

Lesbian, Gay, Bisexual, Transgender and Intersex Human Rights in the United States

This shadow report on lesbian, gay, bisexual, transgender and intersex rights in the United States was coordinated by Global Rights and endorsed¹ by:

**Amnesty International USA
Gender Public Advocacy Coalition
Global Rights
Human Rights Campaign
Immigration Equality
International Gay and Lesbian Human Rights Commission
Lambda Legal Defense & Education Fund, Inc.
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Executive Summary

In the United States today, the human rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) Americans are under attack on many fronts. The heady appreciation that marked the decision to abolish sodomy laws in *Lawrence v. Texas*² has been quickly countered by efforts to enshrine discrimination in municipal ordinances, national legislation and calls for a Constitutional amendment banning efforts to achieve marriage equality. Discrimination and its accompanying violence continue apace.

This report identifies various categories of human rights violations with reference to specific articles of the International Covenant on Civil and Political Rights (ICCPR). At the outset, however, it is crucial to recognize the hostile and often discriminatory landscape that frames all of the cases in this report. Discriminatory animus permeates nearly all categories of human rights violations directed at LGBTI Americans, whether committed by state or non-state actors. Often the discriminatory intent behind other seemingly distinct categories of human rights violation – including deprivations of life, liberty, health and opportunity – may not be easily or even logically separated from the animus that encourages the violation. It is equally important to recognize that many of the abuses described here are directed at individuals who appear to be transgressing gender stereotypes and the violations themselves often seem intended to “punish” individuals for asserting their right to gender expression.

¹ The UCLA Williams Institute also contributed to the report.

² 539 U.S. 558 (2003).

In considering the first periodic report of the United States in 1995, the Human Rights Committee noted “the serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private, and the consequences thereof for their enjoyment of other human rights without discrimination.” Since that last periodic examination, the U.S. Supreme Court has significantly altered the legal framework in the United States through its decisions in the 1996 case of *Romer v. Evans*³ and the 2003 case of *Lawrence v. Texas*. The failure of the United States to explain such major legal advances in its most recent periodic report is highly unusual and raises concern that the U.S. Government does not fully welcome the gains, nor honor its commitments to enforcing the rights protected in those cases and echoed in the ICCPR.

In *Romer v. Evans*, the U.S. Supreme Court struck down a voter-enacted provision that would have permanently prevented lesbian, gay and bisexual residents of the state of Colorado from claiming anti-discrimination protections under state laws. In the more recent decision of *Lawrence v. Texas*, the U.S. Supreme Court overturned one of its earlier decisions by striking down homosexual sodomy statutes in the United States. The *Lawrence* decision recognized an important link between privacy rights and equality, noting that “[e]quality of treatment and . . . respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”

While the U.S. Supreme Court has now invalidated the country’s sodomy statutes, the country’s criminal justice system has not yet fully embraced the decision. In many circumstances, police authorities and prosecutors continue to make selective use of criminal provisions involving morals offenses to target LGBTI individuals. Although *Lawrence* did not strike down statutes relating to public sexual activity, in some cases the highly selective prosecution of these morals offenses, especially when they involve the mere solicitation of private sexual activity in public places, could intrude on privacy guarantees and limit the impact of the decision. Other discriminatory criminal provisions also seem to have survived after the *Lawrence* decision, raising serious ongoing concerns over the protection afforded to consensual adult sexual activity in the United States.

In addition, the legislative framework for protecting equality in the United States still contains significant gaps that fail to protect non-discrimination rights found in articles 2(1) and 26 of the ICCPR. At the national level, despite years of debate the United States Congress has yet to pass any version of the Employment Nondiscrimination Act (ENDA), which would make it illegal for private employers to discriminate against employees on the basis of their sexual orientation. The bill last received serious consideration in the U.S. Senate Committee on Health, Education, Labor and Pensions in April 2002, when it was recommended to the entire Senate for passage. This leaves employment non-discrimination provisions to the states, but a study by the National Gay and Lesbian Task Force (NGLTF) estimates that more than half of the population, 52% on last count, has no legislative protection against sexual orientation discrimination when seeking private

³ 517 U.S. 620 (1996).

employment opportunities.⁴ And many of the existing state-level employment non-discrimination initiatives are also subject to regular challenge and occasional setback. Until standardized non-discrimination protections based on sexual orientation, gender identity and gender expression are passed into law at the federal level, human rights enforcement in this area will remain highly uneven and arbitrarily subject both to geography and to qualifying employer requirements that differ from state to state if they exist at all.

The U.S. report also failed to make reference to the limited non-discrimination protections that exist for federal employees and federal job applicants. Unfortunately the Bush Administration has created roadblocks to these protections and introduced other limitations affecting LGBTI employees within the federal workforce. At least one influential member of the U.S. Congress has accused the Bush Administration of waging a “covert war” on homosexuals in federal employment.⁵

Violence, torture and extrajudicial killings of persons because of their sexual orientation, whether committed by state authorities or non-state actors, raise serious concerns under Articles 6, 7 and 10 of the ICCPR. State acquiescence that results in severe abuse is described extensively in an Amnesty International report, entitled *Stonewalled, Police Abuses and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.* The Gender Public Advocacy Coalition’s recent report, entitled *50 Under 30 – Race, Class, and Death by Gender*, also specifically documents hate murders committed against individuals who transgress gender barriers, many of whom are underage and belong to non-white communities.

According to the federal Hate Crimes Statistics Act of 1990, during 2003, the most recent date for which complete data is available, 7,489 hate crime incidents were reported to the FBI by law enforcement agencies. Of those, 1,239 were reportedly motivated by sexual orientation bias, representing approximately 16.5% of all reported hate crimes that year. Even though the statistics almost certainly underestimate the total number of hate crimes committed in the country, the proportion of sexual orientation hate crimes as compared to the total number of all other bias motivated crimes is substantial. While the lower house of Congress voted twice in favor of a fully trans-inclusive hate crimes bill in the fall of 2005, the Senate has yet to offer support for such an inclusive effort to expand hate crimes protections. In April 2006, an amendment was defeated that could have provided an opportunity for the U.S. Senate to consider a hate crimes bill. To date, there is no authority for the federal government to investigate and prosecute hate crimes motivated by sexual orientation or gender identity bias, as it does with hate crimes motivated by other forms of discrimination. That leaves protection in the hands of state officials, but the National Gay and Lesbian Task Force (NGLTF) again reports that only twenty-nine states and the District of Columbia have hate crimes statutes that encompass real or

⁴ National Gay and Lesbian Task Force, Press Release of January 27, 2006; *see also*, *Legislating Equality*,” by Wayne van der Meide for the Policy Institute of the National Gay and Lesbian Task Force.

⁵*See* Federal EEO Advisor, Vol. 9, No. 3, April 1, 2006 (quoting Rep. Waxman); Rep. Waxman has also introduced a bill in the U.S. Congress, H.R. 3128, to protect gay federal employees.

perceived sexual orientation, and only seven of those states and the District of Columbia cover gender identity.

The failure of many states and of the federal government to add sexual orientation to the categories of bias motivated hate crimes that trigger the provision of additional investigative and prosecutorial resources creates the impression that those crimes are less serious than other bias motivated crimes. This also leaves a significant gap in the protections afforded to LGBTI Americans under articles 6 and 7 of the ICCPR.

Amnesty International's *Stonewalled* report also investigates sexual, physical and verbal abuse committed against LGBTI persons in detention. Abuses carried out under these circumstances constitute intersecting violations of ICCPR provisions. In particular, violations of article 9 are most common when police or custodial officers fail to protect LGBTI persons or deliberately place them in harm's way. Amnesty International has also denounced common police reliance on an individual's "deviance" from stereotypical gender norms as grounds for suspicion or police targeting in a variety of cases.

The compounded impact of discrimination against women because of their sexual orientation requires unique attention, as do various other intersecting forms of discrimination based on race, disability, health status, gender identity, gender expression and sexual orientation. Within the criminal justice system, for example, lesbian and transgender women face significantly heightened risks of sexual violence from male officers immediately upon arrest and in custodial detention.

The United States generally recognizes asylum claims based on past persecution or likely future persecution as a result of an individual's sexual orientation or gender identity. Nonetheless, U.S. immigration advocates note the difficulty of proving such claims, and the insensitivity of some immigration officials to sexuality-based cases. Asylum applicants must also generally seek protection within one year of arriving in the United States. This short timeline for filing asylum claims can be particularly burdensome for LGBTI asylum applicants who may find it difficult to reconcile the extreme persecution faced in their home communities with the possibility of a more "open" sexual orientation or identity in the United States.

With only a few exceptions, state legislation generally prevents transgender individuals from changing their legal sex unless they have undergone surgery for genital reattribution. In some cases, pre-operative transgender individuals are also prevented from legally changing their names. As reported by Amnesty International, the resulting differences between personal appearance, legal name or identified sex often leads to abuse during police identification procedures.

The "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy in the United States is part of a 1993 law prohibiting homosexuals from serving openly in the U.S. military. This constitutes a discriminatory limitation on freedom of expression that was originally intended to loosen restrictions by allowing lesbians, gays and bisexuals to serve in the military so long as they did not publicly disclose their sexual orientation. The

Servicemembers Legal Defense Network reports that hundreds of Americans are still discharged every year under this policy.

