

VIOLENCE AGAINST WOMEN IN THE UNITED STATES

A REPORT OF TRENDS, LEGAL DEVELOPMENTS, AND BEST PRACTICES

prepared for

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covering the period of her tenure (1993-2002)

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COUNTRY SUMMARY

In the United States, acts of violence that specifically or disproportionately target women, such as sexual assault and intimate-partner violence, have historically been under-reported and under-prosecuted, and harmful effects on the lives of victims have not been adequately addressed. The past decade has witnessed an increased awareness of violence against women, as well as an increased availability of legal means to address the problem. For some groups of women, incidents of violence decreased slightly during much of the 1990s. Yet, the most recent government survey still shows that more than a quarter of women in the United States reported being subjected to acts of violence by a current or former spouse, partner, or date.

Increased Awareness and Improved Law

Women are disproportionately the victims of intimate-partner violence. **(See Report Section 1)** Fortunately, in the last decade the U.S. legal system has begun to recognize domestic battery as a major criminal justice problem. States have mandated the enforcement of protective orders, although their effectiveness varies depending on the education and awareness of police and court officials. Some states have introduced controversial mechanisms such as mandatory arrest of abusers in order to increase the effectiveness of prosecution for violence within the family. The federal Violence Against Women Act of 1994 (VAWA), reauthorized in 2000, allocates significant resources to improve domestic violence legislation and remedies and to assist women who are survivors of domestic violence. Campaigns such as V-Day and the Domestic Violence Awareness Month have increased public awareness of the problem.

Women are also at greater risk than men for both intimate and stranger sexual assault. **(See Report Section 2)** According to a government-sponsored national survey, nearly one-fifth of women in the United States report surviving completed or attempted rape at some time in their lives. Sexual assault is still an under-reported, under-prosecuted crime. Advocates have lobbied successfully for more effective sexual assault laws on the state and federal levels and have won greater funding for services and training for those who work in preventing and prosecuting sexual violence against women. Reporting and registration of convicted sexual offenders has become more detailed and comprehensive. VAWA funds additional training for investigators and law enforcement officials to deal with sexual assault crimes, facilitates the filing of complaints by victims of sexual abuse, and updates the Federal Rules of Evidence. Every state now criminalizes marital rape in at least some situations, though only 17 states plus the District of Columbia have completely abolished exceptions in criminal law for marital rape. Stalking, a form of

violence that has been acknowledged only recently, is now recognized as a crime in all 50 states. **(See Report Section 2)**

Addressing Causes and Effects

These recent improvements of the legal apparatus are not enough, however, to prevent violence against women. Prevention would require increasing U.S. public awareness, in order to facilitate both intervention by outsiders and the ability of victims of intimate-partner battery to seek help. Furthermore, services to address the legal, social, and economic needs of survivors must be guaranteed and easily accessible.

Advocates and lawmakers have paid increased attention in recent years to the problems that result when domestic violence affects women at their places of work. **(See Report Section 5)** Low-income women, whose employment is less secure, face the greatest risks when abusive partners come to the workplace or the effects of abuse interfere with their ability to fulfill their job responsibilities. Non-profit organizations, employers, unions, and state legislatures are working on numerous fronts to provide assistance to domestic-violence survivors and to increase employment-related protections.

Vulnerable Communities

State-sponsored institutions, such as the prison system and the U.S. military, have helped to create or tolerate both a culture of violence and inadequate avenues for redress. The U.S. military has taken some steps to address violence against women associated with the military. **(See Report Section 4)** In the wake of sexual harassment and assault scandals in the early 1990s, the military commissioned studies of the problem and instituted additional training and education programs. Domestic violence within military families is in the limelight now, with the focus on providing additional services to these families. The military's policy of discharging openly gay and lesbian service members lends coercive power to the harassment of women based on alleged sexual orientation, i.e. "lesbian-baiting." While the military has taken steps to reduce violence, these have not been pro-active measures, but reactions to public scandal and scrutiny.

Even more shocking are the inadequate efforts taken to reduce violence against women in U.S. prisons. **(See Report Section 3)** Female inmates are subject to widespread violence in contravention of international human rights standards, as documented by the Special Rapporteur in her 1998 mission to the United States. Since then, the number of women in U.S. prisons (most sentenced for drug-related or other non-violent crimes) has continued to grow rapidly. Federal and state governments responded to criticism from the international human rights community by temporarily increasing collection of data on violence against women in prison and by providing additional training for prison officials, but this activity seems to have subsided. Meanwhile, prisoners in some states are finding their ability to seek legal remedy against abuse by prison officials limited by new state laws.

Schools, colleges, and universities are another site of violence against women; indeed, teenage girls and young women are the age group most vulnerable to sexual assault. **(See Report Section 6)** Yet, knowledge about these issues has been limited in the past both by lack of attention and by the degree to which violence at colleges and universities goes unreported. A series of laws in the 1990s significantly increased the availability and quality of information about crime on college campuses. Violence against girls in primary and secondary schools remains an under-researched problem.

Women who live in communities isolated due to religious practices such as polygamy may be at particular risk for violence. Though no reliable empirical evidence on the prevalence of domestic violence and statutory rape within polygamous families exists, anecdotal accounts describe violence as a norm in certain break-away religious sects that embrace polygamy. Though polygamy is illegal, practicing polygamists are rarely prosecuted for polygamy *per se*. **(See Report Section 8)**

In particular, immigrant women who suffer violence are often cut off from remedial services or avenues of legal redress because of legal, economic, and social isolation. **(See Report Section 9)** The 1994 and 2000 VAWAs and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act provide significant legal resources for battered immigrant women, but ensuring that these legal tools are well used and meaningfully applied requires extensive training of law enforcement personnel, as well as the involvement of community organizations. The problem of harassment and sexual violence against immigrant women by border patrol agents, however, has gone unaddressed.

Violence has been used by some religious extremists in the United States to target women exercising their constitutional right to reproductive choice, as well doctors and clinicians who assist them. **(See Report Section 7)** Extremist anti-abortion protestors have resorted to bombings, arson, shootings, death threats, assault, and other means to curtail women's lawfully protected reproductive rights. Injunctions and lawsuits under the 1993 Freedom of Access to Clinic Entrances (FACE) Act and the Racketeer Influenced and Corrupt Organizations Act (RICO) have been used to prosecute such violence. Incidents in which abortion protesters inflict direct physical harm on doctors and women patients have gradually declined since the passage of the FACE Act, but intimidation persists, most recently with a wave of anthrax threats against clinics.

Lack of Federal Standards

The lack of federal remedies or national standards is a cross-cutting theme in many of these issues. Crime, including gender-motivated crime, is generally the responsibility of states, not the federal government. The U.S. Supreme Court has ruled that Congress's attempt in the VAWA to provide women with a federal civil remedy for gender-based abuse violated principles of federalism.¹ While the U.S. federal system allows more progressive states to take the lead in passing appropriate legislation, it also allows other states to lag behind in protection of women. For instance, as the Special Rapporteur

¹ U.S. v. Morrison, 529 U.S. 598 (2000).

found, conditions of violence in prisons vary dramatically from state to state. Laws in some states protect domestic-violence survivors from employer discrimination and allow victims to collect social welfare insurance; but women in other states have no such protections. Despite the loss of the civil remedy provision of VAWA, Congress and the president should continue efforts to ensure that the rights of women in all states are protected equally, and the Supreme Court should give those efforts appropriate deference.

Congress should ensure consistent protection of women against violence by ratifying the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). On June 30, 2002, the Senate Foreign Relations Committee took the first step by voting to forward the treaty to the entire Senate for ratification. In addition to sending a positive signal to the international community, ratification would provide the United States with a comprehensive definition of discrimination against women, which would include gender-based violence. Because CEDAW mandates that state parties take responsibility for ending discrimination in all spheres (political, social, economic, and cultural) and by all appropriate measures, it would lend authority to virtually all of the recommendations contained in this Report.

Progress in International and Refugee Law

The United States has nation-wide policies sheltering refugee women and women victims of trafficking and can be an international leader in this area. Since 1994, U.S. asylum law has made significant progress in addressing the specific needs of refugee women. INS Gender Guidelines issued in 1995 represent a progressive response to the particular problems faced by women around the world, including discriminatory laws, systemic sexual violence, repressive population-control laws, female genital mutilation practices, and domestic violence that goes unprosecuted. Nevertheless, the United States still needs to update its laws to keep up with evolving international norms, specifically to clarify instances where domestic violence can provide a basis for an asylum claim and to define women as a distinct social group for the purposes of asylum. **(See Section 10)**

Trafficking of women is a “hot” issue, and, in 2000, Congress passed the Victims of Trafficking and Violence Protection Act, which improves federal procedures and regulations to tackle the problem. **(See Report Section 11)** These efforts have the potential to be an international model for protecting the rights of victims of trafficking. However, to fully remedy the harms suffered by women trafficking victims, the executive branch and state governments must step in to guarantee the additional services and resources that are needed to rehabilitate victims and prosecute offenders.

SECTION 1

VIOLENCE AGAINST WOMEN IN THE FAMILY

This section discusses domestic violence and stalking and the associated legislation and case law at both state and federal levels.

Narrative Summary

A series of new laws over the last decade has increased protection of women in the United States suffering from family violence. Among other things, stalking as a unique form of violence has received widespread legislative attention. The Violence Against Women Act (VAWA) improves domestic-violence remedies and increases financial assistance to abuse survivors. The 1996 welfare reform bill's Family Violence Option allows states to relax some of the requirements for battered women to qualify for public assistance. The Lautenberg Amendment expands the criminalization of firearms possession to include domestic-violence offenders convicted of misdemeanors. Unfortunately, however, Congress's attempt to introduce a civil remedy for abused women under the VAWA did not survive constitutional challenge, reflecting the Supreme Court's reluctance to expand federal laws addressing domestic violence. The enforcement of protective orders occurs at the state level, although its effectiveness depends on the education and awareness of police and court officials.

A. DOMESTIC VIOLENCE

Introduction

1. Intimate-partner violence is a serious, widespread problem in the United States. Estimates of the prevalence of such violent incidents range from 960,000 to three million per year.¹
2. Women constitute a high percentage of victims of violence within intimate relationships. In 1999, women accounted for 85 percent of the victims of intimate partner violence (671,110 total); men accounted for 15 percent of the victims

¹ Family Violence Prevention Fund, Domestic Violence is a Serious, Widespread Social Problem in America: The Facts, at <http://endabuse.org/newsdesk/facts> citing U.S. DEPARTMENT OF JUSTICE, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS (March 1998) and citing THE COMMONWEALTH FUND, HEALTH CONCERNS ACROSS A WOMAN'S LIFESPAN: 1998 SURVEY OF WOMEN'S HEALTH (May 1999).

(120,100 total).² More information is needed about the causes of and solutions to intimate-partner violence among different demographic groups.³

Federal Legislation

3. The largest and most ambitious federal effort to prevent and remedy violence against women in the last decade was the Violence Against Women Act (VAWA),⁴ passed as part of the Violent Crime Control and Law Enforcement Act of 1994. It represented the culmination of a four-year effort of feminist organizations, domestic-violence groups and their Congressional allies. Under this law, the federal government adopted for the first time a comprehensive approach to fighting domestic violence and sexual violence. The Act was also important because it recognized the nexus between gender-based violence and women's equality (or lack thereof), and addressed the ongoing failure of the states to provide adequate legal remedies to victims and survivors of domestic violence. The Act is administered principally by the Department of Health and Human Services and the Department of Justice.
4. The provisions in the VAWA for combating violence fall into three main categories: (i) the creation of new legal remedies and penalties; (ii) the authorization of extensive grants to states, NGOs and federal agencies for various anti-violence programs; and (iii) the creation of a civil rights remedy.
5. In the first category, VAWA makes it a federal crime to cross state lines to continue to abuse or harass a spouse or partner.⁵ It also amended the Gun Control Act⁶ to make it illegal for a person to possess a firearm while subject to a restraining order due to domestic violence or stalking.⁷ VAWA affects evidentiary rules by extending rape shield laws to protect crime victims from abusive inquiries into their personal life. The Act also created new relief measures designed for immigrants whose abusive spouses obstruct their access to lawful status in the United States.⁸ (*See Report Section 9 on Immigrant Women.*)

² BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, *INTIMATE PARTNER VIOLENCE AND AGE OF VICTIM*, 1993-99, (October 2001). This figure may be significantly affected if one takes into account the incidents of domestic violence within gay and lesbian relationships which are not reported due to the fear of prejudice and general marginalization of such couples.

³ JOAN ZORZA, *VIOLENCE AGAINST WOMEN: LAW, PREVENTION, PROTECTION, ENFORCEMENT, TREATMENT, HEALTH* 1-3-4 (Civic Research Institute, 2002) (noting that rates of domestic violence during the 1990s have declined for black women while holding steady for white women).

⁴ Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 16, 20, 28, and 42 U.S.C.) [hereinafter "VAWA"].

⁵ 18 U.S.C. §§ 2261-2262 (1994). To be more specific, the VAWA creates the crimes of interstate domestic violence and interstate violation of a protection order.

⁶ Pub. L. No. 90-618, 82 STAT. 1213 (codified as amended in scattered sections of 18 & 26 U.S.C.).

⁷ 18 U.S.C. 922(d)(8), (g)(8) (1994). Law enforcement officers remain exempt from the firearm prohibitions in the 1994 amendments. Also, while this was part of the 1994 Crime Bill to which VAWA was amended, it was not listed as part of the VAWA in the Committee Report.

⁸ 42 U.S.C. § 14051, 8 U.S.C. § 1154(a) (1994) (remedies generally limited to immigrant spouses of U.S. citizens or lawful permanent residents).

6. Pursuant to the authorization of grants for anti-violence programs, VAWA committed substantial federal resources – \$1.6 billion in the first five years⁹ – to police, prosecutors, NGOs and government agencies to create anti-violence programs. Examples of such programs include grants to battered women’s shelters;¹⁰ the STOP (Services, Training, Officers, Prosecutors) Violence Against Women grant program to assist state law enforcement officers and prosecutors in training personnel, establishing specialized domestic violence and sexual-assault units, assisting victims of violence, and holding perpetrators accountable; and a grant to the Department of Health and Human Services to establish a toll-free National Domestic Violence Hotline.¹¹ The Department of Justice also provides grants to encourage states to develop innovative programs in law enforcement and prosecutor training, to improve data collection and communication strategies, and to improve victim-service and anti-stalking programs. VAWA also authorizes grants to educate judges and other court personnel on rape and domestic violence and to study gender bias in the federal courts.¹²
7. The most controversial provision of VAWA was its civil rights remedy, codified at 42 U.S.C. Sec. 13981. This provision allowed a victim of violence to sue her attacker in federal court for civil damages if the attacker committed a “crime of violence motivated by gender.” According to a Senate report, by “placing this violence in the context of the civil rights laws,” Congress sought to “recognize [sexual violence] for what it is—a hate crime.”¹³ However, in 2000, the Supreme Court in *United States v. Morrison*¹⁴ held that Section 13981 was unconstitutional because the creation of a “new” civil rights remedy for gender violence lay beyond Congress’s authority under the Commerce Clause and Section 5 of the Fourteenth Amendment. The remainder of VAWA was not affected by this ruling.
8. Because the authorization for the original VAWA provisions expired in 2000, advocates of VAWA and members of Congress began a concerted reauthorization effort in 1997. VAWA reauthorization bills were introduced in 1997¹⁵ and 1998¹⁶ and were finally passed in 2000. VAWA 2000 provided \$3.3 billion for training and services for battered women and their children and created several new programs.¹⁷ President Clinton signed the legislation into law on October 28, 2000.¹⁸ Despite the efforts by advocates and Congressional allies to create a

⁹ Kathryn Anderson Clark et. al., *A Cost Benefit Analysis of the Violence Against Women Act of 1994*, 8 VIOLENCE AGAINST WOMEN: AN INT’L. & INTERDISCIPLINARY J. 417,418 (April, 2002).

¹⁰ 8 U.S.C. § 1154(a)(1994).

¹¹ 42 U.S.C. § 10461(e)(2)(E) (1995).

¹² Pub. L. No. 103-322, tit. IV, subtitle D, (108 STAT.) at 1942-45.

¹³ S. REP. NO. 103-138 (1993, at 49).

¹⁴ 529 U.S. 598 (2000).

¹⁵ 105th Congress, H.R. 3514 and S.2110. Neither bill passed during the 105th Congress.

¹⁶ H.R. 357, H.R. 1248, S. 51, and S.2787, 106th Cong., (1998). Neither bill passed during the 106th Congress.

¹⁷ National Coalition Against Domestic Violence, Timeline of the Domestic Violence Movement, at <http://www.ncadv.org>.

¹⁸ P.L. 106-386 (2000).

- more comprehensive bill, the final version of the VAWA reauthorization was primarily a continuation of existing programs with a few additions and funding increases.
9. In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) replaced the existing federal welfare program with a new system entitled Temporary Assistance for Needy Families (TANF).¹⁹ In addition to expanding work requirements and imposing time limits, TANF requires recipients to establish the paternity of their children as well as seek child support from their children's father. Failure to do so can prevent recipients from benefiting from TANF assistance.²⁰
 10. To alleviate this problem, the PRWORA's Family Violence Option (FVO) allows states to modify the requirements for paternal assistance and to extend time limits in order to assist victims and survivors of domestic violence.²¹ FVO permits the relaxation of all program requirements, recognizing that the TANF requirement that a recipient mother collect child support from the father poses serious problems for abuse victims. Such a requirement may jeopardize the safety of a recipient by requiring that she engage with her abuser on an issue—money—that is often connected to manipulation, threats, and abuse. Specifically, FVO requires states that adopt it to: screen TANF applicants for and identify victims of domestic violence; refer victims of domestic violence to appropriate services; grant “good cause” waivers to domestic violence victims when TANF requirements are harmful or unsafe; and protect the confidentiality of domestic violence victims and their children.
 11. While FVO is not mandatory, 39 states have adopted all or part of it,²² and two states have also made it an option at the county level.

¹⁹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of various titles). For a discussion of the relationship between domestic violence and public welfare programs, see Comment, *The Effects of Domestic Violence on Welfare Reform: An Assessment of the Personal Responsibility and Work Opportunity Reconciliation Act as Applied to Battered Women*, 50 U. KAN. L. REV. 591 (2002).

²⁰ If the child support enforcement agency determines “that an individual is not cooperating with the State in establishing paternity or in establishing, modifying or enforcing a support order with respect to a child of the individual, and the individual does not qualify for any good cause or other exception established by the State pursuant to section 454(29),” then the state must reduce the cash benefits or deny assistance altogether. 42 U.S.C. §609 (a)(5) (Supp. V. 1999).

²¹ *Id.*

²² NOW Legal Defense and Education Fund, *The Family Violence Option: Is Your State Taking Advantage of It?* at <http://www.nowldef.org/html/issues/wel/fvosur.shtml>. According to NOW LDEF, the 39 states which have adopted the family violence option as delineated by PRWORA are: Alabama, Alaska, Arizona, Arkansas, California, Colorado (for county option only, not statewide), Delaware, District of Columbia, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wyoming. Seven additional states have equivalent laws or policies.

12. Despite the VAWA amendment to the Gun Control Act (GCA),²³ many perpetrators of domestic violence manage to evade the gun prohibitions and continue to purchase and use guns.²⁴ In response, the Lautenberg Amendment²⁵ was passed as part of a 1996 spending bill. It expanded the GCA by criminalizing firearm possession for perpetrators of domestic-violence misdemeanors as well as felons.
13. The Lautenberg Amendment has been controversial because, unlike many other federal gun control statutes, it does not exempt the police and the military from its prohibitions. The Amendment has been challenged in several lawsuits as a violation of the Second, Fifth, and Tenth Amendments, as well as the Equal Protection Clause.²⁶ So far, the Lautenberg Amendment has survived legal challenge.

State Legislation

13. In the federal system of the United States, states are the primary loci for the prevention and prosecution of domestic violence. All states have domestic-violence laws that prohibit physical abuse and threatened or attempted physical abuse; many states also prohibit sexual assault or abuse in families, emotional abuse and even gender-motivated financial exploitation.²⁷
14. The standard remedies for domestic violence are a criminal protective order or a civil restraining order, court orders that prohibit further abuse and, often, contact with the victim, thereby excluding the offender from the victim's home and workplace. Violations are treated as either civil or criminal contempt of court or as a separate felony or misdemeanor. VAWA requires states to honor orders issued by courts in other states. This overt exercise of Congressional power that interferes with state autonomy contrasts with the decision in *United States v. Morrison*,²⁸ which struck down the creation of a "new" civil rights remedy for gender violence on the basis that it lay beyond Congress's authority under the Commerce Clause and Section 5 of the Fourteenth Amendment.

²³ Sections 921(32) and 922(8) render the carrying of a firearm unlawful in circumstances where an order is granted relating to domestic violence.

²⁴ Note, *At The Intersection Of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 826 (2000).

²⁵ See Pub. L. No. 104-208, 658, 110 Stat. 3009-371, 3009-371 to -372 (1996).

