection from IPV.
  - b. To publicly recognize that its current laws, policies, and practices too often condone domestic violence, promote discriminatory treatment of victims, and have a particularly detrimental effect on poor, minority, and immigrant women. The United States should take meaningful steps to rectify this situation by sending an unequivocal message that it is a national priority to curb violence against women and protect women and children from acts of domestic violence. The government also should initiate more public education campaigns that condemn violence in the home; programs to educate men and women, boys and girls, about women's human rights; and initiatives that promote domestic violence survivors' knowledge of their rights and the legal remedies available to them.
  - c. To improve data collection on domestic violence and violence against women, including, *inter alia*, information on police response to domestic violence and the impact of interactions with the criminal justice system on victim safety and batterer recidivism, and assessing the disproportionate impact that such violence has on poor, minority, and immigrant women. Such data should be disaggregated by sex, race, age, and disability. National statistical offices and other bodies involved in the collection of data on violence against women must receive necessary training for undertaking this work.
  - d. To promote and protect the human rights of women and children and exercise due diligence in responding to domestic violence. This could be done by providing technical assistance and incentives to states to make domestic violence restraining orders more specific, in order to ensure that the police effectively enforce the terms of those restraining orders in accordance with state law. The government could establish meaningful standards for enforcement and impose consequences for a failure to enforce.
63. Local and national dialogues should be initiated with all relevant stakeholders to consider the effectiveness, in theory and applied, of expedited proceedings, mandatory arrest policies, mandatory prosecution policies, and evidentiary standards. These issues tend to provoke controversy or discord, and merit further review. Open and informed community dialogues could form a space to rethink many of the unanswered questions, unintended effects of policies, and unresolved issues raised in this report. This dialogue remains urgent, especially in light of both the increased skepticism regarding the state's response to domestic violence and the proven disparate impact of these responses on women of color, indigenous women, and immigrant women.
64. Existing mechanisms for protecting victims and punishing offenders should be reevaluated since, as discussed above, many calls for help typically result in neither arrests nor prosecutions, and, thus, have extremely low rates of conviction. This inadequate treatment of domestic violence cases further endangers victims.
65. Both domestic and international advocates should strongly advise that Congress promptly ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as a framework for responding to domestic violence concerns. Ratification of CEDAW would signal to the global community that the United States prioritizes, at the federal level, the right of women to special measures of protection from domestic and gender-based violence.

#### IV. DOMESTIC VIOLENCE, CHILD CUSTODY, AND ECONOMIC CONSIDERATIONS IN FAMILY LAW LITIGATION

##### A. Background and prevalence

66. A substantial body of empirical research confirms that domestic violence has serious negative effects on children.<sup>182</sup> Numerous studies show an alarming co-occurrence of domestic violence and child physical and sexual abuse. The weight of the research demonstrates that 30% to 60% of children living in homes where domestic violence occurs are also physically or sexually maltreated.<sup>183</sup> It is beyond dispute that children who suffer from direct physical and/or sexual abuse often experience multiple emotional and behavioral problems,<sup>184</sup> as well as a variety of trauma symptoms, including nightmares, flashbacks, hyper-vigilance, depression, and regression to earlier stages of development.<sup>185</sup> Significantly, studies show that children who are *exposed* to domestic violence,<sup>186</sup> but who have not been physically or sexually abused themselves, exhibit levels of emotional and behavioral problems, trauma symptoms, and compromised social and academic development comparable to children who are direct victims of physical and sexual abuse.<sup>187</sup> Consequently, domestic violence is known to have multiple seriously detrimental effects on children even when children are not themselves the direct targets of parental aggression.
67. Research also confirms that men who batter are likely to parent very differently from other fathers.<sup>188</sup> Violent fathers tend to be under-involved with their children and more likely to use negative parenting practices, such as spanking, shaming, and exhibiting anger towards their children.<sup>189</sup> Other parenting deficits common to violent fathers include systematically undermining and interfering with the other parent's authority, utilizing controlling and authoritative parenting styles, having unreasonable expectations of other family members, refusing to accept input from others, remaining inflexible, and elevating their own needs above those of their children.<sup>190</sup> In addition, violent parents tend to be very poor role models, impeding their children's development of healthy relationships and conflict resolution skills.<sup>191</sup>
68. While it is often assumed that domestic violence and its impact on children end once a battered parent separates from her abuser, research demonstrates otherwise. First, it is now known that the effects of trauma, once engrained, do not go away on their own, but survive even when the threat that created the trauma is removed.<sup>192</sup> Second, studies show that domestic violence often *first starts* and frequently

<sup>182</sup> D.W. Wolfe, C.V. Crooks, V. Lee, A. McIntyre-Smith & P.G. Jaffe, *The Effects of Exposure to Domestic Violence on Children: A Meta-Analysis and Critique*, 6 CLINICAL CHILD & FAM. PSYCHOL. REV. 171 (2003).

<sup>183</sup> J.L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 VIOLENCE AGAINST WOMEN 134 (1999); A.E., Appel & G.W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 J. FAM. PSYCHOL. 578 (1998).

<sup>184</sup> J.H. Grych, E.N. Juries, P.R. Swank, R. McDonald & W.D. Norwood, *Patterns of Adjustment Among Children of Battered Women*, 68 J. CONSULTING & CLINICAL PSYCHOL. 84 (2000).

<sup>185</sup> S.A. Graham-Bergmann & A.A. Levendosky, *Traumatic Stress Symptoms in Children of Battered Women*, 13 J. INTERPERSONAL VIOLENCE 111 (1998).

<sup>186</sup> Exposure to domestic violence includes, among other things, seeing or hearing the violence itself, being forced to be a part of one or more violent episodes, and witnessing the after-effects of violence by seeing the abused parent physically harmed or the abusive parent being arrested or removed from the home. J. Edelson, *Children's Witnessing of Adult Domestic Violence*, 14 J. INTERPERSONAL VIOLENCE 839 (1999).

<sup>187</sup> U.N. CHILDREN'S FUND, BEHIND CLOSED DOORS: THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN (2006); P.G. JAFFE, D.A. WOLFE & S.K. WILSON, CHILDREN OF BATTERED WOMEN (1990).

<sup>188</sup> PARENTING BY MEN WHO BATTER: NEW DIRECTIONS FOR ASSESSMENT AND INTERVENTION (J.L. Edelson & O.J. Williams eds., 2007).

<sup>189</sup> G.W. Holden & K.L. Ritchie, *Linking Extreme Marital Discord, Child Rearing, and Child Behavior Problems: Evidence from Battered Women*, 62 CHILD DEVELOPMENT 311 (1991); G.W. Holden, J.D. Stein, K.L. Ritchie, S.D. Harris & E.N. Juries, *Parenting Behaviors and Beliefs of Battered Women*, in CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH AND APPLIED ISSUES 185 (G.W. Holden, R. Geffner & E.N. Juries eds., 1998).

<sup>190</sup> L. BANCROFT & J. SILVERMAN, THE BATTERER AS PARENT (2002); A.A. Levendosky & S.A. Graham-Bergmann, *Mothers' Perceptions of the Impact of Woman Abuse on their Parenting*, 6 VIOLENCE AGAINST WOMEN 247 (2000).

<sup>191</sup> P.G. Jaffe, C.V. Crooks & N. Bala, *A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes*, 6 J. CHILD CUSTODY 169 (2009).

<sup>192</sup> Jean Clinton & Linda C. Neilson, *Assessing Alienation in the Context of Domestic Violence and Child Brain Development*, Panel presented at the 47th Annual Conference of the Association of Family & Conciliation Courts (June 4, 2010).

escalates at the time of separation.<sup>193</sup> Third, abusive partners often intensify stalking, harassment, and other non-violent coercive tactics upon separation, where physical proximity is less likely.<sup>194</sup> In addition, where children are involved, abusive parents often utilize custody proceedings to continue their campaign of abuse against their former partners.<sup>195</sup> Indeed, the threat to seek custody is a common strategy used by abusive parents to enhance post-separation power and control over a former partner.<sup>196</sup> Finally, children often remain the bridge that keeps their parents connected long after the parents have physically separated.<sup>197</sup> In light of this reality, it is not uncommon for abusive parents to use their children as instruments of ongoing coercive control even after separation, often during visitation exchange.<sup>198</sup> In one recent study, 88% of women surveyed reported that their abusers had used their children to control them in various ways and to varying degrees not only during their relationships, but beyond.<sup>199</sup>

69. The harsh interplay between domestic violence and custody disputes is not rare. Studies show that 25 to 50% of disputed custody cases involve domestic violence.<sup>200</sup> When abused women attempt to leave their abusive relationships, they are often threatened with the loss of their children.<sup>201</sup> Batterers are more likely than non-abusive fathers to seek sole custody of their children,<sup>202</sup> and are just as likely to gain custody as non-abusive fathers.<sup>203</sup>

## B. Law and policy problems

70. As a result of an increasingly sophisticated understanding of domestic violence, including its detrimental impact on adult victims and children, and its corresponding relevance to child custody determinations, both legislative bodies and professional organizations in the United States have taken strong action to discourage custody awards to violent parents. In 1990, for instance, the United States House of Representatives passed House Concurrent Resolution 172 which “express[ed] the sense of Congress that, for purposes of determining child custody, evidence of spousal abuse should create a statutory presumption that it is detrimental to the child to be placed in the custody of an abusive parent.”<sup>204</sup> In 1989, and then again in 1994, the American Bar Association (ABA) passed resolutions calling for statutory presumptions against allowing custody to batterers.<sup>205</sup> In 1994, the National Council of Juvenile

<sup>193</sup> P.G. Jaffe, C.V. Crooks & S.E. Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, Fall 2003 JUV. & FAM. CT. J. 57 [hereinafter Jaffe et al., *Common Misconceptions*]; R.E. Floury, C.M. Sullivan & D.I. Bybee, *When Ending the Relationship Does Not End the Violence*, 6 VIOLENCE AGAINST WOMEN 1363 (2000); M.R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

<sup>194</sup> L.Frederick, *Questions About Family Court Domestic Violence Screening and Assessment*, 46 FAM. CT. REV. 523 (2008).

<sup>195</sup> K.L. Scott, C.V. Crooks, K.J. Francis & T. Kelly, *Caring Dads: Program Description and Directions*, Panel presented at the Victimization of Child and Youth Conference (Aug. 2002).

<sup>196</sup> Jaffe et al., *Common Misconceptions*, *supra* note 193, at 57-67.

<sup>197</sup> In one recent study, 89% of the women surveyed stated that their children witnessed domestic violence before or during the custody and visitation process. Seventy-one percent of the children were reportedly abused by the violent parent, and 53% of the abuse was reported to have occurred during visitation. Seventy-three percent of the children expressed fear of the abusive parent. And, in the face of these statistics, 58% of the cases studied were decided in favor of joint custody, notwithstanding the reported abuse. R.I. COAL AGAINST DOMESTIC VIOLENCE, SAFETY FOR CHILDREN (Mar. 2010), *available at* [http://www.ricadv.org/images/stories/RICADV\\_SafetyChildrenLORES.pdf](http://www.ricadv.org/images/stories/RICADV_SafetyChildrenLORES.pdf).

<sup>198</sup> L. BANCROFT & J.C. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE* (2000).

<sup>199</sup> Marisa L. Beebe, Deborah Bybee & Cris M. Sullivan, *Abusive Men's Use of Children to Control their Partners and Ex-partners*, 12 EUROPEAN PSYCHOLOGIST 1 (2007).

<sup>200</sup> SUSAN KIBITZ, NATIONAL CENTER FOR STATE COURTS, *DOMESTIC VIOLENCE AND CHILD CUSTODY DISPUTES: A RESOURCE HANDBOOK FOR JUDGES AND COURT MANAGERS* (1997).

<sup>201</sup> In one study, 80% of women interviewed reported that their abuser threatened to take away their children and, thereafter, used the court system to gain custody of the children. Ten percent of victim-mothers in that study said that they stopped reporting abuse for fear of losing their children. Thirty-seven percent of women surveyed lost custody of their children despite being the primary caretaker. VOICES OF WOMEN ORGANIZING PROJECT, BATTERED WOMEN'S RES. CTR., *JUSTICE DENIED: HOW FAMILY COURTS IN NYC ENDANGER BATTERED WOMEN AND CHILDREN* 4, 6 (May 2008), *available at* [www.vowbwrc.org/pdf/justiceDenied.pdf](http://www.vowbwrc.org/pdf/justiceDenied.pdf).

<sup>202</sup> Judith M. Reichler & Nancy S. Erickson, *Custody, Domestic Violence and a Child's Preference*, 8 DOMESTIC VIOLENCE REP. 65, 66 (June/July 2003) (citing R. LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 98-129 (2002)).

<sup>203</sup> Mary A. Kernic et al., *Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991 (Aug. 2005).

<sup>204</sup> H.R. Con. Res. 172, 111th Cong. (1990).

<sup>205</sup> ABA MODEL JOINT CUSTODY STATUTE, 15 FAMILY LAW REPORTER (BNA) 1494 (1989).

and Family Court Judges added a rebuttable presumption against allowing custody to batterers to its Model Code on Domestic and Family Violence.<sup>206</sup> The American Psychological Association added its recommendation in 1996 that states adopt statutes giving custody preference to the non-violent parent whenever possible.<sup>207</sup> Currently, nearly all states in the United States require the court to consider domestic violence when making custody awards,<sup>208</sup> and twenty-two states, plus the District of Columbia, have legislative presumptions against joint custody where domestic violence has occurred.<sup>209</sup>

71. Despite extensive research on the detrimental effects of domestic violence on children and the risks that attend unrestricted parental access where domestic violence has occurred, many courts are still reticent about assessing the impact of domestic violence on children when crafting custody arrangements.<sup>210</sup> A number of empirical studies confirm that courts frequently fail to identify and consider domestic violence and fail to provide adequate safety protections in court orders, even where a history of substantiated violence is known to exist.<sup>211</sup> This same phenomenon has been observed in the context of child custody mediations, child custody evaluations, and visitation determinations.<sup>212</sup>
72. Because domestic violence and its impact on children and their battered parents is neither consistently identified nor adequately accounted for in child custody determinations, the safety of domestic violence victims and their children is compromised in family courts today across the United States.
73. Like custody proceedings, child protection proceedings are governed mostly by state and local law, although similar standards are utilized nationally. Using New York as a representative example, child protection proceedings may be initiated at the discretion of the agency administering child protective services if an investigation by the agency reveals credible evidence to support a report or complaint alleging child maltreatment.<sup>213</sup> The presence of domestic violence in the home has been used as the credible evidence needed to support the allegations of child endangerment contained in a report or complaint.<sup>214</sup> Proceedings have been initiated against the parent who has been the victim of domestic violence, alleging neglect on the part of the victim for failing to protect the child from witnessing domestic violence.<sup>215</sup> Once court proceedings are initiated, the court has the power to order removal of a child if “necessary to avoid imminent danger to the child’s life or health.”<sup>216</sup> Although the National Council of Juvenile & Family Court Judges Guidelines and agency “best practices” indicate that victims of domestic violence should not be deemed unfit parents based upon the batterer’s actions, this rule is not always adhered to in practice.<sup>217</sup>

<sup>206</sup> FAMILY VIOLENCE: A MODEL STATE CODE, §401 (Nat’l Council of Juvenile & Family Court Judges 1994).

<sup>207</sup> AM. PSYCHOLOGICAL ASS’N, REPORT OF THE APA PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY (1996).

<sup>208</sup> ABA COMM’N ON DOMESTIC VIOLENCE, CHILD CUSTODY AND DOMESTIC VIOLENCE BY STATE (Feb. 2008), available at <http://www.abanet.org/domviol/docs/Custody.pdf>.

<sup>209</sup> *Id.*

<sup>210</sup> J.S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining Solutions*, 11 J. GENDER SOC. POL’Y & L., 657, 667 (2003) (internal citations omitted).

<sup>211</sup> See J.G. Silverman, *Child Custody Determinations in Cases Involving Intimate Partner Violence: A Human Rights Analysis*, 94 AM. J. PUB. HEALTH 951 (2004) (Courts frequently fail to consider documentation of domestic violence in custody determinations.); M.A. Kernic et al., *Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991 (2005) (Courts frequently fail to identify domestic violence and provide adequate safety protections in court orders, even where a history of substantiated violence is known to exist.).

<sup>212</sup> N.E. Johnson et al., *Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect*, 11 VIOLENCE AGAINST WOMEN 1022 (2005) (Mediators are just as likely to recommend joint legal and physical custody in domestic violence cases as in cases where there are no allegations of domestic violence.); J. Bow, *Review of Empirical Research on Child Custody Practice*, 3 J. CHILD CUSTODY 23, 39 (2006) (Even where child abuse and domestic violence are documented in the court record, they are often not addressed in the final custody report.); L.S. Horvath, *Child Custody Cases: A Content Analysis of Evaluations in Practice*, 33 PROF. PSYCHOL.: RES. & PRAC. 557 (2002) (Domestic violence is largely overlooked by custody evaluators and often plays no role in custody determinations even when it is noted in evaluators’ reports.); C.S. O’SULLIVAN ET AL., SUPERVISED AND UNSUPERVISED PARENTAL ACCESS IN DOMESTIC VIOLENCE CASES: COURT ORDERS AND CONSEQUENCES (Mar. 2006) (History of domestic violence has little impact on court ordered visitation arrangements.).

<sup>213</sup> *Nicholson v. Williams*, 203 F. Supp. 2d 153, 166-167 (E.D.N.Y. 2002).

<sup>214</sup> *Id.* at 208-09.

<sup>215</sup> *Id.* at 200.

<sup>216</sup> *Id.* at 167.

<sup>217</sup> NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, FAMILY VIOLENCE DEPARTMENT, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE AND CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE (1999), available at [http://www.ncjfcj.org/images/stories/dept/fvd/pdf/greenbook%20final\\_4-5-07.pdf](http://www.ncjfcj.org/images/stories/dept/fvd/pdf/greenbook%20final_4-5-07.pdf).

### C. Effects and consequences

#### i. Child protection proceedings

74. Adult victims of domestic violence are often blamed for failing to protect their children. Instead of taking steps to remove the batterer from the home and hold him accountable, child protection systems allege neglect on the part of the abused caregiver and remove the children from her custody.<sup>218</sup> The manner in which many states apply “failure to protect” statutes against the non-offending caregiver results in re-victimization of battered women by the unjust removal of children from their care.
75. These results often occur whether or not the adult victim has consented to the batterer’s presence in the home,<sup>219</sup> despite estimates that one-half to two-thirds of all abuse occurs when women are single, separated, or divorced.<sup>220</sup> This practice of victim-blaming allows the batterer to continue to deprive the woman of power and control over her life, even after she has taken steps to separate herself and her children from the abusive partner.
76. When a woman does not take steps to leave an abusive partner, it may be used as evidence against her in child protection proceedings.<sup>221</sup> However, this presumption of neglect ignores the reality that domestic violence often escalates upon separation from the abuser, and that it is the victim who best understands her unique situation, including the risks which leaving may pose for herself and her children.<sup>222</sup> The manner in which child protection systems require an abuse victim to meet someone else’s (i.e., caseworker, judge, etc.) expectations regarding actions that should be taken for the safety of herself and her children further undermines her autonomy and may actually exacerbate the danger of abuse.
77. When a victim does draw attention to her domestic violence experience by reaching out for help, the result can be an investigation by child protective services, a finding that she is a neglectful parent and, ultimately, the termination of her parental rights.<sup>223</sup> This deters many women from reporting instances of abuse,<sup>224</sup> causing them to forego the pursuit of security and justice out of fear that they will lose their children.

#### ii. Custody proceedings in divorce and family courts

78. Additionally, victims of domestic violence involved in custody proceedings reported court systems that were broken or biased against them in the administration of justice<sup>225</sup> and deviations in the judicial process that resulted in violations of due process. For example, victims have reported *ex parte* communications between one party and the judge, disallowance of witness testimony that would support the victim’s story, inaccurate or lack of access to hearing transcripts, legal guardians who were ineffective

<sup>218</sup> See *Nicholson v. Williams*, 181 F. Supp. 2d 182 (E.D.N.Y. 2002), supplemented by 203 F. Supp. 2d 153 (E.D.N.Y. 2002), and supplemented and modified by 294 F. Supp. 2d 369 (E.D.N.Y. 2003), and 2004 WL 1304055 (E.D.N.Y. June 14, 2004); Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN’S RIGHTS L. REP. (Spring 2002).

<sup>219</sup> REBECCA KITTY, WATCH’S MONITORING OF OPEN CHIPS CASES IN HENNEPIN COUNTY JUVENILE COURT (May 23, 2001), available at <http://www.watchmn.org/sites/default/files/2001%20CHIPS%20report%20-%20Final.pdf>.

<sup>220</sup> Stark, *supra* note 218, at 118, n.18 (citing SUSAN SCHECHTER & JEFFREY L. EDLESON, IN THE BEST INTEREST OF WOMEN AND CHILDREN: A CALL FOR COLLABORATION BETWEEN CHILD WELFARE AND DOMESTIC VIOLENCE CONSTITUENCIES, available at <http://www.mincava.umn.edu/papers/wingsp.htm>; Bruce Rounsaville & Myrna M. Weismann, *Battered Women: A Medical Problem Requiring Detection*, 8 INT’L J. PSYCHIATRY MED. 194 (1978)).

<sup>221</sup> See Jeanne A. Fugate, *Who’s Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. Rev. 272 (2001); Kitty, *supra* note 219.

<sup>222</sup> Stark, *supra* note 218, at 118-23, n.18 (citing SUSAN SCHECHTER & JEFFREY L. EDLESON, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES: EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE AND CHILD MALTREATMENT: GUIDELINES FOR POLICY AND PRACTICE (June 1999), available at <http://www.vaw.umn.edu/documents/executvi/executvi.html>).

<sup>223</sup> *Id.*

<sup>224</sup> See MARNA ANDERSON, SARAH COULTER & DONNA MCNAMARA, REASONABLE EFFORTS OR UNREALISTIC EXPECTATIONS: A LOOK AT HENNEPIN COUNTY CHILD PROTECTION CASES (May 4, 2010), available at [http://www.watchmn.org/sites/default/files/WATCH%20Report\\_LR.pdf](http://www.watchmn.org/sites/default/files/WATCH%20Report_LR.pdf) (“Another [CHIPS worker] shared her concern that some women are afraid to call 911 even if they are experiencing increased violence when they are trying to leave an abusive relationship because they fear ‘getting tangled up’ with child protection.”).

<sup>225</sup> VOICES OF WOMEN, *supra* note 201.

representatives of the child victims, and the use of unsubstantiated allegations leading to removal of custody.<sup>226</sup>

79. Often, decisions made throughout the custody proceedings by various actors, many of whom are “advocates” of the victim-mothers, actually placed the children in danger.<sup>227</sup> For example, victim-mothers reported that they were told by their attorneys, legal guardians, or the judges not to oppose visitation, even when the mothers felt it was unsafe to allow the abusers access to the children or the children themselves protested the visitation.<sup>228</sup> Frequently, courts failed to grant victim-mothers adequate child support, the direct result of which was a contested custody dispute. In one study, 58% of women interviewed reported that requesting child support triggered retaliation by the abuser, often in the form of custody battles.<sup>229</sup>
80. Victims also reported their voices went unheard in custody proceedings and they were advised by their advocates and court personnel to refrain from mentioning domestic abuse during custody disputes. In one study, half of the women interviewed stated their own attorneys told them that the mention of domestic abuse would hurt their case, and the other half were advised by court personnel, including mediators, to ignore their experience as domestic abuse victims.<sup>230</sup>
81. When domestic violence is not identified and when a history of domestic violence is not accounted for in custody proceedings, custody and/or unrestricted access to the child may be granted to the abusive parent, thereby threatening the safety and wellbeing of the child and his or her battered parent.

### *iii. Economic considerations in family law litigation*

82. Custody litigation in domestic violence cases is often driven both by the abuser’s ongoing attempts to control the mother as well as a desire to avoid paying child support.<sup>231</sup> The origin of many so-called fathers’ rights groups was overlaid by their members’ avoidance of child support obligations.<sup>232</sup> Obtaining custody of the child not only circumvents the need to pay child support to the mother, but also typically imposes upon the mother the obligation to pay the child support to the abuser. All jurisdictions in the United States employ a version of child support guidelines that makes court-ordered payment of child support primarily formulaic as well as automatic upon the request of the custodial parent.<sup>233</sup>
83. Several problems arise when a mother seeks court-ordered support. Very often, her initial request is made during a hearing for a civil protection order that she seeks in an attempt to end the abuse. Even if she does not seek custody of the children during the protective order process, she may seek an order of support, knowing that she cannot otherwise remain independent. While some courts enter child support orders as part of the protective order process,<sup>234</sup> many courts do not even when their jurisdiction’s statute provides the court with explicit authority to enter orders of support. This places the burden on

<sup>226</sup> Victims reported they were denied access to forensic evaluations that resulted in their children being removed from their custody, were accused of alienating their children, or were given a psychiatric label, often with slim or unsubstantiated evidence to support the allegations. *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> PETER G. JAFFE, NANCY LEMON & SAMANTHA POISSON, *CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY* (2003); Chris O’Sullivan, *Estimating the Population at Risk for Violence During Child Visitation*, 5 *DOMESTIC VIOLENCE REP.* 65, 65-66, 77-79 (2000).

<sup>229</sup> VOICES OF WOMEN, *supra* note 201.

<sup>230</sup> *Id.*

<sup>231</sup> Barbara J. Hart et al., *Child Custody*, in *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE* 234 (2d ed. 2004) (“Child custody litigation often becomes a tool for batterers to maintain or extend their control and authority over the abused parent after separation.”); Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 *YALE J.L. & FEMINISM* 291, 298 (1992) (“When a woman wants custody of her children and her ex-husband has no real interest in getting custody, he may nonetheless threaten a custody battle to increase his bargaining power and reduce the amount of child support he will have to pay.”).

<sup>232</sup> “Fathers’ rights” is a term used to describe those organizations whose aim is to undermine mothering as well as the credibility of women and children who raise claims of abuse. These groups are not to be confused with groups that promote responsible fatherhood.

<sup>233</sup> Catherine F. Klein & Leslye Roof, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 *HOFSTRA L. REV.* 801, 999 (1993) (“The institution of child support guidelines in practically every jurisdiction resulted from the federal requirements under 42 U.S.C.S 666, which makes determination of child support awards in civil protection order cases a relatively simple process. It provides the courts and litigants with an objective standard upon which to calculate an equitable child support award.”).

<sup>234</sup> *See, e.g.,* *Baca v. Baca*, 568 S.E.2d 746 (Ga. Ct. App. 2002).

abused women's advocates to appeal the denial of support under a civil protection order.<sup>235</sup> Given the difficulties that abused women encounter in finding adequate representation of any sort, finding appellate counsel can be even more difficult.

84. When a court fails to order support (whether spousal or child support), a battered woman is less likely to have the resources to adequately defend against the father's petition for custody. Without adequate resources, she is less able to hire counsel. In addition, she often cannot provide adequate housing for her children and meet their other needs, factors which can lead to her losing custody in a circular and distressing irony.
85. Should a mother decide not to engage the civil protection order process, she might find herself waiting weeks, if not months, for a hearing on child support under the divorce or legal separation process. Delay can be a powerful tool of control for the abusive father. Continuances and other postponements can empower the abuser who knows that without adequate financial resources, the mother is likely forced to return to him or risk losing custody of her children.<sup>236</sup>
86. Women are not likely to fare well in court without competent counsel. Battered women have indicated that access to legal counsel is the most important factor in their ability to successfully leave an abusive relationship.<sup>237</sup> Primarily, this is due to the ability to access orders of financial support and custody. Access to funds to retain counsel has been cited as a primary need of women as well of a source of attaining gender equity within the court system.<sup>238</sup> The problem of insufficient or non-existent attorney fee awards was identified two decades ago, yet the problem persists.<sup>239</sup>

#### D. Recommendations

87. Based on the discussion presented above, as well as the findings of organizations such as the Arizona Coalition Against Domestic Violence and the Wellesley Centers for Women's Battered Mothers' Testimony Project,<sup>240</sup> we make the following recommendations.
88. Courts should develop policies and protocols that will improve their capacity to identify, differentiate and account for domestic violence and its impact on children and battered parents in order to arrive at safe and appropriate parenting arrangements.
89. Courts should be required to consider any history of domestic violence in determinations of custody, including prior orders of protection and domestic violence criminal convictions.
90. Judges, court personnel, and guardians ad litem should be required to undergo training regarding post-separation abuse, domestic violence, and child abuse.

<sup>235</sup> See, e.g., *Hayes v. Gibbs*, 2008 WL 682493 (Ohio Ct. App. 2008).

<sup>236</sup> Klein & Roof, *supra* note 233, at 992 ("Economic dependence is frequently the reason the victim returns to the offender.").

<sup>237</sup> See Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L. Q. 719, 721-722 (1999) ("The first theme focuses on a call to action: a reminder that representation is often fundamental to an abuse victim's ability to access legal remedies for safety. For decades there has existed a crisis in the dearth of legal representation available for battered women, particularly in the areas of child custody, visitation, and divorce litigation.").

<sup>238</sup> MASS. GENDER BIAS STUDY 746-47 (1989) ("The first and most serious is lack of access to adequate legal representation: many women cannot obtain the assistance they need, particularly in the crucial first days and months after separation. Women without legal representation (*pro se*) find the system difficult to navigate, and free legal services are often not available to them. Private counsel may be unwilling to represent women because of the difficulty obtaining adequate awards of counsel fees during, and sometimes after, a trial.").

<sup>239</sup> *Id.*

<sup>240</sup> See ARIZ. COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE AND CUSTODY (June 2009), available at <http://www.azcadv.org/domestic-violence-info/domestic-violence-fa/facts-and-statistics/domesticviolenceandcustody/top>; ARIZ. COAL. AGAINST DOMESTIC VIOLENCE, A HUMAN RIGHTS APPROACH TO CHILD CUSTODY AND DOMESTIC VIOLENCE (June 2003); CARRIE CUTHBERT ET AL., BATTERED MOTHERS' TESTIMONY PROJECT, WELLESLEY CTRS. FOR WOMEN, BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS (Nov. 2002).

91. Courts should utilize a multi-disciplinary approach to custody evaluations involving experts in domestic abuse, child abuse, and mental health in the process.
92. Custody evaluators should be trained to recognize that men who commit domestic violence against their partners often commit other types of crimes, including child abuse.
93. Judges should be required to prepare written findings of fact and conclusions of law to support their custody orders.
94. “Friendly parent” statutes and policies should be eliminated because they fail to adequately protect a parent who fears harm to herself and her children.
95. “Failure to protect” statutes should not be used to blame victims of domestic violence or to unjustly remove children from the custody of non-offending caregivers.
96. Mediators should assess whether it is appropriate to terminate settlement negotiations and/or to institute safety precautions whenever a history of domestic violence is revealed through court records, screenings, prior protective orders, criminal records, or otherwise. Mandatory face-to-face mediations between the parties should be eliminated.
97. Courts should design custody transition plans to protect domestic abuse victims.

## **V. DOMESTIC VIOLENCE, REPRODUCTIVE RIGHTS, & REPRODUCTIVE/ SEXUAL HEALTH**

### **A. Background**

98. One aspect of the control which abusers exercise over their partners is limiting access to contraception and reproductive health services.<sup>241</sup> Current policies create numerous barriers to women seeking reproductive health services: financial obstacles, shortages of facilities, unnecessary restrictions and delays, and stigma against women seeking contraception and abortion services. The barriers created by these restrictive laws and policies disproportionately affect women experiencing IPV by adding legal and practical barriers to those they already face at home.<sup>242</sup> Additionally, pregnancy, particularly unplanned pregnancy, is frequently a time of escalating violence. Thus, in instances where women choose to end their pregnancies, it is essential that they are able to obtain safe abortions without unnecessary delay to protect themselves from the risk of increased violence by their partners and from the even greater financial and emotional dependency the birth of a child would bring.<sup>243</sup>
99. The United States has failed to guarantee access to reproductive health and abortion services for all women and, in particular, for victims of domestic violence. Laws singling out abortion providers for burdensome regulations have limited the number of providers and the availability of services, forcing women to travel great distances to receive care.<sup>244</sup> Biased counseling and mandatory delay laws often force women to make multiple visits to a clinic before obtaining an abortion. When an abuser is closely monitoring a woman’s behavior, these requirements make it difficult or impossible for a woman to maintain her confidentiality and can prevent her from obtaining a timely abortion.<sup>245</sup> All of these laws may limit women’s, and particularly battered women’s, access to abortion and may ultimately prevent them from ever getting the services they need. Compounding the effect of these laws is the failure of law enforcement to take effective measures against threats to clinics, their staff, and their patients. Police have failed to protect clinics’ security. In addition to making it more difficult for clinics to remain open, this lack of enforcement has enabled protestors to intimidate and harass patients, often by threatening to

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<sup>241</sup> See Jeanne E. Hathaway et al., *Impact of Partner Abuse on Women’s Reproductive Lives*, 60 J. AM. MED. WOMEN’S HEALTH ASS’N 42 (2005).

<sup>242</sup> See Declaration of Lenore Walker ¶¶ 13-14 (on file with author) [hereinafter Walker Decl.].

<sup>243</sup> See *id.* ¶ 23.

<sup>244</sup> CTR. FOR REPROD. RIGHTS, *DEFENDING HUMAN RIGHTS: ABORTION PROVIDERS FACING THREATS, RESTRICTIONS, AND HARASSMENT* 37 (2009).

<sup>245</sup> See Walker Decl., *supra* note 242, ¶ 16.

make their identity public. This harassment, while harmful to all, is particularly devastating to women who must both have an abortion and keep it secret for their own safety.

## B. Prevalence

100. In abusive relationships, the male partner generally makes decisions regarding birth control.<sup>246</sup> Women report a lack of reproductive control regarding decisions on contraceptive use and whether to get an abortion.<sup>247</sup> Abusive partners use tactics including forced or coerced sex, refusal to use or let their partner use birth control, birth control deception, and preventing their partners from getting desired abortions.<sup>248</sup> Sexually abusive partners often refuse to use condoms, and women fear their partners' response to condom negotiation as it may result in more abuse.<sup>249</sup> As a result, women experiencing IPV are less likely to use condoms.<sup>250</sup> Additionally, there is a strong correlation between IPV and birth control sabotage, with the severity of the sabotage increasing along with the severity of the violence.<sup>251</sup> Women report hiding birth control use from their partners and suffering abuse if they are discovered.<sup>252</sup> Other women do not use birth control due to fear of negative repercussions.<sup>253</sup> Because women experiencing IPV are subject to contraceptive control, it is important that they have access to methods that can be used without partner knowledge or cooperation.<sup>254</sup>
101. Studies show a significant number of women experiencing IPV also experience sexual assault in their relationship and report significantly more gynecological conditions.<sup>255</sup> In one study, 90.9% of abused women reported sexual assault; these women were 3.4 times more likely to report unwanted pregnancy than non-abused women.<sup>256</sup> Forced and coerced pregnancy is one form of abuse; pregnancy can ensure that the victim will remain financially dependent and under the batterer's control.<sup>257</sup> Batterers may use various techniques of contraceptive control and sabotage to dictate their partners' sexual and reproductive lives and keep them financially and physically dependent and vulnerable.<sup>258</sup> Batterers often rape their partners while also denying them access to contraceptives, frequently resulting in pregnancies during which the batterers may escalate their abuse.<sup>259</sup>
102. Pregnancy can be a dangerous time for abused women, as it is one of the times when abusers frequently escalate their level of violence from psychological to physical.<sup>260</sup> When pregnancy is unintended, the risk of violence is even greater, and there is a clear correlation between unintended pregnancy and escalated

<sup>246</sup> Daniel Rosen, "I Just Let Him Have His Way": Partner Violence in the Lives of Low-Income, Teenage Mothers, 10 VIOLENCE AGAINST WOMEN 6 (2004).

<sup>247</sup> Margaret Abraham, *Sexual Abuse in South Asian Immigrant Marriages*, 5 VIOLENCE AGAINST WOMEN 591 (1999).

<sup>248</sup> Jeanne E. Hathaway et al., *Impact of Partner Abuse on Women's Reproductive Lives*, 60 J. AM. MED. WOMEN'S HEALTH ASS'N 42 (2005).

<sup>249</sup> Gina M. Wingood & Ralph J. DiClemente, *The Effects of an Abusive Primary Partner on the Condom Use and Sexual Negotiation Practices of African-American Women*, 87 AM. J. PUB. HEALTH 1016 (1997); see also Jacquelyn C. Campbell, *Health Consequences of Intimate Partner Violence*, 359 THE LANCET 1331 (2002) (literature review citing other studies); Anita Raj et al., *Abused Women Report Greater Male Partner Risk and Gender-Based Risk for HIV; Findings from a Community-Based Study with Hispanic Women*, 16 AIDS CARE 519 (2004).

<sup>250</sup> *Id.*

<sup>251</sup> CTR. FOR IMPACT RESEARCH, DOMESTIC VIOLENCE AND BIRTH CONTROL SABOTAGE: A REPORT FROM THE TEEN PARENT PROJECT (2000).

<sup>252</sup> *Id.*

<sup>253</sup> Rosen, *supra* note 246.

<sup>254</sup> LAW STUDENTS FOR REPROD. JUSTICE (LSRJ) & NAT'L WOMEN'S LAW CTR., IPV FACT SHEET: IF YOU REALLY CARE ABOUT INTIMATE PARTNER VIOLENCE, YOU SHOULD CARE ABOUT REPRODUCTIVE JUSTICE 2 (2010), available at [http://lsrj.org/documents/Webinar\\_Wednesdays\\_IPV.pdf](http://lsrj.org/documents/Webinar_Wednesdays_IPV.pdf) [hereinafter LSRJ, IPV FACT SHEET].

<sup>255</sup> Judith McFarlane et al., *Intimate Partner Sexual Assault Against Women: Frequency, Health Consequences, and Treatment Outcomes*, 105 AM. C. OBSTETRICIANS & GYNECOLOGISTS 99 (2005) (finding that 68% of abused women interviewed were also sexually assaulted); Jacquelyn C. Campbell & Karen L. Soeken, *Forced Sex and Intimate Partner Violence: Effects on Women's Risk and Women's Health*, 5 VIOLENCE AGAINST WOMEN 1017 (1999) (finding that 45.9% of battered women were also experiencing forced sex by their partners).

<sup>256</sup> Anita Raj, et al., *South Asian Victims of Intimate Partner Violence More Likely Than Non-Victims to Report Sexual Health Concerns*, 7 J. IMMIGRANT HEALTH 85 (2005).

<sup>257</sup> Letter from Sabrina Salomon, on behalf of the Domestic Violence and Sexual Assault Council of Greater Miami et al., to Charlie Crist, Governor of Florida (May 10, 2010) (on file with author).

<sup>258</sup> LSRJ, IPV FACT SHEET, *supra* note 254, at 2.

<sup>259</sup> Letter to Gov. Crist, *supra* note 257.

<sup>260</sup> Walker Decl., *supra* note 242, ¶ 12.

rates of abuse.<sup>261</sup> Women with unplanned or unwanted pregnancies make up nearly 70% of all women who are physically abused during pregnancy.<sup>262</sup>

### C. Effects and consequences

#### i. Access to abortion

103. In many parts of the United States there is a shortage of abortion providers due to harassment and attacks on providers,<sup>263</sup> the stigma surrounding the provision of abortion services in the United States,<sup>264</sup> and laws that unfairly target abortion providers for extra regulations with attendant burdensome costs.<sup>265</sup> The shortage makes it more difficult for women in abusive situations to access abortion. Many women seeking services must travel large distances, often to neighboring states.<sup>266</sup> This is particularly difficult for women with limited financial resources or no access to transportation or childcare.<sup>267</sup> The lack of services within a reasonable distance, compounded by other laws and requirements that delay women's access, and funding restrictions (described below), may lead to significant or insurmountable delays for IPV survivors who need to obtain services without their abusers' knowledge. Legal restrictions on reproductive health services that impose delays and barriers on access to care have a disproportionate effect on survivors of IPV because of the significant challenges they may already face in getting to a clinic and their heightened need for confidentiality.

#### ii. Mandatory delays

104. Many states have mandatory delay and biased counseling laws for abortion. These requirements are expensive and burdensome and have no medical justification. In their most onerous form, these laws require women to receive in-person counseling and then wait before returning to the health care provider a second time to have an abortion. This may prevent women from obtaining an abortion at all.<sup>268</sup> South Dakota recently passed a law creating a three-day waiting period, the longest in the country.<sup>269</sup> Abused women are subject to close monitoring by their abusers, such that going to the clinic without detection is hard, and having to go twice makes it significantly more difficult to obtain an abortion.<sup>270</sup> An abuser may engage in such tactics as monitoring the mileage on the car and checking up or calling the woman at home or at work to make sure she is there.<sup>271</sup> If he discovers she is not where she is supposed to be, he will usually engage in abuse.<sup>272</sup> These restrictions can be especially burdensome for women who have escaped their abusers and sought safety in shelters as it forces them to leave the shelters and put their physical security in jeopardy twice.<sup>273</sup>

105. Even if abused women are able to make two visits to a clinic, they will rarely be able to do so on consecutive days. Women who must travel long distances to visit an abortion provider would often not be permitted to stay overnight by their abusers or would be unable to do so without facing suspicion and

<sup>261</sup> Jacquelyn C. Campbell et al., *The Influence of Abuse on Pregnancy Intention*, 5 WOMEN'S HEALTH ISSUES 214, (1995); see also Walker Decl., *supra* note 242, ¶ 12.

<sup>262</sup> Melissa Moore, *Reproductive Health and Intimate Partner Violence*, 31 FAM. PLAN. PREPS. 302 (1999).

<sup>263</sup> CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS, *supra* note 244, at 34.

<sup>264</sup> *Id.* at 49, 60.

<sup>265</sup> LSRJ, STATE LAWS REGULATING REPRODUCTIVE RIGHTS 5 (2010), available at [http://lsrj.org/documents/10\\_State%20Laws%20Regulating%20Repro%20Rights.pdf](http://lsrj.org/documents/10_State%20Laws%20Regulating%20Repro%20Rights.pdf).

<sup>266</sup> CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS, *supra* note 244, at 37.

<sup>267</sup> *Id.*

<sup>268</sup> Walker Decl., *supra* note 242, ¶¶ 13-14.

<sup>269</sup> Chet Brokaw, *South Dakota Law Mandates Three-day Wait on Abortions*, ASSOCIATED PRESS, Mar. 23, 2011, available at [http://www.boston.com/news/politics/articles/2011/03/23/south\\_dakota\\_law\\_mandates\\_three\\_day\\_wait\\_on\\_abortions/](http://www.boston.com/news/politics/articles/2011/03/23/south_dakota_law_mandates_three_day_wait_on_abortions/). However, the South Dakota law is preliminarily enjoined pending litigation challenging the constitutionality of the law. *Planned Parenthood v. Daugaard*, No. 11-4071-KES, 2011 WL 2582731 (D.S.D. June 30, 2011).

<sup>270</sup> Walker Decl., *supra* note 242, ¶ 16.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS, *supra* note 244, at 89.

increased violence when they return.<sup>274</sup> Women may also fear that their children would be subject to abuse in their absence.<sup>275</sup> Thus, the mandatory waiting period, in effect, will be much greater than twenty-four hours for these women.<sup>276</sup>

106. Mandatory waiting periods and counseling requirements may also impose additional financial burdens on abused women that may prevent them from returning for the second trip. An abused woman is unlikely to have access to her own money and may be cut off from contacting family and friends by her abuser's control.<sup>277</sup> Some states have passed, or are considering passing, mandatory ultrasound requirements prior to an abortion that may force women to stay in a battering relationship longer as the added costs of the ultrasound deplete the resources needed to leave an abusive partner.<sup>278</sup> The delay caused by these laws will exacerbate women's financial difficulties because abortion becomes more expensive as pregnancy progresses.<sup>279</sup>

**iii. Funding restrictions**

107. Under the Hyde Amendment, federal Medicaid funds may not be used for abortions except in cases of rape or incest or a threat to the woman's life.<sup>280</sup> Even though states are obligated to provide funding for abortions under these exceptions, available data shows that in 2006, twenty-four out of the thirty-three states that should be covering abortions under these circumstances did not spend any money on abortions.<sup>281</sup> Requirements that victims go through the experience of reporting and certifying the rape or incest that led to the pregnancy present a considerable barrier to reimbursement.<sup>282</sup> The Hyde Amendment makes no exception for survivors of IPV.<sup>283</sup> Even if a woman's pregnancy resulted from sexual assault by her partner, she may be deterred by the stringent administrative and reporting requirements.

**iv. Late abortions**

108. Young women, women with health issues, and women living in shelters or dangerous situations, such as IPV survivors, are at greater risk of requiring later abortions.<sup>284</sup> Abused women in particular will be forced to delay abortions both to avoid their abusers' discovery of their actions and to raise money for the additional financial burdens.<sup>285</sup> Barriers to women's access to abortion are compounded when they seek abortions later in their pregnancies. Some women may end up being delayed beyond the gestational limits of the clinic.<sup>286</sup> Because of legal restrictions and the need for doctors with specific expertise, many clinics only offer abortions until the end of the first or during the early second trimester.<sup>287</sup> For later abortions, women often must travel even greater distances.<sup>288</sup> Thus, in addition to the difficulties abused women face in traveling to access services without detection by their abuser, they may be forced to travel even further because of the scarcity of providers offering second trimester abortions. Later abortions are more complicated (sometimes requiring more than one day) and expensive procedures, adding additional financial and logistical burdens and medical risks.<sup>289</sup>

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<sup>274</sup> Walker Decl., *supra* note 242, ¶ 17.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* ¶ 18.

<sup>278</sup> Letter to Gov. Crist, *supra* note 257.

<sup>279</sup> Walker Decl., *supra* note 242, ¶ 18.

<sup>280</sup> CTR. FOR REPROD. RIGHTS, WHOSE CHOICE?: HOW THE HYDE AMENDMENT HARMS POOR WOMEN 19 (2010).

<sup>281</sup> *Id.* at 35.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 25.

<sup>284</sup> *Id.*

<sup>285</sup> Walker Decl., *supra* note 242, ¶ 15.

<sup>286</sup> *Id.*

<sup>287</sup> CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS, *supra* note 244, at 48.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

v. **Harassment and patient confidentiality**

109. Patient confidentiality can be threatened by mandatory counseling requirements and the harassing actions of anti-abortion “protestors.” South Dakota recently passed a law requiring that women go to “pregnancy service centers,” disclose their pregnancies and be counseled against abortion, even if they do not want the counseling. The law does not include an exception for women in abusive situations who fear disclosure of their situation to strangers.<sup>290</sup> Protestors of abortion clinics yell, trespass, threaten escorts, and try to stop cars from entering so they can throw leaflets through car windows.<sup>291</sup> Protestors may try to prevent women from entering the clinic by hanging on to them as they walk.<sup>292</sup> Protestors undermine women’s trust in the medical services they are seeking, as patients are intimidated by false statements that protestors make regarding the safety, risk, and nature of abortion.<sup>293</sup> Patients are also worried about protecting their identities.<sup>294</sup> Protestors have threatened patient confidentiality by uploading footage of patients on YouTube.<sup>295</sup> If protestors recognize a patient, they may threaten to tell her neighbors and employers about the visit.<sup>296</sup> In one instance, a protestor took photos of patients and escorts and told them, “You won’t be smiling on your deathbed.”<sup>297</sup> Many patients are upset by or fear encountering protestors.<sup>298</sup> This distress and fear prevents some women from visiting a clinic at all.<sup>299</sup> One provider observed that on days when more protestors were present the no-show rate would go up.<sup>300</sup> This is especially problematic for women who face the increased costs of having a later abortion or exceeding the gestational limit.<sup>301</sup> For women experiencing IPV, the risk that their visit to the clinic may be revealed to their partners and the additional delays caused by subsequent harassment present particularly difficult barriers.

**D. Law and policy problems**

110. Access to sexual and reproductive healthcare has been recognized as part of the fundamental human rights of women, including the right to health and life, the right to equality and non-discrimination, and the right to reproductive self-determination. The United Nations committees that oversee compliance with CEDAW and the International Covenant on Civil and Political Rights (ICCPR) have consistently criticized restrictive abortion laws as violations of the right to life.<sup>302</sup> The right to health includes “the right to attain the highest standard of sexual and reproductive health.”<sup>303</sup> To fulfill this right, governments must provide access to “a full range of high quality and affordable health care, including sexual and reproductive services.”<sup>304</sup>

111. The Beijing Platform for Action recognized that “the ability of women to control their own fertility forms an important basis for the enjoyment of other rights,” and “neglect of women’s reproductive rights severely limits their opportunities in public and private life, including opportunities for education and

<sup>290</sup> A.G. Sulzberger, *Women Seeking Abortion in South Dakota to Get Anti-Abortion Advice*, N.Y. TIMES, Mar. 22, 2011, <http://www.nytimes.com/2011/03/23/us/23sdakota.html>. *But see* Planned Parenthood v. Daugaard, No. 11-4071-KES, 2011 WL 2582731 (D.S.D. June 30, 2011) (granting a preliminary injunction against the law).

<sup>291</sup> DEFENDING HUMAN RIGHTS, *supra* note 287 at 74-75.

<sup>292</sup> *Id.* at 84.

<sup>293</sup> *Id.* at 102.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 74-75.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 84.

<sup>298</sup> *Id.* at 87.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 102.

<sup>301</sup> *Id.*

<sup>302</sup> *See, e.g.*, CTR. FOR REPROD. RIGHTS, BRINGING RIGHTS TO BEAR: ABORTION & HUMAN RIGHTS 5 & n.52 (2008) (citing multiple Concluding Observations from the Committee on the Elimination of All Forms of Discrimination Against Women where the Committee has urged states to provide safe abortion services or ensure access where abortion is permitted by law).

<sup>303</sup> *Programme of Action of the International Conference on Population and Development*, Cairo, Egypt, Sept. 1994, ¶ 7.3 at 513, U.N. Doc. A/CONF.171/13/Rev.1 (1995) [hereinafter *ICPD Programme of Action*].

<sup>304</sup> Committee on Economic Social and Cultural Rights, General Comment 14, *The Right to the Highest Attainable Standard of Health*, ¶ 21, (22d Sess., 2000) U.N. Doc. E/C.12/2000/4 (2000).

economic and political employment.”<sup>305</sup> Support for women’s right to reproductive self-determination derives from provisions in a number of human rights instruments that ensure autonomy in decision-making about intimate matters, including protection of the long-recognized rights to physical integrity,<sup>306</sup> privacy,<sup>307</sup> and free and responsible decision-making with respect to the number and spacing of one’s children.<sup>308</sup>

112. Targeted Regulation of Abortion Providers (“TRAP”) laws limit women’s access to abortion by singling out the medical practices of doctors who provide abortions with requirements that are often different and more burdensome than those imposed on the medical practices of doctors who provide comparable services. Forty-four states have TRAP laws. Twenty-two states (AL, AZ, AR, CT, FL, IN, KY, LA, MI, MN, MS, MO, NE, OK, NC, PA, RI, SC, SD, TX, UT, WI) have health facility licensing schemes specific to abortion providers regulating clinic staffing, construction, and practices.<sup>309</sup> Abortion providers are subject to discriminatory regulation because of the service itself or because they provide abortions after the first trimester.<sup>310</sup> TRAP laws are not based on medical evidence about safe abortion care but are meant to raise the costs of abortion providers.<sup>311</sup> Because such laws make it difficult for abortion clinics to stay open and discourage new doctors from entering the field, these laws undermine the availability of abortion services and women’s access.<sup>312</sup>
113. Law enforcement is often unresponsive to providers’ concerns about harassment and intimidation tactics.<sup>313</sup> Attempts to form liaisons with local police have failed to change police response to threats against clinic workers.<sup>314</sup> Police have failed to make arrests in response to protestor disruption, even when protestors entered a clinic.<sup>315</sup> Hostile protestors are arrested, only to be released soon after and resume their illegal activities.<sup>316</sup> The lack of police response has reduced protestors’ fear of consequences, encouraging their illegal activities.<sup>317</sup>
114. Many states have mandatory counseling and delay laws. State laws vary as to whether counseling must be in-person, whether information must be given orally and/or in writing, the content of the information, if state-produced written materials are offered, if information must be given by specific medical professionals, and whether an ultrasound must be taken.<sup>318</sup> Thirty-four states have counseling requirements, mandatory delays, or both. Eight states (LA, MS, OH, UT, WI, IN, SD, and MO) have two-trip requirements.<sup>319</sup> Some states require an ultrasound.<sup>320</sup> Providers agree there is no medical reason for mandatory delay and biased counseling laws.<sup>321</sup> Clinics already provide an informed consent and counseling process to ensure patients understand the risks and process of an abortion and are

<sup>305</sup> *Beijing Declaration and the Platform for Action, Fourth World Conference on Women*, Beijing, China, Sept. 4-15 1995, ¶ 97, U.N. Doc. A/CONF.177/20 (1996).

<sup>306</sup> See Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), art. 3, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights (ICCPR), *adopted* Dec. 16, 1966, G.A. res. 2200A (XXI), U.N. GAOR 21<sup>st</sup> Sess., Supp. No. 16, arts. 6.1, 9.1, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976); Convention on the Rights of the Child (CRC), *adopted* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44<sup>th</sup> Sess., Supp. No.49, arts 6.1, 6.2, U.N. Doc. A/44/49 (1989) (*entered into force* Sept. 2, 1990); *ICPD Programme of Action*, *supra* note 303, ¶¶ 7.3, 7.15, 8.34; *Beijing Declaration and the Platform for Action*, *supra* note 305, ¶¶ 96, 106, 108

<sup>307</sup> See ICCPR, *supra* note 306, at art. 17.1; CRC, *supra* note 306, at arts. 16.1, 16.2; *ICPD Programme of Action*, *supra* note 303, ¶ 7.45; *Beijing Declaration and Platform for Action*, *supra* note 305, ¶¶ 106, 107.

<sup>308</sup> See Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), *adopted* Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34<sup>th</sup> Sess. Supp. No. 46, art. 16 (1.e), U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 12 (*entered into force* Sept. 3, 1981); *ICPD Programme of Action*, *supra* note 303, at principle 8; *Beijing Declaration and the Platform for Action*, *supra* note 305, ¶ 223.

<sup>309</sup> LSRJ, STATE LAWS, *supra* note 265, at 5.

<sup>310</sup> CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS, *supra* note 244, at 49.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 25.

<sup>314</sup> *Id.* at 85.

<sup>315</sup> *Id.* at 76.

<sup>316</sup> *Id.* at 74.

<sup>317</sup> *Id.* at 85.

<sup>318</sup> *Id.* at 46.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 3; Brokaw, *supra* note 269.

<sup>321</sup> CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS, *supra* note 244, at 46.

comfortable with their decision.<sup>322</sup> Biased counseling requirements are not useful to the clinics' procedures and often require providers to convey false, confusing, or misleading information.<sup>323</sup>

115. Although the Supreme Court has held that women have a constitutional right to have an abortion, case law on abortion fails to take the needs of IPV victims seriously. In *Planned Parenthood v. Casey*, the Supreme Court held that a spousal notification requirement could result in a woman's abuse and struck down that part of the law as an undue burden on women's right to have an abortion.<sup>324</sup> The Court, however, upheld a counseling and twenty-four-hour waiting period requirement,<sup>325</sup> and lower courts have continued to do so without adequately considering the impact on women's ability to obtain abortion services.<sup>326</sup> In *Cincinnati Women's Service v. Taft*, the Sixth Circuit upheld an in-person counseling and twenty-four-hour waiting period requirement despite evidence that the in-person meeting would be "all but impossible" for women experiencing IPV.<sup>327</sup> However, in assessing whether the restriction constituted an undue burden on access to abortion, the court only considered those women for whom the law would create a complete prohibition and refused to take into account other types of harm short of preventing an abortion.<sup>328</sup> Further, despite the fact that the law would completely preclude a significant proportion of battered women from obtaining an abortion, the court found that it placed no undue burden on the right to abortion.<sup>329</sup> Insisting that the barriers imposed by the law did not make obtaining abortion impossible, the court did not consider the other serious difficulties the law would impose on victims of IPV that might be sufficient to render the law unconstitutional.<sup>330</sup>

### **E. Recommendations**

116. To the United States government:
- a. Make contraception available as part of the minimum benefits of every health insurance plan, including methods of contraception that women can use independently and without detection by their partners.
  - b. Repeal federal funding restrictions on abortion, including the Hyde Amendment.
117. To state and local governments:
- a. Repeal mandatory delay and biased counseling laws.
  - b. Repeal TRAP laws and regulate abortion providers in the same manner as other medical care providers.
118. To the medical community and healthcare providers:
- a. Advocate the repeal of laws restricting access to abortion, such as mandatory delay, counseling, and TRAP laws.
  - b. Ensure that women receiving care are not coerced in their reproductive decision-making.

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<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 47.

<sup>324</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>325</sup> *Id.*

<sup>326</sup> Kathryn Colbert, Linda J. Wharton & Susan Frietsche, *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 *YALE J.L. & FEMINISM* 317, 357-39 (2006).

<sup>327</sup> *Cincinnati Women's Services v. Taft*, 468 F.3d 361, 372 (6th Cir. 2006).

<sup>328</sup> *Id.* at 372-73.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

#### IV. ECONOMIC (IN)SECURITY, EMPLOYMENT, AND HOUSING

##### A. Domestic violence and poverty

###### i. Background and prevalence

119. Domestic violence and poverty are intricately interwoven. While IPV occurs at all socioeconomic levels, it impacts women living below the poverty level disproportionately because of the stress they experience and their limited escape routes.<sup>331</sup>
120. According to recent studies, between 9% and 23% of women receiving public assistance report having been abused in the past twelve months and over 50% report experiencing physical abuse at some point in their adult lives.<sup>332</sup>
121. According to a recent National Institute of Justice (NIJ) study, violence against women in intimate relationships occurs more often and with greater severity in economically disadvantaged neighborhoods. This trend means that economically distressed families experience twice the rate of intimate violence as higher income families and that elevated rates of domestic violence occur within populations vulnerable to poverty.<sup>333</sup>
122. The NIJ found that women whose male partners experienced two or more periods of unemployment over the five-year study were almost three times as likely to be victims of intimate violence as were women whose partners had stable jobs.<sup>334</sup> The results also indicated that, as the ratio of household income to needs goes up, the likelihood of violence goes down. Families who reported extensive financial strain had a rate of violence more than three times that of couples with low levels of financial strain.<sup>335</sup>

###### ii. Effects and consequences

123. Efforts to escape violence can also have devastating economic impacts. Leaving a relationship might result in a corresponding loss of employment, housing, healthcare, childcare, or access to spousal income. Criminal and civil legal remedies, for example, may take time away from work or job training, resulting in lost wages or loss of employment. Mental and physical health problems, whether temporary or more long-term, can likewise diminish the ability to work, to participate in job training or education programs, or to comply with government benefit requirements.<sup>336</sup>
124. Similarly, domestic violence can hinder child support enforcement and threaten the receipt of “TANF” (Temporary Assistance to Needy Families) benefits. In order to qualify for assistance, TANF applicants must cooperate with state efforts to collect support; if they fail to do so, they risk denial or termination of assistance.<sup>337</sup> Ultimately, some battered women must choose to either enforce child support, which may result in retaliatory violence, or to abandon the pursuit of support, which could result in the loss of their TANF benefits and a potential long-term income source.
125. The role of economic distress in fueling domestic violence has particular consequences for groups experiencing high rates of poverty. African American women, for example, experience IPV at a rate 35%

<sup>331</sup> M. Davis, *The Economics of Abuse: How Violence Perpetuates Women's Poverty*, in BATTERED WOMEN, CHILDREN, AND WELFARE REFORM: THE TIES THAT BIND 17, 17-30 (R. Brandeis ed., 1990); L. GREENFIELD ET AL., BUREAU OF JUSTICE STATISTICS, VIOLENCE BY INTIMATES, NCJ-167237 (1998); L. HEYSE & C. GARCIA-MORENO, WORLD HEALTH ORG., VIOLENCE BY INTIMATE PARTNERS, WORLD REPORT ON VIOLENCE AND HEALTH (2002); A. KAPLAN, DOMESTIC VIOLENCE AND WELFARE REFORM, WELFARE INFORMATION NETWORK: ISSUES NOTES: 1-9, at 395 (1997); D. Kurtz, *Women, Welfare, and Domestic Violence*, in WHOSE WELFARE? 132 (G. Mink ed., 1999); J. PTACEK, BATTERED WOMEN IN THE COURTROOM (1999); J. RAPHAEL, SAVING BERNICE: BATTERED WOMEN, WELFARE AND POVERTY (2000).

<sup>332</sup> JILL DAVIES, POLICY BLUEPRINT ON DOMESTIC VIOLENCE AND POVERTY 4 (2002).

<sup>333</sup> BENSON & FOX, *supra* note 21, at 1.

<sup>334</sup> *Id.* at 2.

<sup>335</sup> *Id.*

<sup>336</sup> Richard M. Dolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence*, 56 J. Soc. ISSUES 655, 664-70 (2000); U.S. GAO, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 19 (1998).

<sup>337</sup> 42 U.S.C. § 608(a)(2).

higher than that of white women and about 2.5 times the rate of women of other races.<sup>338</sup> According to the National Violence Against Women Survey (NVAWS), African American women also experience higher rates of intimate partner homicide than their white counterparts. In 2007, black female homicide victims were twice as likely as white female homicide victims to be killed by a spouse (0.96 and 0.50 per 100,000, respectively). Black females were four times more likely than white females to be murdered by a boyfriend or girlfriend (1.44 and 0.34 per 100,000, respectively).<sup>339</sup>

126. Researchers have attributed such disparities largely to economic factors. African Americans and whites with high incomes, for example, experience virtually identical rates of domestic violence.<sup>340</sup> While African Americans with moderate incomes still have a significantly higher rate of intimate violence than their white counterparts, this trend can be explained at least in part by the tendency for neighborhood economic disadvantage to increase the risk of domestic violence in tandem with personal financial distress. The role of community stability is particularly relevant for African Americans, whose neighborhood options do not always mirror individual economic status; for instance, while 36% of African American couples may be considered economically disadvantaged, more than twice as many live in disadvantaged neighborhoods.<sup>341</sup>
127. Abused immigrant women are similarly likely to experience economic hardship. Immigrant women often suffer higher rates of battering than United States citizens because they may come from cultures that accept domestic violence or have less access to legal and social services than United States citizens. Additionally, immigrant batterers and victims may believe that the penalties and protections of the United States legal system do not apply to them. Battered immigrant women who attempt to flee may not have access to bilingual shelters, financial assistance, or food. It is also less likely that they will have the assistance of a certified interpreter in court, when reporting complaints to the police or a 911 operator, or in acquiring information about their rights and the legal system.<sup>342</sup>

### *iii. Law and policy problems*

128. While TANF's Family Violence Option (FVO) allows states to exempt victims of domestic violence from program requirements in cases where compliance would make it more difficult to escape domestic violence or penalize victims of such violence, state and local implementation has often proven ineffective and inadequate.<sup>343</sup>
129. This problem stems primarily from the failure of TANF offices to identify victims of domestic violence. Multiple reports and surveys across the country indicate a stark disparity between the probable number of victims applying for TANF benefits and the number actually identified at the TANF office. One recent study, for example, concluded that domestic violence screenings failed to identify 86% of the likely total women who were victims of recent violence.<sup>344</sup>
130. In addition, TANF offices may have institutional problems with implementing FVO policies. Unlike earlier public assistance programs in which the federal government designed uniform program requirements, TANF provides funding to the states to design and administer their own programs, leading to considerable variation from one region to the next.<sup>345</sup>
131. Since the FVO is not a mandatory provision of TANF, states have a great deal of flexibility in devising their policies. For example, states can opt to limit the circumstances under which program requirements may

<sup>338</sup> WOMEN OF COLOR NETWORK, *FACTS & STATS: DOMESTIC VIOLENCE IN COMMUNITIES OF COLOR 2* (2006).

<sup>339</sup> SHANNON CATALANO, ERICA SMITH, HOWARD SNYDER & MICHAEL RAND, BUREAU OF JUSTICE STATISTICS *SELECTED FINDINGS: FEMALE VICTIMS OF VIOLENCE 3* (2009).

<sup>340</sup> BENSON & FOX, *supra* note 21, at 4.

<sup>341</sup> *Id.*

<sup>342</sup> FAMILY VIOLENCE PREVENTION FUND, *THE FACTS ON IMMIGRANT WOMEN AND DOMESTIC VIOLENCE* (2002).

<sup>343</sup> 42 U.S.C. § 602(a)(7).

<sup>344</sup> NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *SHORTCHANGING SURVIVORS: THE FAMILY VIOLENCE OPTION FOR TANF BENEFITS 5* (2009).

<sup>345</sup> *Id.* at 6.

be waived. Some offer waivers only in cases of ongoing violence; others also provide waivers where compliance would penalize those still struggling with the consequences of past abuse.<sup>346</sup>

132. Due to the decentralized way in which states administer benefits, FVO implementation also varies by locality. While the FVO is initially adopted through legislative or administrative action at the state level, its implementation is left to local government agencies that inevitably vary in culture and resources. As a result, even states with relatively strong FVO legislation can lack uniformity in application from one locality to another.<sup>347</sup>
133. While immigrants who have been “battered or subjected to extreme cruelty” by a United States citizen spouse or a parent may receive public assistance under the Professional Responsibility and Work Opportunity Reconciliation Act (PRWORA), the Department of Housing and Urban Development has yet to reconcile Section 214 of the Housing and Community Development Act of 1980, which imposes restrictions on the use of assisted housing by non-resident aliens, with these expanded eligibility provisions. As a result, public housing authorities currently lack clear guidance regarding the eligibility status of this population.<sup>348</sup>
134. The key national organizations that have worked on this issue include: Legal Momentum, Center for Community Change, Women of Color Network (a project of the National Resource Center on Domestic Violence), National Women’s Law Center, CLASP (policy solutions that work for low-income people), Center for American Progress (Half in Ten campaign), Low Income Families’ Empowerment through Education (LIFETIME), and the Institute for Women’s Policy Research.

**iv. Recommendations**

135. Since job instability, and not merely employment status itself, is a major risk factor for violence against women, legislators should support policies and practices that provide job stability rather than those that promote periodic layoffs and rehiring.
136. In light of findings about how neighborhood types and economic distress increase the risk of intimate violence, service providers should target women who live in the most disadvantaged neighborhoods.
137. Because economic distress has been shown to increase the risk of violence, service providers might choose to address the economic resources of these women and, specifically, their need for cash assistance.
138. The U.S. Department of Health and Human Services (HHS) should provide funding for research into the effectiveness of TANF programs in addressing domestic violence and other barriers to success for TANF applicants/participants, should examine current domestic violence screening policies throughout the country to identify best practices, should actively promote these practices through enhanced federal guidance, and should conduct outreach with TANF offices to ensure they understand the framework of the federal law.
139. Congress should enact H.R. 4978,<sup>349</sup> proposed by Rep. Gwen Moore (D-WI), making the FVO a mandatory, rather than optional, component of the TANF program in order to encourage more uniform implementation throughout the country.
140. State and local agencies should facilitate TANF applicant/participant access to “good cause” domestic violence waivers via improved legislation and regulatory guidance, enhanced funds to support outreach

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<sup>346</sup> For a state-by-state summary of FVO provisions, see LEGAL MOMENTUM, FAMILY VIOLENCE OPTION: STATE BY STATE SUMMARY (2004), available at [http://www.legalmomentum.org/assets/pdfs/www6-6\\_appendix\\_d\\_family\\_violence\\_option.pdf](http://www.legalmomentum.org/assets/pdfs/www6-6_appendix_d_family_violence_option.pdf).

<sup>347</sup> *Id.* at 11-12.

<sup>348</sup> NAT’L HOUSING LAW PROJECT, OVERVIEW: IMMIGRATION STATUS AND FEDERALLY ASSISTED HOUSING 3 (2010).

<sup>349</sup> H.R. 4978, 111th Cong. (2010), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h4978ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4978ih.txt.pdf).

and advocacy, better communication with stakeholders, and improved applicant screening for domestic violence.

141. Local public assistance offices should improve outreach to and collaboration with domestic violence service providers, provide comprehensive training on domestic violence for all caseworkers and administrators, and regularly monitor the number of FVO applications received and waivers granted.
142. Congress should amend—either independently or through the reauthorization of VAWA—Section 214 of the Housing and Community Development Act of 1980 to conform its immigrant eligibility provisions to those of the Professional Responsibility and Work Opportunity Reconciliation Act.

## **B. Domestic violence and employment**

### ***i. Background, prevalence, effects, and consequences***

143. Domestic and sexual violence can significantly affect the workplace. On average, 1.7 million violent crimes occur on the job.<sup>350</sup> Approximately 36,500 people each year are raped and sexually assaulted at work, 80% of whom are women.<sup>351</sup> Homicide by an intimate partner constitutes 3% of workplace murders.<sup>352</sup>
144. Experiencing domestic or sexual violence is also a direct cause of workplace problems for the vast majority of victims who work. Batterers often exercise control over victims by preventing them from going to work or harassing them on the job.<sup>353</sup> The work lives of survivors are also disrupted if they need to seek housing or medical or legal help in response to abuse. Three studies collected by the U.S. Government Accountability Office found that between 24 and 52% of victims of domestic violence reported that they were either fired or had to quit their jobs as a result of abuse.<sup>354</sup> Up to 96% of domestic violence victims have experienced employment difficulties because of abusers and violence.<sup>355</sup> These statistics represent a troubling reality: thousands of employees who are suffering from intimate partner abuse are at great risk of losing their jobs, which will in turn render them more dependent on their abusers and less able to escape the cycle of violence.
145. Currently, a victim is vulnerable to being rejected for or fired from a position when an employer learns that she may have been subjected to abuse. An employer may act on outdated, but commonly held, notions about victims: that they enjoy abuse because they have stayed in a violent relationship or their attire or behavior must have invited sexual assault. Gay and lesbian victims of domestic violence face unique issues; they may not want to disclose abuse to an employer because they fear exposing their sexual orientation or face misconceptions about the dynamics of domestic violence in their relationships.
146. When employers are free to discriminate against survivors, survivors are forced to make the difficult choice between suffering in silence or risking loss of their income, as many abusers exercise complete control over their partners' finances.<sup>356</sup> A legal system that tolerates such obstacles to safe employment discourages victims of these crimes from reporting their abuse or otherwise taking steps to protect themselves.

### ***ii. Law and policy problems***

147. In general, the United States operates on an employment-at-will system. An employee can be fired for any reason, or no reason at all, unless the law prohibits it.

<sup>350</sup> DIETS T. DUHART, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *VIOLENCE IN THE WORKPLACE 1993-1999*, at 2 (2001).

<sup>351</sup> *Id.* at 2-3.

<sup>352</sup> *Id.* at 10.

<sup>353</sup> Dolman & Raphael, *A Review of Research on Welfare and Domestic Violence*, *supra* note 336, at 664-70.

<sup>354</sup> U.S. GAO, *supra* note 336, at 19.

<sup>355</sup> U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *DOMESTIC VIOLENCE: A WORKPLACE ISSUE 1* (1996).

<sup>356</sup> Susan L. Pullet, *Economic Abuse: The Unseen Side of Domestic Violence*, Feb. 2011 N.Y. ST. B.A. J. 40.

148. There is no federal law protecting victims of domestic violence from being fired because they have experienced abuse or because they need to seek leave to address safety, medical, mental health, or legal concerns arising from domestic violence.
149. Some states have passed laws that address the employment rights of survivors, but many gaps exist. A handful of states allow victims to take leave to deal with medical needs, court appearances, and safety issues, but the vast majority does not. At present, only ten states and the District of Columbia<sup>357</sup> provide some form of leave specifically to domestic violence victims, but even in some of those states, leave is restricted to a particular purpose, such as court appearances. Thus, a victim who needs time off to address other compelling health and safety issues may be left without protection. Only three states explicitly prohibit employers from firing employees because they are domestic violence victims.<sup>358</sup> Connecticut and Rhode Island bar employers from penalizing victims who have attended court or obtained restraining orders.<sup>359</sup>
150. While some courts have recognized that domestic violence victims who are fired should be able to sue for wrongful discharge from employment, other courts have held that employers can fire employees simply because they are domestic violence victims.<sup>360</sup>
151. Despite the prevalence of domestic and sexual violence, employers have done little in response. More than 70% of workplaces in the United States do not have a formal program or policy that addresses workplace violence, and only 4% train their employees on domestic violence and its impact on the workplace.<sup>361</sup> Many employers refuse to accommodate survivors' need for time off to attend court dates or doctors' appointments, making it all but impossible for survivors to address the violence in their lives while financially supporting themselves.
152. The key national organizations that have worked on this issue include: the American Civil Liberties Union (ACLU) Women's Rights Project, Legal Momentum, Corporate Alliance to End Partner Violence, and Peace At Work.

### *iii. Recommendations*

153. Federal and/or state laws must be amended to prohibit discrimination against survivors of domestic violence, sexual assault, and stalking and to provide emergency leave when employees need time off to address safety, health, housing, and legal concerns. These laws should require employers to make reasonable accommodations to support victims of domestic violence. Because batterers frequently seek to harass victims at work, survivors may need basic accommodations from their employers to ensure their safety, such as a change in telephone number or seating assignment, installation of a lock, a schedule modification, emergency leave, or job reassignment. These accommodations allow survivors to continue to financially support themselves while imposing a minimal burden on their employers.
154. The government should continue to work to ensure that unemployment compensation is readily available to victims of domestic violence. The American Recovery and Reinvestment Act of 2009 (ARRA) included several provisions for modernizing state unemployment insurance systems, such as providing access to unemployment insurance benefits to various groups who were not previously covered by state laws, including victims of domestic violence.<sup>362</sup> Under ARRA, the federal government provided incentive

<sup>357</sup> See CAL. LAB. CODE §§ 230, 230.1; COLO. REV. STAT. § 24-34-402.7; D.C. CODE §§ 32.131.01, 32.131.02; FLA. STAT. § 741.313; HAW. REV. STAT. § 378-72; 820 ILL. COMP. STAT. 180/1-180/45; K.S.A. §§ 44-1131, 44-1132; 26 ME. REV. STAT. § 850; N.Y. PENAL L. § 215.14; N.C. GEN. STAT. §§ 50B-5.5, 95-270(a); OR. REV. STAT. §§ 659A.290, 659A.885; WASH. REV. CODE § 49.76.

<sup>358</sup> 820 ILL. COMP. STAT. 180/30; K.S.A. §§ 44-1131 & -1132; N.Y. EXEC. L. § 296-1(a) & 292 (34).

<sup>359</sup> CONN. GEN. STAT. § 54-85b; R.I. GEN. LAWS § 12-28-10.

<sup>360</sup> Compare *Danny v. Laidlaw Transit Services*, 165 Wash. 2d 200 (2008) with *Imes v. City of Asheville*, 163 N.C. App. 668, *offs*, 359 N.C. 182 (2004).

<sup>361</sup> U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, SURVEY OF WORKPLACE VIOLENCE PREVENTION (2006).

<sup>362</sup> Pub. L. No. 111-5, Division B, Title II, Sec. 2003 (Jan. 6, 2009).

payments to states that chose to make changes to their unemployment insurance systems. In response, many states, although not yet all, passed laws that guaranteed unemployment compensation to victims who had been forced to leave their jobs due to violence. Even where states do provide coverage, however, laws vary as to whether the claimant or their family member must have been subject to or in fear of domestic violence, sexual assault or stalking, and each state has different requirements for eligibility and documenting the violence.

155. The federal and state governments should encourage all employers to adopt and implement policies addressing the needs of victims of domestic violence. These policies should address issues like taking emergency leave, enforcing a restraining order at the workplace, and making safety-related accommodations at work.

### C. Domestic violence and housing

#### i. Background, prevalence, effects, and consequences

156. The home and domestic violence are inextricably linked. More than 70% of IPV occurs at or near the victim's home.<sup>363</sup> Women living in rental housing experience IPV at nearly four times the rate of women who own their own homes.<sup>364</sup> Because abusers often seek to limit their partners' ability to find or keep a job, those groups of women who are the most vulnerable to the loss of housing and who are the least likely to be able to locate affordable new housing are at the greatest risk of domestic violence.
157. Across the United States, domestic violence is a primary cause of homelessness for women and their children. Up to half of homeless women report that they are homeless as a direct result of abuse.<sup>365</sup> Under "one-strike" or "crime-free" policies, domestic violence victims in government-subsidized and private housing have been evicted because of the violence, even though they were the victims.<sup>366</sup> Because of leases that obligate tenants for the entire term of the lease, many victims choose to stay in a dangerous situation since they cannot afford a new home on top of paying off their existing lease obligation. Furthermore, in many localities, the laws have actually worsened for victims. More cities and towns are passing ordinances that penalize tenants for repeated calls to police.<sup>367</sup> Victims of domestic violence and stalking are particularly affected because they are likely to need to reach out to police more than once.
158. When the government authorizes or condones the eviction of a victim of domestic violence, it sends a pernicious message to all of us: keep violence a secret or risk homelessness. This message is dangerous because the steps a victim undertakes to end an abusive relationship--such as calling the police or

<sup>363</sup> SHANNON CATALANO ET AL., U.S. DEP'T OF JUSTICE, NCJ 228356, FEMALE VICTIMS OF VIOLENCE 1 (2009), available at <http://www.ojp.usdoj.gov/bjs/abstract/fvv.htm>.

<sup>364</sup> *Id.*

<sup>365</sup> See, e.g., CTR. FOR IMPACT RESEARCH, PATHWAYS TO AND FROM HOMELESSNESS: WOMEN AND CHILDREN IN CHICAGO SHELTERS (Jan. 2004), available at <http://www.impactresearch.org/documents/homelessnessreport.pdf> (finding 56% of women in Chicago shelters had been victims of domestic violence, and domestic violence was the immediate cause of homelessness for 22% of women in Chicago shelters); WILDER RESEARCH CTR., HOMELESS IN MINNESOTA 2003 (Feb. 2004), available at <http://www.wilder.org/download.0.html?report=536> (finding 31% of homeless women in Minnesota homeless because of domestic violence); NAT'L CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY (Dec. 2003), available at [http://usmayors.org/pressreleases/documents/hunger\\_121803.asp](http://usmayors.org/pressreleases/documents/hunger_121803.asp) (finding that 36% of cities surveyed identified domestic violence as a major cause of homelessness); MISSOURI ASS'N FOR SOCIAL WELFARE, HOMELESSNESS IN MISSOURI: THE RISING TIDE (May 2002), available at [http://www.masw.org/publications/homeless/report\\_text.pdf](http://www.masw.org/publications/homeless/report_text.pdf) (finding 27% of all homeless persons to be survivors of domestic violence and identifying domestic violence as a primary cause of homelessness); INST. FOR CHILDREN & POVERTY, THE HIDDEN MIGRATION: WHY NEW YORK CITY SHELTERS ARE OVERFLOWING WITH FAMILIES (Apr. 2002), available at <http://www.icpny.org/PDF/reports/foster.pdf?Submit1=Free+Download> (finding almost half of all homeless parents in New York City have been abused and one quarter of all homeless parents are homeless as a direct result of domestic violence); Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 420 (1991) (citing 1990 study finding that 50% of homeless women and children are fleeing abuse).

<sup>366</sup> See ACLU Letter to Senate Committee on Banking, Housing, and Urban Affairs Leadership Urging Implementation of the 2005 Violence Against Women Act (Mar. 11, 2008), available at <http://www.aclu.org/womens-rights/aclu-letter-senate-committee-banking-housing-and-urban-affairs-leadership-urging-imple>. For more information about cases, see *Violence Against Women: Housing*, ACLU, [www.aclu.org/fairhousingforwomen](http://www.aclu.org/fairhousingforwomen) (last visited Sept. 26, 2011).

<sup>367</sup> Cari Fais, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181 (June 2008), available at <http://www.columbia-lawreview.org/assets/pdfs/108/5/Fais.pdf>.

obtaining a protective order—are the very steps likely to escalate an abuser’s violence, make the abuse public, and expose her to the risk of discrimination and eviction.

**ii. Law and policy problems**

159. VAWA was amended in 2005 to prohibit discrimination against victims of domestic violence, dating violence, and stalking in public housing and Section 8-funded housing.<sup>368</sup> These legal protections do not apply to the vast majority of housing in the United States, such as federally subsidized housing that does not fall under the public housing and Section 8 programs or private housing that receives no federal subsidy. They also do not apply to victims of sexual assault and do not provide any avenue to file complaints for violations of VAWA.
160. The U.S. Department of Housing and Urban Development (HUD), public housing authorities, and affected owners have inadequately implemented VAWA’s housing protections. For example, while VAWA requires public housing authorities to incorporate VAWA into the annual plans they submit to HUD, many have failed to do so.<sup>369</sup> HUD issued an interim rule on VAWA in January 2009, basically reiterating the statutes. Advocates across the country filed comments in response, calling for a final rule that provides clear guidance that would help victims access the protections guaranteed under the law.<sup>370</sup> A final rule was issued in October 2010, adopting many of the advocates’ comments but rejecting others, including a recommendation that public housing authorities be required to provide emergency transfers when a tenant is threatened in her current public housing unit.<sup>371</sup> Further guidance is needed to fully protect survivors’ housing.
161. Currently, only eleven states and the District of Columbia have laws prohibiting housing discrimination against victims of domestic violence, and only fourteen states and the District of Columbia have enacted legislation that allows domestic violence victims to terminate a lease early to escape a violent living situation.<sup>372</sup>
162. The key national organizations that have worked on this issue include: the ACLU Women’s Rights Project, National Law Center on Homelessness & Poverty, the National Network to End Domestic Violence, the National Housing Law Project, and the Sargent Shriver National Center on Poverty Law.

**iii. Recommendations**

163. The United States should recognize that discrimination against survivors of domestic violence, sexual assault, and stalking is a form of sex discrimination. Housing policies must not exclude applicants or evict tenants based on the abuse they have experienced. The federal government should codify this anti-discrimination principle by extending the housing protections enacted in 2005 in VAWA to survivors of sexual assault and, at a minimum, to other forms of federally-funded housing, such as housing funded by the Low-Income Housing Tax Credit and the U.S. Department of Agriculture Rural Housing. State governments should pass laws that prohibit discrimination and provide victims with options to ensure their safety, including early lease termination.

<sup>368</sup> 42 U.S.C. §§ 1437d, 1437f.

<sup>369</sup> NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *INSULT TO INJURY: VIOLATIONS OF THE VIOLENCE AGAINST WOMEN ACT* (Apr. 2009), available at [http://www.nlchp.org/content/pubs/Insult\\_To\\_Injury\\_VAWA\\_Apr\\_%2020095.pdf](http://www.nlchp.org/content/pubs/Insult_To_Injury_VAWA_Apr_%2020095.pdf).

<sup>370</sup> See ACLU Coalition Comments to HUD Regarding the VAWA Interim Rule (Jan. 29, 2001), available at <http://www.aclu.org/womens-rights/aclu-coalition-comments-hud-regarding-vawa-interim-rule>.

<sup>371</sup> 75 Fed. Reg. 66,246, 66,253 (Oct. 27, 2010).

<sup>372</sup> See ARK. CODE § 18-16-112; CAL. HEALTH AND SAFETY CODE § 34328.1; COLO. REV. STAT. ANN. §§ 13-40-104(4), 107.5(5); 25 DEL. CODE § 5316; D.C. CODE §§ 2-1404.01, -02, 2-1402.21(f), 42-3505.01, .07, .08; IND. CODE § 32-31-9(1)-(15); M.D. CODE ANN., REAL PROP § 8-5A-05; N.C. GEN. STAT. §§ 42-40, 42-42.2, 42-42.3, 42-45.1; ORE. REV. STAT. §§ 90.453, .456, .459; R.I. GEN. LAWS §§ 34-37-1, 2, 2.4, 3, 4; WASH. REV. CODE ANN. §§ 59.18.570, 575, 580, 585; 2009 W.I. Act 95. See also ARIZ. REV. STAT. ANN. § 33-1318; CAL. CIV. CODE § 1946.7; 25 DEC. CODE §§ 5141(6); D.C. CODE §§ 2-1404.01, -02, 2-1402.21(f), 42-3505.01, .07, .08; 765 ILCS 750/1; IND. CODE § 32-31-9(1)-(15); M.D. CODE ANN., REAL PROP. §§ 8-5A-02 -04; MINN. STAT. § 504B.206; N.J.S.A. 46:8-9.5 - 9.7; N.Y. REAL PROP. LAW §§ 227-c; N.D. CENTURY CODE § 47-16-17.1; N.C. GEN. STAT. §§ 42-40, 42-42.2, 42-42.3, 42-45.1; ORE. REV. STAT. §§ 90.453, .456, .459; TEX. PROP. CODE § 92.016; WASH. REV. CODE ANN. § 59.18.352.