Surprisingly, in its periodic report the U.S. Government offers as examples of its protection of the right to “expressive association” two controversial decisions of the U.S. Supreme Court in *Boy Scouts of America v. Dale*,⁶ and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.⁷ In both cases the Supreme Court was required to reconcile freedom of expressive association, which protects the right of individuals to associate freely with those expressing similar political, social or cultural views, with state prohibitions on discrimination based on sexual orientation. While largely expected, the outcome in each of those decisions still raises serious concerns about the commitment of the United States to non-discrimination rights. It is particularly unfortunate that the U.S. Government’s periodic report makes reference to the decisions within such a positive context and without a more complete discussion of the complexities of the cases or their impact on LGBTI Americans.

The recently re-introduced amendment to the Constitution of the United States to ban same-sex marriage and similar initiatives that have been proposed and passed in a variety of states are having a significantly detrimental impact on a broad range of human rights protections. The periodic report of the United States mentions the complexities of the marriage debate, but it fails to consider the debate’s acrimonious tone, its discriminatory underpinnings or the potential consequences for the lives of ordinary LGBTI Americans following such a politicized national dialogue. When debate opened on the Constitutional amendment in the U.S. Senate in June 2006, Democratic leader Harry Reid noted that “the reason for this debate is to divide our society, to pit one against another.”⁸ The federal debate also appears to be driving state-level initiatives that seek to ban a variety of legal protections for LGBTI Americans and their families.

The uncertainty of the legal status of transgender persons under state law also has a significant impact on family life. As an example, the National Center for Lesbian Rights highlights a 1999 case in which a Texas court invalidated a seven-year marriage between a transgender woman and her deceased husband and refused to recognize a damage award in a medical malpractice case.

Discrimination, abuse and misconduct against LGBTI youth remain particularly severe. Several recent human rights reports have documented the prevalence of verbal, physical and sexual violence directed at LGBTI youth in schools, in juvenile detention facilities and in foster care. The government’s failure in this context to guarantee adequate protection to LGBTI youth raises serious concern under article 24 of the ICCPR. LGBTI associations in schools have also come under attack. And an increasing number of children are now facing economic challenges due to the government’s failure to recognize same-sex relationships involving their parents, or their same-sex de facto step-

⁶ 530 U.S. 640 (2000).

⁷ 515 U.S. 557 (1995).

⁸ “Senators Debate Gay Marriage Ban,” June 6, 2006, *The Washington Post*, at A3.

parents. If a parental figure is unable to establish a legal relationship, a child is often unable to claim health insurance or social security survivor benefits.

As extensively described by Human Rights Watch and Immigration Equality in a recent report, the refusal of the federal government to legally recognize same-sex couples for U.S. immigration purposes also strains the enjoyment of family life, especially with reference to binational couples.

Substantive Violations of the Convention

Articles 2(1) and 26 (Non-discrimination)

The principle of non-discrimination provides a cross-cutting frame of protection for lesbian, gay, bisexual and transgender people under the ICCPR. In the case of *Toonen v. Australia*,⁹ the Human Rights Committee considered the criminalization of private sexual activity between consenting, same-sex adults and found such laws violated articles 2(1), 17 and 26 of the Covenant. That decision has been referenced many times by the Committee, by other treaty bodies and by the UN special procedures when affirming that articles 2(1) and 26 of the Covenant prohibit discrimination based on sexual orientation.

Discriminatory animus permeates nearly all categories of human rights violations directed at lesbian, gay, bisexual, transgender and intersex individuals, whether committed by state or non-state actors. The Working Group on Arbitrary Detention has recognized, for example, that the arbitrary detention of homosexuals on the grounds of their sexual orientation constitutes a breach of article 2(1) of ICCPR based on the *Toonen* decision.¹⁰ Similarly, the Special Rapporteur on Torture in his 2001 Report specifically noted that “discrimination on grounds of sexual orientation or gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place.”¹¹ As a result, this chapter references non-discrimination principles under every article of the ICCPR, and in many cases the discriminatory intent behind other seemingly distinct categories of human rights violation – including deprivations of life, liberty, health and opportunity – may not be easily or even logically separated from the animus that enables the violation.

In considering the first periodic report of the United States in 1995, the Human Rights Committee noted “the serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private, and the consequences thereof for their enjoyment of other human rights without discrimination.”¹² Since that last periodic examination, the U.S. Supreme Court has significantly altered the legal framework in the United States through its

⁹Communication no. 488/1992.

¹⁰ See Reports of December 16, 2002 and December 15, 2003, as well as the opinion on Egypt adopted January 24, 2003.

¹¹ UN Special Rapporteur on Torture, Interim Report to the General Assembly (July 2001, A/56/156).

¹² U.N. Doc. CCPR/C/79/Add.50 at para. 287 (1995).

decisions in the 1996 case of *Romer v. Evans*¹³ and the 2003 case of *Lawrence v. Texas*.¹⁴ The failure of the United States to explain such major legal advances in its most recent periodic report is highly unusual and raises concern over U.S. Government commitments to enforcing the rights protected in those two cases and echoed in the ICCPR.

In *Romer v. Evans*, the U.S. Supreme Court invalidated a voter-approved amendment to the Colorado State Constitution that identified lesbians, homosexuals and bisexuals as a distinct class of persons to be permanently excluded from protections under Colorado's anti-discrimination laws. The U.S. Supreme Court found the sweeping state provision invalid under the federal U.S. Constitution, arguing that under any standard of review it was inexplicable and "born of animosity toward the class of persons affected."

In the more recent decision of *Lawrence v. Texas*, the U.S. Supreme Court overturned one of its earlier decisions¹⁵ by striking down the homosexual sodomy statute of the state of Texas. The Supreme Court found an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Citing emerging international practice and the European Court of Human Rights, and recognizing that sometimes "laws once thought necessary and proper in fact serve only to oppress," the Court found its earlier decision "demeans the lives of homosexual persons" and that the Texas statute violated the right to liberty under the Due Process Clause of the U.S. Constitution. As in the *Toonen* case, the U.S. Supreme Court also found a link between privacy rights and equality, noting that "[e]quality of treatment and . . . respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."

Despite these two important decisions of the U.S. Supreme Court, the legislative framework for protecting equality in the United States still contains significant gaps that fail to protect rights enshrined in articles 2 and 26 of the ICCPR. At the national level, despite years of debate the United States Congress has yet to pass any version of the Employment Nondiscrimination Act (ENDA), which would make it illegal for private employers to discriminate against employees on the basis of their sexual orientation. The bill last received serious consideration in the U.S. Senate Committee on Health, Education, Labor and Pensions in April 2002, when it was recommended to the entire Senate for passage. This lack of federal protection in the area of employment leaves most lesbian, gay, bisexual transgender and intersex (LGBTI) Americans to depend on state or local non-discrimination provisions. At the state level, the Human Rights Campaign reports that it is still legal to fire someone based on sexual orientation in 34 States, while in 44 states it is legal to fire an individual based on gender identity. A study by the National Gay and Lesbian Task Force (NGLTF) estimates that 52% of the population has no legislative protection against sexual orientation discrimination when seeking private

¹³ 517 U.S. 620 (1996).

¹⁴ 539 U.S. 558 (2003).

¹⁵ *Overturning Bowers v. Hardwick*, 478 U.S. 186 (1986).

employment opportunities.¹⁶ According to an interview conducted by the National Center for Lesbian Rights and the Transgender Law Center, 49% of respondents have experienced discrimination in employment because they were perceived to be transgender. Transgender workers also face discrimination in terms of income, with 64% of respondents making less than \$25,000 per year.¹⁷

State-level employment non-discrimination initiatives are also subject to regular challenge and occasional setback. As recently as May 2006, for example, Colorado Governor Bill Owens vetoed a bill that would have prohibited employment discrimination based on sexual orientation, gender identity or gender expression in the state of Colorado. Conservative advocates in Washington state have tried to add a referendum initiative to the upcoming November ballot to overturn a law passed last year that outlaws discrimination based on sexual orientation in employment, housing and lending.¹⁸ And several other initiatives to roll-back non-discrimination protections are working their way through state level procedures. In Ohio and Michigan, lawmakers are attempting to bring legal actions against employers who offer domestic-partner benefits to LGBTI workers through challenges that rely on state-level bans to same-sex marriage and related same-sex relationships.¹⁹ Clearly the record of non-discrimination protection at the state level is concerning, at times suggesting the existence of a sporadic campaign to promote discrimination rather than defend against it.

A 2000 report by the U.S. Government's General Accounting Office found that even within states, employment non-discrimination coverage for sexual orientation depends on a complex variety of qualifying conditions, including the number of workers employed and the nature of the work, with broad exemptions generally provided for religious institutions and for some non-profit employers.²⁰ Until standardized non-discrimination protections based on sexual orientation, gender identity and gender expression are passed into law at the federal level, human rights enforcement in this area will remain highly uneven and arbitrary, subject both to geography and to qualifying employer requirements that differ from state to state if they exist at all. Under current federal employment standards and U.S. domestic practice, the United States remains in violation of articles 2(1) and 26 of the ICCPR.

While passage of federal anti-discrimination legislation is a priority concern, the National Gay and Lesbian Task Force has, as an interim measure, called for the U.S. Equal Employment Opportunity Commission to record complaints of discrimination based on sexual orientation or gender identity. Such documentation will help establish better statistical data on workplace discrimination. Precedent for such an intermediate step can be found in the federal Hate Crimes Statistics Act. This Act currently requires the Federal Bureau of Investigation (FBI) to record annual data on "hate crimes" that

¹⁶National Gay and Lesbian Task Force, Press Release of January 27, 2006; *see also*, "Legislating Equality," by Wayne van der Meide for the Policy Institute of the National Gay and Lesbian Task Force.

¹⁷ National Center for Lesbian Rights, Transgender Law Center, *Trans Realities* (2003) at <http://www.nclrights.org/publications/transrealities0803.htm>

¹⁸ "Eyman to File Signatures to Repeal Gay Rights Law," June 1, 2006, *Seattle Post-Intelligencer*.