²⁶ *Fraternal Order of Police v. United States*, 981 F. Supp. 1 (D.D.C. 1997) (granting summary judgment in favor of government in police association's challenge to Lautenberg Amendment), *rev'd*, 152 F.3d 998, 1004 (D.C.Cir.) (holding that the Lautenberg Amendment violates the Equal Protection Clause), *reh'g granted*, 159 F.3d 1362 (D.C.Cir. 1998) (per curiam), *aff'd on reh'g*, 173 F.3d 898, 905-08 (D.C.Cir.) (affirming the district court's holding and finding that the Amendment does not violate the Fifth Amendment, the Second Amendment, the Tenth Amendment, or the Commerce Clause); *see also* Hiley v. Barrett, 155 F.3d 1276 (11th Cir. 1998) (upholding the constitutionality of Lautenberg Amendment in challenge based on Equal Protection Clause).

²⁷ DOMESTIC VIOLENCE AND CHILD ABUSE SOURCEBOOK 570 (ed. Helene Henderson, Omnigraphics, Inc., 2000).

²⁸ 529 U.S. 598 (2000).

15. At the time VAWA was first introduced in 1990, the majority of states did not make marital rape a prosecutable offense, or allowed the crime to be charged only when aggravating factors (not required in non-marital cases of rape) were present.²⁹ Even sexual assault by a former husband or boyfriend was immunized from prosecution in some states. Since then, marital rape has been criminalized in every state in at least certain circumstances and many, but not all, state courts have invalidated their states' exemptions or "downgrades" for marital rape or sexual assault as a violation of the Equal Protection Clause.³⁰ State inter-spousal civil tort immunity doctrines formed another formal barrier to legal vindication for victims of gender-based bias.³¹ Many state courts declared these laws a violation of the Equal Protection Clause as well. A study by Congress summarized the legal situation for women as follows: "women often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination."³² Indeed, while some states have reformed their laws, vestiges of marital-rape exemptions are still manifest in current law.³³
16. California is the only state that has adopted a state-level Violence Against Woman Act providing a civil remedy for violent crimes motivated by gender animus.³⁴ The Illinois General Assembly is considering the Gender Violence Act, which would enable victims of gender-motivated violence to sue their attackers in state court for monetary damages.³⁵ New York City has adopted a local VAWA that allows civil rights actions for gender-motivated violence.³⁶
17. Victims and survivors of domestic violence often lose housing due to violence in their lives.³⁷ Several states, including California, Minnesota, New Mexico, Washington, Wisconsin and Colorado, have passed laws that specifically prohibit housing discrimination against, or provide some protections for, domestic-violence victims in certain circumstances. Colorado has provided for a defense

²⁹ See *amicus curiae* brief by Senator Joseph Biden (in support of petitioners) to the U.S. Supreme Court in *United States v. Morrison* (No. 99-5, 99-29) at <http://www.senate.gov/biden/issues/amicus-final.pdf>.

³⁰ *Id.* at 21. See also, ZORZA, *supra* note 3, 2-8.

³¹ Biden, *supra* note 29, at 22-23.

³² *Id.* at 23.

³³ See Victoria Nourse, *Symposium on Unfinished Feminist Business: The Normal Successes and Failures of Feminism and Criminal Law*, 75 CHI. KENT L. REV. 591 (2000).

³⁴ Assembly Bill 1928, California's version of VAWA, was signed by Governor Gray Davis in 2002. It created a statutory civil action for injuries resulting from acts of gender-based violence and allows such action to be brought within three years of the act of violence or within eight years after the victim reaches 18, whichever is later. It will take effect on January 1, 2003. See www.endabuse.org/newsflash/index.php3?Search=Article&NewsflashID=376, the website for the Family Violence Prevention Fund.

³⁵ H.B. 3279, 92nd Session, (last action: referred to Rules Committee in April 2001).

³⁶ The Victims of Gender-Motivated Violence Protection Act, Number 752-A (signed into law December 19, 2000). See Mayor's Office, *Mayor Giuliani Signs Bill Granting Victims of Violent Crimes Motivated by Gender an Enhanced Civil Cause of Action against Their Attackers*, Release #479-00, at <http://www.nyc.gov/html/om/html/2000b/pr479-00.html>.

³⁷ NOW Legal Defense and Education Fund, *Housing Discrimination Against Domestic Violence Victims* (2002), at http://www.nowldef.org/html/issues/vio/statelocal_laws.pdf.

against eviction for “a victim of domestic violence that has been documented by the filing of a police report or the issuance of a restraining order” if the landlord seeks to evict the tenant on the ground that the tenant’s guest committed a crime or dangerous act on the premises.

Recent Trends in State Legislation

19. Mandatory arrest and prosecution policies for domestic violence, including pro-arrest and mandatory, a.k.a. “no-drop,” prosecution policies, have multiplied in recent years. By 1996, 15 states and the District of Columbia had responded to the problem of domestic violence by enacting mandatory arrest laws.³⁸ The purpose of mandatory arrest legislation has been to counteract the history of state prosecutorial disregard for domestic violence. For instance, in the 1970s, police departments that responded to domestic-violence calls often had a non-arrest policy.³⁹
20. Mandatory arrest laws direct police to detain a perpetrator when there is probable cause that a domestic assault has occurred, regardless of the victim’s wishes.⁴⁰
21. There is some indication that arrests may actually increase the risk of violence for abused women. Some women’s rights activists fear that by forcing arrest, the legislature undercuts women’s autonomy, thereby compounding the emotional distress caused by domestic violence.⁴¹ Taking the choice away from women could dissuade women from approaching the authorities for interim or temporary assistance.
22. There is a growing recognition that states should prohibit perpetrators of domestic violence from owning or possessing firearms. Until recently, persons charged with misdemeanor crimes of domestic violence were neither required to surrender their personal guns nor prohibited from purchasing additional guns.
23. The Lautenberg Amendment, discussed above in paragraphs 12-13, was an attempt to make state law more uniform on the subject of domestic violence and gun ownership.

³⁸ Vito Nicholas Ciraco, *Fighting Domestic Violence with Mandatory Arrest, Are We Winning? An Analysis in New Jersey*, 22 WOMEN’S RTS. L. REP. 169 (2001).

³⁹ Andrea D. Lyon, *Be Careful What You Wish for: An Examination of Arrest and Prosecution Patterns of Domestic Violence Cases in Two Cities in Michigan*, 5 MICH. J. GENDER & L. 253, 265-67 (1999).

⁴⁰ In a few jurisdictions, mandatory or “no-drop” prosecution requires government attorneys to bring criminal charges against alleged batterers once the victim files formal charges, even if the victim changes his or her mind. See Note, *No-Drop Prosecution of Domestic Violence: Just Good Policy or Equal Protection Mandate?*, 52 STANFORD L.REV. 205 (1999).

⁴¹ Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 554-55, 569 (1999).

24. The extent to which the Lautenberg Amendment preempts state law on the subject of firearm ownership is unclear.⁴² Some argue that federal law prevails in states without restrictive gun laws. However, some states are simply refusing to follow the federal law. Other states are implementing their own laws in accordance with the standards set forth in the Lautenberg Amendment, but these laws are tailored to coexist with the peculiarities of the individual state, which can mean a diluted or less effective form of the Lautenberg Amendment.
25. On the other hand, some states have gone beyond the Amendment's mandates. For instance, Arizona, New Jersey and California have domestic violence laws that specifically mandate police seizure of weapons at all domestic-violence incident scenes.⁴³

Federal Case Law

27. *United States and Alvera v. C.B.M. Group, Inc.*, was the first challenge to landlords' discriminatory policies against victims of domestic violence under the Fair Housing Act.⁴⁴ Tiffanie Alvera was served with a 24-hour notice terminating her tenancy immediately after she informed her landlord that her husband had physically assaulted her and that she had obtained an order of protection. The notice was pursuant to the landlord's "zero tolerance" policy to evict any tenant who commits violence or who controls another who commits an act of violence. In a settlement hailed as a victory for domestic-violence advocates, C.B.M. Group agreed to stop applying its "zero-tolerance" policy to victims of domestic violence in the five states where they own or operate housing facilities.⁴⁵
28. In a less positive recent decision, the Supreme Court upheld the policy of the U.S. Department of Housing and Urban Development (HUD) that permits housing authorities to evict a tenant whenever any member of the tenant's household or guests is convicted of a felony.⁴⁶ HUD's "one strike" policy was primarily intended to target drug-related violence in federally subsidized housing projects. While the ruling in *Rucker* addressed only the drug-related provisions of the "one strike" policy, the decision sets a dangerous precedent by opening the door for housing officials to evict any public-housing resident or visitor who has been convicted of a felony that occurred there or nearby *as well as others who live in the household*. Consequently, the *Rucker* decision could cause women not to report domestic abuse for fear of losing their home.

⁴² For a discussion of the preemption issue and the effort of states with regard to gun use by domestic violence offenders, see, e.g., Note, *Seizing The Ammunition From Domestic Violence: Prohibiting The Ownership Of Firearms By Abusers*, 29 RUTGERS L. J. 607 (1998); Comment, *Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C.922(g)(9)*, 19 PACE L. REV. 445 (1999).

⁴³ See ARIZ. REV. STAT. ANN. 13-3601(C) (West Supp. 1999); N.J. STAT. ANN. 2C:25-21(d)(1) (West 1995); CAL. PENAL CODE 12028.5(3)(b) (West 2001).

⁴⁴ No. 01-857-PA (D. Or., filed June 8, 2001).

⁴⁵ AMERICAN CIVIL LIBERTIES UNION, WOMEN'S RIGHTS PROJECT ANNUAL REPORT 2001 7.

⁴⁶ Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (March 26, 2002).

29. The U.S. Fifth Circuit Court of Appeals ruled in *United States v. Emerson*⁴⁷ that the VAWA provision prohibiting abusers against whom there are protective orders from possessing guns does not violate their Second Amendment Constitutional rights. The Court's ruling upholds the Domestic Violence Protective Order Gun Ban, a federal statute designed to keep firearms from those who are under court-ordered restraint because of domestic violence or assault. The Supreme Court refused to hear Emerson's appeal in June 2002.⁴⁸
30. A Federal District Court in New York held in *Nicholson v. Williams*⁴⁹ that New York City's Administration for Children Services (ACS) violated the constitutional rights of mothers and children by removing children from their homes because their mothers were victims of domestic violence. The Court issued an injunction against the ACS, and any exceptions to the injunction are subject to approval by the Court unless the child is in imminent danger. As a result of this decision, battered women who are fit to retain custody of their children will not face prosecution or the threat of having their children removed because of reporting an incident of domestic violence. ACS was also ordered to implement new policies and procedures to improve ACS response to families experiencing domestic violence.

Administrative Action

31. The Department of Justice established the Violence Against Women Office (VAWO) in 1995 to administer the programs authorized by VAWA and other related programs.⁵⁰ VAWO handles the Department of Justice's legal and policy strategy regarding violence against women, coordinates departmental efforts, and responds to requests for information regarding violence against women.
32. Under the grant programs administered by the Department of Justice, VAWO has awarded more than \$1 billion in grant funds, including more than 1,250 discretionary grants and 336 STOP (Services, Training, Officers, Prosecutors) grants. These grants should increase the remedies and services available to women who are victims and survivors of domestic violence.

Advocacy and NGO Activities

33. Various non-profit groups and governmental entities provide judicial training on matters of violence against women. The National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP) was established in 1980 as a project of NOW Legal Defense and Education Fund.⁵¹ NJEP creates model curricula, and consults on gender bias in the courts for judicial

⁴⁷ 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (June 10, 2002).

⁴⁸ 18 U.S.C. § 922 (g)(8).

⁴⁹ *Nicholson v. Williams*, 203 F.Supp.2d 153 (E.D.N.Y., 2002).

⁵⁰ <http://www.ojp.usdoj.gov/vawo/>.

⁵¹ See <http://www.nowldef.org/html/njep/index.htm> for further information.

- organizations, bar associations, law schools, and legal and lay organizations across the country. *Understanding Sexual Violence: The Judicial Response to Stranger and Non-stranger Rape and Sexual Assault*, NJEP's model curriculum on rape trials, was published in December 1994 and has been presented in more than 20 states, as well as abroad. A self-directed video version of this curriculum and an adaptation for prosecutors are also available.⁵² NJEP has been a catalyst for a series of task forces established by state chief justices and federal circuit councils to examine gender bias in their own court systems, including the efficacy of protection orders and enforcement of other domestic-violence legislation.⁵³
34. V-Day⁵⁴ is a non-profit organization that seeks to use the popularity of Valentine's Day (while debunking its romanticized patriarchy and imposed heterosexuality) by holding annual theatrical and artistic events to raise awareness of sexual assault and money for its victims. This annual cluster of events, campaigns, and initiatives includes, but is not limited to, a Worldwide Campaign, College Campaign, International Stop Rape Contest, Rape Free Zone Campaign, Stand Up with V-Day and Lifetime Initiative, and Spotlight on Afghan Women. Eve Ensler's play, "The Vagina Monologues," has been the centerpiece of these events, the biggest of which was the V-Day 2001 benefit performance at Madison Square Garden.
 35. Domestic Violence Awareness Month (DVAM) was first observed in October 1987.⁵⁵ Its purpose is to connect battered women's advocates across the nation. Special events take place throughout the month at the local, state, and national levels to promote various anti-domestic-violence themes. DVAM was first recognized by Congressional Resolution in 1989 and has been declared annually by Presidential Proclamation.
 36. These public awareness campaigns are important to the effort to prevent domestic violence, in order to facilitate both intervention by outsiders and the ability of victims of intimate-partner battery to seek help.⁵⁶

⁵² In 1996, NJEP published *Adjudicating Allegations of Child Sexual Abuse When Custody is in Dispute* to assist judges in dealing with this subject by providing current empirical information on assessing child sexual abuse allegations in the custody context. *When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts*, published in 1998, addresses problems faced by women of color as litigants, witnesses, defendants, court employees, lawyers, and judges.

⁵³ For a list of task force reports, see <http://www.nowldef.org/html/njep/PDFdocs/taskforce.pdf>.

⁵⁴ See <http://www.vday.org/index2.cfm>

⁵⁵ For further information on DVAM, see the National Coalition Against Domestic Violence at <http://www.ncadv.org/community/dvmonth.htm>

⁵⁶ See Joan Zorza, *There's No Excuse: The National Public Education Campaign*, reprinted in ZORZA, VIOLENCE AGAINST WOMEN 35-4 (Civic Research Institute, 2002).

B. STALKING

Introduction

37. More than one million people in the United States have been stalked. The majority of stalking victims (78 percent) are women and are likely to be pursued and threatened by someone with whom they have had a prior relationship.⁵⁷
38. At the time a battered woman separates, or decides to separate, from her batterer, she is at the greatest risk for severe injury and escalation of the violence.⁵⁸ The majority of women who are killed by a partner are living away from that partner at the time. Eighty percent of women who are stalked by former husbands are physically assaulted by these partners, and 30 percent are sexually assaulted by them.⁵⁹

Federal Legislation

39. The Interstate Stalking Punishment and Prevention Act of 1996 dramatically increased federal sanctions against stalking and harassment.⁶⁰ It makes it unlawful for any person to cross state lines “with the intent to injure or harass or intimidate another person . . . or place that person in reasonable fear of death or serious bodily injury to that person, or a member of the immediate family of that person”
40. VAWA provisions authorize grants for states to improve the process for entering stalking-related data into local, state and national crime information databases such as the National Crime Information Center.⁶¹ Another provision of VAWA requires a training program for judges to ensure that when they issue orders in stalking cases, they have all the available criminal history and other related information from state and federal sources.⁶²

State Legislation

41. Before the enactment of stalking legislation, states used a patchwork of criminal law provisions such as those for harassment, threats and criminal trespass. Stalking laws demonstrated that the state considered stalking itself to be a serious form of violence.

⁵⁷ CENTER FOR POLICY RESEARCH, *STALKING IN AMERICA* (1997).

⁵⁸ *See, e.g.*, Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5-6 (1991).

⁵⁹ *Id.*

⁶⁰ 18 U.S.C. § 2261A, 2261, 2262.

⁶¹ 42 U.S.C. § 14031.

⁶² 42 U.S.C. § 14036.

42. In 1990, California became the first state to pass an anti-stalking law. Over the next decade, all states enacted some form of anti-stalking legislation, a movement that culminated in the passage of the 1996 federal law.⁶³
43. However, state stalking statutes vary widely, and the defined crimes range from misdemeanors to felonies. For example, Alaska, Michigan, Oklahoma and Wyoming prohibit not only conventional stalking but also stalking through electronic means such as email. Twenty-one states prohibit letter threats. Ten states provide for enhanced penalties against persons who stalk minors.⁶⁴

⁶³ DOMESTIC VIOLENCE AND CHILD ABUSE SOURCEBOOK 639 (ed. Helene Henderson, Omnigraphics, Inc. 2000). *See also*, Roslyn Myers, "Anti-Stalking Statutes," *reprinted in ZORZA, supra* note 3, at 3-1.

⁶⁴ Domestic Violence, *supra* note 63 at 640-44.

SECTION 2

SEXUAL ASSAULT

Narrative Summary

At both state and federal levels, the reporting and registration of convicted sexual offenders has become more sophisticated. In response to advocates' complaints, the Department of Justice revised its crime victims survey instruments to more accurately capture the incidence of sexual assault and the fact that the vast majority of rapists are known to their victims. Federal legislation has allocated substantial resources to training officials about sexual assault crimes (including marital rape) and facilitating the filing of complaints by victims of sexual abuse. The phenomenon of drug-facilitated rape and collegiate sexual assault has also received legislative attention. Some states have imposed greater responsibilities on professionals such as doctors and teachers to report instances of statutory rape; however, the consequences of this form of compulsory reporting are controversial. Stalking has been recognized as a form of sexual assault that requires specific legislative and police attention. However, the prosecution of sexual assault crimes is still far from effective. Steps are being taken to address under-reporting and ensure that complaints are properly processed. NGO activity is increasing, and almost every state has at least one organization that deals with domestic violence and sexual assault.

Introduction

1. According to a survey by the Centers for Disease Control and Prevention in 1998, nearly one-fifth of women (18 percent) in the United States report being subjected to a completed or attempted rape at some time in their lives.¹
2. Although many reforms have been instituted in the laws governing sexual assault in the United States, it remains an under-reported, under-prosecuted crime.² Furthermore, some studies indicate that arrest alone may not be sufficient to deter

¹ NATIONAL INSTITUTE OF JUSTICE AND CENTERS FOR DISEASE CONTROL AND PREVENTION, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (Nov. 1998).

² STAFF OF SENATE COMM. ON THE JUDICIARY, 103RD CONG., THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE (Comm. Print 1993) at Chapter III, available at <http://www.mith2.umd.edu/WomensStudies/GenderIssues/Violence+Women/ResponsetoRape/full-text>. See also, Patricia A. Furci, *The Sexual Assault Nurse Examiner: Should the Scope of the Physician-Patient Privilege Extend that Far?*, 5 QUINNIPIAC HEALTH L.J. 229, 232 (2002) (“[I]t is difficult to get accurate estimates of the incidence of sexual assault. It is believed that sexual assault is a seriously under-reported crime. Victims of rape and sexual assault may decide not to report the crime because they fear police attitudes and beliefs concerning rape, as well as the rape perpetrator.”); Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 623-24 (2000) (“[T]he conspicuous failure of prosecutors to charge and juries to convict reinforces the public perception that men who follow the “no sometimes means yes” norm aren’t engaged in rape after all – at which point jurors become even less likely to convict and prosecutors to charge.”)

future violence, but must occur in conjunction with a coordinated community response.³

3. Advocates have lobbied for more effective sexual assault laws at the state and federal levels and have won greater funding for services and training for those who work in preventing and prosecuting sexual violence against women. More than 1,300 sexual-assault programs and more than 1,900 domestic-violence programs now exist in communities across the nation. Sexual-assault and domestic-violence coalitions exist in every state.⁴

Legislation – Federal

Violence Against Women Act (VAWA)

4. Various provisions of the 1994 VAWA⁵ and its 2000 reauthorization⁶ specifically address sexual-assault prevention or prosecution. These provisions: (i) establish various grants for the Department of Transportation to reduce crime in local parks and transportation systems; (ii) amend and update the Federal Rules of Evidence regarding cases of sexual assault; (iii) authorize the Department of Health and Human Services (HHS) to fund rape prevention and education programs;⁷ (iv) authorize Department of Justice grants for the education of judges in state and federal courts on matters of sexual-assault prosecution and adjudication; and (v) authorize STOP (Services, Training, Officers, Prosecutors) grants to provide funds and training to states to improve sexual-assault investigation and prosecution, as well as the support and treatment of victims.

Sex-Offender Registration and Certification

5. Statutes that establish systems of registration and public notification of sex offenders have proliferated in all 50 states and at the federal level.⁸ Many police officers and lawmakers consider sex-offender registration systems important law enforcement tools that aid in the investigation of sex crimes. The Department of

³ Elizabeth Cramer & Janett Forte, *Factors Influencing Case Outcomes in Domestic Violence Trials*, reprinted in JOAN ZORZA, *VIOLENCE AGAINST WOMEN: LAW, PREVENTION, PROTECTION, ENFORCEMENT, TREATMENT, HEALTH* 30-1, 30-1 (Civil Research Institute 2002).

⁴ NATIONAL ADVISORY COUNCIL ON VIOLENCE AGAINST WOMEN, *TOOLKIT TO END VIOLENCE AGAINST WOMEN, CHAPTER 1, STRENGTHENING COMMUNITY-BASED SERVICES AND ADVOCACY FOR VICTIMS*, 1 (date) at <http://toolkit.ncjrs.org/files/chapter1.pdf>.

⁵ Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections within 8, 16, 20, 28, and 42 U.S.C.). See Report, *infra*, Section 1. Family Violence.