164. To meet its “due diligence” obligations, the United States must take reasonable measures to more effectively implement VAWA so that its protections are extended to all tenants living in public housing and Section 8-subsidized housing. Further implementation of VAWA should include, after consultation with advocates for domestic violence survivors and other stakeholders, the issuance of comprehensive VAWA guidance and the designation of HUD staff to coordinate policy-making decisions regarding domestic violence and to investigate complaints regarding violations of VAWA.
165. The United States must make available more affordable, secure housing options for those fleeing domestic violence so that escape from abuse does not end in homelessness. As states slash funding for domestic violence shelters, transitional housing, and long-term housing, it has become even more vital for federal housing programs to prioritize the needs of domestic violence survivors. For example, victims of abuse should be given preference for admission to public housing and Section 8 housing programs; only about a third of public housing authorities grant such preferences.
166. Local ordinances that mandate or encourage the eviction of tenants, such as domestic violence and stalking survivors, because they have called the police should be repealed. These laws punish victims who seek help and burden their right to government assistance.

## V. VIOLENCE AGAINST AMERICAN INDIAN WOMEN

### A. Background, prevalence, effects, and consequences

167. American Indian and Alaska Native women (Indian women<sup>373</sup>) face greater rates of domestic violence and sexual assault than any other group in the United States.<sup>374</sup> Despite this horrific fact, United States law has diminished the authority of American Indian and Alaska Native nations to safeguard the lives of Indian women. The jurisdictional limitations the United States places on Indian nations have created a systemic barrier that denies Indian women access to justice and prevents them from living free of violence or the threat of violence.
168. Violence against Indian women in the United States has reached epidemic proportions. Violence against Indian women greatly exceeds that of any other population in the United States.<sup>375</sup> Every hour of every day an Indian woman is the victim of sexual and physical abuse.<sup>376</sup> Indian women are 2.5 times more likely to experience violence than other women in the United States.<sup>377</sup> The statistics of the United States Department of Justice report that one in three Indian women will be raped at some point in their life and that three in five will be physically assaulted.<sup>378</sup> Indian women are also stalked at a rate more than double that of any other population.<sup>379</sup>
169. Indicating the severity of the violence committed on a daily basis against Indian women, homicide was one of the leading causes of death for Indian women in 2004, outranking heart disease, cancer, diabetes

<sup>373</sup> See, e.g., 25 U.S.C. § 1903 (defining an “Indian” for jurisdictional purposes as any individual who is a member of an Indian tribe or is an Alaska Native and a member of an Alaska Native Regional Corporation).

<sup>374</sup> See, e.g., Pub. L. No. 109-162 § 901 (2006).

<sup>375</sup> *Id.*

<sup>376</sup> Brief of Amici Curiae The National Network to End Domestic Violence, Sacred Circle, National Resource Center to End Violence Against Native Women et al. in Support of Respondents at 4, *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316 (2008) [hereinafter Long Brief].

<sup>377</sup> See STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, AMERICAN INDIANS AND CRIME 8 (2004).

<sup>378</sup> See PATRICIA TJADEN & NANCY THOENNE, U.S. DEP’T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 22 ex. 7 (2000).

<sup>379</sup> See U.S. DEP’T OF JUSTICE, DOMESTIC VIOLENCE AND STALKING, THE SECOND ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT (1997); U.S. DEP’T OF JUSTICE, STALKING AND DOMESTIC VIOLENCE, THE THIRD ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT (1998).

and other such illnesses.<sup>380</sup> Intentional homicide is the third leading cause of death for Indian girls and women between the ages of ten and twenty-four. Some counties within the United States have rates of murder of Indian women that are over ten times the national average.<sup>381</sup>

170. The United States Department of Justice reports reflect a high number of inter-racial crimes, with white or black offenders committing 88% of all violent victimizations of Indian women from 1992 to 2001.<sup>382</sup> Nearly four out of five Indian victims of sexual assault described the offender as white.<sup>383</sup> Three out of four Indian victims of IPV identified the offender as a person of a different race.<sup>384</sup>
171. The epidemic of violence against Indian women in the United States jeopardizes their human rights to life, security of the person, freedom from discrimination, equal protection under the law, and access to effective judicial remedies. The inadequate response of the United States to the epidemic of violence against Indian women adversely impacts entire Indian nations, which already suffer from the worst socio-economic status of any population in the United States. United States laws have created a law enforcement void that appears to condone violence against Indian women and permits perpetrators to act with impunity on Indian lands.
172. As a result, in the United States, where most perpetrators of violence against Indian women go unpunished, the majority of Indian women will have their lives interrupted by violence. Many feel that a violent attack is inevitable. An advocate for survivors of sexual abuse from a tribe in Minnesota describes it not as a question of *if* a young Indian woman is raped, but *when*. Studies show that violent offenders are likely to commit additional acts of violence when they are not held responsible for their crimes.<sup>385</sup> Dr. Lisak, a leading researcher on sexual assault predators in the United States, described the inherent danger that the inadequate response presents to the lives of Indian women: “Predators attack the unprotected. The failure to prosecute sex crimes against American Indian women is an invitation to prey with impunity.”<sup>386</sup>
173. Because women play central and crucial roles in Indian communities, this violence disrupts the stability and productivity of their families, their communities and the entire Indian nation. By every measure, American Indians and Alaska Natives continue to rank at the bottom of every scale of economic and social well-being. Violence against Indian women contributes to the marginalization of Indian and Alaska Native communities. This violence undermines the ability of Indian women to provide positive and safe environments for their children. Studies have found that women victimized by violence are more likely to seek public assistance, and anecdotal evidence suggests that they are more likely to self-medicate with alcohol and drugs to deal with the violence and injustice they have experienced. Reducing violence against Indian women gives them the ability to create better environments for their children and decreases their children’s risk of experiencing violence, alcoholism, drug abuse, and other social ills.

## B. Law and policy problems

174. There are 565 federally recognized Indian nations in the United States, including more than 200 Alaska Native villages,<sup>387</sup> which retain sovereign authority over their lands and peoples.<sup>388</sup> Indian tribal

<sup>380</sup> See Melanie Heron, CDC, *Deaths: Leading Causes for 2004*, 56 NAT’L VITAL STAT. REP. 5 (2004). In 2007, a total of 10,007 Indian people were listed as missing by the National Crime Information Center. See U.S. DEP’T OF JUSTICE, NCIC MISSING PERSON AND UNIDENTIFIED PERSON STATISTICS FOR 2007 (2008).

<sup>381</sup> RONET BACHMAN ET AL., NAT’L INST. OF JUSTICE, *VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN* (2007).

<sup>382</sup> PATRICIA TJADEN & NANCY THOENNE, *supra* note 378, at 22.

<sup>383</sup> See *id.* at 9.

<sup>384</sup> LAWRENCE A. GREENFIELD & STEVEN K. SMITH, U.S. DEP’T OF JUSTICE, *AMERICAN INDIANS AND CRIME* 8 (1999) (noting that among American Indian victims, “75% of the intimate victimizations and 25% of the family victimizations involved an offender of a different race,” a much higher percentage than among victims of all races as a whole).

<sup>385</sup> David Lisa & P.M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 1 (2002).

<sup>386</sup> *Id.*

<sup>387</sup> Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553 (Apr. 4, 2008).

governments are pre-existing sovereigns that possess inherent authority over their people and territory, including the power “necessary to protect tribal self-government [and] to control internal relations.”<sup>389</sup> Indian nations also have such additional authority as Congress may expressly delegate.<sup>390</sup> The basis for tribal authority is their inherent need to determine tribal citizenship, to regulate relations among their citizens, and to legislate and tax activities on Indian lands, including certain activities by non-citizens.<sup>391</sup> Indian nations have broad legislative authority to make decisions impacting the health and safety of the community, including tribal civil and criminal justice responses to violence against women and services for victims. Tribal law enforcement officials are often the first responders to violence against women committed within their communities.

175. The United States, without the agreement of or consultation with Indian nations, imposed legal restrictions upon the inherent jurisdictional authority that American Indian and Alaska Native nations possess over their respective territories. These restrictions, described in detail below, have created systemic barriers that deny Indian women access to justice and prevent them from living free of violence or the threat of violence.
176. Unlike other local communities in the United States, American Indian nations and Alaska Native villages cannot investigate and prosecute most violent offenses occurring in their local communities. Tribes cannot effectively protect Indian women from violence by providing adequate policing and effective judicial recourse against violent crimes in their local communities because they cannot prosecute non-Indian offenders<sup>392</sup> and because they can only sentence Indian offenders to prison terms of up to three years.<sup>393</sup>
177. These limitations are a key factor creating and perpetrating the disproportionate violence against Indian women.<sup>394</sup> As a result, Indian women cannot rely upon their tribal governments for safety or justice services and are forced to seek recourse from foreign federal or state government agencies. The response of federal and state agencies is typically inadequate given the disproportionately high number of domestic and sexual violence crimes committed against Indian women.<sup>395</sup>
178. The major legal barriers obstructing the ability of Indian nations to enhance the safety of women living within the jurisdictional authority of Indian nations include:
  - a. the assumption of federal jurisdiction over certain felony crimes under the Major Crimes Act (1885);
  - b. the removal of criminal jurisdiction over non-Indians by the U.S. Supreme Court in *Oliphant v. Suquamish Tribe* (1978);
  - c. the imposition of a one-year, per offense, sentencing limitation upon tribal courts by the U.S. Congress through passage of the Indian Civil Rights Act of 1968 (ICRA);<sup>396</sup>
  - d. the transfer of criminal jurisdiction from the United States to certain state governments by the U.S. Congress through passage of Public Law 53-280 and other similar legislation (1953); and
  - e. the failure to fulfill treaties signed by the United States with Indian nations as recognized by the court in *Elk v. United States* in 2009.

<sup>388</sup> *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)) (“Indian tribes have long been recognized as sovereign entities, ‘possessing attributes of sovereignty over both their members and their territory.’”); see also *Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

<sup>389</sup> *Montana v. United States*, 450 U.S. 544, 564 (1981); see also Cohen’s Handbook on Federal Indian Law §4.01[1][a] (Nell Newton ed. 2005); VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS 26 (1999) (describing the constitutional status of tribal governments, which existed prior to and independent of the United States Constitution).

<sup>390</sup> *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

<sup>391</sup> *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.* 554 U.S. 316 (2008).

<sup>392</sup> *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

<sup>393</sup> Tribal Law and Order Act of 2010, Pub. L. No. 111-211 (2010).

<sup>394</sup> AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 2, 6-8 (Apr. 2007), available at [http://www.amnesty.org.ru/library/pdf/AMR510352007ENGLISH/\\$File/AMR5103507.pdf](http://www.amnesty.org.ru/library/pdf/AMR510352007ENGLISH/$File/AMR5103507.pdf) [hereinafter MAZE OF INJUSTICE] (finding that there is a clear pattern of discriminatory and inadequate law enforcement in cases of violence against Indian women).

<sup>395</sup> *Id.* at 8.

<sup>396</sup> *But see* Pub. L. No. 111-211 (2010) (expanding tribal court sentencing authority under ICRA to three years when specific conditions are met).

179. Due to these legal restrictions imposed by the United States federal government on Indian nations, criminal jurisdiction on Indian lands is divided among federal, tribal, and state governments. Which government has jurisdiction depends on the location of the crime, the type and severity of the crime, the Indian status of the perpetrator, and the Indian status of the victim.
180. The complexity of this jurisdictional arrangement contributes to violations of women’s human rights because it causes confusion over who has the authority to respond to, investigate, and prosecute violence against Indian women.

*i. Removal of tribal criminal jurisdiction over non-Indians*

181. Inherent tribal criminal jurisdiction over crimes committed by non-Indians was stripped by the United States Supreme Court in 1978. The Supreme Court ruled in *Oliphant v. Suquamish Tribe* that Indian nations lack the authority to impose criminal sanctions on non-Indian citizens of the United States who commit crimes on Indian lands.<sup>397</sup> For the last thirty years, Indian nations have been denied criminal jurisdiction over non-Indians and the authority to prosecute non-Indians committing crimes on Indian lands. When a non-Indian commits physical or sexual violence against an Indian woman on Indian lands, the Indian nation does not have the authority to prosecute the offender. Yet, nationally, non-Indians commit 88% of all violent crimes against Indian women.<sup>398</sup>
182. Either the United States, or—in cases where the United States has delegated this authority to the state—the state government, has the authority to prosecute non-Indian offenders committing crimes on Indian lands. As the United States Civil Rights Commission pointed out, the problem is that the *Oliphant* decision did not place any responsibility on the United States government or its delegates to prosecute non-Indian offenders on Indian lands. In the words of the Commission, “[T]he decision only dealt with limitations to tribal power, not the federal responsibility to compensate for those limitations based on the trust relationship. The Court did not *require* the federal government to protect tribes or prosecute non-Indian offenders who commit crimes on tribal lands.”<sup>399</sup> If the United States or the state government does not prosecute the non-Indian offender, then the offender goes free without facing any legal consequences for his actions, and the Indian woman is denied any criminal recourse against her abuser.
183. Federal authorities, who are often the only law enforcement officials with the legal authority to investigate and prosecute violent crimes in Indian communities, have regularly failed to do so.<sup>400</sup> Prior to the passage of the Tribal Law and Order Act in July 2010, United States federal prosecutors were not required to and did not release official reports detailing the crimes they choose not to prosecute. The United States Senate Committee on Indian Affairs conducted an “Oversight Hearing to Examine Federal Declinations to Prosecute Crimes in Indian Country” on September 18, 2008.<sup>401</sup> Federal United States Attorney for North Dakota Drew Wrigley refused to provide data about the crimes his office failed to prosecute. He stated that providing the information would mislead the public and jeopardize criminal investigations. United States Attorney General Michael Mukasey affirmed Wrigley’s reasons for not providing the information.
184. According to a recent United States Government Accountability Office study, from 2005 through 2009, U.S. attorneys failed to prosecute 52% of all violent criminal cases, 67% of sexual abuse cases, and 46% of assault cases occurring on Indian lands.<sup>402</sup> As these numbers indicate, Indian women are routinely denied their right to adequate judicial recourse. This treatment separates Indian women from other groups under the law. The United States’ restriction of tribal criminal authority combined with its failure

<sup>397</sup> *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

<sup>398</sup> TJADEN & THOENNE, *supra* note 378.

<sup>399</sup> U.S. COMM’N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 67 (2003), available at [http://www.usace.army.mil/CECW/TribalIssues/Documents/quiet\\_crisis.pdf](http://www.usace.army.mil/CECW/TribalIssues/Documents/quiet_crisis.pdf).

<sup>400</sup> Mary Claire Jalonick, *DOJ Will Not Provide Indian Crime Data*, NEWS FROM INDIAN COUNTRY, Sept. 2008, [http://indiancountrynews.net/index.php?option=com\\_content&task=view&id=4641&Itemid=33](http://indiancountrynews.net/index.php?option=com_content&task=view&id=4641&Itemid=33).

<sup>401</sup> *Id.*

<sup>402</sup> U.S. GAO, U.S. DEP’T OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 3 (Dec. 13, 2010).

to effectively police and prosecute these violent crimes violates its obligation to act with due diligence to protect Indian women from violence and to punish perpetrators in accordance with international human rights standards.

**ii. *Transfer of federal criminal jurisdiction to certain state governments***

185. Under the United States Constitution, governmental relations with Indian nations are the function of the federal government.<sup>403</sup> In 1953, in violation of this responsibility and without consultation with Indian nations, the United States Congress passed Public Law 280, delegating criminal jurisdiction over Indians on Indian lands to some states.<sup>404</sup> While this delegation of authority did not alter the authority of Indian nations in those states, it had a devastating impact on the development of tribal justice systems and the safety of Indian women.<sup>405</sup>
186. In Public Law 280 states, the state government has the criminal jurisdiction normally exercised by the federal government over crimes on Indian lands. The state government has exclusive jurisdiction over non-Indians and felony jurisdiction over Indians. Accordingly, when a non-Indian commits physical or sexual violence against an Indian woman on Indian lands, the state has exclusive jurisdiction over the offender. When an Indian commits physical or sexual violence against an Indian woman on Indian lands, only the state government has the criminal authority to impose a sentence of more than three years.
187. Like the United States government, states often fail to prosecute criminal cases occurring within Indian lands.<sup>406</sup> The criticisms of United States prosecutors and their failure to prosecute violent crimes also apply to state prosecutors. The failure to prosecute crimes occurring on Indian lands, however, is often more acute in these states because they do not receive any additional funding from the United States to handle these cases.<sup>407</sup> This often results in the understaffing of police on Indian lands and reluctance on the part of state prosecutors to take cases.

**iii. *Limitations on sentencing authority of tribal courts***

188. United States law also limits tribal authority over Indian perpetrators on their own lands.<sup>408</sup> Indian nations have concurrent criminal authority with the federal government under the Major Crimes Act and may prosecute crimes committed by Indians,<sup>409</sup> but under the recently amended ICRA, tribal courts can sentence Indian offenders to up to three years in prison (with a total of nine years for consecutive sentences for separate offenses) and a fine of up to \$15,000. However, this enhanced sentencing authority (the Tribal Law and Order Act enacted in July 2010 increased tribal court sentencing authority from up to one year in prison and a \$5,000 fine to the current standards) can only be exercised when certain protections are provided to the accused. While a tremendous step forward for some Indian nations, the reality is that most tribes do not have the resources to meet the requirements under the Act, and are thus effectively still limited to the one-year sentencing cap. It may take a significant amount of time before any tribes are able to take advantage of this enhanced sentencing authority. As a result, when an Indian commits violence against an Indian woman, the Indian nation can prosecute the offender, but the woman is still denied an effective remedy because the tribal court can only sentence the offender to a maximum of three years in prison and may only be able to sentence the offender to a one-year prison term.

<sup>403</sup> U.S. CONST. art. 1, § 8.

<sup>404</sup> Pub. L. No. 280, § 7, 67 Stat. 588, 590 (1953). For information on jurisdiction under Pub. L. No. No. 280, see Carole E. Goldberg-Ambrose, *Public Law 280: State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 535-94 (1975).

<sup>405</sup> Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century?*, 38 CONN. L. REV. 697 (2006).

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> 18 U.S.C. §§ 1152, 1162 (providing for federal jurisdiction over crimes in Indian country).

<sup>409</sup> 18 U.S.C.A. §§ 1152, 1153; *see also* United States v. Kagama, 118 U.S. 375 (1886) (upholding the constitutionality of the Major Crimes Act).

189. The complexity of this jurisdictional arrangement contributes to violations of Indian women’s human rights by denying Indian women the rights to:
- a. equality and equal protection of the laws by subjecting them to a law enforcement scheme distinct from all others in the United States;
  - b. life and security by allowing perpetrators to commit acts of rape and domestic violence without legal consequence for their violence; and
  - c. access to justice by denying them legal recourse and allowing for an ongoing pattern of violence that often increases in severity and frequency over time.

**iv. Other issues faced by tribal courts, prosecutors, and law enforcement**

190. In the past decade, Indian nations have developed the infrastructure for tribal justice system components to provide safety to women within their jurisdiction, including tribal police departments, codes, and courts.
191. Many Indian nations have developed their own law enforcement departments. Police powers follow the criminal jurisdiction of the tribal, federal, and state governments in Indian country.<sup>410</sup> Tribal law enforcement has the authority to stop all persons and to detain them for the purpose of transferring the person to federal or state authorities, but it does not have the authority to arrest or to investigate crimes committed by non-Indians. Tribal law enforcement is subject to nearly all the same jurisdictional complications associated with the authority to prosecute. In some circumstances, the effects of the jurisdictional maze may be lessened by practical necessity, by inter-governmental agreements, or by statutes.
192. Many Indian nations have developed domestic violence codes.<sup>411</sup> They have supported personnel and training of tribal law enforcement, tribal courts, prosecutors, and probation officers. Tribal courts have also ordered that offenders enroll in re-education programs, and tribes have supported programs to encourage boys and young men to respect women.<sup>412</sup> According to Indian women’s organizations that are working to end domestic violence against Indian women, “At the tribal level, efforts are coordinated to create a system of safety for women seeking safety and protection within the tribal jurisdiction.”<sup>413</sup>
193. Efforts by Indian nations, however, are diluted by a lack of essential resources. Indian women are greatly disadvantaged by the lack of basic services for victims of sexual and physical violence within tribal jurisdictions. There is an acute need for basic education on domestic violence and sexual assault among law enforcement personnel.<sup>414</sup> Many health clinics and hospitals on Indian lands do not have rape kits or Sexual Assault Nurse Examiners.<sup>415</sup>
194. Funding for law enforcement on Indian lands is also inadequate. States spend an average of \$131 per year on each person in providing law enforcement services.<sup>416</sup> The United States spends considerably less per year per individual on law enforcement within tribal jurisdictions.<sup>417</sup> Many Indian nations have only a few police officers to cover their vast territories.<sup>418</sup> For example, within the state of Alaska, at least

<sup>410</sup> For a fuller discussion of law enforcement issues on Indian lands, see MAZE OF INJUSTICE, *supra* note 394.

<sup>411</sup> See, e.g., OFFICE ON VIOLENCE AGAINST NATIVE WOMEN & THE NAT’L CTR. ON FULL FAITH & CREDIT, VIOLENCE AGAINST NATIVE WOMEN: A GUIDE FOR PRACTITIONER ACTION 15 (2006) [hereinafter GUIDE FOR PRACTITIONER]; Melissa Tatum, *Law Enforcement Authority in Indian Country*, 4 TRIBAL L.J. 2 (2003/2004). For an example of a tribal domestic violence code, see the Navajo Nation Domestic Abuse Protection Act, IX NAVAJO TRIB. CODE § 1601 (1993).

<sup>412</sup> See, e.g., *Cangleska Inc. Men’s Re-Education Program*, SACRED CIRCLE, <http://www.cangleska.org/Mens%20program.htm>.

<sup>413</sup> Long Brief, *supra* note 376.

<sup>414</sup> See, e.g., GUIDE FOR PRACTITIONER, *supra* note 411, at 23-24.

<sup>415</sup> MAZE OF INJUSTICE, *supra* note 394, at 53-58 (finding that there is a clear pattern of discriminatory and inadequate law enforcement in cases of violence against Indian women).

<sup>416</sup> A QUIET CRISIS, *supra* note 399, at 75.

<sup>417</sup> *Id.* (“It is estimated that tribes have been 55 and 75% of the resources available to non-Indian communities, a figure that is even more exaggerated considering the higher crime rates.”).

<sup>418</sup> *Id.* at 75-76; *Law and Order in Indian Country: Hearing Before the Senate Committee on Indian Affairs*, 110th Cong. 8 (June 21, 2007) (statement of Chairman Marcus Wells, Jr., Three Affiliated Tribes of the Fort Berthold Reservation) (noting the “catastrophic shortage of law enforcement personnel” on the Reservation due to unfilled Bureau of Indian Affairs police positions).

eighty Alaska Native villages lack any form of law enforcement services. This public safety crisis confronting Indian nations is well-documented<sup>419</sup> and is often attributed to the United States government's failure to provide adequate resources for essential criminal justice services.<sup>420</sup>

195. Lacking the necessary criminal authority to prosecute non-Indian offenders, tribal courts have used civil laws and remedies to respond to cases of violence against Indian women. United States laws restrict tribal civil jurisdiction,<sup>421</sup> but Indian nations exercise limited civil jurisdiction. In general, "the inherent sovereign powers of an Indian Tribe do not extend to the activities of non-members of the tribe."<sup>422</sup> This principle is "subject to two exceptions: The first exception relates to non-members who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare."<sup>423</sup> Domestic relationships are one of the most common "consensual relations" between Indians and non-Indians.
196. Indian nations have used civil laws and remedies against non-Indian offenders, including civil contempt proceedings, banishment, tribal specific remedies such as suspension of certain tribal benefits, issuance of tribal protection orders, monetary penalties, community service, restitution, civil commitment, forfeiture, treatment and classes, and posting of a peace bond.<sup>424</sup>
197. Tribes historically banished batterers and rapists from their communities, giving women and the community the confidence that their villages and communities were safe. Today numerous Indian tribes such as the Eastern Band of Cherokee Indians maintain and continue this practice to exclude batterers and rapists from their tribal jurisdictional boundaries. Banishment prevents a woman, and many times her children, from being forced to flee her community and home due to violence. The necessity of "hiding" or "exiling" battered women is a tragic statement about the inability of a community to protect a woman from such abuse. Unlike state and county governments, Indian tribes have the authority to protect their members by restricting perpetrators of such crimes from entering their borders.
198. Indian nations have the inherent authority to issue civil protection orders to protect both Indian and non-Indian women from domestic abusers on Indian lands. They regularly issue civil protection orders to prevent future violence, award temporary custody of children, and resolve other urgent issues.<sup>425</sup> Tribal law enforcement enforces tribal protection orders on Indian lands.
199. Once Indian women leave tribal lands, they must rely on other jurisdictions for the enforcement of their tribal protection orders. If these jurisdictions do not enforce tribal protection orders, then Indian women are left unprotected because no other law enforcement has the authority to enforce the orders. States are primarily responsible for the enforcement of protection orders outside of tribal jurisdictions. Many states, however, do not recognize and enforce tribal protection orders. For example, in 2003, the State of Alaska instructed state troopers to disobey a state court order recognizing a tribal court protection order and claimed that both orders were illegal.<sup>426</sup>
200. In *Town of Castle Rock v. Gonzales*, the United States Supreme Court held that the United States Constitution does not require state law enforcement to investigate or enforce alleged violations of

<sup>419</sup> See, e.g., MAZE OF INJUSTICE, *supra* note 394, at 42; *Examining the Prevalence of and Solutions to Stopping Violence Against Indian Women: Hearing Before the Senate Committee on Indian Affairs*, 110th Cong. (Sept. 27, 2007); *Law and Order in Indian Country: Field Hearing Before the Senate Committee on Indian Affairs*, 110th Cong. (Mar. 17, 2008); *Law and Order in Indian Country: Hearing Before the Senate Committee on Indian Affairs*, 110th Cong. (May 17, 2007); *Law and Order in Indian Country: Hearing Before the Senate Committee on Indian Affairs*, 110th Cong. (June 21, 2007).

<sup>420</sup> See generally A QUIET CRISIS, *supra* note 399.

<sup>421</sup> See, e.g., *Montana v. United States*, 450 U.S. 544 (1980).

<sup>422</sup> *Id.* at 565.

<sup>423</sup> *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997).

<sup>424</sup> HALLE BONGAR WHITE ET AL., SOUTHWEST CTR. FOR LAW AND POLICY, CREATIVE CIVIL REMEDIES AGAINST NON-INDIAN OFFENDERS IN INDIAN COUNTRY: 2008 REPORT (2008), available at [www.ovw.usdoj.gov/docs/civil-remedies.pdf](http://www.ovw.usdoj.gov/docs/civil-remedies.pdf).

<sup>425</sup> GUIDE FOR PRACTITIONER, *supra* note 411, at 16.

<sup>426</sup> Sheila Tomey, *Trouble in Perryville*, ANCHORAGE DAILY NEWS, Nov. 3, 2003, <http://dwb.adn.com/front/story/4325477p-4335352c.html>.

domestic violence protection orders.<sup>427</sup> Thus, state law enforcement can choose whether to enforce these orders and may always choose not to enforce them.<sup>428</sup> State law enforcement often chooses not to enforce such orders because it faces no consequences for not enforcing them. Decisions by local law enforcement leave Indian women vulnerable to ongoing violence by domestic abusers.

201. Federal courts have further undermined the safety of Indian women by holding that tribal courts do not have jurisdiction to issue domestic violence protection orders requested by a non-member Indian woman against her non-Indian husband.<sup>429</sup> In *Martinez v. Martinez*, an Alaska Native woman residing on the Suquamish Reservation sought a domestic violence protection order against her non-Indian husband in the Suquamish Tribal Court. The federal district court held that the Tribal Court did not have the authority to issue the protection order because the issuance of the order was not necessary to protect tribal self-government and the non-Indian's conduct was not a menace to the safety and welfare of the Tribe.<sup>430</sup>
202. The *Martinez* decision fails to recognize the current reality of life within an Indian community and the importance of tribal courts in maintaining law and order in Indian communities. Non-member Indians and non-Indians as well as member Indians live within the territorial boundaries of most Indian communities. The tribal court may be the most responsive institution to meet the needs of the residents of the Indian community (Indian communities are often located in rural areas, physically distant from state courts and police stations). The court's ruling may cause many victims of domestic and sexual violence seeking a protection order from a tribal court to question whether such an order will increase their safety.
203. Orders of protection are a strong tool to prevent future violence but are only as strong as their recognition and enforcement. The *Martinez* decision undermines the safety of all women living on tribal lands because it suggests that tribal courts can only issue protection orders to protect their own members. It also makes it difficult for women who are living and being abused on tribal lands to seek any recourse against non-Indian abusers because it is unclear which government authority can issue a protection order against them if the tribal government cannot.
204. Congress took essential steps to address the systemic barriers denying access to justice for Indian women in the Safety for Indian Women Title of VAWA in 2005. Dedicated tribal leaders, advocates, and justice personnel are prepared to implement these amendments to federal code and programs established under this Title. Unfortunately, since passage of this landmark legislation, implementation of key provisions has been stymied, and federal departments charged with the responsibility of implementation have minimized the need for immediate action.<sup>431</sup> The demonstrated lack of will on the part of federal government is not only demoralizing but also life threatening to the women the statute was intended to protect.
205. For example, Congress responded to the epidemic of violence committed against Indian women by creating a new federal felony, *Domestic Assault by a Habitual Offender*, within the 2005 VAWA. This new felony enhances the punishment available for domestic violence and sexual assault perpetrators that have at least two prior convictions of domestic violence or sexual assault.<sup>432</sup> The habitual offender provision of the 2005 VAWA includes tribal court convictions as among the convictions that count towards an offender being indicted under it.
206. Federal courts, however, have refused to recognize tribal court convictions as the basis for an indictment for domestic assault by a habitual offender. The United States district court for North Dakota recently

<sup>427</sup> *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

<sup>428</sup> *Id.*

<sup>429</sup> *See, e.g., Martinez v. Martinez*, No. C08-5503 FDB (W.D. Wash. Dec. 16, 2008) (order denying defendants' motions to dismiss and granting plaintiff declaratory and injunctive relief).

<sup>430</sup> *Id.*

<sup>431</sup> Restoration of Native Sovereignty and Safety for Native Women, Vol. XIV 17, 22-26 (Oct. 2010), available at [http://www.clanstar.org/wp-content/up/2010/09/sovereignty\\_safety\\_volxiv.pdf](http://www.clanstar.org/wp-content/up/2010/09/sovereignty_safety_volxiv.pdf).

<sup>432</sup> 18 U.S.C. § 117.

dismissed a federal indictment under the habitual offender provision stating that it violated the offender's Sixth Amendment right to counsel because he was not afforded an attorney during his previous tribal court prosecutions even though tribal courts are not constitutionally required to provide counsel in their proceedings.<sup>433</sup>

207. In *Cavanaugh v. United States*, a federal prosecutor sought to prosecute Roman Cavanaugh as a habitual offender after he assaulted his domestic partner on the Spirit Lake Indian Reservation because Cavanaugh had been convicted of domestic abuse in tribal court on three prior occasions. Although Cavanaugh's tribal court convictions for domestic abuse were not at issue in the case, the United States district court dismissed Cavanaugh's federal indictment as a domestic violence habitual offender ruling that the statute violated his Sixth Amendment right to counsel under the U.S. Constitution.<sup>434</sup> While Cavanaugh as a citizen of the United States is protected by the U.S. Constitution, the Constitution does not govern Indian tribes or matters before tribal courts. The ICRA and tribal law govern tribal courts proceedings. Unlike the Constitution, the ICRA does not require a tribe to provide counsel but states that no tribe shall "deny to any person in a criminal case the right ... at his own expense to have the assistance of counsel."<sup>435</sup> While Indian tribes can choose to provide an indigent defendant a court-appointed attorney, they are not required to do so by the ICRA. The tribal court convictions of Cavanaugh met the requirements of ICRA and the Spirit Lake Nation Law and Order Code. The Spirit Lake Tribal Court informed Cavanaugh, as required by ICRA and its Law and Order Code, that he had the right to an attorney at his own expense. Congress recognized that tribal courts are not required to provide indigent offenders court-appointed attorneys and did not include this requirement under the habitual offender provision of VAWA 2005.
208. The *Cavanaugh* decision undermines the safety--and equality--of Indian women because habitual offenders of domestic violence against Indian women, who have been convicted in tribal court, will not face the same enhanced penalties as other habitual offenders. By refusing to accept tribal court convictions as a basis for indictment as a habitual offender, the *Cavanaugh* decision suggests that domestic violence against Indian women is not a serious crime. Habitual offenders can continue to abuse and violate Indian women and will face no legal recourse for their crimes.
209. Recently, Congress enacted the Tribal Law and Order Act, which is a step towards the eradication of violence against Indian women. If implemented, the Act has the potential to decrease violence against Indian women by allowing tribal government to exercise increased sentencing authority over Indians, requiring federal prosecutors to share information on declinations of Indian country cases, and requiring more training for and cooperation among tribal, state, and federal agencies. Congress, however, has yet to appropriate any funds for the implementation of the Act.<sup>436</sup>

### C. Recommendations

210. The United States should
- a. increase its efforts to prevent and punish violence and abuse against women by assisting Indian nations in their efforts to respond to sexual and physical violence against women within Indian lands;
  - b. reaffirm the inherent authority of Indian tribal governments to enforce tribal law over all persons for all crimes on tribal lands regardless of race or political status.
  - c. implement VAWA fully by following the recommendations of tribal leaders at the annual consultation as mandated by Section 903 of Title IX of VAWA, including
    - i. ensuring that state authorities comply with the full faith and credit provision of VAWA by recognizing and effectively enforcing tribal court protection orders;

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<sup>433</sup> *Cavanaugh v. United States*, 680 F. Supp. 2d 1062 (2009).

<sup>434</sup> *Id.*

<sup>435</sup> 25 U.S.C. § 1302(6).

<sup>436</sup> Tribal Law and Order Act of 2010, Pub. L. No. 111-211 (2010).

- ii. permitting Indian law enforcement agencies, in cases of domestic violence, dating violence, sexual assault, and stalking, to enter information into, and obtain information from federal criminal databases;
- iii. ensuring enforcement of the firearms possession prohibition that includes tribal law convictions under section 908; and
- iv. ensuring enforcement of the domestic assault by a habitual offender provision under Section 909;
- d. establish state accountability for the prevention, investigation, prosecution, and punishment of sexual and physical violence against Indian women in states where the state has jurisdiction over these crimes, and in particular, address the unique circumstances of Alaska Native women;
- e. establish a national reporting system, in consultation and cooperation with Indian nations, designed to assist in the investigation and prosecution of cases of missing and murdered Indian women;
- f. implement fully the Tribal Law and Order Act in conjunction with Indian nations.

## VI. DOMESTIC VIOLENCE AND TRAFFICKING

### A. Background

211. Victims of domestic violence are also often victims of human trafficking. “There are several common ways in which domestic violence and human trafficking overlap: there are individuals whose experience with domestic violence makes them vulnerable to traffickers; there are trafficking victims who are vulnerable to domestic violence upon their escape from trafficking; and there are the ‘intersection’ cases which contain the elements of both domestic violence and human trafficking, occurring simultaneously.”<sup>437</sup>
212. There is a well-established nexus between domestic violence and human trafficking; “[r]esearch has shown a clear link between sex trafficking and both pre-trafficking domestic violence and trafficking-related gender-based violence.”<sup>438</sup> However, despite the fact that the relationship between these forms of violence against women is overwhelming, it is still frequently not considered or understood. One study found that nearly 70% of adult trafficking victims reported experiencing abuse prior to being trafficked.<sup>439</sup> Women frequently become trapped in relationships where they are increasingly isolated from friends and relatives and therefore have no one to whom they can turn in order to escape their abusers. Consequently, in their efforts to leave these relationships, women often find themselves removed from their communities, without money or an awareness of options, and become increasingly susceptible to being trafficked. Domestic violence situations serve as a “push factor” that leads many women and young girls into the hands of traffickers, where they again experience gender-based violence.<sup>440</sup>
213. The United States is confronted by the challenge of combating the human trafficking of both citizens and non-citizens. Despite substantial efforts to prevent trafficking, the United States remains a source, transit, and destination country for trafficking.<sup>441</sup> Like domestic violence, human trafficking has no geographic, ethnic, or economic boundaries.<sup>442</sup> Reports by law enforcement indicate that trafficking victims can be found in both affluent and impoverished neighborhoods, and evidence illustrates the

<sup>437</sup> ABA, MEETING THE LEGAL NEEDS OF HUMAN TRAFFICKING VICTIMS: AN INTRODUCTION FOR DOMESTIC VIOLENCE ATTORNEYS & ADVOCATES 7 (2009), available at [http://www.abanet.org/domviol/pdfs/DV\\_Trafficking.pdf](http://www.abanet.org/domviol/pdfs/DV_Trafficking.pdf).

<sup>438</sup> See generally U.S. DEP’T OF STATE, 2009 TRAFFICKING IN PERSONS REPORT 41 (2009) [hereinafter TIP 2009]. See also Dorchen A. Leidholt, *Prostitution and Trafficking in Women: An Intimate Relationship*, in PROSTITUTION, TRAFFICKING AND TRAUMATIC STRESS 167, 174 (Melissa Farley ed., 2003). The 2009 TIP Report contained for the first time a special section on the relationship between domestic violence and human trafficking. Unfortunately, the 2010 TIP Report, which is the first to include an evaluation of trafficking in the United States, does not contain such a section and does not have any reference to the nexus between these two issues.

<sup>439</sup> TIP 2009, *supra* note 438, at 41.

<sup>440</sup> *Id.*

<sup>441</sup> U.S. DEP’T OF STATE, 2010 TRAFFICKING IN PERSONS REPORT 338 (2010) [hereinafter TIP 2010].

<sup>442</sup> See Sarah M. Buel, *Fifty Obstacles To Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW. 19 (1999).

varying nature of trafficking and the diverse groups of people who end up as victims.<sup>443</sup> However, immigrants, minorities, and undocumented women and young girls are especially vulnerable to trafficking, and gender-based discrimination intersects with these other characteristics, making some women doubly or triply marginalized.<sup>444</sup>

214. Sex trafficking is widely prevalent throughout the United States. Women and young girls are preyed upon as a result of vulnerabilities such as poverty, abuse, and low self-esteem, which is often the result of years of violence at the hands of a parent/guardian, spouse, or intimate partner. To keep trafficking victims from escaping, traffickers often confiscate passports, refuse to pay wages, threaten families, and physically, sexually, and emotionally abuse victims. These tactics of power and control employed by pimps and traffickers are often indistinguishable from those used by batterers in most domestic violence situations.<sup>445</sup> As they are trafficked, girls and women may continue to have an intimate relationship with their trafficker. These relationships regularly mirror those in which there is IPV.<sup>446</sup>

## B. Prevalence

215. Accurate statistics on the number of people trafficked to and within the United States are difficult to determine due to the hidden, illicit, and insufficiently researched nature of human trafficking. In turn, this difficulty makes it hard to delineate the extent to which trafficking victims are also victims of other forms of gender-based violence. In 2005, the United States Department of State estimated that 40,000 to 50,000 women, men, and children were trafficked into the United States annually.<sup>447</sup> Yet in 2006, the State Department estimated the numbers at 14,500-17,500, and the 2010 Trafficking in Persons (“TIP”) Report did not include any estimates.<sup>448</sup> If the 2006 numbers are accurate, they possibly represent at least an improvement in policing of trafficking victims into the country. However, these figures do not consider the individuals who have already been trafficked into the United States and remain victims of trafficking, nor do they include those trafficked domestically. This focus is problematic.<sup>449</sup>

216. Domestic trafficking is in fact the most prevalent form of trafficking. Therefore, it is important for the United States government to include statistics on intra-country trafficking so that the gravity of this problem can be better addressed. The 2010 TIP Report contained some intra-country statistics, though not overall estimations. Moreover, despite the TIP Report’s lack of overall statistics on trafficking, the State Department still put the United States in the highest tier for countries with the best anti-trafficking records.

<sup>443</sup> See generally Laurence E. Rothenberg, Deputy Assistant Att’y Gen., Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs, Address before the United States House of Representatives Committee on the Judiciary 4 (Oct. 31, 2007).

<sup>444</sup> UNIFEM, ENDING VIOLENCE AGAINST WOMEN AND GIRLS PROGRAMMING ESSENTIALS 3 (Mar. 2010), available at [http://www.endvawnow.org/files/137c-programming\\_essentials\\_feb2010\\_en.pdf](http://www.endvawnow.org/files/137c-programming_essentials_feb2010_en.pdf); Report of the U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, at 1, U.N. Doc. A/61/122/Add.1 (July 6, 2006), available at <http://www.un.org/womenwatch/daw/vaw/v-sg-study.htm>; see The Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women* 55, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000).

<sup>445</sup> See generally EVELINA GIOBBE ET AL., A FACILITATOR’S GUIDE TO PROSTITUTION: A MATTER OF VIOLENCE AGAINST WOMEN (Denise Gouache ed., 1990); Evelina Giobbe, *An Analysis of Individual, Institutional and Cultural Pimping*, 1 MICH. J. GENDER & L. 33 (1993).

<sup>446</sup> Daniel Sheridan & Dawn VanPelt, *Intimate Partner Violence in the Lives of Prostituted Adolescents*, in MEDICAL, LEGAL AND SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION 423-435 (S. W. Cooper, R. J. Estes, A. P. Giardino et al. eds., 2005).

<sup>447</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT (2005), available at <http://www.state.gov/g/tip/rls/tiprpt/2005> (As with adults, there is a lack of data on the sex trafficking of children in the U.S.); see, e.g., Sara Ann Friedman, ECPAT-USA, *Alternative Report to the Initial Report of the United States of America to the U.N. Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography* § II (2007), available at <http://www.ecpatusa.org/pdfs/AlternativeReportUSAFinal2007.pdf>.

<sup>448</sup> Compare U.S. STATE DEPARTMENT, TRAFFICKING IN PERSONS REPORT (2006), available at [http://www.humantrafficking.org/countries/united\\_states\\_of\\_america](http://www.humantrafficking.org/countries/united_states_of_america) with TIP 2010, *supra* note 441, at 340 (“Despite the mandates of 2005 and 2008 amendments to the TVPA, uniform data collection for trafficking crimes or numbers of victims among federal, state and local law enforcement agencies did not occur during the reporting period.”).

<sup>449</sup> Jonathan Torres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 631-632 (2009) (“The fact that the international number is often cited without the intra-country number ignores the majority of the victims of these abuses. Aside from overlooking the large numbers of domestic trafficking victims around the globe, focusing on the international number serves to enable the U.S. public to conclude that it does not happen ‘over here.’”).

217. Within the United States, the type of trafficking a victim experiences seems to be statistically related to whether or not the victim is a citizen. Victims of trafficking who are United States citizens are more likely to be found in sex trafficking than labor trafficking, while it has been reported that 82% of trafficked foreign adults, on the other hand, are victims of labor trafficking.<sup>450</sup> Efforts to combat sex trafficking in the United States often target foreign victims, but in light of these statistics, more policies and services must be provided for victims of sex trafficking who are U.S. citizens. It is also important to note that many victims of labor trafficking may become victims of sex trafficking as labor traffickers frequently sexually abuse their workers.<sup>451</sup>

### C. Effects and consequences

218. Although trafficking victims and victims of domestic violence often overlap, experience similar kinds of abuse, and are served by the same agencies, practices for assisting these victims should be tailored to the specific needs of the victim. The issues for victims who experience both trafficking and domestic abuse may be different than those who have experienced domestic abuse but not trafficking.<sup>452</sup>

219. Domestic violence shelters that house trafficking victims, many of which do so because of a lack of shelters specifically designed for such victims, must alter some policies, including: developing exceptions to rules for length of stay (as trafficking victims frequently necessitate longer stays in shelters), allowing international phone calls to the families of internationally trafficked women, and housing minors without a related adult.<sup>453</sup> Advocates have noted that “[s]ometimes there is an added cultural obstacle to caring for both types of victims in the same facility: in some socially conservative populations, victims of domestic violence resent the perceived stigma of prostitution attached to the victims of sex trafficking with whom they are cohabitating.”<sup>454</sup> Because our society has greater familiarity with domestic violence than human trafficking, there is greater discrimination against victims of trafficking. Also, victim support groups in shelters are often not designed to address the issues and feelings of victims who have experienced both trafficking and domestic violence. For example, one service provider told a story of a trafficking client in a domestic violence shelter who was so depressed that she was sleeping every day until two o’clock in the afternoon, and she felt that the domestic violence victims in the shelter were ridiculing her for this behavior.<sup>455</sup> These challenges were noted in the 2009 TIP Report stating: “assisting victims of [trafficking and domestic violence] in one setting is very challenging. It should only be attempted when the facility can provide a safe and supportive environment and when staff are properly trained to understand the safety, legal, medical, mental health, social, and cultural needs of the victims.”<sup>456</sup>

220. The average age of entry into commercial sexual exploitation in the United States is thirteen to fourteen years old.<sup>457</sup> Children involved in the sex trade come from all segments of the population, though many are from disadvantaged and isolated communities, making them increasingly vulnerable to traffickers.<sup>458</sup>

<sup>450</sup> TIP 2010, *supra* note 441, at 338.

<sup>451</sup> See LARRY J. SIEGEL, *CRIMINOLOGY* 410 (10th ed. 2009) (“While some individuals are trafficked directly for purposes of prostitution or commercial sexual exploitation, other trafficked persons and even those trafficked for legitimate work may become victims of interpersonal violence.”); see also *Sexual Violence: A Fact Sheet*, AMNESTY INT’L, <http://www.amnestyusa.org/violence-against-women/sexual-violence/page.do?id=1108442>.

<sup>452</sup> See, e.g., Amy R. Siniscalchi & Bincy Jacob, *An Effective Model of Case Management Collaboration for Victims of Human Trafficking*, 3 J. GLOBAL SOC. WORK PRAC. 1, 6 (2010) (“Victims of trafficking may not share the same feelings towards their traffickers as domestic violence victims feel towards their abusive partners.”).

<sup>453</sup> Nat’l Human Trafficking Res. Ctr., List of Stand-Alone Trafficking Shelters Nationally (Oct. 29, 2010) (Due to funding constraints, one recent study found that there are only eleven stand-alone trafficking centers in all of the U.S., and four are in California.); see also ASIAN & PACIFIC ISLANDERS AM. HEALTH FORUM, *TRAFFICKING: CONSIDERATIONS & RECOMMENDATIONS FOR BATTERED WOMEN’S ADVOCATES* 4 (2008), available at [http://www.apiahf.org/images/stories/Documents/publications\\_database/dv\\_trafficking-considerationsrecs-2008.pdf](http://www.apiahf.org/images/stories/Documents/publications_database/dv_trafficking-considerationsrecs-2008.pdf); STEPHEN WARPATH, U.S. AGENCY FOR INT’L DEV., *EXAMINING THE INTERSECTION BETWEEN TRAFFICKING IN PERSONS AND DOMESTIC VIOLENCE* 24, 25 (2007), available at [http://nicosia.us embassy.gov/USpolicy/TIP-DV\\_study072307.pdf](http://nicosia.us embassy.gov/USpolicy/TIP-DV_study072307.pdf).

<sup>454</sup> TIP 2009, *supra* note 438, at 41.

<sup>455</sup> Telephone Interview with Lauren Pessa, Human Trafficking Fellow, My Sisters’ Place (Nov. 8, 2010).

<sup>456</sup> TIP 2009, *supra* note 438, at 41.

<sup>457</sup> U.S. DEP’T OF HEALTH AND HUMAN SERV., SENIOR POLICY OPERATING GROUP ON TRAFFICKING IN PERSONS SUBCOMMITTEE ON DOMESTIC TRAFFICKING FINAL REPORT 70 (Aug. 2007) [hereinafter UDHHS Report 2007].

<sup>458</sup> *Id.* at 70.

Estimates indicate that nearly one out of three children who run away from home will be coerced into sex work; this means that 150,000 minors enter prostitution each year.<sup>459</sup> Many of these young girls are running away from domestic abuse, as it has been reported: “[i]n the United States, many domestically trafficked victims are teenage runaways who have been victims of past sexual abuse, and recruited by pimps in the bus stations and streets of urban centers.”<sup>460</sup> Seventy-five to ninety percent of all thirteen to eighteen-year-old girls who work in prostitution have previously been victims of some form of abuse.<sup>461</sup> Furthermore, “[m]ore than two-thirds of sex trafficked children suffer additional abuse at the hands of their traffickers.”<sup>462</sup> Thus, these girls enter into an endless cycle of abuse, losing valuable life-skills training and years of school; they are increasingly susceptible to future cycles of gender violence even if they get away from their traffickers or pimps.<sup>463</sup> More services must be made available to these girls seeking to escape commercial sexual exploitation.<sup>464</sup> Also, school counselors, child protection services, the juvenile justice system, and other government entities responsible for the protection of vulnerable children should be aware of the susceptibility of young women who come from abusive homes to domestic trafficking and sexual exploitation.

221. The United States government provides funding to non-governmental organizations (“NGOs”) that service trafficking victims. However, funding in this area remains deficient as the number of identified victims continues to increase while the amount of government funding remains constant.<sup>465</sup> There is also a lack of federal funding to specifically assist United States citizens and lawful permanent residents who are victims of sexual trafficking.<sup>466</sup> Further, since many organizations that are primarily domestic violence service agencies also become the main providers of assistance to trafficking victims, staff and administration are often overextended. Thus, more overhead funds need to be granted for trafficking instead of the current per capita system. The State Department highlighted one problem with the current funding structure in the most recent TIP Report when it noted that more funding is needed for legal service providers, in particular, in this area.<sup>467</sup> One way to ensure some funding for agencies that assist trafficking victims is to simplify the process of confirming them as victims of trafficking, monitoring such confirmations to ensure non-discrimination in the determinations made by law enforcement.<sup>468</sup>
222. The prevalence of mail-order brides in the United States is both a trafficking and domestic violence issue. A report to Congress stated, “[I]nformational and power imbalances inherent in [international mail-order bride] matches suggest that the incidence of domestic violence in these relationships is higher than the national average.”<sup>469</sup> By recognizing these women primarily as potential domestic violence victims, however, the law governing mail-order brides, the International Marriage Broker Regulation Act, has

<sup>459</sup> *Human Trafficking*, WASH. STATE OFFICE OF ATT’Y GEN., <http://www.atg.wa.gov/HumanTrafficking/SexTrafficking.aspx>.

<sup>460</sup> COAL. AGAINST TRAFFICKING IN WOMEN, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES: INTERNATIONAL AND DOMESTIC TRENDS 23 (2001), available at [http://www.uri.edu/artsci/wms/hughes/sex\\_traff\\_us.pdf](http://www.uri.edu/artsci/wms/hughes/sex_traff_us.pdf); see also generally RICHARD J. ESTES & NEIL ALAN WEINER, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO 146-50 (2001).

<sup>461</sup> UDHHS Report 2007, *supra* note 457, at 70.

<sup>462</sup> EVA J. KLEIN, ABA CTR. ON CHILDREN & THE LAW, PROSTITUTION OF CHILDREN AND CHILD-SEX TOURISM: AN ANALYSIS OF DOMESTIC AND INTERNATIONAL RESPONSES 33 (1999).

<sup>463</sup> *Id.* at 70.

<sup>464</sup> See GEMS: GIRLS EDUCATIONAL AND MENTORING SERVICES, <http://www.gems-girls.org> (GEMS, in New York City, is an example of an organization dedicated to assisting girls who have experienced commercial sexual exploitation and is the only one in the State of New York); see also *Crimes Against Children: Innocence Lost*, FED. BUREAU OF INVESTIGATION, [http://www.fbi.gov/about-us/investigate/vc\\_majorthefts/cac/innocencelost](http://www.fbi.gov/about-us/investigate/vc_majorthefts/cac/innocencelost) (The Innocence Lost Initiative is a collaboration of victim assistance providers and federal and state law enforcement authorities working together to combat child victims of sex trafficking).

<sup>465</sup> TIP 2010, *supra* note 441, at 341 (noting “[w]hile there has been a 210 percent increase in certifications of foreign victims over the past five years, there has been no corresponding increase in funding for services”).

<sup>466</sup> See THE ADVOCATES FOR HUMAN RIGHTS, SEX TRAFFICKING NEEDS ASSESSMENT NEEDS ASSESSMENT FOR THE STATE OF MINNESOTA 36 (Sept. 2008) (“Although Congress specifically found that trafficking occurs within the US when it passed the TVPA reauthorization of 2005, the \$30 million it appropriated for services for trafficked U.S. citizens and lawful permanent residents was never included in the budgets for fiscal years 2006 and 2007.”).

<sup>467</sup> TIP 2010, *supra* note 441, at 340-41.

<sup>468</sup> Tiffany Williams, *Silencing Human Trafficking Victims in America*, HUFF. POST, Feb. 7, 2011, [http://www.huffingtonpost.com/tiffany-williams/silencing-human-trafficki\\_b\\_19844.html](http://www.huffingtonpost.com/tiffany-williams/silencing-human-trafficki_b_19844.html); see also Kevin Bales et al., *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT’L L. 47, 79 (2005).

<sup>469</sup> Robert J. Schools, *Appendix A: The “Mail Order Bride” Industry and Its Impact on U.S. Immigration*, in IMMIGRATION & NATURALIZATION SERVS., INTERNATIONAL MATCHMAKING: A REPORT TO CONGRESS 4, 19 (1999), available at [http://www.uscis.gov/files/article/Mobrept\\_full.pdf](http://www.uscis.gov/files/article/Mobrept_full.pdf) [hereinafter INS REPORT].

made the issue one of domestic violence when it could also be considered a trafficking issue.<sup>470</sup> Some scholars have argued that this industry should be considered trafficking, and that the domestic violence frequently found in these relationships should be considered a subset of the trafficking problem.<sup>471</sup> Further, as the promoters of Internet brides are sometimes also sex tourism promoters, these problems should be considered jointly.<sup>472</sup>

223. In the United States, societal norms must be changed to stop the rampant domestic violence and human trafficking. Men who perpetrate violence against their spouse or intimate partner have similar characteristics to perpetrators of violence against trafficked women and girls. This characteristic has been described as an expectation of service, and “[i]n the child prostitution prevention and domestic violence movements, the expectation of services is viewed as a characteristic that leads to violence and exploitation.”<sup>473</sup> It must be recognized that sex trafficking, like domestic violence, is a form of gender-based domination and control and is a violation of human rights.

#### D. Law and policy problems

224. In both trafficking and domestic violence cases a number of human rights are violated, including the right to personal liberty and autonomy, the right to bodily integrity,<sup>474</sup> the right to freedom of movement and expression, the right to freedom from torture or other cruel or inhuman treatment,<sup>475</sup> the right to be free from discrimination,<sup>476</sup> and the right to be free from forced labor and slavery.<sup>477</sup>

225. The most recent human rights instrument to combat trafficking is the United Nations Trafficking in Persons Protocol—Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children—supplementing the United Nations Convention against Transnational Organized Crime.<sup>478</sup> This protocol defines trafficking, and through its definition, highlights the overlap in structures of dominance in trafficking and domestic violence. The definition includes coercion, abuse of power, and position of vulnerability and states that consent is irrelevant when these conditions exist.<sup>479</sup>

226. In cases of both domestic violence and trafficking, police often arrest rather than protect the victim.<sup>480</sup> Such actions further traumatize already tortured women. “As seen from law enforcement misunderstanding of domestic violence, police officers’ comprehension of victim issues is crucial to cases entering into the criminal justice system. In addition to critical reforms needed in state laws on sex trafficking, officers must be trained to view victims as victims and not as persons complicit in the crimes

<sup>470</sup> Kirsten M. Linder, *Love, Honor, or Control: Domestic Violence, Trafficking, and the Question of How to Regulate the Mail-Order Bride Industry*, 16 COLUM. J. GENDER & L. 551, 555 (2007).

<sup>471</sup> *Id.* at 568.

<sup>472</sup> See IMMIGRATION & NATURALIZATION SERVS., *supra* note 469; Asilyn Loder, *Mail Order Brides Find United States Land of Milk, Battery*, WOMEN’S E-NEWS (July 13, 2003).

<sup>473</sup> See Norma Hotaling & Leslie Levites-Martin, *Increased Demand Resulting in the Flourishing Recruitment and Trafficking of Women and Girls*, 13 HASTINGS WOMEN’S L.J. 117, 124 (2002).

<sup>474</sup> See Universal Declaration of Human Rights, *supra* note 306; ICCPR, *supra* note 306, at arts. 6.1, 9.1; CRC, *supra* note 306; ICPD Programme of Action, *supra* note 303, ¶¶ 106, 107; Beijing Declaration and the Platform for Action, *supra* note 305, ¶¶ 106, 107.

<sup>475</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984); see Rhonda Copeland, *Intimate Terror: Understanding Domestic Violence as Torture*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 116-152 (Rebecca J. Cook ed., 1994).

<sup>476</sup> See CEDAW, *supra* note 308.

<sup>477</sup> ICCPR, *supra* note 306, at art. 8; the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 4, 213 U.N.T.S. 222 (*entered into force* Sept. 3, 1953).

<sup>478</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex II, U.N. Doc. A/RES/55/25 (2001) [hereinafter Trafficking Protocol], available at <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html>.

<sup>479</sup> *Id.* at art. 3(a).

<sup>480</sup> See Valla Rajah, Victoria Frye & Mary Haviland, *Aren’t I a Victim? Notes on Identity Challenges Relating to Police Action in a Mandatory Arrest Jurisdiction*, 12 VIOLENCE AGAINST WOMEN 897-916 (Oct. 2006) (Prostitution is a crime in most states so police often arrest victims of trafficking, and they are criminally charged.); see, e.g., Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 381 (2007).

of their perpetrators.”<sup>481</sup> Although trainings across the United States have taught law enforcement officers to identify victims of trafficking and investigate their cases, continued trainings and oversight are needed.

227. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) is the most recent version of the federal anti-trafficking legislation that was first passed in 2000.<sup>482</sup> This version has some significant improvements from the previous incarnation of the law, including better legal relief for minors. However, there are still areas that need improvement, such as the requirement that victims participate in prosecution of the trafficker in order to receive immigration protection.
228. To receive benefits, trafficking victims must be certified for eligibility.<sup>483</sup> Federal authorities are in charge of issuing federal certification, and for the few states that offer state funds, such as New York, state authorities are in charge. To receive certification, victims must cooperate with the prosecution of their traffickers. Another requisite for prosecution is that the prosecutor must decide to pursue the investigation and prosecution. Thus, the question of whether victims receive benefits and protected status is often left in the potentially arbitrary and discriminatory hands of government officials.<sup>484</sup> Conversations with service providers also suggest that frequent follow-ups with authorities are often required to receive certification.<sup>485</sup> As victims of both trafficking and domestic violence doubly fear turning to authorities for assistance, this procedural barrier may be a real hindrance to victims seeking the services they need.
229. Immigration policy also presents significant challenges for many trafficking and domestic violence victims. In the United States, depending on the situation of a foreign trafficked woman, she is eligible for different kinds of immigration relief. She may be eligible for the two kinds of T visas, a U visa, VAWA relief, or asylum.<sup>486</sup> The 2010 TIP Report states that for a trafficking victim in the United States to receive a T visa “[t]estimony against the trafficker, conviction of the trafficker, or formal denunciation of the trafficker is not required, nor is sponsorship or approval by an investigating agency.”<sup>487</sup> However, in the next sentence, the Report states that “such support counts in an applicant’s favor.”<sup>488</sup> This seems to suggest that the objective of the Act is prosecution of the trafficker and not protection of the victim. For some victims, the terror of testifying is a considerable barrier, especially in cases where they fear for the protection of their family members. This fear may be further exacerbated in cases of trafficking victims who are also victims of domestic abuse. For example, if the trafficker is also the victim’s spouse, then there may be great fear of repercussions for the victim’s family. The implementation of this law may also

<sup>481</sup> Jennifer A. Kurhn & Alison L. Stankus, *Effective Implementation of the Trafficking of Persons and Involuntary Servitude Articles: Lessons from the Criminal Justice System Response to the Illinois Domestic Violence Act*, 28 N. ILL. U. L. REV. 215, 258 (1998).

<sup>482</sup> Cf. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (codified in scattered titles of the U.S.C.) [hereinafter TVPRA of 2008].

<sup>483</sup> Trafficking Victims Protection Act, 22 U.S.C.A. § 7105(b)(1)(E) (Since 2008, an exception to this is that foreign children upon identification can receive benefits and services without a requirement of cooperating with the police.).

<sup>484</sup> April Rigger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J. L. & GENDER 231, 250-251 (2007).

<sup>485</sup> TIP 2010, *supra* note 441, at 340 (noting that “[v]ictim advocates sometimes encountered difficulties securing law enforcement assistance to request public benefits and immigration relief”).

<sup>486</sup> *See id.* at 341 (“The TVPA provides two principal types of immigration relief to foreign trafficking victims: 1) continued presence, which allows temporary immigration relief and may allow work authorization for potential victims who are also potential witnesses in an investigation or prosecution and 2) T nonimmigrant status or ‘T visas,’ which generally allow for legal immigration status for up to four years for victims who cooperate with reasonable law enforcement requests for assistance with an investigation or prosecution.”); SUPREME COURT OF THE STATE OF N. Y., APPELLATE DIV., FIRST DEP’T, LAWYER’S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM 372 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 5th ed. 2006), available at [www.probono.net/ny/family/library/cfm](http://www.probono.net/ny/family/library/cfm) [hereinafter NYC LAWYER’S MANUAL] (“[If the victim] has suffered substantial physical or mental abuse as the result of having been prostituted or trafficked and cooperates with the investigation or prosecution of her exploiters, she may be eligible for a three year U Visa . . . [If the victim] in good faith married her pimp, trafficker, or customer, if he was a US citizen or permanent resident, and if she was subjected to ‘battering or extreme cruelty,’ she may be eligible for a battered spouse waiver or to self-petition under the Violence Against Women Act.”); INA §§ 101(a)(42); 8 U.S.C. §§ 1101(a)(42), 1158 (2001).

<sup>487</sup> TIP 2010, *supra* note 441, at 342.

<sup>488</sup> *Id.*

cause greater violence against women by traffickers, as the traffickers realize the importance of testimony in prosecutions, they may use increased violence to ensure against testimony.<sup>489</sup>

230. Statistics on T visa applications reflect the difficulty of obtaining such a visa. From fiscal year 2001 to the end of fiscal year 2007, the Department of Homeland Security issued only 1,008 T visas to survivors of sex and labor trafficking nationwide, and another 906 T visas to their family members.<sup>490</sup> This total represents a small fraction of trafficking victims.<sup>491</sup> The system may be improving, however, as in 2009 alone 313 T visas were granted to trafficking victims and 273 were issued to members of their immediate families.<sup>492</sup>
231. There are also trafficking/domestic violence victims who have claims to asylum. “If [the victim’s] ordeal as a victim of trafficking or prostitution resulted in persecution in her country of origin or if [she] faces a well-founded fear of future persecution because traffickers and/or their confederates may persecute her upon her return to her native country, she may be eligible for asylum.”<sup>493</sup> However, the one-year time limit on filing a claim after entering the United States can be an impossible obstacle for trafficking victims.<sup>494</sup> The circumstances of trafficked women, such as entrapment in violent situations, imprisonment, psychological illness, and/or linguistic barriers, can prevent them from filing timely asylum applications.
232. The majority of states now have some form of human trafficking legislation, but the protection and assistance offered under these laws varies greatly.<sup>495</sup> Five states do not have any laws on the books for the crime of trafficking (HI, MA, SD, WV, and WY).<sup>496</sup> Additionally, there are states that have human trafficking laws, but their laws are weak for a variety of reasons (AK, AR, CO, OH, SC, OR, and VA).<sup>497</sup> Also, under state law many trafficking victims are arrested instead of offered services and support because most state laws criminalize prostitution. All fifty states prohibit the prostitution of children, and there are some promising initiatives such as the Safe Harbor Act passed in New York that decriminalizes prostitution for minors; Connecticut, Washington, and Illinois have similar laws, and Florida has pending

<sup>489</sup> See Letter from The Coal. Against Trafficking in Women, to Peter Kreisler, Acting Att’y Gen. of the U. S. 2 (Oct. 5, 2007), *available at* [www.justice.gov/olp/pdf/catw-letter.pdf](http://www.justice.gov/olp/pdf/catw-letter.pdf).

<sup>490</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2007, at 49 (2007), *available at* <http://www.state.gov/documents/organization/82902.pdf> (reporting issuance of 729 T visas to survivors of trafficking and 645 T visas for their family members through FY 2006 (this figure was reached by adding figures from two different reports)); U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF THE U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 20-21 (2008) (reporting approval of 279 T visas for survivors of trafficking and 261 T visas for family members in FY 2007).

<sup>491</sup> WOMEN’S COMM’N FOR REFUGEE WOMEN & CHILDREN, THE U.S. RESPONSE TO HUMAN TRAFFICKING: AN UNBALANCED APPROACH 20 (2007), *available at* [http://www.womenscommission.org/pdf/us\\_trfkg.pdf](http://www.womenscommission.org/pdf/us_trfkg.pdf) (citing Alison L. Darrell, Calvin Edwards & Company, Trafficking Victim Outreach Grant: The Results, Presentation at the U.S. Dep’t of Health & Human Servs. Conference on Survivors of Sex Trafficking (Sept. 28, 2006) (results from a 2006 survey of eighteen recipients of federal funds for street outreach demonstrating that only 3.9% of victims found by these organizations ultimately received a T visa)).

<sup>492</sup> TIP 2010, *supra* note 441, at 341.

<sup>493</sup> NYC LAWYER’S MANUAL, *supra* note 479, at 372.

<sup>494</sup> HUMAN RIGHTS FIRST, THE ONE-YEAR ASYLUM DEADLINE AND THE BIA: NO PROTECTION, NO PROCESS (Oct. 2010), *available at* <http://www.humanrightsfirst.org/pdf/1YD-report-FULL.pdf>.

<sup>495</sup> TIP 2010, *supra* note 441, at 342 (“Only nine of 50 states offered state public benefits to trafficking victims. Eighteen permitted victims to bring civil lawsuits in state court. Seven encouraged law enforcement to provide the required accompanying documentation for T visa applications. Eighteen instituted mandatory restitution. Nine states required that victims’ names and/or locations be kept confidential.”).

<sup>496</sup> See *Human Trafficking Report: All Pending Legislation* (Sept. 27, 2011), <http://www.trendtrack.com/texis/cq/viewrpt?event=49f99ef0e9#MA>. The States of Massachusetts and Hawaii have pending legislation.

<sup>497</sup> 2010 Polaris Project State Rating Map, THE POLARIS PROJECT (July 2010), <http://www.polarisproject.org/content/view/297> (Laws were evaluated on the following 10 categories: (1) Sex trafficking; (2) Labor trafficking; (3) Asset forfeiture for human trafficking crimes; (4) Training on human trafficking for law enforcement; (5) Human trafficking commission, task force, or advisory committee; (6) Posting of a human trafficking hotline; (7) Safe harbor; (8) No requirement for force, fraud, or coercion for minors; (9) Victim Assistance; and (10) Civil remedy.).

safe harbor legislation.<sup>498</sup> Other states and the federal government should follow and build on this example.<sup>499</sup>

233. Case law on human trafficking highlights the intersection of the issue with domestic violence and some of the obstacles involved in these types of cases. For example, in the case of *United States v. Carreto*, one of the largest sex trafficking cases in the country, the traffickers had attracted many of their victims by marrying them.<sup>500</sup> Law enforcement was not alerted to this case by their own efforts or by a tip from the victims.<sup>501</sup> Trafficking victims are often afraid to come forward because of fear for not only their own lives but also those of their families.<sup>502</sup> Last, when it came to sentencing in this case, the lawyer for one defendant argued that the fifty-year sentence was too long because no one had died in the case.<sup>503</sup> This argument highlights the lack of societal acceptance and understanding of the severity of trafficking and domestic violence situations.
234. On September 14, 2010, anti-trafficking experts and organizations recorded a victory when Craigslist agreed to permanently and completely remove all Craigslist Adult and Erotic Services sections. This victory came following efforts including numerous protests outside Craigslist's offices. This is one example of the success of a strategic grassroots campaign to combat trafficking. Anecdotal accounts from law enforcement and service providers, however, show some initial drawbacks to the Craigslist decision, such as new difficulties with locating traffickers and trafficking victims. Additionally, some ads for trafficking victims still exist on other sections of the Craigslist website and other sites such as backpage.com are still utilized by traffickers.<sup>504</sup>

## E. Recommendations

235. For the federal government:
- a. Ensure abused women and their families are protected when testifying against their trafficker/batterer.
  - b. Increase efforts to prosecute those responsible for trafficking, especially for commercial sexual exploitation.
  - c. Make implementation of the TVPRA centered on the victim by such means as shifting the focus from prosecution to the protection of victims.
  - d. Improve coordination of government services for trafficked children who are United States citizens.
  - e. Increase funding for service providers to specifically assist trafficking victims.

<sup>498</sup> TIP 2010, *supra* note 441, at 339; see Opening Statement of Sen. Dick Durbin, Senate Judiciary Comm., Subcomm. on Human Rights and Law, (Feb. 24, 2010), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=4389&wit\\_id=747](http://judiciary.senate.gov/hearings/testimony.cfm?id=4389&wit_id=747); *Illinois Governor Signs Bill Protecting Sexually Exploited Children*, THE POLARIS PROJECT (Aug. 23, 2010), <http://www.polarisproject.org/content/view/301/1/>.

<sup>499</sup> *Stop Trafficking of Children and Young People*, THE BODY SHOP, <http://www.thebodyshop-usa.com/beauty/stop-sex-trafficking> (The national beauty chain, The Body Shop, has taken on a campaign along with the Somali May Foundation and ECPAT to get all states to enact safe harbor laws.).

<sup>500</sup> *United States v. Carreto*, No. 04-140 (FB) (E.D.N.Y. June 1, 2006).

<sup>501</sup> *Three Mexicans Plead Guilty in New York Human-Trafficking Case*, STATES NEWS SERV., Apr. 6, 2005 (Authorities were alerted to the case when an anonymous tip was made to the U.S. Embassy in Mexico.).

<sup>502</sup> Katrina Lynne Baker, *Don't Forget the Family: A Proposal for Expanding Immediate Protection to Families of Human Trafficking Survivors*, 30 FORDHAM INT'L L.J. 836, 838 (2007) ("There are many reasons why victims of human trafficking do not come forward to tip off law enforcement officials -- many may have to do with the current legislation. . . . [E]xtending the protections afforded to family members of human trafficking survivors is essential to meeting the goals of anti-trafficking efforts."); see also *Examining U.S. Efforts to Combat Human Trafficking and Slavery: Hearing Before the Subcomm. on Constitution, Civil Rights and Property Rights*, 108th Cong. (July 7, 2004) (testimony of Wendy Patten, U.S. Advocacy Dir., Human Rights Watch) ("Other advocacy groups . . . contend that forcing victims to aid in the investigation and prosecution of traffickers may endanger the victims' families who remain in the home country especially when the trafficker is deported back to the country. They argue that there needs to be some mechanism to either ensure the victims' families' safety in their home country or reunite the families with the victims in the United States.").

<sup>503</sup> Acceptance Speech of Pamela Chen, Assistant U.S. Attorney, Eastern District of New York, Wellstone Award Freedom Network 2010 Conference, Washington, D.C. (Mar. 18, 2010).

<sup>504</sup> Laura Sydel, *Beyond Craigslist, Many Markets For Sex Traffickers*, NPR, Sept. 14, 2010, <http://www.npr.org/templates/story/story.php?storyId=129863089>.

- f. Follow the mandate of the TVPRA to tabulate and study the extent of the trafficking problem, including compilation of accurate numbers on the rates of trafficking into and within the United States.
- g. Reorient anti-trafficking campaigns to align with the standards set by the United Nations High Commissioner on Human Rights and revise the Trafficking Victims Protection Act to align its definition of human trafficking with the Palermo Protocol.
- h. Ensure comprehensive services and legal support is provided for victims of trafficking.

236. For state and local governments:

- a. Improve training for law enforcement to better identify trafficking victims and to ensure law enforcement officers are willing to undertake victim protection measures.
- b. Adopt anti-trafficking laws that include: asset forfeiture for human trafficking crimes; training on human trafficking for law enforcement; human trafficking commission, task force, or advisory committee; posting of a human trafficking hotline; safe harbor; no requirement for force, fraud, or coercion for minors; victim assistance; and civil remedies.

237. For service providers:

- a. Ensure trafficking victims receive services specific to their needs.
- b. Educate law enforcement and service providers in identifying trafficking victims in seemingly domestic violence cases and domestic violence victims in seemingly trafficking cases.

## VII. CONCLUSION

238. Domestic violence is prevalent throughout the United States, and its consequences are pervasive. The abuses and hardships faced by women experiencing IPV in the United States do not stop with physical battering. Battered women are often subject to a range of problems that are inextricably linked to domestic violence: dual arrest, inappropriate charges, and wrongful convictions; the loss of custody of their children who will also experience detrimental effects linked to domestic violence; violations of their reproductive rights and right to sexual health; and the loss of employment, housing, and economic security. Domestic violence is also linked to trafficking in the United States since victims of trafficking almost always inevitably experience the same abuse as victims of domestic violence, and the associated problems faced by trafficked women mirror those faced by battered women.

239. Although domestic violence affects women of all groups, it is largely influenced by contextual factors such as poverty and residence, making some groups of women, including African Americans, Latinas, American Indians and Alaska Natives, and immigrants, more susceptible to such abuse and its consequences. The consequences of domestic violence are often exacerbated by some of the current U.S. policies, federal legal and legislative factors that create barriers to justice for battered and trafficked women.

240. Despite the persistence of domestic violence and its associated problems in the United States, there are significant opportunities for gain. In this report we hope to have provided the Special Rapporteur not only with the necessary information about the human rights abuses of women experiencing domestic violence in the United States but also with an overview of the ongoing advocacy and opportunities for reform. We once again thank the Special Rapporteur for her devotion of time and resources to the important but difficult questions of the treatment of battered and trafficked women in the United States. We hope this report will aid her in her endeavor to effectively support reform and shine light on these pressing human rights issues.



**T**he Role of Guns in  
Perpetrating Violence Against Women  
in the United States

**Christina M. Vogt, Ph.D.**  
*Global Feminist Strategies Task Force  
National Organization for Women*

***Supplement on Gun Violence Against  
American Indian and Alaska Native Women***

**Kirsten Matoy Carlson**  
*Indian Law Resource Center  
Assistant Professor of Law  
Wayne State University Law School*

**Clare Boronow (JD 2012)**  
*University of Virginia School of Law*

## I. INTRODUCTION

1. The issue of when, how, and who can acquire firearms in the United States has been a subject of fiery debate for decades. As such, the intent of this chapter is to examine the effects and trends of gun violence against women in the United States as women have been over-represented as victims of gun violence in homes and/or by intimate partners. Of particular concern, over the past decade, gun laws have become more lax in many states, leading to a growing concern that legislation needs to be enacted to curb gun violence. In light of the shooting of Gabrielle Giffords in January 2011, new legislation may be introduced in Congress to impose further diligence in determining how and to whom guns are sold in the United States.
2. Violence against women is defined as acts of femicide and familicide. A brief presentation of women's incidence of gun-related fatalities in general, and further breakdowns by race/ethnicity, is given in section III. A special supplemental section on *Gun Violence Against American Indian and Alaska Native Women* is also provided. A brief discussion on the Highway Serial Killings Initiative is also presented. The effects and consequences of acts of violence against women cost the United States billions of dollars annually and will continue to do so until we curb the age-old practice of these crimes.
3. Of special interest in this chapter is the concern over the Concealed Carry of Weapons ("CCW") because many states have enacted laws that make gun accessibility easier than it ever has been in recent history. For example, this year, Wyoming will be joining three other states that do not require a permit or any additional requirements other than a background check at the initial weapon sale to carry a concealed weapon publicly. Iowa has recently changed its CCW status from the more restrictive "may-issue" status to "shall-issue." In light of the ease of access to firearms in the United States, one trend that has not been given adequate examination is that of CCW and its effect on femicide and familicide.
4. In analyzing acts of femicide and gun access, an historical analysis of gun laws in the United States was discussed under the Gun Control Act of 1968. While the Brady Handgun Violence Prevention Act of 1993 and the Domestic Violence Misdemeanor Gun Ban have been added to the Gun Control Act of 1968, other laws such as the Tiahrt Amendments have created difficulty in tracking illegal gun ownership in the United States, where a large number of crimes are committed with illegal or untraceable guns. International treaties and resolutions might be used to bolster restrictions on gun sales and gun ownership in the United States by following the examples of other countries' programs in Africa and Latin America. In light of the conflicting ideologies and policies on gun ownership, recommendations are given to curb gun violence against society in general, and women in particular, because for both genders, gun-related homicides remain one of the leading causes of death from violence-related injuries in the United States.

## II. BACKGROUND

5. Violence against women in the United States manifests itself in numerous ways that demand heightened exposure to the public and closer examination by policy-makers and law enforcement officials. In this chapter, we will focus our attention on laws in the United States that make guns easily accessible to the general populace regardless of the suitability for an individual to possess one. We request that the Special Rapporteur on Violence Against Women examine more closely U.S. gun policies and the subsequent violence that serves to injure and kill women. We ask the U.S. government to conduct further research into gun violence and to restrict the sale of guns as suggested by the Brady Campaign and Brady Center to Prevent Gun Violence<sup>1</sup> in order to reduce the number of overall fatalities, specifically those resulting in femicide and familicide.

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<sup>1</sup> *About Us*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradiycampaign.org/about/> (last visited Apr. 15, 2011).

6. The U.S. Constitution's Second Amendment states that an individual has the right to keep and bear arms.<sup>2</sup> Starting in the latter half of the twentieth century, however, the Second Amendment became one of the most debated amendments, according to the American Bar Association.<sup>3</sup> Concerned with the trend of rising violence in the United States and the role that firearms play in proliferating that violence, gun-control advocates interpret the Second Amendment differently than firearm supporters.<sup>4</sup> Because the Bush Administration (2000–2008) loosened restrictions on gun ownership put in place by the Clinton Administration (1992–2000), the current interpretation of the Second Amendment makes it relatively easy for a U.S. resident to own a gun. Hence, the United States continues to be the most heavily armed country in the world,<sup>5</sup> with an estimated 283 million guns in civilian hands.<sup>6</sup> In addition, an increasing number of people in the United States carry concealed weapons, which is alarming in light of the relationship between guns and violence against women. Because CCW is an increasing and fairly recent trend, this will be discussed in greater detail in the following sections. Although gun violence has become a major problem, it has been difficult to pass more restrictive legislation due to the fact that gun proponents are extremely well-funded, file numerous lawsuits against restrictive legislation, and comprise a powerful lobby.

### III. PREVALENCE

#### A. Gun violence is extremely prevalent in the United States, and women are more likely to be victims of gun violence than men

7. The rate of firearm homicide in the United States is nineteen times greater than in any other high-income nation.<sup>7</sup> Firearms were the leading cause of violence-related deaths in individuals in the United States who are under age seventy from 1999 to 2007; this equated to approximately 57% of the total, with suicide-by-firearm accounting for 31% and homicide-by-firearm making up 25.6%.<sup>8</sup> For nonfatal violence in the United States from 2001 to 2009, there were 456,211 individuals injured by firearms, of whom approximately 47,300 were women.<sup>9</sup> Although some research has found that liberal access to firearms may result in fewer deaths, research has not addressed the full impact of liberal gun laws on women.
8. In a landmark, yet controversial, 1998 study, John Lott concluded that permissive concealed carry laws resulted in a decrease in overall crime, suggesting that carrying weapons may result in fewer attacks.<sup>10</sup> Lott relied on Federal Bureau of Investigation (FBI) crime statistics from 1977 to 1993 to find that the increasing passage of concealed carry laws resulted in an 8.5% reduction in murder, a 5% reduction in

<sup>2</sup> U.S. CONST. amend. II.

<sup>3</sup> "There is probably less agreement, more misinformation, and less understanding of the right to keep and bear arms than any other current controversial constitutional issue." Miller, *The Legal Basis for Firearms Controls*, in REPORT TO THE AMERICAN BAR ASSOCIATION § 3, at 22 (1975).

<sup>4</sup> Robert Barnes, *Justices to Decide if State Gun Laws Violate Rights*, WASH. POST, Oct. 1, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/30/AR2009093001723.html> ("[T]he 5 to 4 opinion in *District of Columbia v. Heller* did not address the question of whether the Second Amendment extends beyond the federal government and federal enclaves such as Washington.").

<sup>5</sup> Laura MacInnis, *U.S. Most Armed Country with 90 Guns Per 100 People*, REUTERS, Aug. 28, 2007, available at <http://www.reuters.com/article/idUSL2834893820070828>.

<sup>6</sup> L. Hepburn et al., *The U. S. Gun Stock: Results from the 2004 National Firearms Survey*, 13 INJURY PREVENTION 15, 17 (2007).

<sup>7</sup> EG Krug et al., *Firearm-Related Deaths in the United States and 35 Other High- and Upper-Middle-Income Countries*, 27 INT'L J. OF EPIDEMIOLOGY 214, 218 (1998).

<sup>8</sup> NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., WEB-BASED INJURY STATISTICS QUERY & REPORTING SYSTEM (WISQARS) LEADING CAUSES OF DEATH REPORTS (1999-2007), available at <http://webappa.cdc.gov/sasweb/ncipc/leadcaus10.html> [hereinafter LEADING CAUSES OF DEATH REPORTS]. The search criterion for years was set at 1999–2007.

<sup>9</sup> NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., WISQARS NONFATAL INJURY REPORTS (2001-2009), available at <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html>. Search criteria were set at firearms, all sexes and the years ranged from 2001–2009.

<sup>10</sup> JOHN R. LOTT, JR., MORE GUNS LESS CRIME 163–69 (3d ed. 2010) (discussing conclusions from 1998 first edition).

rape, and a 7% reduction in aggravated assault.<sup>11</sup> However, a follow-up study conducted by law professors at Stanford and Yale claimed that Lott's conclusions were derived from a limited data set and that performing a more comprehensive study with better data did not support Lott's findings.<sup>12</sup> In response, Lott has continued research to support his conclusion, and the debate continues.<sup>13</sup>

9. Throughout the gun control debates, it remains unclear what the true impact of recent concealed carry laws has been on violence against women, especially since the studies mentioned above focus primarily on random violence/crime rather than violence committed by intimate partners or acquaintances. According to the Violence Policy Center (VPC) report *When Men Murder Women: An Analysis of 2007 Homicide Data*, 91% of murdered women were killed by someone they knew.<sup>14</sup> Furthermore, 62% of murdered women were killed by men with whom they had an intimate relationship at one point in their lives.<sup>15</sup> African American women are especially at risk, being three times more likely to be killed by a partner or a family member than white women.<sup>16</sup>
10. Having a gun in the home increases the overall risk of someone in the household being murdered by 41%, and for women, that risk is tripled.<sup>17</sup> Another study, published in *Social Science and Medicine*, shows that states with high gun ownership have 114% higher firearm homicide rates and 60% higher homicide rates than states with low gun ownership.<sup>18</sup>
11. Overall, from the Web-based Injury Statistics Query and Reporting System ("WISQARS") Leading Causes of Death Reports database for women's violence-related deaths in the United States, for females aged fifteen to thirty-four, homicide-by-firearm was the leading cause of death from 1999 to 2007. For women aged thirty-five to sixty-four, homicide-by-firearm was the third leading cause of violence-related death from 1999 to 2007. Moreover, suicide-by-firearm also ranked in the top five causes of violence-related deaths for women of all ages from 1999 to 2007 with the rate increasing with age after age thirty-five. For women aged fifteen to thirty-four, the rank was third, and for women aged thirty-five to sixty-four, it rose to the second leading cause of violence-related death.<sup>19</sup>
12. From the data<sup>20</sup> in the Appendix, it is clear that women of different races and ethnicities had different rates of violence-related deaths due to homicide-by-firearms: black women had a rate of 42%; Hispanic women, 29.9%; Asian and Pacific Islanders, 15.9%; American Indian/Alaska Native women, 15.8%; and white women, 12.2%. The statistics for American Indian and Alaska Native women and gun violence are analyzed in greater detail in the Supplement to this chapter, *Gun Violence Against American Indian and Alaska Native Women*, paragraphs 72–75.

## B. Familicide

13. Guns kept in a home are associated with an increased risk of firearm homicide and firearm suicide, regardless of storage practice, type of gun, or number of guns in the home.<sup>21</sup> Specifically, people who keep a gun in their home are almost twice as likely to die in a gun-related homicide, and they are sixteen times

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<sup>11</sup> Chris Hinyub, *More Guns, Less Crime*, CAL. IND. VOTER NETWORK (June 12, 2010), <http://caivn.org/article/2010/06/12/more-guns-less-crime>.

<sup>12</sup> Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1296 (2003).

<sup>13</sup> Lott, *supra* note 10, at 235–335.

<sup>14</sup> VIOLENCE POLICY CTR., *WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2007 HOMICIDE DATA 3* (2009), available at <http://www.vpc.org/studies/wmmw2009.pdf>.

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> Douglas J. Wiebe, *Homicide and Suicide Risks Associated with Firearms in the Home: A National Case-Control Study*, 41 ANNALS OF EMERGENCY MED. 771, 782 (2003).

<sup>18</sup> Matthew Miller et al., *State-Level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 SOC. SCI. & MED. 656, 659–60 (2007).