¹⁹ See "An Unequal World," *The Economist*, May 20, 2006.

²⁰ Sexual-Orientation-Based Employment Discrimination, GAO/OGC-00-27R.

manifest evidence of prejudice based on sexual orientation, even though the FBI lacks corresponding jurisdiction to investigate those crimes and the data itself may only be used for research or statistical purposes.²¹ The collection of employment data could also assist the federal government, along with state and federal lawmakers, in assessing the prevalence of LGBTI discrimination within the workforce.

The U.S. report also failed to make reference to limited non-discrimination protections that exist for federal employees and federal job applicants. While there is no explicit statutory provision for these protections, President Clinton issued Executive Order 13087 in 1998 to ban sexual orientation discrimination within all Executive Branch agencies. For more than five years, the U.S. Office of Special Counsel (OSC) reviewed and took disciplinary actions in cases involving sexual orientation discrimination in the federal workforce.²²

In February 2004, the Human Rights Campaign and other NGOs found that the OSC had removed references to sexual orientation discrimination from a standard complaint form and from an informational brochure entitled “Your Rights as a Federal Employee.”²³ At the same time, Scott Bloch, the head of the OSC, also began questioning his own authority to enforce Executive Order 13087, suggesting the OSC should rely on specific federal statutes to support enforcement actions and that Executive Order 13087 did not provide sufficient legal authority to do so.²⁴ Advocacy organizations, including the Human Rights Campaign, joined OSC employees in filing a legal complaint, arguing that Bloch was failing to enforce civil service laws and that he was personally engaged in discriminatory employment practices against career OSC employees.²⁵ After more than a year, the U.S. Office of Personnel Management launched a formal investigation into the complaint in October 2005. No outcome has been announced in the case, and the commitment of the OSC and the Bush Administration to continue taking disciplinary action in cases of sexual orientation discrimination in the federal workforce remains unclear.²⁶ In the meantime, members of the U.S. Congress have introduced a bill to clarify the previous authority of the OSC to investigate and take action in cases of sexual orientation discrimination in the federal workforce.²⁷ At least one influential member of the U.S. Congress, Henry Waxman, who serves on the House Government Reform

²¹ 28 USC § 534; *see also* discussion, *infra*, under Article 6.

²² The OSC recognizes itself as “an independent investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment by protecting federal employees and applicants from prohibited personnel practices.”

²³ Human Rights Campaign, Press Release, February 13, 2004.

²⁴ Legal Interpretation of Discrimination Statute, U.S. Office of Special Counsel Press Release, PR04-01, available at http://www.osc.gov/documents/press/2004/pr04_01.htm.

²⁵ *See* “Special Counsel’s Chief is Assailed; Bloch Accused of Silencing Staff,” *The Washington Post*, April 16, 2004 at A19.

²⁶ In January 2006 the Government Accountability Office, an independent investigative agency that reports to the U.S. Congress, recommended that an outside organization should review all such personnel allegations against Office of Special Counsel employees. *See* U.S. Office of Special Counsel - Selected Contracting and Human Capital Issues, GAO-06-16.

²⁷ H.R. 3128, introduced June 30, 2005 by Rep. Waxman and Rep. Shays.

Committee, is concerned that the Bush Administration is waging a “covert war” on homosexuals in federal employment.²⁸

In a separate case involving the U.S. Department of State, in April 2006 Lambda Legal appealed a lawsuit on behalf of a job applicant who was denied employment as a Foreign Service Officer. The employment decision was taken because of the State Department’s twenty-year practice against hiring any HIV-positive employees for the U.S. Foreign Service, including those who are healthy and able to serve.²⁹ The lawsuit alleges that this employment practice violates the federal Rehabilitation Act, which parallels the Americans with Disabilities Act in prohibiting the federal government from discriminating against people with disabilities.

Article 3 (Equal Rights of Men and Women)

The extent to which sexual orientation is a ground of inequality that uniquely affects women has been considered by the U.N. Special Rapporteur on Violence Against Women. In her January 2005 report, she noted that sexual orientation discrimination, combined with other factors of discrimination, creates “multiple forms of oppression that keep women subordinated.” Lesbians, and more generally women who do not live according to the requirements of heterosexist norms, are subjected to violence and rape, as denounced by the Special Rapporteur in many of her reports. The compounded impact of discrimination against women because of their sexual orientation has also been reported by the Special Representative of the Secretary General on the Situation of Human Rights Defenders and in several concluding observations issued by the U.N. Committee on the Elimination of Discrimination Against Women.

One particular area of concern is that lesbian and transgender women face significantly heightened risk of sexual violence from male officers upon arrest and in custodial detention. Amnesty International’s *Stonewalled* report of 2005 highlights some examples of typical assaults against lesbians by police officers or guards.³⁰ The assaults are often sexual in nature. As a common example, a lesbian of color arrested and detained in a police holding cell in Boston was physically assaulted by an officer after having asked him to loosen her handcuffs. The officer reportedly said “You want to act like a man, I’ll treat you like a man!” before beating her.³¹

A 2001 publication by Amnesty International entitled *Crimes of Hate, Conspiracy of Silence* reports the case of Robin Lucas, a lesbian who was detained in a facility in California on a first-time, non-violent offense and sent to segregation in a men’s prison. The male guards harassed and threatened her for being a lesbian and she was raped by

²⁸ Federal EEO Advisor, Vol. 9, No. 3, April 1, 2006; Rep. Waxman has introduced a bill in the U.S. Congress, H.R. 3128, to protect gay federal employees.

²⁹ Taylor v. Rice, Case No. 05-5257, United States Court of Appeals for the District of Columbia Circuit.

³⁰ Amnesty International, *Stonewalled, Police abuses and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005).

³¹ Amnesty International, *Stonewalled, Police abuses and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005), at 64.

three inmates.³² The same report also describes a case that occurred in Athens, Georgia, in 2004, in which a lesbian was forced at gunpoint into her apartment by an officer and raped. According to the testimony of the woman, the man said he wanted to “teach her a lesson” and that “the world needed at least one less dyke.” The perpetrator was brought up on several charges, including rape, but was only found guilty of violating his oath of office.³³

Many lesbian and transgender women are harassed or sexually assaulted by state and non-state actors for their failure to conform to gender stereotypes. The crimes committed against them often manifest an intent by the perpetrator to “punish” the victim for transgressing gender roles. And when such crimes are committed by police, by prison personnel or by other state actors, or when investigations of these crimes are downgraded, dismissed or trivialized, they constitute torture under article 7 of the ICCPR.

Article 6 (Right to Life)

Extrajudicial killings of persons because of their sexual orientation, either by state authorities or non-state actors, as well as deaths in prison that may be attributed to the failure of prison officials to adequately protect LGBTI persons raise serious concerns under Articles 6, 7 and 10 of the ICCPR.

Although there are no recent reports of extrajudicial or summary executions involving federal or state authorities, state acquiescence to private misconduct that results in severe abuse is described extensively in Amnesty International’s *Stonewalled* report.

According to the federal Hate Crimes Statistics Act of 1990, as amended in 1994 and 1996, the FBI is required to collect data related to “hate crimes” that are motivated by bias toward race, religion, ethnicity/national origin, disability or sexual orientation.³⁴ This data is analyzed in regular annual reports issued by the FBI. During 2003, the most recent date for which complete data is available, 7,489 hate crime incidents were reported to the FBI by law enforcement agencies in 49 states and the District of Columbia. Of those, 1,239 were reportedly motivated by sexual orientation bias, representing approximately 16.5% of all reported hate crimes that year. In 2005, the National Coalition of Anti-violence Programs (NCAVP) recorded 1,985 anti-LGBT incidents (compared to 2,272 in 2004) involving 2,306 victims (compared to 2,617 in 2004). The report published by NCAVP recorded at least eleven murders motivated by the real or perceived sexual orientation or gender identity of the victim in 2005 (as opposed to thirteen in 2004).

While these statistics are almost certainly underestimating the total number of hate crimes committed in the country, the proportion of sexual orientation hate crimes to the total

³² Amnesty International, *Crimes of Hate, Conspiracy of Silence* (2001), at 30.

³³ Amnesty International, *Stonewalled, Police abuses and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005), at 41.

³⁴ 28 USC § 534.

number of all other bias motivated crimes is still substantial. Despite this, the federal government currently lacks the corresponding authority to investigate or prosecute sexual orientation motivated hate crimes, as the U.S. Congress has failed to pass a law that would provide federal jurisdiction to investigate and prosecute the cases if local law enforcement personnel are unable or unwilling to do so. The federal government has authority to investigate and prosecute other categories of hate crimes.

The FBI web site specifically notes that it is required to collect data on hate crimes motivated by sexual orientation bias, but unlike other categories of hate crimes “the FBI does not have federal authority to investigate hate crimes motivated by sexual orientation bias.”³⁵ Moreover the Hate Crimes Statistics Act explicitly and anomalously indicates that nothing in the act “shall be construed, nor shall any funds appropriated to carry out the purpose of the Act be used, to promote or encourage homosexuality.” A bill that would have empowered the federal government to investigate and prosecute hate crimes motivated by sexual orientation bias was defeated in a contentious session of the U.S. Senate in May 2006.³⁶ As a result, protection is now left to the willingness and legal mandate of state officials.