⁶ Pub.L. No. 106-386 (2000).

⁷ 42 U.S.C. § 10418 (1994). HHS provides grants to states for programs conducted by rape crisis centers or similar non-governmental entities. The funds support educational seminars, the operation of hotlines, training programs, preparation of informational materials, and other activities to increase awareness of and help prevent sexual assault.

⁸ For a more detailed discussion of sexual-offender registration and notification systems and laws, see Roxanne Lieb, Vernon Quinsey, Lucy Berliner, *Sexual Predators and Social Policy*, 23 *CRIME & JUST.* 43 (1998); and Lucy Berliner, *Sex Offenders: Policy And Practice*, 92 *NW. U. L. REV.* 1203 (1998).

- Justice created the Center for Sex Offender Management in 1996 to coordinate state systems of offender registration and to provide training and technical assistance to local jurisdictions in the management of sex offenders.
6. Three federal statutes govern state sex-offender registration and notification programs.
 - i. The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program,⁹ enacted in 1994 in the same comprehensive crime bill as VAWA, provides a system of financial incentives for states to establish registration programs for persons who have been convicted of certain sex crimes.¹⁰
 - ii. The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program was amended in 1996 by Megan's Law¹¹ and the Pam Lychner Sexual Offender Tracking and Identification Act of 1996.¹² Under these statutes, sex offenders and child molesters must register their addresses with state law enforcement agencies for ten years after their release from prison. State prison officials must notify local law-enforcement officials when these offenders are released or move. States must notify the public about the release of registered sex offenders when necessary for public safety. Specifically, the Lychner Act requires the Attorney General to establish a national FBI database to track the whereabouts and movements of convicted sex offenders who fall into high-risk categories that are based predominantly on the nature of the crime committed, the frequency with which such crimes were committed, and the likelihood of them being repeated.¹³
 - iii. Megan's Law gives states discretion to determine the type of community notification that should be made about offenders, under what circumstances such notification should be provided, and about which offenders such notification must be given.

Federal Rules of Evidence

7. In 1994, Federal Rule of Evidence 412 (Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition) was amended to expand protection for alleged victims of sexual misconduct in order to encourage them to begin legal proceedings against offenders. Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or sexual predisposition, whether offered as substantive evidence or for

⁹ 42 U.S.C. § 14071 (West Supp. 2000).

¹⁰ The sex crimes that require registration vary from state to state. *See infra*, paragraphs 19-22.

¹¹ Pub. L. No. 104-145, 110 Stat. 1345, *codified at* 42 U.S.C. § 170101(d).

¹² Pub. L. No. 103-322, tit. XVII § 1701012, *as added* Pub. L. No. 104- 236, § 2(a), 110 (1996), *codified as* 42 U.S.C.A. § 14072 (1998).

¹³ FEDERAL BUREAU OF INVESTIGATIONS, NATIONAL SEX OFFENDER REGISTRY, *at* <http://www.fbi.gov/hq/cid/cac/registry.htm>

impeachment purposes. The revised rule applies in all cases involving sexual misconduct, without regard to whether the victim is a party or only a witness to the litigation.¹⁴ Rule 412 applies to both civil and criminal proceedings.

8. In 1995, Congress enacted several new rules of evidence that allow the admission of propensity or character evidence against sexual offenders.¹⁵ The new Rules 413 (Evidence of Similar Crimes in Sexual Assault Cases) and 414 (Evidence of Similar Crimes in Child Molestation Cases) represent an exception to the general prohibition in the United States against the use of past “bad acts” as character evidence at trial, allowing the prosecution to submit evidence of a defendant’s past sexual offenses in a criminal trial for sexual assault or child molestation. These changes have been criticized by legal scholars as an unwarranted infringement of a criminal defendant’s right not to be adjudicated on the basis of his or her “propensity” or “disposition” to act in a criminal manner.¹⁶

Drug-Induced Rape Prevention and Control Act (The Rohypnol Act)¹⁷

9. The use of drugs such as Rohypnol or GHB, known as “roofies” or “date rape drugs,” to chemically subdue victims and obliterate their memories has triggered increasing alarm. The drugs are easily slipped into a victim’s drink and consumed by the unsuspecting person. When mixed with alcohol, the drugs are potentially lethal. In 1996, Congress passed the Rohypnol Act, which amended the U.S. Code to provide harsher penalties for violent crimes committed in conjunction with the distribution of an illegal drug to a victim without his or her knowledge. The Act also authorizes the Attorney General to create educational materials about controlled substances for police departments across the United States.

Statutory Rape

10. Since the mid-1990s, studies of the prevalence of childbearing among teenagers with older sexual partners and policy efforts to reduce teen pregnancy have

¹⁴ FED. R. EVID. 412, Advisory Committee Notes (1994 Amendments).

¹⁵ FED. R. EVID. 413(a) and 414(a).

¹⁶ JUDICIAL CONFERENCE OF THE UNITED STATES, Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases (1995), *reprinted in* 159 F.R.D. 51, 52-53 (1995) (arguing that the rules would “diminish significantly the protections that have safeguarded persons accused in criminal cases . . . against undue prejudice.”). Some non-profit organizations, such as the National Organization for Women and the American Civil Liberties Union, and many legal scholars argued the same. *See* 140 Cong. Rec. H5439 (daily ed. June 29, 1994) (statement of Rep. Schumer) (expressing shared concern regarding evidence and due process in the U.S. system); *see also* Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414 and 415*, 38 SANTA CLARA L. REV. 961, 978 (1998) (describing how American courts have consistently found the probative value of character evidence to be outweighed by its prejudicial effects).

¹⁷ Pub. L. No. 104-305, 100 Stat. 3807 (1996), *codified as amended in various sections of* 21 U.S.C. (West Supp. 1997).

- contributed to a marked increase in the awareness and prosecution of statutory rape.¹⁸
11. In 1996, Congress enacted two pieces of legislation that sharpened the federal focus on statutory rape. A federal welfare reform law, the Personal Responsibility and Work Opportunity Act of 1996 (PRWORA),¹⁹ contains several provisions designed to promote prosecution of statutory rape and to increase awareness of the issue and its role in teen pregnancy. The PRWORA encouraged aggressive enforcement of statutory rape laws by requiring the Attorney General to establish a program to study the correlation between adult/teen sex and teenage pregnancy and to educate law enforcement officials on the prevention and prosecution of statutory rape.²⁰
 12. An amendment to the Child Abuse Prevention and Treatment and Adoption Reform Act²¹ included statutory rape within the definition of child sexual abuse.²²
 13. Some criticize the increased prosecution of statutory rape as the criminalization of consensual sexual activity. Other potentially harmful results of increased prosecution include loss of income and support for a teen mother if the father is jailed or deported, and the intrusion of the child welfare system into the girl's life if her sexual relationship is revealed under child-abuse reporting laws.²³ Statutory rape laws may also discourage girls from seeking medical or social services related to contraception, sexually transmitted diseases or prenatal care for fear of implicating their adult partners and possibly exposing them to criminal sanction.²⁴

¹⁸ See, e.g., Elizabeth Hollenberg, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL'Y REV. 267, 274-276 (1999) (discussing the political debate around teenage pregnancy and the increasing focus on predatory older men as a reason for underage pregnancies); Rigel Oliveri, Note, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463 (2000). Although the definition of statutory rape varies from state to state, it is generally a strict liability crime where an older person has intercourse with a minor who is under the statutory age of consent.

¹⁹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in various sections of 42 U.S.C.).

²⁰ *Id.* §103, 110 Stat. at 2113-14.

²¹ 42 U.S.C. § 5106a (1996).

²² In all states, sexual abuse is included in the state statutory definition of child abuse; however, the definition of "sexual abuse" differs from state to state, and statutory rape is not necessarily included in each state's definition of sexual abuse. See Admin. Children & Families, U.S. Dep't of Health & Hum. Serv., National Clearinghouse on Child Abuse and Neglect Information, Child Abuse & Neglect State Statutes Elements, at Mandatory Reporters, No. 2 (current through Dec. 31, 1999), at <http://www.calib.com/nccanch/services/statutes.htm#Laws>.

²³ Abigail English and Catherine Teare, *Statutory Rape Enforcement And Child Abuse Reporting: Effects on Health Care Access For Adolescents*, 50 DEPAUL L. REV. 827, 840-41 (2001).

²⁴ *Id.* at 843-45.

Proposed Federal Legislation

14. The Debbie Smith Act,²⁵ introduced in March 2002, would make the investigation and prosecution of rape cases more efficient by facilitating the analysis of DNA evidence obtained through medical examinations of sexual-assault victims. DNA evidence (and other physical evidence) is collected in a “rape kit,” which then must be analyzed by police and forensic experts. Currently, the Department of Justice estimates that there are approximately 150,000 to 500,000 evidentiary rape kits nationwide that have yet to be analyzed, because law enforcement officials are short on both the funds and the skilled personnel necessary to process the kits. The bill would allocate \$250 million to states to devise a standardized rape kit, maintain a national database of DNA records, and create programs to train specialized nurses to collect evidence that will always be admissible in court.²⁶
15. The Domestic Violence and Sexual Assault Victims’ Housing Act²⁷ would provide financial assistance for housing to individuals or families victimized by domestic violence, stalking, or adult or child sexual assault.

State Legislation

Marital Rape Exemptions

16. As recently as 1985, an exemption for spouses from criminal rape prosecution existed in about 30 states.²⁸ As part of a concerted reform movement, all states have now abolished exemptions under which spouses enjoyed complete immunity from rape prosecution.²⁹
17. In many states, however, the penalties for spousal rape are still far lower than those for “stranger” rape. In 17 states and the District of Columbia, there are no exemptions from rape prosecution granted to husbands. However, 33 states still give husbands some exemption from rape prosecution.³⁰ For instance, in Tennessee, a limited spousal exclusion allows a man to avoid prosecution for raping his legal resident wife unless the assailant was armed or caused serious bodily injury.

²⁵ The Debbie Smith Act, S. 2055, 107th Cong. (introduced March 21, 2002).

²⁶ Rape Kit DNA Analysis Backlog Elimination Act of 2002, S. 2318, 107th Cong., 2d Session (introduced Apr. 25, 2002).

²⁷ H. R. 3752, 107th Cong., 2d Session (introduced Feb. 13, 2002).

²⁸ WAYNE R. LAFAYE, AUSTIN W. SCOTT, JR., 2 SUBST. CRIM. L., § 7.20 Rape--Absence of Consent (2000).

²⁹ JOAN ZORZA, VIOLENCE AGAINST WOMEN: LAW, PREVENTION, PROTECTION, ENFORCEMENT, TREATMENT, HEALTH 2-8 (Civic Research Institute, 2002).

³⁰ Raquel Kennedy Bergen, *Marital Rape* (1999), at <http://www.vaw.umn.edu/Vawnet/mrape.htm>

Statutory Rape

18. Partly in response to the new federal legislation, some states changed the way statutory rape is treated in statute and policy.³¹ There are three important categories of changes in state law:
- i. Some states have increased efforts to prosecute statutory rape offenses; often accompanied by media campaigns to raise the profile of the issue.
 - ii. States have revised statutory rape criminal provisions to raise the age of consent, thus covering more minors.
 - iii. States have revised child-abuse reporting laws³² to designate statutory rape as a form of child abuse, making it a reportable offense by certain service professionals, such as doctors or teachers.

Sex-Offender Registration

19. Since the 1996 enactment of the federal Jacob Wetterling Crimes Against Children and Sexual Violent Offender Registration program (*see supra*, paragraph 6) and its requirement of state funding for registration systems, almost all states have enacted registration laws that are substantially similar to the federal laws.³³ Reflecting the considerable discretion left to the states, the crimes that qualify for reporting under state laws cover a broad spectrum – from forcible rape to indecent exposure.³⁴ States have also varied their information requirements, with many demanding that offenders provide substantial personal data in addition to federally required information.
20. The majority of states allow law enforcement officials to notify the public upon the release of an offender, but the notification procedures differ widely across the states. Some states have broad notification procedures mandating that law enforcement officials disclose to the public all registered sex offenders.³⁵ Other states notify the public only of those offenders deemed to be in the highest risk

³¹ English and Teare, *supra* note 23 at 838.

³² All states have enacted child-abuse reporting statutes that require persons in particular professions—generally in medical, mental health and education—to report their suspicions about child maltreatment to the designated authorities.

³³ See Christina E. Wells & Erin Elliott Motley, *Reinforcing The Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U.L. REV. 127, 131-34 (2001).

³⁴ Some states broaden the registration requirement far beyond the federal statute. For example, in Alabama and Arizona, anyone convicted of the crime of indecent exposure must register. See ALA. CODE § 13A-11-200; ARIZ. REV. STAT. ANN. § 13-3821.

³⁵ See, e.g., MICH. COMP. LAWS ANN. 28.730(2)-(3) (West Supp. 2000) (requiring that certain information be “available for public inspection,” and permitting that information to be “available to the public through electronic [or] computerized ... means”); LA. REV. STAT. ANN. 15:542(B)(1)(a), (B)(3) (permitting the sentencing court to require a notification via “signs, handbills, bumper stickers, or clothing labeled to that effect”).

- categories. For sex offenders with a lower risk of recidivism, only certain groups, such as law enforcement agents or teachers, must be notified by the authorities.³⁶
21. Various commentators have detailed the laws' shortcomings, ranging from ineffectiveness and tendency to cause vigilantism, to their significant stigmatic and liberty-depriving effects.³⁷
 22. State sex-offender registrations based on Megan's Law (*see supra* paragraph 6) have not fared well lately in the courts. A Connecticut district court held that the state's registry violates due process because it fails to provide offenders the opportunity to demonstrate that they are not dangerous.³⁸ The 9th Circuit Court of Appeals similarly ruled that Alaska's policy requiring sex offenders to register even if convicted before the registry law was passed by the legislature was an impermissible retroactive punishment.³⁹

Sexual Predators Laws

22. Several states have enacted "sexual predator" laws that provide for the indefinite commitment to high-security mental-health institutions of convicts deemed to be "sexual predators."⁴⁰ If the state finds that an offender meeting the state definition of a "sexual predator" has a mental disposition that makes him likely to engage in future acts of predatory sexual violence, the state may take civil law steps (as opposed to criminal proceedings) to commit the offender to a mental institution for an indefinite period of time.
23. A Washington state sexual-predator law was upheld by the United States Supreme Court in *Seling v. Young*.⁴¹ The defendant had argued that his conditions were so

³⁶ *See, e.g.*, N.J. STAT. ANN. 2C:7-8(c)(1)-(3) (making the following classifications: "(1) If risk of re-offense is low, law enforcement agencies likely to encounter the person registered shall be notified; (2) If risk of re-offense is moderate, organizations in the community including schools, religious and youth organizations shall be notified...").

³⁷ *See, e.g.*, Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1193-94 (1999) (explaining that notification is a harm in itself and that the offender "can suffer this public ignominy well past the end of their prison sentence, and, indeed, for the rest of their lives"); Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788 (1996).

³⁸ *John Doe v. Dr. Henry C. Lee*, Case No. 3:99CV0314 (May 18, 2001).

³⁹ *Doe I v. Otte*, 259 F.3d 979, (9th Cir. 2001), *cert. granted* *Otte v. Doe*, 534 U.S. 1126 (2002).

⁴⁰ *See, e.g.*, KAN. STAT. ANN. 59-29a01-02 (West 1999) (defining sexual predators as those who have "a mental abnormality or personality disorder which makes [them] likely to engage in repeat acts of sexual violence" and explaining that because the existing civil commitment procedures were inadequate in addressing the "special needs of sexually violent predators . . . a separate involuntary civil commitment process . . . is necessary."). *See also*, CAL. WELF. & INST. CODE 6600 6609 (West 1998 & Supp. 1999); FLA. STAT. ANN. 775.21 (West Supp. 1999); 725 ILL. COMP. STAT. 207/1 207/99 (West Supp. 1999); KAN. STAT. ANN. 59-29a01 59-a15 (1994 & Supp. 1998); WASH. REV. CODE ANN. 71.09.010 71.09.902 (West 1992 & Supp. 1999).

⁴¹ 531 U.S. 250, 256 (2001). *See also* *Kansas v. Hendricks*, 117 S. Ct. 2013 (1996) (upholding Kansas sexual-predator law as a constitutional exercise of the state's civil commitment authority)

punitive and his treatment so inadequate at the state mental facility that his confinement amounted to double jeopardy (being punished twice for the same offense). The Court ruled in an 8-1 vote that double jeopardy is not an appropriate challenge to civil confinement schemes.

Emergency Contraception and Abortion

25. Many hospitals, particularly those affiliated with religious organizations, do not provide rape victims with information about emergency contraception or elective abortions.⁴²
26. In 2001, Illinois lawmakers gave final approval to a bill that requires hospitals to tell rape victims about emergency contraception. In July 2001, Governor George Ryan signed what experts call the first law of its kind in the country.⁴³
27. California and North Carolina have enacted laws that require insurers to provide information about where rape victims can get emergency contraception. Lawmakers in several other states are debating similar bills.⁴⁴

Statutes of Limitations

28. The imposition of statutes of limitations often hinders the prosecution of rape and sexual-assault cases; in the case of child sexual abuse, victims may not be confident enough to press charges until they reach the age of majority. Many states have eliminated statutes of limitations altogether in sexual-assault cases; recently Montana, Nevada, New Jersey and Michigan eliminated or extended their statutes of limitations.⁴⁵ Other states have facilitated the prosecution of child sexual assault by ensuring that the statutes do not begin to run until the victim reaches the age of majority.⁴⁶
29. The advent of DNA identification technology has also increased pressure to reassess the merits of statutes of limitations on sexual-assault crimes. Prosecutors

⁴² See *What Cannot Be Said In America*, THE TEXAS OBSERVER (Oct. 12 2001) (describing lack of access to emergency contraception and elective abortions in Texas), available at <http://www.texasobserver.org/showArticle.asp?ArticleID=451>.

⁴³ Christi Parsons, *Law to Help Victims of Rape Get Advice; Women to be Told of Contraception*, CHICAGO TRIBUNE, July 26, 2001, at 1.

⁴⁴ Ray Long & Rick Pearson, *Lawmakers OK plan for rape victims; Governor gets bill requiring hospitals to provide contraception information*, CHICAGO TRIBUNE, May 4, 2000 at 1.

⁴⁵ See, e.g., MO. ANN.STAT. § 556.036 (West 1997); N.J. STAT. ANN. § 2C:1-6(a) (West Supp. 2000). Wisconsin is currently considering the elimination of time limits on the prosecution of sexual assault.

⁴⁶ See, e.g., NEV. REV. STAT. ANN. §§ 171.085, 171.090, 171.095(2) (Michie 1997). Illinois, for example, recently increased its statute of limitations for sexual-assault crimes from five years to ten. Florida no longer limits the time for prosecuting sexual battery if the crime was reported within 72 hours. FLA. STAT. ANN. § 775.15(b) (West Supp. 2001). Pennsylvania is presently seeking to extend its statute of limitations on rape, while New York has proposed the elimination of its limitation period. Amy Dunn, Note, *Criminal Law-Statutes Of Limitation On Sexual Assault Crimes: Has The Availability Of DNA Evidence Rendered Them Obsolete?*, 23 U. ARK. LITTLE ROCK L. REV. 839, 858 (2001).

in some states have resorted to filing an anonymous indictment or arrest warrant, often termed a “John Doe” indictment, to identify a suspect by his DNA in order to begin the prosecution of the suspect, and thereby avoid the lapsing of the statute of limitations.⁴⁷ For example, California has recently amended its statute of limitations for sexual-assault cases so that the relevant limitation is either ten years from the commission of the crime or one year after the suspect is conclusively identified by DNA testing, whichever is longer.⁴⁸

Enforcement

31. Police discretionary decisions may result in less prosecution of rape. For instance, police disproportionately categorize rape complaints as ‘unfounded’ or record them as a lesser crime or under a non-criminal code.⁴⁹
32. By finding complaints “unfounded” and downgrading crimes involving violence against women, police departments neglect hundreds, perhaps thousands, of legitimate rape complaints every year. In 1998, for instance, the *Philadelphia Inquirer* uncovered the Philadelphia police practice of under-investigating and mishandling rape charges.⁵⁰
33. In response to the *Philadelphia Inquirer’s* discovery, the city Police Commissioner began a review of all possible rape cases in the previous five years, and women’s groups began monitoring police practices regarding rape investigation.⁵¹ Philadelphia police ultimately acknowledged that the department’s rape squad wrongly disregarded approximately 400 cases a year, a total of 2,000 cases in the five-year period examined.⁵²

Advocacy and NGO work

35. The National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP) was established in 1980 as a project of NOW LDEF in cooperation with the National Association of Women Judges. NJEP creates model curricula and consults on gender bias in the courts for judicial organizations, bar

⁴⁷ Such DNA indictments have been used in New York, Pennsylvania, California, Florida, and Wisconsin, among other states. See, Meredith A. Bieber, *Meeting the Statute or Beating It: Using “John Doe” Indictments Based on DNA to Meet the Statute of Limitations*, 150 U. PA. L. REV. 1079 (2002).

⁴⁸ CAL. PENAL CODE § 803(i)(1) (West Supp. 2002).

⁴⁹ Michelle J. Anderson, *Symposium: New Voices on the New Federalism Women Do Not Report the Violence They Suffer: Violence against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 928 (2001).