<sup>19</sup> LEADING CAUSES OF DEATH REPORTS, *supra* note 8.

<sup>20</sup> *Id.*

<sup>21</sup> Linda L. Dahlberg et al., *Guns in the Home and Risk of a Violent Death in the Home: Findings from a National Study*, 160 AM. J. EPIDEMIOLOGY 929, 929, 935 (2004).

more likely to use a gun to commit suicide than people without a gun in their home.<sup>22</sup> Rather than protection, guns in the home are associated with an increased risk of homicide by a family member or intimate acquaintance.<sup>23</sup> States with higher rates of household firearm ownership have significantly higher homicide victimization rates.<sup>24</sup>

14. Psychologists and criminologists define familicide as murdering one's spouse and at least one child before committing suicide. Besides access to a gun,<sup>25</sup> other factors often found in familicide include the presence of a stepchild,<sup>26</sup> substance abuse by the perpetrator,<sup>27</sup> depression or serious mental illness of the perpetrator,<sup>28</sup> domestic violence,<sup>29</sup> jealousy,<sup>30</sup> and economic stress.<sup>31</sup>
15. In familicide cases, studies have found that 91–95% of the time the perpetrator is a man.<sup>32</sup> More incidents of murder-suicide are committed with guns than any other weapon. According to findings published in the *American Journal of Epidemiology* in 2008, 88% of 408 homicide-suicides studied were carried out with a gun.<sup>33</sup> To highlight the level of gun violence in the United States compared to other developed nations, the United States' rate of familicide is three times higher than Canada's, eight times higher than Britain's, and fifteen times higher than Australia's.<sup>34</sup> The U.S. Department of Justice (DOJ) also reports that there is up to eight times the rate of murder-suicides in states with lax gun control laws than in those with restrictive ones.<sup>35</sup>

### C. Highway serial murders of women involve guns

16. While femicide is most often committed by someone whom the victim knew, it can also be impersonal. In one of the most shocking revelations of violent crimes against women, the FBI disclosed in April 2009 that over the last three decades, hundreds of women's bodies had been found near major highways.<sup>36</sup> In some of the convictions thus far, guns were used to murder the women. For example, a few years ago, authorities found the bodies of several women who had been shot with a .22-caliber gun along highways in Georgia and Tennessee. Police arrested Bruce Mendenhall, a long-haul truck driver for these slayings.<sup>37</sup> Some of these highway murders involved forms of brutal violence other than guns, such as strangulation.<sup>38</sup> Nonetheless, serial killers often change their modus operandi;<sup>39</sup> thus, the same killer(s) may use a variety of methods, including guns. In some cases, only body parts or remains were recovered,<sup>40</sup> so the causes of death may remain uncertain. Moreover, the FBI has revealed few details of

<sup>22</sup> Wiebe, *supra* note 17, at 780.

<sup>23</sup> Arthur L. Kellerman et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084, 1084, 1087–90 (1993).

<sup>24</sup> Miller et al., *supra* note 18, at 660.

<sup>25</sup> Esteban Hernandez, *National Institute of Justice Panel Explores Familicide Phenomenon*, 2 CMTY. POLICING DISPATCH (July 2009), [http://www.cops.usdoj.gov/html/dispatch/July\\_2009/nij.htm](http://www.cops.usdoj.gov/html/dispatch/July_2009/nij.htm).

<sup>26</sup> Margo Wilson, Martin Daly & Antonietta Daniele, *Familicide: The Killing of Spouse and Children*, 21 AGGRESSIVE BEHAVIOR 275, 275 (1995).

<sup>27</sup> Bryan Robinson, *Why Fathers Kill Their Families*, ABC NEWS, Jan. 14, 2003, <http://abcnews.go.com/US/story?id=90078>.

<sup>28</sup> Hernandez, *supra* note 25.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Robinson, *supra* note 27.

<sup>32</sup> J. Logan et al., *Characteristics of Perpetrators in Homicide-Followed-by-Suicide Incidents: National Violent Death Reporting System—17 US States, 2003-2005*, 168 AM. J. EPIDEMIOLOGY 1056, 1058 (2008); Wilson et al., *supra* note 26, at 280.

<sup>33</sup> J. Logan et al., *supra* note 32, at 1056–64.

<sup>34</sup> *Murder-Suicide in Families*, NAT'L INST. OF JUSTICE, <http://www.ojp.usdoj.gov/nij/topics/crime/intimate-partner-violence/murder-suicide.htm> (last modified Apr. 7, 2011).

<sup>35</sup> *Id.*

<sup>36</sup> *Highway Serial Killings: New Initiative on an Emerging Trend*, FED. BUREAU OF INVESTIGATION (Apr. 6, 2009), [http://www.fbi.gov/news/stories/2009/april/highwayserial\\_040609](http://www.fbi.gov/news/stories/2009/april/highwayserial_040609) [hereinafter *Highway Serial Killings*].

<sup>37</sup> Scott Glover, *FBI Makes a Connection Between Long-Haul Truckers, Serial Killings*, L.A. TIMES, Apr. 6, 2009, available at <http://articles.latimes.com/2009/apr/05/local/me-serialkillers5>.

<sup>38</sup> Adam Crisp, *FBI Data Points to Killer-Truck Driver Link*, CHATTANOOGA TIMES FREE PRESS, May 24, 2009, available at <http://www.timesfreepress.com/news/2009/may/24/fbi-data-points-killer-truck-driver-link/>.

<sup>39</sup> CURT R. BARTOL & ANNE M. BARTOL, INTRODUCTION TO FORENSIC PSYCHOLOGY: RESEARCH AND APPLICATION 85 (2d ed. 2008).

<sup>40</sup> *Highway Serial Killings*, *supra* note 36.

these crimes, making it difficult to know precisely how many of the murders involved guns.<sup>41</sup> And although the cause of death may not have been homicide by firearms, brandishing and threatening with firearms could certainly be part of the scenario in these killings. Thanks to the high level of state reciprocity, concealed weapons permits are often valid across state lines. Thus, the offenders can easily carry their guns across state lines and use them to commit crimes throughout the country.

17. Victims are typically picked up at truck stops or service stations and then sexually assaulted and murdered, with the bodies dumped along a highway.<sup>42</sup> Stranded motorists have also been a very small percentage of the victims.<sup>43</sup> As of April 2009, there were more than 500 cases nationwide, and FBI officials maintain that the numbers are “grossly underreported.”<sup>44</sup> Several newspaper reports have speculated that the total number of victims may be in the thousands. To gather data on these unsolved murders, the FBI formed the Highway Serial Killings Initiative in April 2009.<sup>45</sup> The Initiative used a computer database to search for patterns and similarities in highway murder cases in hopes of discovering the perpetrators.<sup>46</sup> Based on their findings, investigative authorities believe long-haul truck drivers may be responsible for many of these serial highway killings.<sup>47</sup> The database also contains information on scores of truckers who have been charged with, or suspected of, murders and rapes committed near highways. As of April 2009, 200 potential suspects have been identified by the FBI; some feel that better background checks of trucking personnel may be warranted.<sup>48</sup>
18. While it is possible to discover links between some cases, identifying perpetrators still remains a difficult task. As one investigator has stated, “You’ve got a mobile crime scene. You can pick a girl up on the East Coast, kill her two states away and then dump her three states after that.”<sup>49</sup> The mobile nature of the crime complicates the work of law enforcement authorities, but the implementation of a countrywide database is a step in the right direction. The Highway Serial Killings Initiative has yielded results, according to the FBI. At least ten suspects believed to be responsible for thirty homicides have been apprehended and placed into custody.<sup>50</sup>
19. But these few arrests and prosecutions pale in comparison to the sheer volume of women’s bodies that have been found. The difficulty of investigating these homicides is apparent, but other measures, such as increased federal regulatory requirements for interstate trucking companies, more extensive criminal background checks for drivers, and more restrictive gun regulation, may be necessary.

**D. The correlation between carrying concealed weapons and violence against women deserves heightened research**

20. The impact of CCW on violence against women is a fairly new trend that has received little attention. Federal law does not prohibit or require the carrying of concealed weapons by private citizens, nor does it provide rules for concealed weapons permits or licenses by private citizens. Like most gun laws, policy is largely left to the states. Concealed weapons are defined as “weapons, especially handguns, which are kept hidden on one’s person, or under one’s control.”<sup>51</sup> Under one’s control can also mean a gun that is easily accessed in places such as a glove compartment or under the seat of one’s car while driving.<sup>52</sup>

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<sup>41</sup> Blake Morrison, *Along Highways, Signs of Serial Killings*, USA TODAY, Oct. 4, 2010, available at <http://www.azcentral.com/news/articles/2010/10/04/20101004truck-stop-serial-killers.html#ixzz1AlvLVOxx>.

<sup>42</sup> *Highway Serial Killings*, *supra* note 36.

<sup>43</sup> Morrison, *supra* note 41.

<sup>44</sup> Glover, *supra* note 37.

<sup>45</sup> *Highway Serial Killings*, *supra* note 36.

<sup>46</sup> *Id.*

<sup>47</sup> Glover, *supra* note 37.

<sup>48</sup> *Highway Serial Killings*, *supra* note 36.

<sup>49</sup> Glover, *supra* note 37.

<sup>50</sup> *Highway Serial Killings*, *supra* note 36.

<sup>51</sup> *Concealed Weapons Law & Legal Definition*, US LEGAL, <http://definitions.uslegal.com/c/concealed-weapons/> (last visited Apr. 17, 2011).

<sup>52</sup> *Id.*

21. “From its beginnings in the 1980s, the ‘right-to-carry’ movement has succeeded in boosting the number of licensed concealed-gun carriers from fewer than one million to a record six million today, according to estimates from gun-rights groups . . .”<sup>53</sup> The issuance of a CCW permit has basically three categories, with variations in each state: “shall-issue,” “may-issue,” and “no-issue.”<sup>54</sup> In a “shall-issue” state, once the training course (if required) and background check have been performed and all fees paid to the authorities, local law enforcement may refuse to issue the permit; it is only mandatory to meet the state’s legislative requirements.<sup>55</sup> Thirty-nine states are “shall-issue” states.<sup>56</sup> Nine “may-issue” states allow local law enforcement to exercise discretion when issuing a permit for CCW.<sup>57</sup> Unrestricted states that are included in the “shall-issue” category include Alaska, Vermont, and recently Arizona,<sup>58</sup> where a permit is not required to carry a concealed weapon, and the owner is subject to a background check, with the type depending by state. Wyoming joined these states on July 1, 2011.<sup>59</sup> Only two states are “no-issue,” i.e., they prohibit the carrying of concealed weapons under any circumstance—Illinois and Wisconsin.<sup>60</sup>
22. There has been a growing trend for allowing CCW. In 1986, thirty-five states had provisions for concealed carry, but only eight of these states had “shall-issue” laws until an aggressive campaign by the National Rifle Association (NRA) changed the status of the majority of states to “shall-issue” laws.<sup>61</sup> The “shall-issue,” including “unrestricted,” states pose serious concerns, yet research is inconsistent on crimes and murders committed by CCW permit holders. Most troubling is that in 2000, 50% of female homicide victims were killed with a firearm.<sup>62</sup> Further, of those female firearm-related homicides, 75% were killed with a handgun.<sup>63</sup> In cases of fatal intimate partner violence, the accessibility of a gun was a major determinant of fatalities.<sup>64</sup>
23. For a discussion of American Indian tribes and concealed carry laws, see the Supplement to this chapter, *Gun Violence Against American Indian and Alaska Native Women*, at paragraph 83.
24. The correlation between violence against women and access to firearms indicate that in the United States, guns are used to take women’s lives, not to save them. Moreover, with the dramatic increase in CCW, it follows that the number of guns in homes will increase. To reduce violence against women and intimate partner violence (“IPV”), as well as increase child safety, the data strongly suggests an urgent

<sup>53</sup> Mike Stuckey, *Record Numbers Licensed to Pack Heat*, MSNBC, June 24, 2010, [http://www.msnbc.msn.com/id/34714389/ns/us\\_news-life](http://www.msnbc.msn.com/id/34714389/ns/us_news-life).

<sup>54</sup> *Concealed Carry Permit Information By State*, USA CARRY, [http://www.usacarry.com/concealed\\_carry\\_permit\\_information.html](http://www.usacarry.com/concealed_carry_permit_information.html) (last visited Mar. 7, 2011).

State laws and reciprocity agreements regarding concealed carry are available online at <http://www.usacarry.com>.

<sup>55</sup> John J. Donohue, *The Impact of Concealed-Carry Laws*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* 287 (Jens Ludwig & Philip J. Cook eds., 2003), available at [http://www.brookings.edu/press/books/chapter\\_1/evaluatinggunpolicy.pdf](http://www.brookings.edu/press/books/chapter_1/evaluatinggunpolicy.pdf).

<sup>56</sup> *Concealed Carry Permit Information By State*, *supra* note 54. Of the thirty-nine “shall-issue” states, eighteen states issue permits to residents and non-residents. The remaining twenty-one states issue permits to residents only.

<sup>57</sup> *Id.* Of the nine “may-issue” states, four states issue permits to residents and non-residents. The remaining five states issue permits to residents only.

<sup>58</sup> A new “Arizona Constitutional Carry” law went into effect on July 29, 2010. S.B. 1108, 49th Leg., 2d Reg. Sess. (Ariz. 2010), available at <http://www.azleg.gov/legtext/49leg/2r/laws/0059.htm>; Chris Woodard, *Arizona Constitutional Carry (SB 1108) Signed by Governor Brewer*, TUCSON EXAMINER, Apr. 16, 2010, <http://www.examiner.com/gun-rights-in-tucson/arizona-constitutional-carry-sb-1108-signed-by-governor-brewer>. Anyone who is legally able to own a firearm and is twenty-one years of age or older does not need a permit to carry a concealed weapon in that state. S.B. 1108, *supra*. Jared Lochner, who shot Congresswoman Gabrielle Giffords and others on January 8, 2011, walked into a sporting goods store and walked out the same day with a firearm, after a federal background check turned up no reason for denial. Information was obtained in a personal interview with Mark B. Evans, Editor of the *Tucson Citizen*, on January 13, 2011. See David Weigel, *There Will Be Guns*, SLATE, Jan. 10, 2011, <http://www.slate.com/id/2280772>.

<sup>59</sup> WYO. STAT. § 6-8-104 (2011), available at <http://legisweb.state.wy.us/statutes/statutes.aspx?file=titles/Title6/T6CH8AR1.htm>; see also Lindsey Erin Kroskob, *Concealed Weapons Law Hits Streets Friday*, WYO. TRIB., June 29, 2011, [http://www.wyomingnews.com/articles/2011/06/29/news/19local\\_06-29-11.txt](http://www.wyomingnews.com/articles/2011/06/29/news/19local_06-29-11.txt).

<sup>60</sup> *Concealed Carry Permit Information By State*, *supra* note 54.

<sup>61</sup> *Should Adults Have The Right To Carry A Concealed Handgun? New Website Researches Pros And Cons In Concealed Carry Debate*, PR NEWSWIRE, Apr. 14, 2010, <http://www.thestreet.com/story/10726001/should-adults-have-the-right-to-carry-a-concealed-handgun-new-website-researches-pros-and-cons-in-concealed-carry-debate.html>.

<sup>62</sup> *Facts on Firearms and Domestic Violence*, VIOLENCE POLICY CTR., [http://www.vpc.org/fact\\_sht/domviofs.htm](http://www.vpc.org/fact_sht/domviofs.htm) (last visited Apr. 17, 2011) (analyzing data from the 2000 FBI Supplementary Homicide Report).

<sup>63</sup> *Id.*

<sup>64</sup> Douglas J. Wiebe, *Guns in the Home: Risky Business*, 8 LDI ISSUE BRIEF (2003), available at [http://www.uphs.upenn.edu/ficap/issues\\_updates/ldi/issuebrief8\(8\).pdf](http://www.uphs.upenn.edu/ficap/issues_updates/ldi/issuebrief8(8).pdf).

need to strictly regulate gun ownership. Although his research is continually debated, we dispute Lott's findings in cases of violence against women assaulted and/or murdered by guns.

### E. Effects and consequences

25. The effects of violence against women and children have long-term consequences, not only for the individual, but also for society. The most glaring economic costs associated with gun violence in general are health-related, including increased medical costs due to injury and death. Estimates of direct medical costs for firearm injuries range from \$2.3 billion<sup>65</sup> to \$4 billion.<sup>66</sup> Other economic costs include those associated with strengthening law enforcement to combat gun crime and with prosecuting and incarcerating gun offenders. Other, less quantifiable costs related to gun violence include higher taxes to ensure public safety, increased housing costs as families move to areas perceived to be safe from gun violence, and the psychological and real costs associated with terror threats. Such costs affect all Americans through increased taxes, decreased property values, limits on housing, employment choices, and safety concerns, whether buying our children book bags to meet their school's post-Columbine regulations, having public transportation systems monitored, or financing an inner-city trauma center or emergency room. Moreover, survivors of gun violence will likely suffer from sustained physical, emotional, and mental injuries that may require long-term medical and/or psychological treatment for trauma.<sup>67</sup> Due to the complexity and far reach of the costs of gun violence, Philip Cook and Jens Ludwig state that the entire scope of the cost for all gun-related violence in the United States is approximately \$80 billion annually.<sup>68</sup>
26. Because guns are often used in domestic violence, the costs of gun violence often overlap with those imposed by domestic violence. The annual costs of domestic violence are greater than \$5.8 billion each year, including almost \$4.1 billion in direct medical and mental health-related costs and nearly \$1.8 billion in indirect costs from lost productivity and lost lifetime earnings.<sup>69</sup> Various U.S. laws that attempt to combat violence against women, including that perpetrated with guns, also cost the country millions of dollars annually. The Violence Against Women Act (VAWA) was passed in 1994 and signed into law as Public Law 103-322 in 1994.<sup>70</sup> It was reauthorized in 2000<sup>71</sup> and 2005.<sup>72</sup> VAWA authorizes the government to investigate and prosecute those responsible for violent crime against women, increases the duration of pre-trial detention of accused batterers, imposes automatic and mandatory restitution on those convicted, and allows civil redress in cases that prosecutors chose not to pursue.<sup>73</sup> The Family Violence Prevention and Services Act (FVPSA) as extended by the Department of Health and Human Services Appropriations Act in 2010 provides dedicated federal funding for domestic violence shelters, emergency shelters, crisis hotlines, counseling services, and victim assistance programs for the underserved.<sup>74</sup> FVPSA also funds initiatives for teen dating violence and children who witness violence.<sup>75</sup> Additionally, the Child Abuse Prevention and Treatment Act (CAPTA) intervenes in child abuse, neglect, and sexual violence and improves services for both victims of child abuse and families that are experiencing domestic violence and child maltreatment.<sup>76</sup> While these acts are a critical component to

<sup>65</sup> Am. Acad. of Pediatrics, *Firearm-Related Injuries Affecting the Pediatric Population*, 105 PEDIATRICS 888 (2000).

<sup>66</sup> KW Kizer et al., *Hospitalization Charges, Costs, and Income for Firearm-Related Injuries at a University Trauma Center*, 273 J. AM. MED. ASS'N 1768 (1995).

<sup>67</sup> JUDITH BONDERMAN, OFFICE FOR VICTIMS OF CRIME, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, BULL. NO. NCJ 186155, WORKING WITH VICTIMS OF GUN VIOLENCE (2001), available at [http://www.ncjrs.gov/ovc\\_archives/bulletins/gun\\_7\\_2001/NCJ186155.txt](http://www.ncjrs.gov/ovc_archives/bulletins/gun_7_2001/NCJ186155.txt).

<sup>68</sup> PHILIP J. COOK & JENS LUDWIG, GUN VIOLENCE: THE REAL COSTS 63-73, 85-91 (2000).

<sup>69</sup> NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 2 (2003), available at <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>.

<sup>70</sup> Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified at 42 U.S.C. § 13981); see also *Legislation*, OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUSTICE, <http://www.ovw.usdoj.gov/legislation.htm> (last visited Apr. 17, 2011).

<sup>71</sup> Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

<sup>72</sup> Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006).

<sup>73</sup> *Id.*

<sup>74</sup> Family Violence Prevention and Services Act as extended by the Department of Health and Human Services Appropriations Act, Pub. L. No. 111-117 (codified at 42 U.S.C §§ 10401-10421).

<sup>75</sup> *Id.*

<sup>76</sup> See Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247 (codified at 42 U.S.C. §§ 5101-19).

addressing domestic violence, they will continue to cost the United States several million dollars yearly until we eradicate violence targeted at women and children.

#### IV. LAW AND POLICY

##### A. International standards, both binding and non-binding on the United States

27. In 2001, the United Nations adopted the Illicit Trade in Small Arms and Light Weapons (“SALW”) Program of Action to regulate gun manufacturing and trade as well as individual gun ownership by requiring that all weapons have an identifying mark and be registered with a serial number.<sup>77</sup> The SALW Program, however, is not legally binding. Some pro-gun advocates suspect that the Obama Administration has made advances toward honoring this U.N. Program.<sup>78</sup> However, in light of the United States’ status as the largest exporter of firearms in the world,<sup>79</sup> combined with U.S. pro-gun policies, it remains unclear whether any real progress will be made toward implementing this Program in the United States.
28. The United States is a strong advocate for U.N. Security Council Resolution (UNSCR) 1325,<sup>80</sup> which calls for supporting the essential role played by women in all aspects of peace and security, for recognizing their leadership in peacemaking, and for ending sexual violence in conflict. Secretary of State Hillary Clinton has long worked to highlight the urgent need to end sexual violence against women and promote their participation in peace and security. For example, she has led the unanimous adoption of UNSCR 1888, the successor to UNSCR 1325.<sup>81</sup> Using UNSCR 1325 over the last decade, women’s organizations have initiated micro-disarmament projects internationally, recognizing the connections between violence against women, small arms control, and the peace building goals of UNSCR 1325. For example, in Argentina, women have successfully implemented a buy-back campaign where 70,000 arms and 450,000 rounds of ammunition were collected.<sup>82</sup> In Kenya, women have implemented programs to mark and collect weapons.<sup>83</sup> The Movement Against Small Arms in West Africa is conducting awareness-raising programs for communities in Senegal to mobilize women to develop strategies that are convincing people to turn in their weapons.<sup>84</sup> Although there may be little chance in the United States of collecting gun owners’ weapons, strengthening licensing and registration of gun is worth undertaking to comply with the UNSCR Resolutions. These resolutions are not self-executing, but they can be used to support legal arguments in U.S. and international courts.
29. In 2006, Rhonda Copelon used the U.N. Convention Against Torture (CAT) to frame her argument of domestic violence as a crime of torture perpetrated against women.<sup>85</sup> Because the dynamics of gun violence directed against women might also constitute physical, mental, and emotional abuse, stalking, and rape, the CAT might also be used to frame gun violence perpetrated against women as an act of torture. A brief report on the topic of gun violence against women was submitted to the U.N. Human Rights Council Working Group on the Universal Periodic Review for the United States. The draft report of

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<sup>77</sup> UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, N.Y., July 9–20, 2001, *Report*, 10, ¶ 7, U.N. Doc. A/CONF.192/15, available at [http://www.un.org/events/smallarms2006/pdf/192.15%20\(E\).pdf](http://www.un.org/events/smallarms2006/pdf/192.15%20(E).pdf).

<sup>78</sup> Robert Farago, *U.N. Small Arms Treaty Not a Gun Grab. Still*, THE TRUTH ABOUT GUNS (July 12, 2010), <http://thetruthaboutguns.com/2010/07/robert-farago/u-n-small-arms-treaty-not-a-gun-grab-still/>.

<sup>79</sup> RICHARD F. GRIMMETT, CONG. RESEARCH SERV., CONVENTIONAL ARMS TRANSFERS TO DEVELOPING NATIONS, 2002-2009, *Summary* (2010).

<sup>80</sup> Hillary Rodham Clinton, U.S. Sec’y of State, Remarks at the Tenth Anniversary of UN Security Council Resolution 1325 on Women, Peace and Security (Oct. 26, 2010) (transcript available at <http://www.state.gov/secretary/rm/2010/10/150010.htm>).

<sup>81</sup> Hillary Rodham Clinton, U.S. Sec’y of State, Remarks on the Adoption of a United Nations Security Council Resolution to Combat Sexual Violence in Armed Conflict (Sept. 29, 2009) (transcript available at <http://www.state.gov/secretary/rm/2009a/09/130041.htm>).

<sup>82</sup> Sarah Cheverton, *Small Arms Disarmament: Women Lead the Way to Peace*, WOMEN’S VIEWS ON NEWS (Oct. 25, 2010), <http://www.womensviewsonnews.org/wvon/2010/10/small-arms-disarmament-women-lead-the-way-to-peace/>.

<sup>83</sup> Sarah Masters, *UN Business: Women, Guns and Small Arms Control*, OPENDEMOCRACY (Oct. 25, 2010), <http://www.opendemocracy.net/5050/sarah-masters/un-business-women-guns-and-small-arms-control>.

<sup>84</sup> *Id.*

<sup>85</sup> Rhonda Copelon, *End Torture, End Domestic Violence*, ON THE ISSUES MAG. ONLINE, Winter 2009, [http://www.ontheissuesmagazine.com/2009winter/2009winter\\_7.php](http://www.ontheissuesmagazine.com/2009winter/2009winter_7.php).

the Working Group on the Universal Periodic Review advised the United States to “combat violence against women and gun violence.”<sup>86</sup>

**B. Current domestic practices**

*i. Historical background on gun laws affecting current U.S. policy*

30. While the number of U.S. citizens supporting the right to bear arms is debated, 40% of U.S. homes have guns, 81% of Americans say the issue of gun control is an important factor in his or her Congressional vote, 91% of Americans think there should be at least minor restrictions on owning guns, and 57% of Americans support major restrictions or a ban.<sup>87</sup> Thus, while the majority of U.S. citizens believe that there should be major restrictions on gun ownership, the laws are becoming more lax. The United States has made little progress in restricting handgun ownership by ineligible persons. Progress has occurred to varying degrees depending upon the state in which one resides; California is the most stringent, and Alaska and Arizona are the least.<sup>88</sup>
31. Although earlier laws controlled gun ownership since the 1930s, the federal Gun Control Act of 1968 (GCA) was signed into law after the tragic assassinations of John and Robert Kennedy and Martin Luther King, Jr. Under the GCA, firearms possession by certain categories of individuals is prohibited. This law has been amended several times and currently prohibits ownership by the following categories:<sup>89</sup>
  - a. A person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year or any state offense classified by the state as a misdemeanor and punishable by a term of imprisonment of more than two years.
  - b. Persons who are fugitives of justice—for example, the subject of an active felony or misdemeanor warrant.
  - c. An unlawful user and/or an addict of any controlled substance; for example, a person convicted for the use or possession of a controlled substance within the past year; or a person with multiple arrests for the use or possession of a controlled substance within the past five years with the most recent arrest occurring within the past year; or a person found through a drug test to use a controlled substance unlawfully, provided the test was administered within the past year.
  - d. A person adjudicated mentally defective or involuntarily committed to a mental institution or incompetent to handle their own affairs, including disposition to criminal charges, [or] found not guilty by reason of insanity or found incompetent to stand trial.
  - e. A person who, being an alien, is illegally or unlawfully in the United States.
  - f. A person, who, being an alien except as provided in subsection (y)(2), has been admitted to the United States under a non-immigrant visa.
  - g. A person dishonorably discharged from the United States Armed Forces.
  - h. A person who has renounced his/her United States citizenship.
  - i. The subject of a protective order issued after a hearing in which the respondent had notice that restrains them from harassing, stalking, or threatening an intimate partner or child of such partner. This does not include ex parte orders.
  - j. A person convicted in any court of a misdemeanor crime, which includes the use or attempted use of physical force or threatened use of a deadly weapon and the defendant was the spouse, former spouse, parent, guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited in the past

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<sup>86</sup> Draft Rep. of the Working Group on the Universal Periodic Review: United States of America, Human Rights Council, 9th Sess., Nov. 1–12, 2010, at 25, ¶ 92.167, U.N. Doc. A/HRC/WG.6/9/L.9 (Nov. 10, 2010), available at [http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A\\_HRC\\_WG.6\\_9\\_L.9\\_USA.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_L.9_USA.pdf).

<sup>87</sup> *Issues Match: Absolute Right to Gun Ownership*, ONTHEISSUES.ORG, <http://www.ontheissues.org/frontline/im/q7.asp> (last visited Apr. 18, 2011).

<sup>88</sup> *Brady State Gun Law Scorecard Spotlight*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/stategunlaws/scorecard/descriptions> (last visited Apr. 29, 2011). California has the best score at 79/100 points and Alaska and Arizona have only 2/100 points on Brady’s ranking scale.

<sup>89</sup> Gun Control Act of 1968, 18 U.S.C. § 922(g)(1)–(9) & (n).

- with the victim as a spouse, parent, guardian or similar situation to a spouse, parent or guardian of the victim.
- k. A person who is under indictment for a crime punishable by imprisonment for a term exceeding one year.<sup>90</sup>
32. Without the ability to access an individual's criminal or mental health background, the GCA could not be implemented successfully. Consequently, the Brady Handgun Violence Prevention Act of 1993<sup>91</sup> mandated a national background check system that is kept by the Federal Bureau of Investigation and is now known as the National Instant Criminal Background Check System (NICS). Its purpose is to screen and prevent firearms sales to persons who do not meet the criteria outlined under the GCA.<sup>92</sup>
33. Despite the effectiveness of background checks, in 1997 the Supreme Court ruled that the Brady Handgun Violence Prevention Act violated the Tenth Amendment in *Printz v. United States*.<sup>93</sup> Justice Scalia, writing for the majority, stated that the law violated the Tenth Amendment because it "forced participation of the States' executive in the actual administration of a federal program."<sup>94</sup> Thus, it became the state's responsibility to determine which type of background check it would perform, if any, before granting the sale of a gun. While all states do run background checks, some employ methods that are deficient in prohibiting gun sales to ineligible individuals. This will be discussed further in the following section on due diligence and gun violence.
34. In 1996, the GCA was further amended through the Lautenberg Amendment by the Domestic Violence Misdemeanor Gun Ban, rendering it "unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence . . . [to] possess . . . any firearm or ammunition . . ."<sup>95</sup> However, although it is a minimum standard federal law that is binding on all states, states do not have to enact legislation to implement or augment its provisions.
35. Another blow to regulating the gun industry came in 2003 when the Tiahrt Amendments were passed. These have weakened the federal gun laws by amending the GCA. One provision of the Tiahrt Amendments requires the FBI to destroy all approved gun purchaser records within twenty-four hours of approval,<sup>96</sup> making it extremely difficult for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to quickly trace crime guns or to retrieve firearms from prohibited individuals. In other words, there is no searchable paper trail. The Tiahrt Amendments also prohibit the ATF from requiring gun dealers to submit inventories so that the 50,000 gun dealers currently operating in the United States are not mandated to report the loss or theft of guns.<sup>97</sup> Considering that in 2007, the ATF found that more than 30,000 guns were reported missing from licensed gun dealers' shops,<sup>98</sup> this fuels a critical problem in controlling gun ownership by ineligible persons. Moreover, from 2008 to 2010, at least 62,134 firearms left gun dealers' inventories and were not legally sold.<sup>99</sup> Additionally, the original Tiahrt Amendments had not only blocked access to firearms trace data revealing the location from which a gun was recovered but also blocked access to the identity of the dealer and original retail buyer, making stolen guns almost untraceable.<sup>100</sup> The Tiahrt Amendments' FY 2010 appropriations language restored

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<sup>90</sup> *Id.*

<sup>91</sup> Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (codified at various sections of 18 U.S.C.).

<sup>92</sup> RESPONSIBILITIES OF A FEDERAL FIREARMS LICENSEE (FFL) UNDER THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM, OMB NO. 1110-0026, available at <http://www.fbi.gov/about-us/cjis/nics/ssigna1.pdf>.

<sup>93</sup> 521 U.S. 898 (1997).

<sup>94</sup> *Id.* at 918.

<sup>95</sup> Domestic Violence Misdemeanor Gun Ban, 18 U.S.C. § 922(g)(9).

<sup>96</sup> Pub. L. No. 108-447, § 615, 118 Stat. 2809, 2915 (2004); see also Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3. The FBI NICS Section must destroy all identifying information on allowed transactions within a day. 28 C.F.R. § 25.9(b)(1).

<sup>97</sup> Pub. L. No. 108-447, § 615, 118 Stat. 2809, 2915 (2004). For further discussion, see *The Tiahrt Amendments*, MAYORS AGAINST ILLEGAL GUNS, <http://www.mayorsagainstillegalguns.org/html/federal/tiahrt.shtml> (last visited Apr. 22, 2011).

<sup>98</sup> PUB. AFFAIRS DIV., BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP'T OF TREASURY, FACT SHEET: FFL COMPLIANCE INSPECTIONS (2008), available at <http://www.atf.gov/publications/factsheets/factsheet-ffl-compliance.html>.

<sup>99</sup> BRADY CTR. TO PREVENT GUN VIOLENCE, MISSING GUNS: TENS OF THOUSANDS OF GUNS LEAVE GUN SHOPS WITHOUT BACKGROUND CHECKS OR RECORDS OF SALE (2011), available at <http://www.bradycenter.org/xshare/pdf/reports/Missing-Guns-report.pdf>.

<sup>100</sup> The FY2008 limitation on trace data continues to prohibit the release of firearms trace data for the purposes of suing gun manufacturers and dealers. Moreover, the limitation includes the wording, "in fiscal year 2008 and thereafter," making the limitation

full access to crime gun trace data for state and local law enforcement but continued to restrict what they can do with it. For example, state and local law enforcement are still prohibited from using trace data in civil proceedings to suspend or revoke the license of a gun dealer who has sold weapons illegally.<sup>101</sup>

36. More recent Supreme Court cases support gun proponents who rely heavily on the Second Amendment argument that U.S. citizens have a constitutional right to bear arms. Previous legislation enacted to restrict the right to bear arms has recently been challenged and overturned by the Supreme Court. Specifically, in the 2008 landmark case of *District of Columbia v. Heller*, the U.S. Supreme Court overturned a previous ban on weapons and held that the Second Amendment protects an individual's right to possess a firearm for private use in federal jurisdictions.<sup>102</sup> However, this decision did not address whether the Second Amendment extended to the individual states because of the unique status of Washington, D.C. as a federal jurisdiction rather than a state. In June 2010 in *McDonald v. City of Chicago*,<sup>103</sup> the Supreme Court held that the right of an individual to "keep and bear arms" as protected by the Second Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment, and therefore does apply to the states. The decision cleared up the uncertainty left in the wake of *Heller* as to the scope of gun rights in regard to the states. Gun proponents scored a major victory in making it unambiguous that citizens maintain the right to bear arms.
37. In the wake of *Heller*, the restrictive gun laws in many states have been challenged by gun proponents.<sup>104</sup> Because federal laws governing gun ownership are inadequate, the majority of policies concerning firearms are left to the individual states, where there are wide variations in gun selling, buying, and carrying regulations.

### C. Due diligence

#### i. Inadequate gun laws as a potential pathway to violence against women

38. In 1996, recognizing the deadly role firearms play in domestic violence, Congress passed the Domestic Violence Misdemeanor Gun Ban, prohibiting anyone convicted of a misdemeanor crime of domestic violence or of child abuse from purchasing or possessing a gun.<sup>105</sup> While well-intentioned, the Domestic Violence Misdemeanor Gun Ban has some serious limitations.
39. First, the law does not apply to people who are dating unless the couple has at some point cohabitated and/or have a child together.<sup>106</sup> However, there is a documented risk of domestic violence being committed by a dating partner. Between 1990 and 2005, 50% of all intimate relationship homicides were committed by people who were dating, not married.<sup>107</sup> A recent study of applicants for domestic violence restraining orders in Los Angeles found that the victim and the abuser were most frequently in a dating relationship as compared to any other type of relationship. In fact, the applications for restraining orders were more likely to mention firearms when the parties had never cohabitated and were not legally

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permanent law according to the Government Accountability Office. Letter from the GAO to John Culberson, House of Representatives (July 15, 2008), available at [www.gao.gov/decisions/appro/316510.pdf](http://www.gao.gov/decisions/appro/316510.pdf). However, Congress has modified the language of these limitations and included them in the FY2010 and FY2011 Commerce, Justice, Science, and Related Agencies (CJS) Appropriations Acts. Consolidated Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524; Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034.

<sup>101</sup> *The Tiahrt Amendments*, supra note 97; see also FFL NEWSLETTER (Fed. Firearms Licensee Information Serv., Bureau of Alcohol, Tobacco, Firearms & Explosives, U.S. Dep't of Treasury, Atlanta, Ga.), June 2010, available at <http://www.atf.gov/publications/newsletters/ffl/ffl-newsletter-2010-06.pdf>.

<sup>102</sup> *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>103</sup> *McDonald v. Chicago*, 561 U.S. 702, 721 (2010).

<sup>104</sup> Adam Winkler, *The New Second Amendment: A Bark Worse Than Its Right*, HUFFINGTON POST, Jan. 2, 2009, [http://www.huffingtonpost.com/adam-winkler/the-new-second-amendment\\_b\\_154783.html](http://www.huffingtonpost.com/adam-winkler/the-new-second-amendment_b_154783.html).

<sup>105</sup> 18 U.S.C. § 922(g)(9).

<sup>106</sup> LEGAL CMTY. AGAINST VIOLENCE, REGULATING GUNS IN AMERICA: AN EVALUATION AND COMPARATIVE ANALYSIS OF FEDERAL, STATE AND SELECTED LOCAL GUN LAWS 89 (2008), available at [http://www.lcav.org/content/domestic\\_violence.pdf](http://www.lcav.org/content/domestic_violence.pdf).

<sup>107</sup> *Homicide Trends in the U.S.: Intimate Homicide*, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE (Mar. 2011), <http://bjs.ojp.usdoj.gov/content/homicide/intimates.cfm> (last revised Apr. 22, 2011).

married.<sup>108</sup> California has addressed this gap in federal law by enacting more stringent state laws encompassing a more comprehensive list of persons subject to firearm prohibitions due to domestic violence, including persons convicted of IPV against someone they are or were dating, regardless of sexual orientation.<sup>109</sup>

40. In addition, criminals who have been convicted of misdemeanors other than domestic violence are not usually banned from gun possession under the current laws.<sup>110</sup> This loophole must be closed because research has shown that one previous misdemeanor (violent or not) may be a future indicator for further violence involving a firearm.<sup>111</sup> Another study revealed that individuals convicted of violent misdemeanors were eight times more likely to be charged with subsequent violent crimes, including crimes involving firearms, and that one out of every three violent misdemeanants seeking to purchase a handgun was arrested for newly committed crimes within three years of acquiring that handgun.<sup>112</sup>
41. Adequate enforcement of federal policies on firearm possession by domestic abusers depends heavily on state and local law enforcement. Background checks at the point of transfer can prevent the purchase of firearms by domestic abusers and other misdemeanants and felons. However, while well-intentioned, implementation of the NICS has been less than adequate. In 2008, the NICS Improvement Amendments Act of 2007 provided financial assistance to aid states in sending data to NICS and provided for financial penalties against states failing to provide criminal and mental health records.<sup>113</sup> This law was enacted after the tragedy at Virginia Tech, where Seung-Hui Cho killed thirty-two people and wounded many others before committing suicide. Cho was able to buy a gun because mental health records that could have prevented his purchase were not reported to NICS.<sup>114</sup> In response, some states have started forwarding more records to the NICS. Unfortunately, however, they are not mandated to do so, and the database remains incomplete. In addition, background checks conducted by federally licensed firearms dealers at the time of transfer rely on state and local authorities submitting complete records on not only misdemeanor convictions but also protective orders. The case of Jessica Gonzales is a prime example.<sup>115</sup> Ms. Gonzales' ex-husband acquired a gun because his federal background check did not return any information indicating he had a restraining order against him in Colorado.
42. Each of the varied methods for running background checks has some serious limitations. In general, there are state background checks, federal background checks, and state and federal background checks. When the state is the point of contact ("POC") for a background check, only records in that state are checked. In some ways, however, state background checks are more thorough than those performed by the FBI because states can access their independent criminal history database.<sup>116</sup> State databases

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<sup>108</sup> Katherine A. Vittes et al., *Are Temporary Restraining Orders More Likely to Be Issued When Applications Mention Firearms?*, 30 EVALUATION REV. 266, 271, 275 (2006).

<sup>109</sup> Cal. Penal Code Section 243(e)(1) does not require injury. CAL. PENAL § 243(e) (West 2004). The class of protected persons is broader: in addition to those listed in California Penal Code Section 273.5, it includes cohabitants, previous cohabitants, or married individuals, CAL. PENAL § 273.5 (West 2008); it also includes "fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship." CAL. PENAL § 243(e) (West 2004).

<sup>110</sup> Gun Control Act, *supra* note 89, § 922(g).

<sup>111</sup> Garen J. Wintemute et al., *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 J. AM. MED. ASS'N 2083 (1998).

<sup>112</sup> Garen J. Wintemute et al., *Subsequent Criminal Activity Among Violent Misdemeanants Who Seek to Purchase Handguns*, 258 J. AM. MED. ASS'N 1019 (2001).

<sup>113</sup> NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 104, 122 Stat. 2559, 2568-69 (2008), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-2640&tab=summary>.

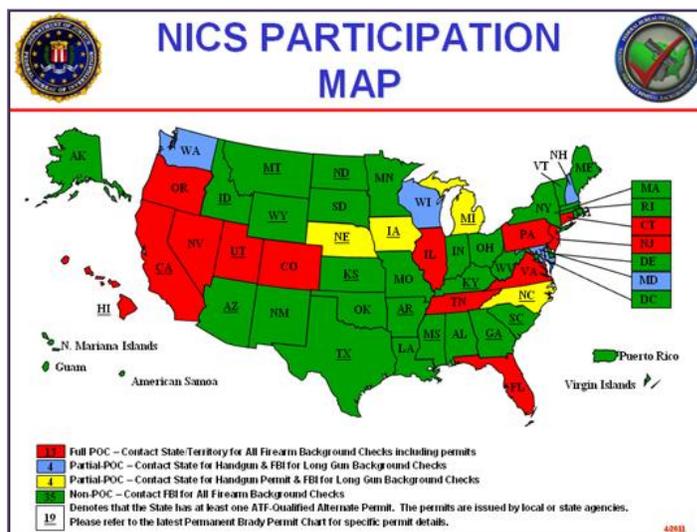
<sup>114</sup> Virginia Code Section 37.2-1014 requires the clerk of the circuit court to certify and forward to Virginia's Central Criminal Records Exchange a copy of any order adjudicating a person incapacitated (as defined by state law), as does Section 37.2-819 for orders of involuntary commitment and outpatient treatment. VA. CODE ANN. §§ 37.2-819, 37.2-1014 (2011). Mr. Cho was not deemed incapacitated by Virginia state law because he was treated in an outpatient facility. Therefore, his information was not forwarded to NICS. This was rectified by Virginia Governor Kaine by Executive Order 50 in April 2007. Commonwealth of Va., Office of the Governor, Exec. Order No. 50, Reporting Critical Safety Data to the Central Criminal Records Exchange (2007), available at [http://www.lva.virginia.gov/public/EO/eo50\(2007\).pdf](http://www.lva.virginia.gov/public/EO/eo50(2007).pdf). A person can now be deemed incapacitated even if only receiving outpatient treatment.

<sup>115</sup> See *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

<sup>116</sup> *Federal Gun Laws: Brady Background Checks*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, available at <http://www.bradycampaign.org/legislation/backgroundchecks> (last visited Apr. 28, 2011).

typically include background data that is unavailable to the FBI, including outstanding felony warrants, mental health records, domestic violence restraining order records, and final hearing disposition records (i.e., records showing whether a charge resulted in an acquittal or a conviction).<sup>117</sup> However, while federal law prohibits the purchase of a firearm by any person who has been adjudicated as mentally ill, many states<sup>118</sup> are remiss in collecting information about these persons. For American Indian concerns on reporting, see Supplement, paragraphs 84 and 85. Because of these reporting deficiencies, mentally ill persons may often buy guns, which is in violation of federal law. For example, an ineligible person can claim residence in another state where he or she has no criminal or mental health records on file, where background checks are conducted only at the state level or at the federal level, or where there has been a deficiency in the reporting procedures. Merely by showing proper identification and passing the requisite background check, he or she might be able to purchase a gun.

43. The NICS database, which many states rely on to conduct their background checks, is still not complete, and more appropriation of funds by Congress is necessary. Currently, many prohibited persons are able to buy guns because their records are not in NICS, including about 80 to 90% of relevant mental health records and 25% of felony convictions.<sup>119</sup> A fully funded NICS Act would block hundreds of thousands of prohibited buyers who are not presently stopped by the Brady Law because their names are not in the NICS.<sup>120</sup>
44. For more information on the difficulties American Indian tribes face in accessing and submitting information to national crime databases, see Supplement, *Gun Violence Against American Indian and Alaska Native Women*, paragraphs 84-85.



Source: <http://www.fbi.gov/about-us/cjis/nics/general-information/participation-map>

<sup>117</sup> LEGAL CMTY. AGAINST VIOLENCE, *LESSONS FROM VIRGINIA TECH: RECOMMENDATIONS FOR STATE LAW CHANGES TO CLOSE LOOPHOLES IN BACKGROUND CHECK SYSTEMS* (2007), available at [http://www.lcav.org/pdf/memo\\_re\\_state\\_loopholes.pdf](http://www.lcav.org/pdf/memo_re_state_loopholes.pdf).

<sup>118</sup> *Brady Background Checks: Mental Health NICS*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, available at <http://www.bradycampaign.org/legislation/backgroundchecks/nics> (last visited Apr. 28, 2011).

<sup>119</sup> *Background Information on the NICS Improvement Amendments Act of 2007 and Answers to "Frequently Asked Questions,"* BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, available at [http://www.bradycampaign.org/xshare/pdf/nics/final\\_act\\_analysis\\_2008-3-8.pdf](http://www.bradycampaign.org/xshare/pdf/nics/final_act_analysis_2008-3-8.pdf) (last updated Mar. 8, 2008).

<sup>120</sup> *Federal Gun Laws: Brady Background Checks*, supra note 116, available at <http://www.bradycampaign.org/legislation/backgroundchecks>.

45. The best solution to the limitations of running a background check is to perform both federal and state checks before allowing a gun to be sold. Colorado has enacted such a system in response to Jessica Gonzales' case.<sup>121</sup>
46. The NICS Section must destroy all identifying information within twenty-four hours of notifying a purchaser that a transaction is permitted.<sup>122</sup> If the NICS Section delays or denies a transaction, the firearms purchaser can appeal. If the appeal is successful, the purchaser is permitted to complete the transaction. The Voluntary Appeal File ("VAF") process allows applicants who had been denied the right to purchase a gun to submit new information, such as court records or pardons, to the NICS Section to avoid future denials.<sup>123</sup> Thus, a person can use the VAF process to modify his or her existing NICS file especially if the ineligible person has his or her record expunged or crime pardoned before re-application.
47. Anyone who has had his or her gun rights removed can appeal to a court to have them restored or can ask for a pardon granted at the state level. If the person is aware of the loopholes in the law, it would not be difficult for someone seeking to have his or her rights restored to reacquire or carry guns legally. For example, Kansas passed a law by nearly unanimous vote in July 2010 establishing that previous charges of drunken driving, carrying a firearm while under the influence of alcohol, and attempted suicide do not affect the ability of a person to carry a concealed weapon if they occurred more than five years prior to the application for a concealed weapon permit.<sup>124</sup> In essence, an individual can restore his or her gun and concealed carry rights while offering no documentation to support treatment or recovery for infractions that could render him or her ineligible to carry weapons.
48. Furthermore, in Florida, a state that has CCW reciprocity laws with thirty-five other states,<sup>125</sup> concealed carry privileges can be restored to individuals over the age of twenty-one who meet the following minimum criteria:
  - a. have not within a three-year period preceding submission of the application been convicted of a crime of violence or committed for drug abuse or been convicted of a minor drug offense;<sup>126</sup>
  - b. have not been adjudicated guilty even with a suspended sentence for a felony or misdemeanor crime of domestic violence, unless three years have elapsed since probation or any other condition of the court has been fulfilled or the record is sealed or expunged;<sup>127</sup>
  - c. are not a chronic or habitual drunkard;<sup>128</sup>
  - d. are not currently under any injunction restraining the applicant from acts of domestic violence or repeated acts of violence.<sup>129</sup>
49. In another example of the restoration of rights to a violent misdemeanor, a federal grand jury in West Virginia indicted Randy Hayes for violating the GCA in possessing firearms after having been convicted of a misdemeanor crime of domestic violence.<sup>130</sup> Hayes had pled guilty to a simple battery misdemeanor charge, which made no reference to the alleged victim's being a spouse or cohabitant even though the victim was Hayes' wife when the incident occurred. Because he was erroneously charged with simple battery, not domestic violence, Hayes argued he had a right to own a gun. In *United States v. Hayes*, the

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<sup>121</sup> Gene Davis, *Caldera Wants Feds, Not State, to Run Background Checks*, STATE BILL NEWS COLO., Feb. 18, 2010, available at <http://www.statebillnews.com/2010/02/caldera-wants-feds-not-state-to-run-gun-background-checks/>.

<sup>122</sup> 28 C.F.R. §§ 25.9(b)(1)–(3).

<sup>123</sup> CRIMINAL JUSTICE INFO. SERVS. DIV., FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, OMB No. 1110-0043, VOLUNTARY APPEAL FILE (VAF) APPLICATION, available at [http://www.fbi.gov/about-us/cjis/nics/appeals/nics\\_vaf\\_brochure\\_eng.pdf/view](http://www.fbi.gov/about-us/cjis/nics/appeals/nics_vaf_brochure_eng.pdf/view) [hereinafter VAF APPLICATION].

<sup>124</sup> KAN. STAT. ANN. § 21-4201 (2011); see also Chad Lawhorn, *Concerns Mount Over New Gun Law*, KTKA NEWS, July 23, 2010, <http://www.ktka.com/news/2010/jul/23/concerns-mount-over-new-gun-law/>.

<sup>125</sup> *Concealed Carry Reciprocity*, DIV. OF LICENSING, FLA. DEP'T OF AGRIC. & CONSUMER SERVS., [http://licgweb.doacs.state.fl.us/news/concealed\\_carry.html](http://licgweb.doacs.state.fl.us/news/concealed_carry.html) (last updated Jan. 1, 2011).

<sup>126</sup> FLA. STAT. § 790.06 subpara. E (2011).

<sup>127</sup> *Id.* § 790.06, subpara. K.

<sup>128</sup> *Id.* § 790.06 subpara. F.

<sup>129</sup> *Id.* § 790.06, subparas. K, L.

<sup>130</sup> *United States v. Hayes*, 129 S. Ct. 1079 (2009); see also Justin Anderson, *U.S. Supreme Court Rules Against W. Va. Man*, W. VA. RECORD, Feb. 24, 2009, <http://www.wvrecord.com/news/217561-u.s.-supreme-court-rules-against-w.va.-man>.

Supreme Court upheld the decision of the federal grand jury and denied Hayes his right to bear arms. Even so, because West Virginia runs a sole federal NICS check, Hayes could have had his NICS file successfully amended. Had Hayes had his record expunged before trying to restore his gun rights, which might have easily been done because he was a police officer, he could have re-applied and passed his federal background check if he had not had any other offenses that would block the clearance.

50. There is also a critical lack of accountability required for gun ownership, especially for carrying a gun in public. For example, one does not have to be a trained marksman to own a gun or carry a concealed weapon in many states; a course is required for CCW in most, but not all, states, most notably in the states that do not require permits for CCW.<sup>131</sup> This course generally lasts a few hours and covers the basics of law, safety, and elementary operation of the weapon. These courses can now often be taken online.<sup>132</sup> In some cases, years can elapse before re-certification requires a person to retake the course. These weapons can be carried most places, including into bars and restaurants, where the absence of regulation involving alcohol consumption and CCW contributes to a dangerous lack of accountability. Exemptions do exist for schools and government buildings, but many exemptions are left to the individual states, counties, or municipalities.<sup>133</sup> This lack of restriction on public carrying makes stalking a victim with a gun in public places uncomplicated.
51. Because handguns are not the only firearms used to commit crimes of violence against women, unrestrictive laws for hunting weapons such as rifles and shotguns also endanger women and children. In many states, a permit is not required for attaining these types of weapons referred to as “long guns,”<sup>134</sup> nor do they have to be registered in many states.<sup>135</sup> Long guns in the home also pose a threat to safety of family members.<sup>136</sup>

**ii. Retrieval of guns from offenders with or without restraining orders**

52. Policies regulating the retrieval of weapons from ineligible individuals are also seriously inadequate. For example, if a crime is committed after the purchase of a gun, it remains unclear in several states which law enforcement agencies must be notified, if any, and which procedure law enforcement must follow to retrieve weapons from the person accused or convicted of a crime. Moreover, laws often do not mandate that stolen guns be reported to law enforcement officials, so a stolen gun could easily be used to commit violent crimes. Some states, including Connecticut, Massachusetts, New York, Ohio, and Rhode Island, as well as the District of Columbia, require owners to report lost or stolen guns.<sup>137</sup> If all states enacted laws mandating that gun owners promptly report stolen guns to the authorities, it would prevent gun owners from covering up illegal sales to prohibited purchasers by later claiming that when a weapon has been traced to crime, that weapon was stolen. ATF has reported that in 89% of the cases where firearms were traced to the crime, the purchaser of the gun is not the same person as the criminal from whom the gun is recovered.<sup>138</sup>
53. While some state laws can prevent ineligible persons from acquiring guns, they do not always adequately describe the procedure for removal of firearms that are already in such a person’s possession. Based on the perceptions of the IPV victims in one study, laws designed to disarm domestic violence offenders were

<sup>131</sup> States that do not require a course for CCW include Pennsylvania, *see* 18 PA. CONS. STAT. § 6109, South Dakota, *see* S.D. CODIFIED LAWS §§ 23-7-7.1, 23-7-8, Washington, *see* WASH. REV. CODE § 9.41.070, and Georgia, *see* GA. CODE § 16-11-129.

<sup>132</sup> For example, Virginia accepts “electronic, video, or on-line” courses, VA. CODE § 18.2-308(G), and Maryland offers its own 30 minute online training video at <http://mdgunsafety.com/>. Wisconsin, which enacted a new CCW law in July 2011, is currently considering whether online classes will satisfy its training requirement. *See* Wisconsin’s New Carrying Concealed Weapon Law Questions and Answers (Aug. 2, 2011), [http://www.doj.state.wi.us/dles/cib/ConcealedCarry/ccw\\_frequently\\_asked\\_questions.pdf](http://www.doj.state.wi.us/dles/cib/ConcealedCarry/ccw_frequently_asked_questions.pdf).

<sup>133</sup> *See* LEGAL CMTY. AGAINST VIOLENCE, THE 2010 REPORT: RECENT DEVELOPMENTS IN FEDERAL, STATE AND LOCAL GUN LAWS 8, 18-19 (2010), available at [http://www.lcav.org/2010\\_report.pdf](http://www.lcav.org/2010_report.pdf).

<sup>134</sup> *Brady State Gun Law Scorecard Spotlight*, *supra* note 88.

<sup>135</sup> *Id.*

<sup>136</sup> Wiebe, *supra* note 64.

<sup>137</sup> *Reporting Lost and Stolen Guns*, MAYORS AGAINST ILLEGAL GUNS, <http://www.mayorsagainstillegalguns.org/html/local/lost-stolen.shtml> (last visited Apr. 29, 2011).

<sup>138</sup> BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP’T OF TREASURY, *Crime Gun Trace Reports (1999): National Report* 8 (2000), available at <http://www.atf.gov/publications/download/ycgii/1999/ycgii-report-1999-national-report.pdf>.

either poorly implemented or failed to inform victims when their abuser's firearms had been either surrendered or confiscated.<sup>139</sup> State laws requiring removal of firearms from abusers can help to ensure that the abusers will not have continued access to firearms to threaten or harm their victims.

54. Similar collection problems exist for perpetrators who have had a protective order issued against them. Researchers at the Center for Gun Policy and Research, Johns Hopkins Bloomberg School of Public Health, conducted a study of the fifty states to review their policies and procedures for the retrieval of weapons from individuals implicated in domestic violence crimes. The study revealed that twenty-three states do not have a court-ordered removal law or a police gun removal law in place;<sup>140</sup> twenty-seven states, including the District of Columbia, have policies for removing guns from armed batterers by authorizing law enforcement and/or the courts to remove guns from them.<sup>141</sup> However, a state's ability to effectively implement these laws is influenced by the authority specified in them.
55. Based on the Johns Hopkins study's analysis, the following elements should be included in state gun removal legislation:<sup>142</sup>
  - a. Mandatory "shall-remove" laws are preferable to discretionary "may-remove" laws. "Shall-remove" laws limit discretion and facilitate consistent implementation in removal of guns from the abuser.
  - b. Requirements that guns have been used as an instrument of abuse prior to removal should be eliminated as such conditions limit the preventive potential of these laws to reduce the risk of severe and lethal abuse.
  - c. Laws that condition gun removal on arrest of the alleged batterer impose a link between two IPV response options that need not be connected, and they may needlessly complicate law enforcement officers' decisions about how and when to use arrest and gun removal to achieve maximum benefit.
  - d. Laws that require the presence or potential risk of danger associated with the gun as a condition of police removal may be too subjective for consistent, effective implementation, and therefore this requirement is not recommended.
  - e. Court authority to remove guns from protective order respondents during both the temporary and permanent stages of the order are more comprehensive than laws that restrict court removal authority to the permanent order stage. Offering this protection when respondents first learn of the order is advisable, given the heightened danger for the protected party at this time.
  - f. Responsibility for removing surrendered guns should rest with law enforcement.
  - g. Relying on respondents to comply with the court's order may result in decreased compliance with the law.
  - h. In general, laws that specify clear procedures for the mechanism, immediacy, and duration of gun removal and provide funding to train law enforcement and the courts in implementing these laws will increase the likelihood that these laws will positively impact victim safety. Good laws require effective implementation and enforcement. Advocates and policy makers in states where these laws exist can assess how law enforcement and the courts are using these laws to increase available protections for IPV victims.
  - i. Working with state and local officials to support efforts to ensure that these laws are effectively used is important.
  - j. There is a need for research that informs how these laws are being implemented, and how their implementation impacts victim, law enforcement, and community safety.
56. Though restraining orders often work, they can be easily violated, leading to significant consequences, such as the catastrophic case of Jessica Gonzales. The local police ignored her call for help and her

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<sup>139</sup> Daniel W. Webster et al., *Women with Protective Orders Report Failure to Remove Firearms from Their Abusive Partners: Results from an Exploratory Study*, 19 J. WOMEN'S HEALTH 93, 93-98 (2010).

<sup>140</sup> SHANNON FRATTAROLI, JOHNS HOPKINS CTR. FOR GUN POLICY & RESEARCH, REMOVING GUNS FROM DOMESTIC VIOLENCE OFFENDERS: AN ANALYSIS OF STATE LEVEL POLICIES TO PREVENT FUTURE ABUSE (2009), <http://www.jhsph.edu/bin/u/p/Gun%20Removal%207%20Oct%2009.pdf>.

<sup>141</sup> *Id.* at 29

<sup>142</sup> *Id.* at 29-30.

statement that her estranged husband had violated her restraining order. Later that night, her ex-husband killed her three daughters before committing suicide. The Supreme Court ruled in *Castle Rock v. Gonzales* that she had no right to compensation from the police force that had ignored her complaint and had failed to effectively enforce her restraining order.<sup>143</sup>

**iii. Gun dealers and gun sales**

57. The GCA mandates the licensing of individuals and companies engaged in the business of selling firearms. This provision effectively prohibits the direct mail order of firearms (except antique firearms) by consumers and mandates that anyone wanting to buy a gun from a source other than a private individual must do so through a federally licensed firearms dealer.<sup>144</sup> The interstate purchase of long guns is not impeded by the Act as long as the seller is federally licensed and such a sale is allowed by both the state of purchase and the state of residence.
58. According to the ATF, private sales between residents of different states are prohibited unless the buyer has a curio or relic license.<sup>145</sup> Private sales between unlicensed individuals who are residents of the same state are allowed under federal law so long as such transfers do not violate existing federal and state laws.<sup>146</sup>
59. There are serious loopholes allowing the acquisition of guns by ineligible individuals at gun shows, where the majority of states do not require any type of background check. Presently, only seventeen states regulate private firearm sales at gun shows.<sup>147</sup> Seven states require background checks on all gun sales at gun shows: California, Rhode Island, Connecticut, Oregon, New York, Illinois, and Colorado. Four states, Hawaii, Maryland, New Jersey, and Pennsylvania, require background checks on all handgun, but not long gun, purchases at gun shows. Five states require individuals to show a valid permit, which involves a background check, to purchase handguns at gun shows: Massachusetts, Michigan, North Carolina, Iowa, and Nebraska. Certain counties in Florida require background checks on all private sales of handguns at gun shows. The remaining thirty-three states do not restrict private, intrastate sales of firearms at gun shows in any manner.<sup>148</sup> This means that one can simply walk into a gun show and buy the weapon of his or her choice. Moreover, the author of this chapter has seen several rifles and shotguns available at yard sales and liquidation sales, where no background checks are done. In fact, approximately 40% of the guns acquired in the U.S. annually come from unlicensed sellers,<sup>149</sup> who are not required by federal law to run background checks on potential gun purchasers.

**iv. Prevention**

60. Closure of the loopholes in the sale, distribution, and collection of guns, as per the previous section, would dramatically reduce the number of victims of gun violence.
61. The United States must strengthen its federal laws concerning who buys, sells, and distributes weapons. Suggestions to render laws more effective include:
  - a. Buttress research on access to guns, the carrying of concealed weapons and incidences of domestic violence. The DOJ should conduct research to clear up inconsistencies in recent findings resulting from the trend of loosening state laws on CCW over the last decade.

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<sup>143</sup> *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

<sup>144</sup> Gun Control Act of 1968, 18 U.S.C. § 922(g)(1)–(9) & (n).

<sup>145</sup> *Unlicensed Persons Questions*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP'T OF TREASURY, <http://www.atf.gov/firearms/faq/unlicensed-persons.html#gca-curios-relics> (last visited Apr. 29, 2011).

<sup>146</sup> *Id.*

<sup>147</sup> *Gun Show Loophole Frequently Asked Questions*, COALITION TO STOP GUN VIOLENCE, <http://www.csgv.org/issues-and-campaigns/gun-show-loophole/gun-show-loophole-faq> (last visited Apr. 29, 2011). Data are also available from Brady State Gun Law Scorecard. *Brady State Gun Law Scorecard Spotlight*, *supra* note 88.

<sup>148</sup> *Id.*

<sup>149</sup> *Gun Violence Statistics*, LEGAL CMTY. AGAINST VIOLENCE, [http://www.lcav.org/statistics-polling/gun\\_violence\\_statistics.asp](http://www.lcav.org/statistics-polling/gun_violence_statistics.asp) (last visited Apr. 29, 2011).

- b. Adopt more stringent reporting procedures on the sale of guns and licensing for gun ownership and CCW. These procedures should require that all gun dealers and sellers have background checks before they can legally sell weapons.
- c. If an individual privately sells guns to anyone, he or she must first report it to local authorities.
- d. Enact stronger federal legislation that not only mandates checking for crimes of violence before issuing a gun permit but also checks for patterns of substance abuse, mental health issues, or past restraining orders and a profile of social instability.
- e. Ensure that all four of the NICS databases are integrated and that all states have access to, and are mandated to use, these databases for running state and federal background checks.
- f. Strengthen the Domestic Violence Misdemeanor Gun Ban to include non-domestic partners, such as dating couples, as dating violence often turns lethal with the use of guns. At this point, dating couples have no federal protections.
- g. Strengthen the Domestic Violence Misdemeanor Gun Ban to mandate examining a potential perpetrator for past crimes and restraining orders, collecting weapons that the person may already have in his or her possession, and preventing the future acquisition of weapons if there is a pattern that denotes a nature of violence and/or substance abuse.
- h. Require police training in responding to serious threats of domestic violence that puts the safety of women and children first.
- i. Repeal the Tiahrt Amendments entirely to enable law enforcement and federal agencies to obtain the information necessary to monitor gun sales and track criminals who obtain weapons. Moreover, law enforcement must be able to use trace data in criminal proceedings to close down disreputable gun dealers.
- j. Require states to collect all weapons from any person who has been served a restraining order or who has made violent threats to an intimate partner in any context, domestic or otherwise.
- k. Require states to rerun background checks more often (a minimum of every other year) to prevent otherwise ineligible individuals from continuing to possess weapons.

**v. Protection**

62. The same resources and remedies available to victims of domestic violence and rape are also available to women who suffer from acts of gun-related violence. However, the difference is that when guns are involved in violence against women and/or their families, police involvement is often necessary, increasing the chance of injury not just to the victim but also to police officers. Therefore, it is in the best interest of the states to implement strong legislation prohibiting the issuance of guns to ineligible individuals and to gather those weapons once a person has committed a violent offense. Many states have created supplementary laws that impede the possession of guns by domestic violence offenders, but more state action is necessary. Given the level of popularity of gun ownership in the United States, campaigns must be run at the state level to ensure adequate checks before licensing gun sellers and clearing gun owners.

**vi. Punishment**

63. Criminal domestic violence charges can be either felonies or misdemeanors. If the victim sustains minor injuries or is uninjured, the charge is generally a misdemeanor. Misdemeanor domestic violence charges may also include coercion, breaking and entering, stalking, or interfering with the reporting of domestic violence. Penalties may entail short-term incarceration, fines, probation, and/or court-ordered treatment for batterers. Misdemeanor domestic violence might be a felony if the batterer has a history of domestic violence or other criminal or civil charges. States vary widely in how they classify felonies, but generally, felony domestic violence charges may include certain types of assault, rape, kidnapping, manslaughter, and degrees of murder.
64. The punishment of a crime of violence in which a gun is used but no one is physically harmed or killed varies by state. However, in general, the perpetrator would likely be given a felony charge of domestic violence or aggravated assault, both of which are serious felonies. Penalties span a broad range, including lengthy incarceration, probation time, and/or heavy fines depending upon the person's

previous criminal record. The offender may also be ordered to pay restitution to the victim. As with most charges, the sentence for a defendant found guilty of aggravated assault or domestic violence depends on several factors, including whether the assault was committed with a weapon, the type of weapon involved, the defendant's prior criminal history, and the injuries suffered by the victim as a result of the assault. If the crime is more serious, the defendant might be charged with attempted murder. This crime generally carries a prison sentence of no more than thirty years.

65. If the victim is killed in a domestic dispute, it is generally considered first-degree murder. The defendant may receive a life sentence or the death penalty, depending upon the state. If the defendant is charged with second-degree murder or manslaughter, the sentence will vary by state. In all cases, previous charges will weigh in the sentencing of the defendant.

### **vii.     Reparation**

66. VAWA recognized the unprecedented right to freedom from gender-motivated violence as a federal civil right, and included a provision that, for the first time, gave victims of such violence the right to bring a private suit in federal court.<sup>150</sup> In 2000, however, this provision was struck down by the Supreme Court in *United States v. Morrison*, which held that Congress exceeded its authority in creating the civil rights remedy.<sup>151</sup>
67. While civil rights are no longer guaranteed in gender crimes as they were under VAWA, an individual may bring civil charges against a defendant in a domestic dispute. For example, in 1997, a civil suit for wrongful death was filed against O.J. Simpson by the Simpson and Goldman families. Simpson was found liable for the deaths of his ex-wife Nicole Brown Simpson and an acquaintance Ronald Goldman, and was ordered to pay the victims' families \$25 million in damages.<sup>152</sup>
68. According to the National Center for Victims of Crime, typical civil charges include the following:
- a. *Assault*—Assault renders the victim fearful of injury while the perpetrator has the present and immediate capacity to cause that injury.
  - b. *Battery*—Battery includes, but is not limited to, sexual battery, rape, molestation, fondling, forcible sodomy, malicious wounding, and attempted murder.
  - c. *Wrongful Death*—Wrongful death occurs when another person causes a death, including murder, manslaughter and vehicular homicide, without justification or excuse.
  - d. *False Imprisonment*—False imprisonment consists of confining a victim against his or her will for any amount of time and frequently occurs in the context of rape and kidnapping.
  - e. *Intentional or Reckless Infliction of Emotional Distress*—This charge is filed, typically along with other charges, when a victim has suffered emotional distress or anxiety due to the perpetrator's conduct, such as in stalking or harassment incidences.<sup>153</sup>

## **V.     DATA AVAILABILITY AND RELIABILITY**

69. The research data for this chapter was not readily available, but much of the data were gathered from several sources. Because the data for background checks are kept no longer than twenty-four hours at the federal level and because the states have varying levels of reporting diligence, it is difficult to profile those possessing guns and identify critical variables.

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<sup>150</sup> 42 U.S.C. § 13981 (2000), *declared unconstitutional by* United States v. Morrison, 529 U.S. 598 (2000); *see also Secondary Readings on the VAWA Civil Rights Provision*, BERKMAN CTR. FOR INTERNET & SOC'Y, HARVARD UNIV., [http://cyber.law.harvard.edu/archived\\_content/events/vaw/readings/DLRreadings.html](http://cyber.law.harvard.edu/archived_content/events/vaw/readings/DLRreadings.html) (last visited Apr. 29, 2011).

<sup>151</sup> *Morrison*, 529 U.S. 598.

<sup>152</sup> Transcript of Verdict, *Rufo v. Simpson, Goldman v. Simpson, Brown v. Simpson*, 1997 WL 53038 (Cal. Super. Ct. Feb. 10, 1997) (Nos. SC031947, SC036340, SC036876).

<sup>153</sup> NAT'L CTR. FOR VICTIMS OF CRIME, CIVIL JUSTICE FOR CRIME VICTIMS (2000), <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32318>.

70. There are limited statistics on concealed weapons. Records are not kept in a central databank, and it is unclear both if the FBI tracks the issuance of gun permits versus CCW permits (separate permits in most states) and if anyone is keeping track of increased or decreased levels of crime due to CCW permits being so easily attained. Moreover, the CCW trend when crimes are committed does not appear to be tracked. A long-term analysis should be conducted at the federal level to determine what the minimum policies should be in order to protect women and children from ongoing gun violence. The DOJ must conduct or find research detailed enough to determine the critical variables and critical paths that result in the highest rates of protection against gun violence.

## **VI. FINAL KEY RECOMMENDATIONS**

71. While several recommendations have been offered throughout the body of this chapter, the most critical ones are reiterated in this section:
- a. Ensure that a background check system will capture all the critical elements and determine whether an individual is suitable for gun ownership;
  - b. Revisit the background check for licensed individuals every one or two years to determine continued suitability;
  - c. Mandate states to have clear gun removal policies when intervening in domestic or family violence, such that guns are removed at the time of first notification of domestic disputes;
  - d. Work to penalize gun dealers for illegally selling guns to people who commit violent crimes, including failure to report stolen guns subsequently used to commit crimes;
  - e. Mandate that gun dealers take yearly inventories and report any lost or stolen guns and/or ammunition;
  - f. Repeal the Tiahrt Amendments, which limit law enforcement from tracing illegal sales of weapons and effectively prosecuting those who do not comply;
  - g. Prohibit the expunging of domestic violence or violent felony charges;
  - h. Revisit state legislation and adopt “may-issue” as compared to “shall-issue” permit laws;
  - i. Adopt more stringent measures for the acquisition of long guns;
  - j. Require that before gun rights are restored to those with previous substance abuse problems, proper treatment and recovery have been documented;
  - k. Allow easier access to data kept in the DOJ databases and allow ATF to keep records of persons who have applied for gun permits, whether denied or granted;
  - l. Amend the Domestic Violence Misdemeanor Gun Ban to include unprotected persons at risk in domestic and family violence situations.

**VII. APPENDIX**

**\*\* Five Leading Causes of Violence-Related Injury Deaths, United States  
1999–2007, White, Non-Hispanic, Females  
Ages 1–60**

| <b>Cause of Death</b>                       | <b>Number<br/>of Deaths</b> | <b>Percentage of All Violence-Related<br/>Injury Deaths in Age Group</b> |
|---|-----------------------------|--|
| <b>Total Violence-Related Injury Deaths</b> | 54,596                      |  |
| <b>Suicide Poisoning</b>                    | 16,717                      | 30.6%  |
| <b>Suicide Firearm</b>                      | 13,698                      | 25.1%  |
| <b>Homicide Firearm</b>                     | 6,685                       | 12.2%  |
| <b>Suicide Suffocation</b>                  | 6,626                       | 12.1%  |
| <b>Homicide Unspecified</b>                 | 1,891                       | 3.5%   |
| <b>All Others</b>                           | 8,979                       | 16.4%  |

**\*\* Five Leading Causes of Violence-Related Injury Deaths, United States  
1999–2007, Black, Non-Hispanic, Females  
Ages 1–60**

| <b>Cause of Death</b>                       | <b>Number<br/>of Deaths</b> | <b>Percentage of All Violence-Related<br/>Injury Deaths in Age Group</b> |
|---|-----------------------------|--|
| <b>Total Violence-Related Injury Deaths</b> | 13,524                      |  |
| <b>Homicide Firearm</b>                     | 5,678                       | 42.0%  |
| <b>Homicide Cut/Pierce</b>                  | 1,721                       | 12.7%  |
| <b>Homicide Unspecified</b>                 | 1,139                       | 8.4%   |
| <b>Homicide Suffocation</b>                 | 1,094                       | 8.1%   |
| <b>Suicide Firearm</b>                      | 825                         | 6.1%   |
| <b>All Others</b>                           | 3,067                       | 22.7%  |

**\*\* Five Leading Causes of Violence-Related Injury Deaths, United States  
1999–2007, All Races, Hispanic, Females  
Ages 1–60**

| <b>Cause of Death</b>                       | <b>Number of Deaths</b> | <b>Percentage of All Violence-Related Injury Deaths in Age Group</b> |
|---|-------------------------|--|
| <b>Total Violence-Related Injury Deaths</b> | 6,795                   |  |
| <b>Homicide Firearm</b>                     | 2,031                   | 29.9%  |
| <b>Suicide Suffocation</b>                  | 931                     | 13.7%  |
| <b>Suicide Poisoning</b>                    | 774                     | 11.4%  |
| <b>Homicide Cut/Pierce</b>                  | 715                     | 10.5%  |
| <b>Suicide Firearm</b>                      | 623                     | 9.2%   |
| <b>All Others</b>                           | 1,721                   | 25.3%  |

**\*\* Five Leading Causes of Violence-Related Injury Deaths, United States  
1999–2007, American Indian/Alaska Native, Non-Hispanic, Females  
Ages 1–60**

| <b>Cause of Death</b>                       | <b>Number of Deaths</b> | <b>Percentage of All Violence-Related Injury Deaths in Age Group</b> |
|---|-------------------------|--|
| <b>Total Violence-Related Injury Deaths</b> | 1,054                   |  |
| <b>Suicide Suffocation</b>                  | 234                     | 22.2%  |
| <b>Suicide Poisoning</b>                    | 179                     | 17.0%  |
| <b>Homicide Firearm</b>                     | 167                     | 15.8%  |
| <b>Suicide Firearm</b>                      | 150                     | 14.2%  |
| <b>Homicide Cut/Pierce</b>                  | 87                      | 8.3%   |
| <b>All Others</b>                           | 237                     | 22.5%  |

**\*\* Five Leading Causes of Violence-Related Injury Deaths, United States  
1999–2007, Asian/Pacific Islander, Non-Hispanic, Females  
Age: 1–60**

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| <b>Cause of Death</b>                       | <b>Number<br/>of Deaths</b> | <b>Percentage of All Violence-Related<br/>Injury Deaths in Age Group</b> |
|---|-----------------------------|--|
| <b>Total Violence-Related Injury Deaths</b> | 2,383                       |  |
| <b>Suicide Suffocation</b>                  | 630                         | 26.4%  |
| <b>Homicide Firearm</b>                     | 378                         | 15.9%  |
| <b>Suicide Poisoning</b>                    | 361                         | 15.1%  |
| <b>Suicide Firearm</b>                      | 211                         | 8.9%   |
| <b>Homicide Cut/Pierce</b>                  | 159                         | 6.7%   |
| <b>All Others</b>                           | 644                         | 27.0%  |

**\*\* Source:** NAT'L CTR. FOR INJURY PREVENTION & CONTROL, *supra* note 8. The search criterion for years was set to 1999–2007, and the race variable was changed for each table. The ages were combined to provide a lifespan view, but there is incidence rate variance by age category.

# Supplement: Gun Violence Against American Indian and Alaska Native Women

## VIII. PREVALENCE OF GUN VIOLENCE AMONG AMERICAN INDIAN WOMEN

72. Although all American Indian and Alaska Native women suffer a rate of violent victimization higher than that of women of other races, especially white women,<sup>1</sup> only Indian women living on or near reservations—approximately 57% of all Indian women in the United States<sup>2</sup>—are significantly more likely than women of other races to face an offender armed with a firearm.
73. Between 1999 and 2007, the overall rate of homicides of American Indian women was 3.81 per 100,000—higher than the rate for women of all races (2.72) and for white women (2.07), but lower than the rate for African American women (6.65). However, the rate of homicides of American Indian women by firearm (1.25) was only slightly higher than that of white women (.94), nearly the same as the rate for women of all races (1.26), and lower than that of African American women (3.21).<sup>3</sup> Data collected between 1992 and 2002 reflects a similar trend. While the overall rate of violent victimization of American Indian women was 2.5 times the rate for all women,<sup>4</sup> the rate of death by firearm for American Indians of both genders was close to that of other races.<sup>5</sup> However, the rate of violent victimization, especially by firearm, skyrockets for Indian women living on or near Indian lands.
74. Based on 2002–2003 data, the Indian Health Service (IHS) found that the homicide rate for American Indians and Alaska Natives who live “on or near” reservations<sup>6</sup> was two times the rate for all races<sup>7</sup> and the firearm death rate was 1.3 times the rate for all races.<sup>8</sup> The discrepancy amongst young American Indian women living on or near reservations was even greater: the firearm death rate for American Indian women aged fifteen to twenty-four was 10.9 per 100,000, whereas the rate for all races was 3.3. For women aged twenty-five to thirty-four, the rate for American Indian women was 10.3, while the rate for all races was 3.6.<sup>9</sup>
75. Between 1992 and 2002, 11% of American Indian victims of violence faced an offender with a firearm.<sup>10</sup> Indian victims were significantly less likely to be murdered by an offender with a handgun than victims of other races, but they were more likely to be killed by an offender with a rifle, shotgun, knife, or blunt object.<sup>11</sup>

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<sup>1</sup> For more information on the prevalence of domestic violence and sexual assault among American Indian women, see Domestic Violence chapter, ¶¶ 165-71.

<sup>2</sup> INDIAN HEALTH SERV., U.S. DEP’T OF HEALTH & HUMAN SERVS., TRENDS IN INDIAN HEALTH 7 (2002).

<sup>3</sup> NAT’L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVICES, WEB-BASED INJURY STATISTICS QUERY & REPORTING SYSTEM (WISQARS) INJURY MORTALITY REPORTS (1999-2007), available at [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_sy.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html); see also Jiaquan Xu et al., *Deaths: Final Data for 2007*, 58(19) NAT’L VITAL STAT. REP., at 91 (May 10, 2010), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58\\_19.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_19.pdf).

<sup>4</sup> STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 203097, A BJS STATISTICAL PROFILE, 1992-2002: AMERICAN INDIANS AND CRIME 7 (2004).

<sup>5</sup> *Id.* at 11.

<sup>6</sup> The IHS collects data for the IHS service population which includes American Indians who live on or near reservations and are eligible for IHS services. INDIAN HEALTH SERV., *supra* note 2, at 7. This comprises approximately 57% of all American Indians and Alaska Natives residing in the United States. *Id.*

<sup>7</sup> *Id.* at 61; see also RONET BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 24 (2008).

<sup>8</sup> *Id.* at 82.

<sup>9</sup> *Id.* at 85.

<sup>10</sup> PERRY, *supra* note 4, at 7.

<sup>11</sup> *Id.* at vi; BACHMAN ET AL., *supra* note 7.

**IX. LACK OF ADEQUATE LAW ENFORCEMENT ON INDIAN LANDS TO COMBAT GUN VIOLENCE**

76. The inadequate staffing and funding of law enforcement agencies that are responsible for combating violence, including gun violence, on Indian lands contributes to the high rates of violent crime there.
77. The Bureau of Indian Affairs (BIA) has estimated that 6,200 officers are required to provide basic law enforcement services to reservations. As of 2002, however, there were less than 2,000 officers policing Indian country.<sup>12</sup> “The typical [Indian country police] department serves an area the size of Delaware, but with a population of only 10,000, that is patrolled by no more than three police officers and as few as one officer at any one time (a level of police coverage that is much lower than in other urban and rural areas of the country).”<sup>13</sup> Tribes have on average 55 to 75% of the resources available to non-Indian law enforcement agencies.<sup>14</sup>
78. The complicated nature of criminal jurisdiction in Indian country further exacerbates the problems faced by law enforcement agencies in dealing with firearm violence on Indian lands.<sup>15</sup> Law enforcement in Indian country may be administered by federal, state, or tribal government, or a combination of all three.
79. Jurisdiction depends on the Indian status of the victim and the offender and the nature of the crime. Indian offenders who commit “major” crimes, which include many crimes committed with firearms such as homicide and felony assault, are subject to federal and tribal jurisdiction.<sup>16</sup> But tribal governments can only sentence Indian perpetrators of gun violence to a maximum of three years of imprisonment, and the sentencing authority of most tribal governments is limited to a one-year term of imprisonment.<sup>17</sup>
80. Tribal governments cannot prosecute or punish any crimes committed by non-Indians on their lands. Non-Indian offenders who commit crimes against Indian victims are only subject to federal jurisdiction,<sup>18</sup> and non-Indians who commit crimes against non-Indians fall under state jurisdiction.<sup>19</sup>
81. Due to these jurisdictional rules, tribal governments are limited in their ability to thwart gun violence on Indian lands. However, tribal law enforcement can detain non-Indian offenders who violate state or federal law on Indian lands and transport them to the proper authorities.<sup>20</sup> They can also exclude and eject both Indians and non-Indians from the reservation.<sup>21</sup> Tribal law enforcement may have more power to arrest non-Indians on and off the reservation if the tribal government has cross-deputization agreements with the state and federal governments.
82. Because the majority of offenders who commit violent crimes against American Indians are non-Indian,<sup>22</sup> the federal government is most likely to have jurisdiction over those crimes. U.S. Attorney’s Offices (USAOs) generally handle crimes in Indian country over which the federal government has jurisdiction. Between 2005 and 2009, USAOs declined to prosecute 50% of the 9,000 Indian country matters referred

<sup>12</sup> ANDREA WILKINS ET AL., CRIMINAL JUSTICE IN INDIAN COUNTRY: REDUCING CRIME THROUGH STATE-TRIBAL COOPERATION 7 (2008).

<sup>13</sup> STEWART WAKELING, POLICING ON AMERICAN INDIAN RESERVATIONS: A REPORT TO THE NATIONAL INSTITUTE OF JUSTICE vi (2001).

<sup>14</sup> *Id.* at vii.

<sup>15</sup> For a more in-depth discussion of jurisdiction in Indian country and how it contributes to violence against Indian women, see Domestic Violence chapter, ¶¶ 174–89.

<sup>16</sup> Major Crimes Act, 18 U.S.C. § 1153.

<sup>17</sup> See Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2261, 2279–81 (2010).

<sup>18</sup> General Crimes Act, 18 U.S.C. § 1152; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

<sup>19</sup> *United States v. McBratney*, 104 U.S. 621 (1882). Public Law 280 creates an exception to this general jurisdictional framework. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 and other sections). Public Law 280 transferred federal criminal jurisdiction to certain states, thereby giving the state exclusive criminal jurisdiction in Indian country. 18 U.S.C. § 1162. Six states are mandatory Public Law 280 states: California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska. *Id.* Nine other states have opted into Public Law 280 to varying degrees. See SARAH DEER ET AL., TRIBAL LAW & POLICY INST., FINAL REPORT: FOCUS GROUP ON PUBLIC LAW 280 AND THE SEXUAL ASSAULT OF NATIVE WOMEN 1 n.5 (2007), available at <http://www.tribal-institute.org/download/Final%20280%20FG%20Report.pdf>. For more information on Public Law 280, see Domestic Violence chapter, ¶¶ 183–84.

<sup>20</sup> *Duro v. Reina*, 495 U.S. 676, 697 (1990).

<sup>21</sup> *Id.* at 696–97.