The National Gay and Lesbian Task Force reports that only twenty-nine states and the District of Columbia have hate crimes statutes that cover real or perceived sexual orientation, and only seven of those states and the District of Columbia cover gender identity.³⁷ In the absence of federal legislation, this leaves a significant gap in the protections afforded to LGBTI Americans under articles 6 and 7 of the ICCPR. And to the extent that other categories of bias-motivated hate crimes are investigated and prosecuted by the federal government, the failure to provide similar jurisdiction for crimes motivated by a sexual orientation bias also raises serious non-discrimination concerns under the ICCPR.

Reporting and correctly identifying the cases is only the first step. All too commonly, when hate crimes cases are taken up by state or local officials, effective prosecution and subsequent punishment is jeopardized during the judicial process. In several notable criminal trials for hate crimes resulting in the death of the victim, defendants have claimed a so-called “gay panic defense.” This troubling defense is essentially one of temporary insanity, and it generally involves a male defendant claiming momentary insanity after interacting with someone he perceives to be homosexual or transgender. The defendant often claims that he was animated by fear of a perceived sexual advance. This defense has been effective in mitigating punishments in a number of hate crimes cases, and it appears most effective when jurors manifest similar levels of bias against the victim.³⁸

³⁵ <http://miami.fbi.gov/hate.htm>

³⁶ See Lou Chibbaro, “Hate Crimes Bill Dies in the Senate,” Washington Blade, May 8, 2006, available at <http://www.washingtonblade.com/2006/5-11/news/national/killbill.cfm>.

³⁷ At <http://www.thetaskforce.org/theissues/issue.cfm?issueID=12>

³⁸ See recommendation of National Coalition of Anti-violence Programs, *Anti-lesbian, gay, bisexual and transgender violence in 2005* (2006), at 12 (noting the extent to which the “gay panic defense” is considered a serious problem in criminal trials and recognizing that the California Assembly has introduced a bill to limit the use of this legal defense in criminal trials in California).

The Gender Public Advocacy Coalition's (GenderPAC) report, entitled *50 Under 30 – Race, Class, and Death by Gender*, focuses on hate murders committed against individuals who transgress gender barriers, many of whom are underage and belong to non-white communities. In these latter cases, serious concerns are raised under articles 6 and 24 of the ICCPR. For example, the GenderPAC report highlights the case of Gwen Araujo, 17, a Latina-American transgender person, who was killed in October 2002. The victim apparently joined a party with some friends, where she was sexually harassed by one of the girls, and repeatedly choked and hit on the head by some of the boys. While she was still conscious, she was kned in the head and finally strangled with a rope.³⁹

GenderPAC also reports that in June 2001, Fred Martinez, 16, who identified as female, transgender, gay, and “two-spirited” within Native American tradition, was beaten to death in Cortez, Colorado by an 18-year-old youth who then bragged to his friends about having “bug-smashed a homo.”⁴⁰

The general failure of authorities to adequately protect basic rights to life and bodily integrity in hate crimes cases also has a strong impact on the way in which domestic violence affects LGBTI individuals. Taken together, excessive intolerance, social stigma and the lack of legal recognition for most same-sex couples exposes many LGBTI Americans to unacceptably high levels of domestic abuse, including killings perpetrated by family members and occasionally even by same-sex partners. For example, the New York City Gay and Lesbian Anti-Violence Project highlights a particularly violent case in which the dismembered and mutilated body of Steen Fenrich, 19, was found in a park in Queens, New York, the apparent victim of a homophobic murder committed by his stepfather.⁴¹ In April 2003, Adam Bishop, 18, living in the Pittsburgh area, was beaten to death with a hammer by his 15-year-old brother, who then bragged about the attack while referring to his brother as a “faggot.”⁴²

Article 7 (Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment)

Worldwide, cases involving violations of article 7 of the ICCPR have been widely reported by the UN Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In a 2001 report, the Special Rapporteur posits that by failing to conform to rigid gender constructions, sexual minorities worldwide face disproportionate exposure to harassment, humiliation and rape, violations that are intended to dehumanize the victims, leaving them even more vulnerable to acts of torture and other inhumane, cruel or degrading treatment. This is certainly reflected in available evidence from the United States.

³⁹ GenderPAC, *50 Under 30 – Race, Class, and death by Gender* (2006), at 4.

⁴⁰ GenderPAC, *50 Under 30 – Race, Class, and death by Gender* (2006), at 10.

⁴¹ New York City Gay and Lesbian Anti-Violence Project, *New York Lesbian, Gay, Transgender and Bisexual Domestic Violence Report* (2005), at 5.

⁴² National Coalition of Anti-violence Programs, *LGBT domestic violence in 2003* (2004), at 6.

As noted, the failure of many states and of the federal government to add sexual orientation to the other categories of bias motivated hate crimes that trigger the provision of additional investigative and prosecutorial resources creates the impression that those crimes are less serious than other bias motivated crimes. This deficiency means that too few of the crimes are appropriately investigated or prosecuted as bias motivated incidents. This constitutes a failure to protect LGBTI Americans in violation of Article 7 of the ICCPR.

A report by the Human Rights Campaign, entitled *A Chronology of Hate Crimes: 1998-2002*, lists 651 violent incidents motivated by sexual orientation or gender identity bias that resulted either in death or bodily injury. For example, in February 2001, in Rifle, Colorado, Kyle Skylock, 16, was found unconscious on the side of a road with severe injuries on his head, face, and body. After having left a party in a car with four other teenagers, he was brought to the location at which he was later found, pulled out of the car and beaten for his perceived sexual orientation, reportedly for being a “faggot.” No criminal charge has been filed in the case.⁴³

In too many cases, police authorities who respond to such crimes may initially side with the perpetrators. For example, in March 2002 in Denver, April Mora, 17, was punched and kicked by three men who carved the words “dyke” and “R.I.P.” into her flesh. During the investigation, the police asked the victim whether the wounds were self-inflicted and asked her to take a polygraph test to prove her story.⁴⁴ Such hostility from officials investigating and prosecuting hate crimes based on sexual orientation, gender identity or gender expression is common. Amnesty International has a detailed report of a particularly troubling case in which a Cincinnati gay man, 26, was himself arrested even though he was actually the victim of a homophobic crime.⁴⁵

Amnesty International’s *Stonewalled* report also investigates and denounces sexual, physical and verbal abuses committed against LGBTI persons in detention. Abuses carried out under these circumstances constitute intersecting violations of ICCPR provisions. Torture and inhuman or degrading treatment committed by police or other custodial agents violate respectively the rights to liberty and security of the person under article 9 and the right of persons deprived of their liberty to be treated with humanity and dignity under article 10.

Within this context, it is important to note that the U.N. Special Rapporteur on the Question of Torture has raised serious concerns over numerous cases involving sexual violence in detention facilities in the United States. The U.S. Government has responded to those concerns, and the responses themselves provide an overview of the steps the federal government is taking to address patterns of sexual abuse committed with the participation, consent or acquiescence of prison officials in a wide variety of detention

⁴³ Human Rights Campaign, *A Chronology of Hate Crimes: 1998-2002* (2003), at 27.

⁴⁴ Human Rights Campaign, *A Chronology of Hate Crimes: 1998-2002* (2003), at 49.

⁴⁵ Amnesty International, *Stonewalled, Police abuses and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005), at 78.

facilities.⁴⁶ Still, reports by rights groups in the United States suggest the official responses remain insufficient. Specific cases are instructive.

In one of the cases detailed by the Special Rapporteur on the Question of Torture, Frederick Mason, 31, filed a lawsuit against the Chicago Police Department for having been called “faggot ass nigger” and sodomized by two agents in July 2000. The City of Chicago denied the charges, while the two police agents counter-sued Mr. Manson on the grounds of malicious prosecution. The Department of Justice’s Criminal Section closed the file, claiming the matter lacked prosecutorial merit under federal criminal civil rights statutes. As also reported by the Special Rapporteur, Kentin Waits filed a lawsuit against the Chicago Police Department for having been physically and verbally harassed with anti-gay slurs for 22 hours under arrest. He was awarded limited punitive and compensatory damages in the case.

According to Amnesty International, in October 2003 in Los Angeles, a Native American transgender woman was arrested by two officers on the charge of prostitution, although she told the officers she was only taking a walk. She was handcuffed, hit in the face, insulted with words like “you fucking whore, you fucking faggot,” and raped. The paramedics she contacted after the sexual assault refused to believe her story.⁴⁷

Sexual assaults are also common within the context of invasive and painful bodily searches, especially against transgender women. This issue has been extensively reported by Amnesty International. For example, in 2001 in Montgomery, Alabama, a lesbian identified, white transgender woman was forced to strip naked, dance, and show her penis during a police arrest. She was then subjected to an invasive search of her body cavities, which according to the victim was particularly painful. She was not allowed to see a doctor and was only allowed to shower in the presence of a male guard.⁴⁸

Article 9 (Right to Liberty and Security of Person)

As already detailed, violations of article 9 have been widely reported in the United States, most often when police or custodial officers fail to protect LGBTI persons or deliberately place them in harm’s way. Amnesty International has also denounced cases of “police profiling,” which is explained in the *Stonewalled* report as police reliance on an individual’s deviance from stereotypical gender norms as a ground for suspicion or police targeting.⁴⁹ Selective and discriminatory enforcement of laws and ordinances may also constitute forms of persecution against LGBTI individuals in extreme cases. This practice

⁴⁶ E/CN.4/2005/62/Add. 1, at paras 1864-1869 (March 30, 2005).

⁴⁷ Amnesty International, *Stonewalled, Police abuses and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005), at 40.

⁴⁸ Amnesty International, *Stonewalled, Police abuses and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005), at 41.