⁵⁰ See Mark Fazlollah, *Philadelphia’s Hidden Rapes*, WOMEN’S ENEWS at www.womensnews.org/article.cfm/dyn/aid/452/context/archive. The newspaper determined that since 1981, the sex crimes unit had rejected large numbers of reported rapes and sexual assaults as “unfounded,” meaning that the unit treated the women’s complaints as fabricated or, at best, unsubstantiated. Police also had a role in affecting the rape statistics by classifying reports by women victims as “requests for information” rather than crimes. *Id.*

⁵¹ *Id.*

⁵² Anderson, *supra* note 49, at 929.

- associations, law schools, and legal organizations across the country. *Understanding Sexual Violence: The Judicial Response to Stranger and Non-stranger Rape and Sexual Assault*, NJEP's two-day model curriculum on rape trials, was published in December 1994 and has been presented in more than 20 states and abroad.⁵³ NJEP created a four-hour self-directed video version of this curriculum and is currently developing a DVD.⁵⁴
36. At the request of judges nationwide, NJEP adapted its curriculum for prosecutors. NJEP presents *Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases* with the American Prosecutors Research Institute in states across the country and publishes the text on the Department of Justice Violence Against Women website.⁵⁵ To provide tools for successful sex-crimes prosecution, especially for acquaintance rape, the curriculum incorporates the most current research about victims' reactions during and after sexual assault, rape-related post-traumatic stress disorder, sex offenders and sex-offender treatment, societal attitudes toward rape, and the latest forensic information.⁵⁶ NJEP is also creating a prosecutors' video library based on the curriculum.⁵⁷
37. NJEP's judicial education programs were the catalyst for a series of task forces established by state chief justices and federal circuit councils to examine gender bias in their own court systems, including the handling of sexual-assault cases and the differential response to stranger and non-stranger rape.⁵⁸ These task forces document discriminatory court decisions, policies and practices, and implement recommendations to eradicate these barriers to equal justice. NJEP provides technical assistance to the task forces in all phases of their work as investigating bodies, implementation committees, and standing committees of the courts. In addition, task forces in more than 40 states and seven federal circuits are now in various stages of collecting data, implementing recommendations and institutionalizing reforms.
38. Collegiate anti-rape organizing, focusing on the issues of date rape, the universities' response to rape and gender issues, grew through the 1980s and 1990s.⁵⁹ In March 1992, the first National Student Conference on Campus Sexual Violence was held at the University of Pennsylvania. Its success prompted student organizers to establish in 1994 the National Student Coalition Against

⁵³ <http://www.nowldef.org/html/njep/stranger.shtml>.

⁵⁴ <http://www.nowldef.org/html/njep/PDFdocs/usvflyer.PDF>.

⁵⁵ For the Prosecutors Curriculum Flyer, see <http://www.nowldef.org/html/njep/PDFdocs/usvadult.PDF>; for the Curriculum text, see <http://www.vsw.umn.edu/FinalDocuments/usvpros.asp>.

⁵⁶ <http://www.nowldef.org/html/njep/updates.htm#jan2001>.

⁵⁷ www.nowldef.org/html/njep/PDFdocs/MedicalEvidenceVideo.pdf.

⁵⁸ Information about these task forces and how to obtain task force reports is available at <http://www.nowldef.org/html/njep/genderbias.shtml>.

⁵⁹ MARIA BEVACQUA, *RAPE ON THE PUBLIC AGENDA* (Northeastern University Press, 2000).

- Sexual Violence (NSCASV), which serves as a coordinating group for college anti-rape groups and holds conferences every other year.⁶⁰
39. Student groups have also advocated campus-wide policies to prevent rape and punish rapists. However, universities have been frequently criticized for their policies on rape, on grounds that they fail for public relations reasons to report rapes to the police and that internal university disciplinary mechanisms do not adequately convict and punish rapists, particularly those who are prominent athletes (*see Report infra*, Section 6, Education).
40. In the 1990s, sexual-assault nurse examiner (SANE) programs were created in hundreds of communities to address the inadequacies of the traditional model for sexual-assault medical evidentiary exams. A SANE is a registered nurse who has received advanced education and clinical preparation in forensic examination of sexual-assault victims. SANE programs are funded through VAWA and can be tailored to the needs of any locality to provide a victim-sensitive solution to systemic gaps in the medical-legal response to these victims.⁶¹

⁶⁰ National Student Coalition Against Sexual Violence, *The Conferences*, at <http://members.aol.com/nascasv/conference.html>.

⁶¹ OFFICE FOR VICTIMS OF CRIME, SEXUAL ASSAULT NURSE EXAMINER (SANE) PROGRAMS: IMPROVING THE COMMUNITY RESPONSE TO SEXUAL ASSAULT VICTIMS (April 2001) at http://www.ojp.usdoj.gov/ovc/publications/bulletins/sane_4_2001/welcome.html.

SECTION 3

VIOLENCE AGAINST WOMEN IN U.S. PRISONS

Note: This section focuses on information available after the Special Rapporteur's January 1999 report, which was based on her visit to the United States in June 1998.

Narrative Summary

The United States lacks standardized national procedures and laws to deal with the problem of violence against women in prison. Prison practices ranging from women's health care to the gender of prison guards are decided on a state-by-state, and often a case-by-case, basis. Female inmates have little confidence in the penal system, and few avenues of adequate redress exist for violence perpetrated against them. The situation of female inmates is further complicated by their constrained legal status and the dearth of legal resources, as well as by the psychological trauma of past or current abuse. Meanwhile, the number of women in prison, most for drug or other non-violent crimes, continues to grow rapidly.

The Federal Bureau of Prisons (BOP), the National Corrections Institute (NCI), and state correctional departments respond occasionally to public campaigns, lawsuits, or governmental criticism of the system, but do not take pro-active steps. The visit to the United States of the UN Special Rapporteur on Violence Against Women, in conjunction with investigations conducted by human rights advocates, seemed to engender a flurry of attention from the Department of Justice, BOP and NCI in 1999. More recent follow-up information from the government is not available, however, and attention to the problem of violence against women in prison seems to have subsided since 1999. Because suits by women prisoners are often settled out of court, litigation has yet to bring systemic change, and actions such as Michigan's restriction of prisoners' civil rights may signal a trend to further reduce the rights and remedies available to women prisoners.

Introduction

1. The United States has failed to adequately protect women incarcerated in the prison system from violence.
2. Since 1995, the population of women in state and federal prisons has grown at an average annual rate of 5.2 percent, significantly faster than the male population.¹ At the end of 2001, there were more than 93,000 women incarcerated in state and federal prisons in the United States, representing 7.1 percent of the total inmate

¹ U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2001 6 (July 2002).

- population.² The large majority of female prisoners have been convicted of drug offenses and other non-violent crimes.³
3. Female prisoners are vulnerable to custodial sexual abuse, a widespread problem.⁴ During her 1998 visit, the UN Special Rapporteur on Violence Against Women heard reports in nearly all of the facilities she investigated of women prisoners subjected to sexual abuse. Statistics on the overall extent of sexual violence against women in prison are unreliable, incomplete, or otherwise unavailable, because of prisoners' reluctance to report such incidents and inadequate data collection by corrections departments.⁵
 4. Female inmates who complain to prison authorities of sexual abuse often suffer retaliation, including further abuse. In Michigan, for instance, human rights investigators found that women who attempted to protect themselves from abuse by reporting it faced severe, punitive retaliation.⁶
 5. Women prisoners are also victimized by the unnecessary use of restraining instruments, including shackles, electric shock devices, and excessive dosages of psychotropic drugs.⁷ These restraints are sometimes imposed during pregnancy, and during and after delivery.
 6. Female prisoners have proportionately greater needs for therapeutic services than male inmates, as they are more likely to have a history of sexual and physical abuse, drug addiction, or mental illness.⁸ Female prison inmates suffer from a lack of adequate health care, including insufficient mental health and gynecological attention.
 7. Overcrowding in prisons can contribute to increased security problems and a "threatening climate" for women.⁹

² *Id.*

³ *Id.* at 13.

⁴ *See, e.g.*, HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS, (December 1996); HUMAN RIGHTS WATCH, WORLD REPORT 2002: PRISONS (2002), available at www.hrw.org.

⁵ UNITED STATES GENERAL ACCOUNTING OFFICE, WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF (June 22, 1999).

⁶ HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS (July 1998).

⁷ *See, e.g.*, AMNESTY INTERNATIONAL, NOT PART OF MY SENTENCE: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (1999).

⁸ U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS: WOMEN OFFENDERS: PROGRAMMING NEEDS AND PROMISING APPROACHES 1 (August 1998).

⁹ *Id.* at 4.

Legislation

8. The Civil Rights of Institutionalized Persons Act (CRIPA)¹⁰ allows the Department of Justice to bring civil suits to enforce the constitutional or federal statutory rights of prisoners.
9. As of 2001, only one state, Illinois, bans the shackling of pregnant women on the way to and from the hospital for delivery.¹¹ At least 18 states have policies specifically allowing pregnant women to be restrained during labor and/or delivery.¹²
10. By the end of 1999, all but nine states (Alabama, Kentucky, Minnesota, Montana, Nebraska, Oregon, Utah, Vermont, and West Virginia) had laws criminalizing sexual contact between staff and inmates, the majority defining such sexual misconduct as a felony.¹³ During 1996-99, 15 states passed new statutes or supplemental legislation to broaden the scope of laws prohibiting staff-inmate sexual contact.¹⁴ Federal law also prohibits consensual sexual contact between a person in custodial, supervisory or disciplinary authority and a person in custody.¹⁵
11. Human Rights Watch has found, however, that in some states laws prohibiting sexual contact between correctional staff and inmates have been used to penalize employees and have the effect of deterring women from reporting custodial assault.¹⁶
12. The 1996 federal Prison Reform Litigation Act (PRLA) limits permissible remedies incases involving prison conditions and imposes special requirements on prisoner release orders.¹⁷ In addition, the PRLA restricts court-awarded attorneys' fees for such cases. Its overall effect is to limit women and other prisoners' ability and incentives to bring claims when they experience discrimination, abuse, or inhumane prison conditions.
13. Michigan amended its state Civil Rights Act in 1999 to exempt prisoners from the protection of the statute, which prohibits discrimination based on race and gender.¹⁸

¹⁰ 42 U.S.C. § 1997 *et seq.*

¹¹ AMNESTY INTERNATIONAL, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN (2001), *available in part at* http://www.amnestyusa.org/women/custody/custody_all.pdf (last visited October 31, 2002).

¹² *Id.*

¹³ U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS, SEXUAL MISCONDUCT IN PRISONS: LAWS, REMEDIES, AND INCIDENCE 4 (May 2000).

¹⁴ *Id.*

¹⁵ 18 U.S.C. §2243.

¹⁶ *See* HUMAN RIGHTS WATCH, ALL TOO FAMILIAR, *supra* note 4.

¹⁷ 18 U.S.C. §3626.

¹⁸ M.C.L.S. §37.2103.

Case Law

14. Though the Eighth Amendment of the U.S. Constitution has generally been construed narrowly, the Supreme Court has held that a prison official's deliberate indifference to a substantial risk of harm to an inmate violates the Eighth Amendment's prohibition on the infliction of cruel and unusual punishment.¹⁹
15. So far, the Supreme Court has not found that prisoners have a reasonable expectation of privacy,²⁰ though the limits of permissible invasion are unclear and a right to privacy may develop in the future.²¹
16. In 1999, 22 state departments of corrections were defendants in litigation based on charges of sexual misconduct between inmates and staff.²²

Administrative and Enforcement Activity

17. From May 1980, when CRIPA was enacted, through September 1997, the Department of Justice investigated conditions in 283 public facilities, including jails, prisons, and juvenile detention centers. These investigations resulted in a series of lawsuits on behalf of female prison inmates, including recent cases against Michigan and Arizona.²³ In 1999, 31 women filed a class action lawsuit against the Michigan Department of Corrections charging that prison management failed to prevent sexual assault and abuse by guards and staff and that the women face retaliation when they report rape.²⁴ Since 1999, the Department of Justice has not reported filing any CRIPA suits filed relating specifically to sexual abuse or violence against women.²⁵
18. In March 1998, as part of a response to a \$500,000 legal settlement in a case brought by inmates against corrections staff at various federal institutions in California, the Federal Bureau of Prisons agreed to institute a variety of measures to prevent and respond to sexual abuse against prisoners. One of these provisions

¹⁹ Farmer v. Brennan, 511 U.S. 825 (1994) (holding that placing an inmate in a situation where sexual assault is highly likely violates the Eighth Amendment). See also, Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993) (finding that subjecting women inmates with a history of sexual abuse to cross-gender pat searches could constitute cruel and inhumane punishment).

²⁰ See, e.g., Hudson v. Palmer, 468 U.S. 517 (1984) (finding that prisoner had no expectation of privacy in his cell).

²¹ See, e.g., Carlin v. Manu 72 F. Supp. 2d 1177, 1179 (D. Ore. 1999) (suggesting that women's privacy rights in prison may be extended in the future).

²² *Supra* note 13 at 6.

²³ U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, SPECIAL LITIGATION SECTION, 1997 REPORT TO CONGRESS ON CRIPA, at <http://www.usdoj.gov/crt/split/documents/crpa97.htm>.

²⁴ The Department of Justice settled this case out of court, under criticism from human rights advocacy groups. See Human Rights Watch, Press Release: U.S. Department of Justice Bargains Away Rights of Women Prisoners, (June 11, 1999), at <http://www.hrw.org/press/1999/jun/reno611.htm> (last visited October 31, 2002).

²⁵ U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, SPECIAL LITIGATION SECTION, 1999-2001 REPORTS TO CONGRESS ON CRIPA; all available at <http://www.usdoj.gov/crt/split/findsettle.htm#CRIPA%20Complaints> (last visited October 31, 2002).

- was a telephone link to allow women to report complaints of sexual abuse to an external inquiry unit.²⁶
19. In a statement released on July 28, 1999, the Bureau of Prisons affirmed its prohibition against sexual contact between staff and inmates in federal correctional facilities. The statement set out the process for complaints, explaining that “when an allegation of sexual misconduct with an inmate is made and brought to the attention of staff, an investigation is conducted to determine if disciplinary action against the staff member is warranted. Additionally, a referral is made to the Department of Justice for an independent investigation, which is followed by criminal prosecution when warranted.”²⁷
 20. In its annual report for 2000, the Bureau of Prisons acknowledged that due to the increased need for new recruits, the Bureau’s workforce is increasingly inexperienced.²⁸ During 2000, sexual-abuse charges were sustained against 12 Bureau staff members and 10 outside contractors. All of these individuals resigned or were terminated, and nine of them were convicted of criminal violations.
 21. In the wake of the 15-year *Cason v. Seckinger* litigation,²⁹ Georgia has established new facilities for women and required every new employee to sign a statement saying that he/she accepts and will adhere to the *Cason* conditions. A new unit in the Georgia Department of Corrections was created specifically to deal with sexual misconduct allegations.
 22. The National Institute of Corrections (NIC) has developed training programs for state and federal corrections officers, focusing on preventing and responding to sexual abuse.³⁰ NIC also reports that between 1996 and 1999, 20 state departments of corrections developed or revised policies on sexual misconduct; 12 other jurisdictions were in the process of updating policies in 1999.³¹ In 37

²⁶ AMNESTY INTERNATIONAL, “NOT PART OF MY SENTENCE”: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY, (1999), available at

<http://www.amnestyusa.org/rightsforall/women/report/index.html>, citing Private Settlement Agreement, Lucas v. White, Case number C96-02905 U.S. District Court of Northern California (March 1998).

²⁷ Federal Bureau of Prisons, Statement of the Federal Bureau of Prisons on Pat Searches (July 28, 1999), at www.bop.gov (last visited October 10, 2002).

²⁸ DEPARTMENT OF JUSTICE, BUREAU OF PRISONS: ANNUAL REPORT 2000, 13 (2001), available at <http://www.bop.gov/ipapg/ipasob2000.pdf>.

²⁹ See discussion of *Cason* in UN Special Rapporteur’s January 1999 report. See also Brenda V. Smith, *Sexual Abuse Against Women in Prison*, 16-SPG Crim. Just. 30, 31 (Spring 2001) (detailing the causes and results of the *Cason* litigation).

³⁰ National Institute of Corrections, Staff Sexual Misconduct, at <http://www.nicic.org/services/special/misconduct/default.htm> (last visited October 31, 2002).

³¹ U.S. Department of Justice, National Institute of Corrections, *Sexual Misconduct in Prisons: Law, Remedies, and Incidence*, SPECIAL ISSUES IN CORRECTIONS (May 2000).

states that responded to a 1998 NIC survey, 115 correctional officers were reported to have been dismissed for sexual misconduct.³²

NGO Advocacy

23. The California Coalition for Women Prisoners³³ organizes visits to women's correctional facilities to support inmates and educate the outside world about conditions within these institutions. It also organizes annual protests outside the largest prisons in California. The Coalition publishes a quarterly newsletter, *The Fire Inside*, to provide female inmates with a vehicle for expression.
24. The Prison Activist Resource Center³⁴ provides a clearinghouse of information on issues relating to women in prisons, including violations of their human rights, and helps women prisoners connect with their children on the outside.
25. In October 2000, women prisoners in California testified in state legislative hearings about their experiences of sexual abuse, lack of health care, and separation from their children. In preparation for this hearing, Legal Services for Prisoners with Children³⁵ compiled a 180-page packet for the Legislature, detailing information about medical care, sexual abuse, and conditions in the Security Housing Units.
26. Human Rights Watch and Amnesty International have conducted extensive investigations into allegations of human rights abuses perpetrated against women in prison and have released more than 15 reports on the topic. Each report contains recommendations for further action to be taken by either the Federal Bureau of Prisons or state corrections departments.

Recommendations

27. The U.S. government should withdraw its reservations to Article 7 of the International Covenant on Civil and Political Rights and Article 16 of the Convention against Torture, which allow it to limit the definition of "cruel, inhuman, or degrading treatment" to the parameters set by the U.S. Constitution's prohibition against cruel and unusual punishment.
28. All states should criminalize sexual misconduct by prison employees. Such laws should be stringently enforced, and all complaints of alleged misconduct should be thoroughly investigated. States should refrain from directly or indirectly punishing prisoners for sexual misconduct. In particular, states should examine

³² More recent information on policies and implementation regarding violence against women in prisons is not available from the NIC. However, the GAO estimates that only about 18% of allegations of staff sexual misconduct ever result in termination, and of staff terminated, very few face criminal prosecution. GAO, *supra* note 5 at 2.

³³ <http://womenprisoners.org/>.

³⁴ <http://www.prisonactivist.org/>.

³⁵ <http://prisonerswithchildren.org/>.

- the inappropriate and *de facto* punitive use of administrative segregation to punish and/or intimidate prisoners involved in investigations of sexual misconduct.
29. Congress should pass the 2002 Prison Rape Reduction Act, which would collect statistics, provide grants, and facilitate confidential reports and training of prison staff on prison rape.³⁶
 30. State and federal prisons should authorize restraints only as a last resort to respond to discipline problems, and should never use restraints or shackles on women during childbirth.
 31. State and federal prison management should be subject to external review and investigation of allegations of abuse or mistreatment.
 32. The National Institute of Corrections should revise its general staff training programs to effectively address the issues of violence against female inmates.
 33. State departments of correction should implement more effective grievance procedures in order to increase inmates' confidence and sense of security in submitting complaints to appropriate administrative bodies.

³⁶ S. 2619 and H.R. 4943.

SECTION 4

VIOLENCE AGAINST WOMEN IN THE U.S. MILITARY

Narrative Summary

Since the mid-1990s, the U.S. military has taken steps to combat violence against women associated with the military. While the Department of Defense and the four branches of the armed forces have responded to the serious issue of violence against women in or associated with the U.S. military, their initiatives seem to have come about only in reaction to scandal and critical media attention.¹ The intense attention in the wake of sexual harassment and assault scandals in the early 1990s (e.g. the Tailhook and Aberdeen incidents) seems to have waned; for instance, there has been no major, publicly available update on sexual harassment in the military since 1995. The problem of domestic violence within the military is in the limelight now, but it remains to be seen whether current efforts will result in substantial decreases in the violence faced at home by women associated with the military. Furthermore, critics charge that the military's efforts to address sexual harassment and violence are little more than window-dressing, and may lead to further victimization.

Finally, an issue that receives less public sympathy and attention is "lesbian-baiting" and other harassment of women that is related to actual or perceived sexual orientation. The problems associated with this type of harassment cannot be fully eliminated until the military's policy of discharging openly gay and lesbian service members is reversed.

Introduction

1. In March 2001, the total number of military women in the Department of Defense was 199,850. Women made up only 14.7 percent of the total membership of the armed forces, ranging from 19 percent in the Air Force to just 6 percent in the Marine Corps.²
2. A 1995 report conducted by the Department of Defense found that 78 percent of women in the armed services reported experiencing some form of sexual harassment (ranging from sexist behavior to sexual assault) in the previous year.³
3. Between 1992 and 1997, the Department of the Navy recorded filings of more than 1,000 new harassment cases and more than 3,500 new charges of indecent

¹ Lauren R. Taylor, *The Defense Department Takes Aim at Domestic Violence*, GOVERNMENT EXECUTIVE (March 2002) (explaining that the DOD "was frightened into becoming a leading advocate for abused spouses by a January 1999 edition of 60 Minutes," which prompted Congressional authorization of the Defense Task Force on Domestic Violence), available at <http://www.dtic.mil/domesticviolence/>.