<sup>22</sup> PERRY, *supra* note 4, at 9 (finding that in 66% of violent crimes against American Indians, the offender was either white or black, and nearly four in five American Indian victims of rape or sexual assault described the offender as white).

to and resolved by them during that time period.<sup>23</sup> Seventy-seven percent of the matters referred were categorized as violent crimes,<sup>24</sup> and of those, USAOs declined to prosecute 52%.<sup>25</sup> Of the total number of matters referred to USAOs, 6% were homicides and 4% were firearms and explosives offenses.<sup>26</sup> The majority were assault (29%) and sexual abuse (26%) matters.<sup>27</sup> The declination rate for sexual abuse cases was highest at 68%,<sup>28</sup> followed by assault and homicide (46%) and firearm and explosive offenses (34%).<sup>29</sup> The most commonly cited reason for declining to prosecute violent crimes was that there was “weak or insufficient evidence” (44%).<sup>30</sup>

83. There is little data available on CCW in Indian country.<sup>31</sup> Although some tribes have laws prohibiting or regulating CCW on their reservations,<sup>32</sup> because of the jurisdictional constraints discussed above, they cannot enforce those laws against non-Indians. Instead, tribes must rely on the state or federal government to enforce state laws regulating CCW. Because there is no federal law regulating CCW, state law applies to fill the gap under the Assimilative Crimes Act.<sup>33</sup> Under the Assimilative Crimes Act, the federal government can prosecute offenses committed on federal lands, such as Indian lands held in trust by the federal government, by applying state law to the offense. This means that neither the tribal, state, nor federal government can prevent non-Indians with a valid state permit from carrying concealed weapons on Indian lands. Notably, two of the three states that place no restrictions whatsoever on CCW—Arizona and Alaska—have large American Indian populations.

## X. TRIBAL ACCESS AND CONTRIBUTION TO NATIONAL CRIMINAL HISTORY RECORDS

84. The National Crime Information Center (NCIC) is the FBI’s database of criminal data and records, accessible by local, state, and federal law enforcement agencies nationwide.<sup>34</sup> When these agencies perform background checks on firearm purchasers and transferees using the NICS, much of the data comes from the NCIC. Tribes, however, face particular difficulties in accessing and submitting information to national crime databases, including the NCIC. As of 2002, only 55% of tribes had access to the NCIC.<sup>35</sup> Even fewer tribes submitted information to the NCIC and other federal and state agencies: 18% of tribes reported submitting criminal records to state or federal agencies,<sup>36</sup> and of the 314 tribes participating in the survey, only fourteen tribes reported routinely sharing crime statistics with neighboring local governments, the state, the FBI, or other tribes.<sup>37</sup>
85. The federal government has recognized the need to integrate tribal criminal history records with state and national databases in order to more thoroughly vet potential firearm purchasers. Between 2004 and 2006, the Bureau of Justice Statistics granted \$2.8 million under the Tribal Criminal History Records Improvement Program.<sup>38</sup> Unfortunately these grants only reached twelve tribes.<sup>39</sup> The NICS Improvement Amendments Act of 2007 authorized the establishment of grant programs for state and tribal governments to establish and upgrade systems for carrying out NICS background checks and

<sup>23</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-167R, DECLINATIONS OF INDIAN COUNTRY MATTERS 3 (2010).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 9.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 25.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 27.

<sup>31</sup> For a more in-depth discussion of the rise of CCW in the United States generally, see *supra* Part III.D.

<sup>32</sup> See *Tribal Law and Concealed Carry*, HANDGUNLAW.US (May 3, 2011), [http://www.handgunlaw.us/documents/tribal\\_law\\_ccw.pdf](http://www.handgunlaw.us/documents/tribal_law_ccw.pdf).

<sup>33</sup> 18 U.S.C. § 13, extended to Indian country by General Crimes Act, 18 U.S.C. § 1152.

<sup>34</sup> See *National Crime Information Center*, FBI, available at <http://www.fbi.gov/about-us/cjis/ncic/ncic>. For more information on criminal history records and background checks of firearm purchasers on the federal and state level, see *supra* ¶¶ 33-37.

<sup>35</sup> STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 205332, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY: 2002 57 (2005).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 218913, IMPROVING CRIMINAL HISTORY RECORDS IN INDIAN COUNTRY: 2004-2006 1 (2007).

<sup>39</sup> *Id.*

submitting criminal records to NICS.<sup>40</sup> The Act authorized up to 5% of grant funding to be reserved for Indian tribes.<sup>41</sup> The 2010 Tribal Law and Order Act permits tribal and BIA law enforcement agencies to access and enter information into federal criminal databases<sup>42</sup> and makes tribes eligible to apply for National Criminal History Improvement Program (NCHIP) grants.<sup>43</sup> Despite the availability of funding through these programs, there is little data available on the number and amount of grants actually made to tribes. Most likely, not enough funding is available to address the issue adequately.

## XI. FULL FAITH AND CREDIT FOR TRIBAL COURT CONVICTIONS AND PROTECTION ORDERS

86. Recent legislation has extended full faith and credit to tribal court convictions and protection orders issued by tribal courts. The Domestic Violence Misdemeanor Gun Ban,<sup>44</sup> which makes it unlawful for any person convicted in any court of a misdemeanor crime of domestic violence to possess a firearm, extends to persons convicted by tribal courts under tribal law.<sup>45</sup>
87. Federal courts, however, may hesitate to enforce the Domestic Violence Misdemeanor Gun Ban because they have refused to recognize misdemeanor convictions in tribal courts for domestic violence offenses. This is so even though the Habitual Offender Provision of VAWA expressly extends full faith and credit to the tribal court convictions. For example, in *Cavanaugh v. United States*,<sup>46</sup> the U.S. District Court for North Dakota dismissed a federal indictment under the Habitual Offender Provision stating that it violated the offender's Sixth Amendment right to counsel. The offender was not afforded an attorney during his previous tribal court prosecutions, even though tribal courts are not constitutionally required to provide counsel in their proceedings.
88. VAWA requires states, territories, and tribes to give full faith and credit to protection orders issued by other states, territories, and tribes.<sup>47</sup> This includes protection orders prohibiting a person from possessing a firearm.<sup>48</sup> Moreover, the relief required for violation of a protection order by the issuing jurisdiction must be enforced by other jurisdictions, even if they would not ordinarily grant such relief under their own laws.<sup>49</sup> For more information about these and other U.S. gun laws, see section IV of this chapter.

## XII. LACK OF DATA ON GUNS AND VIOLENCE ON INDIAN LANDS

89. Despite the recent recognition of the epidemic of violent crime in Indian country,<sup>50</sup> there is little data available, especially on gun violence. Many factors contribute to this lack of data. First, crime on

<sup>40</sup> NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 103, 301 Stat. 2559, 2568–69 (2008), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-2640&tab=summary>.

<sup>41</sup> *Id.*

<sup>42</sup> Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 233, 124 Stat. 2261, 2279–81 (2010).

<sup>43</sup> See *FY 2011 National Criminal History Improvement Program (NCHIP) Solicitation, Addendum for Tribal Applicants*, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE (2011), [http://bjs.ojp.usdoj.gov/content/pub/pdf/nchip\\_addendum.pdf](http://bjs.ojp.usdoj.gov/content/pub/pdf/nchip_addendum.pdf).

<sup>44</sup> Gun Control Act of 1968, 18 U.S.C. § 922(g)(9).

<sup>45</sup> 18 U.S.C. § 921(a)(33); 27 C.F.R. § 478.11.

<sup>46</sup> *Cavanaugh v. United States*, 680 F. Supp. 2d 1062 (D.N.D. 2009).

<sup>47</sup> 18 U.S.C. § 2265. At least one federal district court has greatly diminished the impact of this provision by holding that tribal courts do not have the jurisdiction to issue protection orders requested by non-member Indian women against violent non-Indian perpetrators. See, e.g., *Martinez v. Martinez*, No. C08-5503 FDB, Order Denying Defendants' Motions to Dismiss and Granting Plaintiff Declaratory and Injunctive Relief (W.D. Wash. Dec. 16, 2008). In *Martinez*, an Alaska Native woman residing on the Suquamish Reservation sought a domestic violence protection order against her non-Indian husband in the Suquamish Tribal Court. *Id.* The federal district court held that the Tribal Court did not have the authority to issue the protection order because the issuance of the order was not necessary to protect tribal self-government and the non-Indian's conduct was not a menace to the safety and welfare of the Tribe. *Id.*

<sup>48</sup> See ANDREW R. KLEIN, OFFICE ON VIOLENCE AGAINST WOMEN, ENFORCING DOMESTIC VIOLENCE FIREARM PROHIBITIONS: A REPORT ON PROMISING PRACTICES 12 (2006).

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., Ken Salazar, Secretary of the U.S. Dep't of the Interior, Remarks at the National Congress of American Indians (Nov. 15, 2010) (transcript available at <http://www.doi.gov/news/speeches/Salazar-Outlines-Progress-of-Empowerment-Agenda-in-Speech-to->

reservations tends to be underreported, both by individual tribal members to authorities and by tribal authorities to federal agencies.<sup>51</sup> Social and cultural factors such as shame, fear of retaliation, and distrust of law enforcement combine with practical obstacles, such as geographic isolation, to reduce reporting of crimes by victims.<sup>52</sup> Even when victims do report crimes, tribal law enforcement departments are underfunded, understaffed, and overworked and often lack the time, technology, and access needed to report crime data to state and federal agencies.<sup>53</sup>

90. Second, the amount and type of crime varies between and within reservations. A single reservation may include both urban and rural environments, giving rise to different types of crimes, offenders, and victims.<sup>54</sup> This variety makes it difficult to extrapolate crime statistics for all of Indian country using data from only a few reservations.<sup>55</sup>
91. Third, little research has been done on the connection between substance abuse and gun violence in Indian country. Substance abuse contributes to the high levels of crime and violence on Indian reservations. National surveys have found that American Indian victims were more likely than non-Indian victims to have been victimized by an offender under the influence of alcohol.<sup>56</sup> A 2006 survey by the BIA on the use and production of methamphetamine on Indian lands found that the presence of methamphetamine on reservations correlated with an increase in crime, including a 64% increase in domestic violence, a 22% increase in sexual crimes, and a 31% increase in weapons violations.<sup>57</sup>

### XIII. RECOMMENDATIONS

92. More data needs to be collected and more research needs to be conducted on violence against Indian women. Data collected for women in the United States needs to be disaggregated by race, including American Indian and Alaska Native. Too often data regarding women in the United States is disaggregated only by white, black, and other.
93. The federal government should allow itself to be held accountable under domestic law for failure to fulfill its trust obligations to Indians, including its obligations to protect women from violence.
94. The United States should honor and fulfill the terms of the treaties it has with Indian tribes.
95. The United States should take steps to implement the U.N. Declaration on the Rights of Indigenous Peoples into domestic law.
96. The federal and state governments should reduce the barriers to holding themselves accountable under domestic law for violations of their due diligence obligations to Indian tribes, for example, by waiving sovereign immunity and creating new causes of actions.
97. More data needs to be collected about firearms on Indian lands, including rates of ownership, concealed carrying, association with violent crime, and association with substance abuse.
98. The United States should report how many tribes apply for and receive federal grants to improve their criminal records and background check systems.

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National-Congress-of-American-Indians.cfm) (“But for too long, the government has neglected law enforcement needs on tribal lands, where residents suffer violent crime at far greater rates than other Americans.”).

<sup>51</sup> WAKELING, *supra* note 13, at 13.

<sup>52</sup> *Id.* at 13-14.

<sup>53</sup> *Id.* at 14.

<sup>54</sup> *Id.* at 18-19.

<sup>55</sup> *Id.* at 13.

<sup>56</sup> Darryl S. Wood, *A Review of Research on Alcohol and Drug Use, Criminal Behavior, and the Criminal Justice System Response in American Indian and Alaska Native Communities* v (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/231348.pdf>.

<sup>57</sup> NEW MEXICO INVESTIGATIVE SUPPORT CENTER, NATIONAL METHAMPHETAMINE INITIATIVE SURVEY: THE STATUS OF THE METHAMPHETAMINE THREAT AND IMPACT ON INDIAN LANDS (2006).

99. The United States should increase funding for tribal law enforcement and reduce inequities in the compensation and training of tribal and federal police officers.
100. Data on military sexual trauma needs to be disaggregated by race. Research should be conducted on the effect of violence on American Indian service members.

#### XIV. GLOSSARY OF TERMS

1. **Brady Act:** “The Act passed in 1993 as an amendment to the Gun Control Act of 1968, imposes a waiting period of up to five days for the purchase of a handgun, and subjects purchasers to a background during that period. See 18 U.S.C. § 922(s)(1). The waiting period and background check prescribed by the Act are not required in states that have permit systems meeting standards prescribed by the Act. 18 U.S.C. § 922(s)(1)(C), (D). Within five years from the effective date of the Act, such checks will be performed instantaneously through a national criminal background check system maintained by the Department of Justice, 18 U.S.C. § 922(t), but in the meantime the background checks must be performed by the Chief Law Enforcement Officer (CLEO) of the prospective purchaser's state of residence. 18 U.S.C. § 922(s)(2). The Act requires CLEOs to ‘make a reasonable effort to ascertain whether receipt or possession [of a handgun by the prospective buyer] would be in violation of the law.’ The CLEO performs the check on the basis of a sworn statement signed by the buyer and provided to the CLEO by a federally-licensed gun dealer. 18 U.S.C. § 922(s)(1)(A). If the CLEO approves the transfer, he or she must destroy the buyer's statement within twenty business days after the statement was made. 18 U.S.C. § 922(s)(6)(B). If the CLEO disapproves the transfer, the CLEO must provide the reasons for the determination within twenty business days if so requested by the disappointed purchaser. 18 U.S.C. § 922(s)(6)(C).”<sup>1</sup>
2. **Bureau of Indian Affairs (BIA):** “Indian Affairs (IA) is the oldest bureau of the United States Department of the Interior. Established in 1824, IA currently provides services (directly or through contracts, grants, or compacts) to approximately 1.9 million American Indians and Alaska Natives. There are 565 federally recognized American Indian tribes and Alaska Natives in the United States. Bureau of Indian Affairs (BIA) is responsible for the administration and management of 55 million surface acres and 57 million acres of subsurface minerals estates held in trust by the United States for American Indians, Indian tribes, and Alaska Natives.”<sup>2</sup>
3. **Carrying of Concealed Weapons (“CCW”):** This is defined as the carrying of guns on one's person in a concealed manner, not in a holster or visible mechanism. It can also mean carrying in a concealed place close to one's person, such as in the glove compartment or under the seat of an automobile.
4. **Committee Against Torture (CAT):** “The Committee Against Torture (CAT) is the body of 10 independent experts that monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties. All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Convention and then every four years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of concluding observations.”<sup>3</sup>
5. **Intimate Partner Violence (“IPV”):** “Historically called ‘domestic violence,’ ‘intimate partner violence’ describes physical, sexual, or psychological harm by a current or former intimate partner or spouse. This type of violence can occur among heterosexual or same-sex couples.”<sup>4</sup>
6. **Lautenberg Amendment (i.e., Domestic Violence Misdemeanor Gun Ban):** “The 1968 Gun Control Act and subsequent amendments codified at 18 U.S.C. § 921 *et seq.* prohibit anyone convicted of a felony and anyone subject to a domestic violence protective order from possessing a firearm. The intended effect of this legislation is to extend the firearms ban to anyone convicted of a ‘misdemeanor crime of domestic violence.’ The 1968 Gun Control Act and subsequent amendments codified at 18 U.S.C. § 921 *et seq.* prohibit anyone convicted of a felony and anyone subject to a domestic violence protective order from

<sup>1</sup> *Brady Act Defined*, THE LECTRIC LAW LIBRARY, <http://www.lectlaw.com/def/b071.htm> (last visited May 31, 2011).

<sup>2</sup> *Who We Are*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/index.htm> (last visited May 31, 2011).

<sup>3</sup> *Monitoring The Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, COMM. AGAINST TORTURE, OFFICE OF THE U.N. HIGH COMMISSIONER ON HUMAN RIGHTS <http://www2.ohchr.org/english/bodies/cat/> (last visited May 31, 2011).

<sup>4</sup> *Intimate Partner Violence*, NAT'L INST. OF JUSTICE, <http://www.nij.gov/topics/crime/intimate-partner-violence/welcome.htm> (last visited May 31, 2011).

possessing a firearm. The intended effect of this new legislation is to extend the firearms ban to anyone convicted of a ‘misdemeanor crime of domestic violence.’<sup>5</sup>

7. **“May-Issue” State:** After a background check to determine suitability of an individual to possess a firearm, police or other authorities may make the final determination about an individual’s suitability to own a handgun.
8. **“May-Remove” State:** This is a state where police officers’ removal of firearms and other guns is at the sole discretion of law enforcement involved in the crime.<sup>6</sup>
9. **“No-Issue” State:** Under no circumstances will these states allow CCW.
10. **National Crime Information Center (NCIC):** “NCIC is a computerized index of criminal justice information (i.e., criminal record history information, fugitives, stolen properties, missing persons). It is available to Federal, state, and local law enforcement and other criminal justice agencies and is operational 24 hours a day, 365 days a year. The purpose for maintaining the NCIC system is to provide a computerized database for ready access by a criminal justice agency making an inquiry and for prompt disclosure of information in the system from other criminal justice agencies about crimes and criminals. This information assists authorized agencies in criminal justice and related law enforcement objectives, such as apprehending fugitives, locating missing persons, locating and returning stolen property, as well as in the protection of the law enforcement officers encountering the individuals described in the system.”<sup>7</sup>
11. **National Instant Criminal Background Check System (NICS):** “Mandated by the Brady Handgun Violence Prevention Act (Brady Act) of 1993, Public Law 103-159, the National Instant Criminal Background Check System (NICS) was established for Federal Firearms Licensees (FFLs) to contact by telephone, or other electronic means, for information to be supplied immediately on whether the transfer of a firearm would be in violation of Section 922 (g) or (n) of Title 18, United States Code, or state law.”<sup>8</sup>
12. **Small Arms and Light Weapons (“SALW”):** “Small arms are weapons designed for individual use, such as pistols, sub-machine guns, assault rifles and light machine guns. Light weapons are designed to be deployed and used by a crew of two or more, such as grenade launchers, portable anti-aircraft and anti-tank guns and missile launchers, recoilless rifles and mortars of less than 100mm calibre.”<sup>9</sup>
13. **“Shall-Issue” State:** A “shall-issue” state is one where a CCW permit must be issued if a person passes the requisite background checks at the state and/or federal levels. Law enforcement personnel may not intervene in the sale of guns to qualifying individuals.
14. **“Shall-Remove” State:** “In nine of the eighteen police gun removal states, law enforcement officers must remove firearms when responding to a domestic violence incident.”<sup>10</sup>
15. **Trace Data: Firearms Tracing System (FTS):** “A crime gun trace by ATF’s National Tracing Center (NTC) seeks to identify the Federal firearms licensees (FFLs) who first came in contact with the firearm, i.e. manufacturer, wholesaler, retailer, and the individual who first purchased the firearm from the retail dealer. In addition, for certain FFLs, the NTC may also be able to provide trace information for firearms resold as used guns and subsequently recovered by law enforcement. Finally, ATF special agents and their

<sup>5</sup> Criminal Resource Manual 1117, Restrictions on the Possession of Firearms by Individuals Convicted of a Misdemeanor Crime of Domestic Violence, U.S. DEP’T OF JUSTICE, OFFICES OF THE U.S. ATTORNEYS [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm01117.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01117.htm) (last visited May 31, 2011).

<sup>6</sup> See FRATTAROLI, *supra* note 140, at 6.

<sup>7</sup> National Crime Information Center, FBI, available at <http://www.fbi.gov/about-us/cjis/ncic/ncic.htm> (last visited May 31, 2011).

<sup>8</sup> National Instant Criminal Background Check System (NICS): Fact Sheet, FBI, <http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet>.

<sup>9</sup> Small Arms and Light Weapons, UK ARMS CONTROL AND DISARMAMENT, <http://ukunarmscontrol.fco.gov.uk/en/the-uk-disarmament/small-arms-light-weapons> (last visited May 31, 2011).

<sup>10</sup> FRATTAROLI, *supra* note 140, at 6.

State and local counterparts sometimes conduct investigative traces which seek to identify the complete chain of possessors from initial retail purchase to recovery by law enforcement.”<sup>11</sup>

16. **Unrestricted States for CCW:** These CCW laws do not require a permit or any additional criteria for carrying a concealed weapon. If a person can obtain clearance for buying or obtaining a gun, they can carry that gun in a concealed manner.
17. **UNSCR 1325:** United Nations Security Council Resolution 1325 on women and peace and security was adopted on October 31, 2000. The resolution reaffirms the important role of women in the prevention and resolution of conflicts and peace-building while stressing the importance of women’s equal participation in the promotion of peace and security.<sup>12</sup>
18. **UNSCR 1888:** United Nations Security Council Resolution 1888 was adopted on September 30, 2009. The resolution seeks to establish leadership, deploy expertise, and improve coordination among stakeholders involved in addressing conflict-related sexual violence.<sup>13</sup>
19. **Voluntary Appeal File (“VAF”):** This was recently established to permit applicants to request that the FBI NICS maintain information about an individual in the VAF to prevent future denials or extended delays of a firearm transfer.<sup>14</sup>

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<sup>11</sup> *Information for Law Enforcement Executives*, DEP’T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES 47 (2000), <http://www.atf.gov/publications/download/ycgii/1999/ycgii-report-1999-info-for-execs.pdf>.

<sup>12</sup> S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

<sup>13</sup> S.C. Res. 1888, U.N. Doc. S/RES/1888 (Sept. 30, 2009).

<sup>14</sup> VAF APPLICATION, *supra* note 123.



**V**iolence Against Women in the  
United States Military

**Rachel Natelson**

*Legal Counsel and Board Member  
Service Women's Action Network*

**Brittany Stalsberg**

*Policy Associate  
Service Women's Action Network*

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## I. MILITARY SEXUAL TRAUMA

### A. Background information

1. Military Sexual Trauma (“MST”), which the Department of Veterans Affairs (VA) defines as rape, sexual assault, and sexual harassment, plagues the U.S. military.<sup>1</sup> Even by conservative standards, MST can be considered an epidemic. While MST affects both men and women in uniform, servicewomen are at much higher risk for sexual assault and harassment.<sup>2</sup> Former Representative Jane Harman (D-CA) was sadly correct when she described the epidemic as follows: “Women serving in the U.S. military today are more likely to be raped by a fellow soldier than killed by enemy fire in Iraq.”<sup>3</sup> The danger of serving in the U.S. military, then, not only results from the physical risks associated with war and combat but also from the risk of assault at the hands of one’s own peers.
2. The dynamics of rape, sexual assault, and sexual harassment that occur in the military are different than in civilian life. MST triggers intense feelings of betrayal in survivors, as it upsets deeply-held belief systems about loyalty to fellow service members and ruptures respect for chain of command. In this way, MST is similar to incest, as perpetrators and victims are akin to family members.
3. Perpetrators of MST often wield control over the victim, especially since perpetrators are likely to outrank the victims. If the perpetrators are in the victim’s chain of command, reporting the incident can seem impossible. Victims of MST often feel that they need to make a choice between their military career and seeking justice for their trauma.
4. In addition to struggling with whether to report assault, victims are often at risk of retaliation by perpetrators, and commanders often fail to enforce the protection of those who report MST. Commanders and fellow service members may blame the victim for ruining a “good soldier’s reputation” or may try to convince the victim that what happened was “no big deal” and not worth causing conflict in the unit. Indeed, women under commanders or supervisors who are more tolerant of sexual harassment and sexual quid pro quo behavior were three to five times more likely to experience rape, compared to women under commands that were intolerant of misogyny.<sup>4</sup>
5. The military culture, which privileges hypermasculinity<sup>5</sup> and devalues femininity also explains the high rates of sexual violence towards servicewomen. The military is hostile towards the presence of women, and gender stereotypes about women’s capabilities perpetuate an environment that excludes women and signs of femininity. Women in the military are stereotyped as one of three types of women—“bitches, whores, or dykes.” There is no room in military culture for women to be equal peers. These attitudes towards women and their roles in the military encourage a climate in which rape is not taken seriously. Studies confirm the connection between hostile attitudes towards women and increased propensity to commit sexual violence—military men in training and at military academies are more likely to hold masculine beliefs and traditional sex-role attitudes compared to civilian college men.<sup>6</sup> These attitudes in turn predict increased tolerance of rape, sexual assault, and harassment. Another study found that men in

<sup>1</sup> National Center for PTSD, U.S. Dep’t of Veteran Affairs, *Military Sexual Trauma* (June 15, 2010), <http://www.ptsd.va.gov/professional/pages/military-sexual-trauma.asp>.

<sup>2</sup> Rachel Kimerling et al., *The Veterans Health Administration and Military Sexual Trauma*, 97(12) AM J. PUB. HEALTH 2160, 2160 (2007); Jessica A. Turchik & Susan M. Wilson, *Sexual Assault in the U.S. Military: A Review of the Literature and Recommendations for the Future*, 15 AGGRESSION & VIOLENT BEHAVIOR 267, 268 (2010).

<sup>3</sup> *Sexual Assault in Military ‘Jaw-Dropping,’ Lawmaker Says*, CNN, Jul. 31, 2008, [http://articles.cnn.com/2008-07-31/us/military.sexabuse\\_1\\_sexual-assault-sexual-abuse-military-service?\\_s=PM:US](http://articles.cnn.com/2008-07-31/us/military.sexabuse_1_sexual-assault-sexual-abuse-military-service?_s=PM:US).

<sup>4</sup> Anne G. Sadler et al., *Factors Associated with Women’s Risk of Rape in the Military Environment*, 43 AM J. INDUS. MED. 262, 264 (2003).

<sup>5</sup> Turchik & Wilson, *supra* note 2, at 271 (describing hypermasculinity in the military as “an extreme form of masculinity based on beliefs of polarized gender roles, the endorsement of stereotypical gender roles, a high value placed on control, power, and competition, toleration of pain, and mandatory heterosexuality”).

<sup>6</sup> Sharon E. Robinson Kurpius & A. Leigh Lucart, *Military and Civilian Undergraduates: Attitudes Toward Women, Masculinity, and Authoritarianism*, 43 SEX ROLES 255, 255 (2000); Leora N. Rosen & Lee Martin, *Predictors of Tolerance of Sexual Harassment Among Male U.S. Army Soldiers*, 4 VIOLENCE AGAINST WOMEN 491 (1998).

military academies were more likely than a comparable group of civilian college men to believe in “rape myths,” such as that women “ask for it.”<sup>7</sup> Finally, some evidence indicates that men prone to commit sexual violence are more likely to enter the military in the first place. A study of three large samples of Navy recruits found that 9.9% to 11.6% of men admitted to raping a woman prior to entering the Navy; this rate of perpetration compares to 4.4% of a large sample of college men who also admit to rape.<sup>8</sup> The fact that men who enter the military are more likely to be sexual predators already, combined with a culture that tolerates sexual violence, should make the rape, sexual assault, and sexual harassment crisis come as no surprise.

## B. Prevalence

6. Because 80% of MST cases go unreported,<sup>9</sup> accurate statistics for prevalence are difficult to estimate. However, even though conservative estimates, the statistics that are available are alarming. In 2009, 3,230 rapes and sexual assaults were reported.<sup>10</sup> A recent review of the military sexual assault literature revealed that between 9.5% and 33% of women report experiencing an attempted or completed rape during their time in service.<sup>11</sup> Sexual assault and harassment rates are much higher: up to 84% of women report experiencing these types of assault during their service.<sup>12</sup> Furthermore, military sexual assaults are often *not* isolated incidents and may involve more than one perpetrator. Thirty-seven percent of women veterans who were raped report being raped at least twice, and 14% of rape survivors report experiences of gang rape.<sup>13</sup> Lesbian, gay, bisexual or transgendered (“LGBT”) women may be especially vulnerable to MST, and are also less likely to report these crimes for fear of being discharged if their experience is mistaken for homosexual activity.<sup>14</sup> Some evidence also indicates that women of color are more likely to experience severe forms of sexual harassment compared to their white counterparts, including sexual coercion.<sup>15</sup>

## C. Effects and consequences

7. MST is associated with a range of health and economic consequences, many of which affect women and men differently. Mental health conditions resulting from MST are often long-term and survivors require immediate, adequate treatment for full recovery. Survivors of MST often need a lifetime to recover from their experience, and their quality of life is profoundly affected by the violations they endured. Furthermore, the stress and depression that usually follow experiences of MST affect survivors’ economic stability, which leads to unemployment and homelessness.
8. MST is a strong predictor of PTSD in women.<sup>16</sup> Women who experience MST are nine times more likely to develop PTSD compared to female veterans who have not experienced rape, sexual assault, or

<sup>7</sup> Marjorie H. Carroll & M. Diane Clark, *Men’s Acquaintance Rape Scripts: A Comparison Between a Regional University and a Military Academy*, 55 *SEX ROLES* 469, 478 (2006).

<sup>8</sup> L.L. Merrill et al., *Childhood Abuse and Premilitary Sexual Assault in Male Navy Recruits*, 69 *J. CONSULTING & CLINICAL PSYCHOL.* 252 (2001); M.P. Koss, C.A. Gidycz & N. Wisniewski, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 *J. CONSULTING & CLINICAL PSYCHOL.* 162 (1987) (noting the comparison college group of which 4.4% admit to rape).

<sup>9</sup> DEP’T OF DEF., 2006 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS 48 (2008) *available at* [http://www.sapr.mil/media/pdf/research/WGRA\\_OverviewReport.pdf](http://www.sapr.mil/media/pdf/research/WGRA_OverviewReport.pdf).

<sup>10</sup> DEP’T OF DEF., DEPARTMENT OF DEFENSE FISCAL YEAR 2009 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 66 (Mar. 2010), *available at* [http://www.sapr.mil/media/pdf/reports/fy09\\_annual\\_report.pdf](http://www.sapr.mil/media/pdf/reports/fy09_annual_report.pdf).

<sup>11</sup> Turchik & Wilson, *supra* note 2, at 268 (Rates vary widely mostly because of the different type samples studies use.)

<sup>12</sup> *Id.*

<sup>13</sup> See Sadler et al., *supra* note 4, at 266.

<sup>14</sup> The “Don’t Ask, Don’t Tell” policy discharged service members who engaged in homosexual activity while in service.

<sup>15</sup> Nicole T. Buchanan et al., *Comparing Sexual Harassment Subtypes among Black and White Women by Military Rank: Double Jeopardy, the Jezebel, and the Cult of True Womanhood*, 32(4) *PSYCHOL. WOMEN Q.* 347, 347 (2008).

<sup>16</sup> H. Kang et al., *The Role of Sexual Assault on the Risk of PTSD Among Gulf War Veterans*, 15(3) *ANNALS EPIDEMIOLOGY* 191, 191 (2005); A.E. Street et al., *Sexual Harassment and Assault Experienced by Reservists During Military Service: Prevalence and Health Correlates*, 45 *J. REHABILITATION RES. & DEV.* 409, 415 (2008).

harassment.<sup>17</sup> Further, women who were sexually assaulted in the military are more vulnerable to PTSD than their male counterparts, as women are three times more likely to develop PTSD than men.<sup>18</sup>

9. In addition to PTSD, survivors of MST are also more likely than veterans who were not sexually violated to develop depression, anxiety, and eating disorders. For example, MST survivors are two-and-a-half to three times more likely to develop any mental health disorder compared to non-MST veterans and are two to three times more likely to develop major depression and anxiety. Drug and alcohol abuse are also common afflictions that often follow from MST, as MST veterans are twice as likely than other veterans to develop a drug or alcohol addiction. Perhaps even more alarming, MST survivors are two to three times more likely to attempt suicide or engage in self-inflicted injury.<sup>19</sup>
10. The trauma associated with sexual violation in the military affects veterans' chances of successful reintegration into their homes, workplaces, and communities after they leave service. According to a recent VA survey of homeless women veterans, 40% of respondents reported experiences of sexual assault in the military.<sup>20</sup> MST often triggers feelings of isolation, depression, and other mental health issues, which can cause veterans to enter a "downward spiral," in which they may abuse drugs and alcohol, lose their jobs or struggle to join the workforce, and become homeless.
11. The consequences of MST are compounded by a lack of gender-specific resources for women veterans. Survivors of MST need treatment for the physical and psychological wounds that are directly and indirectly caused by their assault. The sensitive nature of MST requires a welcoming, safe space for women to receive treatment. The male bias of the VA health system, however, discourages women from seeking treatment and also limits the quality of care they do receive. Women veterans are less likely to use VA services and are less likely to be satisfied with the care they do receive compared to their men veteran counterparts.<sup>21</sup> Some women MST survivors even report experiencing a "second victimization" while under care, when community and military service providers exhibit victim-blaming behaviors.<sup>22</sup> The story of a woman veteran and MST survivor illustrates this well—when she asked her VA (male) doctor for a female nurse to be present during her gynecological exam, he loudly sighed and shouted "We've got another one!" as he abruptly walked away.<sup>23</sup>

## D. Law and policy

### i. Current domestic practices

12. The U.S. military's default position is that service members' complaints should be resolved through the chain of command. According to the Manual for Courts-Martial, "Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense."<sup>24</sup>

<sup>17</sup> Alina Suris et al., *Sexual Assault in Women Veterans: An Examination of PTSD Risk, Health Care Utilization, and Cost of Care*, 66 *PSYCHOSOMATIC MED.* 749, 752 (2004).

<sup>18</sup> Kimerling et al., *supra* note 2, at 2160.

<sup>19</sup> See Kang et al. *supra* note 16, at 415-16; Street et al., *supra* note 16, at 753.

<sup>20</sup> Erik Eckholm, *Surge Seen in Homeless Veterans*, N.Y. TIMES, Nov. 8, 2007, available at <http://www.nytimes.com/2007/11/08/us/08vets>.

<sup>21</sup> M. M. Kelly et al., *Effects of Military Trauma Exposure on Women Veterans' Use and Perceptions of Veterans Health Administration Care*, 23(6) *J. GEN. INTERNAL MED.* 741 (2008).

<sup>22</sup> Rebecca Campbell & Sheela Raja, *The Sexual Assault and Secondary Victimization of Female Veterans: Help-Seeking Experiences with Military and Civilian Social Systems*, 29(1) *PSYCHOL. WOMEN Q.* 97 (2005).

<sup>23</sup> Jan Goodwin, *Women's VA Health Care Falls Short*, GOOD HOUSEKEEPING, Mar. 1, 2010, available at <http://www.goodhousekeeping.com/health/womens/va-healthcare-falls-short>.

<sup>24</sup> MANUAL FOR COURTS-MARTIAL UNITED STATES, Rule 306(a) (2008 ed.); Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from the Revolution?* 16 *TUL. J. INT'L & COMP. L.* 419, 428 (2008) (explaining that "[u]nder the current version of the UCMJ, the commander still has extensive power in investigating and charging soldiers, in conducting summary disciplinary actions, and in the court-martial process").

**a) Equal opportunity complaints**

13. The military launched its Equal Opportunity (“EO”) system in 1964. The purpose of the EO complaint system is to “promote an environment free from personal, social, or institutional barriers that prevent Service members from rising to the highest level of responsibility possible.”<sup>25</sup>
14. Any service member who is discriminated against or sexually harassed in the military can make an EO complaint. While each branch has some leeway in how it fields these complaints, the Department of Defense (DoD) demands that “all discrimination complaints are investigated in a fair, impartial, and prompt manner, and that all reports of investigation of formal complaints are reviewed for legal sufficiency.”<sup>26</sup>
15. In the Army these complaints can take two forms: written—or “formal”—complaints, and “informal” complaints.<sup>27</sup> The latter “may be resolved directly by the individual, with the help of another unit member, the commander or other person in the complainant’s chain of command,” while the former “is one that complainant files in writing and swears to the accuracy of the information. Formal complaints require specific actions, are subject to timelines, and require documentation of the actions taken.”<sup>28</sup> Written complaints are made to their military branch’s EO office and Inspector General (“IG”). Service members are encouraged to attempt to resolve the matter through the chain of command before filing a complaint.<sup>29</sup>
16. While there are alternative avenues for reporting sexual harassment, the regulations for the Army EO program are “explicit in affixing responsibility on the chain of command.”<sup>30</sup> The Navy EO Policy explicitly notes that the “chain of command is the primary and preferred channel for identifying and correcting discriminatory practices. This includes the processing and resolving of complaints of unlawful discrimination and [sexual harassment].”<sup>31</sup>
17. A Los Angeles Times article from 1997 reports that the “‘equal opportunity’ complaint-reporting system” in the Army is, according to an internal study conducted by the Army, “all but useless.”<sup>32</sup> According to that Army survey, “only 5% of women who believed that they had been harassed used” the EO complaint system. Soldiers do not use the system because they distrust it.<sup>33</sup>

**b) Sexual assault prevention and response**

18. In October 2004, DoD created the Joint Task Force for Sexual Assault Prevention and Response (“JTF-SAPR”), which served as the temporary single point of accountability for sexual assault matters in the DoD. The Department also created the position of Sexual Assault Prevention and Response Office (SAPRO) to provide oversight, guidance and accountability for sexual assaults within the DoD.
19. In October 2005, the DoD issued a policy directive on its new Sexual Assault Prevention and Response (“SAPR”) Program. According to that directive, DoD strives to “[e]liminate sexual assault within the Department of Defense by providing a culture of prevention, education and training, response capability,

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<sup>25</sup> Eddie Wroblinski, Defense Equal Opportunity Management Institute, *Bullet Background Paper on Military Equal Opportunity (EO), Civilian Equal Employment Opportunity (EEO), Affirmative Employment Program (AEPs), and Diversity* (Oct. 27, 2010), available at [http://www.deomi.org/EOEEOResources/documents/Bullet\\_Background\\_EO\\_Wroblinski.pdf](http://www.deomi.org/EOEEOResources/documents/Bullet_Background_EO_Wroblinski.pdf).

<sup>26</sup> DEP’T OF DEF, DIRECTIVE 1350.2: DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY PROGRAM § 6.2.5 (Aug. 18, 1995), available at [www.carson.army.mil/eo/documents/dod1350.2.pdf](http://www.carson.army.mil/eo/documents/dod1350.2.pdf).

<sup>27</sup> *Frequently Asked Questions*, U.S. ARMY EQUAL OPPORTUNITY BRANCH (Aug. 14, 2007), <http://www.armyg1.army.mil/eo/faq.asp>.

<sup>28</sup> *Id.*

<sup>29</sup> *Grievances: Equal Opportunity Complainants*, GI RIGHTS HOTLINE (Mar. 31, 2008), <http://www.girightshotline.org/girights/grievances/eqopp/index.shtml>.

<sup>30</sup> SEC’Y ARMY, SENIOR REVIEW PANEL REPORT ON SEXUAL HARASSMENT 41 (July 1997).

<sup>31</sup> CHIEF NAVY OPERATION, NAVY EQUAL OPPORTUNITY COMPLAINTS ENCL. 5, 1 (July 25, 2007).

<sup>32</sup> Paul Richter, *Sexual-Misconduct Problem Found Prevalent in the Army*, L.A. TIMES, Sep. 12, 1997.

<sup>33</sup> *Id.*

victim support, reporting procedures, and accountability that enhances the safety and well-being of all its members.”<sup>34</sup>

20. DoD Directive Number 6495.01 acknowledges the importance of finding ways to encourage victims to report incidences of sexual assault: “Sexual assault is one of the most under-reported violent crimes in our society and in the military.” Although the victim’s decision to report is a crucial step following a sexual assault, reporting is often precluded by the victim’s desire for no one to know what happened. Under SAPR, victims of sexual assault can now make either “restricted” or “unrestricted” reports. DoD defines the options as follows:

E3.1.6.1. Unrestricted Reporting. A Service member who is sexually assaulted and desires medical treatment, counseling, and an official investigation of his or her allegation should use existing reporting channels (e.g., chain of command, law enforcement, or report the incident to the [Sexual Assault Response Coordinator (“SARC”)]). When notified of a reported sexual assault, the SARC will immediately assign a [Victim’s Advocate (“VA”)]. Additionally, at the victim’s discretion or request, the healthcare provider shall arrange a [Sexual Assault Forensic Examination] . . . to be conducted, which may include the collection of evidence. Details regarding the incident will be limited to only those personnel who have a legitimate need to know.

E3.1.6.2. Restricted Reporting. Restricted reporting allows a sexual assault victim to confidentially disclose the details of his or her assault to specified individuals and receive medical treatment and counseling, without triggering the official investigative process.<sup>35</sup>

21. The new restricted reporting option is undoubtedly a positive step forward for the armed services, but it is not without its own set of problems. One issue is that commanders may become curious about why soldiers are asking to be excused. This appears to be an especially serious problem with soldiers in Initial Early Training (“IET”).
22. Moreover, despite the implementation of restricted reporting, when it comes to prosecuting sexual assault, the military justice system is—as in the sexual harassment context—“commander-driven—that is, individual commanders have discretion in deciding whether to pursue criminal charges in response to allegations of sexual misconduct.”<sup>36</sup> This likely explains why “nearly half of reported sexual assaults are disposed of with no action taken. Additionally, many sexual assault cases are disposed of administratively through non-judicial punishment, which is described by some as ‘no more than a slap on the wrist.’”<sup>37</sup>

### ***c) Inspector General complaints***

23. Each branch of the military has its own Inspector General (“IG”). While each IG has many functions, the primary role of the IG is to investigate Fraud, Waste, and Abuse (“FWA”).<sup>38</sup>
24. While the Army IG will make sure a “complainant received due process” through existing procedures, the IG will not consider complaints that have “other means of redress.”<sup>39</sup> This likely includes sexual assault and EO complaints.

<sup>34</sup> DEP’T OF DEF, DIRECTIVE NUMBER 6495.01: SEXUAL ASSAULT AND PREVENTION RESPONSE (SAPR) PROGRAM (Oct. 6, 2005, Incorporating Change 1, Nov. 7, 2008), available at [www.dtic.mil/whs/directives/corres/pdf/649501p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf).

<sup>35</sup> *Id.*

<sup>36</sup> Megan N. Schmid, *Combating a Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475 (2010).

<sup>37</sup> *Id.*

<sup>38</sup> See Office of the Inspector General, <http://wwwpublic.ignet.army.mil>.

<sup>39</sup> *Id.*

25. However, the Navy IG will review an EO complaint if the investigation was materially flawed.<sup>40</sup> In the Air Force, complainants who experience “reprisal” for making a report can report it to the IG.<sup>41</sup>
26. Even if the victim of sexual harassment or sexual assault were to get an IG involved in his or her case, IGs can only make findings and recommendations. The member’s command, a superior command, or Service headquarters will decide whether or not to take action.<sup>42</sup>
27. Another major problem is that, although IGs are independent, they “may delegate the actual work of investigating and making findings and recommendations downwards, and the officer assigned to investigate the complaint might be in the member’s command or an immediately superior command.”<sup>43</sup>

**d) Military grievances**

28. Article 138 of Uniform Code of Military Justice (“UCMJ”) provides that a service member can make complaints about her commanding officer:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.<sup>44</sup>

29. The Article 138 process, then, has two steps: first the service member must “submit an initial request for redress” to her commanding officer, the point of which is to give the commanding officer an “opportunity to respond to the Soldier’s allegations and perhaps resolve issues at a much lower level.”<sup>45</sup> If the commanding officer does not respond within fifteen days, the service member can make an official complaint to her commanding officer’s immediate supervisor.<sup>46</sup> “This superior commissioned officer has *the duty* to forward the complaint to the general court-martial convening authority (“GCMCA”), which is normally the installation commanding general.”<sup>47</sup> It is worth underscoring that superior officers have no discretion concerning whether the complaint is forwarded on to the GCMCA.
30. While Judge Advocates are supposed to ensure that commanders do not restrict the submission of Article 138 complaints or penalize complainants, retaliation remains a big problem. Since Article 138 complaints, like other internal military remedies, are limited by their reliance on the chain of command, fear of retaliation tends to restrict their use.

**e) Whistleblower protection**

31. The Military Whistleblower Protection Act (“MWPA”) is one protection to encourage reporting of violations both within and outside the chain of command. The MWPA provides that “[n]o person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector

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<sup>40</sup> See Naval Inspector General, <http://www.ig.navy.mil/index.htm>.

<sup>41</sup> AIR FORCE INSTRUCTION 36-2706: EQUAL OPPORTUNITY PROGRAM MILITARY AND CIVILIAN § 3.18.4 (Oct. 5, 2010), available at [www.e-publishing.af.mil/shared/media/epubs/AFI36-2706.pdf](http://www.e-publishing.af.mil/shared/media/epubs/AFI36-2706.pdf).

<sup>42</sup> *Grievances: Inspector General Complaints*, supra note 29.

<sup>43</sup> *Id.*

<sup>44</sup> 10 U.S.C. § 938.

<sup>45</sup> Major Robert W. Ayers, *Clarifying the Article 138 Complaint Process*, ARMY LAW., Apr. 2008, at 25.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 26 (emphasis added).

General.”<sup>48</sup> It also prohibits retaliation for a service member communicating with a member of Congress, an IG, or a member of the chain of command.<sup>49</sup>

32. A service member’s communications are “protected” if he or she “identifies a violation of the law or regulation, including sexual harassment, discrimination, mismanagement, gross waste of funds or resources, or a substantial and specific danger to public health or safety.”<sup>50</sup> Moreover, the whistleblower can now be a “third party, e.g., spouse, relative, or co-worker of a service member . . . so long as the [responsible management official] believes that the communication was made on behalf of the service member.”<sup>51</sup>

#### *f) Military adjudication*

33. In fiscal year 2009, the military investigated 2,883 subjects of sexual assault allegations. Of those subjects, 2,279 were reported to the alleged offender’s commander for action (others were barred for jurisdictional reasons). Half of these resulted in command action. The other half yielded probable cause only for a non-sexual assault offense, yielded insufficient evidence of an offense, were unfounded by the command, or were dismissed by the command.
34. With respect to command action, 410 subjects had court-martial charges initiated against them; 351 received Article 15 punishments, 53 received administrative discharges, and 169 received “other adverse administrative actions.”<sup>52</sup> This means that only 14% of all FY2009 investigations led to the *initiation* of judicial proceedings.
35. In the unlikely event such proceedings are initiated, moreover, military judges do not enjoy the independence afforded to their civilian counterparts. While judicial independence is one of the defining elements of the civilian judiciary, military judges are appointed by the judge advocate general (“JAG”) of the appropriate armed service, serve without a fixed term at the pleasure of the JAG, and are evaluated at least annually by senior officers.<sup>53</sup> As a result, subsequent promotion and reassignment depend on a judge’s annual officer evaluation and the personal knowledge and desires of the senior officers responsible for assignments.<sup>54</sup> Since military judges enjoy no protected term of office, they are effectively subject to removal without cause.<sup>55</sup>
36. Despite these concerns, the United States Supreme Court has rejected challenges to the United States military justice system on the grounds that it is not sufficiently independent.<sup>56</sup>
37. Against this backdrop, the Armed Services have made attempts to improve the prosecutorial system for sexual assault victims. In 2008, for instance, the Judge Advocate General of the Army (“TJAG”) recommended, and the Secretary of the Army approved, more resources and training of judge advocates

<sup>48</sup> 10 U.S.C. § 1034(a)(1).

<sup>49</sup> See generally 10 U.S.C. § 1034(b); see also NAVY INSPECTOR GEN., MILITARY WHISTLEBLOWERS PROTECTION ACT (Oct. 27, 2005), available at: [www.ig.navy.mil/ethics/WhistleblowerReprisal.pdf](http://www.ig.navy.mil/ethics/WhistleblowerReprisal.pdf).

<sup>50</sup> *Id.*

<sup>51</sup> Major William E. Brown, *Whistleblower Protection for Military Members*, ARMY LAW, Dec. 2008 at 58, 61.

<sup>52</sup> Article 15 of the UCMJ authorizes non-judicial punishment, i.e. administrative discipline without a court-martial. Such punishment can involve reprimand, reduction in rank, loss of pay, extra duty, and other restrictions.

<sup>53</sup> Frederic I. Lederer & Barbara Hundley Zeliff, *Needed: An Independent Judiciary*, in EVOLVING MILITARY JUSTICE 28 (Eugene R. Fidell & Dwight Hall Sullivan eds., 2002).

<sup>54</sup> *Id.*

<sup>55</sup> Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, in EVOLVING MILITARY JUSTICE 23 (Eugene R. Fidell & Dwight Hall Sullivan eds., 2002).

<sup>56</sup> See *Weiss v. United States*, 510 U.S. 163, 180 (1994) (“By placing judges under the control of Judge Advocates General, who have no interest in the outcome of a particular court-martial, we believe Congress has achieved an acceptable balance between independence and accountability.”).

in the litigation of sexual assault cases.<sup>57</sup> The Army has also begun hiring prosecutors who will specialize in sexual assault cases, marking the first time it has hired prosecutors for a specific crime.<sup>58</sup>

**g) Civil suits**

38. The Supreme Court has rejected the argument that service members mistreated by their superiors may bring legal actions in federal court for Constitutional violations.<sup>59</sup>
39. After contending that the “need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion,” the Supreme Court noted in *Chappell v. Wallace* that the armed services has its own “internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provides for the review and remedy of complaints and grievances such as those presented by respondents.”<sup>60</sup>
40. *Chappell* is an extension of the Supreme Court’s “*Feres* doctrine,” born out of *Feres v. United States*. In that landmark case, the Supreme Court held that “the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”<sup>61</sup>
41. This court-made deference, however, has not deterred Equal Protection challenges to military policies intended to benefit women and service members of color; such deference has been notably absent from cases alleging reverse discrimination in the military. For example, a series of actions challenged the military’s late 1990s promotion and retention mandates to achieve diversity and account for the effects of discrimination in evaluating performance. The courts struck down not only numerical goals in promotion and retention, but also simple directives to consider the potential effects that discrimination may have had in determining the relative qualifications of women and service members of color.<sup>62</sup>
42. These reverse discrimination holdings were not impeded by the supposed broad deference to military judgment. For example, in *Berkley v. United States*, the Federal Circuit brushed the *Feres* argument aside, stating that deference to the military “does not prevent or preclude our review of [the policy] in this case in light of constitutional equal protection claims raised.”<sup>63</sup>
43. While the Supreme Court has not weighed in on the applicability of Title VII of the Civil Rights Act of 1964 (“Title VII”) to the Armed Forces, the United States Courts of Appeals have rejected Title VII claims by female service members alleging discrimination and sexual harassment.<sup>64</sup>
44. In *Corey v. United States*, a female service member sued the United States government under Title VII and the Federal Torts Claim Act. Corey alleged that she was “repeatedly subjected to and suffered a continuous history and pattern of sexual harassment and discrimination” during the course of her

<sup>57</sup> Lieutenant Colonel Maureen A. Kohn, *Special Victims Units—Not a Prosecution Program But a Justice Program*, Army Law., Mar. 2010, at 68, 70.

<sup>58</sup> Jeff Schogol, *Army Names Prosecutor for Special Assaults Cases*, STARS & STRIPES (Jan. 28, 2009), available at <http://www.stripes.com/news/army-names-special-prosecutors-for-assault-cases-1.87582>.

<sup>59</sup> See *Chappell v. Wallace*, 462 U.S. 296 (1983).

<sup>60</sup> *Id.* at 300, 302.

<sup>61</sup> *Feres v. United States*, 340 U.S. 135, 146 (1950).

<sup>62</sup> See, e.g., *Berkley v. United States*, 287 F.3d 1076 (Fed. Cir. 2002); *Saunders v. White*, 191 F. Supp. 2d 95 (D.D.C. 2002); *Alvin v. United States*, 50 Fed. Cl. 295 (2001); *Kim v. Brownlee*, 344 F. Supp. 2d 758 (D.D.C. 2004); *Sirmans v. Caldera*, 138 F. Supp. 2d 14 (D.D.C. 2001); *Sirmans v. Brownlee*, 346 F. Supp. 2d 56 (D.D.C. 2004); *Christian v. United States*, 46 Fed. Cl. 793 (2000).

<sup>63</sup> *Berkley*, 287 F.3d at 1091.

<sup>64</sup> See *Roper v. Dep’t of Army*, 832 F.2d 247, 248 (2d Cir. 1987) (finding that “[t]he relationship between the government and a uniformed member of the military remains unlike the relationship which exists between civilian employer and employee”); *Johnson v. Alexander*, 572 F.2d 1219, 1224 (8th Cir. 1978) (denying a Title VII challenge to the Army’s enlistment criteria on the grounds that “if Congress had intended for the statute to apply to the uniformed personnel of the various armed services it would have said so in unmistakable terms”); *Coffman v. Michigan* 120 F.3d 57, 58 (6th Cir. 1997) (“Courts of appeals have consistently refused to extend statutory remedies available to civilians to uniformed members of the armed forces absent a clear direction from Congress to do so.”).

employment” and that she had “no recourse to pursue her harassment claim because the Air Force ‘ha[d] established a system and mechanism to discourage complaints against its senior officers.’”<sup>65</sup> Furthermore, she claimed the Air Force has generally failed to adequately supervise, train, investigate, and discipline its military members regarding sexual harassment and discrimination. Citing *Roper* and the *Feres* doctrine, the U.S. Court of Appeals for the Tenth Circuit affirmed the dismissal of both of Corey’s claims.

45. For practical purposes, however, Title VII already applies within a military environment. Not only may civilian employees of the Department of Defense access such relief, but last year’s Defense Reauthorization Act included Senator Al Franken’s “contractor rape amendment,” which bars the government from contracting with companies that require employees to resolve sexual assault or harassment claims through binding arbitration instead of federal court.<sup>66</sup> Together, these policies suggest that Congress has expressed the intent to allow federal courts to review harassment and assault claims of employees who perform comparable jobs and work in the same setting as uniformed personnel.

#### **h) Implications for data collection**

46. The VA grants benefits to a significantly smaller percentage of female than male PTSD claimants, a disparity that stems largely from the difficulties of substantiating experiences of military sexual assault and harassment. As underreported as sexual assault may be in civilian society, military culture poses a host of additional barriers, ranging from lack of confidentiality to fear of punishment for collateral misconduct to impact on security clearance and availability for deployment.
47. In cases of sexual harassment, these cultural barriers are only exacerbated by an official policy of limited recordkeeping. At the direction of the DoD, paper records of substantiated harassment cases are retained for only two years after the closing of a complaint, and electronic files are erased from a Discrimination and Sexual Harassment (“DASH”) database after five years. Additionally, with informal EO/SH complaints, the creation of a memorandum of record is “recommended,” but the complaint itself is not filed in writing. While confidentiality should be attempted, “it will neither be guaranteed nor promised to the complainant by agencies other than the chaplain or a lawyer.”<sup>67</sup>
48. Under new VA regulations, PTSD is presumed to be connected to military service in cases where a VA provider supports the diagnosis and “the claimed stressor is related to the veteran’s fear of hostile military or terrorist activity.”<sup>68</sup> This presumption, however, does not apply in cases where the stressor is sexual assault or harassment, which still require corroborating evidence in the form of law enforcement or counseling records, pregnancy or STD tests, and statements from fellow servicemembers. As a result, MST survivors are now subject to a higher evidentiary standard than almost any other PTSD claimants.

### **E. Recommendations**

#### **i. Overturning the *Feres* Doctrine**

49. Under the *Feres* doctrine of intramilitary immunity, the U.S. government is not liable under the Federal Tort Claims Act for injuries to service members where the injuries arise out of or are in the course of activity incident to service. Since its introduction, the doctrine has been widely condemned and may well be a target for reform in the near future. In *Costo v. United States*, for example, the Court of Appeals for the Ninth Circuit only “reluctantly” and “without relish” applied the doctrine, saying that they did so out of deference to precedent.<sup>69</sup> The dissenting opinion, moreover, deemed *Feres* unconstitutional on equal protection and separation of power grounds, arguing that the doctrine “effectively declares that the

<sup>65</sup> *Corey v. United States*, 1997 WL 474521, \*1-2 (10th Cir. 1997).

<sup>66</sup> See Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 8099 (2009).

<sup>67</sup> Army Regulation 600-20, Army Command Policy, Appendix D-1(a)(3), available at [http://www.apd.army.mil/pdffiles/r600\\_20.pdf](http://www.apd.army.mil/pdffiles/r600_20.pdf).

<sup>68</sup> See *Stressor Determinations for Posttraumatic Stress Disorder*, DEP’T OF VETERANS AFFAIRS 4 (July 13, 2010), [http://www1.va.gov/ORPM/docs/20100713\\_AN32\\_StressorDeterminationsforPosttraumatic.pdf](http://www1.va.gov/ORPM/docs/20100713_AN32_StressorDeterminationsforPosttraumatic.pdf).

<sup>69</sup> *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001).

members of the United States military are not equal citizens, as their rights against their government are less than the rights of their fellow Americans” and that its origin “runs against our basic separation of powers principles” by engaging in judicial re-writing of an unambiguous and constitutional statute.<sup>70</sup>

50. Similarly, in *Johnson v. United States*, Justice Scalia dismissed the concept of intramilitary immunity as unrelated to the text and history of the Federal Tort Claims Act, declaring *Feres* to be “wrongly decided, and heartily deserv[ing] the ‘widespread, almost universal criticism’ it has received.”<sup>71</sup>
51. More recently, the Cox Commission, an independent panel convened to review the Uniform Code of Military Justice on its fiftieth anniversary, noted the constraints that the doctrine places on service members’ “ability to pursue apparently legitimate claims against the armed forces, many of which bear little if any relation to the performance of military duties or obedience to orders on their merits.”
52. In 2009, Representative Maurice Hinchey (D-NY) proposed the Carmelo Rodriguez Military Medical Accountability Act, which would amend the Federal Tort Claims Act to allow claims for damages to be brought against the military for personal injury or death arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions. While a useful first step, the bill would only override the *Feres* doctrine in cases of medical malpractice. A more equitable proposal would allow service members to bring tort claims against the military in all instances of negligent conduct.

**ii. Amending Title VII to apply to military members**

53. Congress has amended Title VII three times. The Equal Employment Opportunity Act of 1972 expanded its coverage and increased the EEOC’s enforcement power. Six years later, the Pregnancy Discrimination Act of 1978 expanded the definition of sex discrimination to include discrimination on the basis of pregnancy, childbirth, or related medical conditions. Finally, in 1991, Congress made sexual harassment a much more serious offense in terms of employer liability. Prior to the Civil Rights Act of 1991, Title VII only allowed a victim injunctive relief, reinstatement, or recovery of such restitution as lost wages or back pay. These amendments allowed victims of intentional sexual harassment to sue for compensatory and punitive damages resulting from their injuries.
54. Title VII applies to all private employers with fifteen or more employees as well as to federal, state, and local government employers. While the statute applies to employees or personnel in “military departments,” it does not apply to uniformed members of the military. Courts have concluded that the term “military departments” can be understood to include only civilian employees of the Army, Navy, and Air Force and not enlisted personnel. They have asserted that, had Congress intended for Title VII to apply to service members, it would have used the term “armed forces,” which appears in Title X.<sup>72</sup>
55. In order to promote full equality for uniformed personnel, Congress should amend § 717(a) of Title VII so that it applies to all military members and not just civilian defense employees.

**iii. Removing sexual harassment claims from the commander’s discretion**

56. The Armed Forces 2002 Sexual Harassment Survey reports that a mere 30% of women who had experienced sexual harassment in the twelve months prior to the survey reported the experience.<sup>73</sup> This was down from 38% in the 1995 survey. The reasons the other 70% of female service members most frequently indicated for not reporting harassment included: “Was not important enough to report”

<sup>70</sup> *Id.* at 871.

<sup>71</sup> *Johnson v. United States*, 481 U.S. 681, 700 (1987).

<sup>72</sup> See, e.g., *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1978); *Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981); *Gonzalez v. Dep’t of the Army*, 718 F.2d 926 (9th Cir. 1983); *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987); *Spain v. Ball*, 928 F.2d 61 (2d Cir. 1991); *Randall v. United States*, 95 F.3d 339 (4th Cir. 1996); *Hodge v. Dalton*, 107 F.3d 705 (9th Cir. 1997).

<sup>73</sup> Rachel N. Lipari & Anita R. Lancaster, *Armed Forces 2002 Sexual Harassment Survey*, DMDC Report No. 2003-026, at 30 (Nov. 2003), available at <http://www.defense.gov/news/Feb2004/d20040227shs1.pdf>.

(67%); “You took care of the problem yourself” (65%); “You felt uncomfortable making a report” (40%); “You did not think anything would be done” (33%); “You thought you would be labeled a troublemaker” (32%).<sup>74</sup>

57. In light of such distrust, the company level commander should be divested of authority in sexual harassment cases and replaced with the GCMCA. Such a proposal would require the amendment of the Rule for Court-Martial 306, which currently provides: “Each commander has discretion to dispose of offenses by members of that command. Ordinarily, the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense.”<sup>75</sup>
58. Rather than filing a formal complaint with her chain of command within sixty days of the alleged incident, a complainant should be able to file the complaint with the GCMCA. The general’s staff would be responsible for appointing an Investigating Officer who would present a report to the office of the Staff Judge Advocate, who would then submit it, along with his recommendation, to the GCMCA. Under such a system, a general officer, rather than a company commander, would determine whether a claim was legitimate and, if so, what punishment to mete out. As a result, the adjudicator would not have as strong a vested interest in a case’s outcome.

**iv. Amend 38 C.F.R. § 3.304(f)(3) to extend a presumption of service-connection to MST claimants**

59. Instead of requiring victims of in-service assault to submit the corroborating evidence described above, the VA should extend to these claimants the same evidentiary relief it has afforded to veterans who experienced trauma due to deployment-related stressors. In both cases, the agency should accept the veteran’s lay testimony alone as proof of the claimed stressor, provided that a VA psychiatrist or psychologist confirms that the claim is adequate to support a diagnosis of PTSD.

## II. DOMESTIC VIOLENCE IN THE MILITARY

### A. Background information

60. Domestic violence (“DV”)<sup>76</sup> in the military “is a pervasive problem that transcends all ethnic, racial, gender, and socioeconomic boundaries.”<sup>77</sup> The United States Military has stated that “Domestic Violence will not be tolerated in the Department of Defense.”<sup>78</sup> However, the culture of the military—which rewards hypermasculinity and is command-driven—continues to serve as an impediment to the effective and consistent implementation of DV prevention policies and procedures.<sup>79</sup>
61. The DoD has defined “domestic abuse” to encompass “[1] domestic violence or [2] a pattern of behavior resulting in emotional/psychological abuse, economic control, and/or interference with personal liberty that is directed toward a person of the opposite sex who is (a) a current or former spouse, (b) a person with whom the abuser shares a child in common, or (c) a current or former intimate partner with whom the abuser shares or has shared a common domicile.”<sup>80</sup> The DoD further defines “domestic violence” as

<sup>74</sup> *Id.* at 33.

<sup>75</sup> Rules for Court-Martial, R.C.M. 306(a), “Initial Disposition.”

<sup>76</sup> Throughout this chapter, the terms domestic violence and domestic abuse are used interchangeably.

<sup>77</sup> DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, FIRST ANNUAL REPORT (2001), available at <http://www.ncdsv.org/images/InitialReport2001.pdf> [hereinafter 2001 Task Force Report].

<sup>78</sup> *Deputy Secretary of Defense Memorandum on Domestic Violence* (Nov. 19, 2001), reprinted in UNDERSTANDING THE MILITARY RESPONSE TO DOMESTIC VIOLENCE: TOOLS FOR CIVILIAN ADVOCATES 83-84 (Judith E. Beals ed., 2007), available at <http://www.bwjp.org/articles/article-list.aspx?id=30> [hereinafter 2007 BWJP Report].

<sup>79</sup> See generally Donna Winslow, *Gender and Military Sociology*, available at [http://www.alu.army.mil/ALU\\_CULTURE/docs/Winslow%20Docs/38.%20winslow.pdf](http://www.alu.army.mil/ALU_CULTURE/docs/Winslow%20Docs/38.%20winslow.pdf).

<sup>80</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-923, MILITARY PERSONNEL: SUSTAINED LEADERSHIP AND OVERSIGHT NEEDED TO IMPROVE DOD’S PREVENTION AND TREATMENT OF DOMESTIC ABUSE 3 (Sept. 2010), available at <http://www.gao.gov/new.items/d10923.pdf> [hereinafter 2010 GAO Report].

“any offense listed in the United States Code, the Uniform Code of Military Justice, or state law that involves the use, attempted use, or threatened use of force or violence when that offense is directed against a person of the opposite sex who meets the same criteria as defined for domestic abuse.”<sup>81</sup>

62. Several different governmental organizations have investigated the scope of DV within the military. The United States Congress established a Defense Task Force on Domestic Violence (“DV Task Force”) that issued a number of reports between 2001 and 2003 investigating DV in the military.<sup>82</sup>
63. Additionally, the United States Government Accountability Office (GAO) issued a 2006 report,<sup>83</sup> stating that the DoD has failed to implement a number of recommendations and has not established, among other things, “goals for objectives such as reducing the frequency and severity of domestic abuse incidents and reducing recidivism among alleged abusers.”<sup>84</sup>
64. To understand DV in the military, it is helpful to understand certain characteristics that are unique to the military. Each service member is responsible to his or her chain of command (commonly referred to as the “command”), which reflects how authority and power in the military is delegated from top to bottom. Generally, at the top of a service member's chain of command is the commanding officer (or commander) who is charged with, among other things, maintaining discipline, military readiness, and the safety of all service members and their families under the commander’s command.
65. All service members are subject to both civilian laws and to the Uniform Code of Military Justice (“UCMJ”).<sup>85</sup> To determine which set of laws applies (in some cases both will apply), it is essential to determine whether the incident occurred on a military base or “off-base.” If an incident occurs off-base, civilian law enforcement will respond and the service member will be subject to civilian law. However, in many cases, the service member’s command will inevitably learn of the incident because of relationships between the military and local civilian law enforcement.<sup>86</sup> The service member may also be subject to reprimand or punishment under the UCMJ since service members are at all times subject to the UCMJ.<sup>87</sup> If the incident occurs on-base, military police will respond and the service member will be subject to the UCMJ, and civilian law enforcement may not have any jurisdiction over such incident.<sup>88</sup>
66. Women—civilian spouses or active duty service members<sup>89</sup>—associated with the military are particularly vulnerable to DV because of a number of characteristics unique to military life:
  - a. Economic dependence is increased due to the relative job security of serving in the military and the availability of services for military service members and their families. Wives of active duty service members generally earn less and are less likely to be employed than their civilian counterparts;

<sup>81</sup> *Id.*

<sup>82</sup> See generally DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, SECOND ANNUAL REPORT (2002), available at

<http://www.ncdsv.org/images/Year2Report2002.pdf> [hereinafter 2002 Task Force Report]; DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, THIRD ANNUAL REPORT (2003), available at <http://www.ncdsv.org/images/Year3Report2003.pdf> [hereinafter 2003 Task Force Report].

<sup>83</sup> See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-540, MILITARY PERSONNEL: PROGRESS MADE IN IMPLEMENTING RECOMMENDATIONS TO REDUCE DOMESTIC VIOLENCE, BUT FURTHER MANAGEMENT ACTION NEEDED (2006), available at <http://www.gao.gov/new.items/d06540.pdf> [hereinafter 2006 GAO Report].

<sup>84</sup> 2010 GAO Report, *supra* note 80, at 12.

<sup>85</sup> Uniform Code of Military Justice, Article 2, available at <http://www.au.af.mil/au/awc/awcgate/ucmj.htm> [hereinafter UCMJ].

<sup>86</sup> Memorandum of Understanding-Hampton Roads (2006) [hereinafter Hampton MOU], reprinted in 2010 BWJP Report app. 13, available at [http://www.bwjp.org/files/bwjp/articles/Appendix%2013\\_Memorandum%20of%20Understanding-Hampton%20Roads.pdf](http://www.bwjp.org/files/bwjp/articles/Appendix%2013_Memorandum%20of%20Understanding-Hampton%20Roads.pdf) [hereinafter 2010 BWJP Report].

<sup>87</sup> See South Carolina Victim Assistance Academy, Military Justice,

[http://academicdepartments.musc.edu/scvaa/Academy%20Topics/textandppt\\_06/power%20points%20pdf/SCVAA%20CH%203.2.pdf](http://academicdepartments.musc.edu/scvaa/Academy%20Topics/textandppt_06/power%20points%20pdf/SCVAA%20CH%203.2.pdf); John F. Awtry & Jeffery Porter, *Civilian and Military Law Enforcement Action*, POLICE CHIEF MAGAZINE, Feb. 2004, available at [http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=227&issue\\_id=22004](http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=227&issue_id=22004).

<sup>88</sup> UNDER SEC’Y DEF., MEMORANDUM: ESTABLISHING PROTOCOLS FOR LAW ENFORCEMENT AND COMMAND RESPONSES TO DOMESTIC VIOLENCE INVOLVING MILITARY MEMBERS ON ACTIVE DUTY (Oct. 22, 2004), reprinted in 2007 BWJP Report, *supra* note 78 [hereinafter DoD PROTOCOLS]; see also 2001 Task Force Report, *supra* note 77, at 37. This Protocol follows the recommendation of the Task Force. See 2003 Task Force Report, *supra* note 82.

<sup>89</sup> More and more women are joining our nation’s armed services. Since that trend began over a decade ago, an increasing number of active duty women are victims of domestic violence. See 2001 Task Force Report, *supra* note 77.

- b. Frequent family separation and reunification may lead to issues such as feelings of distrust, uncertainty, and extra stress;
  - c. Military service members' accountability for their families' actions may be used as a rationale for abusive power and control tactics;
  - d. Easier access to weapons for service members has been shown to be a significant factor in DV homicides;
  - e. The risk of retaliation, job loss, and shame both for the service member victim and batterer for reported abuse are higher because of requirements of mandatory reporting to the service member's command. Victims may be deterred from reporting incidents because of this lack of confidentiality and the assumption that the commander must know of all inappropriate acts committed by service members and/or their families; and
  - f. A high percentage of military personnel have prior histories of family violence, and the military population is concentrated in the ages of high risk for interpersonal violence (ages twenty to forty).<sup>90</sup> Further, the military has given a number of waivers to individuals previously convicted of DV related charges, allowing those individuals to join the armed forces.<sup>91</sup>
67. In 2001, the DoD issued a strongly worded military-wide memorandum declaring that DV would not be tolerated by the DoD, branding DV as an offense against the institutional values of the U.S. military, and reminding commanders at every level of their prevention, protection, and accountability duties in this area.<sup>92</sup>
68. In 2004, the DoD issued memoranda requiring specialized DV training on specified topics for commanding officers and senior personnel,<sup>93</sup> health care providers,<sup>94</sup> and chaplains.<sup>95</sup> The various branches of the military (the "Services") responded to these requirements by providing a variety of training options.<sup>96</sup> However, in reviewing these training efforts in 2006, the GAO noted that additional efforts were needed.<sup>97</sup> The DoD failed to track which chaplains have completed the new specialized training programs and to collect their feedback, and without this data the DoD cannot determine the extent to which chaplains are actually being provided with the necessary training to assist DV victims.<sup>98</sup> Additionally, there is continued confusion among chaplains as to their confidentiality duties in the DV context.<sup>99</sup>
69. Although the DoD has implemented various programs and has made a commitment to address DV, these efforts have not always succeeded in keeping victims safe and holding batterers accountable.<sup>100</sup>

## B. Prevalence

70. It is difficult to determine how many DV cases involving service members, either as batterers or victims, actually occur each year.<sup>101</sup> DoD has required the Services to maintain and report annually all

<sup>90</sup> 2007 BWJP Report, *supra* note 78, at 13.

<sup>91</sup> 2001 Task Force Report, *supra* note 77, at 53.

<sup>92</sup> 2007 BWJP Report, *supra* note 78, at 83-84.

<sup>93</sup> UNDER SECRETARY OF DEFENSE MEMORANDUM: DOMESTIC ABUSE RESPONSE AND INTERVENTION TRAINING FOR COMMANDING OFFICERS AND SENIOR ENLISTED PERSONNEL (Feb. 3, 2004), *reprinted in* 2007 BWJP Report, *supra* note 78, at 117-22.

<sup>94</sup> *Id.* at 123-27.

<sup>95</sup> UNDER SECRETARY OF DEFENSE MEMORANDUM: DOMESTIC ABUSE TRAINING FOR CHAPLAINS (Jan. 29, 2004), *reprinted in* 2007 BWJP Report, *supra* note 78, at 112-16.

<sup>96</sup> 2006 GAO Report, *supra* note 83, at 6.

<sup>97</sup> *Id.* at 20.

<sup>98</sup> *Id.* at 23.

<sup>99</sup> *Id.* at 23-24.

<sup>100</sup> See 2007 BWJP Report, *supra* note 78, at 19; see also Lizette Alvarez, *When Strains on Military Families Turn Deadly*, N.Y. TIMES, Feb. 15, 2008 (Several months after Sgt. William Edwards and his wife, Sgt. Erin Edwards, returned to a Texas Army base from separate missions in Iraq, he assaulted her mercilessly. He struck her, choked her, dragged her over a fence and slammed her into the sidewalk.); CBS *Evening News: The Hidden Casualties of War* (CBS television broadcast Jan. 28, 2009), available at [http://www.cbsnews.com/8301-500803\\_162-4760522-500803.html](http://www.cbsnews.com/8301-500803_162-4760522-500803.html) (interviewing military wives who have suffered domestic violence).

<sup>101</sup> The United States military is the largest employer in the United States, employing approximately 1.4 million active duty soldiers, sailors, marines, and airmen. Approximately 85% of active duty military personnel are men. It is estimated that there are approximately

information received on each DV incident reported to a) law enforcement, b) the Family Assistance Program, and c) a commander.<sup>102</sup> The reported information must include the number of incidents with sufficient evidence to support disciplinary action and a description of the allegations and discipline ordered in those cases.<sup>103</sup> However, these reporting mechanisms serve different purposes and have different definitions of DV, so these reports do not necessarily give a complete representation of DV incidents throughout the armed forces.<sup>104</sup>

71. In 2009, the military recorded 18,208 reported incidents of DV. Of these incidents 8,223, or 45%, were “substantiated.”<sup>105</sup> (Reported incidents of DV are only considered substantiated after being reviewed by the Case Review Committee as further described in section II.C.ii below.) Sixty-two percent of the abusers in reported cases were active duty service members. Forty-seven percent of the reported DV victims are active duty service members.<sup>106</sup>
72. Drugs and alcohol also play an important role in reported incidents of DV. Twenty-nine percent of the substantiated cases in 2008 reported the use of some drugs or alcohol by the abuser, and in 18% of the cases the victim had been using drugs or alcohol.<sup>107</sup>
73. Between 1995 and 2001, over 200 service members in the military suffered DV-related homicides, including 54 in the Navy and Marine Corps, 131 in the Army, and 32 in the Air Force.<sup>108</sup>
74. Between reporting years 2000 and 2008, both the number of reported incidents and the number of substantiated incidents declined steadily. Specifically, since 2000 (until 2008), the number of substantiated incidents of domestic violence fell by 38.1%.<sup>109</sup> However, in 2009, there was a sudden spike in both the number of reported incidents and the number of incidents found to be substantiated.<sup>110</sup> Specifically, the number of substantiated incidents of domestic violence has increased 10.5% from 2007.<sup>111</sup>

### C. Law and policy

#### i. Family Advocacy Program

75. DoD directives provide for a victim’s right to be reasonably protected from the accused offender and to be treated with fairness and respect by the military law enforcement and criminal justice process.<sup>112</sup> Each of the Services has developed a Family Advocacy Program (“FAP”). Any domestic abuse incident that is reported to a military superior will be referred to FAP for a variety of services. Victims can also directly access FAP services on their own.<sup>113</sup>

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1.9 million family members of active duty service members. Over one-third of the 1.4 million active duty service members are married with children or are a single parent. Over 50% of military families live off-base in a civilian setting. See 2007 BWJP Report *supra* note 77, at 4, 12-13.

<sup>102</sup> DEP’T OF DEF. MANUAL 7730.47-M-V1: DEFENSE INCIDENT-BASED REPORTING SYSTEM (DIBRS): DATA SEGMENTS AND ELEMENTS, at 11, 18 (Dec. 7, 2010) [hereinafter DIBRS].

<sup>103</sup> *Id.*

<sup>104</sup> 2010 GAO Report, *supra* note 80, at 38.

<sup>105</sup> “Substantiated” means that a review committee determined that the incident likely happened and likely did involve domestic abuse. Men constitute 67% of the reported abusers and women the remaining 33%. *Id.* at 35.

<sup>106</sup> *Id.* at 18-19.

<sup>107</sup> *Id.* at 19.

<sup>108</sup> Virginia Sexual & Domestic Violence Action Alliance, *At a Glance: Military Resource Handbook for Virginia’s Sexual and Domestic Violence Centers* (2008), reprinted in 2010 BWJP Report, *supra* note 86 [hereinafter *Handbook*].

<sup>109</sup> Frequently Asked Questions about the Family Advocacy Program FY09 Domestic Abuse Data, [http://www.ncdsv.org/images/DOD\\_FAQ\\_FAP\\_DomesticAbuseData\\_FY09.pdf](http://www.ncdsv.org/images/DOD_FAQ_FAP_DomesticAbuseData_FY09.pdf) [hereinafter FAQ].

<sup>110</sup> 2010 GAO Report, *supra* note 80, at 35.

<sup>111</sup> *Id.*

<sup>112</sup> DEP’T OF DEF., DIRECTIVE 1030.1: VICTIM AND WITNESS ASSISTANCE (Apr. 13, 2004), available at <http://www.dtic.mil/whs/directives/corres/pdf/103001p.pdf>.

<sup>113</sup> See *My Army Benefits*,

[http://myarmybenefits.us.army.mil/Home/Benefit\\_Library/Federal\\_Benefits\\_Page/Family\\_Advocacy\\_Programs\\_\(FAP\).html?serv=147](http://myarmybenefits.us.army.mil/Home/Benefit_Library/Federal_Benefits_Page/Family_Advocacy_Programs_(FAP).html?serv=147) (Service members and their families may access FAP services.).

76. Though they may differ in name, all active military bases have a Family Support Center staffed by human services professionals and volunteers that offer free services to families suffering domestic abuse.<sup>114</sup> In addition, the DoD established the Domestic Violence Victim Advocate Program to provide a protocol that ensures advocacy services, such as immediate and ongoing informational support, safety planning, and medical and counseling attention, are available at all times.<sup>115</sup>
77. FAP provides services to victims that include safety planning, accessing medical or counseling services, and assisting a victim in obtaining a protective order if necessary.<sup>116</sup> For example, the U.S. Army FAP is “dedicated to the prevention, education, prompt reporting, investigation, intervention and treatment of spouse and child abuse. The program provides a variety of services to soldiers and families to enhance their relationship skills and improve their quality of life. This mission is accomplished through a variety of groups, seminars, workshops, and counseling and intervention services.”<sup>117</sup>
78. Because of routine relocations during the career of a service member, there may be gaps in DV-related services or treatment along with increased vulnerability for a victim. Reports of abuse at one location may not be forwarded to the family services agencies at the service member’s new location.<sup>118</sup>
79. FAP is notified of all reported incidents of domestic abuse, whether the abuse is reported directly to FAP or to the command.<sup>119</sup> A domestic abuse incident reported to FAP will be referred to a Case Review Committee (“CRC”) to determine whether the abuse is substantiated.

**ii. Case Review Committee**

80. The CRC is typically comprised of representatives from the military’s medical, legal, and law enforcement services, and the alleged offender’s command.
81. For each reported incident, the CRC will receive and review the results of a medical evaluation, law enforcement’s investigation, and the mental health and social assessments of the victim and alleged abuser.<sup>120</sup> The CRC will determine by a majority vote whether the allegation of abuse is unsubstantiated, suspected, or substantiated.<sup>121</sup> The alleged offender’s command has a vote, whereas victim’s advocates do not.<sup>122</sup>
82. The incident will be classified as “unsubstantiated” if the CRC determines that the information provided is insufficient to support the claim of abuse and that the family needs no family advocacy services.<sup>123</sup> The incident will be classified as “suspected” if the CRC determines that more information is needed in order for it to make a classification and an investigation will commence, which shall not exceed twelve weeks.<sup>124</sup>

<sup>114</sup> *Handbook*, *supra* note 108; see also DEP’T OF DEF., INSTRUCTION 6400.06: DOMESTIC ABUSE INVOLVING DOD MILITARY AND CERTAIN AFFILIATED PERSONNEL § 6.4.1.2, 6.4.1.3 (Aug. 21, 2007), available at <http://www.dtic.mil/whs/directives/corres/pdf/640006p.pdf> [hereinafter DOD INSTRUCTION 6400.06].

<sup>115</sup> UNDERSECRETARY OF DEFENSE, MEMORANDUM: DOMESTIC ABUSE VICTIM ADVOCATE PROGRAM (Feb. 17, 2005); see 2010 BWJP Report, *supra* note 86. The establishment of VAP was recommended by Task Force in their Third Report. See 2003 Task Force Report, *supra* note 82, at 25-30.

<sup>116</sup> DEP’T OF DEF., INSTRUCTION 1030.2: VICTIM AND WITNESS ASSISTANCE PROCEDURES (June 4, 2004).

<sup>117</sup> Family Advocacy Program, ARMY ONESOURCE, <https://www.myarmyonesource.com/familyprogramsandservices/familyprograms/familyadvocacyprogram/default.aspx>.

<sup>118</sup> DOD INSTRUCTION 6400.06, *supra* note 114, § 6.1.1.19.

<sup>119</sup> See Military Domestic Problems, Part IV – Family Violence, <http://usmilitary.about.com/od/divdomviolence/l/aadomviol1.htm>.

<sup>120</sup> *Frequently Asked Questions about the Family Advocacy Program Data Collection System and Central Registry*, NAT’L CTR. ON DOMESTIC & SEXUAL VIOLENCE, <http://www.ncdsv.org/images/FAQFAPDataCollectioncentralregistry.pdf>.

<sup>121</sup> DEP’T OF DEF., DIRECTIVE NO. 6400.1: FAMILY ADVOCACY PROGRAM § E2.1.2 (Aug. 23, 2004), available at <http://www.dtic.mil/whs/directives/corres/pdf/640001p.pdf> [hereinafter DOD DIRECTIVE 6400.1].

<sup>122</sup> 2003 Task Force Report, *supra* note 82, at 113-15.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

83. The incident will be classified as “substantiated” if the CRC determines that a) the abuse has occurred, b) it meets DoD’s definitions of domestic abuse and domestic violence, and c) that FAP’s services should be provided to the victim and his/her family.<sup>125</sup> If the abuse is substantiated, the CRC will also determine, by a majority vote, the severity of the abuse.<sup>126</sup>
84. If the incident is substantiated, the CRC will make recommendations to the offender’s commanding officer for counseling or treatment of the offender. The commanding officer ultimately has total discretion to accept or alter CRC’s recommendations for treatment.<sup>127</sup> The victim, alleged abuser, and the command each have the right to request that the CRC reconsider its decision, but the CRC will only reconsider its decision if new information is available or if it can be shown that the CRC failed to follow its prescribed procedures.<sup>128</sup>
85. The CRC’s judgment is a clinical decision, not a legal one, so if the CRC classifies an incident as substantiated that does not necessarily mean that the reported abuse is a crime under the UCMJ, federal, or state law.<sup>129</sup> Additionally, if the reported incident is proven to be untrue in a legal proceeding, the incident will be reclassified as “unsubstantiated” under the procedures of each of the Services.<sup>130</sup>
86. In many Services, the CRC will determine the “severity of abuse” level according to definitions that differentiate between “severe,” “moderate,” and “mild” physical abuse.<sup>131</sup> The acts that qualify as severe, moderate or mild differ in practice across the Services and are inconsistent with current best practices in civilian communities. For example, to be categorized as “severe physical abuse” a victim must sustain major physical injury requiring inpatient medical treatment or causing temporary or permanent disability or disfigurement. Strangulation in the civilian community is considered very serious, but in the DoD, it might be defined as mild or moderate abuse.<sup>132</sup> The DV Task Force reported that the DoD’s current policy of using “severity of abuse” standards minimizes victim’s experiences and fails to capture critical information about the threat of future harm.<sup>133</sup>
87. To determine whether to accept the CRC’s recommendations and to determine whether to discipline the alleged abuser, the command independently investigates DV incidents, separate from the FAP and CRC processes. Victims and their advocates need to inquire about and stay abreast of both parallel processes to have a full picture of the military response.<sup>134</sup>
88. The collateral effects of CRC determinations vary among the Services. In the Marine Corps, if the CRC substantiated an instance of DV committed by a service member, the service member’s supervisor is only required to mark the service member’s fitness report (which is similar to a performance evaluation) as “adverse” if the CRC determined that the severity of the abuse was level III or higher.<sup>135</sup> A Marine commander must initiate processing for an administrative separation after the second CRC substantiation of spouse or child abuse at level III or higher when services for the offender have already been attempted or refused.<sup>136</sup>

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 113–15, 133–34.

<sup>127</sup> Michael S. Archer, *Domestic Violence: Military Response and Regulations* (Feb. 2010), [http://www.ncbar.gov/lamp/2010%20CLE/Domestic\\_Violence\\_Military\\_Response\\_and\\_Regulations%201.pdf](http://www.ncbar.gov/lamp/2010%20CLE/Domestic_Violence_Military_Response_and_Regulations%201.pdf).

<sup>128</sup> *Id.* at 8.

<sup>129</sup> 2003 Task Force Report, *supra* note 82, at 134.

<sup>130</sup> *Id.*

<sup>131</sup> DEP’T OF DEF., DIRECTIVE NO. 6400.1-M-1: MANUAL FOR CHILD MALTREATMENT AND DOMESTIC ABUSE INCIDENT REPORTING SYSTEM § C2.3.7 (2005), available at <http://www.dtic.mil/whs/directives/corres/pdf/640001m1.pdf>; see also 2003 Task Force Report, *supra* note 82, at 135.