⁴⁹ Amnesty International, *Stonewalled, Police abuses and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005), at 13.

is reported most often with respect to police harassment of transgender women, with many reports coming from Chicago, New York and Los Angeles. In many of the cases, the police automatically assume that transgender persons are engaged in prostitution and they may often use trivial excuses to arrest them on prostitution related grounds. In some reported cases from the Transgender Law Center, the possession of more than one condom has been used improperly as evidence to justify the arrest of transgender persons for prostitution. Also, the National Center for Lesbian Rights and the Transgender Law Center have documented cases of sexual touching by police in order to “establish the true gender” of a person, as well as attempts to “shame” transgender women by calling them by their prior names.⁵⁰

Amnesty International reports, for example, that an African-American, transgender woman was stopped by a white male police officer in New York City while she was leaving a meeting at the Gay and Lesbian Center and was automatically searched for evidence of prostitution.⁵¹ Similarly in Chicago in February 2004, three gay men who met at a taco stand were stopped, insulted and threatened with prostitution arrests.⁵²

Numerous allegations suggest that police officers also harass transgender individuals on the basis of their gender identity when using public toilets. In one notable case, Dean Spade, a well known transgender lawyer and founder of the Sylvia Rivera Law Project, was arrested in 2002 at Grand Central Station in New York City, together with two friends, for having used the men’s room. The charges were dropped as there was no legal basis for their arrests.⁵³ Many similar cases are regularly reported in New York and elsewhere.

Article 10 (Treatment of Individuals Deprived of their Liberty)

Numerous abuses against LGBTI individuals in detention have been reported by rights organizations. In many of those cases, the abuses are committed by prison or other custodial officers, as already described above with reference to other provisions of the ICCPR. In other cases, guards either fail to prevent abuses by other inmates or place LGBTI detainees in particularly unsafe locations where they are likely to be attacked by other inmates.

In testimony before the National Prison Rape Elimination Commission in August 2005, the National Center for Lesbian Rights denounced the frequency with which lesbian, gay and bisexual prisoners are at risk of torture, sexual assaults, rape and ill treatment. For

⁵⁰ National Center for Lesbian Rights, Transgender Law Center, *Trans Realities* (2003) at <http://www.nclrights.org/publications/transrealities0803.htm>

⁵¹ Amnesty International, *Stonewalled, Police abuses and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005), at 16-17.

⁵² Amnesty International, *Stonewalled, Police abuses and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005), at 16-17.

⁵³ Amnesty International, *Stonewalled, Police abuses and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005), at 20; Sylvia Rivera Law Project, at <http://www.srlp.org/index.php?sec=03C&page=genderseg>

some gay male prisoners, sexual submission or prison prostitution are a means of securing protection from even more violent inmates. In other cases guards allow attacks on gay prisoners, often just by “outing” them to other inmates. In additional testimony delivered at that same hearing before the National Prison Rape Elimination Commission, the National Center for Lesbian Rights also described the case of a young gay man they represent who was placed in a sex offender unit of a state juvenile correctional facility for being gay, even though he had never been accused of a sex offense. Under those circumstances, he experienced three-and-a-half years of sexual and physical abuse. Each time he attempted to defend himself, he was placed in solitary confinement.⁵⁴

In written testimony to the National Prison Rape Elimination Commission, the Sylvia Rivera Law Project also denounced the case of a low-income, transgender woman who was placed in a men’s county jail, as almost all transgender women are, and subjected to extreme forms of verbalized sexual harassment and threats from other inmates. She was then inexplicably placed in a cell with a sex offender, where she was raped repeatedly while correction officers ignored her requests for help.⁵⁵

In the report *Family, Unvalued*, Human Rights Watch and Immigration Equality point to a similarly severe case involving a post-operative transsexual woman from the Bahamas who was detained in a New York City Immigration Detention Center in 2003. While facing deportation for not being legally married, she was searched by male guards, insulted because of her gender identity and placed in detention with male inmates for two weeks, where she was constantly harassed. After complaining and being moved to Bergen County Jail, she was first put into a cell with another male detainee and then moved to solitary confinement, where the majority of those detained were sexual offenders.⁵⁶

Article 13 (Expulsion of Aliens)

The U.N. Office of the High Commissioner for Refugees has repeatedly emphasized that persecution based on sexual orientation and gender identity should be considered as grounds for refugee status under the 1951 Convention Relating to the Status of Refugees. Moreover, the application of the principle of *non-refoulement* prevents the United States from deporting individuals to countries where they could be subjected to torture as a result of their sexual orientation, gender identity or gender expression.

While the case law remains uneven, the United States generally recognizes asylum claims based on past persecution or likely future persecution as a result of an individual’s sexual

⁵⁴ National Center for Lesbian Rights, Testimonies submitted to the National Prison Rape Elimination Commission on August 15th 2005, available at http://www.nclrights.org/releases/prison_testimony_081905.htm.

⁵⁵ Sylvia Rivera Law Project, *Testimony of Z Arkles* (2005), at <http://www.srlp.org/index.php?sec=03N&page=criminaljust>

⁵⁶ Human Rights Watch & Immigration Equality, *Family, Unvalued* (2006), at 85-86.

orientation or gender identity.⁵⁷ Nonetheless, U.S. immigration advocates note the difficulty of proving such claims, and the insensitivity of some immigration officials to sexuality-based cases. Oddly enough, there is also an emerging trend that suggests some immigration officials are arbitrarily denying asylum claims of those who do not subjectively appear “gay enough,” or who are perceived as being able to “pass” for heterosexual in the communities they are fleeing.⁵⁸

Asylum applicants must also now seek protection within one year of arriving in the United States, unless they can prove exceptional circumstances and explain why they could not apply within that one-year time limit. This short timeline for filing asylum claims can be particularly burdensome for LGBTI asylum applicants who may find it difficult to overcome their fears of persecution, even in their new surroundings, or to reconcile the extreme persecution they faced in their home communities with the possibility of a more “open” sexual orientation or identity in the United States. Nonetheless, they must make that psychological transition and affirmatively claim specific, identity-based protection as an LGBTI asylum seeker within one year of their arrival. *Non-refoulement* protections may be claimed at any time, but both the administrative process and the burden of proof are more difficult outside of the affirmative asylum procedure that must generally be initiated within the first year. As a result of these new expedited immigration procedures, there is substantial fear that the United States may be expelling LGBTI aliens in violation of articles 7 and 13.

Article 17 (Freedom from Arbitrary Interference with Privacy, Family, Home)

As already noted, in the case of *Toonen v. Australia* the Human Rights Committee recognized that adult consensual sexual relationships are covered by the notion of privacy under article 17. In 2003, the U.S. Supreme Court, in *Lawrence v. Texas*,⁵⁹ outlawed the sodomy statutes still in force in many states. However, police authorities and prosecutors have in many circumstances selectively made use of other criminal provisions involving morals offenses to target LGBTI individuals.

The use of undercover police officers to enforce morals regulations, including statutes prohibiting lewd conduct, public obscenity and public indecency, especially against gay men, raises concerns under Articles 2, 9, 17 and 26 of the ICCPR. The *Stonewalled* report by Amnesty International considers the selective use of entrapment schemes to target LGBTI individuals. In November 2004, for example, Alejandro Martinez was arrested for public lewdness in a public restroom at the New York Port Authority for having allegedly responded to an undercover officer who approached him. According to his account of the incident, Martinez repeatedly ignored the undercover officer’s

⁵⁷ Such cases have been fully recognized since June 1994, when the *Toboso-Alfonso* case, 20 I&N Dec. 819 (BIA 1990), was adopted as precedent for all future cases.

⁵⁸ See Punishing Masculinity in Gay Asylum Claims, 114 Yale L.J. 913 (2005).

⁵⁹ 539 U.S. 558 (2003).

advances. The charges were ultimately dismissed and Martinez was awarded compensation.⁶⁰

Solicitation laws are also used selectively to circumvent the decision in *Lawrence* by revitalizing sodomy statutes when same-sex conduct is solicited or committed in public places, such as public toilets.⁶¹ Although *Lawrence* did not strike down statutes relating to public sexual activity, selective prosecutions for these morals offenses could intrude on privacy guarantees and limit the impact of the decision. In a 2005 Virginia case, the Court of Appeals of Virginia upheld a conviction for merely soliciting oral sodomy.⁶² These cases raise serious concerns under Article 17 of the ICCPR and the protection it affords for consensual adult sexual activity.

Other discriminatory criminal provisions seemed to have survived after the *Lawrence* decision. It was not until 2005, for example, that the Supreme Court of Kansas overturned a discriminatory provision in the state's so-called "Romeo and Juliet" statute.⁶³ That law mitigates sanctions for statutory rape charges if the offender is less than 19 years old or less than four years older than the victim, but it only originally applied if the victim and the offender were of the opposite sex. Similar discriminatory provisions apply in other juvenile justice contexts.

With only a few exceptions, state legislation generally prevents transgender individuals from changing their sex unless they have undergone surgery for genital reattribution. In some cases, pre-operative transgender individuals are even prevented from legally changing their names. This places unreasonable burdens on the transgender person, encouraging discriminatory behaviors, especially at the workplace, and intrusion into the person's private life both by state and non-state actors.

The Sylvia Rivera Law Project has been documenting cases of transgender applicants requesting name changes. In one case, where the applicant's request to change first and last names was rejected, a judge of the Civil Court of the City of New York found that there was no legal basis for the court to "appoint themselves the guardians of orthodoxy" with reference to the social tradition of names.⁶⁴

As reported by Amnesty International, the differences between personal appearance, legal name and identified sex of many transgender persons is in many circumstances a cause for abuse by police officers during identification procedures. Often the officers use the birth name or its related pronoun, even if it does not correspond to the gender identity of the person. As a common example, a Latina transgender woman was reportedly arrested

⁶⁰ Amnesty International, *Stonewalled, Police abuses and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005), at 25.