² WOMEN'S RESEARCH AND EDUCATION INSTITUTE, ACTIVE DUTY SERVICE PERSONNEL BY BRANCH OF SERVICE, OFFICER/ENLISTED STATUS, AND SEX, (March 31, 2001), at <http://www.wrei.org/military/Table7series.pdf> (last visited October 10, 2002).

³ DEPARTMENT OF DEFENSE, 1995 SEXUAL HARASSMENT SURVEY (1995). This report either has not been updated since 1995, or follow-up studies were not found on the relevant websites.

- assault (from groping to rape). This figure is nearly three times the national rate in the United States.⁴
4. Studies of military families have found rates of domestic violence that are between two and five times higher than in the civilian population, and the acts of violence committed were more serious.⁵ Women associated with the military are at particular risk for domestic violence due to their “geographical isolation from friends and family, social isolation within the military culture, residential mobility, financial insecurity, and fear of adverse career impact.”⁶ Domestic violence issues gained national prominence in the summer of 2002, when four military men killed their wives within a six-week period at Fort Bragg, North Carolina.⁷
 5. Many incidents of domestic violence and harassment against women go unreported. Reports of the Defense Advisory Committee on Women in the Services (DACOWITS) indicate a “lack of protection and support for some individuals who are recipients of harassment and/or sexual assault.” Some women fear being punished for reporting.⁸
 6. “Lesbian-baiting,” a form of anti-gay, anti-female harassment in which women are accused of being lesbians (often for unrelated retaliatory purposes), affects women of all sexual orientations in the military.⁹ The military’s “Don’t Ask, Don’t Tell” policy regarding the sexual orientation of service members has been found to have a disproportionate adverse affect on women, who are almost twice as likely as men to be discharged under the policy.

Legislation

7. The National Defense Authorization Act for Fiscal Year 2000¹⁰ called upon the Secretary of Defense to establish a Military-Civilian Task Force on Domestic Violence to create a plan for the Department of Defense to address domestic violence issues more effectively. The Task Force considers issues such as victim safety, training for military commanders, offender accountability, and prevention of and responses to domestic violence at overseas locations.

⁴ Kristin K. Heimark, *Sexual Harassment in the United States Navy: A New Pair of Glasses*, 44 NAVAL L. REV. 223, 225 (1997).

⁵ Christine Hanson, *A Considerable Service: An Advocate’s Introduction to Domestic Violence and the Military*, DOMESTIC VIOLENCE REP. Vol. 6. No. 4, p. 2, (April/May 2001).

⁶ *Id* at 1.

⁷ *House Panel Studies Deaths At Fort Bragg*, WASHINGTON POST, (Oct. 1, 2002), at A6.

⁸ DEFENSE ADVISORY COMMITTEE ON WOMEN IN THE SERVICES, 2001 SPRING CONFERENCE ISSUE BOOK, (2001) available at <http://www.dtic.mil/dacowits/>. See also CHRISTINE HANSEN & KATE SUMMERS, INTIMATE PARTNER VIOLENCE AND THE MILITARY: A VICTIM’S HANDBOOK, The Miles Foundation (2001) (detailing the unique problems facing domestic violence victims associated with the military).

⁹ SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE EIGHTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T HARASS, DON’T PURSUE” 41-42 (2002).

¹⁰ National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65 §591 (2000).

8. The National Defense Authorization Act for Fiscal Year 1994¹¹ established the Transitional Compensation Program for abused dependents of military personnel. The legislation authorizes temporary payments to families of personnel who have been discharged due to abuse. However, the Task Force found a widespread lack of awareness of this program among members of the armed forces.¹²
9. Proposed language in the 1998 version of the Violence Against Women Act (VAWA) would have allowed for prosecution in federal court of acts of sexual violence committed by and against members of the armed forces.¹³ This provision was reportedly pulled from the final 2000 text of the bill in order to get the rest of the legislation through Congress.¹⁴

Adjudication/Prosecution

10. The following three articles of the Universal Code of Military Justice (UCMJ)¹⁵ are used to charge members of the armed forces in cases involving violence against women. They are primarily misconduct provisions, and none specifies violence against women as a separate offense.
11. Article 134 of the UCMJ,¹⁶ which concerns service-discrediting conduct, is often used to address violence against women in the military. Offenses under Article 134 are subjected to a summary, general, or special court martial and are punished at the discretion of that court. Explanatory notes for Article 134 specifically identify indecent assault, acts, language, or exposure, communicating insulting language to females, and wrongful fraternizing as among those acts in violation of the law.
12. Article 92 of the UCMJ,¹⁷ concerning failure to obey an order, is also used to punish violence against women in cases where a prior warning has been given. Punishment is subject to the decision of a court martial and ranges from a \$100 fine to one year at hard labor to a dishonorable discharge. The punishment is left to the discretion of the court martial.
13. Article 128 of the UCMJ,¹⁸ regarding assault consummated by a battery, is used to prosecute domestic violence in the military. Consent is not a valid defense if

¹¹ National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160 (1994).

¹² DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, INITIAL REPORT TO CONGRESS PURSUANT TO SEC. 591, P.L. 106-65 (2001), at <http://www.dtic.mil/domesticviolence/Report.pdf> (last visited October 10, 2002).

¹³ The 1998 Violence Against Women Act, H.R. 3514 and S. 2110, at <http://www.now.org/issues/violence/vawa/title5.pdf>.

¹⁴ Email from Dorothy Mackey, Founding Director, Survivors Take Action Against Abuse by Military Personnel, to Anna Rich, Lowenstein International Human Rights Clinic (Oct. 16, 2002) (on file with Clinic).

¹⁵ The UCMJ is located at 10 U.S.C. §801-964 (2000).

¹⁶ 10 U.S.C. §934.

¹⁷ 10 U.S.C. §892.

¹⁸ 10 U.S.C. §928.

the assault results in serious bodily harm or death. Again, this charge is punishable at the discretion of a court-martial. Past punishments have included six months in military prison, ten years at hard labor, bad conduct discharges, or a reduction of pay grade.

14. Federal law specifies the process by which commanding officers must respond to complaints of sexual harassment, including promptly reporting the incident to a superior officer authorized to convene a general court-martial, investigating the incident, and submitting a report within 14 days.¹⁹ However, many paragraphs are qualified with the phrase “to the extent practicable.”²⁰
15. Because the UCMJ contains no specific criminal provision for stalking, most military courts have based stalking proceedings on misconduct provisions.²¹ There is also anecdotal evidence that most instances of stalking are dealt with at the administrative level.²² Because stalking is not a crime under the UCMJ, military prosecutors face jurisdictional challenges when prosecuting stalking, because they can only make use of the federal anti-stalking statute when the incident occurs on federal property.²³

Executive Branch Policies and Enforcement

16. The Department of Defense issued an interim policy on October 22, 1997, implementing the Lautenberg Amendment to the Gun Control Act of 1968²⁴ by prohibiting the military from recruiting anyone convicted of a crime of domestic violence.²⁵ The Military-Civilian Task Force on Domestic Violence recommends mandatory training for soldiers about the Lautenberg Amendment and its consequences in order to increase awareness of this law.²⁶ Critics argue that the military has circumvented the law by charging both partners with domestic violence even after incidents in which the woman suffered much more severe physical harm.²⁷
17. Federal prosecutors may use the Assimilative Crimes Act (18 U.S.C. §13) to apply state law to offenses committed in areas of exclusive or concurrent federal jurisdiction. In practice, this is often used to charge members of the armed forces

¹⁹ 10 U.S.C. §1561.

²⁰ 10 U.S.C. §1561(b), (c), (d).

²¹ Major Joanne P.T. Eldridge, *Stalking and the Military: A Proposal to Add an Anti-Stalking Provision to Article 134, Uniform Code of Military Justice*, 165 MIL. L. REV. 116, 137 (2000).

²² *Id.* at 130.

²³ *Id.* at 146.

²⁴ 18 U.S.C. §922. The amendment makes it a felony for anyone who has been committed of a misdemeanor crime of domestic violence to ship, transport, possess, or receive firearms or ammunition.

²⁵ Assistant Secretary of Defense for Force Policy Management, Memorandum for Secretaries of the Military Departments (Oct. 22, 1997), available at <http://www.usarc.army.mil/90thrc/807thMedJag/lautenberg.htm>

²⁶ DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 12, at 42.

²⁷ Mackey, *supra* note 14.

- with stalking or elements of sexual harassment on military bases that are not covered by the Uniform Code of Military Justice.
18. In February 1997, the Senate held hearings on sexual harassment in the military in response to a sexual harassment scandal at an army training facility in Aberdeen, Maryland. The U.S. Army had made public charges of rape, sexual harassment, and other abuses of authority against four drill instructors and a captain at Aberdeen. A sexual harassment hotline was set up in Aberdeen, in just two months, it received 6,825 calls from women in all branches of the military.
 19. The Aberdeen incident also caused the Army to take specific steps to train its personnel about sexual harassment policies. The Army's Training and Doctrine Command, which oversees training operations, shifted 100 new lieutenants and a group of chaplains to individual training units for counseling and information-gathering. Other remedial steps taken by the Army included additional instruction for officers on sexual harassment, increased psychological testing for drill-instructor candidates, and intensified scrutiny of candidates' records for prior problems.²⁸
 20. In March 1994, the Secretary of Defense ordered the development of a sexual-harassment policy action plan for the armed forces. Upon its completion in April 1994, this report established the Defense Equal Opportunity Task Force on Discrimination and Sexual Harassment. The primary goal of this task force was to conduct a sexual-harassment survey and make recommendations for improvements. The survey was conducted in 1995; its authors concluded that progress had been made toward reducing harassment in the military, though it warned that military members, especially junior members, continued to experience harassment at work.²⁹
 21. The Department of Defense created the Family Advocacy Program (FAP) in 1972. Each branch of the Armed Forces has its own FAP, and every military installation worldwide has an FAP office. In recent years, the initially limited FAP mandate has expanded to include preventing spousal abuse, collecting reports of such abuse, and providing treatment for families. FAP officials are responsible for victim safety and access to services, intervention services for abusers, notification of unit commanders of reported spouse abuse, and annual public awareness campaigns. However, FAP officers cannot conduct searches or obtain statistics for soldiers whose family violence included stalking, and the organization itself makes little effort to track or report ongoing instances of stalking.³⁰

²⁸ Paul Richter, *Army's Behavior Rules Found Confusing*, L.A. TIMES (July 24, 1997), at A16.

²⁹ Department of Defense, *supra* note 3 at 37-38.

³⁰ Eldridge, *supra* note 21 at note 90.

22. The Military-Civilian Task Force on Domestic Violence has submitted two annual reports to Congress so far.³¹ The 2002 report made 68 policy recommendations to the Department of Defense on cooperation between military and civilian enforcement communities; education and training; offender accountability; victim safety; and program management. Specific recommendations include:
- a. requiring separate branches of the military to issue joint memoranda of understanding so as to create consistent policies regarding domestic violence;
 - b. making the violation of a civilian protection order an offense under the UCMJ;
 - c. requiring mandatory initial training on domestic violence for all commanding officers and senior enlisted advisors;
 - d. providing standardized and additional training for military law enforcement teams on responding to domestic violence;
 - e. requiring investigation of every reported incident of domestic violence;
 - f. establishing an evaluation program for the Family Advocacy Program;
 - g. reviewing the impact of mandatory reporting on victim safety;
 - h. expanding the scope of the National Domestic Violence hotline; and
 - i. exploring all options for creating a system of confidential services for victims.
23. On November 19, 2001, Deputy Defense Secretary Paul Wolfowitz announced a new “zero-tolerance” policy on domestic violence; he stated “Commanders at every level have a duty to take appropriate steps to prevent domestic violence, protect victims and hold those who commit it accountable.”³²
24. Critics charge that even those laws and policies instituted in order to protect victims of violence fail to fulfill their purposes. One former service member and advocate noted that “[f]or those who do report, it is nearly impossible to get the abuse substantiated within this system and rare to get [abuse] punished anyway;” she also reported women being charged with sexual harassment violations for discussing their experiences of being raped.³³ Those who report abuse are at risk for further victimization; some service members find “that their experiences of reporting the sexual assault were worse than the actual rape.”³⁴

³¹ DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 11; DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, SECOND ANNUAL REPORT TO CONGRESS PURSUANT TO SEC. 591, P.L. 106-65 (2002), at <http://www.dtic.mil/domesticviolence/> (last visited October 10, 2002).

³² Taylor, *supra* note 1.

³³ Mackey, *supra* note 14.

³⁴ T.S. NELSON, FOR LOVE OF COUNTRY: CONFRONTING RAPE AND SEXUAL HARASSMENT IN THE U.S. MILITARY (2002) (detailing the experience of sexual assault in the military from the perspective of victims).

Advocacy and NGO Activity

25. Survivors Take Action Against Abuse by Military Personnel (STAMP) is an organization based in Fairborn, Ohio, that assists victims of abuse. STAMP connects active-duty personnel with information, legal representation, and support throughout the administrative and judicial process, and works to increase public awareness and advocate policy reforms.³⁵
26. The Women's Research and Education Institute in Washington, D.C., established a project for women in the military in 1990; it serves to provide information and policy analysis of issues important to military women and women veterans. The Institute continues to collect information about and resources relating to women in the military.³⁶
27. The Miles Foundation, Inc., is a private, non-profit organization based in Newtown, Connecticut, that provides comprehensive services to the military community by furnishing professional education and training, conducting and supporting research, and serving as a resource center for policymakers and scholars. The Foundation has established a toll-free advocacy helpline with counselors for victims of violence associated with the military. The Helpline also provides copies of *Intimate Partner Violence and the Military: A Victim's Handbook* to those affected by domestic violence perpetrated by or upon military personnel.³⁷
28. The Servicemembers Legal Defense Network is a non-profit organization to assist male and female members and ex-members of the military who have been harmed by the "Don't Ask, Don't Tell" policy.³⁸ SLDN's activities include direct legal assistance, lobbying, outreach and education.

Recommendations³⁹

29. Congress should create an outside independent agency with investigative authority over cases of violence against women in the military. An independent authority is needed in order to overcome the chain-of-command problems involved with internal investigations.⁴⁰

³⁵ <http://www.staaamp.org>.

³⁶ <http://www.wrei.org>.

³⁷ <http://hometown.aol.com/milesfdn/myhomepage/index.html>.

³⁸ <http://www.sldn.org>.

³⁹ For a more comprehensive list of recommendations related to domestic violence, see the Defense Task Force's 2002 Annual Report, *supra* note 31.

⁴⁰ See National Organization for Women, Combating Sexual Harassment, (Mar. 1997) (calling for creation of a rapid response team of experienced investigators outside the military structure for reporting and investigating complaints), at <http://www.now.org/nnt/03-97/sexual.html> (last visited October 10, 2002).

30. Congress should add an explicit anti-stalking provision to the UCMJ. In the meantime, the president should use his authority to issue an executive order including stalking among the crimes under Article 134 of the UCMJ and in the Manual for Court-Martials.⁴¹
31. Congress should amend Article 128 of the UCMJ to include specific provisions for domestic violence as a form of aggravated assault, taking into account the long-term effects of domestic abuse.
32. Until the “Don’t Ask, Don’t Tell” policy banning employment of openly gay and lesbian servicemembers is amended, the president and Department of Defense should ensure enforcement of anti-harassment policies, increase training to prevent anti-gay harassment, and hold accountable those who do harass.

⁴¹ See Eldridge, *supra* note 21, at 150-51. The Manual for Court-Martials provides sentencing guidelines for UCMJ offenses.

SECTION 5

VIOLENCE AGAINST WOMEN IN THE WORKPLACE

Narrative Summary

The dangers that domestic violence poses to women in the workplace have gained greater prominence in the last decade. Researchers and advocates have recognized that domestic violence can have a severe, negative impact on a woman's ability to perform her job, posing the greatest employment risks to low-income women whose employment is less secure. Several non-profit organizations, as well as employers and unions, are working on numerous fronts to provide assistance to domestic-violence survivors on the job and to advocate for increased employment-related protections. Many states have recently passed measures to protect domestic-violence survivors from employer discrimination and to allow them to collect social insurance. The federal government, however, has been largely missing from the leadership of these efforts. Congress has an opportunity to begin to remedy this gap by passing the Victims' Economic Security and Safety Act, which would provide domestic-violence survivors with tools to protect their employment status, such as emergency leave, unemployment compensation, and protection against employment discrimination.

Courts in the United States define sexual harassment on the job as a violation of the federal statutes that bar discrimination based on sex in employment. Ultimately, both violence against women at work and sexual harassment threaten to limit women's economic independence.¹ A robust body of case law has developed around the issue of sexual harassment, which includes, but is not limited to, violence based on sex. Because employers may be held vicariously liable for their employees' sexual harassment, many large employers have developed workplace policies on sexual harassment.

A. THE WORKPLACE AND DOMESTIC VIOLENCE

Introduction

1. Advocates and policy makers are becoming increasingly aware that family violence and sexual assault have spill-over effects in the workplace.²
2. Surveys have found that between 35 and 56 percent of women currently suffering from domestic violence report that abusive husbands and partners had harassed them at work.³

¹ See Judith Resnik, *Categorical Feminism: Jurisdiction, Gender and the Globe*, 111 Y.L.J. 619, 634 (Dec. 2001) (arguing despite *Morrison* that federal law is appropriately concerned with violence against women).

² Family Violence Prevention Fund, Workplace Impact: Fact Sheet, at <http://endabuse.org/programs/display.php3?DocID=70> (last visited October 10, 2002). See also *infra*, Report Section 1, Family Violence and Section 2, Sexual Assault.

³ See UNITED STATES GENERAL ACCOUNTING OFFICE, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS, p. 19 (Nov. 1998) (summarizing three

3. Workplace consequences of abuse include lateness, missed work, reprimands at work for behavior related to abuse, and loss of job.⁴
4. Abusers may sabotage welfare recipients' efforts to comply with work requirements. Studies have shown that severe domestic violence is prevalent among women who receive public cash assistance.⁵ Abusers often interfere with work efforts, for example, harassing their partner at work or refusing to cooperate with childcare and transportation needs.⁶
5. Domestic violence also threatens employee safety generally, as the workplace may be the only place where an assailant can locate and harm his partner.⁷ In recent surveys, more than three quarters of human-resource professionals agreed that domestic violence is a workplace problem.⁸

Legislation

6. Some states and local jurisdictions have adopted legislation to protect domestic-violence victims from discrimination in the workplace and to promote other workplace accommodation for victims. California, Maine, Maryland, New York, and Rhode Island, as well as New York City, all passed legislation since 2000, protecting victims of domestic violence against employment discrimination.⁹
7. Some states and localities have passed laws that provide domestic-violence victims with leave from work to go to the doctor or to take other steps to address the violence in their lives. Between 1999 and 2002, California, Colorado, Maine, New York, and Miami-Dade County in Florida each passed domestic-violence leave laws.¹⁰

studies of employed battered women residing at battered women's shelters or participating in support groups).

⁴ *Id.*

⁵ See, Richard M. Tolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence*, 56 J. SOC. ISSUES 655, 661-62 (2000) (surveying a series of studies).

⁶ *Id.* at 664-67.

⁷ Family Violence Prevention Fund, *supra* note 2.

⁸ National Advisory Council on Violence Against Women, "Promoting Safety and Nonviolence in the Workplace," Toolkit to End Violence Against Women, available at <http://toolkit.ncjrs.org/> (last visited October 3, 2002), citing C.M. Solomon, *Talking Frankly About Domestic Violence*, 74 PERSONNEL JOURNAL, 62-65 (1995).

⁹ NOW Legal Defense and Education Fund, Violence Against Women, Fact Sheets On State Laws: Discrimination Against Domestic Violence Victims (May 2002), at <http://www.nowdef.org/html/issues/work/StateLawFactshts/Laws-Discrim.pdf> (last visited October 10, 2002).

¹⁰ NOW Legal Defense and Education Fund, Violence Against Women, Fact Sheets On State Laws: Leave for Domestic Violence Victims (May 2002), at <http://www.nowdef.org/html/issues/work/StateLawFactshts/Laws-Leave.pdf> (last visited October 10, 2002).

8. As of January 2001, 27 states had passed laws making it illegal for an employer to fire or otherwise discriminate against a crime victim for taking time off work to testify in court.¹¹
9. Since 1999, 18 states have passed laws that explicitly provide unemployment insurance to domestic-violence victims and include domestic violence in the definition of “good cause” for leaving a job: California, Connecticut, Colorado, Delaware, Maine, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, Washington, Wisconsin, and Wyoming.¹²
10. Several states now require that all state agencies adopt workplace policies on domestic violence. For instance, Maryland Executive Order No. 01.01.1998.25 requires each state agency to adopt domestic violence policies and to provide domestic-violence awareness training to all employees. The Department of Human Resources and the Maryland Network Against Domestic Violence jointly developed a workplace policy, curriculum, and training package, which ensured that employees would not be penalized because they are victims of domestic violence.¹³ Other states, such as Illinois and New York, have passed laws in recent years requiring state domestic-violence commissions to create model workplace policies for voluntary adoption by private employers.¹⁴

Case Law

11. In 2001, an administrative law judge for the State of New York Unemployment Insurance Appeal Board ruled that a domestic-violence survivor who was discharged from work for reasons related to the abuse remained eligible for unemployment insurance benefits.¹⁵ The decision affirmed the principle that a domestic violence victim who misses work for related reasons does not commit “misconduct” that would otherwise make her ineligible for unemployment insurance.