<sup>132</sup> See 2003 Task Force Report, *supra* note 82, at 135.

<sup>133</sup> *Id.* at 134.

<sup>134</sup> Judith E. Beals, *Understanding the Military Response to Domestic Violence*, BWJP (Patricia Erwin ed., 2d ed. 2007) available at [http://www.bwjp.org/files/bwjp/articles/BWJP\\_Military\\_Part1.pdf](http://www.bwjp.org/files/bwjp/articles/BWJP_Military_Part1.pdf).

<sup>135</sup> Archer, *supra* note 127, at 9-10.

<sup>136</sup> *Id.*

### iii. *Housing issues*

89. If the incident occurs on-base, military police will respond. Military police are charged with stopping any violence, separating the couple involved, and protecting a victim from further harm. In all cases, the victim will be informed about FAP, local shelters, and other victim services. The military police will also arrange for or provide transportation to a victim shelter, medical facility, or other agency.<sup>137</sup>
90. Under DoD policy, the commander is responsible for ensuring that safe housing is available for the victim, and the DoD's preference is to remove the alleged abuser from the home when the parties need to be separated to safeguard a victim.<sup>138</sup> If a service member no longer resides at the on-base residence, either because he or she was removed or because the service member vacated the premises as a result of a divorce or separation, the family may be forced to move off-base into civilian housing, which will likely place an economic burden on the family, as civilians are not eligible for military housing unless a service member resides at the location.<sup>139</sup>
91. If the service member is already living on-base, he or she may relocate to off-base housing if permitted (the command would need to approve this move). If the service member is living off-base when the incident occurs, he or she may request to be relocated to on-base housing; however, this may be difficult given the shortage of military housing. Additionally, a service member may request to reside in military housing designated for unmarried service members. However, this last option is not available to those service members who wish to reside with their children.<sup>140</sup>
92. The DoD attempts to encourage reporting of abuse by minimizing the adverse effects and consequences on an abusive service member's civilian spouse and family. Upon separation or divorce, generally, civilian family members must vacate military housing within thirty days.<sup>141</sup> In some cases, a spouse may request "relocation [assistance] for personal safety" if a number of requirements are met, including (1) a finding that the spouse's safety is identified as "at risk," (2) the relocation is advisable and in the best interests of the spouse and the U.S. government, and (3) the relocation is approved by a service-designated official.<sup>142</sup> To encourage victims to report, federal law authorizes the military to pay transitional financial compensation and medical benefits for dependents if a service member is discharged or separated because of a DV offense. However, a civilian spouse will not be authorized for military-provided transport of household goods and personal vehicles unless there is an order from a civilian court or a written agreement from the service member establishing the civilian spouse's ownership rights. The requirement for abuser-approval or court-ordered property rights poses an additional barrier to victims.<sup>143</sup>

### iv. *Reporting*

93. Recognizing that victims may be reluctant to report abuse for fear of potential adverse consequences to their safety, the service member's career, or the family's earning capacity, the DoD offers two different reporting options: restricted and unrestricted reporting.<sup>144</sup>

<sup>137</sup> DoD PROTOCOLS, *supra* note 88, at 46, 163-70; *see also* 2001 Task Force Report, *supra* note 77, at 37. This Protocol follows the recommendation of the Task Force in their Third Report. *See* 2003 Task Force Report, *supra* note 82, at 73-92.

<sup>138</sup> DoD Instruction 6400.06, *supra* note 114, §§ 6.1.1.9, 6.1.1.9.1.

<sup>139</sup> *See generally* DoD PROTOCOLS, *supra* note 88; *see also* 2001 Task Force Report, *supra* note 77, at 37. This Protocol follows the recommendation of the Task Force in their Third Report. *See* 2003 Task Force Report, *supra* note 82, at 73-92.

<sup>140</sup> 2007 BWJP Report, *supra* note 78, at 37.

<sup>141</sup> *Id.* at 46.

<sup>142</sup> DEP'T OF DEF., TRAVEL AND TRANSPORTATION ALLOWANCE COMMITTEE, MEMORANDUM: UNIFORMED TRAVEL DETERMINATION – TERMINATION TRAVEL AND TRANSPORTATION FOR DEPENDENTS RELOCATING FOR REASONS OF PERSONAL SAFETY (FY04 DAA), *reprinted in* 2007 BWJP Report, *supra* note 78, at 128-31.

<sup>143</sup> 2007 BWJP Report, *supra* note 78, at 46-47; *see generally* Archer, *supra* note 127; UNDER SEC'Y OF DEF., MEMORANDUM: DURATION OF PAYMENT FOR TRANSITIONAL COMPENSATION FOR ABUSED DEPENDENTS (June 14, 2004), *reprinted in* 2007 BWJP Report, *supra* note 78, at 160.

<sup>144</sup> Beals, *supra* note 134, at 23 (citing Memorandum from the Deputy Secretary of Defense: Restricted Reporting Policy for Incidents of Domestic Abuse (Jan. 22, 2006)). The implementation of a nondisclosure option was an effective and admirable response-in-action from the DoD to recommendations and working groups of the Defense Task Force between 2001 and 2003.

94. A “restricted reporting” option is available to a victim who does not want an official investigation and is permitted if the victim is a) a military service member or b) a spouse, family member, or intimate partner of a service member. Under the restricted reporting option, a victim can confidentially disclose details of her abuse to a victim advocate or health provider who will be required to keep the abuse confidential,<sup>145</sup> and the victim can receive services that will not trigger an official investigation. In order for the report to remain restricted, the initial report must be made to a victim advocate or health care provider. If the initial report is made to any other person, that person may be required to report the incident up the military chain of command, which could initiate an investigation. Significantly, if a report is made to civilian police and the abuser is identified, the abuser’s command will be made aware of the civilian investigation and will likely initiate its own command investigation. Further, if a restricted report becomes known to FAP or the abuser’s supervisors from a source other than the restricted report, it will be fully investigated as if it were an unrestricted report.<sup>146</sup>
95. An “unrestricted reporting” option is also available and can be initiated by a) any victim, civilian or service member, disclosing the abuse to the abuser’s supervisor, or b) the victim telling a health care provider or advocate that she would like the report to initiate an investigation.<sup>147</sup> An unrestricted report made by anyone to any military personnel initiates a series of mandated cross reports by different divisions in the military. The cross-reporting is mutually mandated, and FAP must investigate unrestricted reports. However the alleged abuser’s command has discretion as to whether to conduct its own independent investigation into the allegations.<sup>148</sup>
96. If an incident is reported through the unrestricted procedure—whether to a military superior who is required to report the incident to FAP or directly to FAP through the initial report—FAP advocates will obtain statements and available records bearing on the allegations of abuse and present the information to the CRC (as described in section II.C.i above).

**v. Offender accountability**

97. In general, military justice may be pursued through either a formal court-martial judicial procedure or an informal Article 15 non-judicial procedure.
98. The offender’s superiors have enormous discretion to adjudicate and punish minor offenses without resorting to the formal court-martial process,<sup>149</sup> but the commander must consider the nature of the offense and the circumstances surrounding its commission when determining whether an offense is minor in nature. Article 15 proceedings are initiated by commanding officers for minor offenses of those in their command. Generally, the term “minor offense” does not include misconduct that, if tried by general court-martial, could be punished by a dishonorable discharge from the military or confinement for more than one year, but the final determination as to whether an offense is minor is within the sound discretion of the commanding officer. In an Article 15 proceeding, the accused has a hearing and punishment may be imposed or the case may be referred to court-martial. An Article 15 procedure is not a trial (as the term “non-judicial” implies); it is not a conviction and if no punishment is imposed, it is not an acquittal.<sup>150</sup>
99. “Commanders can order service members into treatment programs, administer non-judicial punishment, administratively separate the abuser from the service, or prosecute the abuser under the Uniform Code of

<sup>145</sup> The confidentiality assured in the restricted reporting option is limited in instances where disclosure is required by law (i.e., mandatory reporting of child abuse) or by a court order. If it is necessary for medical or other treatment care, the report may be shared with the direct supervisor of the person who initially received the report. See *Handbook*, *supra* note 108, at 9.

<sup>146</sup> DEPUTY SEC’Y OF DEF., MEMORANDUM: RESTRICTED REPORTING POLICY FOR INCIDENTS OF DOMESTIC ABUSE (Jan. 22, 2006), available at [http://www.usfk.mil/usfk/Uploads/SAPR/SAPRMod23\\_DoDDomesticAbusePolicy.pdf?AspxAutoDetectCookieSupport=1](http://www.usfk.mil/usfk/Uploads/SAPR/SAPRMod23_DoDDomesticAbusePolicy.pdf?AspxAutoDetectCookieSupport=1) [hereinafter RESTRICTED REPORTING MEMO].

<sup>147</sup> *Id.*

<sup>148</sup> Beals, *supra* note 134, at 15.

<sup>149</sup> Archer, *supra* note 127, at 3.

<sup>150</sup> Rod Powers, Nonjudicial Punishment (Article 15), <http://usmilitary.about.com/od/justicelawlegislation/a/article15.htm>.

Military Justice [in a court-martial].”<sup>151</sup> The majority of domestic abuse incidents are handled by administrative discipline, with only five to six percent of incidents categorized as severe enough to warrant prosecution by court-martial.<sup>152</sup>

100. Court-martial proceedings are similar to a civilian trial and involve arresting the alleged abuser, providing formal charges, pretrial hearings, a trial, sentencing, and appeal rights.<sup>153</sup> In a court-martial for domestic abuse, the prosecuting attorney will be chosen from the military justice counsel (Judge Advocate General, or “JAG”), and the Command will serve as convening authority, select the jury, and conduct the trial with witnesses.<sup>154</sup>
101. In practice, the base commander has enormous influence on how seriously DV will be treated on his or her base, and individual commanders have great discretion in how much pressure will be placed on an offender under their command. DV advocates assert that too often decisions are made, consciously or unconsciously, based on the military’s financial investment in the service member, or the job description or rank of the offender. Critics charge that the military is far more likely to administratively separate or discharge someone in basic training than someone who committed the same DV offense who is an experienced service member with an otherwise adequate military record because the military has invested considerable resources and training in that service member. Informal disciplinary action by a commander in response to reported abuse by a service member can vary widely.<sup>155</sup>
102. Whether military justice is pursued under court-martial or an Article 15 proceeding has an impact on civilian laws as well. The federal Domestic Violence Misdemeanor Amendment to the Gun Control Act (commonly referred to as the Lautenberg Amendment) prohibits anyone convicted of a DV crime from possessing a weapon.<sup>156</sup> The military interprets “conviction of offense” to include conviction for a DV crime by court-martial, but it does not include non-judicial punishment under Article 15 or incidents substantiated by FAP.<sup>157</sup> Because military policy and practice encourages informal discipline under Article 15 procedures, and Article 15 actions are not actionable under the Lautenberg Amendment, many victims of military offenders may never receive the Amendment’s intended protections.

#### *vi. Protection orders*

103. Victims of abuse by military service members have two options for protective orders—a military protective order (“MPO”) or a civilian protective order (“CPO”).
104. An MPO can be a quick and significant remedy for a victim whose abuser is a military service member. However, because the MPO is dependent entirely on the discretion of the service member’s commander, the remedy is not certain, and a victim may be more reluctant to report abuse to the offender’s commander. Without a hearing and upon receiving facts that, in the commander’s opinion, warrant it, a commander may issue an MPO directing a service member to stay away from a particular person and/or a particular place.<sup>158</sup>
105. In addition to an MPO or in the alternative, any service member or civilian may seek a CPO from the local state court. Although the procedures for obtaining a CPO are more rigid than for an MPO,<sup>159</sup> the CPO is enforceable by any civilian law enforcement officer. What is more, commanders and military base law

<sup>151</sup> See Christine Hansen, *A Considerable Service: An Advocate’s Introduction to Domestic Violence and the Military*, 6 DOMESTIC VIOLENCE REPORT 4 (Apr./May 2001).

<sup>152</sup> *Id.*

<sup>153</sup> See UCMJ, *supra* note 85, at art. 16-58.

<sup>154</sup> See Hansen, *supra* note 151.

<sup>155</sup> See *id.*

<sup>156</sup> 18 U.S.C. § 922(g)(9).

<sup>157</sup> DoD INSTRUCTION 6400.06, *supra* note 114, at §§ 6.1.4.3, 6.1.4.3.2.

<sup>158</sup> Archer, *supra* note 127, at 3.

<sup>159</sup> CPOs generally may be of two varieties: a “No Contact Order” prohibits the defendant from contacting the petitioner in any way, including through third parties; a “Permissive Contact Order” prohibits the defendant from abusing, threatening, stalking, or harassing the victim but allows non-abusive contact.

enforcement are required to “take all reasonable measures necessary to ensure that a CPO is given full force and effect on all DoD bases within the jurisdiction of the court that issued such order.”<sup>160</sup>

**vii. Civilian action**

106. The civilian and military responses to domestic violence historically have been separate parallel systems at best, and in direct opposition at worst. Collaboration between military and civilian authorities and services responsible for responding to DV incidents is critical to provide a comprehensive response for victims and offenders.<sup>161</sup> Military commanders at many bases have reached out to civilian agencies and developed programs for effective communication, reporting, and victim services.<sup>162</sup>
107. Designated jurisdiction for civilian law enforcement authorities on military bases varies widely. Some bases allow military and civilian police concurrent authority to investigate and prosecute offenses committed on the base. Other bases do not allow state or local authorities to investigate any offenses occurring on the base.<sup>163</sup> To address this issue, the DoD now requires that Memoranda of Understanding (“MOUs”) be negotiated between local military and civilian officials to establish specific operating procedures regarding DV.<sup>164</sup> MOUs often address law enforcement response, prosecution, protective orders, shelter, and information sharing.<sup>165</sup>
108. The military is required to enforce civilian protective orders.<sup>166</sup> However, if a victim does *not* have a CPO currently in place and is attacked on-base, the outcome will depend on the MOU in place. If the civilian police do not have jurisdictional authority to respond to a criminal report, the victim is dependent on the military law enforcement process for response and investigation.

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<sup>160</sup> DoD INSTRUCTION 6400.06, *supra* note 114.

<sup>161</sup> Beals, *supra* note 134, at 22.

<sup>162</sup> See, e.g., Jacksonville Demonstration Project, *Memorandum of Understanding* (2005), reprinted in 2010 BWJP Report, *supra* note 86; Fort Campbell Demonstration Project, *Memorandum of Understanding* (2005), reprinted in 2010 BWJP Report, *supra* note 86, at 12; Hampton MOU, *supra* note 86.

<sup>163</sup> Archer, *supra* note 127, at 4.

<sup>164</sup> UNDER SEC’Y OF DEF., MEMORANDUM: ESTABLISHING DOMESTIC VIOLENCE MEMORANDA OF UNDERSTANDING BETWEEN MILITARY AND LOCAL CIVILIAN OFFICIALS 100-11 (Jan. 29, 2004), available at [http://www.bwjp.org/files/bwjp/articles/Appendix%2007\\_Understanding%20the%20Military%20Response%20to%20Domestic%20Violence\\_Part2.pdf](http://www.bwjp.org/files/bwjp/articles/Appendix%2007_Understanding%20the%20Military%20Response%20to%20Domestic%20Violence_Part2.pdf).

<sup>165</sup> Beals, *supra* note 134, at 22.

<sup>166</sup> DoD INSTRUCTION 6400.06, *supra* note 114.



**W**omen in Detention  
in the United States

**Deborah LaBelle, Esq.**

**Robin Levi**  
*Justice Now*  
*with the support of*  
**Virginia Taylor**  
*U.C. Hastings School of Law (JD 2012)*

**Brenda V. Smith**  
*Professor and Acting Director of the Clinical Program*  
*Community and Economic Development Law Clinic*  
*Director, Project on Addressing Prison Rape*  
*American University, Washington College of Law*  
*with the support of*  
**Ashley Prather (JD 2012)**  
**Jaime M. Yarussi, M.S.**

**Danielle Lang (JD 2012)**  
**Caitlin Mitchell (JD 2012)**  
**Hope Metcalf**  
*Supervising Attorney*

*Allard K. Lowenstein International Human Rights Clinic at Yale Law School*

## I. INTRODUCTION

1. In 1998, the United Nations' Special Rapporteur on violence against women visited twelve prisons to study the issue of violence against women in detention in the United States. The result was a groundbreaking report that was also an important illustration of how the international human rights framework can be brought to bear domestically.<sup>1</sup> This chapter provides an overview of current conditions for women in prison, focusing on physical, sexual, and psychological violence and on major shifts in the legal and policy landscapes. Our chapter is based on extensive research into case law, academic publications, and qualitative and quantitative studies relating to incarceration in the United States. Throughout this process, we have been guided and informed by interviews with nearly twenty experts on women in prison in the United States, including women prisoners, attorneys, academics, legal practitioners, and activists.<sup>2</sup>
2. At its root, the problem of violence against women in detention is a problem of a culture of imprisonment of marginalized people in the United States. The United States incarcerates more people than any other country in the world, with 2.3 million people currently in the nation's prisons and jails—a 500% increase over the past thirty years.<sup>3</sup> Incarceration rates are strongly correlated with race, with African-American men imprisoned at a rate 6.5 times higher than white men.<sup>4</sup> In 2008, 38% of all sentenced prisoners were black and 20% were Hispanic,<sup>5</sup> though they represent only 12.4% and 15.8% of the total population, respectively.<sup>6</sup> One out of every nine black men between the ages of 20 and 34 is behind bars.<sup>7</sup> Racial and economic disparities also affect women, with nearly half of the women in prison in the United States being women of color and the majority of incarcerated women being single parents. Women have always been a small minority within the total United States prison population. Yet today, the number of women in prison is growing at a rate that far surpasses the rate of men.<sup>8</sup> This is due in part to the implementation of harsh drug and minimum sentencing laws, which result in prison sentences for non-violent and first-time offenders and effectively punish women for untreated drug addiction and mental health conditions. Over-incarceration creates prison environments in which violence and abuse are more likely to occur. At the same time, the legal and moral justifications for over-incarceration support attitudes towards prisoners that are punitive and dehumanizing, legitimizing inhumane conditions and making it more difficult for incarcerated women to seek redress. Throughout our interviews, advocates emphasized over-incarceration first and foremost, suggesting that violence against women in detention should be understood as a symptom of this larger problem.
3. Within prisons it has become increasingly difficult for people to assert their rights against inhumane conditions of confinement. The provisions of the United States Constitution that provide a degree of protection have been interpreted by American courts in ways that severely limit their reach. At the same time, the Prison Litigation Reform Act of 1996 (PLRA) has made it more difficult for prisoners to access the court system at all, requiring them to rely on draconian internal grievance procedures. Prisons are managed under a patchwork of state regulations and are increasingly privatized, resulting in considerable variety in prison conditions and access to remedies across the country. In addition, media

<sup>1</sup> Radhika Coomaraswamy, Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Report of the Mission to the United States of America on the Issue of Violence against Women in State and Federal Prisons*, U.N. Doc. E/CN.4/1999/68/Add. 2 (Jan. 4, 1999) [hereinafter SRVAW 1999 U.S. Report], available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/7560a6237c67bb118025674c004406e9?OpenDocument>.

<sup>2</sup> See *infra* Part III (list of interviewees).

<sup>3</sup> WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008 (2008) ("State and federal prisons and local jails had custody or physical guardianship over 2,304,115 inmates.").

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES (2009), available at [http://factfinder.census.gov/servlet/ADPTable?\\_bm=y&-bm=y&-qr\\_name=ACS\\_2009\\_1YR\\_G00\\_DP2&-ds\\_name=ACS\\_2009\\_1YR\\_G00\\_&-\\_caller=geoselect&-geo\\_id=01000US&-format=&-\\_lang=en&-geoid=01000US](http://factfinder.census.gov/servlet/ADPTable?_bm=y&-bm=y&-qr_name=ACS_2009_1YR_G00_DP2&-ds_name=ACS_2009_1YR_G00_&-_caller=geoselect&-geo_id=01000US&-format=&-_lang=en&-geoid=01000US).

<sup>7</sup> THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA (2008), available at [http://www.pewcenteronthestates.org/news\\_room\\_detail.aspx?id=35912](http://www.pewcenteronthestates.org/news_room_detail.aspx?id=35912) ("While one in 30 men between the ages of 20 and 34 is behind bars, for black males in that age group the figure is one in nine.").

<sup>8</sup> *Id.* ("Men still are roughly 10 times more likely to be in jail or prison, but the female population is burgeoning at a far brisker pace. For black women in their mid- to late-30s, the incarceration rate also has hit the 1-in-100 mark.").

bans, prohibitively expensive phone calls, and restrictions on mail and recording severely limit the ability of people inside prison to report human rights abuses to audiences on the outside.

4. Within this context of a lack of access to legal remedies, abuse in prison is prevalent. Prisoners in the United States may be vulnerable to physical and sexual abuse by correctional staff and other prisoners; housed in inhumane conditions where they are exposed to filthy conditions, excessive heat, cold, noise, and light, or a total lack of human contact; denied care for physical and mental health needs; and denied the possibility of intimate, interpersonal, and familial relationships. It has been widely recognized that imprisonment can have extremely destructive effects on individuals, families, and communities. In addition to suffering physical and psychological damage, those who are released are often ineligible for jobs, welfare and health benefits, and are denied the right to vote.
5. Women who suffer all those difficulties face particular challenges, due in part to their status as a minority in a correctional system created by and for the needs of men. Because there are fewer women's prisons overall, facilities are often located far from women's families and communities. At the same time, prisons fall short in areas in which women have needs that are different from their male counterparts. For example, women prisoners have gender-specific health concerns, and are particularly vulnerable to certain forms of abuse, such as sexual assault by correctional officers.
6. While many of the egregious abuses documented by the Special Rapporteur in 1999 continue to exist today, some important gains have been made. Most notably, the Prison Rape Elimination Act (PREA), passed in 2003, signaled Congress' willingness to take seriously the issue of sexual assault in prisons, and has led to positive changes in the form of increased reporting and proposed standards. There have been successful lawsuits in a number of states across the United States challenging inhumane conditions of confinement in women's prisons. As in 1999, while the prevailing attitude towards incarcerated people in the United States is punitive, there are efforts in some states to explore alternative, rehabilitative approaches.
7. This chapter seeks to provide the Special Rapporteur with an overview of violence against women in detention in the United States today. Part I reviews the legal framework for prisoners' rights in the United States. Part II summarizes three of the most pressing areas of human rights violations that affect women in prison: sexual abuse; access to physical, mental, and reproductive health care; and access to children, families, and other relationships. Part III focuses on five populations of incarcerated women who face particular challenges: women of color; migrant women; American Indian women; lesbian, gay, bisexual, transsexual, and queer ("LGBTQ") individuals; and juveniles. Part IV provides specific recommendations on how the United States can improve the situation of women in detention and recommends experts in the field with whom the Special Rapporteur may wish to visit or speak during her mission. Finally, in an appendix we provide case studies of five states, the District of Columbia, and the Federal Bureau of Prisons (FBP). We are grateful for the Special Rapporteur's attention to this urgent question of the treatment of women in detention in the United States and hope this chapter will be useful in that endeavor.

## II. LEGAL FRAMEWORK AND ACCESS TO REMEDIES

8. To understand the challenges facing incarcerated women in the United States, it is crucial first to examine the access that these women have to remedy and redress. Access to remedies has been recognized in most international humanitarian and human rights treaties, including the Universal Declaration of Human Rights,<sup>9</sup> the Convention on the Elimination of all Forms of Discrimination against Women, and the Declaration on the Elimination of Violence Against Women.<sup>10</sup> Without access to courts and fair, impartial

<sup>9</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948), art. 8 (Dec. 10, 1948) ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law").

<sup>10</sup> Rashida Manjoo, *Report of the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences*, ¶¶ 22-23, U.N. Doc. A/HRC/14/22 (Apr. 2010), available at <http://iansa-women.org/nde/446>.

judicial and administrative proceedings, a prisoner's rights cannot be protected. At the same time, lack of remedies creates a climate of impunity in which further violations are likely to occur.

9. In the United States, the substantive rights of prisoners under the Constitution have been significantly eroded over the past few decades. The PLRA, passed in 1996, poses significant procedural barriers to litigation. Prisoners are thus forced to rely on what are often inadequate internal prison grievance systems. The difficulties of pursuing litigation, combined with further barriers relating to evidence and credibility, mean that sexual abuse in prison is rarely prosecuted. The most substantial efforts at reform have been in attempts to amend the PLRA through legislation, and to combat unconstitutional conditions of confinement through oversight mechanisms such as the Special Litigation Section of the Civil Rights Division of the United States Department of Justice.

#### A. Constitutional framework

10. The Eighth Amendment to the United States Constitution bars the infliction of punishment that is "cruel or unusual."<sup>11</sup> The Supreme Court has held, however, that because the Eighth Amendment concerns "punishment" rather than "conditions," inhumane conditions of confinement can only constitute a violation under certain circumstances.<sup>12</sup> "Punishment" is the official sentence given at the time of conviction, while "conditions of confinement" is a broad term used to describe the qualitative elements of a person's experience while she is incarcerated, including food, medical care, safety from physical harm, and placement in solitary confinement or in an overcrowded cell. A petitioner must satisfy both objective and subjective requirements to prevail in an Eighth Amendment claim alleging unconstitutional conditions of confinement. First, she must show that the conditions are objectively "serious."<sup>13</sup> Second, she must show that the prison official in question had a "sufficiently culpable state of mind."<sup>14</sup>
11. The Supreme Court has found that when prison conditions fail to provide the "minimal civilized measure of life's necessities," they are "sufficiently serious" to meet the objective requirement of the Eighth Amendment test.<sup>15</sup> These necessities include the basic physical requirements of food, clothing, shelter, medical care, and personal safety.<sup>16</sup> In practice, however, courts have set an extremely high bar, emphasizing that the purpose of confinement is to punish and, thus, that uncomfortable and even harsh conditions are neither unusual nor cruel.<sup>17</sup> In addition, the Supreme Court has found that multiple forms of abuse and deprivation cannot cumulatively constitute cruel and unusual punishment.<sup>18</sup> Instead, each abuse must be evaluated individually on the basis of the test articulated above.<sup>19</sup>
12. Even if the conditions of confinement meet the objective threshold of being "sufficiently serious," a petitioner must also prove that the officials overseeing the incarceration were "deliberately" or "recklessly indifferent" before the conditions can be considered unconstitutional.<sup>20</sup> This standard leaves

<sup>11</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.")

<sup>12</sup> *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (holding that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety).

<sup>13</sup> *Id.* at 834; *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (holding that only those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation).

<sup>14</sup> *See Farmer*, 511 U.S. at 834; *see also Wilson*, 501 U.S. at 297.

<sup>15</sup> *Rhodes v. Chapman*, 452 U.S. 337 (1981) (finding that double ceiling did not constitute cruel and unusual punishment as it did not lead to deprivations of essential food, medical care, or sanitation).

<sup>16</sup> *Farmer*, 511 U.S. at 832.

<sup>17</sup> *See Hill v. Pugh*, 75 F. App'x 715, 721 (10th Cir. 2003) ("To the extent that [an inmate's] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."); *Magluta v. U.S. Fed. Bureau of Prisons*, 2009 U.S. Dist. LEXIS 49170, at \*20 (D. Colo. 2009) ("ADX is a prison, after all, and confinement is intended to punish inmates, not coddle them.")

<sup>18</sup> *See Wilson*, 501 U.S. at 296 (holding that "overcrowding, excessive noise...inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates" taken together do not constitute cruel and unusual punishment).

<sup>19</sup> *Id.* at 304 (holding that prison conditions do not constitute "...a seamless web for Eighth Amendment purposes. Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.")

<sup>20</sup> *Estelle v. Gamble*, 429 U.S. 97, 104-07 (1976) (rejecting inmate's claim that prison doctors inflicted cruel and unusual punishment by inadequately responding to the prisoner's medical needs since only the "unnecessary and wanton infliction of pain" implicates the Eighth

petitioners vulnerable to continued incarceration under conditions that are otherwise “cruel and unusual,” solely because they cannot prove that the prison officials knew of and disregarded those conditions. Moreover, because the standard is subjective, a court ruling that particular policies are barred by the Eighth Amendment in one prison, or in relation to one prisoner, will not guarantee that other petitioners can successfully bring a suit challenging the same policies carried out in another context.

13. Finally, even when conditions of confinement are found to be unconstitutional, courts may be reluctant to intervene based on a general practice of judicial deference to prison administrators.<sup>21</sup> In the area of First Amendment rights, for example, the Supreme Court has found that a regulation that impinges on a prisoner’s right of expression may be valid “if it is reasonably related to legitimate penological interests”<sup>22</sup>—a standard giving a tremendous amount of leeway to prison administrators and correctional officers.

## **B. Access to courts: the Prison Litigation Reform Act**

14. While prisoners are afforded some protections under the Eighth Amendment, the PLRA, enacted in 1996, prevents the claims of many prisoners from reaching the federal courts in the first place.<sup>23</sup> The legislative purpose of the PLRA was to keep frivolous lawsuits brought by prisoners out of federal court, and to shift the burden of adjudicating claims to the prisons’ internal grievance systems.<sup>24</sup> The breadth of the PLRA, however, combined with the fact that courts can apply the PLRA regardless of whether a prison’s grievance system provides an adequate or fair alternative, has the effect of limiting access to remedies. The provisions that have most significantly affected prisoner claims are the requirement of administrative exhaustion, the requirement that plaintiffs must have suffered physical harm in order to collect damages, the limitation on attorney’s fees, and the law’s application to juvenile prisoners. Additionally, the PLRA limits the scope of consent decrees and imposes a more restrictive time limit on these kinds of agreements.

### *i. Provisions of the PLRA that limit access to courts*

15. The PLRA mandates that “[n]o action shall be brought with respect to prison conditions...by a prisoner...until such administrative remedies as are available are exhausted.”<sup>25</sup> In *Woodford v. Ngo*, the Supreme Court interpreted this provision to require prisoners to take their claims through the entire applicable prison grievance process, complying with all technicalities, in order to gain access to the federal courts.<sup>26</sup> As a result, claims can be barred when prisoners misfile a complaint, report to the wrong authority, or make any other minor, technical error that results in a dismissal of their grievance.<sup>27</sup> Claims

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Amendment; to meet this standard, a prisoner must show, at a minimum, “deliberate indifference” to “serious” medical needs); *Farmer*, 511 U.S. at 839-40.

<sup>21</sup> *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (“Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”).

<sup>22</sup> *Turner v. Safley*, 482 U.S. 78, 89 (1987).

<sup>23</sup> 18 U.S.C. § 3626.

<sup>24</sup> *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (“Beyond doubt, Congress enacted §1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.”).

<sup>25</sup> 18 U.S.C. § 3626.

<sup>26</sup> *Woodford v. Ngo*, 548 U.S. 81, 85 (2006) (“Prisoners must now exhaust all ‘available’ remedies, not just those that meet federal standards. Indeed... a prisoner must now exhaust administrative remedies even where the relief sought—monetary damages—cannot be granted by the administrative process.”).

<sup>27</sup> HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES (2009) [hereinafter HUMAN RIGHTS WATCH (2009)] (documenting cases dismissed in whole or in part because the prisoner submitted a form to the “inmate appeals branch” rather than to the “appeals coordinator” (*Chatman v. Johnson*, 2007 WL 2023544 (E.D. Cal. 2007)); filed an “administrative appeal rather than a disciplinary appeal” (*Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001)); or wrote directly to the grievance body rather than filing a “service request” form (*McNeal v. Cabana*, 2006 WL 2794337, at \*1 (N.D. Miss. 2006))), available at <http://www.hrw.org/en/reports/2009/06/16/no-equal-justice-0>.

have been barred despite the fact that special circumstances, such as illiteracy, physical illness, and mental illness, would have made compliance with standard grievance procedures impossible.<sup>28</sup>

16. The exhaustion of administrative remedies requirement has created two particularly powerful barriers to prisoners seeking judicial review. First, it compels prisoners to report up the chain of command as specified in the prison's grievance procedures, even when this would require a prisoner to report to the very individual who is victimizing her. Second, in order to exhaust administrative remedies, prisoners must file grievances within what is often an extremely small window of time following an injury, as specified by the internal regulations of the prison. On average, prisoners are required to file within a few weeks; in some prisons the time frame is as short as two days.<sup>29</sup> These barriers are especially formidable in cases of sexual assault and abuse.<sup>30</sup>
17. The case of *Amador v. Andrews* demonstrates how the exhaustion of administrative remedies requirement can severely limit incarcerated women's access to remedies. In 2003, a group of women prisoners filed a class action suit in the Southern District of New York alleging sexual assault by correctional officers and asking the court to intervene.<sup>31</sup> It took the court almost five years to come to the conclusion that the women had not properly exhausted their administrative remedies.<sup>32</sup> The court pointed to a number of technical shortcomings, but focused on the fact that most of the women had reported the abuse informally instead of following formal procedures. The court found that this disqualified their claims—despite the fact that prison officials had repeatedly told the women that in cases of sexual abuse, they should feel free to disclose to whomever they felt comfortable.<sup>33</sup>
18. The PLRA's physical injury requirement is a second major barrier to litigation. The PLRA provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."<sup>34</sup> Under this provision, some courts have found that prisoners have no judicial remedy for violations of non-physical constitutional rights, including religious, speech, and due process rights.<sup>35</sup> Courts have banned awards of compensatory damages for any non-physical injuries, no matter how intentional the act and no matter how damaging the effect. The physical injury requirement has also been interpreted to bar prisoners' claims based on incidents of sexual abuse that do not physically abuse, such as sexual harassment, threats of assault, or groping.<sup>36</sup> Some courts have found that sexual assault itself does not constitute a physical injury within the meaning of the PLRA.<sup>37</sup>

<sup>28</sup> *Id.* (documenting application of the exhaustion requirement where non-compliance was due to dyslexia (*Williams v. Pettiford*, 2007 WL 3119548, at \*3 (D.S.C. 2007)); illiteracy (*Ramos v. Smith*, 187 F. App'x 152, 154 (3d Cir. 2006)); inability to read English (*Benavidez v. Stansberry*, 2008 WL 4279559, at \*4 (N.D. Ohio 2008)); cerebral palsy (*Elliott v. Monroe Correctional Complex*, 2007 WL 208422, at \*3 (W.D. Wash. 2007)); and mental illness. (*Yorkey v. Pettiford*, 2007 WL 2750068, at \*4 (D.S.C. 2007)).

<sup>29</sup> THE NAT'L PRISON RAPE ELIMINATION COMM'N, REPORT (2009) [hereinafter NPREC REPORT].

<sup>30</sup> As has been widely documented, survivors of violence, particularly sexual assault or abuse, may not report for a number of reasons. They may be experiencing post-traumatic stress disorder ("PTSD"), and they may be terrified of retribution, whether at the hands of other prisoners or correctional officers. Even outside of prisons, only a small fraction of sexual assault survivors report to the police or other public entities. The barriers to reporting within the prison context are necessarily more powerful by several orders of magnitude than those outside of prison, as prisoners may not have anyone they can trust or confide in and are trapped in the context where the abuse took place. See NPREC Report, *supra* note 29 ("The Prison Litigation Reform Act...has compromised the regulatory role of the courts and the ability of incarcerated victims of sexual abuse to seek justice in court.")

<sup>31</sup> *Amador v. Andrews*, No. 03 Civ. 0650 (KTD) (GWG), First Amended Complaint, (S.D.N.Y. Sept. 5, 2003).

<sup>32</sup> *Amador v. Andrews*, 2007 WL 4326747, at \*7-9 (S.D.N.Y. 2007).

<sup>33</sup> *Id.*

<sup>34</sup> 18 U.S.C. § 3626.

<sup>35</sup> See, e.g., *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001) (holding that the PLRA's physical injury requirement barred a suit by a prisoner alleging a First Amendment violation: "The plain language of the statute does not permit alteration of its clear damages restrictions on the basis of the underlying rights being asserted...The statute limits the remedies available, regardless of the rights asserted, if the only injuries are mental or emotional.")

<sup>36</sup> See Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 73 (2007) ("On its face...the physical injury requirement appears to bar prisoner claims for sexual abuse if no physical injury results. For example, the text of this provision appears to bar claims that a prisoner was forced to perform or submit to oral sex...or was coerced into sexual compliance through threats or inducements without a beating.")

<sup>37</sup> See, e.g., *Hancock v. Payne*, 2006 WL 21751, at \*3 (S.D. Miss. 2006) ("In their Amended Complaint, the plaintiffs do not make any claim of physical injury beyond the bare allegation of sexual assault.")

19. A third significant barrier to prisoner access to remedies is the PLRA's restrictions on a prisoner's ability to retain counsel. The PLRA caps the fees an attorney may recover from defendants in prison reform litigation.<sup>38</sup> This creates an obvious disincentive for competent attorneys to represent prisoners, and consequently, many prisoners—who have no automatic right to appointed counsel [footnote]—file claims *pro se*.
20. A final area of concern is the application of the PLRA to juveniles incarcerated in juvenile institutions. Young people are even less likely to be able to navigate complex internal grievance procedures than adults. Most lawsuits concerning juveniles are filed on their behalf by parents or guardians. Still, compliance with internal grievance procedures by parents or guardians has been deemed legally insufficient under the PLRA.<sup>39</sup> Juvenile lawsuits made up only a small percentage of pre-PLRA prison cases in federal court, and now have been further reduced.<sup>40</sup>

**ii. Effects of the PLRA and efforts at reform**

21. In her 1999 report on violence against women in prison, the Special Rapporteur called attention to the recently passed PLRA as a potentially problematic restriction of prisoners' access to remedies.<sup>41</sup> Today the consequences of the PLRA have become more apparent. By 2006, the number of prisoner claims brought in federal courts had dropped by 60%, despite a massive increase in the incarcerated population since the PLRA's enactment ten years earlier.<sup>42</sup> Advocates are finding that the PLRA's procedural barriers ultimately bar meritorious claims as well as frivolous ones, create perverse incentives for prisons to make their grievance procedures complex and opaque, and result in a climate of impunity within prisons and jails.<sup>43</sup>
22. Courts across the country have chosen to apply and interpret the PLRA in widely differing ways. While some have taken an extremely literal approach,<sup>44</sup> others have created safeguards, refusing to apply the exhaustion of administrative remedies requirement when administrative remedies do not exist or when special circumstances have made a prisoner unable to pursue available remedies.<sup>45</sup> Whether and how the PLRA will be interpreted by the Supreme Court remains unknown, suggesting that amendment through statute may be the most effective way of addressing the problems it has raised.

<sup>38</sup> Pub. L. No. 104-134, 110 Stat. 1321 (2006) (The PLRA caps attorney's fees in prisoner litigation at 150% of the damage award, and further provides that "No award of attorney's fees...shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel").

<sup>39</sup> HUMAN RIGHTS WATCH (2009), *supra* note 27, at 35.

<sup>40</sup> See Margaret Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case For Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 152-54 (2008); HUMAN RIGHTS WATCH (2009), *supra* note 27, at 29.

<sup>41</sup> U.N. Econ. & Soc. Council [ECOSOC], *Report of the Mission to the United States of America on the Issue of Violence Against Women in State and Federal Prisons*, ¶ 33, U.N. Doc. E/CN.4/1999/68/Add.2 (1999) ("The passage of the [PLRA] is an attempt to limit prisoners' access to...recourse. Many activists have queried whether it is constitutional.")

<sup>42</sup> See HUMAN RIGHTS WATCH (2009), *supra* note 27, at 3 ("The effect of the PLRA on prisoners' access to the courts was swift. Between 1995 and 1997, federal civil rights filings by prisoners fell 33 percent, despite the fact that the number of incarcerated persons had grown by 10 percent in the same period. By 2001 prisoner filings were down 43 percent from their 1995 level, despite a 23 percent increase in the incarcerated population. By 2006 the number of prisoner lawsuits filed per thousand prisoners had fallen 60 percent since 1995.")

<sup>43</sup> See Schlanger & Shay, *supra* note 40, at 140 ("The PLRA's obstacles to meritorious lawsuits are undermining the rule of law in our prisons and jails, granting the government near-impunity to violate the rights of prisoners without fear of consequences."); see also Buchanan, *supra* note 36, at 72 ("A prison is virtually insulated from prisoner litigation to the extent that its grievance process is complex and time-consuming, its deadlines for filing a grievance are brief, and the threat of retaliation deters prisoners from using the process at all...[The] requirement invites technical mistakes resulting in inadvertent noncompliance with the exhaustion requirement, and bar[s] litigants from court because of their ignorance and uncounseled procedural errors.")

<sup>44</sup> See *supra* text and accompanying notes ¶ 18 (describing how some courts have interpreted sexual assault as not rising to the level of physical injury under the PLRA).

<sup>45</sup> *Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir. 2004) (in determining whether administrative remedies have been exhausted, the court considers 1) whether administrative remedies are actually available to the plaintiff; 2) whether the defendant should be estopped from asserting the defense of failure to exhaust because he/she inhibited the ability of the plaintiff to pursue administrative remedies; and 3) whether special circumstances excuse the plaintiff's failure to exhaust); see also Buchanan, *supra* note 36, at 73-74 (describing how many appellate courts have concluded that the physical injury requirement bars only actions for compensatory damages, and does not apply to actions for declaratory or injunctive relief or for nominal or punitive damages).

23. While there have been numerous efforts to reform the PLRA, currently none have been successful. The Prison Rape Elimination Act Commission<sup>46</sup> recommended that Congress modify the exhaustion of administrative remedies requirement by allowing prisoners who claim sexual abuse to automatically exhaust their remedies after 90 days of reporting, regardless of when the incident allegedly occurred. In 2007, Congress responded to the Commission's recommendations with the proposed bill H.R. 4109, The Prison Abuse Remedies Act, which would have (1) eliminated the physical injury requirement; (2) provided a 90-day stay for non-frivolous claims relating to prison conditions, so as to give prison officials adequate time to consider such claims through the administrative process; (3) made the PLRA inapplicable to prisoners under the age of 18; and (4) eliminated certain restrictions on awarding attorney fees in civil actions brought by prisoners. Human Rights Watch (HRW) praised the proposed bill as an appropriate response to the PLRA, calling it one that would put the United States in compliance with international human rights agreements relating to the treatment of prisoners.<sup>47</sup> Unfortunately, the bill never reached a vote in either legislative body.

### C. Internal grievance procedures

24. Due to the PLRA, most prisoner claims relating to conditions of confinement are evaluated and adjudicated within the prisons' internal grievance systems. Because each state has different laws regulating its prisons, and because there is no centralized body overseeing the rules and regulations of various branches of the Department of Corrections (DOC), grievance systems may vary widely from prison to prison.
25. As described above, one of the most problematic policies is the short timeframe within which a prisoner must file a grievance. In an amicus brief filed before the Supreme Court in *Woodford v. Ngo*, the Jerome N. Frank Legal Services Organization of Yale Law School documented the complex array of procedures relating to grievance timeframes among the different states. Timeframes ranged from two to thirty days, with nine states requiring that the grievances be filed within as short as two to five days. States required various types of processes: some mandated that prisoners first attempt informal resolution by talking with a staff member, while others only allowed prisoners to discuss the matter after they submitted a formal grievance. Different deadlines were imposed for informal resolution attempts as opposed to the formal filing of grievances. Some states required prisoners to allow prison officials a certain number of days to respond to informal complaints before a formal complaint could be initiated. Finally, all of the states covered by the survey required a prisoner to pursue at least one, and sometimes two or more, levels of review of the initial response to a formal grievance in order to complete administrative exhaustion. Each of these appeals had its own timeframe for filing, which were as short as three to five days in many cases.<sup>48</sup> This brief look into the complexity of the timeframe provision illustrates how difficult it is for a prisoner to successfully navigate the many aspects of the grievance system in order to correctly exhaust her administrative remedies.
26. Another problematic set of policies within prison grievance systems is based on the premise that prisoners are non-credible and should not be believed if their stories conflict with reports by correctional officers.<sup>49</sup> For example, in New York State, women seeking redress for sexual abuse by prison guards are required to produce physical proof, an extremely difficult task.<sup>50</sup> Prison administrators often fail to keep

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<sup>46</sup> See *infra* ¶¶ 42-51 (describing PREA in depth).

<sup>47</sup> HUMAN RIGHTS WATCH, IN SUPPORT OF THE PRISON ABUSE REMEDIES ACT OF 2007: HEARING IN THE HOUSE JUDICIARY SUBCOMMITTEE (Apr. 21, 2008), available at <http://www.hrw.org/en/news/2008/04/21/support-prison-abuse-remedies-act-2007-hearing-house-judiciary-subcommittee>.

<sup>48</sup> *Woodford v. Ngo*, 548 U.S. 81, 85 (2006); Brief for Jerome N. Frank Legal Services Organization of Yale Law School as Amicus Curiae A1-A7.

<sup>49</sup> For an extensive discussion of the inadequacies of grievance procedures in women's prisons, see, for example, Buchanan, *supra* note 36; see also NPREC REPORT, *supra* note 29.

<sup>50</sup> See *Amador v. Andrews*, No. 03 Civ. 0650 (KTD) (GWG), First Amended Complaint, (S.D.N.Y. Sept. 5, 2003) (describing how the policy of the New York correctional department is to take no action on a prisoner allegation of sexual abuse by a guard unless the prisoner provides either physical proof or DNA evidence).

grievances confidential, and retaliation for complaining—by other prisoners, and particularly by the abuser—is commonplace.<sup>51</sup>

#### D. Institutional oversight

27. While conditions in state prisons vary from one state to another, there are oversight mechanisms that check prison administration discretion and individual state practices. The Civil Rights of Institutionalized Persons Act (CRIPA), passed in 1980, authorizes the United States Attorney General to investigate and take action to enforce the constitutional rights of prisoners when there is a pattern or practice of unconstitutional conduct or conditions.<sup>52</sup> Under the CRIPA, the Special Litigation Section of the Civil Rights Division of the U.S. Department of Justice investigates state facilities such as jails, prisons, juvenile correction facilities, nursing homes for the elderly, and mental health facilities.<sup>53</sup> It issues reports on individual facilities, negotiates with facility administrators in an attempt to resolve issues of unconstitutional conditions of confinement, and initiates litigation when negotiation fails. In 2009, the Special Litigation Section filed nine lawsuits involving 29 facilities; closed three cases involving 32 facilities; and partially closed three cases involving six facilities.<sup>54</sup>
28. One significant barrier to prison oversight, however, is that the media have very restricted access to prisons and prisoners. The Supreme Court has given state and federal prison administrators wide latitude in limiting prisoners' ability to communicate with persons on the outside, and with members of the media in particular.<sup>55</sup> Further, the Court has held that the press has "no constitutional right of access to prisons or their inmates beyond that afforded the general public."<sup>56</sup> A summary of prison regulations affecting prisoner-media communication in the District of Columbia and eleven states is provided in the Appendix.<sup>57</sup>

#### E. Prosecution of violence against incarcerated women

29. A final barrier to remedies is the fact that the majority of cases of prisoner sexual abuse are not prosecuted.<sup>58</sup> A number of factors make it unlikely that these cases ever reach a prosecutor's office. First, due to inadequate grievance systems and fear of retaliation, prisoners may not report abuse they have suffered.<sup>59</sup> Second, when prisoners do report, any delay means that evidence that could corroborate a complaint of abuse may be compromised or lost.<sup>60</sup> Third, prison investigations of incidents of sexual abuse of prisoners are notoriously unreliable.<sup>61</sup>

<sup>51</sup> Buchanan, *supra* note 36, at 66-67.

<sup>52</sup> Pub. L. No. 96-247, §2, 94 Stat. 349 (1980) (codified at 42 U.S.C § 1997).

<sup>53</sup> DEP'T OF JUSTICE CIVIL RIGHTS DIV., CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS—SUMMARY, *available at* <http://www.justice.gov/crt/about/spl/cripa.php>.

<sup>54</sup> DEP'T OF JUSTICE SPECIAL LITIGATION SECTION, DEPARTMENT OF JUSTICE ACTIVITIES UNDER THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT (2009), *available at* <http://www.justice.gov/crt/split/findsettle.php>.

<sup>55</sup> *Thornburg v. Abbott*, 490 U.S. 401, 404 (1989) (holding that prison regulations affecting a prisoner's First Amendment rights should be analyzed under the reasonableness standard set forth in *Turner v. Safley*, 482 U.S. 78, 89 (1987): "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests").

<sup>56</sup> *Pell v. Procunier*, 417 U.S. 817, 834 (1974).

<sup>57</sup> *See infra* Appendix Part II.

<sup>58</sup> *See* Brenda V. Smith & Jaime M. Yarussi, *Prosecuting Sexual Violence in Correctional Settings: Examining Prosecutors' Perceptions*, 3 CRIM. L. BRIEF 19, 19 (2008) [hereinafter *Examining Prosecutors' Perceptions*]; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 9 (2005) [hereinafter *OIG (2005)*] *available at* <http://www.justice.gov/oig/special/0504/final.pdf>.

<sup>59</sup> *See* STOP PRISONER RAPE, REPORT ON THE PRISON RAPE ELIMINATION ACT, UPDATE 4 (2005), *available at* <http://www.justdetention.org/pdf/preupdate0505.pdf>; *see also* *Riley v. Olk-Long*, 282 F.3d 592, 593-94 (8th Cir. 2002) (explaining plaintiff inmate did not report incidents of sexual assault by staff members because "she doubted that she would be believed and feared the resulting discipline"); *Corona v. Lunn*, 00 CIV 7330 (GEL), 2002 WL 550963, \*2 (S.D.N.Y. Apr. 11, 2002), *aff'd*, 56 F. App'x 20 (2d Cir. 2003).

<sup>60</sup> *See* NATIONAL PRISON RAPE ELIMINATION COMMISSION, REPORT 100-23 (2009); *see also* *Examining Prosecutors' Perceptions*, *supra* note 58, at 20, 24.

<sup>61</sup> *See generally*, ALLEN BECK & TIMOTHY HUGHES, BUREAU OF JUSTICE STATISTICS, PRISON RAPE ELIMINATION ACT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES 2004 (2005); ALLEN BECK & PAIGE HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2005 (2006); ALLEN BECK, PAIGE HARRISON & DEVON ADAMS, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006 (2007).

30. In the instances when reports of sexual abuse do reach prosecutors' offices, prosecutors have reported that they are reluctant to pursue these cases because of the relatively modest penalties involved.<sup>62</sup> In two states, staff sexual abuse of prisoners is only a misdemeanor offense.<sup>63</sup> Additionally, as a result of PREA, federal prosecutors are reluctant to bring cases against FBP employees because the penalties are so low.<sup>64</sup> Even in states where staff sexual misconduct with prisoners is a felony, correctional employees rarely receive felony sentences.<sup>65</sup> Prosecutors often encourage state correctional departments to handle these matters administratively through firing or reassigning staff, or through moving or reclassifying prisoners. Lack of incentive to prosecute due to low penalties is even greater when the defendant is another prisoner, since even if that person is convicted, he is already serving a sentence.
31. In addition to the systemic issues described above, prisoners face significant disadvantages within trials themselves. This creates a further disincentive to prosecute cases of sexual abuse. Cases of prisoner sexual abuse frequently end up pitting a staff member's word against a prisoner's, and the legal system in the United States does not give these two sources equal weight and credibility. The Federal Rules of Evidence permit the impeachment of witnesses with past criminal convictions,<sup>66</sup> and most jury instructions permit the judge to instruct the jury that they can take the witness's past criminal convictions into account in assessing credibility. Additionally, the victim's criminal record can affect both judges' and juries' view of her credibility, and can fuel suspicions that, as a prisoner, she is more likely to lie.<sup>67</sup> Juries tend to think that prisoners seduce correctional staff, and the defense of "consent" is a major problem with prosecuting these cases.<sup>68</sup> Two states, Nevada and Delaware, have codified prisoners' ability to consent by providing separate penalties to punish prisoners who engage in consensual sexual activity with staff.<sup>69</sup> Given that staff will always be able to claim that a prisoner consented, prisoners are even less likely to report, thereby further reducing the prospects for prosecution.
32. Prosecutors' own lack of knowledge about prosecuting sex abuse cases in correctional settings constitutes a final disincentive to prosecute.<sup>70</sup> Only limited training is available,<sup>71</sup> and many prosecutors do not appreciate the impact staff sexual abuse has on the lives of prisoners.<sup>72</sup> Some prosecutors continue to behave as if prisoners deserve whatever treatment they receive, despite the fact that prosecutor education in this area stresses that imprisonment—the loss of freedom—is the only penalty for crime.<sup>73</sup> With proper training, resources, and willingness, prosecutors may be able to overcome some of these problems and provide prisoners with the same level of protection and respect they accord to other citizens.

<sup>62</sup> See *Examining Prosecutors' Perceptions*, *supra* note 58; OIG (2005), *supra* note 58, at 22.

<sup>63</sup> See generally, Brenda V. Smith, *Fifty State Survey of Criminal Laws Prohibiting the Sexual Abuse of Individuals Under Custodial Supervision*, PROJECT ON ADDRESSING PRISON RAPE (2009), available at <http://www.wcl.american.edu/nic/documents/50StateSurveyofSSMLawsFINAL2009Update.pdf?rd=1> (noting that staff sexual misconduct is a misdemeanor in Iowa and Maryland).

<sup>64</sup> See OIG (2005), *supra* note 58, at 10.

<sup>65</sup> See, e.g., Felisa Cardona, *Jail Time Rare for Colorado Officers: Punishment Can be Key To Prevention, but Prosecution of Jailers is Difficult*, DENV. POST, Sept. 6 2009, available at [http://www.denverpost.com/headlines/ci\\_13279083](http://www.denverpost.com/headlines/ci_13279083); Frank Green, *Correctional Officer Gets 40 Days in Inmate-Sex Case*, RICHMOND TIMES-DISPATCH, Nov. 24, 2009, available at [http://www2.timesdispatch.com/news/2009/nov/24/priz24\\_20091123-221405-ar-22832/](http://www2.timesdispatch.com/news/2009/nov/24/priz24_20091123-221405-ar-22832/); Michael Hinkelman, *Ex-Corrections Officer Sentenced to Ten Months for Sex with Inmates*, PHILA. DAILY NEWS, July 24, 2009; *NV Prison Guard Firing for Inmate Romance Upheld*, LAS VEGAS SUN, Nov. 14 2009.

<sup>66</sup> Fed. R. Evid. 609.

<sup>67</sup> See THE NAT'L INST. OF CORR./WASHINGTON COLL. OF LAW PROJECT ON ADDRESSING PRISON RAPE, IMPROVING PROSECUTIONS OF ALLEGATIONS OF SEXUAL ABUSE IN CORRECTIONAL SETTINGS: A MEETING WITH FEDERAL PROSECUTORS (Oct. 13, 2006) (under NIC Cooperative Agreements 06S20GJ1) (on file with Brenda V. Smith); see also OIG (2005), *supra* note 58.

<sup>68</sup> See *Examining Prosecutors' Perceptions*, *supra* note 58, at 23-24.

<sup>69</sup> See NEV. REV. STAT. ANN. § 212.187 (2003); DEL. CODE ANN. tit. 11, § 1259 (2010).

<sup>70</sup> See generally D. Berman, Training Session for the Project on Addressing Prison Rape, *Module 13: The Role of Prosecutors in Cases of Staff Sexual Misconduct: Investigating Allegations of Staff Sexual Misconduct with Offenders* (2010), available at [http://www.wcl.american.edu/nic/documents/Module13\\_TheRoleofProsecutors.pdf?rd=1](http://www.wcl.american.edu/nic/documents/Module13_TheRoleofProsecutors.pdf?rd=1).

<sup>71</sup> See generally *id.*; see also AEQUITAS, THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, TRAINING, available at <http://www.aequitasresource.org/training.cfm> (last viewed on Nov. 23, 2010) [hereinafter AEQUITAS]; see also *Examining Prosecutors' Perceptions*, *supra* note 58, at 23-24; OIG (2005), *supra* note 58, at 4.

<sup>72</sup> *Examining Prosecutors' Perceptions*, *supra* note 58, at 23-24; OIG (2005), *supra* note 58, at 4.

<sup>73</sup> See generally AEQUITAS, *supra* note 71.

### III. FORMS OF VIOLENCE AGAINST INCARCERATED WOMEN

#### A. Sexual abuse and misconduct in women's prisons

##### i. *Prevalence and causes of sexual abuse and misconduct in women's prisons: an overview*

33. Custodial sexual assault, dubbed "America's most 'open' secret,"<sup>74</sup> is a well-known, if not always publicly recognized, problem in American prisons. Women in prison, as well as incarcerated men, are too often left unprotected and without redress for sexual abuse by both custodial staff and other prisoners. Until recently, there was little to no available data on the prevalence of sexual assault in prisons, especially among women prisoners.<sup>75</sup> Recent studies reveal that sexual abuse of women prisoners is persistent and widespread, but also highly variable across facilities.<sup>76</sup> In 2002, a survey on coercive sexual experiences of incarcerated women in three Midwestern prisons found highly divergent rates of sexual coercion in prisons, from 27% of the women in one facility to 8 or 9% in others.<sup>77</sup> In 2006, in a study examining 436 prisoners in a large southern prison system, 17.2% of women prisoners reported in-prison sexual victimization.<sup>78</sup>
34. Reports by the BJS are the first to systematically analyze national data on the problem. The reports confirm the above findings of highly variable but persistent sexual abuse. The 2008-2009 report, released in August 2010, indicated that 4.7% of women in prison have experienced inmate-on-inmate sexual victimization within the past twelve months and 2.1% have experienced staff sexual misconduct in the same time period.<sup>79</sup> These aggregate numbers hide the significant variance among the institutions. Several women's institutions had much higher rates of abuse; nearly 12% of women experienced abuse in one institution.<sup>80</sup> While data on the problem has improved, advocates suspect that, due to prisoners' lack of trust in confidentiality and fear of retaliation, underreporting likely still exists.<sup>81</sup>
35. Sexual abuse in women's prisons takes many forms. Women may be sexually assaulted by other prisoners or by correctional staff and volunteers. The conduct might involve forced nonconsensual sexual

<sup>74</sup> Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System, Analyzing America's Most 'Open' Secret*, 18 YALE L. & POL'Y REV. 195 (1999).

<sup>75</sup> Most early studies focused on the problem in men's prisons only. Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J. SEX RESEARCH 217, 217 (2002). This may be in part due to the now debunked view that female inmates do not coerce each other into sexual contact. The first empirical studies on the prevalence of the problem in women's prisons were small sample-size studies conducted in the 1990s. See Agnes L. Baro, *Spheres of Consent*, 8 WOMEN & CRIM. JUST. 61 (1997) (finding chronic problems of custodial sexual abuse in a small women's facility in Hawaii); Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RESEARCH 67 (1996) (conducting a survey of women in a small Midwestern women's facility).

<sup>76</sup> NPREC REPORT, *supra* note 29, at 4.

<sup>77</sup> Struckman-Johnson & Struckman-Johnson, *supra* note 75 at 220.

<sup>78</sup> Ashley G. Blackburn et al., *Sexual Assault in Prison and Beyond: Toward an Understanding of Lifetime Sexual Assault Among Incarcerated Women*, 88 THE PRISON J. 351, 351 (2008).

<sup>79</sup> BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008-2009, at 12 (2010) [hereinafter BJS (2008-2009)]. Women were significantly more likely than men to experience inmate-on-inmate victimization, 4.7% compared to 1.9%, and slightly less likely than men to experience staff sexual misconduct, 2.1% compared to 2.9%. *Id.* The number of female staff to male inmate incidents of misconduct came as a surprise to many advocates and researchers, who are currently grappling with its implications for questions of gender in men's and women's prisons. See Brenda Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues* 12 AM. UNIV., WCL RESEARCH PAPER No. 2008-49, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1129810](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1129810); Lauren A. Teichner, *Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Violence in U.S. Prisons*, 14 MICH. J. GENDER & L. 259, 276-90 (2008) (discussing the divide between social expectations and the rate of female staff sexual misconduct and discussing the differential treatment of female perpetrators).

<sup>80</sup> Two women's institutions, Taycheedah Correctional Institution (Wisconsin) and Fluvanna Correctional Center (Virginia) had exceptionally high rates of inmate on inmate incidents, 11.9% and 11.4% respectively. And Fluvanna Correctional Center, again, and Bayview Correctional Center (New York), had exceptionally high rates of staff sexual misconduct, 11.5% and 6% respectively. BJS (2008-2009), *supra* note 79, at 8-9.

<sup>81</sup> NPREC REPORT, *supra* note 29, at 20; see also, RAPE, ABUSE, AND INCEST NATIONAL NETWORK, REPORTING RATES, available at <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited Nov. 17, 2010) (indicating that sexual assault generally is one of the most underreported crimes).

penetration, but might also be limited to unwanted sexual contact and touching.<sup>82</sup> In the case of staff sexual misconduct, advocates report that, while forced nonconsensual sex does occur, more often staff exert their position of power vis-à-vis the female prisoners' extreme vulnerability to coerce sexual activity. As a result, women often exchange sex to protect their rights to phone calls, visits, or basic supplies such as food, shampoo, and soap.<sup>83</sup> Women prisoners, most of whom have been previously traumatized by sexual or physical abuse, often as children, are particularly vulnerable to sexual abuse.<sup>84</sup> Victims of sexual abuse often suffer from lifelong physical and mental repercussions, including post-traumatic stress disorder, anxiety, depression, and thoughts of suicide.<sup>85</sup> In prison, the stress of the abuse might be exacerbated by the prisoner's inability to escape her perpetrators and the fear of retaliation if she reports the abuse.

## ii. *Cross-gender supervision and searches*

36. The United States is "one of the few developed countries that permits cross-gender supervision of male or female prisoners in sensitive areas such as living areas, showers, and bathrooms."<sup>86</sup> International standards, in fact, require that only female officials supervise women prisoners.<sup>87</sup> The 2007 BJS report showed that staff sexual misconduct against women is overwhelmingly perpetrated by male staff. This report lends empirical support to advocates' long-held belief that cross-gender supervision in private quarters exacerbates the problem of custodial sexual assault.<sup>88</sup>
37. In practice, women in prison lose nearly all rights to privacy while incarcerated. Male correctional officers can often view them in their most intimate moments: while they are changing, in the shower, and in the bathroom.<sup>89</sup> The problem of cross-gender supervision is particularly acute in the context of physical searches. Many argue that state correctional policies requiring cross-gender invasive body cavity searches may, in and of themselves, constitute state-sponsored sexual abuse. In addition to violating international standards, invasive cross-gender searches may violate prisoners' remaining Fourth Amendment right to privacy and may "exacerbate[] traumatic experiences and constitute[] cruel and unusual punishment."<sup>90</sup> Recently, the American Civil Liberties Union (ACLU) in Colorado discovered that the Denver Women's Correctional Facility (DWCF) put into practice a new randomized strip search that required women to hold open their labias for inspection by officers.<sup>91</sup> While the DWCF subsequently ended the practice after significant press coverage, this incident demonstrates the ongoing concern surrounding such invasive searches: their necessity, their legality, and their connection to sexual assault

<sup>82</sup>See NPREC REPORT, *supra* note 29, at 7 (defining various terminology for the types of sexual abuse reported).

<sup>83</sup>Deborah Labelle, *Bringing Human Rights Home to the World of Detention*, 40 COLUM. HUM. RTS. L. REV. 79, 105 (2008) ("In the course of committing such gross misconduct, male officers have not only used actual or threatened physical force, but have also used their near total authority to provide or deny goods and privileges to female prisoners, to compel them to have sex...."); Buchanan, *supra* note 36, at 55 ("Guards often extend unofficial accommodations to favored inmates and use illegal forms of intimidation and force on others. In such a setting, the sticks and carrots guards may use to coerce sex from prisoners are plausible and effective."). Advocates, lawyers, and lawmakers all tend to agree, at least in principle, that due to the power structure of the prison, any sexual contact between staff and inmates is abusive, regardless of any 'consent' given. See BJS (2008-2009), *supra* note 79, at 7.

<sup>84</sup>Studies estimate that up to 80% of women in prison have experienced prior sexual or physical abuse. See Angela Browne et al., *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT'L J. L. & PSYCHIATRY 301 (1999). For more information on the prevalence of histories of abuse, as well as the prevalence of mental health and substance abuse problems, see *infra* ¶¶ 62-67.

<sup>85</sup>NPREC REPORT, *supra* note 29, at 45.

<sup>86</sup>Brenda Smith, *Watching You, Watching Me*, 15 YALE J. L. & FEMINISM 225, 230 (2003). There are significant questions about whether or not Title VII, which makes employment discrimination on the basis of sex illegal, requires prisons to allow cross-gender supervision. However, courts have been willing to uphold policies limiting cross-gender supervisions when a sufficient record demonstrates that it is necessary to prevent sexual abuse. See *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 748-49 (6th Cir. 2004).

<sup>88</sup>UN Standard Minimum Rules for the Treatment of Prisoners, Rule 53 (1955), available at <http://www2.ohchr.org/english/law/pdf/treatmentprisoners.pdf>.

<sup>89</sup>BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2007, at 7 (2007).

<sup>90</sup>See generally Smith, *supra* note 86.

<sup>91</sup>*Id.* at 249. In *Bell v. Wolfish*, the Supreme Court held that privacy rights of prisoners are significantly diminished and upheld body cavity searches. 441 U.S. 520 (1979). However, the Court has not passed on the direct question of cross-gender body cavity searches. While the case law is not entirely coherent or unified on this question, courts have been more sympathetic to women inmates' challenges to cross-gender supervision than to men's. Smith, *supra* note 86, at 264.

<sup>92</sup>Letter from ACLU to Avi Zavaras, Exec. Dir., Colo. Dep't of Corr. (Aug. 23, 2010), available at [http://www.aclu.org/files/assets/Zavaras\\_ACLU\\_8-23-10.pdf](http://www.aclu.org/files/assets/Zavaras_ACLU_8-23-10.pdf).

and sexually degrading behavior. At minimum, these policies create additional opportunities for sexual abuse.<sup>92</sup>

**iii. Legal framework and responses: U.S. constitutional and international law framework**

38. In *Farmer v. Brennan*, the Supreme Court found that deliberate indifference to the substantial risk of sexual assault and abuse is a violation of the Eighth Amendment.<sup>93</sup> However, as discussed in detail above, meeting the subjective standards of Eighth Amendment jurisprudence is often difficult in practice.<sup>94</sup> Courts have also been somewhat unwilling to recognize conduct that falls short of physical penetration as a constitutional violation.<sup>95</sup>
39. International human rights standards clearly protect prisoners from custodial sexual abuse. The International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT), both of which the United States has ratified, require states to protect individuals from torture and cruel, inhuman, or degrading punishment and treatment. Both of “[t]hese treaties and the Standard Minimum Rules for the Treatment of Prisoners...require states to ensure that those who engage in such abuse are appropriately punished and that individuals seeking to complain about such ill-treatment are provided with an effective remedy.”<sup>96</sup> Further, “Article 17 of the ICCPR protects all individuals against arbitrary interference with their privacy, and the Standard Minimum Rules specify that the privacy of female prisoners should be respected by male corrections staff.”<sup>97</sup>

**iv. Advocacy, criminalization, and the passage of the Prison Rape Elimination Act**

40. From the mid-1990s on, there has been significant advocacy and legal work around the issue of custodial sexual abuse in the United States, both domestically and internationally. Domestically, in 1996, the National Institute of Corrections began an investigation into the problem of staff sexual misconduct.<sup>98</sup> In 1999, the investigative arm of the United States Congress, the Government Accountability Office, issued a report on staff sexual misconduct,<sup>99</sup> and early litigation on the issue was initiated both by advocates and the Department of Justice.<sup>100</sup> Internationally, both HRW and Amnesty International issued reports on sexual abuse of women in American prisons, in 1996 and 1999 respectively.<sup>101</sup> Finally, the Special Rapporteur commented on the problem of sexual abuse of women in prison in her 1999 report on violence against women in United States state and federal prisons.<sup>102</sup> Most advocates agree that these

<sup>92</sup> Forty percent of women that reported unwanted sexual touching indicated that it occurred during a strip search or pat down. BJS (2008-2009), *supra* note 79, at 24.

<sup>93</sup> 511 U.S. 825 (1994).

<sup>94</sup> See *supra* ¶¶ 10-13.

<sup>95</sup> See *Boxer v. Harris*, 437 F.3d 1107, 1111 (11th Cir. 2006) (holding that ordering a male prisoner to masturbate under threat of reprisal was *de minimis* harm); *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004) (officer’s actions of exposing himself and making offensive comments were not actionable under the Eighth Amendment); *Morales v. Mackalm*, 278 F.3d 126, 132 (2d Cir. 2002) (plaintiff alleging that a female staff member asked her to have sex with her and to masturbate in front of her and other staff failed to state a constitutional claim.); see also *Dori Lewis & Lisa Freeman, The Sexual Abuse of Women Prisoners: Much Concern But Little Progress From the Perspective of Plaintiffs’ Counsel in Amador et al. v. Andrews et al.* 10 (Mar. 11, 2010) (unpublished memorandum) (on file with Yale Detention and Human Rights Clinic).

<sup>96</sup> HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN STATE PRISONS 60 (1996) [hereinafter HUMAN RIGHTS WATCH (1996)].

<sup>97</sup> *Id.*

<sup>98</sup> NAT’L INST. OF CORR., SEXUAL MISCONDUCT IN PRISONS: LAW, AGENCY RESPONSE, AND PREVENTION (1996), available at <http://nicic.gov/pubs/1996/013508.pdf>.

<sup>99</sup> GOV’T ACCOUNTABILITY OFFICE, WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF (1999), available at <http://www.gao.gov/archive/1999/gg99104.pdf>.

<sup>100</sup> *Cason v. Seckinger*, 231 F.3d 777 (11th Cir. 2000); *Women Prisoners v. Dist. of Columbia*, 877 F. Supp. 634 (D.D.C. 1994); *United States v. Michigan*, No. 97-CVB-71514-BDT (E.D. Mich. 1999) (settled); *United States v. Arizona*, No. 97-476-PHX-ROS (D. Ariz. 1999) (settled).

<sup>101</sup> HUMAN RIGHTS WATCH (1996), *supra* note 96; AMNESTY INTERNATIONAL, NOT PART OF MY SENTENCE: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (1999).

<sup>102</sup> SRVAW 1999 U.S. Report, *supra* note 1.

advocacy movements together have spurred a national conversation, and have led to at least some changes in policies and practices within prison systems.<sup>103</sup>

41. This advocacy movement has contributed to both state and federal legislative changes. In the states, the movement spurred the passage of laws criminalizing all sexual conduct between custodial officials and prisoners. In 1990, less than twenty states had criminal laws specifically prohibiting the sexual abuse of prisoners. Now, “each of the fifty states [has] enacted laws protecting offenders from sexual abuse by staff.”<sup>104</sup> Since the majority of prisoners in the United States fall under the jurisdiction of the states, and federal constitutional claims are difficult to sustain, state criminal laws are arguably the most important mechanism for addressing sexual misconduct in prisons.<sup>105</sup> At the federal level, there have been numerous attempts to amend the PLRA, but none have been successful. In 2003 Congress unanimously passed the PREA, which seeks to establish a “zero-tolerance” standard for sexual abuse in United States correctional settings, including adult prisons and jails, community correctional supervision and juvenile justice agencies, as well as immigration detention facilities.<sup>106</sup> The specifics of that legislation, its positive qualities and shortcomings, are discussed in the following section.

#### v. *Prison Rape Elimination Act: an overview*

42. The PREA functions on several levels: it requires an extensive yearly survey on the incidents and effects of sexual assault in correctional settings nationwide;<sup>107</sup> creates a national clearinghouse with information and assistance to authorities about prevention, investigation, and prosecution;<sup>108</sup> and provides \$40 million annually for state grants to fund policy improvements.<sup>109</sup> Further, it created the National Prison

<sup>103</sup> See, e.g., NPREC REPORT, *supra* note 29, at 49 (“In short, the landscape is changing. Reporting hotlines and zero tolerance posters are becoming commonplace.”).

<sup>104</sup> See Smith, *supra* note 63.

<sup>105</sup> While federal laws cover roughly 201,142 offenders under federal supervision, state law covers the other 7,312,498 prisoners (state and local), probationers, and parolees under custodial supervision. See HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, PRISONERS AT YEAR END 2009 (June 2010); LAUREN GALZE & THOMAS BONCZAR, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2008 (2009). These state criminal laws create a baseline of liability for misconduct and provide important routes to other sanctions, including official misconduct, loss of license, and sex offender registration. See Brenda V. Smith & Jaime M. Yarussi, *Legal Responses to Sexual Violence in Custody: State Criminal Laws Prohibiting Staff Sexual Abuse of Individuals Under Custodial Supervision* (2009). State criminal laws are also flexible instruments that can reflect the political and social priorities of the state. In its 2005 report, the OIG reaffirmed the important role that state laws play in addressing staff sexual misconduct by comparing the federal law to existing state laws. See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES (2005).

<sup>106</sup> See Prison Rape Elimination Act, 42 U.S.C. § 15602 (2003). The first federal bill addressing staff sexual abuse in prisons, the Custodial Sexual Abuse Act, was introduced in 1998, but was at that time unsuccessful. See Violence Against Women Act of 1999, H.R. 357, 106th Cong., §§ 341-346; see also Press Release, Rep. John Conyers, Conyers Introduces Omnibus Bill to Stop Violence Against Women and Their Children (May 12, 1999), available at <http://www.house.gov/conyers/pr051299.htm>. The introduction of this legislation and its ultimate passage was driven by the work of human rights organizations (Human Rights Watch and Just Detention International [then Stop Prisoner Rape]), domestic civil rights organizations (the NAACP and the ACLU Prisoners Rights Project), and faith-based organizations (the Hudson Institute and Prison Fellowship Ministries). That work built on the earlier reports addressing staff sexual misconduct in custodial settings that were at the core of the Special Rapporteur’s 1998 visit. See Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, 3 CRIM. L. BRIEF 19, 10 (2008). Another significant impetus for the passage of the legislation was a concerted campaign to address male prisoner rape. This issue was highlighted in a 2001 report by Human Rights Watch. HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001). As a direct result, Congressmen Bobby Scott (D-VA), Tom Wolfe (R-VA), Senator Jeff Sessions (R-AL), and Ted Kennedy (D-MA) sponsored the “The Prison Rape Reduction Act.” The legislation, when initially introduced in 2001, only addressed male on male sexual violence in custodial settings. See Prison Rape Reduction Act, H.R. 1707, 108th Cong. (2003). In 2002, the bill was amended to add provisions related to all forms of sexual violence in custody in all settings, both adult and juvenile, and to change its name to the Prison Rape Elimination Act. See Prison Rape Reduction Act of 2003: Hearing on H.R. 1707: Before the S. Comm. on Crime, Terrorism, and Homeland Security of the S. Comm. on the Judiciary, 108th Cong. (2003).

<sup>107</sup> 42 U.S.C. § 15603.

<sup>108</sup> 42 U.S.C. § 15604.

<sup>109</sup> 42 U.S.C. § 15605. Since passage, the Bureau of Justice Statistics has awarded grants to over 28 state departments of corrections to improve their practices. See PROJECT ON ADDRESSING PRISON RAPE, INVESTIGATING ALLEGATIONS OF STAFF SEXUAL MISCONDUCT WITH OFFENDERS: THE PRISON RAPE ELIMINATION ACT OF 2003—OVERVIEW AND UPDATE (2008), available at [http://www.wcl.american.edu/nic/conference\\_july\\_08\\_staff/modules/2\\_prea.pdf?rd=1](http://www.wcl.american.edu/nic/conference_july_08_staff/modules/2_prea.pdf?rd=1) [hereinafter THE PRISON RAPE ELIMINATION ACT OF 2003—OVERVIEW AND UPDATE]. While laudable, many of the states awarded grants had already received substantial assistance since at least 1996 from the National Institute of Corrections on similar issues. See PROJECT ON ADDRESSING PRISON RAPE, DATABASE OF TRAINING PARTICIPATION 1996-2008 (on file with Project on Addressing Prison Rape). The Bureau of Justice Assistance did not provide funding to agencies that had received little funding over the years to address sexual abuse in custody – specifically jails, lockups, juvenile agencies, and Native American communities. See THE PRISON RAPE ELIMINATION ACT OF 2003—OVERVIEW AND UPDATE, *supra* note 109, at 16.

Rape Elimination Commission (NPREC), which was charged with recommending national standards to reduce sexual abuse.<sup>110</sup> In turn, the statute requires the United States Attorney General to adopt a final rule creating national standards based on these recommendations. The rule will be automatically binding on the FBP, and each state will be required to comply with the rule or risk losing 5% of federal funding designated for criminal justice activities.<sup>111</sup>

43. The PREA is primarily commended for directly acknowledging the problem previously dubbed “America’s most ‘open’ secret.”<sup>112</sup> The statute’s reporting requirements have generated a great deal of data in a field previously understudied empirically. Since most policy advocates and practitioners agree that changing institutional culture is key to effecting change in correctional settings, the mere passage of PREA and the continuing spotlight of the BJS reporting may reorient culture and improve conditions.<sup>113</sup>
44. There is some evidence that states and correctional facilities are taking PREA seriously. In at least seven states, correctional authorities have implemented and publicly shared written correctional policies in response to the goals and requirements of PREA.<sup>114</sup> California and Texas have both passed laws to implement the PREA: both, among other things, create independent ombudsman positions in charge of impartial resolution of complaints.<sup>115</sup> And the American Correctional Association has created new standards, and revised old, to better combat sexual abuse in correctional settings.<sup>116</sup> Further, the passage of the PREA, and the subsequent hearings and debates within the NPREC, bring important policy questions to the forefront including: how the PLRA blocks remedies for sexual assault victims, whether the ban on providing funding through the Violence Against Women Act to certain incarcerated persons should be lifted, and whether conjugal and family visiting programs could ease the problem of sexual abuse.<sup>117</sup>

**vi. National Prison Rape Elimination Commission report and standards**

45. Perhaps the most notable outcome of PREA is the extensive work of the NPREC, culminating in the detailed report and standards submitted to the Attorney General on June 23, 2009.<sup>118</sup> The Commission found that sexual abuse continued to be a pervasive problem in United States custodial settings; that certain populations were at particular risk; and that there were still many barriers individuals in custody faced when reporting abuse. The recommended standards are thorough and address many of the issues advocates indicate are most important. If they are implemented effectively, they should produce significant improvements in correctional settings housing or supervising women. The standards create protocols related to supervision and staffing, response planning (including forensic medical exams),<sup>119</sup> training (for staff and prisoners),<sup>120</sup> risk screening (barring the use of segregation housing for

<sup>110</sup> 42 U.S.C. § 15606.

<sup>111</sup> 42 U.S.C. § 15607.

<sup>112</sup> Cheryl Bell et al., *supra* note 74; *see, e.g.*, Sarah Wake, *Not Part of the Penalty: The Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 220, 237 (2006) (“Perhaps the most important contribution the PREA has made thus far is bringing the topic of prison rape out in the open.”).

<sup>113</sup> Kevin Corlew, *Congress Attempts to Shine Light on a Dark Problem: An In-Depth Look at the Prison Rape Elimination Act of 2003*, 33 AM. J. CRIM. L. REV. 157 (2006).

<sup>114</sup> *See* NAT’L INST. FOR CORR./WASHINGTON COLL. OF LAW PROJECT ON ADDRESSING PRISON RAPE, AN END TO SILENCE: POLICIES AND PROCEDURES, available at <http://www.wcl.american.edu/nic/policies.cfm#prea> (last visited Nov. 18, 2010).

<sup>115</sup> CAL. PENAL CODE §§ 2635-2643 (2006); TEX GOV’T CODE ANN. § 501.172.

<sup>116</sup> Robert Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79-the Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 142, 143-44 (2006).

<sup>117</sup> *See* Brenda V. Smith, *Reforming, Reclaiming or Reframing Womanhood: Reflections on Advocacy for Women in Custody*, 29 WOMEN’S RTS. L. REP. 1, 8-9 (2007).

<sup>118</sup> NPREC REPORT, *supra* note 29.

<sup>119</sup> *See id.* at 216 (“[A]ll victims of inmate-on-inmate sexually abusive penetration or staff-on-inmate sexually abusive penetration are provided access to forensic medical exams performed by qualified forensic medical examiners.”).

<sup>120</sup> *Id.* (“[E]mployees are educated as soon as possible following the agency’s adoption of the PREA standards, and the agency provides periodic refresher information...to ensure that they know the agency’s most current sexual abuse policies and procedures...[S]taff informs inmates of the agency’s zero-tolerance policy regarding sexual abuse and how to report incidents or suspicions of sexual abuse...”).

protection),<sup>121</sup> reporting systems (including access to confidential support services and protection from retaliation),<sup>122</sup> the provision of medical and mental health care, and data collection.

46. The standards propose reform of the exhaustion of administrative remedies requirement of the PLRA. They also prohibit cross-gender strip searches and visual body cavity searches as well as cross-gender pat-downs. The standards also ban nonmedical staff from viewing opposite-gender prisoners while nude or performing bodily functions.<sup>123</sup> This standard, if implemented, will bring the United States closer to the international standards on cross-gender staffing of detention facilities.<sup>124</sup> The report also recommended that the Violence Against Crime Act guidelines, which prohibit the use of funding for incarcerated victims, and the Violence Against Women Act, which prohibits funding to incarcerated victims convicted of certain crimes, be amended to more equitably provide funding to all victims of sexual violence.<sup>125</sup>
47. Many advocates voice concern that the standards are overly vague and leave too much discretion to the correctional institutions themselves. Advocates have requested more concrete standards that mandate the use of cameras and technology, enhanced supervision of staff, consideration of prior credible complaints against staff as corroborating evidence of a prisoner's claim, and affirmative investigations alongside effective grievance responses.<sup>126</sup> Advocates also urge the inclusion of a provision in the final standards that makes clear that the standards do not represent the constitutional minimum. Without such a provision, corrections departments might use superficial compliance with the standards to shield themselves from litigation.<sup>127</sup>
48. There is no guarantee that the standards will be adopted in substantially the same form as they were recommended. For example, there is still considerable debate over whether the cross-gender supervision standards will remain in place. Prison and jail officials have also objected to a number of the standards, claiming they are too onerous or costly.<sup>128</sup> The final standards may be changed to reflect these complaints.
49. One serious constraint on the Commission's work was the requirement that the standards not impose "substantial additional costs" on the correctional systems.<sup>129</sup> While the Commission consciously attempted to be mindful of the limitation,<sup>130</sup> it appears that cost may still be slowing implementation of the standards. According to the statute, the Attorney General was required to adopt new standards on June 23, 2010. Despite repeated calls from advocacy organizations, he has not yet adopted the standards.<sup>131</sup> His reasons are primarily financial.<sup>132</sup> On June 18, 2010, the Department of Justice released

<sup>121</sup> *Id.* at 217 ("Inmates at high risk for sexual victimization may be placed in segregated housing only as a last resort and then only until an alternative means of separation from likely abusers can be arranged.")

<sup>122</sup> *Id.* at 217-18 ("[T]he facility provides inmates with access to outside victim advocates for emotional support services related to sexual abuse...The facility ensures that communications with such advocates are private, confidential, and privileged...The agency protects all inmates and staff who report sexual abuse...from retaliation by other inmates or staff...").

<sup>123</sup> *See id.* at 215.

<sup>124</sup> *UN Standard Minimum Rules*, *supra* note 87, at Rule 53.

<sup>125</sup> NPREC REPORT, *supra* note 29, at 16.

<sup>126</sup> Letter from Dori Lewis & Lisa Freeman, New York Legal Aid Society, to Robert Hinchman, Senior Counsel, Office of Legal Policy, with Comments on the National Standards to Prevent, Detect, and Respond to Prison Rape (May 3, 2010) (on file with Yale Detention and Human Rights Clinic).

<sup>127</sup> New York State has already threatened in the pending *Amador* lawsuit to use its compliance with the standards to "moot or sharply curtail" the litigation. *Id.* at 15.

<sup>128</sup> *See, e.g.*, David Kaiser & Lovisa Stannow, *The Way to Stop Prison Rape*, N.Y. REV. BOOKS, Mar. 25, 2010, available at <http://www.nybooks.com/articles/archives/2010/mar/25/the-way-to-stop-prison-rape/?page=1>.

<sup>129</sup> 42 U.S.C. § 15606.

<sup>130</sup> NPREC REPORT, *supra* note 29, at 27 ("From the outset, we have been mindful of the statutory prohibition against recommending standards that would impose substantial additional costs compared to current expenditures. With the assistance of information provided during the public comment period, the Commission attempted to further limit potential new costs and to shape realistic standards that represent what is minimally required to meet Congress' mandate to eliminate sexual abuse in confinement...To the extent that the standards create new costs, those expenditures are necessary to fulfill the requirements outlined in PREA. And those costs are not substantial when compared to the significance of lives damaged or destroyed by sexual abuse and the broader costs of undermining the purposes of corrections in America.")