⁶¹ See opening brief on appeal filed in the Court of Appeals in Virginia submitted by Lambda Legal at <http://www.lambdalegal.org/cgi-bin/iowa/cases/brief.html?record=1755>

⁶² *Singson v. Virginia*, 46 Va. App. 724; 621 S.E.2d 682 (2005).

⁶³ *Kansas v. Limon*, 280 Kan. 275; 122 P.3d 22 (2005).

⁶⁴ Civil Court of the City of New York, County of New York, In the Matter of the application of Frank Joseph Guido, Jr., decision of October 24, 2003; see also the Petitioner's memorandum of law in support of Petition for individual adult change of name drafted by Dean Spade, Esq., Sylvia Rivera Law Project.

in Los Angeles for providing false information when, during a police identification procedure, she identified herself as a woman. The charges in that case were later dropped.⁶⁵

Article 19 (Freedom of Expression)

Violations of the right to freedom of expression related to LGBTI persons have often been reported by the U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. Restrictions and abuses directed against individuals based on their gender expression or related to the expression of their sexual orientation have also been widely reported.

The “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” policy in the United States is part of a 1993 law banning homosexuals from serving openly in the U.S. military. The law fully authorizes the discharge of servicemembers who publicly declare their sexual orientation. As such, it is a discriminatory limitation on freedom of expression that was originally intended to loosen the prohibitions against homosexuals serving in the military by allowing individuals to serve as long as they did not disclose their sexuality. Hundreds of Americans are discharged every year under this policy.

In May 2006, the Servicemembers Legal Defense Network (SLDN), a non-profit organization dedicated to ending discrimination and harassment of military personnel based on their sexual orientation, released data showing that the armed forces continued to discharge two lesbian, gay and bisexual military personnel per day in 2005. That discharge rate has been relatively constant in recent years. A total of 742 military personnel were discharged under the “Don’t Ask, Don’t Tell” ban on openly gay service members in 2005, which is an increase from 668 discharges in 2004.⁶⁶

Article 22 (Freedom of Association)

The U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has addressed many cases of violation of the right to freedom of association. The Special Representative of the Secretary-General on Human Rights Defenders has also considered the same issue from another perspective, focusing on how advocates for LGBTI rights are threatened and targeted for violence in several areas of the world.

Surprisingly, in its periodic report the U.S. Government offers as examples of its protection of the right to “expressive association” two controversial cases from the U.S.

⁶⁵ Amnesty International, *Stonewalled, Police abuses and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005), at 18-19.

⁶⁶ Servicemembers Legal Defense Network, Press Release of May 24, 2006, available at: <http://www.sldn.org/templates/press/record.html?record=2979>.

Supreme Court in *Boy Scouts of America v. Dale*,⁶⁷ and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.⁶⁸ In both cases the Court was required to balance freedom of expressive association, which protects the right of individuals to associate freely with those expressing similar political, social or cultural views, with prohibitions against discrimination based on sexual orientation as established by laws in New Jersey and Massachusetts.

The general position of the Supreme Court in freedom of association cases is that the forced inclusion of an unwanted person in a group can infringe on that group's right to define its own membership and express its private viewpoint. As a result, the majority ruled that the Boy Scouts of America could revoke the membership of an openly homosexual scoutmaster and prevent him from participating in the organization. This was a closely divided and emotionally charged decision. As the dissenting opinion in *Dale* recognized, the U.S. Supreme Court had never before found that the right to association in the selection of group members prevailed over state antidiscrimination laws.⁶⁹ For that very reason, this decision raises serious non-discrimination concerns, and it is particularly unfortunate that the U.S. Government's periodic report cites to it in such a positive context without discussing its impact on LGBTI Americans.

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, private organizers of the St Patrick's Day parade in Boston sought to exclude an organization representing lesbian, gay and bisexual descendants of Irish immigrants from participating in the 1992 and 1993 parades. A Massachusetts trial court and the Supreme Judicial Court of Massachusetts both found the parade was a recreational event that was subject to a Massachusetts state law that prohibits discrimination based on sexual orientation in public accommodation. In a unanimous decision, the U.S. Supreme Court reversed the Massachusetts courts under the freedom of speech provisions of the First Amendment of the U.S. Constitution, noting that the gay Irish organization never argued that the organizers of the parade were acting under color of state authority, and that the gay organization could have sought its own parade permit. The Court found that disapproval of a private speaker's views did not provide sufficient justification for a state to demand a more tolerant message.⁷⁰ While not unexpected, the decision raises concerns about the reach of non-discrimination provisions in the United States.

These two decisions of the U.S. Supreme Court reach beyond the right of expressive association and seem to justify private discrimination of LGBTI groups and individuals. Nonetheless, this is a complicated area of U.S. law, and the U.S. Government's periodic report goes on to recognize that in the case of *University of Wisconsin v. Southworth*,⁷¹ the Supreme Court decided that state educational institutions can use mandatory fees to fund organizations whose positions are opposed by particular students provided the

⁶⁷ 530 U.S. 640 (2000).

⁶⁸ 515 U.S. 557 (1995).

⁶⁹ *Dale*, 530 U.S. 640, 679 (dissenting opinion of Justices Stevens, Souter, Ginsburg and Breyer).

⁷⁰ *Hurley*, 515 U.S. 557, 581.

⁷¹ 529 U.S. 217 (2000).

financial allocations are decided through a viewpoint-neutral process. This decision has positive implications for LGBTI student groups on public university campuses.

Amnesty International has also documented more common police raids on LGBTI clubs, gatherings and demonstrations.⁷² For example, in March 2003, in New York City, a group of LGBTI activists protesting their own exclusion from the St. Patrick's Day parade was reportedly abused both physically and verbally by police, while one lesbian activist was beaten, handcuffed and dragged head first from a police vehicle.⁷³

The failure of the government to protect association rights in local schools is also detailed in a 2001 report by Human Rights Watch, entitled *Hatred in the Hallways*.⁷⁴ In many schools, after-school clubs are forming to provide support for LGBTI students and to circulate information on sexual orientation and gender identity within the larger student community. These groups are generally known as "gay-straight alliances." Despite the importance of these clubs both for LGBTI students and for building more tolerant educational institutions, local school administrators have often tried to suppress them. Attempts to ban these associations are sometimes successful, while in other cases school administrators have gone so far as to ban all after-school associations to avoid recognition of a single LGBTI focused group. In other cases, courts have stepped in to protect gay-straight alliances. In Salt Lake City, for example, a judge ruled that the specific prohibition of gay-straight clubs in public secondary schools in the Salt Lake City School District violated federal laws demanding that schools receiving federal funds grant equal access to all non-curricular clubs or associations.⁷⁵

Article 23 (Family Life)

Although the Human Rights Committee in *Joslin v. New Zealand*⁷⁶ found that the refusal of a state to open marriage to same-sex couples did not constitute a violation of the scope of article 23 of the ICCPR, Committee members Lallah and Scheinin argued that the denial to same-sex couples of benefits available to married couples could ground certain discrimination claims under article 26 of the ICCPR. Later, in *Young v. Australia*⁷⁷, the Human Rights Committee found that the lack of recognition of same-sex couples for specific pension benefits, when the government recognized those same benefits for unmarried heterosexual couples, violated article 26 of the ICCPR and that the distinction constituted an impermissible form of discrimination on the grounds of sexual orientation. Within this context, the *Young* decision by the Human Rights Committee also suggests a

⁷² Amnesty International, *Stonewalled, Police abuses and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005), at 30.

⁷³ Amnesty International, *Stonewalled, Police abuses and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005), at 31.

⁷⁴ Human Rights Watch, *Hatred in the Hallways* (2001).

⁷⁵ *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District*, 81 F. Supp. 2d 1166, 1197 (D. Utah 1999).

⁷⁶ Communication No. 902/1999.

⁷⁷ Communication No. 941/2000.

definition of family or of a couple that could have implications for the protection of family life under article 23 of the ICCPR.

Notwithstanding the decision in *Joslin*, the proposed amendment to the Constitution of the United States to ban same-sex marriage, which has been reintroduced in the U.S. Senate, along with analogous initiatives that have been proposed and passed at the state level in a variety of states, could have a broad and significantly detrimental impact on LGBTI Americans. The periodic report mentions the complexities of the marriage debate, but it fails to consider the debate's acrimonious tone, its discriminatory underpinnings or the potential consequences on the lives of ordinary LGBTI Americans following such a politicized national dialogue. When debate opened on the Constitutional amendment in the U.S. Senate in June 2006, Democratic leader Harry Reid noted that "the reason for this debate is to divide our society, to pit one against another."⁷⁸

According to a 2006 report by NCAVP,⁷⁹ the highly charged political debate over marriage amendments is impacting LGBTI Americans across the country, with potentially harmful consequences including increased violence, discrimination and exclusion of individuals based on their gender expression, gender identity or sexual orientation. The federal debate also appears to be fueling extreme state-level initiatives to ban marriage and a variety of other legal protections for LGBTI Americans and their families.⁸⁰

According to studies carried out by the National Gay and Lesbian Task Force (NGLTF) and by the General Accounting Office (GAO), marital status provides eligibility for approximately 1,138 federal protections, rights and benefits under at least 1,049 different federal laws.⁸¹ The lack of federal recognition for same-sex couples denies those couples equal treatment under Social Security policies, federal tax laws, immigration laws and for all other major government benefits.⁸²

Some states have provided legal recognition of same-sex unions in different forms, from domestic partnerships to full same-sex marriage. So far, however, only the Supreme Court of Massachusetts in *Goodridge v. Department of Public Health* has recognized that a state's denial of marriage licenses to same-sex couples creates equal protection and due process concerns under state constitutional provisions. And even same-sex couples married in Massachusetts are denied any of the federal benefits of marriage as a result of

⁷⁸ "Senators Debate Gay Marriage Ban," June 6, 2006, *The Washington Post*, at A3.