Advocacy in NGO and Private Sectors

12. Employment Rights for Survivors of Abuse (ERSA) is a program of the NOW Legal Defense and Education Fund that provides free legal advice, information,

¹¹ NOW Legal Defense and Education Fund, *Domestic Violence & Work: Survivors Right to Take Time From Work to Participate in Criminal Proceedings* (June 2001), at <http://www.nowldef.org/html/issues/work/StateLawFactshts/Criminal%20Proceedings.pdf> (last visited October 10, 2002).

¹² NOW Legal Defense and Education Fund, *Violence Against Women, Fact Sheets On State Laws: Unemployment Insurance* (May 2002), at <http://www.nowldef.org/html/issues/work/StateLawFactshts/Laws-UI.pdf> (last visited October 10, 2002).

¹³ NOW Legal Defense and Education Fund, *Domestic Violence Workplace Policies* (March 2002), at <http://www.nowldef.org/html/issues/vio/laws-modelpolicies.shtml> (last visited October 10, 2002).

¹⁴ *Id.*

¹⁵ A.L.J. Case No. 001-08794 (July 20, 2001), available at http://www.nowldef.org/html/issues/work/cjr_decision.pdf.

- and counseling for individuals who need assistance with work issues related to domestic violence.¹⁶ ERSA works with domestic-violence survivors to help them maintain employment or seek available remedies if they have already lost their jobs. ERSA also provides training programs for advocates, attorneys, social workers, employers, and union representatives to instruct them on enforcing domestic-violence survivors' employment rights.
13. The Employment Law Center in San Francisco has established the Domestic Violence and Employment Project (DVEP),¹⁷ which enables survivors of domestic violence to maintain employment while pursuing legal remedies and receiving medical care. The project also educates legislators, judges and investigators at administrative agencies about the importance of jobs for victims of domestic violence.¹⁸ Important features of DVEP include an information telephone line where project counselors provide callers with information about their employment rights under California and federal laws; and a public education program that conducts in-service trainings for domestic-violence organizations and for workers and employers throughout California.
 14. The Illinois-based Corporate Alliance to End Partner Violence¹⁹ is a coalition of major businesses that promotes workplace awareness of, and efforts to prevent, partner violence, and publishes resources such as a toolkit to help businesses design awareness programs and materials for coordinating Work to End Domestic Violence Day and Domestic Violence Awareness Month.

Best Practices

15. The Family Violence Prevention Fund has identified a series of “best practices” for public and private sector actors to take actions in the workplace to prevent and address the effects of domestic violence.²⁰ These include the U.S. Office of Personnel Management (OPM) which, in 1998, prepared a handbook for federal employees and supervisors on handling domestic violence in the workplace. The booklet, *Responding to Domestic Violence: Where Federal Employees Can Find Help*, provides information on domestic violence and on resources and management tools that can assist federal employees in abusive relationships.²¹
16. Private sector employers across the United States are implementing policies that educate and support victims of domestic violence. Examples include:

¹⁶ See <http://www.nowldef.org/html/issues/work/ersastart.shtml>. Another good resource is NOW LDEF's updated 2002 guidebook, *The Impact of Violence in the Lives of Working Women: Creating Solutions, Creating Change*, at <http://www.nowldef.org/html/pub/pubs/CreatingSolutions.pdf>.

¹⁷ See <http://www.las-elc.org/gender.html>.

¹⁸ See The Legal Aid Society, Employment Law Center, *Gender Equity Program*, at <http://www.las-elc.org/gender.html#dvemp>.

¹⁹ See <http://www.caepv.org/>.

²⁰ See <http://endabuse.org/programs/display.php3?DocID=73>.

²¹ See U.S. OFFICE OF PERSONNEL MANAGEMENT, RESPONDING TO DOMESTIC VIOLENCE: WHERE FEDERAL EMPLOYEES CAN FIND HELP, <http://www.opm.gov/workplac/html/domestic.html-ssi>.

- i. Blue Shield of California, in conjunction with the Family Violence Prevention Fund, a non-profit organization, has founded the San Francisco-based National Workplace Resource Center on Domestic Violence and recently began the creation of a large-scale domestic-violence education program for businesses. The multi-year program will mobilize businesses to educate workers about domestic violence, help employees who are victims of abuse, and support domestic-violence programs in their communities.
- ii. Verizon Wireless has developed an initiative to put wireless products and services to work to combat domestic violence. Its HopeLine® program donates cellular phones to victims of domestic violence so that they can remain in communication with police and others for safety purposes.²²

B. SEXUAL HARASSMENT IN THE WORKPLACE

Introduction

17. Sexual harassment, a form of sex discrimination, is also a serious problem for American workers. During 1995-2001, more than 15,000 sexual harassment charges were filed with the U.S. Equal Employment Opportunity Commission (EEOC) and state and local Fair Employment Practices agencies; 88 percent of those complaints were filed by women.²³ During that period, the total number of sexual harassment charges has held fairly steady, while the percentage of charges filed by men has increased slightly, from 9.9 percent in 1995 to 13.7 percent in 2001.²⁴
18. Sexual harassment disproportionately harms women. Women are nine times more likely than men to quit their jobs due to harassment; five times more likely to transfer, and three times more likely to lose their jobs.²⁵

Legislation

19. There are no federal “sexual harassment statutes” *per se* in the United States. Instead, sexual harassment law is “judge-made law,” representing the judicial extension of existing civil rights statutes, principally Title VII, to cover situations of sex-based harassment and harassment of a sexual nature.

²² For more information, see Verizon Wireless, HopeLines Fact Sheet, at http://www.verizonwireless.com/jsp/aboutus/community_service/hopeline_fact.jsp (last visited October 10, 2002).

²³ U.S. Equal Employment Opportunity Commission, Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992-FY 2001 (2002), at <http://www.eeoc.gov/stats/harass.html> (last visited October 10, 2002).

²⁴ *Id.*

²⁵ Alison M. Konrad & Barbara A. Gutek, *The Impact of Work Experiences on Attitudes Toward Sexual Harassment*, 31 ADMINISTRATIVE SCIENCE Q. 422, 438 (1986).

20. Title VII of the Civil Rights Act of 1964²⁶ forbids discrimination on the basis of race, sex, and other invidious characteristics in employment. Courts characterize sexual harassment as a form of sex discrimination in employment.
21. Title IX of the Civil Rights Act, , precludes the use of federal education funds for discriminatory purposes: “[n]o person . . . shall, on the basis of sex, . . . be subjected to discrimination.”²⁷ This brings all state schools and universities that receive federal funding under federal civil rights law. Title IX also provides that for violations of the anti-discrimination provision, states waive their immunity from suit.²⁸
22. Congress amended Title VII when it passed the Civil Rights Act of 1991.²⁹ These amendments did not alter the substantive law of sexual harassment, but made procedural changes. For the first time, victims of sexual harassment could recover punitive damages for their injuries and were granted the right to a jury trial. Unlike other Title VII claims, however, the availability of damages is capped for sex discrimination claimants.³⁰
23. Most states have fair-employment statutes that create a state cause of action for sexual harassment victims.
24. Some states, such as Connecticut, have passed laws requiring companies of a certain size to post notices concerning the illegality of sexual harassment and the procedure for filing a complaint with the states’ human rights commission.³¹

Case Law³²

Standards for Sexual Harassment

25. In order to bring a successful lawsuit, the sexual harassment victim must claim that the harassment was “severe or pervasive” to the extent that it could be considered both subjectively and objectively hostile. The perspective courts should use to judge such harassment is still a matter of controversy. In 1991, the Ninth Circuit Court of Appeals in *Ellison v. Brady*³³ adopted a *reasonable woman*

²⁶ Pub. L. No. 88-352, 42 U.S.C. 2000e.

²⁷ 20 U.S.C. § 1681 et seq. (1994).

²⁸ 42 U.S.C. § 2000d-7(a)(1) (1994) (providing that for a violation of the anti-discrimination edict in § 1681, “[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title IX of the Education Amendments of 1972”).

²⁹ Pub. L. No. 102-166, 42 U.S.C. § 1981a (1994 & Supp. III 1997).

³⁰ 42 U.S.C. § 1981a(b)(3). Up to \$50,000 may be recovered from an employer with 15 to 100 employees; up to \$100,000 from employers with 101 to 200 employees; up to \$200,000 from employers with 201 to 500 employees; and up to \$300,000 from employers with more than 500 employees.

³¹ See, e.g., CGS 46a-54-200 et seq.

³² For a detailed overview of recent trends in sexual harassment case law, see Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548 (2001).

³³ 924 F.2d 872 (9th Cir. 1991).

standard as the appropriate test to be applied in determining whether conduct is sufficiently severe or pervasive to create a hostile work environment. The court declared, “We . . . prefer to analyze harassment from the victim’s perspective.”³⁴

26. In 1993, the Supreme Court in *Harris v. Forklift Systems, Inc.* held that the standard for judging whether sexual harassment was sufficiently hostile was that of an objective “reasonable person.”³⁵ However, although the Court used a “reasonable person” standard, it did not expressly overrule the “reasonable woman” test. In the wake of *Harris*, the various lower courts have split on the question of the appropriate objective standard.³⁶

Standards of Harm

27. *Jenson v. Eveleth Taconite Co.*³⁷ was the first sexual harassment class-action suit. A group of female mine workers argued that the harassment was so pervasive and severe that it discriminated against the entire group. In ruling for the plaintiffs, the Court produced a new legal standard applicable to class-action suits involving sexual harassment: plaintiffs as a class had to prove a “pattern or practice of sex discrimination.”
28. In 1994, the Second Circuit Court of Appeals in *Karibian v. Columbia University*³⁸ held that a plaintiff, to prove *quid pro quo* sexual harassment, need only allege an unwelcome sexual advance plus the reasonable fear of a job-related reprisal, not actual economic harm.
29. In *Harris*,³⁹ the Supreme Court expanded the definition of a hostile work environment. It held that, to be subject to suit on grounds of creating a hostile environment, conduct need not seriously affect an employee’s psychological well-being or lead the plaintiff to suffer injury.

Same-Sex Harassment

30. In 1998, in *Oncale v. Sundowner Offshore Services*,⁴⁰ the Supreme Court held that sex discrimination consisting of same-sex sexual harassment is grounds for legal action under Title VII. The groundbreaking decision found that Title VII’s prohibition of discrimination “because of sex” protected men as well as women from sexual harassment by perpetrators of either sex.

³⁴ *Id.* at 878.

³⁵ 510 U.S. 17, 21-22 (1993).

³⁶ Compare *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995) (holding that the standard for evaluating sexual harassment claims depends upon the context of the work environment), with *Williams v. Gen. Motors*, 187 F.3d 553, 564 (6th Cir. 1999) (expressly rejecting the Tenth Circuit’s view that the standard for evaluating sexual harassment claims varies depending upon the work environment).

³⁷ 842 F.Supp. 847 (D. Minn. 1993).

³⁸ 14 F.3d 773 (2nd Cir. 1994).

³⁹ *Harris*, *supra* note 35.

⁴⁰ 523 U.S. 75, 78 (1998).

Employer Liability

31. In *Faragher v. City of Boca Raton*, the Court held that an employer is vicariously liable for discrimination caused by a supervisor.⁴¹ However, the Court simultaneously created an affirmative defense for hostile environment cases. If the employer can prove that it exercised reasonable care to prevent and correct sexually harassing behavior and that the plaintiff employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer, the employer will not be found vicariously liable.⁴²
32. In 1998, the Supreme Court in *Ellerth v. Burlington Industries*⁴³ held that under Title VII, an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing that the employer is negligent or otherwise at fault for the supervisor's actions.

First Amendment and Sexual Harassment

33. The relationship between Title VII's prohibition of sexual harassment and the First Amendment right to free expression is still being worked out in American courts.⁴⁴ The Supreme Court has not yet addressed this issue.

Recommendations

34. Congress should pass the Victims' Economic Security and Safety Act (VESSA). Introduced in July 2001, this bill would promote employment stability, economic security, and safety for survivors of domestic violence, dating violence, sexual assault, and stalking.⁴⁵ The bill would entitle victims of violence up to 30 days of emergency leave, with a guarantee of their position or its equivalent upon their return. It mandates unemployment compensation for any individual who loses a job due to circumstances resulting from domestic abuse. The bill also protects victims' rights in the workplace by prohibiting employer discrimination against domestic-abuse victims regarding conditions or privileges of employment. It also

⁴¹ 524 U.S. 775, 785-86 (1998).

⁴² *Id.* At 807.

⁴³ 524 U.S. 742 (1998).

⁴⁴ For a critique of sexual harassment law's impact on free speech rights, see, e.g., Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEORGETOWN L.J. 627 (1997) (arguing that sexual harassment laws have a chilling effect on constitutionally protected speech). Compare *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (holding that pin-ups and pornography displayed in the workplace violated Title VII) with *Johnson v. Los Angeles Fire Dept.* 865 F.Supp. 1430 (C.D. Cal. 1994) (finding that department's policy of prohibiting *Playboy* abridged employees' First Amendment rights where firemen resided in firehouse).

⁴⁵ Victims' Economic Security and Safety Act of 2001, S. 1249 and companion bill H.R. 2670.

requires employers to reasonably accommodate the known limitations of survivors where doing so does not pose an undue hardship on employers.

35. The Senate should ratify the Convention on the Elimination of All Forms of Discrimination Against Women, without reservation.

SECTION 6

VIOLENCE AND SEXUAL HARASSMENT AGAINST WOMEN IN EDUCATIONAL INSTITUTIONS

Narrative Summary

Violence against women and children in United States educational institutions is a serious problem; indeed, young women are the age group most vulnerable to sexual assault. Yet knowledge about these issues has been limited in the past both by lack of attention and by the degree to which violence at colleges and universities goes unreported. A series of laws passed in the 1990s significantly increased the availability and quality of information about crime on college campuses.

The past decade has witnessed a significant increase in awareness of the problem of sexual harassment in secondary schools. The Supreme Court's 1992 ruling that sexual harassment in schools violates federal anti-discrimination law has resulted in a significant increase in the adoption of school-based harassment policies, though harassment remains a pervasive problem for girls and boys in U.S. schools.

Recognizing the risk of violence that girls and women face in educational settings has been a step forward; it remains to be seen whether this increased awareness will lead to a decrease in violence against women in schools.

A. VIOLENCE IN EDUCATIONAL INSTITUTIONS

Introduction

Middle and High Schools

1. Violence experienced by girls in middle school and high school has only recently received attention by U.S. researchers.¹ Available data suggests, however, that adolescent girls are vulnerable to physical and sexual violence; in a recent study, approximately one in five female high school students reported being physically and/or sexually abused by a dating partner.²
2. During the 1996-97 school year, there were an estimated 4,000 incidents of rape or other types of sexual assault in public schools across the country.³

¹ NAN STEIN, CLASSROOMS AND COURTROOMS: FACING SEXUAL HARASSMENT IN K-12 SCHOOLS 97-98 (Teachers College Press, 1999). Stein points out that most studies have focused on teenage dating violence, but have not inquired into where such violence occurs or the possible complicity or indifference of schools and teachers in such violence.

² Family Violence Prevention Fund, Domestic Violence is a Serious, Widespread Social Problem in America: The Facts, at <http://endabuse.org/newsdesk/facts/>, citing Jay G. Silverman, et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, J. AM. MED. ASS'N, Vol. 286, No. 5 (2001).

³ Family Violence Prevention Fund, Domestic Violence is a Serious, Widespread Social Problem in America: The Facts, at <http://endabuse.org/newsdesk/facts/>, citing U.S. DEPARTMENT OF EDUCATION, VIOLENCE AND DISCIPLINE PROBLEMS IN U.S. PUBLIC SCHOOLS: 1996-1997.

College

3. College-age women are at high risk for all forms of sexual violence. More than one-half of all stalking victims are between 18 and 29 years old, and the highest rate of intimate-partner violence is among women ages 16 to 24.⁴ Sexual assault is the second most common violent crime committed on college campuses; most perpetrators are fellow students known to the victim.⁵
4. A national survey sponsored by the Department of Justice estimated that one-fifth to one-quarter of women are victims of rape or attempted rape during their college career.⁶ Advocates believe that rape and sexual assault are greatly under-reported on college campuses and may be more under-reported on campuses than in other situations: an estimated 81 percent of on-campus and 84 percent of off-campus sexual assaults are not reported to the police.⁷

Federal Legislation

Crime Awareness and Campus Security Act of 1990⁸

5. This law mandates that colleges and universities participating in federal student aid programs provide current students and staff with an annual report of basic campus crime statistics and security policies. Prospective students and staff must be notified of the availability of this information and given it upon request.
6. The 1992 Campus Sexual Assault Victims' Bill of Rights amends the 1990 Campus Security Act to require that schools have policies in place to address campus sexual assault and to afford sexual assault victims certain basic rights.⁹ Most importantly, schools must notify victims of their option to report their assault to the proper law enforcement authorities. Schools found to have violated this law can be fined up to \$25,000 or lose their eligibility to participate in federal student aid programs.

⁴ Callie Marie Rennison, Bureau of Justice Statistics Special Report: Statistics Intimate Partner Violence and Age of Victim, 1993-99 1, NCJ 187635 (Oct. 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipva99.pdf>.

⁵ National Advisory Council on Violence Against Women, *Promoting Safety and Nonviolence on College and University Campuses*, in *Toolkit To End Violence Against Women*, at <http://toolkit.ncjrs.org/files/chapter7.pdf> [hereinafter "Toolkit"] (NACVAN is a project of the National Criminal Justice Reference Service).

⁶ Bonnie S. Fisher, et al., *The Sexual Victimization of College Women*, (National Institute of Justice and Bureau of Justice Statistics, 2000), available at <http://www.ncjrs.org/pdffiles1/nij/182369.pdf>.

⁷ Toolkit, *supra* note 5.

⁸ Student Right-to-Know and Campus Security Act of 1990, Pub. L. No. 101-542, 104 Stat. 2381 (codified as amended in scattered sections of 20 U.S.C.). The Act is now known as the "Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act," because the 1998 amendments formally named the law in memory of Jeanne Clery.

⁹ The Bill of Rights was passed as a part of the Higher Education Amendments of 1992, Pub. L. No. 102-325, 1555(a) (1992) (codified as amended at 20 U.S.C. 1232g(a)(4)(B)(ii) (1994)).

7. The Act was amended again in 1998 to include additional reporting obligations, extensive campus security-related provisions, and a requirement that schools keep a daily public crime log.¹⁰

Family Educational Rights and Privacy Act (FERPA)¹¹

8. FERPA (also known as the Buckley Amendment) provides generally that student records are to be kept confidential, with access to third parties only with parent consent. Student records may be challenged by parents as misleading, inaccurate, or in violation of students' privacy rights.
9. Women's advocates have been concerned that universities have used this law to conceal campus crime, particularly campus assault, by sealing the records of university disciplinary hearings, on the grounds that such proceedings are part of the confidential records of the individual students.
10. The 1998 Foley Amendment changed FERPA to exempt from protection under federal student privacy laws¹² the final results of disciplinary cases where students were found to have violated school rules in association with crimes of violence or non-forcible sex offenses. Victim information, however, continues to be protected.

Campus Sex Crimes Prevention Act (2000)¹³

11. This Act provides for the collection and disclosure of information about convicted, registered sex offenders either enrolled at or employed by institutions of higher education.

State Legislation

12. A repeated critique of the handling of teen dating violence and violence in schools is the limited availability of state temporary restraining orders (TRO) for non-cohabitating minors. Only 13 states currently allow minors to apply for TROs.¹⁴

¹⁰ The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act amends the 1990 Act to eliminate loopholes and expand reporting requirements. Statistics for certain off-campus areas must be disclosed, and schools with a security department must maintain a daily crime log.

¹¹ 20 U.S.C. 1232(g) (1994 & Supp. 2001).

¹² Higher Education Amendments of 1998, Pub. L. No. 105-244, 951-952, 112 Stat. 1581, 1835-36 (codified as amended at 20 U.S.C. 1232g (1998)).

¹³ Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, 1601(d), 114 Stat. 1464, 1538 (2000) (codified as amended at 20 U.S.C. 1232g (2000)).

¹⁴ STEIN, *supra* note 1 at 111. Those states are Alabama, Alaska, California, Colorado, Illinois, Massachusetts, Minnesota, New Hampshire, New Mexico, North Dakota, Oklahoma, Pennsylvania and West Virginia. Three additional states allow minors over 16 years to apply for a TRO.

Case Law

13. The remedies available to women who suffer gender-based assault on college campuses were limited by the Supreme Court's 2000 holding that the civil remedy section of the Violence Against Women Act was unconstitutional.¹⁵ The plaintiff in *Morrison* had been raped in a university dormitory by fellow students; both the trial court and the Fourth Circuit found that the main defendant's disparaging statements after the rape helped to demonstrate the "gender-based animus" required to state a claim under VAWA.¹⁶ Although a university judicial committee first found the defendant guilty of sexual assault and suspended him for two semesters, the university subsequently overturned the punishment and allowed him to stay in school, remain on the football team, and retain a full athletic scholarship.¹⁷ In a blow to Congressional authority to establish federal civil rights remedies, the Supreme Court ruled that VAWA's civil remedy provision fell outside Congressional powers and violated principles of federalism.¹⁸
14. Students who are battered or sexually assaulted by fellow students sometimes request that their university judicial board or disciplinary committee hear the matter and discipline the offending student if he is found guilty. The effectiveness and fairness of such internal university discipline is uncertain because courts have held that campus adjudicatory proceedings must be closed to non-parties under a federal law that protects the privacy of student education records (FERPA).¹⁹
15. Balancing the rights of the sexual assault victim and the accused in internal university proceedings has been the source of controversy. In reviewing university disciplinary proceedings, courts have generally allowed universities considerable discretion in the processing and adjudication of student-on-student sexual assault and other violent crimes.²⁰ This has provoked complaints that universities are infringing upon the procedural rights of the accused and, alternately, that universities attempt to conceal and "sweep under the rug"

¹⁵ United States v. Morrison, 529 U.S. 598 (2000).