<sup>131</sup> *See* ACLU, ACLU AND COALITION URGES HOLDER TO ADOPT STANDARDS AIMED AT ERADICATING PRISON RAPE (2010), available at <http://www.aclu.org/prisoners-rights/aclu-and-coalition-urges-holder-adopt-standards-aimed-eradicating-prison-rape>; *Disgraceful*

a report on the possible cost impact of the standards<sup>133</sup> and on January 24, 2011 it released a proposed rule for public comment.<sup>134</sup> A final set of standards is expected to be implemented in early 2012. Under the language of the statute, the FBP would immediately implement the standards, but states would have another year before they would be required to comply.<sup>135</sup>

**vii. Limitations of PREA**

50. First and foremost, PREA fails to provide direct protection or redress to victims or to sanction perpetrators. The Act does not create a private right of action that can be enforced in the courts.<sup>136</sup> While acknowledging that PREA does not create a private right of action, some scholars hope that it will collaterally assist litigation by easing the burden of the “deliberate indifference” standard. They argue the existence of PREA reports, along with forthcoming standards, will demonstrate awareness of the problem of sexual assault of inmates, and lack of response to the problem will be more quickly identified as “deliberate indifference.”<sup>137</sup> However, that prediction has yet to come to fruition. Although one district court opinion does make such an argument, there is a flood of opinions summarily dismissing cases that mention PREA on the “no private right of action” ground.<sup>138</sup> Many have criticized PREA as inadequate due to the lack of a remedy from the courts, or any direct sanctions, except perhaps funding decreases built into the statute.<sup>139</sup>
51. The law also fails to address or directly remedy any of the possible causes of prison rape,<sup>140</sup> such as overcrowding. It does, at least, direct two federal agencies, BJS and NPREC, to focus on identifying those root causes. It also creates other concerns about how PREA may be enforced, including the possibility that it will provide a “potent tool to selectively sanction inmates for any sexual expression.”<sup>141</sup> Finally, funding for the programs created by PREA was only authorized through 2010. While many believe some of the programs will continue to receive funding, the authorization expiration puts into question whether and to what extent these programs will be funded in the future.

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*Delays*, WASH. POST Dec. 12, 2010, available at <http://washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121203345.html>.

<sup>132</sup> Carrie Johnson, *U.S. Likely to Miss Deadline on Prison Rape Rules*, NAT'L PUB. RADIO (June 3, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=127376570> (“Attorney General Eric Holder explained his challenge to Congress this year: ‘When I speak to wardens, when I speak to people who run local jails, when I speak to people who run state facilities, they look at me and say, ‘Eric, how are we supposed to do this? How are we supposed to segregate people and build new facilities and do training?’ That is what we are trying to work out.’ State and local prison officials say making the changes could cost more than \$1 billion to start — and another \$1 billion each year to keep the standards in place.”).

<sup>133</sup> BOOZ ALLEN HAMILTON, PRISON RAPE ELIMINATION ACT COST IMPACT ANALYSIS (June 18, 2010), available at <http://www.ojp.usdoj.gov/programs/pdfs/preacostimpactanalysis.pdf> (indicating that while most of the standards will have low to moderate cost impact, a few will have very high upfront costs).

<sup>134</sup> Press Release, U.S. Dep’t of Justice, *Justice Department Releases Proposed Rule in Accordance with the Prison Rape Elimination Act* (Jan. 24, 2011).

<sup>135</sup> 42 U.S.C. § 15608.

<sup>136</sup> See, e.g., *Pirtle v. Hickman*, 2005 WL 3359731, at \*1 (D. Idaho 2005); *Law v. Whitson*, 2009 WL 5029564, at \*4 (E.D. Cal. 2009); *Bell v. County of Los Angeles*, 2008 WL 4375768, at \*6 (C.D. Cal. 2008).

<sup>137</sup> David Ries, *Duty-to-Protect Claims by Inmates After the Prison Rape Elimination Act*, 13 J. L. & POL’Y 915, 971-73 (2005).

<sup>138</sup> *Chao v. Ballista*, 630 F. Supp. 2d 170, 178 (D. Mass. 2009) (“Given the public attention devoted to sexual abuse in prisons writ large, and the repetitive, long-lasting abuse alleged in this case, it is a fair inference from the pleadings that prison officials—including Commissioner Dennehey—were deliberately indifferent to the risks and reality of this abuse.” See, e.g., Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003)).

<sup>139</sup> See Buchanan, *supra* note 36, at 47 n.11 (“The misnamed Prison Rape Elimination Act of 2003 does not adequately punish or eliminate sexual abuse. It establishes no sanctions for guards who rape prisoners or for institutions that look the other way when prisoners are raped.”); Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, SLATE MAGAZINE, Oct. 1, 2003, available at <http://www.slate.com/id/2089095/> (“The reason you’ve never heard of the Prison Rape Elimination Act is probably that no one who knows our criminal justice system believes it will do much of anything to eliminate prison rape.”).

<sup>140</sup> See Jerita L. DeBaux, *Prison Rape: Have We Done Enough? A Deep Look into the Adequacy of the Prison Rape Elimination Act*, 50 HOW. L. J. 203, 204 (2006).

<sup>141</sup> Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 193-94 (2006) [hereinafter, Smith, *Rethinking Prison Sex* (2006)].

**B. Lack of adequate health care for women in prison**

52. Inadequate access to proper health care services—characterized by delays, neglect, and outright mistreatment—is a pervasive problem affecting men and women alike in prisons across the United States.<sup>142</sup> However, women in prison in the United States generally present “far more serious and longstanding health problems when they first enter the system.”<sup>143</sup> Further, women in prison also have distinct biological and acquired medical risks and needs that require customized attention.<sup>144</sup> Prison health care systems, designed around the needs of men, have proven systematically unable to respond to these gender-specific needs.<sup>145</sup> According to advocates and researchers, lack of adequate health care is the most pressing concern for most women in prison.<sup>146</sup>
53. Part I of this section will briefly review the minimal constitutional requirements for provision of health care in United States prisons and the corresponding international law framework. Part II will discuss the general problems of access to health care and the particularized harms women in the prison system experience. To demonstrate the prison system’s inability to address gender-specific needs, Part III explores in further depth reproductive health care concerns, including access to abortion services and the treatment of pregnant women.

*i. Legal framework in the United States and in international law*

54. The Eighth Amendment of the United States Constitution, which forbids “cruel and unusual punishment,”<sup>147</sup> requires the state to provide adequate medical care to the individuals it incarcerates.<sup>148</sup> In order to bring a successful claim under the Eighth Amendment, an incarcerated person must show that a prison official was “deliberately indifferent” to a “serious medical need.”<sup>149</sup> This standard requires a prisoner to prove both an objective element and a subjective element. She must first prove that a “serious medical need”<sup>150</sup> went untreated or was inadequately treated. Second, she must prove that the prison official knew about and disregarded the substantial risk of harm.<sup>151</sup> As discussed above, the “deliberate indifference” standard’s subjective element makes it very difficult for prisoners to succeed even where there are demonstrated violations.
55. International law standards require the provision of adequate and qualified medical, dental, and mental health care.<sup>152</sup> The Standard Minimum Rules require that medical officials see prisoners complaining of illness without delay and prisoners in need of specialized treatment are transferred to appropriate facilities to receive adequate care.<sup>153</sup> On October 14, 2010, the Third Committee of the United Nations recommended to the General Assembly the new rules for the treatment of women prisoners, called the Bangkok Rules. In addition to the requirements of the UN Standard Minimum Rules, the Bangkok Rules, recognizing that prison systems are often designed to meet men’s needs, require the provision of adequate gender-specific and gender-sensitive health care.<sup>154</sup>

<sup>142</sup> SILJA J.A. TALVI, *WOMEN BEHIND BARS: THE CRISIS OF WOMEN IN THE U.S. PRISON SYSTEM* 87 (2007).

<sup>143</sup> *Id.*

<sup>144</sup> VERNETTA D. YOUNG & REBECCA REVIERE, *WOMEN BEHIND BARS: GENDER AND RACE IN U.S. PRISONS* 86 (2006) (biological risks include higher rates of susceptibility to sexually transmitted diseases; acquired risks include likely exposure to prior violence and drugs).

<sup>145</sup> *Id.* at 85; TALVI, *supra* note 142, at 88.

<sup>146</sup> See, e.g., TALVI, *supra* note 142, at 86 (“I can say without any exaggeration that medical ‘care’ represents one of the absolute worst aspects of life in women’s jails and prison...”); KATHLEEN J. FERARRO & ANGELA M. MOE, *WOMEN’S STORIES OF SURVIVAL AND RESISTANCE, WOMEN IN PRISON: GENDER AND SOCIAL CONTROL* 71 (Barbara H. Zaitzow & Jim Thomas, eds., 2003) (“The lack of adequate health care was a major concern for the women in our study.”).

<sup>147</sup> U.S. CONST. amend. VIII.

<sup>148</sup> *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

<sup>149</sup> *Id.* at 104-05.

<sup>150</sup> For more information on what constitutes a serious medical need, see ACLU NATIONAL PRISON PROJECT, *KNOW YOUR RIGHTS: MEDICAL, DENTAL, AND MENTAL HEALTH CARE* (2005), available at [http://www.aclu.org/images/asset\\_upload\\_file690\\_25743.pdf](http://www.aclu.org/images/asset_upload_file690_25743.pdf).

<sup>151</sup> *Farmer v. Brennan*, 511 U.S. 825, 836-39 (1994).

<sup>152</sup> *UN Standard Minimum Rules*, *supra* note 88.

<sup>153</sup> *Id.*

<sup>154</sup> *U.N. Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*, Oct. 6, 2010, U.N. Doc. A/C.3/65/L.5 (2010).

**ii. The realities of health care access in women's prisons: delays in access and mistreatment of women in the prison health care system**

56. In a 2001 legislative hearing on women's medical problems in the Valley State Prison for Women in California, Assemblyman Carl Washington commented that "[f]rom what I've heard, cats and dogs are treated better than some of these people."<sup>155</sup> Anecdotal and empirical evidence, from advocates and in the literature, indicate that women often experience extreme delays in access to health care, and sometimes outright mistreatment, despite serious medical needs.<sup>156</sup> In interviews, advocates reported endless stories of delay and grossly inept care. Examples included a woman who waited three months to have her broken arm cast, a woman with hepatitis C who repeatedly requested medical attention to no avail,<sup>157</sup> and a woman who was diagnosed with cancer, given chemotherapy, and sent to hospice care, only to be told months later she did not in fact have cancer.<sup>158</sup>
57. Prisons are often understaffed with unlicensed or otherwise under-qualified physicians and medical personnel. The inmate/physician and inmate/nurse ratios almost always greatly exceed the national recommendations of the National Commission on Correctional Health Care (NCCCHC).<sup>159</sup> To fill the gap, prisons routinely use non-medical staff, dubbed "medical technical assistants" or "gatekeepers." Although these gatekeepers ordinarily have little or no medical training, and often have no written protocols, they have the power to determine whether a prisoner can see a physician.<sup>160</sup> Prisoners report similar difficulties and delays in access to medication. Simple requests for Tylenol or cold medication are often ignored or only filled days after the need has passed.<sup>161</sup> Women requesting pain medications are often labeled as "drug seekers" and are routinely denied.<sup>162</sup>
58. Even if a woman manages to reach a prison doctor, there is no assurance of quality care. Prisons and jails routinely hire doctors who "would not be acceptable to practice in the free-world civilian sector": doctors with limited licenses, previous sexual abuse convictions, or significant substance abuse problems.<sup>163</sup> Further, indigent incarcerated women may be reluctant to request care in the first instance. Increasingly, correctional facilities charge fees for medical services provided to prisoners, dissuading prisoners in serious need of medical attention from seeking it.<sup>164</sup> In one study, women reported that they had never had a Pap smear because they could not afford the \$5 co-pay.<sup>165</sup>
59. Access to obstetrical and gynecological care, a key element of comprehensive health care for all women, is at best inconsistent in United States women's prisons. Although doctors recommend that young to middle-aged women<sup>166</sup> in the general population have annual pelvic examinations, Pap smears, and access to reproductive health information, these services are not regularly offered in prisons.<sup>167</sup> Women consistently report the lack of regular checkups, Pap smears, and follow-ups for irregular Pap smears.<sup>168</sup> One study showed that only 53% of jails provided gynecological and obstetrical services.<sup>169</sup> Since prison

<sup>155</sup> TALVI, *supra* note 142, at 79.

<sup>156</sup> NANCY STOLLER, IMPROVING ACCESS TO HEALTH CARE FOR CALIFORNIA'S WOMEN PRISONERS, WOMEN AND GIRLS IN THE CRIMINAL JUSTICE SYSTEM: POLICY ISSUES AND PRACTICE STRATEGIES 40-42 (Russ Immarigeon ed., 2006) (reporting instances of denial of medical care such as a woman who was forced to wait more than a year for a mammogram despite family history of breast cancer and a burn victim who was denied prescribed dressings and physical therapy despite having burns covering more than half her body).

<sup>157</sup> FERRARO & MOE, *supra* note 146, at 72.

<sup>158</sup> Interviews with advocates (on file with Yale Detention and Human Rights Clinic).

<sup>159</sup> YOUNG & REVIERE, *supra* note 144, at 96.

<sup>160</sup> *Id.*; see also STOLLER, *supra* note 156, at 40-45.

<sup>161</sup> FERRARO & MOE, *supra* note 146, at 72.

<sup>162</sup> TALVI, *supra* note 142, at 84, 93.

<sup>163</sup> MICHAEL PUISIS, CLINICAL PRACTICE IN CORRECTIONAL MEDICINE 32 (2006).

<sup>164</sup> *Id.*; see also YOUNG & REVIERE, *supra* note 144, at 97.

<sup>165</sup> TALVI, *supra* note 142, at 88.

<sup>166</sup> The greatest number of women in prison fall within the age range of 25 to 44, with an average age of 29. CINDY BANKS, WOMEN IN PRISON: A REFERENCE HANDBOOK 165 (2003); *Women in Prison*, PRISON ACTIVIST RESOURCE CENTER, Dec. 7, 2008, available at <http://www.prisonactivist.org/articles/women-prison>.

<sup>167</sup> YOUNG & REVIERE, *supra* note 144, at 89.

<sup>168</sup> TALVI, *supra* note 142, at 88.

<sup>169</sup> FERRARO & MOE, *supra* note 146, at 71.

health care is designed with a male-centered approach, gynecological care is labeled a “specialty service,” though it is essential to women’s healthcare. Lack of access to OB-GYN care can cause delays in the diagnosis of serious diseases such as breast cancer, ovarian cancer, and sexually transmitted diseases. Women in prison often report shortages of everyday hygienic products including soap, toilet paper, and sanitary pads. Without access to soap, hot water, and laundry facilities, the spread of disease—already a significant problem in such crowded conditions—can run rampant.<sup>170</sup> A woman in a Texas prison wrote, “We only get six tampons a month...and a roll of toilet paper a week. The rest of the time we are using rags as toilet paper.”<sup>171</sup> Advocates confirm that women are not always provided with sanitary pads. One advocate discussed the palpable discomfort in a meeting of correctional facility leaders, almost all men, when advocates raised the issue of access to hygiene products.<sup>172</sup> The lack of access to tampons and pads once again highlights the ways in which the system is not designed to respond to gender-specific concerns.

### iii. Disease

60. Women in prison have higher rates of HIV and other diseases than men in prison; chronic and/or serious diseases such as AIDS, tuberculosis, and hepatitis C require special attention that often is not provided in women’s facilities. In 2004, approximately 2.4% of women in prison were diagnosed as HIV-positive, compared to 1.7% of men.<sup>173</sup> Women entering prison “are at greater risk than men of entering prison with sexually transmitted disease and HIV/AIDS because of their greater participation in prostitution and the likelihood of sexual abuse.”<sup>174</sup> While this rate is on the decline—3.5% of women in prison were HIV-positive in 1998<sup>175</sup>—prisoners are still eight or nine times more likely to be infected with HIV than the general population.<sup>176</sup> While many prisons do offer HIV testing,<sup>177</sup> comprehensive HIV treatment is rare in prison facilities,<sup>178</sup> and quality treatment, educational, and support groups are often not available. Further, HIV-positive prisoners may be stigmatized by prison officials. They often suffer from the same delays in health care access and neglect as the general prison population, which can be deadly for women suffering from HIV/AIDS.<sup>179</sup>
61. Prisoners are also nine to ten times more likely to have hepatitis C than the general population.<sup>180</sup> While some prison administrators have put in place policies to address what some refer to as a “silent epidemic,” advocates argue that “too little is being done...too late.”<sup>181</sup> Ultimately, many prisons do not provide adequate treatment, and 1.4 million female and male prisoners carry the hepatitis C virus back to their communities every year after their release.<sup>182</sup> Women’s prisons have also experienced serious epidemics of tuberculosis and MRSA (a highly contagious and dangerous mutation of staph). The overcrowding in women’s prisons, combined with the lack of sanitary supplies and sanitary conditions, aggravate the spread of such highly contagious diseases.<sup>183</sup>

<sup>170</sup> *Id.* at 102.

<sup>171</sup> *Id.* at 109.

<sup>172</sup> Interviews on file with Yale Detention and Human Rights Clinic.

<sup>173</sup> THE SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM: BRIEFING SHEETS (2007), available at [http://www.sentencingproject.org/doc/publications/womenincj\\_total.pdf](http://www.sentencingproject.org/doc/publications/womenincj_total.pdf).

<sup>174</sup> Stephanie Covington, *Women and the Criminal Justice System*, 17 WOMEN’S HEALTH ISSUES 180 (2007).

<sup>175</sup> BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: WOMEN OFFENDERS 8 (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/wo.pdf>.

<sup>176</sup> TALVI, *supra* note 142, at 96.

<sup>177</sup> YOUNG & REVIERE, *supra* note 144, at 90.

<sup>178</sup> *Id.* at 91.

<sup>179</sup> See, e.g., Kendra Weatherhead, *Cruel but Not Unusual Punishment: The Failure to Provide Adequate Medical Treatment to Female Prisoners in the United States*, 13 HEALTH MATRIX 429, 441 (2003).

<sup>180</sup> TALVI, *supra* note 142, at 97.

<sup>181</sup> *Id.* “New Jersey...doesn’t test prisoners for HCV until they begin to show symptoms of liver disease. Pennsylvania tests all of its prisoners, but the Oklahoma prison system has gone so far as to adopt a ‘don’t ask don’t tell’ policy as a way of avoiding costs affiliated with HCV treatment. Other state correctional systems, including those in New York and California, say they provide testing upon request and treatment only if a prisoner can meet certain criteria.” *Id.* Despite regulations to the contrary, California charges a \$5 co-pay for HCV testing, creating a significant disincentive to testing for women in prison. See *infra* ¶ 196 (discussing California’s co-pay system and its effects on women in the California prison system).

<sup>182</sup> TALVI, *supra* note 142, at 98.

<sup>183</sup> See *id.* at 100-06; see also Brent Staples, *Treat the Epidemic Behind Bars Before It Hits the Streets*, N.Y. TIMES, June 22, 2004.

**iv. Drug treatment and mental health care**

62. Reports estimate that between sixty and eighty percent of women in prison face substance abuse problems.<sup>184</sup> Women are more likely than men to report using drugs at the time of their offense, and nearly a third of women reported committing their offense to obtain money to buy drugs.<sup>185</sup> Women are increasingly arrested for drug crimes. “Between 1997 and 2006, women’s arrests for drug abuse violations rose by 29.9%, while men’s arrests for the same type of crimes rose by 15.7%. Over 200,000 adult women were arrested for drug abuse violations in 2006, an increase of nearly 23% from 2002.”<sup>186</sup> Despite the increasing problem of drug dependence among prisoners, in 2006 only 11.2% of prisoners that meet clinical criteria for a substance abuse disorder received any sort of professional treatment.<sup>187</sup> Women are actually slightly more likely to receive treatment than men, but only by a small margin.<sup>188</sup> Although methadone maintenance therapy is known to be an effective treatment for heroin addiction and other opiate dependence, a 2009 study revealed that only about half of prison systems offer methadone treatment to prisoners.<sup>189</sup> Of those facilities, half offered methadone only to pregnant women or for chronic pain management.<sup>190</sup>
63. Research demonstrates that women use drugs in different ways and for different reasons than men. Women are more likely to use drugs to relieve emotional or psychological issues. These issues are often related to a history of abuse.<sup>191</sup> However, the same study reveals that treatment options for women are often modeled after male programs and are not tailored to women’s needs.<sup>192</sup> In order to effectively treat women prisoners and reduce recidivism, research suggests prisons should adopt programs built for women’s needs, such as trauma-informed approaches to drug treatment.<sup>193</sup>
64. Women in prison also tend to have much higher rates of mental health problems and dual diagnoses (the co-occurrence of a mental health disorder and substance abuse problem). Women in prison are highly likely to have histories of physical or sexual abuse. Over half of all women in prison reported experiencing sexual or physical abuse before entering prison.<sup>194</sup> In a 2005 study, nearly all the women in a jail study had been exposed to a traumatic event; 90% reported one interpersonal trauma, and 71% reported exposure to domestic violence.<sup>195</sup> Medical research has demonstrated that histories of violence and trauma significantly affect an individual’s physical and mental health.<sup>196</sup> In 2005, nearly three-quarters of all women in state prisons reportedly had a mental health problem.<sup>197</sup>
65. Researchers and advocates report that few women actually receive mental health services. When they do, the care is inconsistent and does not meet medical standards.<sup>198</sup> Of the 12% of women diagnosed with severe psychiatric disorders, only 25% receive mental health care.<sup>199</sup> Meanwhile, many women are

<sup>184</sup>THE SENTENCING PROJECT, *supra* note 173; Weatherhead, *supra* note 179, at 441.

<sup>185</sup> THE SENTENCING PROJECT, *supra* note 173.

<sup>186</sup> WOMEN’S PRISON ASSOCIATION, <http://www.wpaonline.org/institute/> (last visited Nov. 19, 2010).

<sup>187</sup> Press Release, The Nat’l Ctr. on Addiction & Substance Abuse at Columbia Univ., Behind Bars II: Substance Abuse and America’s Prison Population 4 (2010), available at <http://www.casacolumbia.org/download.aspx?path=/UploadedFiles/tw0t55j5.pdf>.

<sup>188</sup> *Id.* at 41.

<sup>189</sup> Nunn et al., *Methadone and Buprenorphine Prescribing and Referral Practices in U.S. Prison Systems: Results from a Nationwide Survey*, 105 DRUG & ALCOHOL DEPENDENCE 83, 83 (2009).

<sup>190</sup> *Id.*

<sup>191</sup> Women with histories of abuse are three times more likely to have an alcohol abuse disorder and four times more likely to have a drug abuse problem. Nat’l Ctr. on Addiction & Substance Abuse at Columbia Univ., *supra* note 187, at 47.

<sup>192</sup> *Id.*; see also YOUNG & REVIERE, *supra* note 144, at 82 (“Even with new knowledge about gender differences, most prison drug treatment programs are still based on a male model and modified only slightly for women.”).

<sup>193</sup> Nat’l Ctr. on Addiction & Substance Abuse at Columbia Univ., *supra* note 187, at 47.

<sup>194</sup>THE SENTENCING PROJECT, *supra* note 173.

<sup>195</sup>Bonnie L. Green et al., *Trauma Exposure, Mental Health Functioning, and Program Needs of Women in Jail*, 51 CRIME & DELINQUENCY 133, 141 (2005).

<sup>196</sup> Covington, *supra* note 174.

<sup>197</sup> THE SENTENCING PROJECT, *supra* note 173.

<sup>198</sup> See, e.g., Covington, *supra* note 174; TALVI, *supra* note 142, at 126 (“[W]omen...who end up in prison...have very little access to any kind of real psychiatric care.”).

<sup>199</sup> THE SENTENCING PROJECT, *supra* note 173.

heavily medicated with psychotropic drugs without corresponding mental health care services or therapy. Women are significantly more likely to be medicated than men: 22% of women are given psychotropic medications compared with 9% of men.<sup>200</sup> Numerous advocates report overmedication of women causing stupors, drooling, and a generalized inability to function.<sup>201</sup> Some advocates posit that the overmedication of women is a result of gender roles; women are not expected to engage in criminal behavior and therefore when they do their problems are “psychiatrized” and “controlled” via medication.<sup>202</sup> Whether the explanation is explicitly gendered or merely a result of negligent or absent medical services, most researchers agree that many women in prison are overmedicated and undertreated.

66. Many women suffering from mental health disorders in prison often experience a downward spiral in their mental health. When they act out as a result of untreated mental health issues, they are often punished by being sent to administrative segregation. Isolation conditions in most segregation units are extreme, and their detrimental effects on prisoners’ mental health are well-documented.<sup>203</sup> Many argue isolation is particularly harmful to women.<sup>204</sup> Because many incarcerated women have poor mental health, they are unable to ‘earn’ their way out of segregation, and their mental health continues to deteriorate in isolation.<sup>205</sup>
67. “Suicide watch” in many prisons is also experienced as punishment rather than treatment. One prisoner writes, “I had to strip in front of male and female guards. For the first fourteen days [under suicide watch], I lay naked in a cell by myself, in a room with a broken window.”<sup>206</sup> Another writes “[t]hey take you and put you in a holding cell that’s smaller than this. There’s a bunk in there and they chain you to it. They take away your clothes and your blanket, everything. You have nothing...If I wasn’t suicidal, that’ll drive you to it.”<sup>207</sup> Therefore, rather than seeking treatment, women report hiding suicidal or self-harm tendencies to avoid segregation.<sup>208</sup>

**v. *Flynn v. Doyle***

68. The recent litigation brought by the ACLU challenging the conditions of the Taycheedah Correctional Institution (TCI), a women’s facility in Wisconsin, demonstrates the severity and systematic nature of the many problems ongoing in United States women’s prisons. In May 2006, the ACLU sued on behalf of women prisoners in TCI alleging serious deficiencies in the provision of medical care at the facility. The court records document the inadequacy of treatment, including: (1) nurses acting as improper “gatekeepers” to access to treatment; (2) delays in treatment reaching several months; (3) unreliable and dangerous provision of medications by untrained officials; (4) lack of an on-site infirmary; and (5) lack of follow-up from off-site care.<sup>209</sup> The ACLU demonstrated that while seriously mentally ill men in Wisconsin have access to the Wisconsin Resource Center, a facility with extensive mental health services, women have no comparable option.<sup>210</sup> The court issued a preliminary injunction as to the dispensation of medications by untrained officials and denied the defendants’ motion to dismiss, finding that the ACLU had alleged facts sufficient to demonstrate Eighth Amendment violations. The ACLU reached a settlement

<sup>200</sup> YOUNG & REVIERE, *supra* note 144, at 105.

<sup>201</sup> TALVI, *supra* note 142, at 123.

<sup>202</sup> YOUNG & REVIERE, *supra* note 144, at 105-06.

<sup>203</sup> See Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 456-507 (2006); Istanbul Statement on the Use and Effects of Solitary Confinement (adopted on Dec. 9, 2007 at the International Psychological Trauma Symposium, Istanbul).

<sup>204</sup> TALVI, *supra* note 142, at 127 (“Women turn to each other for support and basic survival in ways that men don’t do as often. So the isolation issue takes on an even deeper [meaning] for women.”) (quoting Ellen Barry of Legal Services for Prisoners).

<sup>205</sup> For a description of the conditions of women’s segregation units and experiences of women struggling with mental health problems in them, see TALVI, *supra* note 142, Chapter 5: Trying to Stay Sane.

<sup>206</sup> *Id.* at 131.

<sup>207</sup> FERRARO & MOE, *supra* note 146, at 77.

<sup>208</sup> *Id.* at 77-78.

<sup>209</sup> *Flynn v. Doyle*, 672 F. Supp. 2d 858 (E.D. Wis. 2009).

<sup>210</sup> *Id.* at 877.

with the defendants in June 2010.<sup>211</sup> The Wisconsin Department of Corrections agreed to improve its medical facilities and policies to meet the NCCHC's accreditation standards; they are also constructing a Women's Resource Center to provide adequate mental health care equal to the treatment provided to men.

**vi. Reproductive justice**

69. Between six and ten percent of incarcerated women in the United States are pregnant.<sup>212</sup> Although little reliable data exists on the topic, that means approximately two thousand incarcerated women give birth annually.<sup>213</sup> Pregnancies are usually unplanned and high risk due to psychiatric illness, alcohol and substance abuse, and poor nutrition.<sup>214</sup> Therefore, access to appropriate medical services is crucial to preserve the health of the mother, and her child if she chooses to continue the pregnancy.

**vii. Access to abortion**

70. There is now a significant body of United States case law holding that a woman does not lose her Fourteenth Amendment right to choose to terminate her pregnancy<sup>215</sup> as a result of her incarceration.<sup>216</sup> When challenged, courts have struck down corrections policies that either flatly prohibit transportation for prisoners to obtain elective abortions<sup>217</sup> or require women to petition for a court order to authorize transport or temporary release to obtain an abortion.<sup>218</sup> Only one court has held that it is a violation of a woman's Eighth Amendment right to adequate care for "serious medical needs" to refuse women access to elective abortions and that, therefore, correctional facilities must provide the funding if not otherwise available.<sup>219</sup> Since most women in prison are indigent, and only make 12 to 40 cents per hour working in prison, many women are effectively unable to obtain abortions because of cost. Many argue that while the state can attempt to recover costs, the state must provide access for indigent women regardless of their abilities to pay. One court recently agreed, at least as to the costs of transportation and security. The Arizona district court held that Sheriff Joe Arpaio's policy of charging prisoners up-front for security and transportation for the procedure was unconstitutional.<sup>220</sup> At a constitutional minimum, facilities must provide timely access to abortion, but not necessarily funding.
71. Studies show that the realities of correctional facilities do not live up to constitutional standards. A recent survey concluded that policies are "highly variable" across the states and inconsistent in practice.<sup>221</sup> Only 68% of correctional health providers answer affirmatively when asked whether women at their facilities are allowed to obtain an elective abortion.<sup>222</sup> 88% of that group replied that their facilities arrange transportation for women seeking abortions.<sup>223</sup> These findings are consistent with the

<sup>211</sup> Flynn v. Doyle, No. 06-C-0537 (E.D. Wis. June 15, 2010), available at <http://www.aclu.org/files/assets/2010-8-23-FlynnvDoyle-Settlement.pdf>.

<sup>212</sup> CTR. FOR REPRODUCTIVE RIGHTS, HUMAN RIGHTS ABUSES OF U.S. INCARCERATED PREGNANT WOMEN 6 (2009) (on file with Yale Detention and Human Rights Clinic) [hereinafter CENTER FOR REPRODUCTIVE RIGHTS SUBMISSION].

<sup>213</sup> Jenni Vainik, *The Reproductive and Parental Rights of Incarcerated Mothers*, 46 FAM. CT. REV. 670, 676 (2008).

<sup>214</sup> Jennifer Clark et al., *Reproductive Health Care and Family Planning Needs Among Incarcerated Women*, 96 AM. J. OF PUB. HEALTH 834, 834 (2006).

<sup>215</sup> Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

<sup>216</sup> See Lorraine Kenny, *Women Don't Check Their Reproductive Rights at the Jailhouse Door*, WOMEN, GIRLS & CRIM. JUST. 21 (Feb./Mar. 2007); Diana Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict with Constitutional Standards*, 41 PERSP. ON SEXUAL & REPROD. HEALTH 59 (2009).

<sup>217</sup> Elective abortions are often defined as all abortions not necessary to save the life of the mother.

<sup>218</sup> See Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008); Doe v. Barron, 92 F. Supp. 2d 694 (S.D. Ohio 1999); Reprod. Health Serv. v. Webster, 851 F.2d 1071 (8th Cir. 1988); Roe v. Leis, 2001 U.S. Dist. LEXIS 4348 (S.D. Ohio 2001); Doe v. Arpaio, 150 P.3d 1258 (Ariz. Ct. App. 2007).

<sup>219</sup> *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987).

<sup>220</sup> Doe v. Arpaio, No. CV2004-009286 (Sup. Ct. Ariz. 2009).

<sup>221</sup> Carolyn B. Sufrin et al., *Incarcerated Women and Abortion Provision: A Survey of Correctional Health Providers*, 41 PERSP. ON SEXUAL & REPROD. HEALTH 6, 10 (2009).

<sup>222</sup> *Id.* at 8.

<sup>223</sup> *Id.*

experience of advocates, who report that while the law in this area has improved, the realities have not kept pace. The number of calls from women whose access is being impeded has not decreased.<sup>224</sup>

72. The ACLU's review of available prison standards found that twenty-two states had passed standards for abortion access for female prisoners.<sup>225</sup> Likewise, a thorough 2004 review of state policies similarly found that fourteen states had no written policy at all on abortion access.<sup>226</sup> The dominant policy in states appears to be to "permit prisoners to obtain abortions on the same basis as other 'elective' medical care...paying for transportation and security to an outside medical provider as well as paying for the abortion itself."<sup>227</sup> The author of the study found that as of 2004, four states—Alabama, Indiana, Mississippi, and Wyoming—still prohibited access to abortions unless they are to save the life of the mother. Further, general restrictions on access to abortions, such as waiting periods and two-trip requirements, may increase the price of an abortion for incarcerated woman from \$2,000 to \$3,000 for a first-trimester abortion.<sup>228</sup>
73. The problem appears to be particularly acute in county jails. Since jails are typically only used for shorter sentences or pre-trial detention, officials often try to avoid addressing the issue. Because access to a legal abortion is temporally limited and the risks of the procedure increase with time, such an attitude is harmful to women seeking abortions. A recent New York Civil Liberties Union report confirms this trend: a study of the New York county jail system, which houses 3,000 women at any given time, indicated that less than half of the counties had any policy specifically addressing prisoners' access to abortion, and only 23% provided for unimpeded access.<sup>229</sup>
74. Under international law standards, governments have a general responsibility to ensure access to safe abortion when it is legal. At least six treaty monitoring bodies—the Committee on the Elimination of Discrimination Against Women, the Committee on the Rights of the Child, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee Elimination of All Forms of Racial Discrimination, and the Committee Against Torture<sup>230</sup>—have discussed the importance of access to abortion to a woman's right to life, health, privacy, and non-discrimination.<sup>231</sup> State responsibility is arguably strengthened in prisons, where the government monopolizes prisoners' access to care, and is required to provide adequate care.<sup>232</sup> While American courts have repeatedly held that a woman retains a right to abortion in prison, access to the courts is limited, and the courts do not address the fiscal realities of women in prison. Only through uniform and enforceable policies will consistent access to abortion for incarcerated women become a reality.

### *viii. Other reproductive injustices*

75. In addition to the lack of access to abortion across the country, advocates are concerned that incarcerated women are being denied their reproductive freedom in other systematic ways. Justice Now, an advocacy organization in California, has begun to research and document incidents of sterilization, either after delivery or during other medical procedures, that may have been done under coercion or without informed consent.<sup>233</sup> This research is discussed in further detail in the California case study in the

<sup>224</sup> Interview with Diana Kasdan, ACLU (on file with Yale Detention and Human Rights Clinic).

<sup>225</sup> ACLU, STATE STANDARDS FOR PREGNANCY-RELATED HEALTH CARE AND ABORTION FOR WOMEN IN PRISON, available at <http://www.aclu.org/state-standards-pregnancy-related-health-care-and-abortion-women-prison-map> (last updated Oct. 28, 2009).

<sup>226</sup> Rachel Roth, *Do Prisoners Have Abortion Rights?*, 30 FEMINIST STUDIES 353, 368 (2004).

<sup>227</sup> *Id.* at 366-67.

<sup>228</sup> *Id.* at 372.

<sup>229</sup> N.Y. CIVIL LIBERTIES UNION, ACCESS TO REPRODUCTIVE HEALTH CARE IN NEW YORK STATE JAILS 2 (2008), available at [http://www.nyclu.org/files/rrp\\_jail\\_report\\_030408.pdf](http://www.nyclu.org/files/rrp_jail_report_030408.pdf).

<sup>230</sup> The U.S. has ratified only the ICCPR, ICERD, and CAT.

<sup>231</sup> CENTER FOR REPRODUCTIVE RIGHTS, BRINGING RIGHTS TO BEAR: ABORTION AND HUMAN RIGHTS 2 (2008), available at [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB\\_abortion\\_hr\\_revised\\_3.09\\_WEB.PDF](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB_abortion_hr_revised_3.09_WEB.PDF).

<sup>232</sup> UN Standard Minimum Rules, *supra* note 87, at Rules 22-26; see also UN OFFICE ON DRUGS AND CRIME & WORLD HEALTH ORG. EUROPE, WOMEN'S HEALTH IN PRISON: CORRECTING GENDER INEQUITY IN PRISON HEALTH (THE KYIV DECLARATION) 23 (2009), available at [http://www.unodc.org/documents/commissions/CND-Session51/Declaration\\_Kyiv\\_Women\\_60s\\_health\\_in\\_Prison.pdf](http://www.unodc.org/documents/commissions/CND-Session51/Declaration_Kyiv_Women_60s_health_in_Prison.pdf) ("Women may also decide not to proceed with their pregnancy in prison, especially if they were previously unaware that they were pregnant.").

<sup>233</sup> See Human Rights Program at Justice Now, *Prisons as a Tool of Reproductive Oppression*, 5 STAN. J. C.R. & C.L. 309 (2009).

appendix of this report.<sup>234</sup> While little work on the topic has been done nationwide, the possibility of such coercive practices is concerning to women's advocates. State control of women's reproductive choices, either by refusal of abortion or coerced sterilization, violates women's reproductive rights in irreversible ways.

76. Mandatory minimum sentence laws, indeterminate sentencing, and other harsh incarceration policies have increasingly led to longer sentences for prisoners in the United States. Many of these policies disproportionately affect women, since they apply primarily to drug offenses, and women are increasingly and at higher rates imprisoned for drug-related crimes.<sup>235</sup> The natural result of many of these policies is that many women are deprived of all reproductive capacity: they enter prison at a young age and remain there throughout their childbearing years. Incarcerated women have voiced serious concern about their effective inability to ever have children, and advocates are increasingly concerned about this less visible, but severe, reproductive injustice.<sup>236</sup>

**ix. Prenatal care**

77. Inadequate access to medical care in prison extends to prenatal care for incarcerated pregnant women. Pregnant women regularly report "that they do not receive regular pelvic exams or sonograms, that they receive little to no education about prenatal care and nutrition, and that they are unable to maintain an appropriate diet to suit their changing caloric needs."<sup>237</sup> Two recent studies demonstrate how unprepared prisons are to respond to the distinct needs of pregnant women. A review of state policies by the ACLU revealed that only thirty-five jurisdictions (thirty-four states and the District of Columbia) have any correctional policies relevant to pregnancy-related care.<sup>238</sup> Comparing those policies to the national standards provided by the NCCHC and the American Public Health Association (APHA), the ACLU found nearly all the policies seriously lacking.<sup>239</sup>
78. In October 2010, the Rebecca Project for Human Rights and the National Women's Law Center released a state-by-state report card on conditions of confinement for pregnant and parenting women. The report based its "grade" for the provision of prenatal care on whether the state met the following basic standards: (1) provides for medical exams as part of prenatal care; (2) screens and provides treatment for high-risk pregnancies; (3) addresses the nutritional needs of pregnant women; (4) offers HIV testing; (5) provides a preexisting arrangement for deliveries; (6) provides advice on activity levels and safety; and (7) requires prisons to report all pregnancies and their outcomes.<sup>240</sup> Twenty-seven states received an 'F' indicating that they have none of these policies. Eleven states received a 'D' indicating that they have one or in some instances two of these policies, but generally do not provide adequate prenatal care. No state received an 'A', which would indicate compliance with all of the above standards. The two reports demonstrate that while some states have started to recognize the importance of prenatal care and to institutionalize appropriate policies, the majority are still unprepared and unresponsive to the needs of pregnant women in prison.
79. The ACLU represented a woman in Montana who was five months pregnant when she voluntarily reported to the detention facility to serve a short term for traffic violations.<sup>241</sup> She was refused access to essential medication for her ongoing participation in a treatment program for her diagnosed opiate

<sup>234</sup> See *infra* Appendix, California case study.

<sup>235</sup> KATHERINE GABEL & DENISE JOHNSTON, CHILDREN OF INCARCERATED PARENTS 274 (1995); THE SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM: INVOLVEMENT IN CRIME 3 (2007)

<sup>236</sup> Human Rights Program at Justice Now, *supra* note 233.

<sup>237</sup> YOUNG & REVIERE, *supra* note 144, at 89.

<sup>238</sup> ACLU, *supra* note 225.

<sup>239</sup> *Id.* (Only eight states explicitly state that medical examinations shall be included in prenatal care, four mention HIV testing, six include advice on levels of activity and safety, nineteen mention prenatal nutrition but only ten actually require provision of appropriate nutrition, seven explicitly require an agreement with a specific community facility for delivery, two require that institutions track pregnancies and their outcomes, and seventeen provide for screening for high-risk pregnancies).

<sup>240</sup> REBECCA PROJECT FOR HUMAN RIGHTS & NAT'L WOMEN'S LAW CTR., MOTHERS BEHIND BARS 23-25 (2010), available at <http://www.rebeccaproject.org/images/stories/files/mothersbehindbarsreport-2010.pdf>.

<sup>241</sup> *Cajune v. Lake County*, No. 9:2009cv00164 (D. Mont. filed Nov. 19, 2009).

addiction. She “suffered complete and abrupt withdrawal, experienced constant vomiting, diarrhea, rapid weight loss, dehydration, and other withdrawal symptoms, all extremely dangerous during pregnancy.”<sup>242</sup> Only after nine days and the intervention of a public defender was she able to continue her treatment. Advocates indicate that many prisons force pregnant women to go without any drug treatment (go “cold turkey”) even though withdrawal symptoms can put serious stress on the pregnancy.

**x. Shackling in labor**

80. In many United States jails and prisons “pregnant women are routinely restrained by their ankles or their wrists when transported for prenatal medical appointments or to go to the hospital,” and often they “remain shackled during labor, delivery, and the post-delivery recovery period.”<sup>243</sup> Such treatment is dangerous, degrading, and violates international human rights standards.
81. During transportation, a shackled woman is put at a greater risk of falling. If she does, she will be unable to catch herself.<sup>244</sup> In labor, shackling restricts a woman’s ability to move freely to alleviate the pain.<sup>245</sup> The resulting stress may reduce the flow of oxygen to the baby during delivery.<sup>246</sup> If complications result, doctors’ ability to quickly respond with an emergency cesarean may be hampered.<sup>247</sup> The American Congress of Obstetricians and Gynecologists (ACOG) wrote: “Physical restraints have interfered with the ability of physicians to safely practice medicine by reducing their ability to assess and evaluate the physical condition of the mother and the fetus, and have similarly made the labor and delivery process more difficult than it needs to be; thus, overall putting the health and lives of women and unborn children at risk.”<sup>248</sup>
82. Further, the experience of shackling during pregnancy is degrading and humiliating. Tina Reynolds, founder of the nonprofit WORTH: Women on the Rise Telling HerStory, was shackled while giving birth to her son. She writes, “Women remember the births of their babies for the rest of their lives and children ask to understand the how and why they came to being the world. This is the story I’ve told my son when he’s asked about his birth. For all mothers and fathers what story did you tell your children of their birth?”<sup>249</sup>
83. Shackling incarcerated pregnant women violates international human rights standards. Rule 33 of the United Nations Standard Minimum Rules for the Treatment of Prisoners prohibits the use of restraints except when necessary to prevent the prisoner from injuring injury to herself, others, or property, or when the prisoner is a flight risk. Most women in the United States are not imprisoned for violent crimes. It is highly questionable that a pregnant woman could be a flight risk, especially during and directly after labor. In 2006, both the CAT and the Human Rights Committee expressed concern regarding the United States practice of shackling women during childbirth.<sup>250</sup> Likewise, during the Special Rapporteur’s 1998 visit, she noted that the shackling of pregnant women in the United States “may be said to constitute cruel and unusual practices.”<sup>251</sup>
84. There have been a number of improvements in United States practice in recent years. In October 2009 in *Nelson v. Correctional Medical Services*, the Eighth Circuit held that women have a “clearly established”

<sup>242</sup> Press Release, ACLU, *Mother Asks Court to Remedy Mistreatment of Pregnant Inmates by Detention Facility* (Nov. 19, 2009), available at <http://www.aclu.org/reproductive-freedom/montana-mother-asks-court-remedy-mistreatment-pregnant-inmates-detention-facili>.

<sup>243</sup> CTR. FOR REPRODUCTIVE RIGHTS, *supra* note 212, at 1.

<sup>244</sup> Vainik, *supra* note 213, at 678.

<sup>245</sup> *Id.*

<sup>246</sup> Weatherhead, *supra* note 179, at 450.

<sup>247</sup> CTR. FOR REPRODUCTIVE RIGHTS, *supra* note 212, at 5.

<sup>248</sup> Letter from Ralph Hale, Exec. Vice Pres., Am. Cong. of Obstetricians and Gynecologists, to Malika Saada Saar, Rebecca Project for Human Rights (June 12, 2007), available at <http://www.acog.org/departments/underserved/20070612SaarLTR.pdf>.

<sup>249</sup> CTR. FOR REPRODUCTIVE RIGHTS, *supra* note 212, at Appendix.

<sup>250</sup> U.N. HUMAN RIGHTS COMMISSION, CONCLUSIONS AND RECOMMENDATIONS OF THE COMMITTEE AGAINST TORTURE, 36<sup>th</sup> Sess., U.N. Doc. CAT/C/USA/CO/2, at ¶ 33 (July 25, 2006) (“The Committee is concerned at the treatment of detained women in the State party, including gender-based humiliation and incidents of shackling of women detainees during childbirth (art. 16).”); *Concluding Observations of the Human Rights Committee: United States of America*, 87<sup>th</sup> Sess., U.N. Doc. CCPR/C/USA/CO/3/Rev.1, at ¶ 33 (Dec. 18, 2008).

<sup>251</sup> SRVAW 1999 U.S. Report, *supra* note 1.

right not to be shackled during the “final stages of labor...absent clear evidence that she is a security or flight risk.”<sup>252</sup> In 2008, only two states had laws prohibiting shackling of pregnant women, but as of October 2010, there were ten.<sup>253</sup> The FBP has issued a new policy mandating that restraints will not be used on prisoners in labor, delivery, or post-delivery unless the prisoner presents an “immediate and credible risk of escape that cannot be reasonably contained through other methods.”<sup>254</sup>

85. However, this progress is limited. Forty states and the District of Columbia still have no such laws, and seven correctional departments have no formal written policy governing the use of restraints on pregnant women. Twenty-three state departments of corrections allow the use of restraints during labor.<sup>255</sup> The laws that do exist typically do not create private rights of action, and there is significant evidence that these policies and laws are often not enforced or followed in practice.<sup>256</sup>
86. Further, *Nelson*, and a number of the protective policies and laws, are limited only to shackling during delivery, and do not address the larger problem of shackling incarcerated women throughout pregnancy. Recently, then-Governor Schwarzenegger vetoed a unanimously passed bill in California that would have prohibited the use of shackles on pregnant women during transport, labor and delivery, and recovery absent a safety concern.<sup>257</sup> While the movement to end shackling in labor is growing, advocates argue the “current patchwork system of laws, regulations, and written and unwritten policies has created an atmosphere of noncompliance among correction officials.”<sup>258</sup>

### C. Access to children, loved ones, and intimate relations

87. In the United States, removing the prisoner from her social and familial relationships is part of the meaning and purpose of incarceration. Standard prison rules severely restrict the ability of prisoners to visit with friends and family, or to engage in physical or sexual contact with people outside the prison. Logistical and financial barriers make it difficult for prisoners to take advantage of even the limited possibilities for contact and communication through authorized visits, telephone calls,<sup>259</sup> and mail. Relationships and intimacy are restricted within prisons as well: consensual sexual activity between prisoners is generally prohibited, and social deprivation, in the form of “administrative segregation” or solitary confinement, is one of the most severe punishments inflicted upon prisoners. Studies have shown that solitary confinement has severe psychological effects on human beings.<sup>260</sup>
88. For many incarcerated parents, regardless of gender, one of the most devastating aspects of imprisonment is forcible separation from their children. Incarcerated women face particular challenges related to infants and children, in part because they are more likely than male prisoners to be the primary caretakers.<sup>261</sup> Women may lose custody of their children while they are incarcerated. Even if custody is maintained, prisons make it difficult for women to visit with their children and infants. Maternal incarceration is very destabilizing to a family’s health and stability.<sup>262</sup>

<sup>252</sup> *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 533 (8th Cir. 2009); see also *Women Prisoners of D.C. Dep’t of Corr. v. District of Columbia*, 877 F. Supp. 634, 668-69 (D.D.C. 1994).

<sup>253</sup> Compare Vainik, *supra* note 213, with REBECCA PROJECT FOR HUMAN RIGHTS, SHACKLING FACT SHEET, available at [http://www.rebeccaproject.org/images/stories/factsheets/ShacklingFactSheet\\_7-12-10.pdf](http://www.rebeccaproject.org/images/stories/factsheets/ShacklingFactSheet_7-12-10.pdf).

<sup>254</sup> Fed. Bureau of Prisons, U.S. Dep’t of Justice, No. 5538.05, available at [http://www.bop.gov/policy/progstat/5538\\_005.pdf](http://www.bop.gov/policy/progstat/5538_005.pdf).

<sup>255</sup> REBECCA PROJECT FOR HUMAN RIGHTS, *supra* note 245.

<sup>256</sup> CTR. FOR REPRODUCTIVE RIGHTS, *supra* note 212, at 2.

<sup>257</sup> Jodi Jacobson, *Schwarzenegger Vetoes Bill to Ban Shackling of Pregnant Women*, RH REALITY CHECK (Sept. 29, 2010), available at <http://www.rhrealitycheck.org/blog/2010/09/29/schwarzenegger-vetoes-bill-shackling-pregnant-women>.

<sup>258</sup> CTR. FOR REPRODUCTIVE RIGHTS, *supra* note 212, at 2.

<sup>259</sup> Phone calls can be prohibitively expensive in many states, including New York. Julie Kowitz Margolies & Tamar Kraft-Stolar, *When “Free” Means Losing Your Mother: The Collision of Child Welfare and the Incarceration of Women in New York State*, WOMEN IN PRISON PROJECT OF THE CORR. ASS’N OF N.Y. (“[I]n New York, inmates are permitted to make collect calls only, which cost 600% more than market rates for the general public.”).

<sup>260</sup> *In re Medley*, 134 U.S. 160, 168-69 (1890) (noting in dicta the detrimental effects of solitary confinement on prisoners and a brief history of solitary confinement); see also *supra* text and accompanying notes ¶ 66.

<sup>261</sup> Jocelyn M. Pollack, *A National Survey of Parenting Programs in Women’s Prisons in the U.S.*, in WOMEN AND GIRLS IN THE CRIMINAL JUSTICE SYSTEM: POLICY ISSUES AND PRACTICE STRATEGIES 19-1, 19-2 (2006) (“Most incarcerated mothers have minor children and were, before their incarceration, the primary caretakers of their children.”).

<sup>262</sup> REBECCA PROJECT FOR HUMAN RIGHTS, *supra* note 245.

**i. Legal framework**

89. While there is no general right to relationships or intimacy in the United States, the Supreme Court has recognized certain rights relating to children, family, and consensual sexual activity. It has found that a parent's right to raise his or her own children is fundamental,<sup>263</sup> and that a parent's interest in the care and custody of his or her children does not "evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."<sup>264</sup> The Supreme Court has also found that consensual sexual intimacy is a form a liberty that receives special protection under the Constitution.<sup>265</sup> These constitutional protections, however, are precarious in the context of the prison, where the "rights" and "liberties" that exist in the outside world are necessarily compromised.
90. The Adoption and Safe Families Act (ASFA), passed in 1997, has made it easier for states to terminate the parental rights of incarcerated mothers whose children have been placed in foster-care. Referred to as "the most sweeping change to the nation's adoption and foster-care system in nearly two decades,"<sup>266</sup> ASFA was designed to move children from the foster care system into permanent homes and to prioritize children's health and safety over biological family reunification.<sup>267</sup> Most significantly, ASFA requires states to file a petition terminating parental rights when a child has been in foster care for 15 of the most recent 22 months, unless a relative is caring for the child or there is a compelling reason why termination would not be in the child's best interests.<sup>268</sup> At the same time, ASFA allows states to bypass the duty to make a "reasonable effort" to reunite children with their biological parents in certain situations.<sup>269</sup> ASFA provides bonuses to states that increase their adoption rates, at the rate of \$4,000 for each child adopted above the previous year's number and \$6,000 for the adoption of a child who is older or has a physical or emotional disability. Custody issues are handled through state courts as a civil matter, so mothers facing the termination of their parental rights have no automatic right to counsel.
91. There is considerable variation across the states in how ASFA is applied. While ASFA requires the initiation of termination proceedings, it is individual state law that specifies how the actual termination of rights is to be determined and carried out, and how the state's interest in the child's welfare is to be balanced with the parental rights of incarcerated mothers. While some state laws take a variety of factors into consideration, other states authorize termination based on single, bright-line rules. These include whether the mother is serving a sentence of a particular length, whether she has had a certain number of contact visits with her child, or based on the type of conviction she received.<sup>270</sup>

**ii. Consequences for incarcerated mothers**

92. While ASFA has increased the adoption rate, it has also resulted in incarcerated women losing their parental rights not because of abuse or neglect, but because their children have been put into foster care

<sup>263</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); see also *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential' basic civil rights of man, and rights far more precious than property rights. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

<sup>264</sup> *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

<sup>265</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>266</sup> Katherine Q. Seelye, *Clinton to Approve Sweeping Shift in Adoption*, N.Y. TIMES, Nov. 17, 1997.

<sup>267</sup> *Id.* ("Senator John H. Chafee, the Rhode Island Republican who was a leading sponsor of the legislation, said on the Senate floor before the measure passed by a voice vote: 'We will not continue the current system of always putting the needs and rights of the biological parents first.' Although that is a worthy goal, he said, 'it's time we recognize that some families simply cannot and should not be kept together.'"); see also 105 Pub. L. No. 89 § 101(a)(15)(A) (codified at 42 U.S.C. § 671(15)(A)) ("[T]he child's health and safety shall be the paramount concern.").

<sup>268</sup> *Id.* § 103(a)(3)(E) (codified at 42 U.S.C. § 675(5)(C)).

<sup>269</sup> *Id.* § 101(a)(15)(D) (codified in 42 U.S.C. § 671(15)(D)) (stating that states do not have to make a reasonable effort at reunification if a parent has subjected the child to aggravated circumstances as defined by state law, if the parent has committed certain violent crimes against another of his/her children, or if the parent has previously had his/her rights terminated).

<sup>270</sup> Margolies & Kraft-Stolar, *supra* note 259 (describing how incarcerated mothers with children in foster care are often unable to meet court-mandated family reunification requirements for contact and visitation with their children, and consequently lose their parental rights).

and they are unable to maintain contact for the required 15 months. Data suggests that ASFA may have a disparate impact on women, since incarcerated women are more likely than men to have children in foster care<sup>271</sup> because they are more likely than their male counterparts to have been primary caregivers of young children prior to incarceration,<sup>272</sup> and they are less able to rely on their children's other parent to take on the caretaking role for the duration of their sentences.<sup>273</sup>

93. Even when they are able to retain custody, most incarcerated women have few opportunities to see their children. There are few correctional facilities for women prisoners, and most are located in remote, rural areas far from their homes and communities. This distance poses a major logistical and financial barrier to visitation.<sup>274</sup> In addition, a higher percentage of women than men prisoners are incarcerated in the federal system, in which prisoners can be transferred to facilities in other states. More than half of mothers never receive visits from their children during the time they are incarcerated.<sup>275</sup>
94. Considering that a large percentage of incarcerated women are serving sentences for nonviolent, drug-related crimes, and that separating mothers and children is detrimental to mothers, children, and communities alike,<sup>276</sup> many advocates support sentencing alternatives that allow mothers and children to stay together. The Rebecca Project, one of the foremost experts on incarcerated mothers, strongly supports family-based programs that provide services such as therapy, parenting classes, and substance abuse treatment.<sup>277</sup> Thirty-four states already make alternative sentencing programs of some kind available to women, although they may have limited capacity. Prison nurseries, while far inferior to family-based alternative sentencing, also offer some opportunity for mother-child bonding and are available in thirteen states. Seventeen states do not offer family-based treatment programs of any kind.<sup>278</sup>
95. Women in prison commonly have little access to their children, families, and loved ones; at the same time, their ability to form relationships within prison is often severely limited. There is extensive documentation of the fact that women prisoners often enter into relationships with each other. These relationships may be sexual, romantic, and/or familial, and may involve both individuals who identify as non-heterosexual, and individuals who form homosexual relationships solely during incarceration.<sup>279</sup> HRW and others have documented similar romantic relationships between girls, whether self-identifying

<sup>271</sup> See LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS PARENTS IN PRISON AND THEIR MINOR CHILDREN, (2008) (reporting that mothers (11%) were 5 times more likely than fathers (2%) to report that their children were in the care of a foster home, agency, or institution).

<sup>272</sup> See *id.* (reporting that mothers were more likely than fathers to report living with at least one child prior to incarceration; that among parents in state prison who had lived with their minor children just prior to incarceration, mothers (77%) were almost three times more likely than fathers (26%) to report that they had provided most of the daily care for their children; and that more than 4 in 10 mothers in state prison who had minor children were living in single-parent households in the month before arrest).

<sup>273</sup> *Id.* ("Eighty-eight percent of fathers reported that at least one of their children was in the care of the child's mother, compared to 37% of mothers who reported the father as the child's current caregiver.")

<sup>274</sup> See Margolies & Kraft-Stolar, *supra* note 259; see also U.S. DEP'T OF JUSTICE NAT'L INST. OF CORR., DEVELOPING GENDER-SPECIFIC CLASSIFICATION SYSTEMS FOR WOMEN OFFENDERS (2004) ("[The] distance creates barriers to family visitation, work and educational opportunities, and access to medical and mental health services.")

<sup>275</sup> Barbara Bloom, Barbara Owen & Stephanie Covington, *Gender Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders* 7, NAT'L INST. OF CORR. (2003); see also DEVELOPING GENDER-SPECIFIC CLASSIFICATION, *supra* note 274 (noting that in Florida, children of women offenders were less likely to visit their incarcerated parent: 57.1 percent of women offenders reported that their children would not visit them in prison, compared with 34.6 percent of male inmates); GLAZE & MARUSCHAK, *supra* note 271 (noting that 70% percent of parents in state prison reported exchanging letters with their children, 53% had spoken with their children over the telephone, and 42% had a personal visit since admission).

<sup>276</sup> REBECCA PROJECT FOR HUMAN RIGHTS, *supra* note 245, at 13 ("Studies show that the children left behind as a result of maternal incarceration are vulnerable to suffering significant attachment disorders. They are more likely to become addicted to drugs or alcohol, engage in criminal activity, manifest sexually promiscuous behavior, and dangerously lag behind in educational development and achievement").

<sup>277</sup> *Id.* at 12 ("Family-based treatment programs...demonstrate consistently successful outcomes for children's health and stability, family reunification, reduced rates of recidivism, and sustained parental sobriety. Moreover, it is less costly than incarceration and achieves better outcomes than those achieved by maternal incarceration and a child's placement in foster care.")

<sup>278</sup> *Id.* at 7.

<sup>279</sup> Smith, *Rethinking Prison Sex*, *supra* note 141 at 193-94 ("While there are certain sexual interactions that clearly have the potential to affect safety and security in an institution, there are others that are non-threatening.... Often prisoners engage in sex for love or desire. Even in the prison setting, where individuals are legally stripped of their autonomy and dignity and face violence from other prisoners and staff, prisoners manage to establish meaningful and sometimes loving relationships. There is a great deal of literature on how women create families while imprisoned.")

as lesbian or not, in juvenile facilities.<sup>280</sup> While there is much variation among states and institutions, relationships between female prisoners are often highly policed by prison officials. Consensual sexual contact between prisoners is generally treated as a form of misconduct, and women suspected of being “lesbian”—whether based on their actions or on stereotypical assumptions based on appearance—are targeted and separated from their peers.<sup>281</sup>

#### IV. SPECIAL POPULATIONS

##### A. Women of color

96. The racial disparities of the recent prison-sentencing boom, dubbed the “race to incarcerate,”<sup>282</sup> have been profound. Nearly 60% of the current prison population is black or Hispanic.<sup>283</sup> It is now a widely-reported statistic that, if the trends persist, about one in three black males born today can expect to go to prison in his lifetime.<sup>284</sup> Although rates of incarceration are higher for men in general, the racial disparities persist across gender lines. Black women are incarcerated at a rate three times higher than white women; Hispanic women are incarcerated at 1.5 times the rate of white women.<sup>285</sup> Furthermore, rates of incarceration for women of color have rapidly increased in recent years. African-American women are the fastest growing population in prisons.<sup>286</sup>
97. The possible causes for the racial disparity are complex and varied. Social and economic inequality along racial lines likely contributes to racial differences for some crimes.<sup>287</sup> However, the racial disparity in prison, overall six to one, significantly outstrips racial disparities in “unemployment (two to one), non-marital child-bearing (three to one), infant mortality (two to one), and wealth (one to five)[.]”<sup>288</sup> After close analysis of the available data, scholar Michael Tonry found that only 61% of the black incarceration rate can be explained by disproportionate crime rates.<sup>289</sup> Rates of incarceration for drug offenses illustrate the point. While over half of persons sentenced to prison for drug offenses are African-American,<sup>290</sup> national data show that rates of illegal drug use are fairly consistent across all races.<sup>291</sup> These disparities between incarceration for drug charges and actual drug use exist for women as well as men.<sup>292</sup>
98. There is a large body of literature demonstrating racial bias and discrimination at all stages of the law

<sup>280</sup> HUMAN RIGHTS WATCH, *CUSTODY AND CONTROL: CONDITIONS OF CONFINEMENT IN NEW YORK’S JUVENILE PRISONS FOR GIRLS* (2006), available at <http://www.hrw.org/en/reports/2006/09/24/custody-and-control>.

<sup>281</sup> *Infra* ¶¶ 119-124.

<sup>282</sup> MARC MAUER, *RACE TO INCARCERATE* (2006).

<sup>283</sup> About 38% of the incarcerated population is black and 20% is Hispanic. BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2008* (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>. The rate of incarceration is far out of proportion with their share of the population. Black persons make up approximately 13% of the population; persons of Hispanic origin make up approximately 16% of the population. See U.S. CENSUS BUREAU, *STATE AND COUNTY QUICK FACTS*, available at <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Nov. 21, 2010).

<sup>284</sup> See BUREAU OF JUSTICE STATISTICS, *PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001*, at 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf>.

<sup>285</sup> *Id.* at 2.

<sup>286</sup> Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *STAN. L. REV.* 1271, 1274 (2004).

<sup>287</sup> See DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 4-5 (1999).

<sup>288</sup> Bruce Western & Christopher Wildeman, *The Moynihan Report Revisited: Lessons and Reflections After Four Decades: The Black Family and Mass Incarceration*, 621 *ANNALS* 221, 228 (2009).

<sup>289</sup> Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 *CRIME & JUSTICE: A REVIEW OF RESEARCH* 1 (Michael Tonry ed., 2008).

<sup>290</sup> THE SENTENCING PROJECT, *RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM: TESTIMONY OF MARC MAUER* 4 (Oct. 29, 2009), available at [http://www.sentencingproject.org/detail/publication.cfm?publication\\_id=289&id=120](http://www.sentencingproject.org/detail/publication.cfm?publication_id=289&id=120).

<sup>291</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW* 97 (2010) (citing data from U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration). Although the rates of imprisonment of black offenders compared to white has dropped somewhat in recent years, the numbers are still grossly disproportional. See MARC MAUER, *THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS* (2009), available at [http://www.sentencingproject.org/search/dp\\_raceanddrugs.pdf](http://www.sentencingproject.org/search/dp_raceanddrugs.pdf).

<sup>292</sup> ACLU ET AL., *CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES* 7 (2005), available at [http://www.aclu.org/files/images/asset\\_upload\\_file431\\_23513.pdf](http://www.aclu.org/files/images/asset_upload_file431_23513.pdf).

enforcement process: police enforcement, prosecution, conviction, and sentencing.<sup>293</sup> Furthermore, many have criticized the numerous “race-neutral” criminal laws that have foreseeably disparate impacts by race. Most famously, the federal crack cocaine law, until recently, inflicted a one hundred to one penalty for the possession of crack cocaine, associated closely with African-American use, over possession of powder cocaine, a more expensive but pharmaceutically similar drug.<sup>294</sup> State and federal “school zone” drug laws, which penalize drug offenses within school zones more harshly, also have a racially disparate impact. Since African-Americans are more likely to live in dense urban areas where residences are more likely in a school zone, blacks convicted of drug offenses are often subject to harsher penalties than whites convicted of the same offense.<sup>295</sup> Most recently, states have begun to criminally prosecute women who use drugs while pregnant. Although studies show that the number of white women who use drugs while pregnant is higher than black or Hispanic women, women of color are “increasingly the focus of drug tests, arrests, prosecution, and incarceration for drug use during pregnancy.”<sup>296</sup>

99. Despite the stark racial disparities created by discriminatory policies and practices, a series of Supreme Court cases have made it practically impossible to successfully bring racial discrimination cases. In *Whren v. United States*, the Court held that individuals cannot bring claims of racial bias under the Fourth Amendment, which protects citizens from unreasonable searches and seizures.<sup>297</sup> In *McCleskey v. Kemp*, McCleskey challenged his death sentence on the basis that the death penalty scheme in Georgia was racially biased.<sup>298</sup> He showed that black defendants who killed white victims were eleven times more likely to be sentenced to death than defendants charged with killing black victims. This was largely due to Georgia prosecutors’ discriminatory decisions to seek the penalty. The Court held that McCleskey, in order to challenge his sentence, had to prove, with specific evidence, racial discrimination in his individual case. Such a ruling insulates law enforcement from liability for racially biased policies that result in stark racial disparities, as long as the policies are not explicit in an individual case. Finally, in *Armstrong v. United States*, the Court held that to even reach discovery, a defendant raising racial bias claims had to show specific proof that similarly situated white individuals were treated differently.<sup>299</sup> In that case, that was precisely the evidence Armstrong sought in his discovery request. These cases, taken together, have effectively short-circuited any attempt to challenge racially disparate law enforcement activity in U.S. courts.
100. The racial disparities in the incarceration of women in America have significant and harmful effects on women of color and their communities. Dorothy Roberts has described the negative impact on communities of color in three categories of harm: damage to social networks, distortion of social norms,

<sup>293</sup> For an in depth discussion of how and why racial bias influences law enforcement and thus creates the wide racial disparity in prison, see ALEXANDER, *supra* note 291, at Chapter 3: The Color of Justice; THE SENTENCING PROJECT, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE (2005), available at [www.sentencingproject.org/doc/publications/rd\\_sentencing\\_review.pdf](http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf) (reviewing the numerous studies demonstrating a correlation between race and harsher sentencing in different contexts); ACLU ET AL., *supra* note 292, at 28 (describing a 2000 GAO report which found that U.S. customs agents at airports disproportionately singled out women of color for pat downs, frisks, and strip searches); NAT’L CRIMINAL JUSTICE COMM’N, THE REAL WAR ON CRIME 112 (1996) (“All else being equal, whites did better than African Americans and Hispanics at getting charges dropped, getting cases dismissed, avoiding harsher punishment, avoiding extra charges and having their criminal records wiped clean.”). See generally MICHAEL TONRY, MALIGN NEGLECT, RACE CRIME AND PUNISHMENT IN AMERICA (1995).

<sup>294</sup> ALEXANDER, *supra* note 291, at 109. The law inflicted a mandatory five-year sentence for possession of only five grams of crack, while possession of five hundred grams of powder cocaine was required to trigger an identical sentence. *Id.* The combined effect of this “race-neutral” law and federal enforcement practices “resulted in African Americans constituting 80% of those charged with crack cocaine offenses over a 20-year period.” Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 94 JUDICATURE 6, 8 (2010). In August 2010 Congress passed a law lowering the crack-powder penalty ratio to about 18 to 1; the law is not retroactive. The Fair Sentencing Act of 2010, Pub. L. No. 111-220.

<sup>295</sup> THE SENTENCING PROJECT, *supra* note 293, at 5.

<sup>296</sup> ACLU ET AL., *supra* note 292, at 15. A hospital in Charleston, South Carolina, which served a predominately black population, engaged in “selectively drug test[ing] pregnant women whom staff deemed ‘likely’ to have a drug abuse problem and reported positive tests to the police, who then arrested the women....” *Id.* Twenty-nine of the thirty women prosecuted were black. In *Ferguson v. South Carolina*, the Supreme Court held that the practice was unconstitutional. 532 U.S. 67 (2001).

<sup>297</sup> 517 U.S. 806 (1996).

<sup>298</sup> 481 U.S. 279 (1987).

<sup>299</sup> 517 U.S. 456 (1996).

and destruction of social citizenship.<sup>300</sup> While it is impossible to fully describe the disparate impact of incarceration on women of color, the following paragraphs will discuss some of the harms disproportionately inflicted on these women and their communities.

101. Because they are overrepresented in the prison system, women of color disproportionately suffer the long-term effects of the sexual abuse, inadequate health care,<sup>301</sup> and other human rights abuses prevalent inside the system. Further, scholar Kim Buchanan, among others, argues that our racially biased image of prisoners informs the pervasive indifference to their treatment, thus preventing effective change and reform within the institutions.<sup>302</sup> In other words, the very racial biases that place people of color in prison in high numbers also exacerbate the poor conditions of their confinement. Women of color, because of their disproportionate incarceration, also unequally bear the burden of the stigma of past incarceration. Previously-incarcerated women will have a more difficult time obtaining a job, are more likely to be homeless, and, if they are convicted of a drug felony, will be barred from federally funded public assistance.<sup>303</sup>
102. Felony disenfranchisement laws disproportionately deprive women of color, and men of color, of the right to vote. Currently, ten states permanently disenfranchise some or all persons convicted of felonies, and only two states do not disenfranchise persons with criminal convictions at all.<sup>304</sup> One in fifty African-American women currently cannot vote. That figure is four times the rate of disenfranchisement for non-African-American women and an increase of 14% since 2000.<sup>305</sup> These disenfranchisement laws not only deeply affect the individual women who are deprived of this fundamental right, but also have ripple effects on the African-American community's political power.
103. As discussed above, as more women are incarcerated, more mothers are incarcerated. These women lose access to their children, sometimes permanently.<sup>306</sup> Unsurprisingly given the racial disparities in imprisonment, children of color are overwhelmingly more likely to have a parent in jail: one in fifteen black children, one in forty-two Latino children, and one in 111 white children have at least one incarcerated parent.<sup>307</sup> Incarcerated mothers are more likely to be living with their children at the time of their imprisonment, and thus their incarceration is likely to be more disruptive to their home. If no other family member is available, children are generally sent into foster care. African-American children are overrepresented in the foster care system in practically every state.<sup>308</sup> Ultimately, the data show that "the prison boom has been massively corrosive for family structure and family life" in African American communities.<sup>309</sup>
104. The overrepresentation of incarcerated women of color means that these women, and their communities, bear a disproportionate portion of the individual and societal harms inflicted by the harsh and rapidly expanding incarceration scheme.

<sup>300</sup> Roberts, *supra* note 286.

<sup>301</sup> Scholar Michael Massoglia's research demonstrates that incarceration has significant effects on later health outcomes and "indicate[s] that the penal system accounts for a sizeable proportion of racial disparities in general health functioning." MARC MAUER, TWO TIERED JUSTICE: RACE, CLASS, AND CRIME POLICY, THE INTEGRATION DEBATE: COMPETING FUTURES FOR AMERICAN CITIES 169, 179 (Chester Hartman & Gregory Squires, eds., 2010) (citing Michael Massoglia, *Incarceration, Health, and Racial Health Disparities*, 42 L. & SOC. REV. 275 (2008)).

<sup>302</sup> Buchanan, *supra* note 36.

<sup>303</sup> For a full explanation of the hardships that accompany individuals once released from prison, see Alexander, *supra* note 291, at Chapter 4: The Cruel Hand.

<sup>304</sup> ERIKA WOOD, BRENNAN CTR. FOR JUSTICE, RESTORING THE RIGHT TO VOTE 3 (2009), available at <http://www.brennancenter.org/page/-/Democracy/Restoring%20the%20Right%20to%20Vote.pdf>.

<sup>305</sup> THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT RATES FOR WOMEN, 1 (2008), available at [http://www.sentencingproject.org/doc/publications/fd\\_bs\\_women.pdf](http://www.sentencingproject.org/doc/publications/fd_bs_women.pdf).

<sup>306</sup> See *supra* ¶¶ 92-95; see also THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991-2007 (2009), available at [www.sentencingproject.org/doc/inc\\_incarceratedparents.pdf](http://www.sentencingproject.org/doc/inc_incarceratedparents.pdf).

<sup>307</sup> *Id.* at 7.

<sup>308</sup> Nekima Levy-Pounds, *From the Frying Pan into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285, 328 (citing U.S. Department of Health & Human Services data).

<sup>309</sup> Western & Wildeman, *supra* note 288, at 240-41.

## B. Women in immigration detention

105. Immigration and Customs Enforcement (ICE), the primary investigative arm of the Department of Homeland Security, detains asylum seekers, undocumented immigrants, legal permanent residents who have been convicted of certain crimes, and other individuals whose legal immigration status the United States disputes while their immigration cases are pending. ICE now operates the largest detention and supervised release program in the country, detaining approximately 30,000 individuals at any given time,<sup>310</sup> more than three times the number of detainees in 1996.<sup>311</sup> Women comprise approximately ten percent of this growing population.<sup>312</sup>
106. Immigrant detainees are held in about 300 facilities nationwide. A detainee can be held in any one of four different types of facilities: (1) “service processing centers” operated directly by ICE; (2) contract detention facilities managed by private companies such as the GEO Group and Corrections Corporation of America; (3) state and county jails that ICE has contracted with through intergovernmental service agreements; and (4) facilities run by the FBP.<sup>313</sup> Although they are a relatively small population, women detainees are spread out over hundreds of facilities,<sup>314</sup> “where they are often of very few Immigration Detention females.”<sup>315</sup> Therefore, “they are not likely to have comparable or gender appropriate access [and] many facilities employ men primarily and assign female detainees to open bay housing where there is little privacy.”<sup>316</sup> In order to hold women, ICE facilities only have to show that they can maintain separation of the sexes.<sup>317</sup>
107. The multiple sources of authorities running detention facilities, including private and municipal organizations, contribute to the lack of consistency in treatment and conditions, and makes consistent oversight difficult. The lack of transparency in ICE’s detention network is a significant issue. At ICE’s behest, monitoring reports by the American Bar Association (ABA) and the United Nations High Commissioner for Refugees (UNHCR), as well as ICE’s own annual audits have been kept confidential.<sup>318</sup>
108. While immigration detention is legally civil and administrative, not punitive,<sup>319</sup> the experience of immigration detention in the United States—confinement, isolation, and harsh conditions—can be very similar to punitive incarceration in the United States.<sup>320</sup> Doctor Dora Schriro, in her official review of the detention system, wrote:

<sup>310</sup> DORA SCHRIRO, DEP’T OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009).

<sup>311</sup> THE CONSTITUTION PROJECT, RECOMMENDATIONS FOR REFORMING OUR IMMIGRATION DETENTION SYSTEM AND PROMOTING ACCESS TO COUNSEL IN IMMIGRATION PROCEEDINGS 9 (2009), available at <http://www.constitutionproject.org/pdf/359.pdf>. In 1996, INS (which at that time was responsible for immigration detention) had the capacity to detain up to 8,270 people in any given day. As of 2008, ICE has the funding for 32,000 beds. UNIV. OF ARIZ., UNSEEN PRISONERS: A REPORT ON WOMEN IN IMMIGRATION DETENTION FACILITIES IN ARIZONA 3 (2009), available at <http://sirow.arizona.edu/files/UnseenPrisoners.pdf>. This exponential growth in immigration detention can be attributed to a number of different legal initiatives and policies such as (1) the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which mandates detention for broad categories of noncitizens; (2) the USA Patriot Act, and other post 9/11 initiatives, which give broad discretionary detaining power to the Attorney General; and (3) increasingly aggressive immigration enforcement policies such as “Operation Endgame” which seeks to deport all removable aliens in the United States.

<sup>312</sup> UNIV. OF ARIZ., *supra* note 311, at 4.

<sup>313</sup> HUMAN RIGHTS WATCH, DETAINED AND DISMISSED: WOMEN’S STRUGGLES TO OBTAIN HEALTH CARE IN UNITED STATES IMMIGRATION DETENTION 12 (2009), available at [http://www.hrw.org/sites/default/files/reports/wrd0309webwcover\\_1.pdf](http://www.hrw.org/sites/default/files/reports/wrd0309webwcover_1.pdf).

<sup>314</sup> ICE estimates that 68% of women detainees are held in state and county jails and prisons, 25% in contract detention facilities, and 7% in centers run directly by ICE. UNIV. OF ARIZ., *supra* note 311, at 6; HUMAN RIGHTS WATCH, *supra* note 313, at 13.

<sup>315</sup> SCHRIRO, *supra* note 310, at 27.

<sup>316</sup> *Id.*

<sup>317</sup> HUMAN RIGHTS WATCH, *supra* note 313, at 13.

<sup>318</sup> ACLU OF S. CAL. & NAT’L IMMIGRATION LAW CTR., A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS (2009), available at <http://www.aclu-sc.org/documents/view/197>.

<sup>319</sup> See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect.”).

<sup>320</sup> Immigration detainees are civil detainees protected by the Fifth Amendment, which protects individuals from conditions imposed by the government that amount to punishment without the due process of criminal proceedings. See *Wong Wing v. United States*, 163 U.S. 228 (1896) (striking down provisions requiring imprisonment at hard labor before deportation). The courts have not significantly explored the bounds of these protections. Anything that amounts to a violation of the Eighth Amendment is clearly unconstitutional in the context of immigration detention. The U.S. Court of Appeals for the Ninth Circuit has held that conditions for civil detainees must be

[T]he facilities that ICE uses to detain aliens were built and operate, as jails and prisons to confine pre-trial and sentenced felons. ICE relies primarily on correctional incarceration standards designed for pre-trial felons and on correctional principles of care, custody, and control. These standards impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population.<sup>321</sup>

109. The majority of female detainees are held in county jails and prisons with mixed populations of pre-sentence and sentenced prisoners. Like prisoners, detainees are often verbally abused and treated harshly by correctional officers,<sup>322</sup> subjected to invasive strip searches,<sup>323</sup> and shackled during transport.<sup>324</sup>
110. Immigrant detainees report similar concerns and deprivations to women in prison in the United States: sexual abuse, lack of access to medical care, separation from children and families, and inadequate grievance procedures and access to remedies. A recent incident at T. Don Hutto immigration detention facility, in which an employee was accused of inappropriate and unwanted sexual contact with multiple detainees while in transport, has called attention to the problem of sexual abuse in immigration facilities.<sup>325</sup> The HRW report, *Detained and at Risk*, released in August 2010, documents fifteen incidents of sexual assault or abuse, involving more than fifty detainees, demonstrating that this is not an isolated problem.<sup>326</sup>
111. Numerous reports detail the consistent inadequacy and severe delays of medical treatment for immigrant detainees,<sup>327</sup> especially the lack of gender-specific care such as OB-GYN care, prenatal care, services for victims of sexual or gender-based violence, or the mere provision of sanitary pads or breast pumps for nursing mothers.<sup>328</sup> Women, especially in workplace raids, are often suddenly detained without an opportunity to make arrangement for, or communicate with, their children.<sup>329</sup> In an Arizona study, advocates found that women were often not able to reach child protective services or receive information

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superior to conditions of both convicted prisoners and pre-trial criminal detainees. *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004). If conditions are equal to or more restrictive than conditions for pre-trial detainees or convicted prisoners, those conditions are presumptively unconstitutional. *Id.* at 934; *see also* *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1104 (9th Cir. 2004) (immigration detention “may be a cruel necessity of our...policy; but if it must be done, the greatest care must be observed in not treating the innocent like a dangerous criminal”). It is also worth noting that the Prison Litigation Reform Act does not apply to civil detainees. *See* TOM JAWETZ, ACLU NAT’L PRISON PROJECT, LITIGATING IMMIGRATION DETENTION CONDITIONS (2008), available at [http://www.law.ucdavis.edu/alumni/.../Jawetz\\_Detention\\_Conditions.pdf](http://www.law.ucdavis.edu/alumni/.../Jawetz_Detention_Conditions.pdf).

<sup>321</sup> SCHRIRO, *supra* note 310, at 2.

<sup>322</sup> *See* ACLU MASS., DETENTION AND DEPORTATION IN THE AGE OF ICE: IMMIGRANTS AND HUMAN RIGHTS IN MASSACHUSETTS 37 (2008), available at [http://www.aclum.org/ice/documents/aclu\\_ice\\_detention\\_report.pdf](http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf) (discussing the mistreatment of detainees by correctional officers in Massachusetts).

<sup>323</sup> *See* HUMAN RIGHTS WATCH, DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN IMMIGRATION DETENTION 17 (2010), available at <http://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf>. Many searches are routine and do not require suspicion. While cross-gender strip searches are restricted to emergencies, there is no restriction on cross-gender pat searches. *Id.*

<sup>324</sup> *See* HUMAN RIGHTS WATCH, *supra* note 313, at 35.

<sup>325</sup> *See* ACLU, SEXUAL ABUSE OF FEMALE DETAINEES AT HUTTO HIGHLIGHTS ONGOING FAILURE OF IMMIGRATION DETENTION SYSTEM, SAYS ACLU (2010), available at <http://www.aclu.org/immigrants-rights-prisoners-rights/sexual-abuse-female-detainees-hutto-highlights-ongoing-failure-im>.

<sup>326</sup> HUMAN RIGHTS WATCH, *supra* note 323, at 3.

<sup>327</sup> HUMAN RIGHTS WATCH, *supra* note 313 *see also* UNIV. OF ARIZ., *supra* note 311, at 18-25; NAT’L IMMIGRANT JUSTICE CTR., THE SITUATION OF IMMIGRANT WOMEN DETAINED IN THE UNITED STATES, DETENTION AND DEPORTATION WORKING GROUP, BRIEFING MATERIALS SUBMITTED TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS 99, 103 (2007); ACLU MASS., *supra* note 322, at 49-56. There have also been a number of lawsuits challenging the medical care system in immigration detention. *See* *Kiniti v. Myers*, No. 05-01013 (S.D. Cal. Jan. 28, 2009) (ACLU lawsuit against a San Diego contract detention facility) (dismissed pursuant to settlement agreement); *Families for Freedom v. Chertoff*, No. 08-4056, 2009 U.S. Dist. LEXIS 56092 (S.D.N.Y. June 25, 2009) (petition requesting formal regulations governing conditions of ICE custody).

<sup>328</sup> HUMAN RIGHTS WATCH, *supra* note 323; UNIV. OF ARIZ., *supra* note 311; NAT’L IMMIGRANT JUSTICE CTR., *supra* note 327.

<sup>329</sup> NAT’L IMMIGRANT JUSTICE CTR., *supra* note 327, at 105. The difficulties of being separated from their children are so severe that detained mothers are more likely to give up on legitimate asylum claims and agree to return to their home countries, however dangerous, in order to be reunited with their children. *See* HUMAN RIGHTS WATCH, REFUGEE WOMEN AT RISK: UNFAIR U.S. LAWS HURT ASYLUM SEEKERS (2002), available at [http://www.humanrightsfirst.org/refugees/reports/refugee\\_women.pdf](http://www.humanrightsfirst.org/refugees/reports/refugee_women.pdf).

about custody hearings while in detention.<sup>330</sup> Numerous reports have outlined the various human rights abuses occurring in different immigration detention facilities across the country.<sup>331</sup>

112. Several factors place female immigrant detainees in a particularly vulnerable position. While no solid data exist, most advocates and researchers agree that female immigrant detainees are more likely to have experienced sexual or gender-based violence and, thus, have higher levels of post-traumatic stress disorder and other mental health problems. Generally, “the vulnerability of migrant women to violence is well-documented.”<sup>332</sup> One health official reported that rape during border crossing is not an unusual occurrence.<sup>333</sup> Many detained women are asylum seekers, sometimes seeking refuge from the sexual or gender-based violence they experienced in their home country.<sup>334</sup> Because of the high prevalence of previous sexual or gender-based violence, immigrant detainees require specialized services and mental health care, are more susceptible to custodial sexual abuse, and are more likely to be re-traumatized severely by any such abuse.
113. In addition to similar roadblocks to redress that prisoners face—fear of retaliation, lack of adequate grievance procedures, and mistrust of those held in custody—immigrant detainees face several other barriers. Grievance procedures often require detainees to report to the agency that is seeking their deportation. Therefore the fear of retaliation, specifically the harsh penalty of deportation, is a significant disincentive to filing grievances. Women, especially those that are not informed of their rights, often fear the possibility of retaliatory deportation.<sup>335</sup> Language barriers create another layer of difficulty for immigrant detainees seeking redress or other assistance.
114. Perhaps most importantly, immigrant detainees are often held in remote facilities hundreds of miles away from their families. Because they are held under federal authority, immigrant detainees can be held in any ICE-contracted facility anywhere in the country. Women can be, and often are, transferred to out-of-state facilities far away from their families, without any explanation.<sup>336</sup> In these situations, especially given the limited financial means of most detainees, family visitations are nearly impossible. The detention facilities are often in remote areas, seriously hampering detainees’ ability to retain any legal counsel for their removal proceedings.<sup>337</sup> Physical isolation from both family and counsel is compounded by harsh and restrictive phone access policies.<sup>338</sup>
115. The Obama Administration has made significant efforts to reform the immigrant detention system. On August 6, 2009, ICE Assistant Secretary John Morton acknowledged that the system was “sprawling and too punitive in nature for immigrants in civil immigration proceedings” and announced reform measures

<sup>330</sup>WOMEN’S REFUGEE COMM’N, *MIGRANT WOMEN AND CHILDREN AT RISK: IN CUSTODY IN ARIZONA* (2010), available at <http://womensrefugeecommission.org/.../656-migrant-women-and-children-at-risk-in-custody-in-arizona>.