⁷⁹ National Coalition of Anti-violence Programs, *Anti-lesbian, gay, bisexual and transgender violence in 2005* (2006), at 17.

⁸⁰ In February 2006, the U.S. Court of Appeals for the Eighth Circuit heard arguments in a case challenging an extreme antigay family law in Nebraska that bans all protections for the relationships of same-sex couples. *Citizens for Equal Protection, Inc., et al v. Attorney General Jon Bruning, et al*, filed in the U.S. Court of Appeals for the 8th Circuit, case number 05-2604. Legal documents are available at www.aclu.org/caseprofiles and www.lambdalegal.org.

⁸¹ United States General Accounting Office, GAO/OGC-97-16, January 13, 1997; see also the National Gay and Lesbian Task Force discussion at <http://www.thetaskforce.org/theissues/issue.cfm?issueID=14>.

⁸² National Gay and Lesbian Task Force, *Economic Benefits of Marriage under Federal and Oregon Law* (2004), at 4.

the 1996 federal “Defense of Marriage Act” (DOMA).⁸³ The existence of DOMA makes the Senate’s current debate over a constitutional amendment altogether unnecessary, as the federal government is statutorily prohibited from recognizing same-sex marriages performed in Massachusetts or in any other jurisdiction.

The denial of federal benefits to same-sex couples in the United States raises serious concerns under articles 23 and 26 of the ICCPR, insofar as the lack of legal recognition prevents same-sex couples from claiming major benefits or services from the government. Appropriate legal recognition need not be in the form of marriage, assuming the same benefits are provided under some other legal status. But the restrictive definition here of the legal notion of family by the U.S. Government leads to differences in treatment that contradict the principles of non-discrimination and family life under the Covenant.

According to the National Gay and Lesbian Task Force (NGLTF), the difference in treatment afforded to wedded couples under federal law is often particularly substantial. For example, the difference in income tax liability between a same-sex couple and a couple that is able to legally marry, where both couples have a combined income of about \$50,000, was almost \$2,000 per year back in 2004, meaning the same-sex couple’s tax liability was almost 25% higher than the heterosexual couple.⁸⁴ Similarly, if same-sex couples were allowed to marry, their social security benefits would be higher, and they would be entitled to Social Security survivor benefit and workers’ compensation benefits which they are currently denied.⁸⁵ Under the analysis provided by the Human Rights Committee in *Young*, the burden posed by such differential treatment under the country’s national pension plan and through the denial of other retirement benefits is difficult to justify.

As extensively described by Human Rights Watch and Immigration Equality, the refusal of the federal government to recognize same-sex couples also has a burdensome implication on family life under U.S. immigration laws, especially with reference to binational couples. The U.S. immigration system is based on a notion of “family reunification,” but same-sex couples are prevented from lawfully living together in the United States.⁸⁶

Quoting Human Rights Watch’s and Immigration Equality’s report *Family, Unvalued* “[i]nternational law recognizes the rights of nations to define their immigration policies. It is nonetheless inconsistent with human rights principles for a state to frame its immigration policies in a way that denies human rights on a basis of proscribed discrimination. When a government allows such discrimination to destroy its own citizens’ right to a family life, separating partners at national borders on account of their

⁸³ Pub. L. No. 104-199, 100 Stat. 2419 (Sept. 21, 1996), 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

⁸⁴ National Gay and Lesbian Task Force, *Economic Benefits of Marriage under Federal and Oregon Law* (2004), at 5.

⁸⁵ National Gay and Lesbian Task Force, *Economic Benefits of Marriage under Federal and Oregon Law* (2004), at 4-11; National Lesbian and Gay Task Force, *Economic Benefits of Marriage under Federal and Connecticut Law* (2005).

⁸⁶ Human Rights Watch & Immigration Equality, *Family, Unvalued* (2006), at 35.

sexual orientation and HIV status, it strikes intolerably at the idea of equality.”⁸⁷ Such inequality affects all aspects of the lives and livelihoods of same-sex couples in the United States. Similarly, the restrictive notion of family under U.S. immigration law, which excludes same-sex couples, sends a “devastating message to them about their dignity and worth,” as well as “about U.S. society, and what it wants to become.”⁸⁸

Decisions of the Human Rights Committee have long recognized that immigration deportations may interfere with family life. As such, the lack of recognition and potential deportation from the United States of binational couples is alarming. The situation is particularly troubling when same-sex spouses are wedded to U.S. citizens or U.S. residents through legal marriages or other same-sex legal procedures performed in other countries. Such deportations may constitute violations of article 23,⁸⁹ as well as potential violations of article 13 of the ICCPR. For example, Human Rights Watch and Immigration Equality raise a case of deportation of a British citizen while visiting her American same-sex partner in the United States. Although the couple was living in the United Kingdom at the time and the British partner had never stayed illegally in the United States, she was refused entry to the United States by the Department of Homeland Security, which then launched an investigation into their relationship.⁹⁰

The current federal provision that already defines marriage as the union of a man and a woman (the “Defense of Marriage Act”), as well as the proposed federal and already existing state constitutional amendments that seek to ban same-sex marriage, also frustrate state-level efforts to prevent domestic violence between partners of the same sex. According to the New York City Gay and Lesbian Anti-Violence Project (AVP), bias against same-sex relationships limits domestic violence prevention programs, as well as investigations and prosecutions of same-sex domestic violence cases. And efforts to restrict access to the family court system often mean that same-sex couples are denied important protections, including legal mechanisms and mediation services that otherwise regulate normal family related disputes. Such alienation from the law can escalate tensions in particularly difficult cases, at times even increasing the likelihood of violent outbursts and economically one-sided settlements.⁹¹

The NCAVP report points to the story of an Ohio woman, 36, who together with her partner of three years and her 16-month-old daughter moved in with the partner’s mother. The partner’s mother was verbally abusive and bruises and welts soon appeared on the child’s body. When the woman tried to flee with her daughter, she was unable to obtain any assistance from the local domestic violence shelter because of the same-sex nature of her relationship with her partner.⁹²

⁸⁷ Human Rights Watch & Immigration Equality, *Family, Unvalued* (2006), at 129-130

⁸⁸ Human Rights Watch & Immigration Equality, *Family, Unvalued* (2006), at 138.

⁸⁹ L. Ayoub, S. Wong, *Separated and Unequal*, 32 William Mitchell Law Review 559 (2006), at 587.

⁹⁰ Human Rights Watch & Immigration Equality, *Family, Unvalued* (2006), at 67-69.

⁹¹ New York City Gay and Lesbian Anti-Violence Project, *New York Lesbian, Gay, Transgender and Bisexual Domestic Violence Report* (2005), at 4 and 7.

⁹² National Coalition of Anti-violence Programs, *LGBT domestic violence in 2003* (2004), at 23.

According to Amnesty International, the poor response of police authorities in domestic violence cases involving two partners of the same sex is often alarming. For example, in 2002, in Washington D.C., a transgender woman who was choked by her male partner was later arrested and charged with assaulting her abuser.⁹³

The uncertainty of the legal status of transgender individuals under state law also has a significant impact on their family life. As Shannon Minter of the National Center for Lesbian Rights explains, in those states that do not legally recognize sex reassignment, paradoxically de facto same-sex unions between a post-operative transsexual and a spouse (the opposite-sex partner at the time of the celebration of the marriage) are legal, while opposite-sex marriage between a transsexual and a partner of the opposite sex may be invalidated. The state's ambivalence in recognizing the legal effects of marriages involving transsexual individuals may also constitute a serious violation of article 23 of the ICCPR.⁹⁴ For example, Minter highlights a 1999 case in which a Texas court invalidated a seven-year marriage between Christine Littleton, a transgender woman, and her deceased husband, and refused to recognize damage compensation awarded for her husband's death in a medical malpractice case.⁹⁵

Article 24 (Special Protection of Children)

Discrimination, abuse and misconduct against LGBTI youth raise additional cross-cutting issues that may be linked to multiple violations of the provisions of the ICCPR. LGBTI teenagers are particularly vulnerable to hate crimes, as highlighted in the Gender Public Advocacy Coalition's (Gender PAC) report *50 Under 30 – Race, Class, and death by Gender*. And the government's failure to guarantee adequate protections for LGBTI youth in school, foster care and juvenile detention also raises serious concern.

LGBTI teenagers are particularly vulnerable to domestic violence. According to a 2004 report by NCAVP, domestic violence has increased significantly in recent years for the lower age groups tracked by the organization's statistics. And within that group, teenagers are particularly vulnerable to physical and verbal violence when they disclose their sexual orientation or gender identity to their families. As indicated by the National Center for Lesbian Rights and the Transgender Law Center, domestic violence is extremely common against children who begin to express a gender that is different from the one assigned at birth, and parents sometimes subject their children to harmful "mental health" practices in such cases.⁹⁶

⁹³ Amnesty International, *Stonewalled, Police abuses and misconduct against lesbian, gay, bisexual and transgender people in the U.S.* (2005), at 84.