¹⁶ Brzonkala v. Va. Polytechnic Inst. & State Univ., 935 F.Supp. 779, 785 (W.D. Va. 1996); 169 F.3d 820, 830 (4th Cir. 1999).

¹⁷ Plaintiff's Amended Complaint at 15-18, Brzonkala v. Va. Polytechnic Inst. & State Univ., 935 F.Supp. 779 (No. 95-1358-R).

¹⁸ *Morrison*, 529 U.S. at 609, 619. For discussion of this decision, see Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57 (Oct. 2002).

¹⁹ Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232. See *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002) (barring public release of student judicial records on grounds that FERPA precludes such release); see also Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 *COLUM. J.L. & SOC. PROBS.* 167, 190 (1998) (noting that critics are divided over whether campus courts hurt or help victims of sexual assault).

²⁰ See, e.g., *Tigrett v. Rector & Visitors of the University of Virginia*, 290 F.3d 620 (4th Cir. 2002) (finding that the University of Virginia did not deny due process to students disciplined by a judicial committee for assaulting fellow male student).

victims' allegations of assault so as to avoid negative publicity and reporting requirements under the federal laws discussed above.²¹

Advocacy and NGO activities

16. Security On Campus, Inc., is a grassroots organization dedicated to safe campuses for college and university students. It was founded in 1987 by Connie and Howard Clery following the murder of their daughter at Lehigh University and has been an important lobby to pass the federal statutes pertaining to college campus safety.²²

B. SEXUAL HARASSMENT IN EDUCATIONAL INSTITUTIONS

Introduction

17. This decade has been marked by the Supreme Court's acknowledgement that sexual harassment in the schools is a form of sex discrimination in violation of Title IX of the Education Amendments to the Civil Rights Act. Recent developments in sexual-harassment law as it relates to schools have centered on the scope of school liability for sexual harassment committed by teachers against students, as well as the issue of peer-on-peer sexual harassment.
18. In response to changing federal case law, there has been a huge increase since 1993 in school policies on sexual harassment and in student awareness of such policies. Seventy percent of students say that their school has a policy on sexual harassment today, compared to only 26 percent of students in 1993.²³
19. Incidents of harassment remain common. In 2001, 83 percent of girls and 79 percent of boys report experiencing harassment in the schools.²⁴

Legislation

20. California, Minnesota, Florida, and Washington have passed state legislation requiring school districts to develop policies to respond to peer sexual harassment.²⁵

²¹ Note, *Student Misconduct at Private Colleges and Universities: a Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 654-55 (May 2001) (describing positions of both critics and supporters of private disciplinary proceedings in universities).

²² <http://campussafety.org/>.

²³ AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, *HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL* (2001).

²⁴ *Id.*

²⁵ Cal. Educ. Code § 212.6 (West 1994) Minn. Stat. § 127.46 (1997); Fla. Stat. ch. 230.23(6)(c)(2)(d)(8) (1997); Wash. Rev. Code § 28A.640.020(2)(a)-(f) (1997).

Case Law

21. It was not until 1992, in *Franklin v. Gwinnet County Public Schools*,²⁶ that the Supreme Court considered whether Title IX of the 1972 Education Amendments to the Civil Rights Act prohibited sexual harassment in schools as a form of sex discrimination in the same manner that Title VII forbade sexual harassment in the workplace. Title IX prohibits discrimination based on sex in education programs and activities that receive federal financial assistance. In *Franklin*, the Supreme Court affirmed that sexual harassment by teachers violated the Title IX rights of students. The Court also upheld the right of harassment victims to bring a private cause of action under Title IX against their school for monetary damages.
22. In 1998 in *Gebser v. Lago Vista Independent School District*,²⁷ the Supreme Court held that damages may not be recovered for teacher-student sexual harassment in an implied private action under Title IX unless a school district official who, with authority to institute corrective measures on the district's behalf, had actual notice of, and was deliberately indifferent to, the teacher's misconduct.
23. A year later in *Davis v. Monroe County Board of Education*,²⁸ the Supreme Court held that a victim of student-on-student harassment may bring a private Title IX damages action against a school board, but only where the school authorities had actual knowledge of the incident and were deliberately indifferent. Furthermore, the harassment must be so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.

²⁶ 503 U.S. 60 (1992).

²⁷ 524 U.S. 274 (1998).

²⁸ 526 U.S. 629 (1999).

24. Courts continue to grapple with striking the proper balance in the classroom between the right of students to be free from sexual harassment and the First Amendment academic freedom right of professors to teach material germane to the subject matter.²⁹

²⁹ See, e.g., *Bonnell v. Lorenzo* (Macomb Community College), 241 F.3d 800 (6th Cir. 2001) (“While a professor’s rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student’s right to learn in a hostile-free environment;” the court found the professor’s use of vulgar language not germane to the subject matter); *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 520 U.S. 1140 (1997), and *Silva v. University of New Hampshire*, 888 F. Supp. 293 (D.N.H. 1988) (finding sexual harassment policies vague or overbroad as applied to punish professor who had “legitimate pedagogical reasons,” which included provocative language, to illustrate points in class and to sustain student’s interest in the subject matter of the course).

SECTION 7

RELIGIOUSLY MOTIVATED PROTESTS AGAINST A WOMAN'S RIGHT TO CHOOSE ABORTION

Narrative Summary

Religious extremism in the battle over abortion obstructs a woman's ability to freely exercise her reproductive rights in the United States. Court-ordered injunctions and lawsuits against abortion terrorists under the Freedom of Access to Clinic Entrances Act ("FACE Act") and the Racketeer Influenced and Corrupt Organizations Act ("RICO") provide a means of restraining violence against women exercising their right to abortion and the men and women who aid abortion seekers. Indeed, some of the most violent acts of abortion protesters, involving direct physical harm, have gradually declined since the passage of the FACE Act in 1994. The prospects for ongoing use of FACE Act and RICO suits to stem the tide of violence and intimidation depends on U.S. courts' continued broad interpretation of the statutes.

Introduction

1. The U.S. Supreme Court stated in 1973 that laws prohibiting abortion violated women's constitutional right to privacy.¹
2. Violent attempts by abortion protesters, however, chill the free exercise of reproductive rights by women and place the choice of abortion in a climate of fear and intimidation. While abortion protesters may be motivated by secular or religious concerns, "violent pro-life protestors, attackers, and murderers are typically acting out of a deep and sincere religious belief."² Specifically, "American evangelicals . . . [and] Roman Catholics form the most important opposition to abortion."³ Importantly, though, most violent anti-abortion groups act "without the sanction of the mainstream church-affiliated pro-life organizations."⁴ Some of the most important churches in the anti-abortion

¹ Roe v. Wade, 410 U.S. 113, 159 (1973) (holding that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

² Mark C. Alexander, *Religiously Motivated Murder: The Rabin Assassination and the Abortion Clinic Killings*, 39 ARIZ. L. REV. 1161, 1199 (1997).

³ David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness*, 47 BAYLOR L. REV. 119, 121 (1995); see also ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE* 134 (1993) ("Catholics and conservative Protestants became the backbone of the emerging right-to-life movement.").

⁴ Christopher W. Tomlin, *The Reign of Terror: The Judiciary's Inability to Stop Anti-Abortion Violence forces Congress back to the Drawing Board*, 18 LAW & PSYCH. REV. 423, 425 (Spring 1994) (citing Charles Piller, *Anti-Abortion War: Frustration Gives Birth to Violence*, L.A. DAILY J., Dec. 16, 1982, at 4).

- movement, including the Roman Catholic Church, publicly disapprove of violence.⁵
3. The most radical groups, like the Pro-life Action League, Operation Rescue, Rescue America, and the Lambs of Christ, are religiously oriented.⁶ The purpose of these organizations “is to prevent women from getting abortions; their method is to intimidate and terrorize both the women seeking abortions and those who staff the clinics providing abortion.”⁷
 4. The National Abortion Federation, an association of U.S. abortion providers, documented 3,158 reported incidents of violence against abortion providers between 1988 and 2001, including murder, attempted murder, stalking, bombing, arson, attempted bombing and arson, invasion, vandalism, trespassing, butyric acid attacks, anthrax threats, assault and battery, death threats, kidnapping and burglary.⁸ A Feminist Majority Foundation survey in 2000 found that one in five abortion clinics reported incidents of severe violence, including blockades, bombings, arson, chemical attacks, stalking and gunfire.⁹ According to National Abortion Federation statistics, the number of abortion-related murders and attempted murders peaked in 1994.¹⁰
 5. In the 1990s, the nation witnessed seven anti-abortion related murders. Most recently, a man known for his devout and fervent religious belief shot New York doctor Barnett Slepian with a high-powered rifle as the doctor talked with his wife and four children in his kitchen.¹¹ Other abortion service providers, including doctors and receptionists, were shot outside abortion clinics.¹²
 6. Such violence against abortion providers, while not specifically directed at women, creates a cloud of intimidation that makes more harrowing the experience of women seeking to exercise their reproductive rights. Abortion providers report that this “climate of violence” is leading to a decrease in abortion availability.¹³ After the 1998 murder of Dr. Slepian, 10 percent of clinics reported that a

⁵ See, e.g., Eloise Salholz et al., *The Death of Doctor Gunn*, NEWSWEEK, Mar. 22, 1993, at 34 (quoting a statement by Gail Quinn, executive director of the National Conference of Catholic Bishops’ anti-abortion office, that “violence is not a part of the pro-life message”).

⁶ *Id.*

⁷ Laurie Taylor, *Right-to-Life Turns to Terror*, L.A. DAILY J., Mar. 26, 1993, at 6.

⁸ National Abortion Federation (NAF), Incidents of Violence and Disruption Against Abortion Providers, at <http://www.prochoice.org/> (last visited Sept. 20, 2002). The NAF has kept statistics on incidents of violence and disruption against abortion providers since 1977. *Id.*

⁹ Erwin Chemerinsky & Katherine Spillar, *Abortion Clinics Deserve Protection*, L.A. TIMES, Dec. 12, 2001, at 13.

¹⁰ The National Abortion Federation compiled statistics for the years 1977-1986, and 1987-2002.

¹¹ Ed Vulliamy et al., *Abortion Death Hunt Muzzles ‘Atomic Dog’: For Three Years After a Doctor Was Shot, the FBI Was Kept at Bay by a Suspect Using a Secret Email System*, OBSERVER, Apr. 1, 2001, at 23.

¹² Mary Jacoby, *Domestic Terrorist*, ST. PETERSBURG TIMES, Aug. 4, 2002, at 1A.

¹³ Matthew Carolan, *The City’s Hospitals Err in Abortion Training*, NEWSDAY (New York), June 19, 2002, at A32. Note also, however, that “abortion demand has dropped 17.4 percent between 1990 and 1997.” *Id.*

physician or other staff member quit because of violence or intimidation, according to a Feminist Majority Foundation survey.¹⁴

7. The incidence of intimidation involving direct physical harm appears to have peaked around the early to mid-1990s, about the time that Congress enacted the FACE Act in response to the waves of violence. It is not clear, however, whether the overall level of violence has decreased. The level of anthrax threats skyrocketed in 2001. That year clinics reported 554 anthrax threats in 2001, compared to 30 in 2000.¹⁵

Constitutional Provisions

8. The Ninth Amendment provides, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Section 1 of the Fourteenth Amendment provides, in part, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The U.S. Supreme Court has read these rights to support a Constitutional right to privacy, under which a woman may decide whether to terminate her pregnancy.¹⁶

Legislation

9. In response to the escalating wave of anti-abortion violence in the late 1980s and early 1990s, Congress enacted the Freedom of Access to Clinic Entrances Act (the “FACE Act”) in 1994.¹⁷ More than 1,000 reported cases of violence targeting abortion clinics between 1977 and 1993,¹⁸ as well as the murders of two abortion doctors, prompted legislators to act. The purpose of the Act “is to prevent the use of blockades, violence and other forceful or threatening tactics against medical facilities and health care personnel who provide abortion-related services.”¹⁹ The Act makes anti-abortion violence a federal crime that may also entail civil penalties.²⁰
10. The FACE Act prohibits the “use of force, threat of force, or physical obstruction” to “injure, intimidate, or interfere with any person because that

¹⁴ Erwin Chemerinsky & Katherine Spillar, *Abortion Clinics Deserve Protection*, L.A. TIMES, Dec. 12, 2001, at 13.

¹⁵ NAF, *supra*, note 8.

¹⁶ *Roe*, *supra* note 1.

¹⁷ Pub. L. No. 103-259, *codified at* 13 U.S.C. § 248.

¹⁸ S. Rep. 103-117, at 3 (1993) (finding that between 1977 and 1993, more than 1,000 acts of violence were reported against abortion service providers, including 36 bombings, 81 arsons, 84 assaults, and 327 clinic invasions).

¹⁹ S. Rep. 103-117, at 2.

²⁰ *See infra*, paragraphs 13-14.

person is or has been . . . obtaining or providing reproductive health services.”²¹ Thus, to gain protection, three elements must be demonstrated: (1) that the defendant engaged in the prohibited activity; (2) that the defendant intended to engage in the activity; and (3) that the defendant was motivated by a desire to prevent a person from obtaining or providing reproductive health services.²²

11. While the plaintiff must prove an impermissible motive, courts make clear that defendants cannot escape liability by arguing that their objective was to save the lives of babies and that, as a result, they lacked the necessary criminal intent.²³ Both intent and motive can be inferred from the conduct of demonstrators.²⁴
12. Courts have interpreted the FACE Act’s prohibition of threats as applying to “true threats,” statements that a reasonable person would conclude express a “determination or intent to injure presently or in the future.”²⁵
13. Section 248 (c)(1)(B) of the FACE Act also provides civil remedies in the form of damages and injunctive relief. Recoverable damages include compensatory and punitive damages, as well as costs and reasonable attorneys’ fees and expert witnesses fees. Plaintiffs may also elect to pursue statutory damages of \$5,000 per violation in lieu of compensatory damages.
14. In addition to monetary damages, Section 248 (c)(1)(B) also authorizes temporary, preliminary and permanent injunctive relief. Injunctions generally provide two forms of protection: buffer zones (areas from which protest activities are excluded) and noise restrictions.
15. Plaintiffs have also successfully brought suit against anti-abortion protesters under the Racketeer Influenced and Corrupt Organizations Act (hereinafter “RICO”),²⁶ enacted as Title IX of the Organized Crime Control Act of 1970. The statute criminalizes organized crime and racketeering by “enterprises,” defined broadly enough to include anti-abortion protesters and groups.²⁷ The Supreme

²¹ 18 U.S.C. § 248(a)(1).

²² See, e.g., *United States v. Wilson*, 2 F. Supp. 2d 1170, 1171 (E.D. Wis. 1998).

²³ See *United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998) (holding that protection of unborn children constitutes interference with the receipt of reproductive health services as defined by Congress); *Wilson*, 2 F. Supp. 2d at 1172 (same).

²⁴ In *United States v. Gregg*, 32 F. Supp. 2d 151, 156 (D.N.J. 1998), the district court found that since the “natural and probable consequences” of a blockade are to restrict access to the abortion facility, defendants intended to interfere with the provision of abortion services. The court also concluded that videotape and eyewitness testimony of protestors yelling anti-abortion statements, and the fact that the blockade took place in the midst of anti-abortion demonstrations, established that the protestors’ motive was to block access to reproductive health services. *Id.* at 156.

²⁵ *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996); accord *Planned Parenthood of the Columbia/Willamette v. ACLA*, 41 F. Supp. 2d. 1130 (D. Or. 1999) (holding that a true threat is a statement “interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm”).

²⁶ 18 U.S.C. §§ 1961-1968 (2000).

²⁷ *Id.*

Court ruled that an enterprise need not have an economic motive to be subject to prosecution under the statute, thus opening the door for the use of RICO by those who wish to protect women seeking abortion from harm by protesters.²⁸

Case Law

Guidelines on Injunctions Against Clinic Protestors

18. *Madsen v. Women's Health Center*, 512 U.S. 753 (1994). *Madsen* is the first of three recent decisions by the Supreme Court governing acceptable injunctions limiting protest activity, although the Court has yet to hear a case arising under the FACE Act itself. The injunction in *Madsen* involved several protections, including buffer zones around the clinic property and around approaching clinic patients. The Supreme Court struck down portions of the buffer zone on private land as unnecessarily burdening free speech, but upheld the buffer zone on public property. The Court also struck down the prohibition against protestors approaching individuals seeking clinic services within 300 feet of the clinic without the consent of the individual. The Court reasoned that the protestor's speech must be independently proscribable (fighting words or threats) or "so infused with violence to be indistinguishable from a threat of physical harm" in order to be held unconstitutional.
19. *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997). In *Schenck*, several clinics and doctors in Rochester, New York, won an injunction after "numerous large-scale blockades in which protesters would march, stand, kneel, sit, or lie in parking lot driveways and in doorways." Anti-abortion groups challenged the injunction's floating buffer zones around people and vehicles seeking access to the clinics; fixed buffer zones around the clinic doorways, driveways, and parking lot entrances; and a cease and desist provision that applies inside the buffer zones and requires "sidewalk counselors," or those advising women against abortion, to retreat 15 feet from a clinic client once she indicates a desire not to be "counseled." The Supreme Court found the buffer zone necessary to ensure access to the clinic and found acceptable the cease and desist order with regard to sidewalk counselors. The Court struck down the floating buffer zone requirement, however, reasoning that (1) the restriction would prevent protestors from communicating a message from a normal conversational distance or distributing leaflets to people entering clinics; and (2) the floating nature of the buffer zone might chill the speech of protestors wishing to engage in peaceful expressive activities.
20. *Hill v. Colorado*, 530 U.S. 703 (2000). This case involved a First Amendment challenge to Colo. Re v. Stat. § 18-9-122(3) (1999), which affords a protective space for abortion seekers within 100 feet of a health care facility's entrance by

²⁸ National Organization for Women v. Scheidler, 510 U.S. 249, 261 (1994) ("Congress has not, either in the definitional section or in the operative language, required that an 'enterprise' . . . have an economic motive"). See description of case, *infra*, paragraph **Error! Reference source not found.** .

making it unlawful, within that zone, for any person to knowingly approach within eight feet of another person to distribute a leaflet or handbill, display a sign, or engage in oral protest, education, or counseling without consent. The Supreme Court held that the Colorado statute was a narrowly tailored, content-neutral, valid time-place-and-manner restriction. The Court reasoned that the statute did not regulate speech but rather the places where speech may occur, and that the regulation served the important governmental purpose of protecting women seeking medical treatment from the potential emotional and physical harm suffered when a protester delivers an unwelcome message at close range.

Prohibited Threats of Force Under the FACE Act

21. *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996). This case held that Regina Rene Dinwiddie used violent threats to interfere with the ability of women to exercise their reproductive rights, in violation of the FACE Act. Dinwiddie targeted an abortion doctor, Robert Crist, often using a bullhorn, reminding Crist of other murdered abortion providers and stating “[t]his could happen to you . . . Whoever sheds man’s blood, by man his blood shall be shed.” Upholding the conviction, the court emphasized the relevance, among other things, of the reaction of the recipient of the threat; whether the maker of the threat had made similar statements to the victim in the past; and whether the victim had reason to believe the maker of the threat had a propensity for violence. While Dinwiddie did not specifically threaten Crist with injury, the context of the statements and the doctor’s reactions to them supported the conclusion that they were threats of force. The defendant made the statements directly and repeatedly to the doctor, who reacted by wearing a bulletproof vest. The doctor was aware that Dinwiddie was a well-known advocate of the view that lethal force should be used against doctors who perform abortions, and Dinwiddie had also threatened the clinic’s executive director and assaulted a maintenance supervisor.
22. *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc). The defendants in the case, the American Coalition of Life Activists (ACLA) and the American Life Ministries (ALM), advocate the use of violence against abortion providers. Among other things, the ACLA created a website listing 200 doctors with the label “abortionists, the shooters,” and identified another 200 abortion rights supporters, including judges, politicians, law enforcement agents and their spouses. A legend accompanying the list indicated “Black font” (working), “Greyed-out Name” (wounded), and “Strikethrough” (fatality). The names of three abortion doctors murdered in 1996 and 1997 were struck through. Planned Parenthood and four of the listed doctors filed suit under the FACE Act, alleging that the ACLA and ALM targeted them with threats. An *en banc* majority of the Ninth Circuit affirmed the district court decisions that the “Guilty Posters” and website constituted “true threats,” because of, among other things, the “wanted-type” format.