<sup>331</sup> See JACOB CHIN ET AL., *ATTORNEYS’ PERSPECTIVES ON THE RIGHTS OF DETAINED IMMIGRANTS IN MINNESOTA* (2009), available at [www.aila.org/Content/default.aspx?docid=30514](http://www.aila.org/Content/default.aspx?docid=30514); NEW ORLEANS WORKERS’ CTR. FOR RACIAL JUSTICE, *DETENTION CONDITIONS AND HUMAN RIGHTS UNDER THE OBAMA ADMINISTRATION: IMMIGRANT DETAINEES REPORT FROM BASILE, LOUISIANA* (2009), available at <http://www.nowcrj.org/wp-content/uploads/.../detention-conditions-report.pdf>; UNIV. OF ARIZ., *supra* note 311; ACLU MASS., *supra* note 322; GEORGIA DETENTION WATCH, *REPORT ON THE DECEMBER 2008 HUMANITARIAN VISIT TO THE STEWARD DETENTION CENTER* (2008), available at [http://www.acluga.org/Georgia\\_Detention\\_Watch\\_Report\\_on\\_Stewart.pdf](http://www.acluga.org/Georgia_Detention_Watch_Report_on_Stewart.pdf).

<sup>332</sup> HUMAN RIGHTS WATCH, *supra* note 313, at 57 (citing the UN Commission on Human Rights, Report of the Special Rapporteur on violence against women, Radhika Coomaraswamy, Report on Trafficking in Women, Women’s Migration and Violence Against Women).

<sup>333</sup> *Id.* at 57.

<sup>334</sup> “When researchers interviewed detainees in 2003, they found that the levels of anxiety, depression and post-traumatic stress disorder among detained asylum seekers were substantially higher than those reported in previous studies of refugees living in refugee camps and asylum seekers living freely in the United States.” NAT’L IMMIGRANT JUSTICE CTR., *supra* note 327, at 103.

<sup>335</sup> See NPREC REPORT, *supra* note 29, at 179.

<sup>336</sup> ACLU MASS., *supra* note 322, at 23; HUMAN RIGHTS WATCH, *LOCKED UP FAR AWAY* (2009), available at [http://www.hrw.org/sites/default/files/reports/us1209webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us1209webwcover_0.pdf).

<sup>337</sup> NAT’L IMMIGRANT JUSTICE CTR., *ISOLATED IN DETENTION* (2010), available at <http://www.immigrantjustice.org/download-document/793-isolated-in-detention-full-report.html> (finding that more than a quarter of detention facilities are not served by any legal aid organization). Individuals facing removal are entitled to be represented by counsel, but do not have the right to counsel at government expense. See 8 U.S.C. § 1362.

<sup>338</sup> UNIV. OF ARIZ., *supra* note 311, at 29 (finding that none of the three contract facilities surveyed provide telephone access in accordance with the national detention standards); NATIONAL IMMIGRANT JUSTICE CENTER, *supra* note 327, at 9 (finding that inadequate phone access further hinders detainees’ access to counsel).

aimed at creating a “truly civil” model of immigration detention.<sup>339</sup> The Administration has implemented several significant policy developments such as creating a risk assessment tool for determining who should be eligible for alternatives to detention programs, conducting extensive visits to facilities to assess conditions, and reducing the number of ICE-authorized facilities from 350 to 270.<sup>340</sup> ICE has drafted new standards with the help and input of non-government organizations, and intends to implement them at facilities holding 55% of the population of detainees by the end of 2010, and facilities holding 85% of the population by the end of 2011.<sup>341</sup> The new standards are expected to include improved gender-specific standards on the issues of sexual abuse and health care.<sup>342</sup> However, many advocates are disappointed that the new standards, while attempting to correct egregious abuses, do not overhaul the system.<sup>343</sup> Neither these new standards nor the old standards are, or ever have been, codified into regulation. Therefore, they are open to change at the discretion of ICE and are not legally enforceable. Overall, while advocates recognize some marked improvements, one year after the Obama administration’s overhaul announcements, immigrant rights organizations have seen little practical impact, and human rights abuses persist in most detention facilities.<sup>344</sup>

### C. American Indian women

116. There is little documentation of the treatment of American Indian women in United States prisons. The PREA Commission did not investigate sexual abuse in tribal detention facilities, nor did it mention American Indians in its section on “Special Populations” or in its discussion of the relationship between sexual abuse and race.<sup>345</sup> Yet American Indians are overrepresented in United States prisons, with a rate of incarceration that is about 21% higher than the national average.<sup>346</sup> The rate of incarceration for American Indian women, along with African-American women, has increased more rapidly than the rate of incarceration of women belonging to other racial or ethnic groups, with American Indian women twice as likely as white women to be incarcerated.<sup>347</sup> Advocates argue that American Indian women are disproportionately represented because of deep-seated prejudice,<sup>348</sup> and because their communities struggle with some of the most extreme poverty, unemployment, and alcoholism in the country.<sup>349</sup>

<sup>339</sup> DETENTION WATCH NETWORK ET AL., YEAR ONE REPORT CARD: HUMAN RIGHTS & THE OBAMA ADMINISTRATION’S IMMIGRATION DETENTION REFORMS 2 (2010), available at <http://www.immigrantjustice.org/download-document/794-ice-year-one-report-card-october-2010.html>.

<sup>340</sup> *Id.* at 6, 9.

<sup>341</sup> *Id.* at 10. Currently, the standards for detention facilities are in a state of flux. In 2008, ICE revised the detention standards, adding for example a requirement for pre and post-natal care and “gender-appropriate examinations.” HUMAN RIGHTS WATCH, *supra* note 313, at 4. The 2008 standards are set to become “binding” on facilities in January 2010. They are “binding” in the sense that each facility is supposed to be in accordance at that time. However, these standards are not legally enforceable in court. Now ICE is once again revising the standards, with plans to roll out the 2010 standards shortly. Therefore, while ICE is developing new standards, some facilities are still working under the 2000 standards, which contain practically no gender-sensitive requirements. HUMAN RIGHTS WATCH, *supra* note 323, at 16-17.

<sup>342</sup> Interviews with advocates (on file with authors).

<sup>343</sup> Susan Carroll, *ICE overhaul falls short, critics claim*, HOUSTON CHRON., Sep. 28, 2010, available at <http://www.chron.com/disp/story.mpl/metropolitan/7222609.html> (“‘I really do feel it’s a far cry from what we’d hoped for,’ said Lory D. Rosenberg, policy director for Refugee and Migrant Rights at Amnesty International USA. ‘This doesn’t read like guidelines for a civil facility ... or any kind of institutional setting. This reads to me like a prison manual.’”).

<sup>344</sup> See DETENTION WATCH NETWORK ET AL., *supra* note 339 **Error! Bookmark not defined.**; ACLU, ANALYSIS OF OBAMA ADMINISTRATION’S PROCESS IMPROVING IMMIGRATION DETENTION SYSTEM (2010), available at <http://www.aclu.org/files/assets/2010-8-6-ImmigrationDetentionAnalysis.pdf>.

<sup>345</sup> NPREC REPORT, *supra* note 29 (“The Commission consulted informally with Native American leaders and heard distressing testimony at a public hearing about the conditions of tribal detention facilities....Correctional facilities in Indian Country are certainly within PREA’s ambit. However, the time-consuming work of consulting with numerous and diverse sovereign nations and entities posed an insurmountable challenge. We encourage Native American leaders to adapt the standards to their cultures and communities.”).

<sup>346</sup> TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, JAILS IN INDIAN COUNTRY, 2008 (2009), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1748>.

<sup>347</sup> U.S. SENTENCING COMM’N, SYMPOSIUM ON ALTERNATIVES TO INCARCERATION (2008), available at [http://www.ussc.gov/SYMPO2008/NSATI\\_0.htm](http://www.ussc.gov/SYMPO2008/NSATI_0.htm).

<sup>348</sup> LUANA ROSS, INVENTING THE SAVAGE (1998) (“[American Indian women in prison are] labeled as deviant, often because of characteristics that are attributed to being ‘Native’ in a system that has no understanding, training, education, or interest in being burdened with the rights or needs of indigenous people.”).

<sup>349</sup> U.S. SENTENCING COMM’N (2008), *supra* note 347 (“We have somewhere between seven and ten generations of Native American people living on reduced reservations with very few natural resources, save for a few oil-based tribes, not many. They have the highest rates of alcoholism and chemical dependency. They have the lowest life spans for men and women. They have the highest infant mortality rate and high levels of unemployment. On Pine Ridge Indian Reservation, unemployment is routinely between 70 and 86 percent...”).

117. Within prisons, the needs of American Indian women, particularly those related to spiritual practices, are overlooked. The Supreme Court has found that state prisons cannot deny individuals of minority religions the right to practice their religious faiths.<sup>350</sup> American Indian women in prison have not, however, been able to exercise these rights.<sup>351</sup> Like incarcerated women generally, American Indian women in prison are often housed far from their communities, where prison chaplains are unable to provide culturally appropriate programming. States have been unwilling to provide the necessary funding to hire Native American spiritual leaders.<sup>352</sup> While mental health is a major concern for all incarcerated women, advocates argue that American Indian women's mental health needs may be overlooked, due to the fact that, for this population, mental health and spiritual practice are intertwined.<sup>353</sup> American Indian women are also likely to enter into prison with high rates of past trauma, as this population has a rate of violent victimizations outside prisons that is more than double the general rate.<sup>354</sup> Native Americans are 2.5 times more likely to experience rape or sexual assault than other races,<sup>355</sup> and they experience the highest rates of domestic violence of any group in the United States.<sup>356</sup>
118. One reason for high rates of violence against Native women is the fact that the criminal justice system is particularly complex as applied to American Indians, making it difficult for victims of crime to seek redress. While most people living in the United States have to contend with the dual state-federal systems, Native peoples living on American Indian lands exist in three overlapping jurisdictions: federal, state, and tribal.<sup>357</sup> Tribal courts have jurisdiction over crimes committed by American Indians on American Indian land. However, up until recently, tribal courts could only sentence offenders to one year of imprisonment in a tribal jail, a fine of \$5,000, or both.<sup>358</sup> Pursuant to the recently passed Tribal Law and Order Act, tribal courts can now sentence certain offenders to up to three years of imprisonment, a fine of up to \$15,000, or both.<sup>359</sup> Federal courts have jurisdiction over all crimes specified by the Major Crimes Act of 1885,<sup>360</sup> while state courts have jurisdiction over crimes on tribal lands that are specified under Public Law 280.<sup>361</sup> Law enforcement and attorneys are often not prepared to handle overlap between the jurisdictions or to determine how cases should be tried, creating a climate of impunity in which violent crimes against American Indian women go unpunished.<sup>362</sup>

#### D. Lesbian, gay, bisexual, transsexual, and queer women in detention

119. Lesbian, gay, bisexual, transsexual, queer or otherwise non-gender-conforming individuals in prisons—as well as female-identifying individuals who are incarcerated in men's prisons—face particular challenges to their safety and well-being. Studies have consistently shown that those with a non-heterosexual

<sup>350</sup> *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (finding that a Buddhist inmate must be given “a reasonable opportunity of pursuing his faith comparable to the opportunity afforded to fellow prisoners who adhere to conventional religious precepts...”).

<sup>351</sup> Laura E. Donaldson, *Speaking Out: Religious Rights and Imprisoned American Indian Women*, 17 J. FEMINIST STUDIES IN RELIGION 57-59 (2001) (“The gains from *Cruz v. Beto* remain divided along gender lines...although Native men have had some success in forcing prisons to build sweat lodges and hire Native counselors, the spiritual needs of Native women have remained unnoticed and unheard.”); see also Ross, *supra* note 348 (“Native men...receive higher gate pay upon being released and have greater access to Native religious resources and Native counselors.”).

<sup>352</sup> Donaldson, *supra* note 351 (“Even when near to home, prisons often refuse to hire Indian spiritual leaders to perform ceremonies for their female inmates. In Montana, for example, former Governor Stan Stephens dismissed a plan to hire Native religious leaders and counselors by stating that he would only implement it if tribes in the state assisted in the financing.”).

<sup>353</sup> LUANA ROSS, *NATIVE AMERICAN VOICES: A READER* 415 (Susan Lobo & Steve Talbot, eds., Longman) (1998) (“Without access to their traditions, many Native women become even more susceptible to the endemic violence and bitterness of the prison environment. They themselves assert that spirituality-and not tranquilizers or Euro-American counseling-is the answer ... to surviving...”).

<sup>354</sup> STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, *AMERICAN INDIANS AND CRIME* (2004), available at [www.justice.gov/otj/pdf/american\\_indians\\_and\\_crime.pdf](http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf).

<sup>355</sup> *Id.* at 5.

<sup>356</sup> LISA BHUNGALIA, NAT'L ORG. FOR WOMEN, *NATIVE AMERICAN WOMEN AND VIOLENCE* (2001), available at <http://www.now.org/nnt/spring-2001/nativeamerican.html>.

<sup>357</sup> See TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, *JAILS IN INDIAN COUNTRY*, 2008, at 2 (2009) (illustrating that in 2008, approximately 81% of the Native persons in custody were in state custody, 10.5% were in federal custody and 7% were in jails in Indian country).

<sup>358</sup> 25 U.S.C. § 1302(7).

<sup>359</sup> Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 304(b) (2010).

<sup>360</sup> 18 U.S.C. § 1153.

<sup>361</sup> *Id.* § 1162.

<sup>362</sup> BHUNGALIA, *supra* note 356.

orientation, or whose gender expression does not fall neatly into categories of “male” and “female,” are vulnerable to targeting and abuse both by staff and by other prisoners.<sup>363</sup> While most available documentation focuses on the treatment of these individuals in men’s prisons and jails, it appears that abuse is prevalent in women’s prisons as well.<sup>364</sup> The PREA Commission has found that male corrections officers are the perpetrators of most of the violence directed at LGBTQ women.<sup>365</sup> As in the case of hate crimes that occur outside of the prison context, these individuals are targeted and victimized specifically because of their perceived or actual sexual or gender identities.<sup>366</sup>

120. Within women’s prisons, there is often an underlying assumption that prisoners should be passive, emotional, and submissive. There is an assumption that since “obviously non-feminine behavior landed them in prison, incarceration should ‘restore them to it.’”<sup>367</sup> Correctional officers routinely subject prisoners who appear as masculine or “butch” to threats, harassment, and physical abuse.<sup>368</sup> Male guards may perceive prisoner masculinity as a form of insubordination and a challenge to their authority, and may respond with confrontation and retaliation. In a related problem, guards may engage these individuals in power struggles, informing them that if they act “like men” that is how they will be treated, singling them out for particularly forceful disciplinary action. Prisons also subject non-gender-conforming individuals to “forced feminization” through restrictive requirements relating to dress, hair length and style, and other aspects of physical appearance.<sup>369</sup>
121. Male-to-female transgender individuals are one of the most vulnerable sub-groups of the LGBTQ population. While they may neither identify as male nor be perceived as male by others, they are often housed in men’s prisons, and their gender nonconformity puts them at extremely high risk for abuse.<sup>370</sup> In *Farmer v. Brennan* the Supreme Court unanimously ruled that deliberate indifference to the substantial risk of sexual abuse violates an incarcerated individual’s rights under the Eighth Amendment. The case concerned the failure of prison authorities to protect a transgender prisoner from rape.<sup>371</sup> Congress relied upon the case in its findings supporting PREA.<sup>372</sup>
122. Queer youth in juvenile detention facilities are another particularly vulnerable sub-population. A BJS survey of youth in juvenile facilities found that more than one in five non-heterosexual youth had reported sexual victimization involving another youth or facility staff member.<sup>373</sup> These youth were almost ten times as likely as their heterosexual peers to report that they had been sexually abused by other youth while in custody (12.5% vs. 1.3%).<sup>374</sup> As is the case in adult populations, male-to-female

<sup>363</sup> See NPREC Report, *supra* note 29, at 7 (stating that “research on sexual abuse in correctional facilities consistently documents the vulnerability of men and women with non-heterosexual orientations and transgender individuals”); ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN LOCAL JAILS, REPORTED BY INMATES, at 6 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svljri07.pdf> (estimating that 2.7% of heterosexual inmates alleged an incident of sexual victimization, compared to 18.5% of inmates identifying as homosexual, and 9.8% of inmates identifying as bisexual or “other”).

<sup>364</sup> See NPREC Report, *supra* note 29, at 74 (noting that “lesbian and bisexual women ... are targeted in women’s correctional settings.”); Robin Levi et al., Justice Now, *Unpublished Briefing Paper on Gender-Identity Based Violations in California Women’s Prisons* (2010).

<sup>365</sup> NPREC Report, *supra* note 29, at 74.

<sup>366</sup> See *id.* at 73 (“The discrimination, hostility, and violence members of these groups often face in American society are amplified in correctional environments and may be expressed by staff as well as other incarcerated persons.”).

<sup>367</sup> Levi, *supra* note 364, at 3.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> THE SYLVIA RIVERA LAW PROJECT, SEE IT’S WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS (2007), available at <http://srlp.org/resources/pubs/warinhere>; STOP PRISONER RAPE & ACLU NAT’L PRISON PROJECT, STILL IN DANGER: THE ONGOING THREAT OF SEXUAL VIOLENCE AGAINST TRANSGENDER PRISONER (2005), available at <http://www.justdetention.org/pdf/stillindanger.pdf>.

<sup>371</sup> *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (asserting that sexual assault is “not part of the penalty that criminal offenders pay for their offenses against society”).

<sup>372</sup> See 42 U.S.C. § 15601(13).

<sup>373</sup> See ALLEN J. BECK, PAIGE M. HARRISON & PAUL GUERINO, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-09, at 11 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svlfry09.pdf>. In comparison, 11.1% of heterosexual youth reported such abuse. *Id.*

<sup>374</sup> *Id.* at 1.

transgender youth are regularly placed in juvenile detention centers for boys and are subject to particular abuse and harassment.<sup>375</sup>

123. The PREA Commission Final Report devotes considerable attention to the sexual abuse of LGBTQ individuals, and includes recommendations that seek to protect this and other vulnerable groups.<sup>376</sup> It recommends a zero-tolerance policy,<sup>377</sup> as well as education and training.<sup>378</sup> The report emphasizes the seriousness of all forms of sexual abuse and challenges the homophobic view that the abuse of non-gender-conforming individuals is less of a crime. It also recommends that prisoner screening for risk of sexual victimization and abusiveness includes factors relating to gender and sexuality, thus recognizing that LGBTQ individuals may be particularly vulnerable and in need of heightened protection.<sup>379</sup>
124. While the PREA Commission's recommendations have been recognized as an important first step,<sup>380</sup> the proposed regulations may have unintended negative consequences. The recommendations invite a heightened level of scrutiny, supervision, and intervention into the sexual lives of prisoners.<sup>381</sup> Advocates are concerned that correctional officers may use a PREA-based rationale to target women who appear to be "gay" and place them in separate or even solitary cells, whether for their own protection or because they are seen as potential perpetrators of sexual violence against others.<sup>382</sup> LGBTQ youth and girls in custodial settings may be particularly affected by this kind of profiling.<sup>383</sup> PREA-inspired intervention also might invite correctional officers to increase their policing of sexual expression between women in prison that may in fact be consensual.<sup>384</sup>

## E. Juveniles

125. Girls confined in juvenile detention facilities<sup>385</sup> face many of the same challenges as women in prison, such as the threat of sexual assault, lack of access to families, policing of sexuality, and inadequate physical and mental health services. Young people, however, are particularly vulnerable to abuse and mistreatment, and are less able than adults to follow grievance procedures and seek remedies for injuries. The fact that girls suffer from a more acute version of the abuse that characterizes adult women's prisons reveals a central, underlying problem: juvenile facilities are too much like adult prisons. Many of the abuses described below stem from the fact that these facilities are generally punitive instead of rehabilitative. Young people are treated like hardened criminals, despite the fact that many are in

<sup>375</sup> See Audio tape: Voices for Justice: An Oral History Project Capturing the Experiences of Lesbian, Gay, Bisexual and Transgender Youth in the Juvenile Justice System, held by Urban Justice Center, Peter Cicchino Youth Project (2006).

<sup>376</sup> NPREC Report, *supra* note 29, at 88.

<sup>377</sup> *Id.* at 230.

<sup>378</sup> *Id.* at 231.

<sup>379</sup> *Id.* at 232.

<sup>380</sup> NAT'L CTR. FOR LESBIAN RIGHTS, PREVENTING THE SEXUAL ABUSE OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX PEOPLE IN CORRECTIONAL SETTINGS 6 (2010) available at [http://www.nclrights.org/site/DocServer/PREA\\_Standards\\_Comments\\_-\\_ACLU\\_Lambda\\_NCLR\\_NCTE\\_TLC\\_.pdf?docID=7542](http://www.nclrights.org/site/DocServer/PREA_Standards_Comments_-_ACLU_Lambda_NCLR_NCTE_TLC_.pdf?docID=7542) ("[T]he Commission's standards reflect pragmatic solutions to the grave problem of sexual abuse. We are especially pleased to see that all four sets of standards recognize the well-documented vulnerabilities of LGBTI individuals to sexual abuse.").

<sup>381</sup> For a comprehensive analysis of PREA from the perspective of LGBTQ advocates, see *id.*

<sup>382</sup> Smith, *Rethinking Prison Sex*, *supra* note 141, at 193-94; *Virginia Women's Prison Segregated Lesbians in 'Butch Wing'*, Associated Press (June 2010), available at <http://www.foxnews.com/story/0,2933,525757,00.html> (describing that in a women's prison in Virginia, inmates who "looked gay" were confined to a particular area. The PREA Commission has also acknowledged this risk.); see also NPREC Report, *supra* note 29, at 8 ("The Commission is concerned that correctional facilities may rely on protective custody and other forms of segregation as a default form of protection...The Commission also discourages the creation of specialized units for vulnerable groups and specifically prohibits housing prisoners based solely on their sexual orientation or gender identity because it can lead to demoralizing and dangerous labeling.").

<sup>383</sup> HUMAN RIGHTS WATCH, CUSTODY AND CONTROL: CONDITIONS OF CONFINEMENT IN NEW YORK'S JUVENILE PRISONS FOR GIRLS 75-76 (2006) [hereinafter HUMAN RIGHTS WATCH, CUSTODY AND CONTROL] (describing how girls who are perceived as "gay" in institutional settings are singled out for abusive treatment by staff. They are monitored, subjected to harsh treatment, and separated from their peers, punished for what is treated as sexually threatening behavior by having their sentences extended or by being put in solitary confinement.).

<sup>384</sup> Smith, *supra* note 382 at 194; see also *supra* ¶¶ 87-95.

<sup>385</sup> 18 U.S.C. § 5031 (juvenile is defined under United States federal law as "a person who has not attained his eighteenth birthday."). *But see* 42 U.S.C. § 5633 (however, within certain guidelines, states may determine when and whether juveniles may be tried as adults and incarcerated in adult facilities).

detention for minor, nonviolent crimes, and that their behavior is often related to physical abuse, sexual abuse, or neglect at home.

126. In its investigation, the PREA Commission found that the rate of sexual abuse for youth in confinement is more than five times the rate of abuse for incarcerated adults,<sup>386</sup> with nearly one in every five of the youth surveyed reporting an incident of abuse during the preceding 12 months.<sup>387</sup> Girls in detention were even more at risk for sexual abuse than boys,<sup>388</sup> and were more likely than boys to have been victimized by staff members.<sup>389</sup> The Commission has suggested that these higher rates of sexual violence can be explained in part by the fact that youth of a wide range of ages and developmental stages are often housed together, putting younger, smaller, and less developed youth at risk.<sup>390</sup> In addition, in many jurisdictions, juvenile detention facilities house both violent juvenile offenders and “status offenders.” Status offenders are youth who have violated rules that only apply to young persons and that are typically minor and nonviolent, such as running away, disobeying parental orders, and truancy.<sup>391</sup>
127. Girls in detention also face threats of physical violence in the form of inappropriate and excessive use of force by staff. In its extensive report documenting the treatment of girls in juvenile facilities in New York State, HRW found that girls were routinely bound in handcuffs, leg shackles, and leather belts when they left the facilities; subjected to forcible, face-down “restraint” procedures;<sup>392</sup> and forced to undergo frequent strip-searches which required them to undress and submit to visual inspection of their genitals.<sup>393</sup> HRW found that these kinds of measures were inappropriate and disproportionate to any potential threat.<sup>394</sup>
128. In addition to physical and sexual violence, girls in detention face a variety of other threats. Parallel to the general population of incarcerated women, the number of girls in detention has risen sharply over the last decade,<sup>395</sup> without a corresponding adjustment in the design of facilities to meet their needs.<sup>396</sup> While girls are more likely than boys to enter the juvenile detention system with mental health issues and with a history of physical and sexual abuse, advocates have found that juvenile facilities do not provide resources to address these issues.<sup>397</sup> In addition to being designed for boys, there are also fewer facilities for girls than there are for boys, and these are generally located in rural areas far from the girls’ families and communities.

<sup>386</sup> ALLEN J. BECK, DEVON B. ADAMS & PAUL GUERINO, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY JUVENILE CORRECTIONAL AUTHORITIES, 2005-06, at 2 (2008) (“The rate in juvenile facilities was 16.8 per 1,000 in 2005 and 2006, five times greater than substantiated allegations of sexual abuse reported to corrections authorities and captured in administrative records in adult facilities”).

<sup>387</sup> NPREC Report, *supra* note 29, at 145 (“Nearly one of every five youth surveyed (19.7 percent) reported at least one sexual contact during the preceding 12 months or since they had arrived at that facility if they had been there less than 12 months.”).

<sup>388</sup> *Id.* at 17 (“36 percent of all victims in substantiated incidents of sexual violence in the State systems and local or private juvenile facilities providing data were female, even though girls represented only 15 percent of youth in residential placement in 2006.”).

<sup>389</sup> *Id.* at 147 (“Girls were the victims in more than half (51 percent) of all substantiated incidents perpetrated by staff, compared to being the victims in only 21 percent of incidents perpetrated by other youth.”).

<sup>390</sup> *Id.* at 145 (“In some States, youth as young as 6 and as old as 20 fall within juvenile court jurisdiction and can be housed, at least in theory, in the same facility. This mix is fraught with danger because younger and smaller residents may be particularly vulnerable to force, violence, sexual abuse, and intimidation from older and stronger residents.”).

<sup>391</sup> HUMAN RIGHTS WATCH, CUSTODY AND CONTROL, *supra* note 383, at 4 (“In the wake of legal reform in 1996, girls who commit “status offenses” ... are no longer supposed to be placed in custody, but such offenses—and the related issue of involvement with child welfare agencies because of parental abuse and neglect—continue to function as gateways through which particularly vulnerable children are drawn into the juvenile justice system.”).

<sup>392</sup> *Id.* at 4-5 (“HRW/ACLU have documented the excessive use of a forcible face-down “restraint” procedure intended for emergencies but in fact used far more often. ... We found that the procedure is used against girls as young as 12 and that it frequently results in facial abrasions and other injuries, and even broken limbs.”).

<sup>393</sup> *Id.* at 5.

<sup>394</sup> *Id.* at 5-6 (“The measures...are hard to justify as legitimate or reasonable security measures for children, many of whom have been found by judges to require a “non-secure” environment.”).

<sup>395</sup> *Id.* at 3 (“[A]n increasing proportion of the children being put behind bars are girls. In New York State, the proportion of girls taken into custody has grown from 14 percent in 1994 to over 18 percent in 2004.”).

<sup>396</sup> See NPREC Report, *supra* note 29, at 147-48 (“[The] shifting demographic poses a significant challenge to the juvenile justice system and individual facilities, which were traditionally designed to meet the needs of boys and may not have enough women staff to supervise and monitor girls who enter the system.”).

<sup>397</sup> HUMAN RIGHTS WATCH, CUSTODY AND CONTROL, *supra* note 383, at 6 (“Serious failings remain...especially where mental health services are concerned. Many incarcerated girls physically harm themselves and even attempt suicide, to which facilities’ staff frequently respond with punishment in addition to treatment.”).

129. Finally, when the state takes custody of girls and puts them in detention facilities, the state also becomes responsible for the girls' education. The education that is provided, however, is often deeply inadequate. Two-thirds of youth leaving juvenile facilities in New York State fail to re-enter the public high school system at all.<sup>398</sup> Vocational training at girls' facilities is generally either unavailable or confined to stereotypically feminine skills that are not as useful or marketable as those offered to boys.<sup>399</sup>
130. Like women in adult prisons, girls in detention facilities face major barriers to remedies. While constitutional protections against cruel and unusual punishment are limited when it comes to prisoners' rights,<sup>400</sup> courts have found that youth are entitled to a heightened level of protection under the Fourteenth Amendment,<sup>401</sup> and that states have a particular responsibility to protect when they take custody of children.<sup>402</sup> However, even with this heightened protection, it has been difficult to hold juvenile detention facilities accountable for unconstitutional conditions of confinement. The PLRA places major restrictions on when and how girls in juvenile detention can bring claims in federal court, just as it does for adult claims.<sup>403</sup> The PLRA has an even more restrictive effect on juvenile claims than it does on the claims of adults, however, as youth are less likely to understand or be able to navigate the often complex grievance systems.<sup>404</sup> As in adult prisons, most juvenile claims are evaluated and adjudicated by grievance systems that are inadequate or improperly implemented. Finally, as with adult prisons, lack of oversight is a crucial problem in juvenile facilities.<sup>405</sup>

## V. RECOMMENDATIONS

### A. Access to remedies

131. Congress should amend the PLRA. An amendment should eliminate the physical injury requirement, make the PLRA inapplicable to prisoners under the age of 18, modify the restrictions on attorney fees in actions brought by prisoners, and modify the exhaustion of administrative remedies requirement so that it bars fewer meritorious claims and does not incentivize opaque and overly-complex grievance procedures. The PLRA should require the exhaustion of administrative remedies requirement only when internal grievance procedures meet a certain threshold of fairness, and should allow exceptions for special circumstances and reasonable technical errors.
132. In the absence of an amendment, the physical injury requirement of the PLRA should be interpreted to cover sexual assault and abuse, at a minimum.
133. State departments of corrections should make their grievance procedures more transparent and easier to navigate, starting with PREA standard compliance.

<sup>398</sup> *Id.* at 6 (The Tryon and Lansing facilities provide "haphazard and insufficient educational and vocational opportunities for girls.").

<sup>399</sup> *Id.* ("When vocational training is available at all, that offered to girls is limited to stereotypically female pursuits such as culinary arts, cosmetology, and clerical skills...These educational failings can amount to a crippling future disadvantage for incarcerated girls, exacerbating the pattern of intergenerational educational and economic marginalization suffered by many of the girls and their families.").

<sup>400</sup> *See supra* ¶¶ 10-13.

<sup>401</sup> *See* *K.M. v. Ala. Dep't Youth Serv.*, 360 F. Supp. 2d 1253, 1258-59 (M.D. Ala. 2005) ("Because of their age, youth are entitled to even greater protections from abuse and unnecessary pain than incarcerated adults. Youth in criminal justice settings have a right to 'bodily integrity' under the 14th Amendment of the Constitution, as would any child in school.").

<sup>402</sup> *See* *N.G. v. Connecticut*, 382 F.3d 225, 232 (2d Cir. 2004) (holding that when the State exercises custodial authority over children, "its responsibility to act in the place of parents (*in loco parentis*) obliges it to take special care to protect those in its charge, and that protection must be concerned with dangers from others and self-inflicted harm.") (citing *Schall v. Martin*, 467 U.S. 253, 265 (1984)).

<sup>403</sup> *See supra* ¶ 20.

<sup>404</sup> *Id.*

<sup>405</sup> *See* HUMAN RIGHTS WATCH, *CUSTODY AND CONTROL*, *supra* note 383, at 3 ("Internal monitoring and oversight of the facility are, to put it charitably, dysfunctional, and independent outside monitoring is all but nonexistent. As a result, the conditions in the...facilities addressed in this report are shrouded in secrecy and girls who suffer abuse have little meaningful redress.").

134. Prosecutors should receive training on prosecuting sexual abuse cases in the prison context so that they are prepared to prosecute these kinds of crimes.

**B. Sexual abuse**

135. The federal and state governments should maintain funding for nationwide data collection on the problem of sexual abuse in prisons. The government should continue to provide funding for improvements in policies and practices related to the prevention of sexual abuse in custody.

136. The Attorney General should, without delay, comply with his statutory duty under PREA to adopt nationwide standards that address the problem of sexual abuse in prisons. In doing so, he should not weaken the standards. The standards are a first step towards eliminating sexual abuse and fulfilling our nation's international responsibility to protect from harm those that we detain in our prisons. The standards should be enhanced to provide for specific mechanisms of oversight, mandatory use of technology and cameras, and affirmative investigations in addition to grievance investigations.

137. The federal government should appoint a standing body to monitor enforcement of the PREA standards and to suggest revisions to the standards.

138. States should ensure that all state laws criminalizing sexual abuse of prisoners cover not only guards and correctional officers but all individuals who work in prisons, including volunteers and government contractors. These laws should be regularly enforced.

139. States should pass laws that mirror PREA, like those in California and Texas, that implement the goals of PREA within the state. States should have independent ombudsmen who investigate charges of sexual abuse and other misconduct, and with whom prisoners can file grievances directly.

140. States should move towards same-sex supervision in women's prisons, as required by international standards. At minimum, only same-sex officers should perform strip and pat searches or observe women in situations of nudity. Unnecessarily invasive and degrading strip search procedures should be eliminated.

141. The bans on funding for incarcerated persons in the Victims of Crimes Act and Violence Against Women Act should be lifted.

142. Courts should recognize that all types of sexual abuse by prison officials, regardless of penetration, are violations of the Eighth Amendment.

**C. Health care**

143. All prison facilities should be accredited by the NCCHC and adhere to its standards on physical and mental health care. All prison facilities should maintain the recommended prisoner to doctor ratios at all times to avoid delays in care.

144. Non-medical staff should not be used to "screen" prisoners or in any way determine whether prisoners can or cannot see a doctor. Prisons should hire doctors equivalent in caliber to those in the civilian sector. Prisons should not hire doctors who have had their licenses revoked or have previous convictions that bear on their professional responsibility (such as sexual abuse convictions).

145. States and the FBP should adopt policies that ensure that all people in women's prisons receive the highest attainable level of physical and mental health care. In particular, women's prisons should provide annual OB-GYN examinations and Pap smears. States should adopt specific and comprehensive prenatal care policies. All states should adopt policies that allow women access to abortion services, if they so choose, in a timely fashion.

146. States and the FBP should ensure that adequate and gender-sensitive mental health and drug treatment programs are provided to women with mental illness or addictions. Women should not be punished, through administrative segregation or otherwise, for behavior associated with their mental illness.
147. All states should pass legislation barring the use of restraints on pregnant women at any time unless there are overwhelming security concerns that cannot be handled by any other method. Pregnant women should never be restrained during labor or delivery.

**D. Access to children, loved ones, and intimate relations**

148. States should implement the ASFA in ways that create safeguards for the parental rights of incarcerated mothers. While ASFA requires the initiation of custody termination proceedings, states should take a comprehensive look at the situation of the family involved in order to most fairly balance the best interests of the child with the parental rights of the mother. Alternatively, Congress could amend the ASFA to achieve the same result across all states.
149. States and the FBP should allow incarcerated mothers to maintain relationships with their children. Following the example of Bedford Hills in New York, prisons should maintain nurseries for infants, offer more generous and flexible visiting schedules, and provide child-appropriate visiting areas.
150. Following the recommendations of the Rebecca Project, states should provide and fund sentencing alternatives that allow mothers and children to stay together and provide services such as counseling and drug rehabilitation.
151. Prisons should adopt policies that minimize the policing of consensual sexual conduct between prisoners, focusing energy and resources instead on educating inmates about health, sexuality, and disease prevention, and eliminating sexual abuse and assault through the PREA recommended standards.

**E. Communities of color**

152. Legislatures, at both the state and federal level, should revisit disparities in criminal sentencing requirements that create racial disparities in prisons. In particular, any remaining disparities in sentencing between crack and powder cocaine should be eliminated.
153. Legislatures should, using New York as an example, revisit harsh and draconian mandatory minimum sentencing laws for drug crimes, especially first time drug offenses. They should consider drug rehabilitation options in lieu of prison sentences for those with substance abuse problems.
154. States should review and eliminate law enforcement policies that have unjustifiably disparate impacts on communities of color. States must have a “zero-tolerance” policy for racial discrimination at all stages of law enforcement including arrest, prosecution, and sentencing.
155. States should repeal felony disenfranchisement laws that strip individuals of their right to vote even after they have rejoined their communities.

**F. Immigration detention**

156. The current administration should, as it has promised, adopt improved national standards that will begin to transform our immigration detention system from a punitive model into a “truly civil” model. These standards should be made legally binding on all detention facilities, including those run by state, local, or private parties. Such standards should also be enforceable in courts.
157. Detention of immigrant children and families should be eliminated to the fullest extent possible.
158. Immigrant detainees should not be held in mixed custody with convicted individuals.

159. The size of the immigration detention population should be minimized and consolidated into fewer detention facilities. These facilities should be located closer to urban centers where legal services and families are more accessible.
160. Extensive language assistance should be provided to detainees who do not speak English.

**G. American Indian women**

161. Further investigation and research needs to be done into American Indian women in prison and the challenges they face.
162. The constitutionally protected religious rights of American Indian women in prison must be respected.
163. Particular resources should be devoted to mental health care, counseling, and support groups for American Indian women, as this population suffers disproportionately from domestic violence and sexual assault.

**H. Lesbian, gay, bisexual, transsexual, and queer women**

164. Individuals should be placed in male or female detention facilities based on a variety of factors, including their self-presentation and gender identity, and not based on genitalia alone.
165. PREA recommendations that take sexual orientation into account when determining a prisoner's vulnerability to abuse should be implemented. However, segregating prisoners based on sexual orientation or non-gender-conformative appearance should be strictly prohibited.
166. States should adopt policies that strictly prohibit singling out non-gender-conforming prisoners and that protect gender-related self-expression of prisoners to the extent that it does not conflict with safety and security. Prison should not be a site of "forced feminization."

**I. Juveniles**

167. Juvenile facilities should be rehabilitative rather than punitive and should provide better educational and vocational training for girls.
168. Juvenile facilities should address the high rates of sexual abuse in their populations by housing youth who are younger and less developed in different areas from older youth, and by separating violent offenders from "status offenders."
169. Detention facilities for girls should be smaller and located close to or within urban communities.
170. Excessive use of force against girls in detention should never be tolerated.

**VI. VISIT COORDINATION**

171. Based on our research, we recommend that the Special Rapporteur speak with the following list of individuals, who work in a variety of capacities and roles to improve the lives of women in detention in the United States:
  1. Dori Lewis and Lisa Freeman (Legal Aid Society, New York, NY)
  2. Malika Saar (Rebecca Project for Human Rights, Washington D.C.)

3. Kathy Boudin (Columbia University School of Social Work, New York, NY)
4. Tina Reynolds (Women on the Rise Telling Herstory, New York, NY)
5. Amy Fettig (ACLU National Prison Litigation, New York, NY)
6. Michelle Brane (Women's Refugee Commission, New York, NY)
7. Brenda Murray (National Association of Women Judges, Washington D.C.)
8. Tamar Kraft-Stolar (Women in Prison Project, New York, NY)
9. Brenda Smith (American University, Washington D.C)
10. Deborah Labelle (Ann Arbor, Michigan)
11. Robin Levi (Justice Now, Oakland CA)

## **VII. CONCLUSION**

172. The abuses and hardships suffered by women in detention in the United States are pervasive. Women are often subject to conditions of confinement that inadequately protect them from sexual abuse at the hands of prison officials or other inmates; endure grossly inadequate, negligent, and sometimes deadly health care services; and are effectively deprived of stable family relationships, often resulting in the permanent loss of parental rights. At the same time, the ability of prisoners to assert their rights and avail themselves of the legal process has been short-circuited by the PLRA and an increasingly hostile court system.
173. These abuses occur within the context of a culture of over-incarceration in the United States. Over-incarceration affects abuses in prison on multiple fronts. The punitive justifications for high rates of incarceration legitimize poor conditions and make prisoners' individual claims for dignity invisible, while the overcrowding of prisons makes abuse all the more likely. Women of color and their communities, significantly overrepresented in prisons, overwhelmingly bear the long-term consequences—fractured families, long-term health concerns, untreated substance abuse problems, and cyclical recidivism—of this harsh system.
174. Many of the problems noted by the Special Rapporteur in her 1999 report persist, and some have worsened. However, in the past decade a vast network of advocates has increased the awareness of communities and lawmakers throughout the United States, and has made significant gains both at the state and federal level. In this report we hope to have provided the Special Rapporteur not only with the necessary information about the abuses in the system, but also with an overview of the ongoing advocacy work and opportunities for reform. We once again thank the Special Rapporteur for her devotion of time and resources to the important but difficult questions of the treatment of women in detention in the United States. We hope that this report will aid her in her endeavor to effectively support continuing reform and shine a light on these pressing human rights issues.

## VIII. APPENDIX

### A. Case studies

#### i. California

175. The Special Rapporteur's report written on her visit to the United States in 1999 had an impact in California. As a result of the findings in the report, the California legislature conducted hearings inside women's prisons to hear women's views on prison conditions. For the first time, legislators did not rely solely on the statements of prison officials regarding prison conditions. In turn, the report motivated female prisoners to organize around human rights violations and to learn the language of human rights discourse. Sadly, none of the bills that materialized from these hearings became law. The report did pique the interest of national donors to finance work to improve the conditions of California's women's prisons. However, within the last few years, all small remedial changes that occurred due to the report have been virtually erased. The prolonged economic downturn has resulted in a level of brutality and scarcity of resources that leaves conditions in women's prisons worse now than in 1999.
176. As of September 30, 2010, California has a total prison population of 154,593 people, with 9,859 incarcerated in women's prisons. As of June 30, 2010, 35.3% of women incarcerated in California are white, 30.3% are Hispanic, 28.9% are black, and 5.4% are of another race.<sup>406</sup> The California Correctional Women's Facility (CCWF) was designed to house 2,004 women but now houses roughly 4,093. The Valley State Prison for Women (VSPW) was designed to house 2,024 women but now houses roughly 3,810. These prisons are located across the street from each other in Chowchilla, California. The third women's prison in California, the California Institution for Women (CIW), is located in Chino, California, and was designed to house 1,026 women but now houses roughly 2,443.<sup>407</sup>
177. Since 1999, the number of people in California's prison system has risen to such a high number that in October 2006, Governor Schwarzenegger proclaimed a state of emergency.<sup>408</sup> Currently, California prisons house over 160,000 people, nearly twice as many as the facilities are designed to hold. Judges have concluded that California prisons are unable to provide constitutionally adequate medical care (*Plata v. Schwarzenegger*<sup>409</sup>) and mental health care (*Coleman v. Schwarzenegger*<sup>410</sup>) due in part to severe overcrowding. On January 12, 2010, a federal three-judge panel issued an order requiring California to reduce its prison overcrowding to 137.5 percent of design capacity, in accordance with a plan submitted by the State on November 12, 2009. However, the panel stayed the population reduction order, while the United States Supreme Court decided an appeal filed by the State.<sup>411</sup> On May 23, 2011, the Supreme Court affirmed the order.<sup>412</sup>
178. Since 2005, California's Gender Responsive Strategies Commission, under the purview of the California Department of Corrections and Rehabilitation (CDCR), has promoted gender-responsive prisons to address the needs of incarcerated women. However, the gender-responsive movement has only produced plans to build more prisons in California, even though it acknowledges that women are not a threat to public safety.<sup>413</sup> In the past five years, conditions have worsened due to authorization of the use of higher levels of force and weaponry by the guards, frequent lockdowns, rationing of basic sanitary

<sup>406</sup> Department of Corrections and Rehabilitation, Offender Information Services Branch, Estimates and Statistical Analysis Section, Data Analysis Unit, *Prison Census Data* (Sept. & June 2010).

<sup>407</sup> Justice Now Human Rights Documentation Program, *They Treat You Like An Animal: Pregnancy, Delivery, and Postpartum Abuses Inside California's Women's Prisons*, 1 RIGHT TO FAMILY SERIES 80-81 (2010).

<sup>408</sup> Proclamation by the Gov. of Cal., *Prison Overcrowding State of Emergency Proclamation* (Oct. 4, 2006), available at <http://www.gov.ca.gov/proclamation/4278/>.

<sup>409</sup> *Plata v. Schwarzenegger*, No. C01-13510, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).

<sup>410</sup> *Coleman v. Schwarzenegger*, 2008 U.S. Dist. LEXIS 37193 (E.D. Cal. Mar. 18, 2008).

<sup>411</sup> Prison Law Office, Briefing Filed in U.S. Supreme Court Appeal of Federal Three-Judge Court Order Requiring California to Reduce Prison Overcrowding (Oct. 26, 2010), available at <http://www.prisonlaw.com/events.php>.

<sup>412</sup> *Brown v. Plata*, No. 09-1233, 563 U.S. \_\_ (2011).

<sup>413</sup> Angela Wolf, *Reducing the Incarceration of Women: Community-Based Alternatives* (Aug. 2006), available at [http://www.nccd-crc.org/nccd/pubs/2006\\_WIP\\_special\\_report.pdf](http://www.nccd-crc.org/nccd/pubs/2006_WIP_special_report.pdf).

supplies like toilet paper and tampons, elimination of virtually all educational and vocational opportunities, drastically limited family visitation, reduced access to prisons for community groups, and many other restrictions. In addition, the California Correctional Peace Officers Association (CCPOA) is still the most politically powerful union in the state, even though it is not the biggest.<sup>414</sup> These circumstances have radically heightened the stress and brutality in women's prisons. Some of these changes are codified in law, while others reflect a societal shift caused by the current economic downturn.

**a) Sexual misconduct**

179. Since the Special Rapporteur's 1999 report, there has been an increased awareness of and interest in documenting sexual violence in prisons. This has reduced overt sexual violence by prison staff. However, sexual assaults remain highly underreported, and consensual coercive relationships, which have decreased since 1999, are rarely documented. In addition, the current framework, which focuses on sexual assault, continues to minimize other types of sexual violence that occur in prisons, such as staff-on-inmate indecent exposure and voyeurism. Women in prison have no privacy: thin "modesty doors" hang in the showers, and guards watch the women go to the bathroom. In addition, body cavity searches continue to occur. They are performed by licensed medical providers but consist of unwanted touching that is not medically necessary. Cross-gender pat searches have been discontinued, but a male guard can still hold a woman down while a search is conducted by a female guard. Most women still feel violated by sexually abusive pat searching done by female guards. For example, a woman incarcerated at CCWF who was the victim of this type of sexual assault stated that, "[t]here are no limitations on how female officers may touch a female inmate while performing a search...A female officer can legally cup, rub, and repeatedly grab or pat at an inmate's genitals...sexual assault/abuse is not based on sex or gratification, its use as a weapon to abuse is not gender specific."<sup>415</sup> These horrendous activities are not defined as "violence" under the federal PREA, which California adopted in 2005 so there is no longer an avenue for women to seek redress for this type of harm. Although the level of sexual violence has decreased, the reduction appears to be a result of heightened publicity, not PREA.
180. A new practice in women's prisons has been the intense rationing of toilet paper and sanitary pads under the guise of saving money.<sup>416</sup> With eight women to a cell, each cell gets sixty tampons at the beginning of each month. This rationing leaves only seven or eight tampons per person, and the distribution of the tampons to each cellmate is left to the social dynamics of the cell, leading to great inequities. Extra guards must be paid to ransack cells to search for contraband toilet paper and tampons. In the end it is questionable if this rationing saves the state any money at all.

**b) Health care court cases**

181. *Shumate v. Wilson*, a class action suit by women inmates accusing CDCR of providing inadequate medical care, was dismissed with prejudice on August 21, 2000.<sup>417</sup> Less than a year later, ten people in California men's prisons filed a complaint against many of the same defendants as in *Shumate*, alleging that the CDCR's inadequate medical care system violated the Cruel and Unusual Punishment Clause of the Eighth Amendment. This case, *Plata v. Davis*, became *Plata v. Schwarzenegger* in 2003.<sup>418</sup>
182. In 2005, in *Plata v. Schwarzenegger*, Judge Thelton Henderson, of the Federal District Court in the Northern District of California, found that California's prison medical care system was so poor that it violated the United States Constitution's prohibition against cruel and unusual punishment. Judge Henderson placed the CDCR medical delivery system under federal receivership.<sup>419</sup> The current federal

<sup>414</sup> The Teachers' Union Myth of California, *Truth about the CCPOA*, available at

<http://prisonmovement.wordpress.com/2009/07/22/the-teachers-union-myth-of-california-truth-about-the-ccpoa>.

<sup>415</sup> From an internal grievance form written by a woman imprisoned at CCWF (Sept. 28, 2008) (on file with author).

<sup>416</sup> Select Comm. on Women and Children in the Criminal Justice System, *Inquiry Regarding the Master Plan for Female Offenders, A Blueprint for Gender-Responsive Rehabilitation* (Oct. 21, 2010).

<sup>417</sup> *Shumate v. Wilson*, No. 95-619 (E.D. Cal. dismissed Aug. 22, 2000).

<sup>418</sup> *Plata v. Schwarzenegger*, 329 F.3d 1101 (9th Cir. 2003).

<sup>419</sup> *Plata v. Schwarzenegger*, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).

receiver is J. Clark Kelso, a Sacramento law professor appointed on January 23, 2008 by Judge Henderson after his predecessor, Robert Sillen, was fired from the position amidst criticism of overspending, lack of progress, and a confrontational approach to reform. However, Kelso has no knowledge of health care or medicine. Kelso supports additional prison construction and requests investment in his reform plans.<sup>420</sup> Kelso's approach fails to address the underlying causes of neglect and mistreatment in the prison system, and instead will serve merely to expand that harmful system. Advocates have not seen any improvement in medical care in the women's prisons since the receiver took over in 2005.

183. *Plata* was very frustrating to the women's prison advocacy community. The case did not include any female plaintiffs and the Prison Law Office (PLO), the law firm that filed the suit and represented the original ten plaintiffs, did not communicate with anyone in women's prisons before agreeing to the case's settlement. After pressure from advocates, the PLO fought to get women's prisons covered by the 2005 settlement, but neglected to include reproductive health care in the first settlement decree. It was later included in the standards and practices that have been released. *Plata* and its settlement are indicative of the State's general lack of attention to women's health care.<sup>421</sup>

**c) Current medical conditions**

184. Adequate provision of medical care is still one of the most pressing problems facing women prisoners. Prisoners with the greatest health needs are housed at CCWF's Skilled Nursing Facility (SNF). Pregnant women are housed at VSPW and CIW. Inadequate health care and medical neglect exists at all of the California facilities that house women.
185. Women seeking medical assistance are likely to experience delays at every step in the process: access to a doctor, tests, and follow-up care or surgery. California's co-payment system requires women who are not completely destitute to pay \$5.00 for each appointment with a doctor. However, women sometimes end up paying this co-payment multiple times before actually seeing a doctor, or women may have to return to the doctor multiple times for the same concern, paying the \$5 co-payment each time. For most women, the co-payment requirement makes seeing a doctor almost impossible. Also, unless the woman is able to articulate the problem and express how severe it is in medical or legal terms, they are unlikely to get the right care or any care at all. Women frequently complain that doctors do not explain anything to them, and when the medical staff does communicate with them, they often use abusive and degrading language.<sup>422</sup>
186. Delays for medication are frequent. Women whose medical conditions require that they receive regular medication for seizures, diabetes, arthritis, or high blood pressure often have their medication disrupted for days at a time. This can cause a normally manageable condition to become critical. Regular preventive care is non-existent. Many reproductive cancers such as breast and uterine cancers go undiagnosed and untreated because there is no systematic plan in place to provide for regular Pap smears and mammograms. For example, one woman incarcerated at CCWF spent six months trying to get medical care. By the time doctors finally examined her, the breast cancer had spread significantly and she died six months later.<sup>423</sup>
187. Post-surgical follow-up is also limited. Bandages are not changed on a regular basis because prison medical staff insist that such acts be done by outside hospital staff, but do not authorize outside appointments. Physical therapy is offered on an extremely limited basis, and recommendations for follow-up care and treatment made by outside physicians are often ignored. Women who need to see specialists for HIV care, transgendered therapies, or other conditions are forced to use telemedicine technology to talk to their doctors through video-conferencing. People who have difficulty with mobility

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<sup>420</sup> Andy Furillo, *New Receiver: Fixing California prison medical care will cost plenty*, SACRAMENTO BEE, Mar. 6, 2008, at A4.

<sup>421</sup> Interview by Virginia Taylor with Cynthia Chandler, Co-director of Justice Now (Oct. 4, 2010).

<sup>422</sup> Interview by Virginia Taylor with Amanda Scheper, Client Coordinator at Justice Now (Oct. 11, 2010).

<sup>423</sup> *Id.*

must rely completely on other women in prison to push their wheelchairs. These women in wheelchairs are then all too commonly left outside in the freezing cold or hot sun.<sup>424</sup>

188. The peer education programs that were won in the 1980s by HIV-positive people in the prisons have been obliterated. Gradually, those programs have shifted into general health education programs with a focus on abstinence, which is not helpful to a population of people frequently addicted to intravenous drugs. Now, even those programs have been decimated because of a lack of funding. As a result, the stigma associated with being HIV-positive has returned to a pre-1989 level.<sup>425</sup>
189. In 2008, California Penal Code Section 1170(e) was amended to expand the class of people eligible for compassionate release to include people who are medically incapacitated. This population consists of those unable to perform acts required for basic daily living in prison. Now, people can have their sentence recalled if they are within six months of dying or medically incapacitated.<sup>426</sup> However, while the group of people eligible for compassionate release has expanded since 2008, the number of people actually released under this provision has not. In 2009, only three people were released from prison in the entire state of California under this provision.<sup>427</sup> In 2010, the California state legislature passed and the Governor signed into law SB1399, creating a new procedure to give medically incapacitated people in prison the opportunity to be released on early parole.<sup>428</sup> Advocates are cautiously hopeful about the effect of this law because of the chronic underuse of compassionate release by the CDCR and the fact that the medical parole provision does not change any of the barriers that exist under the compassionate release system.<sup>429</sup>

#### **d) Sterilization**

190. In correspondence with the Federal Receiver in September 2008, Justice Now asked whether sterilization is offered to pregnant women in prison. The Federal Receiver confirmed that sterilization is offered “in certain circumstances” at VSPW and that “postpartum tubal ligation” is performed at CIW.<sup>430</sup> Since 2006, California has sterilized more than 200 women after giving birth under the guise of gender responsiveness.<sup>431</sup> These sterilizations are the *only* elective procedure available to people in prison other than tooth extraction.<sup>432</sup> For example, a forty year old black woman imprisoned at VSPW was asked just before her cesarean section birth if she wanted her tubes tied while she was on the delivery table with her arms strapped down and out from her body.<sup>433</sup> The doctor asked, “Are we tying your tubes here?” The woman adamantly refused and stated that she only consented to a cesarean section.<sup>434</sup> She still is not certain whether a tubal ligation was performed. Elective sterilization of prisoners violates international human rights law<sup>435</sup> and United States federal law. Federal and state laws adopted in the last twenty years prohibit sterilization in coercive environments and specifically prohibit elective sterilization in prisons, making clear that voluntary, informed consent cannot be procured in the prison environment.<sup>436</sup>
191. Over the past four years, Justice Now has also documented a shocking pattern of aggressive and coercive sterilization of women of color in women's prisons that is not related to birth or delivery.<sup>437</sup> Examples include the regular treatment of minor reproductive health concerns with hysterectomy and oophorectomy, and in several cases, sterilization occurring during unrelated abdominal surgery without

<sup>424</sup> Interview with Chandler, *supra* note 421.

<sup>425</sup> *Id.*

<sup>426</sup> CAL. PENAL CODE § 1170(e)(9) (2011).

<sup>427</sup> Interview with Chandler, *supra* note 421.

<sup>428</sup> CAL. PENAL CODE § 2065 (2011).

<sup>429</sup> Interview with Chandler, *supra* note 421.

<sup>430</sup> Letter from Federal Receiver, J. Clark Kelso, to Justice Now (Sept. 10, 2008) (on file with Justice Now).

<sup>431</sup> Interview with Chandler, *supra* note 421.

<sup>432</sup> CAL. CODE REGS. tit. 15 §3350.1(b) (2011).

<sup>433</sup> Interview with Justice Now interview (Mar. 19, 2010).

<sup>434</sup> *Id.*

<sup>435</sup> SRVAW 1999 U.S. Report, *supra* note 1, ¶51.

<sup>436</sup> 42 C.F.R. § 50.201-206 (2011).

<sup>437</sup> Justice Now Human Rights Documentation Program, *Prisons As a Tool of Reproductive Oppression*, 5 STAN. J. CIV. RTS & CIV. LIB. 2, 321-23 (2010) [hereinafter *Prisons As a Tool of Reproductive Oppression*].

the patient's consent or knowledge.<sup>438</sup> For example, Hector, a black transgender man, received his first Pap smear when he was in his early twenties and in prison.<sup>439</sup> After discovering uterine fibroids, the prison doctor recommended that he get a hysterectomy. When Hector asked if any other options might be available, the doctor merely looked at him and stated, "Well, you don't want to have kids, do you?" Hector's uterus was removed, and only afterwards did the prison medical staff ask him to sign a form indicating that he consented to the procedure.<sup>440</sup> Hector is one of many people reporting sterilization being pushed as a first response to problems such as uterine fibroids or ovarian cysts, although far less invasive remedies are available.<sup>441</sup>

*e) Pregnancy*

192. Overall, approximately 7% of people in California's women's prisons give birth while serving their sentences.<sup>442</sup> In 2007, there were 208 vaginal deliveries, 71 caesarian sections, and 1 stillbirth in California women's prisons.<sup>443</sup> For most of these women, the pregnancy, birthing, or postpartum experience in a California women's prison included some form of daily mistreatment. In January 2006, Assembly Bill 478 ("An Act Regarding Female Inmates and Wards") went into effect in California.<sup>444</sup> The new law requires that people in prison have access to complete prenatal health care, regular prenatal appointments, a "balanced, nutritious diet approved by a doctor," prenatal vitamins, information on childbirth and infant care, as well as postpartum information and health care.<sup>445</sup>
193. However, advocates have not seen an improvement in the conditions for pregnant women at VSPW or CIW since the passage of Assembly Bill 478.<sup>446</sup> The most common mistreatments that pregnant women experience are the lack of basic information regarding pregnancy, ineffective relationships with medical practitioners, and a lack of access to responsive and consistent physical and mental health care. In addition, pregnant women are still not provided an adequate diet, are frequently subjected to degrading treatment and language by medical and non-medical prison staff, and do not receive adequate dental care. "I got no dental cleaning while I was pregnant here. I had to argue with the dentist to get two teeth pulled . . . he said I had 'meth mouth' . . . [H]e said it wouldn't happen."<sup>447</sup> Moreover, both pregnant and postpartum women may be forced to return to their prison work duties before they are medically able to do so, putting their long-term health at risk.<sup>448</sup>
194. Those who have any physical complications or mental health problems, or who choose to question aspects of their treatment, are vulnerable to serious consequences, including death or the death of their fetuses or newborns. For example, even though Lynette was experiencing complications with her pregnancy, she only saw the OB-GYN twice.<sup>449</sup> When Lynette finally saw the doctor, she said, "The doctor told me that I could be having a tubal pregnancy. Instead of sending me out to the hospital for someone to actually check me out, I was told to go back to my unit... [A] week or two later...they did the D&C (dilation and curettage) and found out that I was pregnant in my tubes and that I had miscarried. I still had to have my tube removed because it was damaged just that fast from it."<sup>450</sup> Neither pregnant nor postpartum women are given adequate medical treatment when pregnancy complications arise or birth injuries occur.

<sup>438</sup> *Id.*

<sup>439</sup> Interview with Justice Now (July 17, 2008).

<sup>440</sup> *Id.*

<sup>441</sup> *Prisons As a Tool of Reproductive Oppression*, *supra* note 437, at 322.

<sup>442</sup> Charlene Wear Simmons, Cal. Research Bureau, *Children of Incarcerated Parents*, 7 CRB NOTE 2 (2000), available at <http://www.library.ca.gov/crb/00/notes/v7n2.pdf>.

<sup>443</sup> Communication from Tim Rougeux, Chief Operating Officer, Medical Services of California Prison Health Care Receivership Corp. (Sept. 10, 2008).

<sup>444</sup> CAL. PENAL CODE § 3424 (2011).

<sup>445</sup> *Id.*

<sup>446</sup> Interview by Virginia Taylor with Karen Shain, Policy Dir. at Legal Serv. for Prisoners with Children (Oct. 4, 2010).

<sup>447</sup> Interview by Justice Now with Katie at VSPW (Mar. 30, 2007).

<sup>448</sup> Justice Now Human Rights Documentation Program, *They Treat You Like An Animal: Pregnancy, Delivery, and Postpartum Abuses Inside California's Women's Prisons*, 1 RIGHT TO FAMILY SERIES 25 (2010).

<sup>449</sup> Interview by Justice Now with Lynette at VSPW (June 23, 2006).

<sup>450</sup> *Id.*

**f) Shackling**

195. Since the passage of Assembly Bill 478 in 2005, California law restricts the shackling of pregnant, birthing, and postpartum women.<sup>451</sup> Assembly Bill 478 also requires that pregnant women “temporarily taken to a hospital outside the prison for the purposes of childbirth shall be transported in the least restrictive way possible.”<sup>452</sup> Shackling during transportation to and from the hospital still occurs, and only thirty-three of California’s fifty-eight counties have written policies addressing shackling.<sup>453</sup> In addition, pregnant women in California prisons are still shackled by the ankles, wrists, belly, and/or to another person while being transported to or from a correctional facility, a court hearing, or outside medical visits. Assembly Bill 1900, which was proposed in 2010, would have set uniform standards for the implementation of the provisions of Assembly Bill 478 and would require that every time a pregnant woman is transported she be restrained in the least restrictive way possible. The bill was passed unanimously by both houses, but Governor Schwarzenegger vetoed it.<sup>454</sup>

**g) Termination of parental rights**

196. Termination of parental rights is a concern for many women in California prisons. In a February 2003 report, the California Research Bureau estimated that 79% of people in California’s women’s prisons were parents and that about two-thirds of those parents were the primary caretakers of their children before entering prison.<sup>455</sup> Many of these women will lose their parental rights while they are incarcerated because of the federal ASFA. However, Assembly Bill 2070, which took effect on January 1, 2009, extends reunification services for up to twenty-four months. This is an increase from the standard set by the ASFA, which requires states to petition to terminate parental rights when a child is in foster care for up to fifteen out the previous twenty-two months.<sup>456</sup> This revision will allow more women in prison to successfully pursue reunification. However, permanent separation is still likely in cases in which the child is under the age of three when the mother is incarcerated, or when the baby is born in jail.

197. The only time that a woman has a right to be present at the dependency court hearings for her child is at the final termination of parental rights hearing.<sup>457</sup> However, women are not automatically taken to that hearing; they must make a request if they wish to attend. Consequently, a vast number of women are not present at hearings that they have a right to attend. SB962, passed in 2010, will provide women with the opportunity to be present at any of the hearings by telephone conference or video conference, so long as the necessary technology is available at the woman’s prison.<sup>458</sup>

209. Not surprisingly, the primary source of anxiety and distress for many pregnant women in California’s women’s prisons is what will happen to their babies once they are born. If a woman gives birth while in prison, she will generally stay in the hospital with her baby for two to four days before it is taken away. Many infants will be taken by Child Protective Services (CPS), transported to the county of the mother’s last legal residence, and placed in foster care.<sup>459</sup> Sometimes a family member is able to take the infant and serve as its unofficial guardian, but, as Legal Services for Prisoners with Children points out, this leads to the all too common practice of baby stealing.<sup>460</sup> Those friends or family members may refuse to give the babies back to women when they are released. Women do not have a right to a court-appointed attorney if their children are taken by friends or family members.<sup>461</sup>

<sup>451</sup> CAL. PENAL CODE § 3423 (2011).

<sup>452</sup> *Id.* § 5007.7 (2011).

<sup>453</sup> Cal. Nat’l Org. for Women, *Stop Shackling Pregnant Prisoners! Support AB 1900 (Skinner)*, <http://www.canow.org/canoworg/2010/05/stop-shackling-pregnant-prisoners-support-ab-1900-skinner.html>.

<sup>454</sup> Press Release, Office of the Gov., Legislative Update (Sept. 27, 2010).

<sup>455</sup> Charlene Wear Simmons, Cal. Research Bureau, CRB03-003, *California Law and the Children of Prisoners* 5, 8 (2003).

<sup>456</sup> CAL. WELF. & INST. CODE § 361.5(a)(4) (2011).

<sup>457</sup> Interview with Shain, *supra* note 446.

<sup>458</sup> CAL. PENAL CODE § 2625 (2011).

<sup>459</sup> Interview by Lysay Skiba with Cassie Pierson, Staff Attorney, Legal Serv. for Prisoners with Children, in S.F., Cal. (Dec. 14, 2007).

<sup>460</sup> Interview with Shain, *supra* note 446.

<sup>461</sup> *Id.*

210. Two programs currently in operation in California allow a small number of mothers with criminal convictions to stay with their young children in a closed facility: the Family Foundations Program, a program independent of the CDCR, and the Community Prisoner Mother Program (CPMP), which is run by the CDCR. However, both programs are limited in capacity and by several restrictions. For example, the mother must: be pregnant or have a child under six years old; have six years or less left on her sentence; and fulfill requirements concerning criminal record, prison disciplinary history, past involvement with child protective services, and medical and dental health status. Despite its availability on paper, very few people are accepted into the program since the facilities only have seventy beds. In addition, in a few cases, the facilities have been the site of serious abuses.<sup>462</sup> According to attorney Cassie Pierson, “They’re run more like mini prisons than alternatives to prison.”<sup>463</sup>
211. Moreover, due to budget cuts, California has reduced the number of days for social and family visits.<sup>464</sup> Another hurdle to family visits is that if a child is brought into prison by someone who is not a legal guardian or biological parent of that child, that person must present a notarized form signed by the child’s biological parent or legal guardian giving that person permission to bring the child into the prison. Women must pay a notary ten dollars for each signature, and most times there is a three month waiting list. Additionally, some notaries charge travel fees.

**ii. Minnesota**

212. The Minnesota Department of Corrections adheres to a philosophy of rehabilitation and restorative justice. Restorative justice is “a framework that engages victims, offenders and the community in repairing the harm caused by crime.”<sup>465</sup> Each correctional facility in Minnesota now has its own restorative justice representative, and committees of staff and offenders working on restorative justice programs and activities.<sup>466</sup> The Minnesota DOC also attempts to adhere to a policy of parity, meant to ensure the provision of gender-specific services for female offenders “substantially equivalent” to programming for male offenders.<sup>467</sup> Unfortunately, the Planning for Female Offenders Unit, which had a full-time director devoted to women’s programming and education, was eliminated in 2003.<sup>468</sup> However, an Advisory Task Force on the Woman and Juvenile Female Offender, which consults on model programs and makes recommendations on matters related to female offenders, remains active.<sup>469</sup>
213. The number of women incarcerated in Minnesota has increased significantly since the Special Rapporteur’s visit in 1999. At that time, the women’s prison operated slightly above its capacity of 237 prisoners. Today, it has the capacity for 601 individuals, and currently 543 women are incarcerated at the facility.<sup>470</sup> Despite this significant increase, Minnesota still has the second-lowest overall incarceration rate in the country, and is tied for the fourth-lowest incarceration rate of women in the

<sup>462</sup> Solomon Moore, *California Investigates a Mother and Child Prison Center*, N.Y. TIMES (July 6, 2007), available at [http://www.nytimes.com/2007/07/06/us/06women.html?\\_r=1&scp=1&sq=mother-child%20prison%20center&st=cse&oref=slogin](http://www.nytimes.com/2007/07/06/us/06women.html?_r=1&scp=1&sq=mother-child%20prison%20center&st=cse&oref=slogin).

<sup>463</sup> Interview with Pierson, *supra* note 459.

<sup>464</sup> Cal. Dep’t of Corrections, *Inmate Visiting Guidelines* 6.

<sup>465</sup> Minn. Dep’t of Corrections, *Restorative Justice Backgrounder* (Apr. 2008), available at <http://www.corr.state.mn.us/publications/backgrounders/documents/RJbackgrounder.pdf>.

<sup>466</sup> *Id.*

<sup>467</sup> Minn. Dep’t of Corrections, *Policy Manual, Policy 102.210 Parity for Female Offenders* (2010), available at [http://www.doc.state.mn.us/DocPolicy2/html/DPW\\_Display\\_TOC.asp?Opt=102.210.htm](http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=102.210.htm).

<sup>468</sup> Amicus, *Amicus Girls Study: Paying Attention to Girls in the Juvenile System* 51 (2010), available at [www.amicususa.org/pubs/AmicusGirlsStudy503small.pdf](http://www.amicususa.org/pubs/AmicusGirlsStudy503small.pdf).

<sup>469</sup> Minn. Dep’t of Corr. Advisory Task Force on the Woman and Juvenile Female Offender, available at <https://forums.doc.state.mn.us/site/fo/default.aspx> (last visited Nov. 18, 2010).

<sup>470</sup> Minn. Dep’t of Corr., *Minnesota Correctional Facility – Shakopee*, available at <http://www.corr.state.mn.us/facilities/shakopee.htm> (last visited Nov. 18, 2010); Minn. Dep’t of Corr., *Inmate Profile Minnesota Correctional Facility – Shakopee* (Nov. 18, 2010), available at <http://www.corr.state.mn.us/facilities/tourreport/04FacilityInmateProfile.pdf>.

country.<sup>471</sup> Although it has a relatively low incarceration rate, Minnesota still has a low rate of violent crime, ranking thirty-fifth in violent crime nationally.<sup>472</sup>

214. The Minnesota Correction Facility– Shakopee is the only adult women’s facility in the state. The institution, as the Special Rapporteur noted in her last report, is a “model prison” in that it is designed to blend into the neighboring area and has no perimeter fence. It has eleven buildings in total, in a campus-like setting. The question of whether to fence the institution has been one of considerable debate in recent years, with the Governor expressing support for a fence in 2006 and 2008. But due to both financial constraints and some community resistance, there are currently no plans to build a fence.<sup>473</sup>
215. Since the 1999 visit, the Minnesota legislature has passed a law criminalizing all sexual conduct between correctional staff and prisoners.<sup>474</sup> The DOC also bans cross-gender pat searches and body cavity searches, except in cases of emergency.<sup>475</sup> From 1972 to 2003, Minnesota had an ombudsman for corrections, and an agency independent of the corrections department that investigated complaints. Female offenders could communicate confidential information directly to the ombudsman’s office, including complaints of sexual abuse.<sup>476</sup> Unfortunately, in 2002, the ombudsman’s budget was cut by over 50%.<sup>477</sup> The following year, the office was closed down entirely, purportedly because the budget cuts made it “difficult to maintain ongoing operations.”<sup>478</sup> Therefore, there is no longer an independent body charged with investigating complaints against the DOC. The DOC does, however, maintain a Special Investigations Unit, charged with investigating complaints, including complaints of sexual abuse by staff.<sup>479</sup> One recent report of sexual abuse provides some evidence that the office of special investigations is responsive to complaints. In June 2010, an inmate reported an incident of staff sexual misconduct. After an internal investigation, the officer was terminated from his position, and he has been charged by the county attorney’s office.<sup>480</sup>
216. In her 1999 report, the Special Rapporteur praised Shakopee’s parenting programs and child visitation policies. Shakopee’s current policies are similar. Women in the Anthony Living Unit, a privileged living unit, are able to have overnight visits, from Friday evening to Saturday afternoon with their children under the age of eleven.<sup>481</sup> Children twelve and above have extended visit privileges, all day on Saturday, monthly.<sup>482</sup> Shakopee also hosts several education and support groups on parenting for mothers and expectant mothers. In a recently released report by the Rebecca Project, Minnesota received an ‘A’ for its alternatives to incarceration.<sup>483</sup> Minnesota has numerous family-based treatment centers for women

<sup>471</sup> BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008, at 30 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

<sup>472</sup> U.S. CENSUS BUREAU, VIOLENT CRIMES PER 100,000 POPULATION – 2007, available at <http://www.census.gov/compendia/statab/2010/ranks/rank21.html> (last visited Nov. 18, 2010). Minnesota’s ranking among the states for incarceration and violent crime has generally remained the same since the Special Rapporteur’s visit in 1999.

<sup>473</sup> David Peterson, *Neighbors get ready to fight Shakopee prison fence – again*, STAR TRIBUNE, Dec. 5, 2007, available at <http://www.startribune.com/local/south/12150056.html>; Peter Cox, *Shakopee prison fence doing time in political purgatory*, STAR TRIBUNE, Mar. 2, 2010, available at <http://www.startribune.com/local/south/85726657.html>.

<sup>474</sup> MINN. STAT. § 609.344 (2011). The law makes sexual penetration between a staff member and an inmate criminal sexual conduct in the third degree, and makes any sexual contact between a staff member and an inmate criminal sexual conduct in the fourth degree.

<sup>475</sup> Minn. Dep’t of Corr., Policy Manual, Policy 301.010 Searches (May 4, 2010), available at [http://www.doc.state.mn.us/DOCpolicy2/html/DPW\\_Display.asp?Opt=301.010.htm](http://www.doc.state.mn.us/DOCpolicy2/html/DPW_Display.asp?Opt=301.010.htm) (last visited Nov. 18, 2010).

<sup>476</sup> SRVAW 1999 U.S. Report, *supra* note 1.

<sup>477</sup> Brian D. Heskamp, *The Prisoner’s Ombudsman: Protecting Constitutional Rights and Fostering Justice in American Corrections*, 6 AVE MARIA L. REV. 527, 535 (2008) (citing Minn. Dep’t of Fin., Agency Profile: Ombudsman for Corrections (Nov. 26, 2002), available at <http://www.budget.state.mn.us/budget/operating/200405/prelim/192362.pdf>).

<sup>478</sup> *Id.* (quoting Minn. Dep’t of Fin., Change Item: Eliminate Ombudsman for Corrections (Feb. 18, 2003), available at <http://www.budget.state.mn.us/budget/operating/200405/final/corrections-ombudsman.pdf>).

<sup>479</sup> Minn. Dep’t of Corr., Office of Special Investigations Brochure (2005), available at <http://www.doc.state.mn.us/org/facilityserv/documents/OSIbrochure.pdf>.

<sup>480</sup> *Guard Accused of Sexually Touching Inmate*, SHAKOPEE NEWS, June 21, 2010, available at [http://www.shakopeenews.com/news/general\\_news/guard\\_accused\\_sexually\\_touching\\_inmate-106](http://www.shakopeenews.com/news/general_news/guard_accused_sexually_touching_inmate-106).

<sup>481</sup> Minn. Dep’t of Corr., *Parenting Programs at Minnesota Correctional Facility – Shakopee* (August 2010), available at [http://www.doc.state.mn.us/publications/documents/10-19HousingDirectory-October2009\\_000.pdf](http://www.doc.state.mn.us/publications/documents/10-19HousingDirectory-October2009_000.pdf).

<sup>482</sup> *Id.*

<sup>483</sup> REBECCA PROJECT FOR HUMAN RIGHTS & NAT’L WOMEN’S LAW CTR., *MOTHERS BEHIND BARS 19* (Oct. 2010), available at <http://www.rebeccaproject.org/images/stories/files/mothersbehindbarsreport-2010.pdf>.

with substance abuse problems, and mothers can be sentenced to these facilities as an alternative to prison.<sup>484</sup>

217. Health care services are reportedly comprehensive and gender-responsive; for example, women receive annual mammograms and Pap smears.<sup>485</sup> Shakopee prison has a mental health care unit<sup>486</sup> and a chemical dependency treatment program,<sup>487</sup> both of which attempt to provide gender-specific care for women.<sup>488</sup> However, Minnesota received an ‘F’ in a recent report on prenatal care policies because the DOC has no official policy or directive on prenatal care for women.<sup>489</sup> Further, the Minnesota policy on access to abortion is excessively restrictive. While Minnesota provides transportation for women to abortion providers, it requires women to pay the costs of the procedure, security, and transportation upfront.<sup>490</sup> Minnesota does have a policy, although not a statute, against the use of restraints on pregnant women during transportation and hospitalization absent explicit security concerns.<sup>491</sup>
218. Female offenders at Shakopee have access to a range of educational programs. As of 2008, 153 of the 549 women at Shakopee were enrolled in adult education programs.<sup>492</sup> These programs include GED programming, art, English as a Second Language (ESL), parenting/family skills, and special education.<sup>493</sup> The vocational/technical programs at Shakopee—computer careers support specialist and cosmetology license preparation—are limited compared to some men’s facilities, but on par with others.<sup>494</sup>
219. Reentry Metro, a female halfway house in St. Paul, was lauded in the previous report for its provision of a structured and cooperative living environment for women reentering the community. This program has now been in operation for fifteen years and continues to provide the same comprehensive services.<sup>495</sup> It is worth noting that Reentry Metro only has space for twenty-six women and their children.<sup>496</sup> Thus, as the female offender population rises, we can expect a shortage of this service. As early as 2001, a study indicated that halfway house services were only provided to 5% of those offenders reentering the community.<sup>497</sup>
220. In the past ten years, Minnesota has eliminated two programs in which it was a progressive leader: the Planning for Female Offenders Office and the Ombudsman of Corrections. However, Minnesota can still

<sup>484</sup> *Id.* This report provides additional information about how family-treatment centers work and their benefits as alternatives to incarceration. For a comprehensive list of family-based treatment centers in Minnesota, as well as elsewhere, see Rebecca Project for Human Rights, *List of Comprehensive Family Treatment Programs*, available at [http://www.rebeccaproject.org/index.php?option=com\\_content&task=blogcategory&id=66&Itemid=182](http://www.rebeccaproject.org/index.php?option=com_content&task=blogcategory&id=66&Itemid=182) (last visited Nov. 22, 2010).

<sup>485</sup> Kate Hannahen, *Caring for Invisible Patients: Challenges and Opportunities in Health care for Incarcerated Women*, 29 *HAMLIN J. PUB. L. & POL’Y* 161, 198 (2007).

<sup>486</sup> See Minn. Dep’t of Corr., *Mental Health Services Backgrounder* (Jan. 2009), available at <http://www.doc.state.mn.us/publications/backgrounders/documents/1-09Mentalhealthservicesbackgrounder.pdf> (indicating that 75% of female offenders receive some type of psychiatric care and describing the mental health care unit, the Mead Unit, at Shakopee which has a structured 21 day program for women before placement in general population).

<sup>487</sup> See Minn. Dep’t of Corr., *Chemical Dependency Treatment Services in Prison Backgrounder* (Jan. 2009), available at [http://www.doc.state.mn.us/publications/backgrounders/documents/1-09CDtreatmentservices\\_001.pdf](http://www.doc.state.mn.us/publications/backgrounders/documents/1-09CDtreatmentservices_001.pdf) (indicating that there are 40 chemical dependency treatment beds available at Shakopee women’s prison).

<sup>488</sup> Hannahen, *supra* note 485, at 198.

<sup>489</sup> REBECCA PROJECT FOR HUMAN RIGHTS & NAT’L WOMEN’S LAW CTR., *supra* note 483, at 16.

<sup>490</sup> Minn. Dep’t of Corr., Policy Manual, Policy 500.108 Adult Offender Abortion (Oct. 3, 2006), available at [http://www.doc.state.mn.us/DOCpolicy2/html/DPW\\_Display.asp?Opt=500.108.htm](http://www.doc.state.mn.us/DOCpolicy2/html/DPW_Display.asp?Opt=500.108.htm).

<sup>491</sup> *Id.* at Policy 301.081 Use of Force – Adult Facilities (June 6, 2006), available at [http://www.doc.state.mn.us/DOCpolicy2/html/DPW\\_Display.asp?Opt=301.081.htm](http://www.doc.state.mn.us/DOCpolicy2/html/DPW_Display.asp?Opt=301.081.htm).

<sup>492</sup> Minn. Corr. Educ. Ctr., *Master Academic Plan 2009-2011*, at 4 (2009), available at <http://www.corr.state.mn.us/publications/documents/MasterAcademicPlan2009-2011.pdf>.

<sup>493</sup> Minn. Dep’t of Corr., *Adult Education Programming* (Apr. 1, 2010), available at <http://www.corr.state.mn.us/publications/documents/04-10MCECAAdultEducationalProgramming.pdf>.

<sup>494</sup> *Id.*

<sup>495</sup> RS Eden-Reentry Metro, available at [http://www.rseden.org/index.asp?Type=B\\_BASIC&SEC={3FDBBAE7-4C5F-42CE-83E8-4EF6D416FB2C}](http://www.rseden.org/index.asp?Type=B_BASIC&SEC={3FDBBAE7-4C5F-42CE-83E8-4EF6D416FB2C}) (last visited Nov. 18, 2010).

<sup>496</sup> *Id.*

<sup>497</sup> Minn. Dep’t of Corr., *Safe Homes, Safe Communities: A Focus Group Report on Offender Housing 25* (Mar. 2001), available at <http://www.corr.state.mn.us/publications/documents/housing.pdf>.

serve as a model in some areas for other women’s prisons across the country, particularly on the issues of alternatives to incarceration and parental visit programs.

**iii. New York**

221. As of January 2009, 2,618 women were incarcerated in New York’s prisons,<sup>498</sup> making it the ninth-largest incarcerated female population in the United States.<sup>499</sup> From 1973 to 2009, the size of the female prison population in New York increased by 580%, while the general population increased by 388%.<sup>500</sup> However, in recent years the female prison population has decreased: between 1997 and 2009, the number of women in prison dropped by 30%, alongside a general 13% drop in incarceration.<sup>501</sup>
222. Women in prison in New York are generally incarcerated for nonviolent offenses: in 2008, 83% of the women sent to prison were convicted of nonviolent offenses, 16% of women sent to prison in 2007 were convicted of drug possession only, and nearly one-third of all women in prison are incarcerated for drug-related offenses.<sup>502</sup> Similar to women in prison across the country, women in New York prisons disproportionately suffer from past physical or sexual abuse, alcohol or substance abuse problems, and mental illness.<sup>503</sup> While women of color only represent 30% of the women in New York’s general population, they comprise almost 68% of the State’s female prisoners.<sup>504</sup> Almost 73% of the women in New York prisons are mothers.<sup>505</sup> The median minimum sentence for women in New York is thirty-six months.<sup>506</sup>
223. New York’s draconian “Rockefeller Drug Laws” were emblematic of the nationwide war on drugs. They instituted harsh mandatory penalties for drug crimes and eliminated the role of judicial discretion in sentencing. As the Special Rapporteur noted in her last visit, “[t]he law require[d] that a person convicted of a sale of two ounces of cocaine in New York State receive[] the same mandatory minimum sentence as a murderer: 15 years to life.”<sup>507</sup> These harsh penalties coupled with increased enforcement led to extraordinary increases both in the number of women in prison and the length of time they were confined. From 1973 to 2008, the number of women in prison for drug crimes increased 787%.<sup>508</sup>
224. Reforms in recent years have eliminated the most objectionable elements of the Rockefeller laws. The Drug Law Reform Acts of 2004 and 2005 increased the quantity of narcotics an individual must possess to be charged with drug felonies, reduced mandatory minimum sentences, and provided for the re-sentencing of individuals convicted of certain offenses.<sup>509</sup> The Drug Law Reform Act of 2009 further

<sup>498</sup> New York has six prison facilities that hold female prisoners: Albion, Bayview, Beacon, Bedford Hills, Lakeview Shock, and Taconic correctional facilities.

<sup>499</sup> Women in Prison Project, *Women in Prison Fact Sheet 1* (Apr. 2009), available at [http://www.correctionalassociation.org/publications/download/wipp/factsheets/Wome\\_in\\_Prison\\_Fact\\_Sheet\\_2009\\_FINAL.pdf](http://www.correctionalassociation.org/publications/download/wipp/factsheets/Wome_in_Prison_Fact_Sheet_2009_FINAL.pdf). Texas, California, Florida, Ohio, Arizona, Georgia, Virginia and Illinois all have larger female prison populations. *Id.* at 3. At the time of the Special Rapporteur’s last report in 1999, New York had the third largest female incarcerated population.

<sup>500</sup> *Id.* at 1.