⁹⁴ This is also explained in National Center for Lesbian Rights, Transgender Law Center, *Trans Realities* (2003) at <http://www.nclrights.org/publications/transrealities0803.htm>

⁹⁵ S. Minter, *Transgender people and Marriage: the Importance of Legal Planning* (2002), at <http://www.nclrights.org/publications/tgmarriage.htm>

⁹⁶ National Center for Lesbian Rights, Transgender Law Center, *Trans Realities* (2003) at <http://www.nclrights.org/publications/transrealities0803.htm>

Physical, verbal and sexual abuse against underage LGBTI individuals is also common within juvenile correctional facilities. Testimony by the National Center for Lesbian Rights before the National Prison Rape Elimination Commission raised the case of a 17-year-old gay boy in a Louisiana facility who was regularly forced to have sex with ten other juvenile inmates. He was forcibly raped at least four times, and the staff of the facility constantly refused his requests to be placed in protective custody.⁹⁷ According to testimony, staff at the facility assumed that because the youth was gay, he desired sexual activity and so refused to intervene even when requested to do so. When staff in juvenile facilities do intervene in sexual violence cases, at-risk LGBTI youth are often placed in extended isolation for their own protection.⁹⁸

The problem of harassment and violence against LGBT teenagers is particularly commonplace in schools. According to a 2005 report of the Gay, Lesbian and Straight Education Network, 33% of teens reported that students in their schools were harassed because of their real or perceived sexual orientation, while 52% of all students overheard other students making homophobic remarks.⁹⁹ LGBT students are three times as likely as other students to feel unsafe at school, and 90% of LGBT students report having been verbally or physically abused at school.¹⁰⁰

Human Rights Watch also documented abuses in schools in its 2001 report *Hatred in the Hallways*. That report highlights a 1996 case brought by a Wisconsin student who was verbally and physically assaulted from middle-school onward. The details of the case are shocking. The student was sexually humiliated, beaten and urinated on, and he sustained internal injuries on at least one occasion. He attempted suicide twice. The school district was ultimately held responsible for the abuse, since the school principal failed to intervene even though she was aware of the violence. While the details of that case were especially alarming, the patterns of abuse in the case are not unusual.

Lesbian teenagers are particular targets of sexual harassment. A 2002 report by the National Gay and Lesbian Task Force (NGLTF) provides accounts of eight “gang rape” incidents involving eleven students, some as young as sixth grade. In one case, a lesbian teenager who had been harassed for a sustained period of time was severely beaten and raped by a group of students who wanted to teach her to “stay away from their girls.”¹⁰¹

The National Coalition of Anti-Violence Programs details the case of a 13-year-old boy with developmental disabilities who was verbally and physically harassed in a small

⁹⁷ National Center for Lesbian Rights, Testimonies submitted to the National Prison Rape Elimination Commission on August 15, 2005.

⁹⁸ R. Estrada, J. Marksamer, *Lesbian, Gay, Bisexual and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice System Safe for all Youth through Litigation, Advocacy and Education*, forthcoming on Temple Law Review, Summer 2006.

⁹⁹ Gay, Lesbian and Straight Education Network, *From Teasing to Torment: School Climate in America* (2005), at 7.

¹⁰⁰ Gay, Lesbian and Straight Education Network, *From Teasing to Torment: School Climate in America* (2005), at 7.

¹⁰¹ National Gay and Lesbian Task Force, *Family Policy – Issues affecting Gay, Lesbian, Bisexual and Transgender Families* (2002), at 107.

Catholic middle-school because of his perceived sexual orientation. Despite his mother's reports, the principal did not intervene in the case.¹⁰² The lack of intervention by teachers and administrators in school violence cases involving LGBTI youth was also widely reported by Human Rights Watch in its 2001 report on the subject.

According to another study by the Human Rights Campaign, children are also discriminated against and face unique economic challenges because of the failure of the government to recognize same-sex relationships involving their parents, or their same-sex de facto step-parents. If a parental figure is unable to establish a legal relationship, the child may not be entitled to health insurance or to social security survivor benefits. Same-sex parenting is becoming more common, so these legal prohibitions are also becoming increasingly harmful to the special protection of children.

According to the Williams Institute at UCLA Law School, up to forty percent of same-sex couples aged 22 to 55 are raising children, and about 5 percent of those children are adopted. Unfortunately same-sex parents face a wide variety of legal obstacles, including a state-level ban on gay adoptions in Florida and significant obstacles to the recognition of same-sex adoptions in many other states. In *Lofton v. Secretary of Department of Children and Family Services*, the U.S. Eleventh Circuit Court of Appeals upheld Florida's adoption ban in a 2004 case, finding the ban "rationally related to Florida's interest in furthering the best interests of adopted children by placing them in families with married mothers and fathers."¹⁰³ Some states even prohibit LGBTI Americans from serving as foster parents.

In addition, LGBTI employees must often pay from their own salary to receive domestic benefits for their same-sex partners or their partners' children, while married heterosexual employees in the same situation are more often exempt from such payments.¹⁰⁴ Even when health and other benefits for same-sex partners and their children are provided by employers, that support is treated as a taxable benefit to the employee. The Human Rights Campaign notes that similar benefits are not taxed by the federal government when provided to married heterosexual couples.¹⁰⁵

¹⁰² National Coalition of Anti-violence Programs, *Anti-lesbian, gay, bisexual and transgender violence in 2002* (2003), at 19.

¹⁰³ *Lofton v. Secretary of Department of Children and Family Services*, F.3d 804 (11th Cir. 2004), rehearing *en banc* denied, 377 F.3d 1275 (11th Cir. 2004), petition for cert. to the U.S. Supreme Court denied, 125 S. Ct. 869 (2005); see also Nancy Marcus, *Beyond Romer and Lawrence: the right to privacy comes out of the closet*, 15 Columbia Journal of Gender and Law 355, June 22, 2006.

¹⁰⁴ Human Rights Campaign, *The Cost of Marriage Inequality to Children and their Same-sex Parents* (2004), at 9-11.

¹⁰⁵ www.hrc.org/Template.cfm?Section=Homeownership1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=18619.

Concluding Observations

- While the U.S. Supreme Court has now invalidated the country's sodomy statutes and recognized a right to sexual privacy, the country's criminal justice system has not yet fully embraced the contours of that decision. Police authorities and public prosecutors must not turn to selective criminal prosecutions for morals offenses to limit protections for consensual adult sexual activity that are now recognized in the United States.
- Standardized non-discrimination protections based on sexual orientation, gender identity and gender expression should be passed into law at the federal level, especially in the area of employment non-discrimination.
- While passage of federal anti-discrimination legislation covering sexual orientation, gender identity and gender expression in the workplace remains a priority, as an immediate interim measure, the federal government should begin to record workplace complaints involving such discrimination. The effort will help establish better statistical data on employment discrimination and may lead to more effective protection and legislation in the workplace.
- Non-discrimination protections that exist for federal employees and federal job applicants should be reaffirmed by the President, and executive officers must be instructed to enforce them. Other health and employment related limitations affecting LGBTI employees within the federal workforce should be rescinded.
- The federal government should add sexual orientation to the list of bias motivated hate crime categories that trigger the provision of additional investigative and prosecutorial resources from the FBI and other government offices. The failure to do so leaves the impression that such crimes are less serious than other bias motivated crimes, and it also leaves a significant gap in the protections afforded to LGBTI Americans under articles 6 and 7 of the ICCPR.
- Reports of UN Special Rapporteurs raise serious concerns over violations of article 9 of the Covenant, especially in situations where police or prison administrators fail to protect LGBTI persons or deliberately place them in harm's way. The United States must take greater care to protect the rights of LGBTI prisoners. The United States must also take steps to prevent the selective and inappropriate arrest, harassment and prosecution of individuals who transgress stereotypical gender norms, since those individuals are also more vulnerable to abuse and torture in detention.
- The compounded impact of discrimination against women because of their sexual orientation requires additional attention and documentation in subsequent reports, as do other intersecting forms of discrimination based on race, disability, health status, gender identity, gender expression and sexual orientation.

- Immigration officials should receive additional sensitivity training to assist in the adjudication of asylum and other immigration claims based on sexual orientation, gender identity or gender expression. Additional protections should also be considered for asylum applicants who must generally seek protection within one year of arriving in the United States, since such a short timeline for filing asylum claims can be particularly difficult for LGBTI applicants.
- State laws should be streamlined to facilitate applications from both pre-operative and post-operative transgender individuals who wish to change their names or legal sex on official documents. Current barriers to such identity changes place transgender persons at greater levels of risk during police questioning and identification procedures. The uncertain legal status of transgender persons under state law also has a significant impact on family life that must be clarified by the federal government.
- The “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” policy in the United States constitutes a discriminatory limitation on freedom of expression and should be rescinded. LGBTI Americans should be allowed to serve openly in the U.S. Armed Forces.
- The federal government must recognize that the recently re-introduced amendment to the Constitution of the United States to ban same-sex marriage is having a detrimental impact on a broad range of human rights protections. The denial of rights and benefits to same-sex couples unreasonably burdens LGBTI Americans and raises substantive consequences under the principles of non-discrimination and family life as established by articles 2(1), 23 and 26 of the ICCPR. The United States should repeal the Defense of Marriage Act and provide appropriate legal recognition for same-sex couples and their families at the federal level.
- Widespread discrimination and abuse against LGBTI youth pose significant human rights concerns. Current levels of verbal, physical and sexual violence directed at LGBTI youth in schools, juvenile detention facilities and foster care are legally unacceptable under the Covenant. The United States must take immediate steps to protect LGBTI youth from all forms of violence.
- The refusal of the federal government to recognize same-sex couples for U.S. immigration purposes strains the enjoyment of family life, especially with reference to binational couples, and leads to serious violations of the Covenant.