<sup>501</sup> *Id.*

<sup>502</sup> Women in Prison Project, *Women in Prison and Substance Abuse Fact Sheet 1* (Mar. 2008), available at

[http://www.correctionalassociation.org/publications/download/wipp/factsheets/Wome\\_in\\_Prison\\_Fact\\_Sheet\\_2009\\_FINAL.pdf](http://www.correctionalassociation.org/publications/download/wipp/factsheets/Wome_in_Prison_Fact_Sheet_2009_FINAL.pdf).

<sup>503</sup> *Id.* at 2 (More than 88% of women in New York’s prisons report having an alcohol or substance abuse problem prior to arrest.);

Women in Prison Project, *supra* note 499, at 2 (As of January 2007, more than 42% of women in New York’s prisons had been diagnosed with a serious mental illness, compared to nearly 12% of male inmates.); Women in Prison Project, *Survivors of Abuse Fact Sheet 1* (Apr. 2009), available at

[http://www.correctionalassociation.org/publications/download/wipp/factsheets/Suvivors\\_of\\_Abuse\\_Fact\\_Sheet\\_2009\\_FINAL.pdf](http://www.correctionalassociation.org/publications/download/wipp/factsheets/Suvivors_of_Abuse_Fact_Sheet_2009_FINAL.pdf) (A 1999 study found that 82% of women at New York’s Bedford Hills Correctional Facility had a childhood history of severe physical and/or sexual abuse and that more than 90% had suffered physical or sexual violence in their lifetimes. This study also found that 75% of the women had experienced severe physical violence by an intimate partner during adulthood.)

<sup>504</sup> Women in Prison Project, *supra* note 499, at 2.

<sup>505</sup> *Id.*

<sup>506</sup> *Id.*

<sup>507</sup> SRVAW 1999 U.S. Report, *supra* note 1.

<sup>508</sup> Women in Prison Project, *supra* note 499, at 1.

<sup>509</sup> N.Y. LAW § 3907 (2004); N.Y. LAW § 3434-36 (2005); Peter A. Mancuso, *Resentencing After the ‘Fall’ of Rockefeller: The Failure of the Drug Law Reform Acts of 2004 and 2005 to Remedy the Injustices of New York’s Rockefeller Drug Laws and Compromise of 2009*, 73 ALB. L. REV. 1535, 1542-44 (2010).

relaxed sentencing requirements by expanding judicial discretion in the punishment scheme, creating a judicial diversion program in which the court can divert defendants to treatment programs in lieu of prison, and incorporating the re-sentencing opportunities of the previous reforms.<sup>510</sup> Although advocates object to some of the limitations placed on retroactive application of the sentencing guidelines and the judicial diversion program, many of the goals of the drug law reform movement have been met by this set of sweeping changes to the New York drug laws.<sup>511</sup>

225. In addition to the major drug reform victories of the past decade, there have been a few discrete legislative accomplishments for women in prison in New York. As discussed above, the ASFA has resulted in the termination of parental rights for many women in prison.<sup>512</sup> In June 2010, the New York legislature passed the Adoption Safe Families Expanded Discretion Bill, which, among other safeguards, gives foster care agencies discretion to delay filing for termination if a parent is incarcerated or in a drug treatment program.<sup>513</sup> As a result of this law and its safeguards, it is significantly more difficult to terminate the parental rights of individuals merely because they are separated from their children by prison. Also, in 2009, the New York state legislature, along with numerous other states, passed a law banning the shackling of pregnant women during labor and post-delivery recovery, and restricting the use of shackles during transport.<sup>514</sup>
226. In her 1999 report, the Special Rapporteur raised concerns about the adequacy of health care in New York prisons, particularly about the availability of gender-specific health care. Recent studies reaffirm that the provision of health care, and gender-responsive health care in particular, is a concern in New York prisons. The New York Correctional Association's health care report, based on prison visits from 2004 to 2007, indicates that the quality of health care within this large network of jails and prisons is extremely varied.<sup>515</sup> The report notes that medical care is the most grieved issue in the DOC, and that even at full staffing levels some prisons do not have enough medical personnel to meet prisoner needs.<sup>516</sup> The report also documents the inconsistency of women's medical treatment: "Some inmates reported delays in getting abnormal gynecological test results and in receiving adequate follow-up care for gynecological issues. The Department seems to lack a comprehensive quality improvement program to monitor these and other women-specific health services."<sup>517</sup> Outside of a less-than-comprehensive prenatal care standard,<sup>518</sup> there are no statewide standards on women's health care.
227. Finally, in the 1999 report, the Special Rapporteur noted the persistent problem of sexual abuse in women's prisons in New York. New York passed a law in 1996 outlawing all sexual contact between prison staff and inmates.<sup>519</sup> Since then, the DOC issued directives outlining "zero-tolerance" policies for

<sup>510</sup> Mancuso, *supra* note 507, at 1572-77.

<sup>511</sup> See CORR. ASS'N OF N.Y., ANALYSIS OF ROCKEFELLER DRUG LAW REFORM (2009), available at <http://droptherock.ipower.com/wp-content/uploads/2009/03/analysis-of-rockefeller-reform-bill.pdf>.

<sup>512</sup> See *supra* ¶¶ 90-91.

<sup>513</sup> Corr. Ass'n of N.Y., *The Adoption and Safe Families Act (ASFA) Expanded Discretion Bill Becomes Law* (June 16, 2010), available at [http://www.correctionalassociation.org/news/ASFA\\_becomes\\_law\\_June10.htm](http://www.correctionalassociation.org/news/ASFA_becomes_law_June10.htm); Tamar Kraft-Stolar, *A Fair Chance for Families Separated by Prison*, NORTH STAR FUND, available at <http://northstarfund.org/blog/2010/06/a-fair-chance-for-families-separated-by-prison.php>. This legislative success is largely the result of an extensive organizing, educating, and lobbying effort on the part of the Women in Prison Project, an arm of the Correctional Association of New York.

<sup>514</sup> N.Y. CORRECT. LAW § 611 (McKinney 2011); Corr. Ass'n of N.Y., *Anti-Shackling Advocacy a Success* (Aug. 26, 2009), available at [http://www.correctionalassociation.org/news/Anti-Shackling\\_Advocacy\\_Success\\_Aug09.htm](http://www.correctionalassociation.org/news/Anti-Shackling_Advocacy_Success_Aug09.htm).

<sup>515</sup> See CORR. ASS'N OF N.Y., HEALTH CARE IN NEW YORK PRISONS 2004-2007, at 2 (2009), available at [www.correctionalassociation.org/.../pvp/.../Health\\_care\\_Report\\_2004-07.pdf](http://www.correctionalassociation.org/.../pvp/.../Health_care_Report_2004-07.pdf). ("[T]he quality of health care varies throughout the state prison system, with some facilities providing timely access to care that meets community standards and others providing substandard care." This finding, of extreme variation in the quality of care, is corroborated by our discussions with advocates.)

<sup>516</sup> *Id.* at 4.

<sup>517</sup> *Id.* at 12; see also NEW YORK CIVIL LIBERTIES UNION, ACCESS TO REPRODUCTIVE HEALTH CARE IN NEW YORK STATE JAILS (2008), available at [http://www.nyclu.org/files/rrp\\_jail\\_report\\_030408.pdf](http://www.nyclu.org/files/rrp_jail_report_030408.pdf) (reporting on reproductive health care policies in county jails across the state that indicated the same amount of inconsistency and variation in attention to women's health care needs).

<sup>518</sup> 9 NYCRR § 765.1.17; see also REBECCA PROJECT FOR HUMAN RIGHTS & NAT'L WOMEN'S LAW CTR., MOTHERS BEHIND BARS 16 (2010), available at <http://www.rebeccaproject.org/images/stories/files/mothersbehindbarsreport-2010.pdf> (giving New York a 'C' for its prenatal care, indicating that the standard does not live up to the national medical recommendations).

<sup>519</sup> N.Y. PENAL LAW § 130.05 (McKinney 2011).

staff sexual misconduct as well as inmate-on-inmate sexual abuse.<sup>520</sup> In addition, in 2007, the New York legislature amended the penal statute on sexual misconduct to widen the proscription to include contractors and volunteers working in prisons.<sup>521</sup> However, there is still no independent agency or monitor that investigates claims of sexual abuse. And while the DOC purports to limit the number of cross-gender pat-searches, there is no policy banning the practice.<sup>522</sup> As the sexual abuse claims brought by fifteen women prisoners in the *Amador* litigation, discussed above,<sup>523</sup> demonstrate, problems of sexual abuse persist in the face of these “zero-tolerance” policies.<sup>524</sup>

228. While women in the New York State prison system continue to struggle with issues of sexual abuse and access to health care, the Bedford Hills maximum security women’s prison has served as a model for progressive, humane, and women-centered programming. This reputation is due in large part to a powerful organizing effort made by prisoners and their advocates over the past few decades. The Children’s Center Program at Bedford Hills provides comprehensive services to incarcerated mothers and their children, including prenatal care, a parenting center, a nursery, a child advocacy office, and a GED-preparation program that is designed for mothers and pregnant women.<sup>525</sup> Bedford Hills is the only facility for women in New York State that permits visiting every day. This is a particularly striking fact considering that it is also the only maximum security facility for women in the state.<sup>526</sup> The quality of visiting areas is higher, and the areas are better adapted to the needs of children than visiting areas at other prisons.<sup>527</sup> In their November 2010 report on incarcerated mothers in the United States, the Rebecca Project highlighted the nursery program at Bedford Hills as a commendable example of how prisons can provide opportunities for bonding between mothers and children, noting that the nursery has served as a model for many other prison nursery programs throughout the country.<sup>528</sup> The nursery is equipped to house twenty-six mothers and infants and allows incarcerated mothers to keep their infants with them for up to eighteen months.<sup>529</sup>
229. In addition to parent- and child-oriented programming, Bedford Hills offers vocational, educational, and rehabilitative programs for women that aim to prepare them for their transition back into society.<sup>530</sup> It is also a mental health “level one” facility, which means that it has the capacity to provide women with the highest level of mental health services available in the state prison system.<sup>531</sup>
230. Kathy Boudin, who was formerly incarcerated at Bedford Hills and who was instrumental in organizing, proposing, and developing many of these reforms, describes the importance of viewing incarcerated women as active agents who have the power to improve their own conditions:

<sup>520</sup> N.Y. Dep’t of Corr., Sexual Abuse Prevention & Intervention Staff on Inmate, Directive 4028A; N.Y. Dep’t of Corr., Sexual Abuse Prevention & Intervention Inmate on Inmate, Directive 4028A.

<sup>521</sup> N.Y. PENAL LAW § 130.05.

<sup>522</sup> AMNESTY INT’L, NEW YORK, AN UPDATED STATE BY STATE SURVEY OF POLICIES AND PRACTICES IN THE USA 5 (2005), available at [www.amnestyusa.org/women/custody/states/newyork.pdf](http://www.amnestyusa.org/women/custody/states/newyork.pdf).

<sup>523</sup> See *supra* ¶ 17.

<sup>524</sup> For a discussion of reported incidents of sexual abuse, both in the media and the courts, see Amnesty International, *supra* note 522.

<sup>525</sup> REBECCA PROJECT FOR HUMAN RIGHTS *supra* note 239, at 31.

<sup>526</sup> THE WOMEN IN PRISON PROJECT OF THE CORR. ASS’N OF N.Y., WHEN ‘FREE’ MEANS LOSING YOUR MOTHER: THE COLLISION OF CHILD WELFARE AND INCARCERATION OF WOMEN IN NEW YORK STATE 38 (2006) (“While Bedford Hills Correctional Facility, New York State’s only maximum security facility for women, permits visits every day, all minimum and medium security facilities for women allow visits on weekends only — a practice that significantly limits opportunities for visiting.”).

<sup>527</sup> *Id.* at 39-40 (“Most visiting facilities at women’s prisons do not address the unique needs of children, who cannot be expected to remain seated for the duration of a visit without activities, toys, or appropriate food. Bedford Hills Correctional Facility is an exception, providing a separate children’s center with enough space for comfortable mother-child interaction as well as child-friendly books and toys.”).

<sup>528</sup> REBECCA PROJECT FOR HUMAN RIGHTS, *supra* note 518, at 31.

<sup>529</sup> The Women in Prison Project, *supra* note 497, at 26 n.135.

<sup>530</sup> THE CORR. ASS’N OF N.Y., REPORT ON CONDITIONS OF CONFINEMENT AT BEDFORD HILLS CORRECTIONAL FACILITY 2-3 (Aug. 2007) (“With regard to programs at Bedford, we were pleased to hear positive comments from inmates and staff...We commend the Superintendent for continuing to run these valuable programs which allow inmates to build useful skills and serve themselves and the outside community in a productive way.”).

<sup>531</sup> For a comprehensive evaluation of the mental health services at Bedford Hills, see CORR. ASS’N OF N.Y., REPORT ON MENTAL HEALTH PROGRAMS AND SERVICES AT BEDFORD HILLS CORRECTIONAL FACILITY (Sept. 2007).

Female prisoners are often described as victims. This paradigm ignores the strengths of female prisoners and overlooks their successes in organizing meaningful programs to improve their health and wellbeing. At Bedford Hills, female prisoners organized to develop an innovative program for AIDS counseling and education. Women at Bedford Hills also worked together to solve their parenting challenges by participating in the Children’s Center program...Women in the program receive counseling on parenting skills and how to improve their relationships with their children’s caregivers. Many of these women go on to serve as counselors for incarcerated parents. Through a collaborative effort between female prisoners and outside members of the community, inmates are also able to earn associate and bachelor’s degrees. As these initiatives demonstrate, programs to aid female prisoners must not only serve their needs, but also build on their potential.<sup>532</sup>

231. Recent reporting on Bedford Hills by the Correctional Association of New York’s Women in Prison Project indicates, however, that inmates at Bedford Hills struggle with many of the same challenges facing incarcerated women across the country.<sup>533</sup> After conducting an extensive investigation and interviewing over 100 prisoners in 2007, the Project found that the general atmosphere and approach at Bedford Hills has become increasingly punitive and hostile. The report cites contentious officer-inmate relations, inconsistent enforcement of rules and regulations, a dysfunctional grievance system, verbal harassment, excessive use of force by officers,<sup>534</sup> and the implementation of more restrictive cell lock and movement policies as areas of particular concern.<sup>535</sup> These changes may stem in part from efforts made by the New York DOC to standardize policies across all the maximum security facilities in New York State. This is in spite of the fact that Bedford Hills is the only maximum security prison for women, and that advocates have consistently shown that women are less likely to be incarcerated for violent crimes, and have gender-specific needs relating to children, mental health, and history of trauma.<sup>536</sup> These changes demonstrate how precarious even relatively substantial institutional reforms may be.

#### iv. Georgia

232. When the Special Rapporteur visited Georgia in 1999, a team of lawyers had recently brought a major class action suit, *Cason v. Seckinger*, against the Georgia DOC on behalf of all male and female prisoners housed at the Middle Georgia Correctional Complex.<sup>537</sup> Based in part on the facts that came to light over the course of this lawsuit, HRW conducted an extensive investigation of women’s prisons in Georgia, exposing high rates of sexual and physical abuse, an abysmal health record, and incidents of forced abortions and other major reproductive justice violations.<sup>538</sup> The *Cason* lawsuit succeeded in bringing about a series of reforms in Georgia’s prison system in the form of consent decrees imposed by magistrate judges and accepted by the DOC. The decrees covered an enormous range of issues, including access to physical and mental health services, grievance procedures, use of force, seclusion, strip searches, safety and sanitation, classification, visitation, and mail. The decrees also prohibited corrections staff from sexually harassing or abusing prisoners and required the Georgia DOC to change its procedures

<sup>532</sup> Kathy Boudin, *The Resilience of the Written Off: Women in Prison as Women of Change*, 29 WOMEN’S RTS. L. REP. 15 (2007).

<sup>533</sup> THE CORR. ASS’N OF N.Y., REPORT ON CONDITIONS OF CONFINEMENT, *supra* note 530, at 2 (“Bedford Hills has been...one of the facilities closest to achieving the Department’s goal of maintaining a “stable and humane ‘community’ environment.... The aforementioned issues indicate that the facility has veered from this path.”).

<sup>534</sup> *Id.* at 3-5 (Inmates reported that a small number of corrections staff consistently engaged in overly aggressive behavior and, in the most severe cases, used force not to restrain or control, but to inflict pain.).

<sup>535</sup> *Id.* at 5-7.

<sup>536</sup> *Id.* at 2 (“[I]t seems that certain policy changes may have been developed in an effort to ensure that operations at Bedford Hills parallel those at other maximum security prisons in the state.”).

<sup>537</sup> *Cason v. Seckinger*, 231 F.3d 777 (11th Cir. 2000).

<sup>538</sup> HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996) available at [www.aclu.org/hrc/PrisonsStates.pdf](http://www.aclu.org/hrc/PrisonsStates.pdf).

for reporting and investigating abuse, and for responding to survivors of abuse.<sup>539</sup> The *Cason* reforms relating to sexual assault in the 1990s provided a strong foundation for the implementation of PREA standards a decade later.<sup>540</sup> Speaking highly of the state in its final report, the PREA Commission noted that the Georgia DOC had followed the Commission's recommendations, implementing "sweeping reforms" relating to sexual abuse investigation and increasing its rate of sexual assault prosecutions.<sup>541</sup>

233. While at least some of the policies and procedures that the DOC implemented in response to the *Cason* consent decrees remain on the books,<sup>542</sup> it is unclear to what extent these policies are actually being implemented. There appears to be no independent organization investigating or monitoring Georgia's women's prisons at this time. In 2000, the Eleventh Circuit Court of Appeals denied a motion brought by the DOC to have the decrees terminated under the newly-passed PLRA, finding that the plaintiffs must be given a chance to introduce evidence demonstrating that constitutional violations continue to exist.<sup>543</sup> Over the next few years, however, the plaintiffs were unable to meet this burden, and the District Court for the Middle District of Georgia issued its final judgment terminating the decrees in February 2002.<sup>544</sup> It is unclear what effect this action has had on the actual conditions within Georgia's prisons.
234. While the *Cason* consent decrees and resulting reforms were a major victory for women in detention and their advocates,<sup>545</sup> Eighth Amendment jurisprudence and the PLRA continue to constitute major barriers to remedies in Georgia. In *Doe v. Scroggy*, which involved a prisoner's allegations of sexual assault by a guard, the District Court for the Middle District of Georgia initially found that there was a reasonable basis to find an Eighth Amendment violation,<sup>546</sup> citing *Cason* extensively to provide a context for understanding sexual abuse of prisoners by guards.<sup>547</sup> The Court of Appeals, however, overruled the district court, finding that "one uncorroborated and disputed allegation of sexual assault" does not qualify as an "objectively substantial risk of serious harm."<sup>548</sup>
235. Over-incarceration remains a major problem in Georgia. Georgia ranks fifth in the nation for its total population in prison, and has an incarceration rate that is 20% higher than the national average.<sup>549</sup> In 2004, Georgia also had the fifth-largest total number of incarcerated women with 3,433 individuals, up

<sup>539</sup> Petition for Permanent Injunction, *Cason*, 231 F.3d 777 (11th Cir. Mar. 7, 1994); see also *Cason*, 231 F.3d at 778 ("The parties' differences were resolved by entry of a series of consent decrees between May 10, 1990 and March 29, 1996.").

<sup>540</sup> Georgia Bd. of Corr., Minutes 8 (Aug. 6, 2009) available at

<http://www.dcor.state.ga.us/AboutGDC/AgencyOverview/pdf/BOCMminutes090806.pdf> ("There is a very good foundation for the PREA mandate, because the Department of Corrections is under the federal Consent Decree itself, *Cason v. Seckinger*. Therefore, the Georgia Department of Corrections is ahead of the game when handling sexual assault cases.").

<sup>541</sup> NPREC Report, *supra* note 29, at 107 ("The Georgia Department of Corrections also implemented sweeping reforms, including a policy to investigate all allegations of sexual abuse and the provision of specialized training for investigators. According to Angela Grant, Deputy Warden of Care and Treatment at Pulaski State Prison, 'We have investigators now who only deal with sexual assault cases. There are specialists in all four of our regions. We are doing more thorough investigations. We are now more proactive and definitely pursue these cases all the way to prosecution.'").

<sup>542</sup> For a comprehensive list of Georgia DOC policies regarding sexual assault, see AMNESTY INTERNATIONAL, GEORGIA SURVEY, available at [www.amnestyusa.org/women/custody/states/georgia.pdf](http://www.amnestyusa.org/women/custody/states/georgia.pdf). See also *Doe v. Scroggy*, 2006 WL 3022278, at \*2, No. 5:04-CV-172(Df) (M.D. Ga. Oct. 23, 2006) ("The *Cason* litigation ended in February 2002, but the SOPs [standard operating procedures] implemented as a result of that litigation remain in place within the GDOC's correctional facilities.").

<sup>543</sup> *Cason*, 231 F.3d at 783 ("[T]he plaintiffs were not afforded an opportunity to prove that there are 'current and ongoing' violations of class members' federal rights....We read [the PLRA] as requiring particularized findings, on a provision-by-provision basis, that each requirement imposed by the consent decrees satisfies the need-narrowness-intrusiveness criteria, given the nature of the current and ongoing violation. It is not enough to simply state in conclusory fashion that the requirements of the consent decrees satisfy those criteria.").

<sup>544</sup> Final Judgment, *Cason*, 231 F.3d 777.

<sup>545</sup> NPREC Report, *supra* note 29, at 92 ("*Cason v. Seckinger*...was one of the first court cases to reveal pervasive sexual abuse and compel system-wide reforms... [Cases such as this] have the potential to spark reforms reaching far beyond the individual plaintiffs to protect other prisoners.").

<sup>546</sup> *Scroggy*, 2006 WL 3022278.

<sup>547</sup> *Id.* at \*2 ("The *Cason* litigation ended in February 2002, but the SOPs implemented as a result of that litigation remain in place within the GDOC's correctional facilities. With this background in mind, the Court turns to the factual allegations that are the basis of this suit.").

<sup>548</sup> *Doe v. Ga. Dep't of Corr.*, 245 F. App'x 899, 903 (11th Cir. 2007).

<sup>549</sup> THE SENTENCING PROJECT, INCARCERATION TRENDS IN GEORGIA, 1988 – 2008 (2009), available at

[http://www.communityvoices.org/Uploads/Incarceration\\_Trends\\_in\\_Georgia\\_1988-2008\\_00108\\_00232.pdf](http://www.communityvoices.org/Uploads/Incarceration_Trends_in_Georgia_1988-2008_00108_00232.pdf). ("As of 2008, there were 54,016 people held in Georgia state prisons [and its incarceration rate was] 542 people per 100,000 population....By these measures, Georgia is at the forefront nationally in the use of imprisonment.").

from 493 individuals in 1977.<sup>550</sup> Conforming with incarceration trends in the United States, people of color are disproportionately represented in Georgia's prisons.<sup>551</sup>

**v. Michigan**

236. In 1996, class actions were filed in Michigan alleging that women and girls incarcerated in Michigan's prisons were subject to a pervasive risk of sexual assault and harassment by the male correctional officers. By 1996, over 100 women had formally reported rapes, sexual assaults, and sexual harassment and retaliation by male guards during their incarceration. The United States Department of Justice (DOJ), prior to joining the federal case in 1997, issued a findings letter, concluding that the reported rapes and assaults reflected "only a small percentage of the numbers actually occurring at the prisons." Of the 1,750 women under the jurisdiction of the Michigan DOC, nearly every woman interviewed by DOJ reported sexually aggressive acts by guards, including forced oral sex, indecent exposure, masturbation, routine groping, sex-based insults, prurient viewing, and privacy violations.
237. Based upon the DOJ's 1997 interviews with women, 15% of all women prisoners reported that they had been sexually assaulted by correctional officers. Nearly every woman prisoner reported some form of sexual abuse from male staff, ranging from sexually abusive pat-downs to verbal harassment to violation of their privacy rights by male staff.<sup>552</sup>
238. In 1997, the culture of abuse that existed in Michigan's women's prisons was highlighted in the HRW report, *All Too Familiar*.<sup>553</sup> Over the next decade, from 1996 through 2006, over 500 women reported some form of sexual misconduct by male staff. 148 women reported being raped or forced to perform oral sex on male staff members of the Michigan DOC while in prison.<sup>554</sup> Another 142 women reported non-penetrative sexual assaults that included groping of their breasts and genitals and forced touchings. Over 200 women reported extensive degrading treatment, sexual harassment, privacy violations, and retaliation.<sup>555</sup>
239. In the midst of the class litigation, the Special Rapporteur's 1999 report addressed the allegations of custodial sexual misconduct. The report also addressed issues of retaliation for reporting abuse and privacy and health care issues for women incarcerated in Michigan prisons. HRW issued a special follow-up report on the extensive retaliation against Michigan's women prisoners who participated in the litigation and cooperated with the DOJ and the United Nations Special Rapporteur.<sup>556</sup>
240. After the United Nations report was released, the DOJ and women prisoners involved in the federal litigation reached separate settlements of their claims for injunctive relief. Part of the relief implemented variations of the recommendations of the Special Rapporteur's 1999 report.<sup>557</sup> Pursuant to the women prisoners' settlement, and consistent with the United Nations Standard Minimum Rules for the Treatment of Prisoners, male staff were removed from all housing units in the women's prisons and from areas where the female prisoners could be viewed in a state of undress or performing basic bodily functions. Cross-gender pat-downs were eliminated.

<sup>550</sup> THE PUNITIVENESS REPORT, PART II: STATE BY STATE ANALYSIS 34 (2004) available at [www.wpaonline.org/institute/hardhit/Part2StatebyStateAnalysis.pdf](http://www.wpaonline.org/institute/hardhit/Part2StatebyStateAnalysis.pdf).

<sup>551</sup> THE SENTENCING PROJECT, *supra* note 549 ("African Americans comprise 30% of the state's population, but 63% of persons in prison. Conversely, whites, who comprise 66% of the state's population, represent 36% of the state prison population.").

<sup>552</sup> Interviews by Annabelle Romero with woman prisoners in Michigan (1997).

<sup>553</sup> See HUMAN RIGHTS WATCH, *ALL TOO FAMILIAR*, *supra* note 538, at 121.

<sup>554</sup> MDOC sustained the allegations of over fifty of these women. The majority of the others were closed as unable to determine whether sustained or not.

<sup>555</sup> From 1993 to 2000 all women in Michigan prisons were subject to body searches by male guards who were instructed to search their breasts, between their buttocks, and their thighs and genitals while male staff commented on their bodies and what they would like to do to them. Some Plaintiffs reported being subjected to these searches, at the hands of male employees, five to ten times a day. Women were also routinely observed by men while they were in showers, while dressing and undressing, and while performing basic bodily functions. The evidence is overwhelming that women were routinely referred to as bitches and whores.

<sup>556</sup> See HUMAN RIGHTS WATCH, *NOWHERE TO HIDE* (1998), available at <http://www.hrw.org/legacy/reports98/women/>.

<sup>557</sup> See SRVAW 1999 U.S. Report, *supra* note 1, ¶¶ 207 (a)-(d), 212-217.

241. Following the injunctive settlement, male staff challenged the gender supervision restrictions. The United States Court of Appeals for the Sixth Circuit recognized the privacy rights of women prisoners and girls in Michigan prisons by upholding an equal protection challenge to the removal of male staff from the supervision of women prisoners' housing units in the State of Michigan, and cited "Michigan's deplorable record regarding the care of its female inmates."<sup>558</sup> The court held that the privacy rights of Michigan's female prisoners and the history of custodial sexual abuse, together with the "gravity of the harm visited on the victims of sexual abuse," required the removal of male custody staff from Michigan's women's prisons, and allowed for gender-based assignments at female correctional facilities.<sup>559</sup> The United States Supreme Court declined to hear the petition for certiorari.<sup>560</sup>
242. Subsequent to the settlement of the federal claims, the class action continued in state court. The Michigan women's class action litigation was filed under the state's civil rights act, known as the Elliott Larsen Civil Rights Act (ELCRA).<sup>561</sup> Subsequent to filing, the state legislature amended the ELCRA to exclude prisoners from its protections. The legislature cited the litigation as the impetus for the change and, thereafter, barred all prisoners from relief from any discriminatory treatment while incarcerated in Michigan's prisons.<sup>562</sup> On January 23, 2007, a federal court struck down the amendment to the civil rights act as an unconstitutional violation of women prisoners' equal protection rights. However, it did so in an unpublished opinion. The court also did not reach the claim that the amendment violated the ICCPR and the CAT, noting that, "[b]ecause the court has determined that the ELCRA amendment does not survive equal protection analysis, it is not necessary to address Plaintiffs' other challenges to the legislation."<sup>563</sup>
243. Not long ago, custodial sexual abuse in Michigan's women's prisons was pervasive and rampant.<sup>564</sup> Thirty percent of male staff were alleged to have been involved in sexual assaults. Girls, who are housed in Michigan's adult prisons starting at age fourteen, were particular targets of the abuse. Every girl interviewed reported sexual abuse by either male custodial staff or civilian male workers in the women's prisons. Girls serving sentences of life without possibility of parole were especially singled out for systematic sexual abuse.<sup>565</sup>
244. The institutional failures to respond to allegations of sexual abuse, inadequate investigations and oversight, combined with high levels of retaliation and lack of effective reporting systems resulted in an entrenched culture of abuse in Michigan's women's prisons. The only mechanism available to the women was formal litigation. The fact that the litigation predated the PLRA was significant in its success.
245. Litigation filed by women prisoners in Michigan alleged violations of state and federal statutory civil rights, state and federal constitutional provisions, and international treaties and standards. As a result of this litigation, cross-gender pat-downs were eliminated in women's prisons in November 1999, a ban which continues to date.<sup>566</sup> Also, as a result of the litigation, in 2006 male staff was removed from

<sup>558</sup> *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 760 (6th Cir. 2004).

<sup>559</sup> *Id.* at 756; *see also* *Everson v. Mich. Dep't of Corr.*, 222 F. Supp. 2d 864, 885 n.32 (E.D. Mich. 2002) (The lower court noted its review of various human rights documents including the United Nations "Standard Minimum Rules for the Treatment of Prisoners.").

<sup>560</sup> *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, *cert. denied*, 546 U.S. 825 (2005).

<sup>561</sup> MICH. COMP. LAWS § 37.2102 (2011).

<sup>562</sup> *Id.* § 37.2301(b).

<sup>563</sup> *See* *Mason v. Granholm*, No. 05-73943, 2007 WL 201008, at \*4 & n.1 (E.D. Mich. Jan. 23, 2007). (recognizing the "abhorrent and well-documented history of sexual and other abuse of female prisoners" in Michigan).

<sup>564</sup> *See* *Neal v. Dep't of Corr.*, 2009 WL 187813 (Mich. App. Jan. 27, 2009) (affirming a trial on behalf of ten members of the Plaintiff class challenging violations of their civil rights as a result of sexual harassment and abuse by male custodial staff).

<sup>565</sup> Michigan has the second highest number of juveniles serving this sentence in the United States. The sentence is imposed automatically on girls as young as fourteen, who are convicted of aiding and abetting, felony murder, or homicide. The Commission on Human Rights, Committee Against Torture, and GAO have all condemned this sentence as violative of basic human rights of children. *See* CERD Committee Report on the U.S., U.N. Doc. CERD/C/USA/CO/6 (2008); *see also* U.S. HUMAN RIGHTS NETWORK WORKING GROUP ON JUVENILE JUSTICE, CHILDREN IN CONFLICT WITH THE LAW: JUVENILE JUSTICE & THE U.S. FAILURE TO COMPLY WITH OBLIGATIONS UNDER THE CONVENTION FOR THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2008); HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR YOUTH OFFENDERS IN THE UNITED STATES IN 2008, at 7 (2008), *available at* <http://www.hrw.org/backgrounder/2008/us1005/us1005execsum.pdf> (last visited on, Nov. 11, 2008).

<sup>566</sup> Male staff continue to supervise women and continue to conduct cross-gender pat-downs of women held in county jails. The lack of privacy and degrading treatment of women at one county jail was the subject of class action litigation. *See* Press Release, ACLU,

housing units and areas where they could view women in states of undress. As of 2009, male staff no longer supervises any housing areas or living quarters of women prisoners, and are not assigned to any direct supervision areas.

246. Sexually degrading language from both male and female staff, however, remains a significant problem in Michigan's women's prisons. The lack of remedies and the threat of retaliation for reporting such conduct continue as well. While the elimination of direct cross-gender supervision has increased the safety and privacy of women prisoners, the installation of cameras in all areas of the housing units, and the lack of oversight of the viewing of the images, creates significant privacy concerns. In addition, the routine invasive strip-search procedures has degraded the women's bodily integrity and infringed on their privacy rights.
247. Inadequate mental health facilities and overcrowding are other causes for concern. These factors, combined with the prisoners' lengthy pre-existing trauma, have a direct correlation to the rising number of suicide attempts and the high number of successful suicides in the last year. The prior trauma of women, many of whom now suffer from post-traumatic stress disorder, combined with poor prison conditions and the lack of adequate counseling and psychological services has had a significant impact on the ongoing diminished psychological state of women in Michigan's prisons.

**vi. Washington, District of Columbia (D.C.)**

248. Washington, D.C. had a well-documented problem of sexual abuse of women in custodial settings. In 1993, counsel for a class of women prisoners incarcerated in the District of Columbia correctional system filed suit challenging a pattern of sexual abuse; poor obstetrical and gynecological care, including the shackling of pregnant women during medical visits, labor, and delivery; unequal educational, vocational, and work opportunities; and poor sanitation and living conditions. The Plaintiffs filed suit for declaratory and injunctive relief raising both federal claims—under 42 U.S.C. § 1983 and the Fifth and Eighth Amendments—and claims based on D.C. laws. The United States District Court for the District of Columbia found in favor of the women prisoners on each of the claims.<sup>567</sup>
249. In reaching its decision, the court found that there had been “many incidents of sexual misconduct between prison employees and female prisoners in all three of the women’s facilities.”<sup>568</sup> That conduct involved “forceful sexual activity, unsolicited sexual touching, exposure of body parts or genitals and sexual comments.”<sup>569</sup> The court found that the evidence presented by the plaintiffs met the Eighth Amendment requirement of wanton and unnecessary infliction of pain and “revealed a level of sexual harassment which is so malicious that it violates contemporary standards of decency.”<sup>570</sup> In particular, the court found that “physical assaults endured by women prisoners at [various D.C. prisons] unquestionably violate the Eighth Amendment. Rape, coerced sodomy, unsolicited touching of women prisoners' vaginas, breasts and buttocks by prison employees are ‘simply not part of the penalty that criminal offenders pay for their offenses against society.’”<sup>571</sup> The court also found that shackling women during their third trimester and during labor and delivery violated the Eighth Amendment,<sup>572</sup> and that women’s lack of access to educational, vocational, and work opportunities violated Title IX and Equal Protection under the Fifth Amendment.<sup>573</sup>
250. D.C. appealed the District Court’s ruling on limited grounds, including those related to providing equal access to work opportunities for women inmates and proscriptions against that staff retaliation for

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*Agreement Near in Livingston County Jail Lawsuit* (Feb. 10, 2004), available at <http://www.aclumich.org/issues/criminal-justice/2004-02/1050>.

<sup>567</sup> See *Women Prisoners of Dist. of Columbia Dep't of Corr. v. Dist. of Columbia*, 877 F. Supp. 634, 679-90 (D.D.C 1994) [hereinafter *Women Prisoners I*] (ordering declaratory and injunctive relief in favor of the plaintiffs).

<sup>568</sup> *Id.* at 640.

<sup>569</sup> *Id.*

<sup>570</sup> *Id.*

<sup>571</sup> *Id.* at 665 (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

<sup>572</sup> *Id.* at 668.

<sup>573</sup> *Id.* at 676.

female inmates who complained of sexual harassment.<sup>574</sup> Though it left intact the major provisions of the District Court's order, the Court of Appeals ruled that male prisoners and female prisoners in D.C. were not similarly situated for equal protection or Title IX analysis because of women's smaller numbers, lower security status, and shorter sentences.<sup>575</sup> Because the court found they were not similarly situated, it overturned portions of the lower court's order that required D.C. to increase and improve work, recreational, and religious programs available to female inmates; to provide greater access to law library hours and group events; and to provide transportation to job interviews.<sup>576</sup> Additionally, D.C. raised concerns about the validity of the remedy ordered by the District Court in light of the passage of the PLRA. The D.C. Court of Appeals vacated portions of the order and remanded the case to the District Court where the parties agreed on an order that remained in place until September 9, 2004.<sup>577</sup> Most recently, in 2007 the D.C. DOC revised its policy related to sexual abuse of inmates to address both staff sexual abuse of inmates and inmate-on-inmate sexual abuse.<sup>578</sup>

251. While there is no comparative preexisting data, according to the 2010 data collections done by the BJS, 6% of inmates report being sexually abused by staff or other inmates in the past twelve months, or since their admission into the facility.<sup>579</sup> This is almost double the national average.<sup>580</sup>

**a) Sexual harassment of female correctional employees**

252. A month after the filing of the *Women Prisoners* litigation in 1994, six female staff and one male staff member of the DOC filed suit against D.C. alleging behavior that was remarkably similar to the conduct alleged by women inmates.<sup>581</sup> The staff members alleged a pattern and practice of sexual abuse of female staff by their male counterparts and supervisors. In the liability phase of *Neal v. District of Columbia*, a jury found that "plaintiffs had established, by a preponderance of the evidence, that defendants had engaged in a pattern and practice of quid pro quo sexual harassment, hostile environment sexual harassment, and retaliation in violation of Title VII and 42 U.S.C. § 1983."<sup>582</sup> In a series of four orders, the D.C. District Court ordered declaratory and injunctive relief to the class of female employees of D.C. That relief included training for staff, a special inspector to monitor compliance with the order and to resolve complaints of harassment, and money damages to class members.<sup>583</sup> Each of the six named plaintiffs received awards: two received awards of \$500,000, another received an award of \$200,000, and three others received awards of \$75,000.<sup>584</sup> Though the court rendered its decisions in 1995, appeals by D.C. and by plaintiffs meant that the parties did not settle on relief until 1999<sup>585</sup> and that the Office of the Special Inspector established by the settlement did not begin its work until 2002. Most recently in 2004, the D.C. DOC published and disseminated a revised policy outlining its program to address employee sexual harassment in the DOC.<sup>586</sup>

<sup>574</sup> *Women Prisoners v. Dist. of Columbia*, 93 F.3d 910, 913 (D.C. Cir. 1996).

<sup>575</sup> *Id.* at 925-27.

<sup>576</sup> *Id.* at 927. *But see id.* at 951-57 (Rogers, J., dissenting) (rejecting the majority's Title IX analysis of "similarly situated").

<sup>577</sup> *Women Prisoners of the Dist. of Columbia Dep't of Corr. v. Dist. of Columbia*, 968 F. Supp. 744 (D.D.C. 1997).

<sup>578</sup> See DIST. OF COLUMBIA DEP'T OF CORR., ELIMINATION OF SEXUAL ABUSE, ASSAULT AND MISCONDUCT (2007), available at [http://doc.dc.gov/doc/frames.asp?doc=/doc/lib/doc/program\\_statements/3000/PS\\_3350.2E\\_PRISON\\_RAPE\\_ELIMINATION\\_2-21-07.pdf](http://doc.dc.gov/doc/frames.asp?doc=/doc/lib/doc/program_statements/3000/PS_3350.2E_PRISON_RAPE_ELIMINATION_2-21-07.pdf).

<sup>579</sup> See ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008-09, at 59 (Aug. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>.

<sup>580</sup> *Id.* at 5 (An estimated 4.4% of prison inmates and 3.1% of jail inmates nationwide reported experiencing one or more incidents of sexual victimization by another inmate or facility staff in the past 12 months or since admission to the facility.).

<sup>581</sup> *Neal v. Dir., Dist. of Columbia Dep't of Corr.*, Civ. A. 93-2420, 1995 WL 517248 (D.D.C. Aug. 9, 1995).

<sup>582</sup> *Id.* at \*9.

<sup>583</sup> *Id.* at \*10-11.

<sup>584</sup> *Id.* at \*11.

<sup>585</sup> Cynthia Deitch, *Sexual Harassment and the Neal Consent Decree at the DC Department of Corrections*, Presentation to the IWPR/ WAGE Consent Decree Project Expert Panel (Washington D.C.: George Washington Univ. July 20, 2010), available at [http://www.iwpr.org/Employment/Research\\_employment.htm](http://www.iwpr.org/Employment/Research_employment.htm).

<sup>586</sup> See DIST. OF COLUMBIA DEP'T OF CORR., SEXUAL HARASSMENT AGAINST EMPLOYEES (2004), available at [http://doc.dc.gov/doc/frames.asp?doc=/doc/lib/doc/program\\_statements/3000/PS\\_3310-4G\\_Sexual\\_Harassment\\_Against\\_Employees\\_6-21-04AR.pdf](http://doc.dc.gov/doc/frames.asp?doc=/doc/lib/doc/program_statements/3000/PS_3310-4G_Sexual_Harassment_Against_Employees_6-21-04AR.pdf).

**b) Current situation and challenges for female inmates in D.C.**

253. Taken together, the litigation by women inmates and women staff of the D.C. DOC paints a picture of a jurisdiction where sexual harassment, abuse, and victimization of women was deeply ingrained in the culture of the agency. The combination of vigorous litigation by staff and inmates, training of staff and inmates, and continued monitoring has made a difference. Interviews with inmates, former prisoners, staff, and advocates in the District reveal that while sexual abuse of female inmates still exists,<sup>587</sup> it has been significantly reduced. Additionally, the quality of medical care for inmates has been greatly improved by the District's retention of a non-profit health care provider to provide services for inmates.<sup>588</sup> However, these gains, especially those related to addressing sexual harassment and abuse in the D.C. DOC may be diminished or lost altogether by the lack of resources currently devoted to these efforts.<sup>589</sup>

254. There continue to be issues related to educational and vocational opportunities for women inmates in D.C. correctional facilities. Inmates and advocates report that women receive few educational, vocational, and recreational services. Additionally, because of D.C.'s unique status, individuals who commit offenses requiring a term of incarceration longer than a year serve their sentences in FBP facilities.<sup>590</sup> While this provision has a serious impact on all inmates, the impact is especially harsh for women inmates who are incarcerated farther from D.C. because of the limited number of federal facilities for women. The distance has an adverse impact on reentry efforts and maintaining contact with children.

**vii. Federal Bureau of Prisons**

**a) Background**

255. Sexual abuse of women in the FBP has been a longstanding problem. As of November 24, 2010, 201,410 individuals are in the custody of the Federal Bureau of Prisons;<sup>591</sup> 13,722 are women.<sup>592</sup> Since 1998, there have been at least four reports by federal agencies addressing concerns related to staff sexual abuse in federal prisons. Taken together, these reports paint a picture of some success, but continued struggle, in responding humanely and effectively to the sexual abuse of women in federal custody.

**b) The FBP report**

256. The first report, *Sexual Abuse/Assault Prevention and Intervention*, was issued by the FBP in 1998<sup>593</sup> in the wake of the well-publicized sexual abuse of six female inmates at the Dublin Federal Correctional Institution in 1996.<sup>594</sup> In that case, six female inmates were placed in the cells of male inmates and sold by correctional officers.<sup>595</sup> In the wake of that event, the FBP examined its policies and procedures and

<sup>587</sup> See, e.g., *Daskalea v. Dist. of Columbia*, 227 F.3d 433 (D.C. Cir. 2000) (District of Columbia inmate sued the District because staff members forced her to perform a strip tease in front of male staff and inmates); *R.W. v. United States*, 958 A.2d 269 (D.C. 2008) (Correctional Treatment Facility employee convicted of sexual abuse of transgendered female inmate); BJS, *SEXUAL VICTIMIZATION*, *supra* note 579, at 23,

<sup>588</sup> Telephone Interview with Deborah Golden, D.C. Prisoners' Project, Wash. Lawyers' Comm. for Civil Rights in D.C. (Nov. 22, 2010); Telephone Interview with Ashley McSwain, Exec. Dir., Our Place DC, in D.C. (Nov. 22, 2010); Telephone Interview with Carolyn Lerner, Former Special Inspector for Sexual Harassment Complaints, Dist. of Columbia Dep't of Corr., in D.C. (Nov. 22, 2010).

<sup>589</sup> *Id.*

<sup>590</sup> See National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 11 Stat. 712 (1995).

<sup>591</sup> U.S. Dep't of Justice Fed. Bureau of Prisons, *Weekly Population Report* (Nov. 23, 2010) available at [http://www.bop.gov/news/weekly\\_report.jsp](http://www.bop.gov/news/weekly_report.jsp).

<sup>592</sup> U.S. Dep't of Justice, Fed. Bureau of Prisons, *Quick Facts About the Bureau of Prisons* (Dec. 1, 2010), available at <http://www.bop.gov/news/quick.jsp#2>.

<sup>593</sup> U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, *SEXUAL ABUSE/ASSAULT PREVENTION AND INTERVENTION: A SYSTEM RESPONSE AND AGENCY PLAN* (1998) [hereinafter *SEXUAL ABUSE/ASSAULT PREVENTION AND INTERVENTION*].

<sup>594</sup> See *Lucas v. White*, 63 F. Supp. 2d 1046 (N.D. Cal. 1999); see also SRVAW 1999 U.S. Report, *supra* note 1, at 4 (reporting that two months after "V" was incarcerated in Dublin penitentiary she was placed in administrative segregation for pushing a unit manager. Soon after she and five other women in administrative segregation were placed in the men's wing of the prison. The women's cell doors were kept open and the male prisoners came in and raped the women. "V" alleges that the officers were paid \$50 by the offending male prisoners).

<sup>595</sup> *Id.*

pledged to take action. In characterizing the problem, the FBP stated that “sexual abuse of inmates continues to be an issue for the Bureau of Prisons—there are many allegations and far too many are being sustained.”<sup>596</sup>

257. The Special Rapporteur visited federal facilities in Danbury, Connecticut and Dublin, California, both of which had been the site of major incidents of sexual abuse of women in custody.<sup>597</sup> One involved the aforementioned sale of women inmates as sex slaves to male inmates by male staff. The second involved a female inmate who complied with demands for sex from a correctional officer who threatened to limit her visitation with her daughter.<sup>598</sup> These and other cases generated the FBP’s plan to address sexual abuse of women in custody.<sup>599</sup> However, in the ten years since the Special Rapporteur’s visit the FBP has continued to experience serious problems in addressing the abuse of women in custody and by all accounts has faltered in its response to the sexual abuse of women in custody.

**c) The Government Accountability report**

258. In 1999, the Government Accountability Office (GAO), at the request of D.C. Congresswoman Eleanor Holmes Norton, issued another report on sexual misconduct in three jurisdictions: California, Texas, and the FBP. The report found that staff sexual misconduct occurred in the FBP but that the full extent of the problem was unknown because of poor reporting by inmate victims.<sup>600</sup> The report also noted that neither the FBP nor the other jurisdictions had “readily available, comprehensive data on the number, nature, and outcome of sexual misconduct allegations.”<sup>601</sup> The report found that FBP provided data on the most serious allegations such as sexual assault and sexual contact, but did not keep information on other forms of sexual misconduct such as verbal harassment and inappropriate viewing.<sup>602</sup> Additionally, the FBP sustained only 9% of allegations of staff-on-inmate sexual misconduct, the lowest percentage of the three jurisdictions.<sup>603</sup> California and Texas sustained 19% and 31% of their allegations, respectively. Of the twenty-two allegations that the FBP sustained during the time period for the report, 1995-1998, fourteen resulted in prosecutions with convictions. As discussed *infra*, this number is deceptive because most often the offense was viewed as a misdemeanor and staff were rarely imprisoned for their offenses.<sup>604</sup> Additionally, the GAO report indicated that the FBP had a pattern of permitting staff to resign without noting any adverse personnel action in their files.<sup>605</sup> While the FBP had a database that assured they would not rehire these staff, that database was not available to the public at large, and those former employees were free to seek employment in other agencies without notice of their conduct.<sup>606</sup> During the time period the report covered, the FBP had been involved in fourteen civil lawsuits—four were closed or dismissed, three settled, and seven were pending.<sup>607</sup> In the Dublin case the FBP agreed to pay three women \$500,000 to settle the case.<sup>608</sup>

**d) Office of the Inspector General Report I**

259. Six years later in 2005, the Office of the Inspector General (OIG) of the DOJ filed its first report on sexual abuse of federal inmates, *Deterring Sexual Abuse of Federal Inmates*.<sup>609</sup> OIG is the agency charged with

<sup>596</sup> SEXUAL ABUSE/ASSAULT PREVENTION AND INTERVENTION, *supra* note 593, at 2.

<sup>597</sup> See Lucas, 63 F. Supp. 2d at 4 (awarding attorney fees to plaintiff inmates in their suit against the Federal Bureau of Prisons); Peddle v. Sawyer, 64 F. Supp. 2d 10 (D. Conn. 1999) (holding that the plaintiff inmate’s action against the FBP was not subject to the exhaustion requirement of the Prison Litigation Reform Act and that her complaint stated a claim for violation of the Violence Against Women Act).

<sup>598</sup> See SRVAW 1999 U.S. Report, *supra* note 1, ¶¶ 13, 58.

<sup>599</sup> See generally SEXUAL ABUSE/ ASSAULT PREVENTION AND INTERVENTION, *supra* note 593, at 16.

<sup>600</sup> See GAO, WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF 7 (1999) [hereinafter SEXUAL MISCONDUCT BY CORRECTIONAL STAFF].

<sup>601</sup> See *id.* at 8.

<sup>602</sup> *Id.*

<sup>603</sup> *Id.*

<sup>604</sup> *Id.*

<sup>605</sup> *Id.*

<sup>606</sup> *Id.*

<sup>607</sup> *Id.* at 12.

<sup>608</sup> *Id.*

<sup>609</sup> OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES (2005) [hereinafter DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES].

investigating criminal matters, including sexual abuse of inmates, in federal facilities. In its report, OIG noted that it had “investigated hundreds of allegations of sexual abuse of inmates by FBP staff” and that FBP sex abuse cases comprise 12% of its annual caseload.<sup>610</sup> OIG reported that from 2000 to 2004 it had opened 351 sexual abuse investigations against FBP employees and had another 185 investigations during that time that resulted in criminal or administrative outcomes.<sup>611</sup>

260. In its 2005 report, OIG noted that federal law was deficient in two ways: (1) sexual abuse of an inmate without the use of force or overt threats was a misdemeanor punishable by a maximum penalty of a year<sup>612</sup> and (2) the law did not cover individuals employed at contract facilities.<sup>613</sup> For example, OIG investigated an FBP psychiatrist who had sexual relationships with several of his female mental health clients. While the psychiatrist was convicted of seven counts of sexual abuse of a ward, he was only sentenced to one year of incarceration.<sup>614</sup> Equally compelling, OIG noted that of 163 cases it had presented for prosecution in 2000-2004, only seventy-three, or 45%, were accepted for prosecution. Sixty-five of the cases resulted in conviction; of those forty-eight, or 73%, received a sentence of probation; ten, or 15%, received a sentence of less than one year; and only five, or 8%, served a sentence of greater than one year.<sup>615</sup> Equally troubling was the continued trend of permitting staff to resign or retire during investigation. Of the 120 administrative outcomes, ninety-one, or 75%, resulted in the retirement or resignation of the staff member without adverse consequences.<sup>616</sup> OIG noted that those who were terminated often obtained employment in other correctional settings and continued to abuse inmates in their new job.<sup>617</sup> OIG recommended that the DOJ seek legislation to address the issues identified in its report.
261. As a result of the report, federal law was amended. Federal law now extends criminal liability to staff of federal prisons or “any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General.”<sup>618</sup> Congress also amended the federal criminal law on staff sexual misconduct in 2006 to increase the penalty for sexual misconduct with individuals under federal custody from a misdemeanor penalty of one year to a five-year felony.<sup>619</sup> The federal penalties for staff sexual misconduct were increased again to fifteen years, with the passage of the Adam Walsh Act in 2006.<sup>620</sup>
262. Yet another set of tragic circumstances brought the issue of sexual violence in custody to the fore again in the FBP. On June 21, 2006, two weeks after having attended training specifically for OIG investigators on investigating sexual abuse in federal facilities,<sup>621</sup> William “Buddy” Sentner III, an OIG Investigator, was shot and killed by a correctional officer whom he had attempted to serve with a warrant. The warrant was for the arrest of five officers for sexual abuse of inmates.<sup>622</sup> This incident shocked the nation and was a potent reminder that sexual abuse of inmates is not a “no harm, no foul” situation, but has serious security consequences. It also highlighted a little known practice in FBP that allows officers to bring personal weapons to work. The practice is dangerous for staff and especially for inmates.

<sup>610</sup> *Id.* at 3.

<sup>611</sup> *Id.*

<sup>612</sup> *Id.*

<sup>613</sup> *Id.* (This was huge failure particularly because the FBP had begun to increasingly contract out custody of inmates in order to accommodate the 33% increase in FBP prisoners between 1999 and 2004).

<sup>614</sup> *Id.* at 5, 11-14 (Noting, however, many of these cases go unprosecuted. FBP teachers, psychologists, officers, maintenance workers, and case managers have all confessed to sexually abusing inmates and did not face prosecution).

<sup>615</sup> *Id.* at 10.

<sup>616</sup> *Id.* at 11.

<sup>617</sup> *Id.*

<sup>618</sup> 18 U.S.C. § 2243; see OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE DEPARTMENT OF JUSTICE’S EFFORTS TO PREVENT STAFF SEXUAL ABUSE OF FEDERAL INMATES iii (2009) [hereinafter EFFORTS TO PREVENT STAFF SEXUAL ABUSE OF FEDERAL INMATES].

<sup>619</sup> *Id.*

<sup>620</sup> Kevin Johnson, *In Light of Florida Shootout, Officers may be Screened*, USA TODAY (2006), available at [http://www.usatoday.com/news/nation/2006-06-22-prison-screening\\_x.htm](http://www.usatoday.com/news/nation/2006-06-22-prison-screening_x.htm).

<sup>621</sup> See generally NAT’L INST. OF CORR./PROJECT ON ADDRESSING PRISON RAPE, INVESTIGATING ALLEGATIONS OF STAFF SEXUAL MISCONDUCT WITH OFFENDERS: TRAINING FOR THE OFFICE OF THE INSPECTOR GENERAL (2006) (on file with Project on Addressing Prison Rape at American University Washington College of Law).

<sup>622</sup> See Johnson, *supra* note 620.

**e)      *OIG Report II***

263. The fourth report on the FBP, *The Department of Justice's Effort to Prevent Sexual Abuse of Federal Inmates*, was released a year ago.<sup>623</sup> The report's issuance is fortuitous as it closely corresponds to Special Rapporteur's visit to the United States and critically reflects the DOJ's efforts to address sexual abuse of federal inmates from 2001 to 2008. In assessing the DOJ's sexual abuse prevention program since 1991, OIG found that DOJ's progress was mixed.<sup>624</sup> Some successes include improved data collection and analysis; enhanced penalties for sexual abuse of wards and expanded application of criminal provisions to private facilities that contract with the federal government; and continued investigation, prosecution, and discipline of federal staff who have abused inmates.<sup>625</sup>
264. However, the report also found significant deficits. First, the FBP needed to make substantial improvements in its efforts to protect inmates from staff sexual abuse. It noted that the FBP's training for staff was outdated and did not reflect the significant changes in penalties for sexual abuse of a ward.<sup>626</sup> The training material also failed to address the significant challenges raised by cross-gender supervision—for both male and female staff.<sup>627</sup> The FBP's materials for inmate education on sexual abuse were old and suggested that inmates could be punished if they reported abuse by staff.<sup>628</sup> Shockingly, the United States Marshall Service (USMS) also had no sexual abuse prevention program.<sup>629</sup> The report found that USMS had not even articulated a "zero tolerance" standard for staff sexual abuse in its cellblocks and transport programs.<sup>630</sup> Moreover, USMS had no training program for personnel on how to respond to reports of sexual abuse or their obligations to refrain from the conduct themselves.<sup>631</sup> Likewise, USMS provided no information to inmates on how to report abuse.<sup>632</sup>
265. The OIG report found that between 2001 and 2008, "allegations of criminal sexual abuse and non-criminal sexual misconduct more than doubled."<sup>633</sup> This growth in allegations exceeded the growth in the prisoner and staff populations.<sup>634</sup> The sexual abuse allegations came from ninety-two of the ninety-three FBP prison sites, and involved staff in fifteen or sixteen occupational categories.<sup>635</sup> The positions with the greatest inmate contact—food services, recreation, education, and vocational training—were also the ones with the highest number of allegations.<sup>636</sup>
266. One of the more troubling findings of the report was that the FBP routinely placed sexual abuse victims in special housing units or local jails and then transferred them to other facilities. The OIG report noted that "segregation and transfer can have negative effects on the victims and can reduce their willingness to report abuse and cooperate in investigations."<sup>637</sup>
267. Another important finding of the report that is relevant to the Special Rapporteur's mandate addresses the involvement of female staff in sexual abuse of persons in custody. The disproportionate involvement of female staff in sexual abuse of male inmates and juveniles is well documented in BJS reports<sup>638</sup> and in

<sup>623</sup> EFFORTS TO PREVENT STAFF SEXUAL ABUSE OF FEDERAL INMATES, *supra* note 618.

<sup>624</sup> *Id.* at iii.

<sup>625</sup> *Id.*

<sup>626</sup> *Id.* at v.

<sup>627</sup> *Id.*

<sup>628</sup> *Id.*

<sup>629</sup> *Id.* at vi.

<sup>630</sup> *Id.*

<sup>631</sup> *Id.*

<sup>632</sup> *Id.*

<sup>633</sup> *Id.* at iv.

<sup>634</sup> *Id.*

<sup>635</sup> *Id.*

<sup>636</sup> *Id.*

<sup>637</sup> *Id.*

<sup>638</sup> See BJS, SEXUAL VICTIMIZATION, *supra* note 579, at 24 (Among the 39,121 male prison inmates who had been victims of staff sexual misconduct, 69% reported sexual activity with female staff; an additional 16% reported sexual activity with both female and male staff. In comparison, among the 2,123 female prison inmates who had been victimized, 72% reported that the staff perpetrator was male; an

both the 2005 and 2009 OIG reports.<sup>639</sup> The OIG found that while female staff made up only 27% of the workforce, they had accounted for between 30% and 39% of allegations of staff sexual abuse from 2001 to 2008.<sup>640</sup> Both the BJS and OIG reports have noted that this is a significant and unexpected finding. There may be complicated reasons for female staff members' involvement in sexual abuse, including their own sexual harassment by coworkers.<sup>641</sup> Nonetheless, these interactions are illegal and have led to serious harm and even death, both in FBP and state facilities.<sup>642</sup> Such incidents must be addressed in any comprehensive response to staff sexual abuse in federal facilities.

268. The OIG made twenty-one recommendations in its report but highlighted three in its executive summary: (1) substantial improvements in the functioning of the FBP with regard to sexual abuse prevention and response, including considering alternatives to segregation and transfer of complainants, updated training for staff and inmates and better oversight of individual institutions' response to sexual abuse in custody; (2) USMS implementation of a program to prevent, detect, investigate and address sexual abuse of those prisoners under its authority; and (3) training for federal prosecutors on staff sexual abuse cases by the Executive Office of the United States Attorneys.<sup>643</sup>

*f) Continued challenges and conclusion*

269. As described above in a series of reports spanning fifteen years, there continues to be a serious problem of sexual abuse in federal correctional facilities. These problems are persistent and intractable and will only change with strong and purposeful action. For at least the past fifteen years, cross-sex supervision of female inmates in the custody of the FBP has been a problem.<sup>644</sup> Despite the reports described above, litigation,<sup>645</sup> and standards proposed by the NPREC,<sup>646</sup> the FBP has resisted this fundamental change that could significantly reduce the sexual victimization of women in custody<sup>647</sup> and potentially lessen the abuse of male inmates by female staff.<sup>648</sup> This fundamental change recommended in the NPREC standards is consistent with the UN Standard Minimum Rules for the Treatment of Prisoners.<sup>649</sup>

270. More fundamentally, the federal government has held itself as above the problems that states face in addressing the abuse of women in custody. Experience has shown it is not. Therefore, the federal government should be held accountable in the same way as the states. However, the combination of the Federal Tort Claims Act, the PLRA, and the retrenchment on *Bivens* actions has left the FBP and the USMS virtually unaccountable to the public.<sup>650</sup> These laws limit the actions that inmates can bring and the recovery they may receive, and thus create a culture where cases are often settled and there is little public knowledge of the agency's failures or the recovery granted to harmed inmates.<sup>651</sup>

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additional 19% reported both male and female staff. Similar patterns of staff sexual misconduct were reported by jail inmates. Nearly two-thirds of the male jail inmates who had been victimized said the staff perpetrator was female (64%); BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-09, at 13-14 (2010) (Approximately 95% of all youth reporting staff sexual misconduct said they had been victimized by female facility staff).

<sup>639</sup> See DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES, *supra* note 616; EFFORTS TO PREVENT STAFF SEXUAL ABUSE OF FEDERAL INMATES, *supra* note 618.

<sup>640</sup> See EFFORTS TO PREVENT STAFF SEXUAL ABUSE OF FEDERAL INMATES, *supra* note 618, at iv.

<sup>641</sup> See Brenda V. Smith, *Looking for Love in All the Wrong Place: Female Correctional Staff and Their Intimate Relations with Men and Boys in Custody* 4 (working paper on file with authors).

<sup>642</sup> See Johnson, *supra* note 620.

<sup>643</sup> See EFFORTS TO PREVENT STAFF SEXUAL ABUSE OF FEDERAL INMATES, *supra* note 618, at viii.

<sup>644</sup> See *Peddle*, 64 F. Supp. 2d 10 (D. Conn. 1999); *Colman v. Vasquez*, No. CV 08-3130-DDP (RNB), 2008 WL 2374235 (C.D. Cal. June 5, 2008); see also *Heckenlaible v. Va. Peninsula Reg'l Jail Auth.*, 491 F. Supp. 2d 544 (E.D.Va. 2007).

<sup>645</sup> See *id.*

<sup>646</sup> See NPREC Report, *supra* note 29, at 62-64; NPREC, STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS 11-13 (2009).

<sup>647</sup> See Radhika Coomaraswamy, *Women in Detention in the United States: Preliminary Report for the United Nations Special Rapporteur on Violence Against Women* 70-72 (1994) [hereinafter *Preliminary Report for the UN Special Rapporteur on Violence Against Women*].

<sup>648</sup> See *Elimination of Prison, The Corrections Perspective: Hearing Before the National Prison Rape Elimination Comm'n*, (2006) (response by Harley Lapin, Dir. of the Fed. Bureau of Prisons), available at

[http://www.cybercemetery.unt.edu/archive/nprec/20090820160453/http://nprec.us/docs/miami\\_correctionsmgmt\\_lappin.pdf](http://www.cybercemetery.unt.edu/archive/nprec/20090820160453/http://nprec.us/docs/miami_correctionsmgmt_lappin.pdf).

<sup>649</sup> See *Preliminary Report for the UN Special Rapporteur on Violence Against Women*, *supra* note 647, at 14.

<sup>650</sup> *Id.* at 5-10.

<sup>651</sup> See *infra* ¶¶ 272-88.

271. Thus, the Special Rapporteur's inquiry into the practices of the federal government is particularly timely and necessary.

**viii. Representative sexual abuse cases against the Federal Bureau of Prisons**

**a) *Peddle v. Sawyer, 64 F. Supp. 2d 10 (D. Conn. 1999)***

272. Plaintiff Sharon Peddle was an inmate at the Federal Correctional Institution (FCI) in Danbury, Connecticut. Ms. Peddle filed suit against the FBP and several prison officials claiming that these officials failed to protect her and therefore violated her Eighth Amendment rights, as well as her rights under the Violence Against Women Act (VAWA), by continuing to employ a correctional officer whom they knew or should have known had a history of sexual misconduct.

273. Ms. Peddle was sexually harassed and abused by Correctional Officer Opher Cephas for over a year. Cephas had been investigated by FCI Special Investigative Services, the Office of Internal Affairs, and the OIG for sexual misconduct in the past, and prison officials were aware of the investigations. However, Cephas remained assigned to posts where he had contact with female inmates. Cephas singled out Ms. Peddle and used knowledge about her personal life to coerce her into having oral and vaginal sex with him. Inmates witnessed sexual contact between Cephas and Ms. Peddle. Other prison employees set up meetings so that Cephas could be alone with Ms. Peddle.

274. There were several attempts to investigate Cephas' abuse of Ms. Peddle, along with threats of retaliation by both Cephas and his colleagues if Ms. Peddle reported the abuse and a failed sting operation to catch Cephas in the act. Ms. Peddle finally cooperated with Special Investigative Services officers. As a result, Cephas was arrested by FBI officers and pled guilty to six counts of sexually abusing a prison inmate.

275. The defendants moved to dismiss the resulting lawsuit, claiming that Ms. Peddle failed to exhaust her administrative remedies as required by the PLRA for suits involving prison conditions. The court rejected this argument, however, holding that intentional sexual assault is not a claim concerning prison conditions; rather it is a violation of the Eighth Amendment right to be free from cruel and unusual punishment. The court also held that Ms. Peddle had a claim under the VAWA supervisory liability theory based on her allegations that the prison officials were grossly negligent in assigning Cephas to posts where he had prolonged and unsupervised contact with female inmates.

276. The FBP settled the case.

**b) *Foley-Clark v. United States, No. C- 00-4056 (N.D. Cal. 2002)***

277. Plaintiff, Ms. Foley-Clark, was an inmate at FCI Dublin. She filed suit against the FBP after she participated in a sting operation in order to obtain evidence against Correctional Officer Hyson.

278. Officer Hyson had been sexually assaulting Ms. Foley-Clark while she was in FBP custody. At the suggestion of other correctional officials, Ms. Foley-Clark served as "bait" in the sting operation. She was wired to intercept conversations from Officer Hyson and told to encourage his behavior. The OIG informed the FBP that Foley-Clark would participate in the sting. During their encounter, Hyson exposed his genitals and touched Ms. Foley-Clark's breasts before the OIG officer emerged from hiding. Hyson was ultimately convicted for sexually assaulting Ms. Foley-Clark.

279. After Hyson's arrest, Ms. Foley-Clark was placed in administrative segregation. She was given the option of remaining in administrative segregation or being moved to a more restrictive setting. Ms. Foley-Clark chose to remain in general population, where she was harassed and threatened by other officers and inmates.

280. Upon her release, the OIG attempted to give Ms. Foley-Clark reward money, which she characterized as “hush money.” Ms. Foley-Clark proceeded with her suit against the FBP and OIG, claiming *Bivens* violations for negligent hiring, training, retaining, and supervision of FBP employees, as well as assault and battery, false imprisonment and intentional infliction of emotional distress. The government’s motion to dismiss the *Bivens* claims was granted, but the assault and battery, false imprisonment, and intentional infliction of emotional distress claims were allowed to proceed to trial. The government argued that Ms. Foley-Clark’s consent to participate in the sting was voluntary.

281. The case eventually settled on the eve of the trial.

**c) *Cane v. Lappin, No. 3:04-CV-00912, 2004 WL 3043170 (D. Conn. Sept. 3, 2004)***

282. Plaintiff Lisah Cane was an inmate at the FCI in Danbury, Connecticut. She filed a complaint against several current and former prison officials, including the director of the FBP, alleging that she was sexually assaulted and repeatedly threatened with sexual assault by Correctional Officer Mark Johnson. Johnson forcibly raped Ms. Cane and threatened harm if she reported the assault. Ms. Cane was hesitant to report the abuse for fear of being expelled from the Residential Drug Abuse Program (RDAP), as the successful completion of which would have earned her a one-year sentence reduction. Soon after she reported the rape, Ms. Cane was removed from RDAP. Ms. Cane alleged that she was discharged from the program in retaliation for reporting the abuse.

283. Ms. Cane filed a *Bivens* action, claiming violations of her First and Eighth Amendment rights, on the grounds that the prison officials failed to protect her, used excessive force, and retaliated against her for reporting the assault. Ms. Cane also claimed violations of the Federal Tort Claims Act for negligent failure to protect, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, and assault and battery under the theory that Johnson was a “law enforcement officer” for purposes of the Federal Tort Claims Act.

284. Although Ms. Cane’s *Bivens* claims against the OIG were dismissed for lack of personal involvement, the Federal Tort Claims Act claims remained once she was given the opportunity to amend her complaint. The FBP settled the case for \$215,500, without contribution from OIG.

**d) *Sanchez-Luna v. United States (Dec. 2004)***

285. Plaintiff, Ms. Sanchez-Luna, was an inmate at FCI Danbury. She filed suit against the FBP after she was sexually abused by Correctional Officer Vazquez while in FBP custody.

286. As a result of Ms. Sanchez-Luna’s report of the sexual assault by Vazquez, the OIG conducted a sting operation to catch Vazquez. OIG agents positioned themselves in a closet with a video camera and witnessed Officer Vazquez force Ms. Sanchez-Luna to perform oral sex on him. The OIG agents did not make an effort to stop the oral sex, but eventually arrested Vazquez. Vazquez pled guilty to sexually assaulting Ms. Sanchez-Luna.

287. Ms. Sanchez-Luna claimed Eighth and Fifth Amendment violations, as well as violations of the Federal Tort Claims act, under theories of assault and battery, negligent failure to prevent assault and battery, negligent infliction of emotional distress, and intentional infliction of emotional distress.

288. The FBP settled the case.

**B. Summary of prison regulations affecting prisoner-media communication<sup>652</sup>**

289. Limits on communication from prison have had a broad and deep impact on the ability of people in prison to protest human rights violations and receive redress. The limits on visitation, mail, phone calls, recording equipment, and in some cases outright media bans, severely restrict the flow of information out of prison. This, combined with the extreme difficulty in litigating abuses in prison, leaves prison officials free to control the discussion about prison conditions and to act largely with impunity. Communications restrictions have been consistently upheld by United States courts as necessary for public safety.

**i. Visitation**

**a) Limits on regular visitation**

290. All of the prison regulations surveyed distinguish between general prisoner visitation and media access, by providing an exclusive definition of who may visit, specific media visitation regulations, or both. Regular, repeated visitation of people in prison is generally limited to an approved list of family, friends, and associates who have a relationship established prior to confinement. There are also some classifications of visitors who need not have an established prior relationship, such as clergy or spiritual advisors and attorneys (to whom special regulations usually apply).<sup>653</sup> Consequently, members of the media, who usually have no prior relationship to prisoners, are by definition excluded from this type of contact.

**b) Media-specific visitation regulations**

291. Most of the prison regulations surveyed provide a definition of “media,” to whom special visitation and interview regulations apply.<sup>654</sup> Under federal regulations, and in Louisiana, Nevada, Ohio, Washington, and Massachusetts, members of the “media” or “news media” are relatively strictly defined to include only those persons whose “principal employment” is to gather or report news for newspapers of general circulation, news magazines with a national circulation, national or international news services, or FCC-licensed radio or television programs.<sup>655</sup> Some of these states provide a separate definition for media that do not fit into this more conventional category, and other states extend the definition of “media” to include other persons such as free-lance reporters, documentary filmmakers, and non-fiction authors.<sup>656</sup> Media representatives not fitting the most restrictive definition of “news media” are often required to provide administrators with extra information about their employment and project in order to gain visitation or interview access.<sup>657</sup>

<sup>652</sup> This summary is based on the Program Statements of the Federal Bureau of Prisons and the administrative policies and regulations of the District of Columbia and eleven states: Alabama, Arizona, California, Colorado, Louisiana, Massachusetts, Nevada, New York, Ohio, Texas, and Washington.

<sup>653</sup> See Fed. Bureau of Prisons, Program Statement 5267; Ala. Dep’t of Corrections, Admin. Reg. 303; Ariz. Dep’t of Corr., Dep’t Order 911; Ohio Dep’t of Rehab. & Corr., Policy Number 76-VIS-01; Tex. Dep’t of Criminal Justice, Offender Rules and Regulations for Visitation Handbook (Aug. 2008), available at <http://www.tdcj.state.tx.us/policy/policy-home.htm>.

<sup>654</sup> Fed. Bureau of Prisons, Program Statement 1480.05; Ala. Dep’t of Corr., Admin. Reg., 005; Cal. Dep’t of Corr., 15 C.C.R. § 3261; Colo. Dep’t of Corr., Admin. Reg. 1350-01; Dist. of Columbia Dep’t of Corr., Public Statement 1340.2B; La. Dep’t of Corr., Dep’t Reg. No. C-01-013; Nev. Dep’t of Corr., Admin. Reg. 120.02; N.Y. Dep’t of Corr. Serv., Directive No. 0401; Ohio Dep’t of Rehab. & Corr., Policy Number 01-COM-09; Wash. State Dep’t of Corr., Policy Number 150.100; Mass. Dep’t of Corr., 103 C.M.R. § 131.

<sup>655</sup> Fed. Bureau of Prisons, Program Statement 1480.05; La. Dep’t of Corr., Dep’t Reg. No. C-01-013; Nev. Dep’t of Corr., Admin. Reg. 120.02; Ohio Dep’t of Rehab. & Corr., Policy Number 01-COM-09; Wash. State Dep’t of Corr., Policy Number 150.100; Mass. Dep’t of Corr., 103 C.M.R. § 131.

<sup>656</sup> See, e.g., Ala. Dep’t of Corr., Admin. Reg. 005; Dist. of Columbia Dep’t of Corr., Public Statement 1340.2B.

<sup>657</sup> For example, in Nevada “other media representatives,” such as documentary film-makers and authors of non-fiction books, must submit a written request to the Public Information Officer at least two weeks prior to the requested date that includes a description of the project, a proposed list of facilities, offenders, and activities, an estimated project completion date and proposed schedule, and a list of major financial contributors to the project. In Ohio “access to institutions by independent filmmakers, writers for non-news magazines and others may be permitted by special advance arrangement and approval of the managing officer and Central Office [Public Information Officer].”

292. Generally, as with requests for specific interviews, members of the media wishing to view prison facilities and activities who meet the applicable definition must request access to a prison facility in advance, often in writing, and sometimes requiring specific requests to use cameras or other recording devices.<sup>658</sup> Permission to visit is ultimately at the discretion of the institution head or the Public Information Officer (PIO), subject to limitations necessary to maintain order and security and promote the rehabilitative or penal goals of the prison. In Alabama, “access will be granted at the discretion of the Commissioner, Departmental PIO, Warden, or designee and coordinated in a manner that will ensure the safety and security of inmates, employees, institutions, and community, and the protection of the individual’s right to privacy.”<sup>659</sup> In D.C., the DOC “may deny a facility visit and deny and/or limit recording devices for reasons including but not limited to . . . [i]f it is determined the interview would significantly disrupt the orderly operations of the institution or pose a security risk.”<sup>660</sup> These visits allow access to some parts of the facilities and observations of limited activity, but interviews with people inside prison are typically covered in other sections.

**ii. Interviews**

293. Of the states surveyed, only California uniformly bars “specific-person face-to-face interviews” between media representatives and people in prison.<sup>661</sup> California does allow “random face-to-face interviews,” including spontaneous interviews with people in prison “encountered while covering a facility activity or event . . . as stipulated by the institution head.”<sup>662</sup> In all other states, the discretion to grant an interview with a specific individual rests with the institution head or a designee. Again, it is often based on concerns about security, privacy and well-being, and penological and rehabilitative goals.<sup>663</sup> Other express reasons for denial of an interview request include: the individual is involved in a pending court action (Ohio),<sup>664</sup> the person has been identified as in need of mental health services (Nevada),<sup>665</sup> and the person has been segregated for disciplinary action (Washington).<sup>666</sup>

294. Requests for interviews with individual people often require the written consent of the individual, usually gained only through written correspondence. Some jurisdictions explicitly allow for telephone interviews. In Arizona, these interviews are limited to fifteen minutes.<sup>667</sup> In D.C., media interviews “shall be conducted via telephone and are limited to thirty minutes . . . Only the Director or designee shall approve face-to-face interviews.”<sup>668</sup> Colorado and Ohio expressly prohibit telephone interviews.<sup>669</sup> In Louisiana, prisoners are forbidden “in general” to “conduct interviews where they discuss the crimes they have been convicted of.”<sup>670</sup> These time limits are usually too limited for a full and comprehensive interview. In addition, telephone calls from prison are prohibitively expensive.

**iii. Mail**

295. Because the process of requesting an interview with a specific person usually requires written correspondence, often with the media representative initiating contact, regulations on prison mail have a direct impact on media access to prisons and people inside prison. Further, the opening and reading of

<sup>658</sup> Fed. Bureau of Prisons, Program Statement 1480.05; Ala. Dep’t of Corr., Admin. Reg.005; Ariz. Dep’t of Corr., Dep’t Order 207; Cal. Dep’t of Corr., 15 C.C.R. § 3261; Dist. of Columbia Dep’t of Corr., Public Statement 1340.2B; Nev. Dep’t of Corr., Admin. Reg. 120.02.

<sup>659</sup> Ala. Dep’t of Corr., Admin. Reg. 005.

<sup>660</sup> Dist. of Columbia Dep’t of Corr., Public Statement 1340.2B.

<sup>661</sup> Cal. Dep’t of Corr., 15 C.C.R. § 3261.5.

<sup>662</sup> *Id.*

<sup>663</sup> See Fed. Bureau of Prisons, Program Statement 1480.05; Ala. Dep’t of Corr., Admin. Reg. 005; Ariz. Dep’t of Corr., Dep’t Order 207; Colo. Dep’t of Corr., Admin. Reg. 1350-01; Dist. of Columbia Dep’t of Corr., Public Statement 1340.2B; Nev. Dep’t of Corr., Admin. Reg. 120; Ohio Dep’t of Rehab. & Corr., Policy No. 01-COM-09; Wash. State Dep’t of Corr., Policy No. 150.100; Mass. Dep’t of Corr., 103 C.M.R. § 131.00.

<sup>664</sup> Ohio Dep’t of Rehab. & Corr., Policy No. 01-COM-09.

<sup>665</sup> Nev. Dep’t of Corr., Admin. Reg. 120.

<sup>666</sup> Wash. State Dep’t of Corr., Policy No., 150.100.

<sup>667</sup> Ariz. Dep’t of Corr., Dep’t Order 207.

<sup>668</sup> Dist. of Columbia Dep’t of Corr., Public Statement 1340.2B.

<sup>669</sup> Colo. Dep’t of Corr., Admin. Reg. 1350-01; Ohio Dep’t of Rehab. & Corr., Policy No. 01-COM-09.

<sup>670</sup> La. Dep’t of Corr., Dep’t Reg. No. C-01-013.

prisoners' ingoing and outgoing mail presents the possibility of self-imposed or administration-imposed censorship of communications critical of the prison or its staff.

**a) Monitoring of prisoner correspondence**

296. Correspondence is usually divided between general and special/confidential mail. General mail is opened, inspected, and read to prevent criminal activity and to prevent prisoners from receiving contraband and other material considered detrimental to safety and security. Special mail is often defined as correspondence to or from United States government officials, officers of the court, and a prisoner's attorney and legal services organizations.<sup>671</sup> The FBP also classifies correspondence to (but not from) members of the media as special. Often, as is the case in federal prison, special mail is opened only in the presence of the prisoner and inspected for contraband, and its content is either "scanned," or not read at all.<sup>672</sup>

**b) Postage**

297. There is no limit to the number of letters a person in prison may send or receive where the individual bears the mailing cost. In most of the surveyed jurisdictions, regulations specifically provide for the provision of some postage to "indigent" people.<sup>673</sup> Most jurisdictions limit the number of stamps or pre-stamped envelopes that people may receive in a single piece of mail. New York flatly prohibits people in prison from receiving stamps through the mail, with the exception of postage-prepaid, pre-addressed envelopes from a court or attorney,<sup>674</sup> and D.C. regulations state that the DOC "shall not accept envelopes mailed to inmates for use in future correspondence."<sup>675</sup> Colorado regulations provide that mail "may be rejected if it contains postage stamps, stamped envelopes, blank stationary, blank writing paper, blank cards, or blank post-cards."<sup>676</sup>

298. The result of all these limitations on communication means that people inside prison find it very difficult to tell people about human rights violations, and those of us on the outside find it very difficult to find out exactly what is happening inside prison.

**C. List of interviewees**

299. The following is a complete list of the individuals the authors interviewed during the course of researching and writing this report:

1. Deborah Labelle (Ann Arbor, MI)
2. Robin Levi (Justice Now, Oakland, CA)
3. Alice Miller (Yale Law School, New Haven, CT)
4. Brenda Smith (American University Washington College of Law, Washington, D.C.)
5. Lynn Paltrow (National Advocates for Pregnant Women, New York, NY)
6. Elora Mukherjee (ACLU, New York, NY)

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<sup>671</sup> See Fed. Bureau of Prisons, Program Statement, 5265.11; Ala. Dep't of Corr., Admin. Reg. 448; Cal. Dep't of Corr., 15 C.C.R. § 3135; Colo. Dep't of Corr., Admin. Reg. 300-38; Nev. Dep't of Corr., Admin. Reg. 750; Ohio Dep't of Rehab. & Corr., Policy Number 75-MAL-01; N.Y. State Dep't of Corr. Serv., Directive No. 4421; Wash. State Dep't of Corr., Policy No. 450.100; Mass. Dep't of Corr., 103 C.M.R. 481.

<sup>672</sup> *Id.*

<sup>673</sup> See, e.g., Cal. Dep't of Corr. 15 C.C.R. § 3138; Mass. Dep't of Corr. 103 C.M.R. § 481.

<sup>674</sup> N.Y. State Dep't of Corr. Serv., Directive No. 4422.

<sup>675</sup> Dist. of Columbia Dep't of Corr., Public Statement 4070.4D.

<sup>676</sup> Colo. Dep't of Corr., Admin. Reg. 300-38.

7. Meghan Rhoad (HRW, New York, NY)
8. Karen Shain (Legal Services for Prisoners with Children, San Francisco, CA)
9. Dori Lewis and Lisa Freeman (Legal Aid Society, New York, NY)
10. Mie Lewis (ACLU, New York, NY)
11. Sonia Kumar (ACLU Maryland, Yale Law Liman Fellow, Baltimore, MD)
12. Giovanna Shay (Western New England College of Law, Springfield, MA)
13. Malika Saar (Rebecca Project for Human Rights, Washington, D.C.)
14. Serena Alfieri (Women in Prison Project, New York, NY)
15. Diana Kasdan (ACLU, New York, NY)
16. Kathy Boudin (Columbia University School of Social Work, New York, NY)
17. Jamie Fellner (HRW, New York, NY)
18. Robert Doody (ACLU of South Dakota, Sioux Falls, SD)

**D. List of non-governmental organizations and key players**

***i. Women in prison, generally***

1. New York Correctional Association – Women in Prison Project
2. Rebecca Project for Human Rights
3. Women on the Rise Telling Herstory
4. Justice Now – Robin Levi, Human Rights Director
5. Legal Services for Prisoners with Children
6. Human Rights Watch
7. Chicago Legal Advocacy for Incarcerated Mothers
8. Deborah Labelle, Esq.
9. American Civil Liberties Union– National Prison Project

***ii. Sexual assault***

1. Just Detention International
2. National Institute of Corrections/Washington College of Law Project on Addressing Prison Rape—  
Brenda Smith, Professor of Law and Project Director
3. Vera Institute of Justice

4. Legal Aid Society of New York – Dori Lewis and Lisa Freeman, Staff Attorneys

**iii. Racial disparity**

1. The Sentencing Project
2. Sistersong: Women of Color Reproductive Justice Collective

**iv. Health care/shackling**

1. American Civil Liberties Union – Reproductive Freedom Project
2. Center for Reproductive Rights
3. National Advocates for Pregnant Women – Lynn Paltrow, Executive Director
4. National Commission on Correctional Health Care

**v. Immigration**

1. Women’s Refugee Commission
2. Human Rights Watch
3. Detention Watch Network
4. National Immigrant Justice Center

**vi. Lesbian, bisexual, transsexual, and queer people in women’s prisons**

2. Sylvia Rivera Law Project
3. Urban Justice Center, Peter Cicchino Youth Project
4. National Center for Lesbian Rights
5. Transgender, Gender-variant, Intersex Justice Project, San Francisco—Miss Major

**vii. Juveniles**

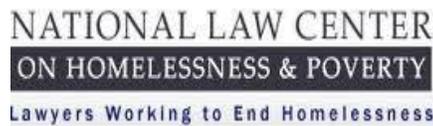
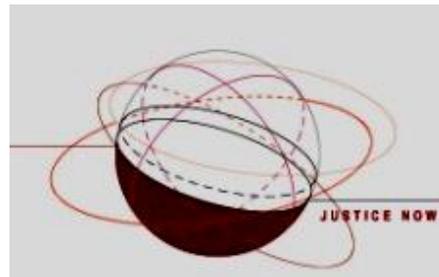
1. ACLU Women’s Rights Project—Mie Lewis, Staff Attorney
2. Missouri Youth Services Institute—Mark Steward, Founder and Director



Allard K. Lowenstein International Human Rights Clinic  
Yale Law School



National Congress of American Indians



Full document also available at:

[www.law.virginia.edu/vaw](http://www.law.virginia.edu/vaw)