Prosecutions for obstructing clinic entrances

23. *United States v. Mahoney*, 247 F.3d 279 (D.C. Cir. 2001). In *Mahoney*, the Court of Appeals for the D.C. Circuit upheld the convictions of several protesters for violating the FACE Act by circumventing the free entrance and exit of a clinic entrance. Rejecting as a “post-hoc self-serving explanation” one protestor’s argument that the emergency exit he blocked was not used, the court held that obstruction of an emergency exit rendered ingress or egress unreasonably difficult and was therefore prohibited conduct.
24. *New York ex rel Spitzer v. Operation Rescue National*, 273 F.3d 184 (2d Cir. 2001) (hereinafter *Rescue I*). *Rescue I* illustrates that activities short of a complete blockade can still constitute physical obstruction. In *Rescue I*, the Court of Appeals for the Second Circuit held that protesters who walked across driveways to deliberately slow or stop the progress of cars, interfered with pedestrians by shouting at them, stood in front of people as they attempted to enter an abortion clinic, and blocked clinic doors by standing directly in front of them, violated the FACE act by “obstructing access to the facilities and making egress and ingress unreasonably difficult for patients.”
25. *United States v. Gregg*, 32 F. Supp. 2d 151 (D.N.J. 1998). In *Gregg*, the district court held that “physical injury to clinic clients, or staff or the non-occurrence of scheduled procedures or abortions” are not necessary to demonstrate a violation of the FACE Act. The court held that “as long as access is made ‘unreasonably difficult or hazardous,’ it is not necessary to establish that there was absolutely no way to enter an abortion facility in order to prove a violation of the Act.”

Prosecution of anti-abortion protesters for illegal activities under RICO

26. *National Organization for Women v. Scheidler*, 510 U.S. 249 (1994). This case temporarily paved the way for lawsuits against anti-abortion activists under the Racketeer Influenced and Corrupt Organizations Act (RICO).²⁹ The plaintiffs, the Delaware Women’s Health Organization, Inc., Summit Women’s Health Organization, Inc., and the National Organization for Women, Inc., alleged that Joseph Scheidler, a coalition of anti-abortion groups called the Pro-Life Action Network (PLAN), and other individuals and organizations that oppose legal abortion were involved in a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity. The district court dismissed the claim, reasoning that “some profit-generating purpose must be alleged in order to state a RICO claim.”³⁰ The Court of Appeals affirmed.³¹ The Supreme Court reversed, ruling that defendants prosecuted under RICO need not be motivated by an economic purpose in pursuit of their illegal activities. Following the Supreme Court’s decision in *Scheidler*, the plaintiffs proceeded with the suit in federal

²⁹ Pub. L. 91-452, Title IX, 84 Stat. 941, *as amended*, 18 U.S.C. §§ 1961-1968 (1988 ed. and Supp. IV).

³⁰ Nat’l Organization for Women v. Scheidler, 765 F. Supp. 937, 943 (N.D. Ill. 1991).

³¹ Nat’l Organization for Women v. Scheidler, 968 F.2d 612 (7th Cir. 1992).

district court and won a jury verdict of \$86,000 against the anti-abortion groups.³² The jury found that the Pro-Life Action League and Operation Rescue committed acts of extortion against abortion clinics throughout the country, using intimidation and violence against clinic employees and patients to shut down the clinics. Nevertheless, in February, 2003, the Supreme Court vacated the damages award and accompanying injunction, holding that the activities did not meet the statutory definition of extortion, and therefore the petitioners could not be charged with the civil violations of the RICO Act.³³ This ruling effectively eviscerates anti-abortion intimidation from the ambit of RICO, although it has no direct impact on FACE or on existing state statutory or judicial remedies for illegal activity in opposing abortion access.

³² Nat'l Org. for Women v. Scheidler, No. 86 C 7888, 1999 WL 571010, at *1 (N.D. Ill. July 28, 1999).

³³ See *Scheidler v. National Organization for Women, Inc.*, 123 S.Ct. 1057 (2003). The Supreme Court found that extortion requires the offender "obtain" property from the victim. In this case, the Court said that the rights violations and deprivations to which the petitioners subjected the respondents, while criminal, did not constitute the "obtaining" of property.

SECTION 8

VIOLENCE AGAINST WOMEN IN THE PRACTICE OF POLYGAMY BY BREAK-AWAY FUNDAMENTALIST SECTS OF THE MORMON CHURCH

Narrative Summary

Though there is no reliable empirical evidence on the prevalence of domestic violence and statutory rape within polygamous families, the following discussion and anecdotal accounts suggest that women in such families are at particular risk. As practiced in the United States, polygamy appears to go hand in hand with domestic violence, under-age and forced marriage, statutory rape, incest, and sexual assault. Polygamy is a violation of international and domestic U.S. law; it violates prohibitions on discrimination in that it treats women's marital rights differently. Thus, polygamy both manifests violence against women in practice and institutionally reinforces women's subordination.

Introduction

1. The practice of polygamy in the United States has been linked to a wide range of incidents of violence against women and girls, including domestic violence, under-age and forced marriage of girls, statutory rape, and incest.¹ Polygamy-related violence has other repercussions, including the denial of women's economic, social, and cultural rights through, for example, diminished educational opportunities and a lack of proper health care. The emotional and psychological consequences of social isolation and subordination within polygamous communities, combined with the lack of mental health care services, are particularly harmful to women and girls.²

¹ For a specific example of forced marriage and incest, see the history of the Kingston family at Ray Rivera and Greg Burton, *Did Teen Mom Die Harboring a Secret?*, SALT LAKE TRIBUNE, 1998 at www.xmission.com/~plporter/lds/kingston2.htm#Incestuous; see also Greg Burton, *Affidavits Give Peek into Secretive and Incestuous Polygamous Clan: Incest Prominent Feature of Kingston Polygamists*, SALT LAKE TRIBUNE, August 2, 1998 at A1 cited at www.xmission.com/~plporter/lds/kingston2.htm#Incestuous.

² See Memo prepared by Donna Sullivan, International Human Rights Clinic, New York University, for the Polygamy Justice Project at www.polygamyjusticeproject.org. See also Tapestry Against Polygamy at <http://www.polygamy.org>. Tapestry is an organization based in Utah and led by former wives of abusive polygamous marriages. Recently, the group was awarded the Women of Courage Award from the National Organization for Women for their work to stop the abuse of women and girls in illegal polygamous marriages. See <http://www.now.org/nnt/fall-99/conference.html>, "National Conference Sets Busy Schedule for year 2000." Lowenstein International Human Rights Clinic (Kapil Longani) phone conversation with Andrea Moore Emmett on October 10, 2002. Moore Emmett is a freelance journalist, researcher, and speaker who has focused on polygamists and polygamous communities throughout the United States. Lowenstein Clinic phone conversation and e-mail from Donna Sullivan, October 14, 2002.

2. Historically, polygamy was practiced in the United States by members of the Church of Jesus Christ of Latter Day Saints, also known as the Mormons.³ The Mormon Church was premised on a Christian belief system and espoused a patriarchy that placed men at the apex of a divine hierarchy, with women and children subordinate to their command.⁴ Ordained men⁵ were the sole conduit through which women and girls could reach heaven; and through polygamy, the Mormon Church imposed and enforced its principle of male superiority.⁶ In 1890, under pressure from the federal government, the mainstream Mormon Church banned polygamy and, as a condition for gaining statehood for Utah in 1896, political leaders were forced to include a ban on the practice in the state constitution.⁷

Polygamy as Currently Practiced

3. Although the practice of polygamy is illegal in all 50 states today, anti-polygamy laws are rarely enforced. As a result, there are a number of fundamentalist groups that continue to practice polygamy without legal repercussions. The largest of these groups is the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS),⁸ a break-away sect of the Mormon Church with communities throughout the United States, particularly in Utah, California, Arizona, Idaho, New Mexico, Wyoming and Idaho.⁹ Although the FLDS is the largest organized sect of practicing polygamists in the United States, there are also a significant number of polygamist communities, each with a unique ideology, that are not identified with the FLDS.¹⁰ The mainstream Mormon Church has repeatedly distanced itself from the beliefs of all of these groups, including the FLDS.
4. No empirical studies of polygamous communities in the United States have been conducted. However, at least 30,000 individuals, and possibly as many as 150,000,¹¹ are believed to be members of the FLDS and other break-away

³ Patti Epler, "An Abbreviated History of Polygamous Communities," October 2, 2002 at www.phoenixnewtimes.com. See also The Principle, an organization devoted to helping educate the general public about historical and contemporary abuses in polygamy, at www.polygamyinfo.com (history).

⁴ Tapestry Against Polygamy at www.polygamy.org. See also Lowenstein Clinic phone conversation with Vicky Prunty, president of Tapestry Against Polygamy on October 11, 2002.

⁵ According to Mormon Church doctrine, all married men are ordained priests. Only men can be ordained in the Mormon Church. See http://www.lightplanet.com/mormons/basic/organization/priesthood/Priesthood_EOM.htm.

⁶ *Id.*

⁷ The Principle at www.polygamyinfo.com

⁸ See www.gospelcom.net/apologeticsindex/f05.html, website of the Apologetics Index, an information database devoted to providing resources on religious cults, sects, movements, doctrines, etc., throughout the world.

⁹ See www.gospelcom.net/apologeticindex/m03.html.

¹⁰ There are several "independent" practicing polygamous communities throughout the western United States with no relationship to the mainstream Mormon Church or the FLDS. See Lowenstein Clinic phone conversations with Andrea Moore Emmett, October 10, 2002 and Donna Sullivan, October 20, 2002.

¹¹ This number varies among sources, from a minimum of 30,000 practicing polygamists to more than 150,000. See, e.g., "Covering Up Mormon Polygamy," www.xmission.com/~country/slem/slem94b.htm

offshoots of the mainstream Mormon Church. The veil of secrecy behind which these communities live makes it difficult to estimate the actual number of practicing polygamists in the United States and, thus, the extent to which abuse of women and children is occurring. Clearly, however, within these fundamentalist polygamous communities, a male-dominated structure supported by organized religion tolerates, if not sanctions, abuse under the guise of legitimate religious practice. Thus, polygamy continues to be actively practiced in several western states despite being expressly prohibited by those states' constitutions.¹²

5. Ex-wives in polygamous marriages who have left Mormon fundamentalist polygamist groups or families have been the primary source of information about the specific instances of abuse perpetrated by polygamists in the United States.¹³ They have provided evidence that implicates polygamists in a pattern of physical, sexual, and psychological abuse against their multiple wives and children, as well as other female family members. Accounts from these women repeatedly include instances of incest, child molestation, and under-age marriage.¹⁴

The Social Context of Polygamy

6. The violent manifestations of polygamy may escape the attention of authorities, because, by their very nature, sexual crimes occur in the private sphere and are often concealed as a "family secret." Adults may also indoctrinate their children with a fear that authorities will harm the family if they talk about what goes on at home; as a result, children learn to shun outsiders and keep family activities a secret.¹⁵

and www.polygamy.org/faq/shtml. See also, Lowenstein Clinic phone conversation with Vicky Prunty, October 11, 2002.

¹² See Ariz. Const., Art. XX, par. 2; Idaho Const., Art. I, § 4; N.M. Const., Art. XXI, § 1; Okla. Const., Art. I, § 2; Utah Const., Art. III, § 1.

¹³ See, e.g., Tapestry Against Polygamy at www.polygamy.org; Polygamy Justice Project, an organization founded to help abused women and girls leave polygamous relationships at www.polygamyjusticeproject.org; and The Principle at www.polygamyinfo.com

¹⁴ Julie Cart, *Groups Airing Utah's 'Dirty Little Secret'*, L.A. TIMES, Aug. 18, 2002, at 15; see also Jamie Jones, *Polygamist Could Get Life on Sex Battery Convictions*, ST. PETERSBURG TIMES, June 1, 2002 at www.polygamyjusticeproject.org/media/news.htm (discussing the case of Bruce Behensky, a 51-year-old polygamist who had two wives, aged 12 and 15, and was convicted of nine counts of sexual battery. One wife stated, "[Behensky] had demonstrated many forms of physical violence, mental cruelty and emotional abuse...with threats of God's vengeance should any of us disobey him." See also Lowenstein Clinic phone conversation with Amanda Emmett, October 10, 2002 and Vicky Prunty, October 11, 2002; Jerald & Sandra Tanner, *Mormonism's Problem with Child Sexual Abuse*, SALT LAKE CITY MESSENGER, November 1996, Issue 91, November 1996; Kevin Cantera, *Green Faces Charge of Child Rape*, SALT LAKE CITY TRIBUNE Jan. 10, 2002, at A1.

¹⁵ Lowenstein Clinic phone conversation with Andrea Moore Emmett, October 10, 2002. See also Todd M. Gillett, *The Absolution of Reynolds: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL OF RTS. J. 497, 498, February 2000.

7. The social isolation of polygamous communities is another reason why authorities have a difficult time enforcing anti-polygamy laws.¹⁶ Furthermore, in some polygamous communities, the legal authorities and civic leaders are practicing polygamists, which makes it difficult for victims within polygamous relationships to report abuse.¹⁷ This merger of church and state is representative of the general pattern in Utah, where virtually all political representatives, judicial officials, and law enforcement personnel are practicing Mormons.¹⁸ Most of these government officials are descendants of polygamists and, as such, may be culturally conditioned to accept the practice, leading to a purposeful ignorance of the law and the abuses that take place in polygamous families.¹⁹ It must be noted however, that the mainstream Mormon Church has repeatedly condemned the abuse of women and children, including child marriage, incest and physical violence of any kind, in polygamous relationships.²⁰
8. Furthermore, several of these independent polygamous communities, including the FLDS, are powerful financial entities that control businesses and property empires throughout the United States.²¹ The economic strength of these communities may also contribute to the reluctance of local authorities to investigate allegations of abuse within these communities.

¹⁶ This isolation and control has taken many forms, including mass withdrawal from public schools. *See*, Catherine Gewertz, "Student Exodus Hits School in Two Towns," September 13, 2000 at www.polygamyinfo.org (discussing the situation in Colorado City, Arizona, in which Rudolf Jeffs, the leader of the Fundamentalist Church of Latter Day Saints, ordered the withdrawal of all members of the church from the public school system. As a result, close to 700 students and two-thirds of the teachers in the school district immediately left the public school system.)

¹⁷ This is especially true in FLDS communities. *See* Lowenstein Clinic phone conversation and e-mail from Donna Sullivan, October 20, 2002.

¹⁸ For example, 91 percent of the Utah State Legislature is Mormon. *See* letter from Andrea Moore Emmett to Lowenstein Clinic (Kapil Longani), October 20, 2002. *See also* Pauline Arragilla, "Utah Locals Combat State's Odd Image," Associated Press, February 6, 2002 at www.polygamyinfo.com/plygmedia%2002%2015.htm

¹⁹ *See* Jay Beswick, *Conspiracy in High Places to Protect Polygamy*, July 11, 2001 at www.polygamyinfo.com. *See also* John Dougherty, Cover Up (Arizona Attorney General Internal Memo), October 3, 2002 at www.phoenixnewtimes.com. This article discusses the leak of a memo from the Attorney General's office documenting extensive and ongoing criminal activity in Colorado City, Arizona. Instances of rape ("rape is punishment for women and reward for men"), incest, assault, kidnapping, forced marriages of under-age girls, weapons violations, and welfare fraud are rampant within the community, according to the memo. As of today, only Dan Barlow, Jr., has been prosecuted (he was charged with molesting his five daughters after his wife and daughter went to the Colorado City police and detailed a pattern of sexual abuse that had gone on for years).

²⁰ *See* www.mormon.org/question/faq/category/answer/0.9777,1601-1-62-1.00.html, the official website of the Church of Jesus Christ of Latter Day Saints.

²¹ *See* Associated Press, *Polygamist Sect Growing Ever More Reclusive*, DALLAS MORNING NEWS, September 17, 2001 at www.gospelcom.net/apologeticsindex/news/an200918.html; Lowenstein Clinic phone conversation with Donna Sullivan, October 22, 2002; www.cephasministry.com/mormon-fundamentalists.html, the website of Cephass Ministry; and Brooke Adams, *Kingston Inc.: Polygamy's Entrepreneurial Empire*, SALT LAKE OBSERVER, Volume 1, Number VI, August 14-27, 1998, at www.xmission.com/~pporter/lds/kingston.htm

Legal Issues and Prosecution

9. Anti-polygamy advocates state that the First Amendment, which allows for freedom of religion, should not prohibit the passage of a federal law criminalizing polygamy. They argue that the harm associated with polygamy-related abuses places the practice beyond the scope of religious freedom protected by the Constitution.²² Also, the Supreme Court has ruled that the First Amendment does not protect Mormons from attempts by majoritarian institutions to eliminate the practice of polygamy.²³
10. Finally, under binding international legal instruments, the United States has an obligation to protect many of the rights that polygamists have violated, including rights to: freedom from torture and cruel, inhuman, or degrading treatment; freedom from discrimination based on sex or religion; equal protection of the law;

²² For a discussion of the First Amendment vis -a-vis polygamy see Richard Vazquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEG. & PUB. POL'Y 225, January 4, 2002 at www.nyu.edu/pubs/jlpp/articles/vol5num1/vazquez.pdf. Douglas White, an attorney for Tapestry Against Polygamy, states the case for why the First Amendment does not protect religious freedom as follows: "The U.S. Constitution by its very nature creates the ideology that we Americans have agreed to live in an ordered society, obeying civil law and criminal law, created and enforced by the power of the majority of the people. In fact, Constitutions grant society the 'right' to act in self-defense to such criminal acts and hence we have public prosecutions of those acts which are deemed to be harmful to our society. Children are being molested in Utah every day because of someone else's religious beliefs and acts. These are children not even old enough to consent to a sexual relationship let alone have the maturity or means to protect themselves from their parents and so-called religious leaders. Their parents and religious leaders demand their obedience of their minds and their bodies. What civil rights do they have? Absolutely none. All in the name of God. Legalizing polygamy cannot be done unless we also legalize child rape, incest, and several other forms of sexual abuse and the conspiracy to commit these crimes committed by the children's parents and religious leaders." See <http://www.polygamyinfo.com/plygmedia%2000%2053sltrib.htm>

²³ See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878); *Cleveland v. United States*, 329 U.S. 14 (1946); *Romer v. Evans*, 517 U.S. 620, 648-651(1996) (Scalia, J., dissenting). The *Reynolds* Court rejected a Free Exercise Clause challenge to a federal statute criminalizing bigamy. The Court upheld the statute despite the fact that an accepted doctrine of the defendant's church (i.e., the Mormon church) imposed upon its male members the duty to practice polygamy. The Court cited public policy and the historical condemnation of polygamy by "civilized nations" such as England. Overall, the Court reasoned that although legislative power over opinion is forbidden, such power may reach people's actions when these opinions are found to violate important social duties or to be subversive of good order, even if demanded by religious belief. The Supreme Court in *Cleveland* ruled that the transportation across state lines of multiple wives by Mormons practicing polygamy was for an "immoral purpose," violating the Mann Act, § 2, 18 U.S.C.A. § 398. That the regulation of marriage is a state matter did not make the Mann Act an unconstitutional interference by Congress. Moreover, the fact that Mormons practiced polygamy and were motivated by a religious belief was no defense to prosecution, since the determination of whether an act is immoral within the meaning of the Act is not to be determined by the accused's concepts of morality. Justice Scalia's dissent in *Romer* illustrates the delicate line between discrimination and proscribing a practice such as polygamy. In that case, the Supreme Court struck down a Colorado state constitutional amendment that effectively repealed state and local provisions that barring discrimination on the basis of sexual orientation. The Court held that the amendment violated the equal protection clause of the U.S. Constitution's Fourteenth Amendment. Justice Scalia likened the Colorado provision to selective targeting of polygamy, stating that the Court has concluded that the perceived social harm of polygamy is a "legitimate concern of government," while the "perceived social harm of homosexuality is not."

- “free and full” consent to marriage; education; information; an adequate standard of living; and an effective remedy where one’s rights have been violated.²⁴
11. Practicing polygamists are rarely prosecuted for polygamy *per se*,²⁵ and there does not seem to be legislative support for strengthening anti-polygamy laws in the United States. For example, in 2000, several representatives in the Utah state legislature supported a statute that would have funded a special investigator for crimes committed in polygamous communities.²⁶ The bill failed by a convincing margin to pass the legislature. Some opponents of the bill said it is difficult to target crimes committed under the cloak of a religion, without appearing to be targeting the religion itself.²⁷
 12. The social isolation and insular nature of polygamous communities also make it difficult for authorities to prosecute offenders.²⁸
 13. Victims of polygamy often have no choice but to continue suffering at the hands of their abusers, because their entire support system resides within their polygamous communities. Women who have left these communities analogize their situation to that of “refugees,” as they have no place to turn for financial, physical, and emotional support.
 14. Polygamy is a violation of international and domestic U.S. law regarding the rights of women. Specifically, it violates prohibitions on discrimination, because it treats women’s marital rights differently. There is disagreement as to whether the institution of polygamy is itself a manifestation of violence against women or merely an institution that, as practiced, is particularly prone to violence. At the very least, it can be said that violence within polygamous relationships is both generated by women’s subordination and reinforces that subordination. Furthermore, as long as polygamy creates a right for men – but not for women – to have multiple spouses, it is discriminatory and unacceptable under international human rights standards. Thus, the problem of polygamy in the United States is both the violence as practiced and the institution itself with respect to women.

Case Law

15. *People of New York v. Ezeonu*, 588 N.Y.S. 2d 116 (N.Y. Sup. Ct 1992). A Nigerian man was legally married under Nigerian law to two women, one of

²⁴ See, e.g., the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. See Memo prepared by Donna Sullivan, International Human Rights Clinic, New York University, for the Polygamy Justice Project at <http://www.polygamyjusticeproject.org>.

²⁵ Polygamists are more often prosecuted for other crimes, including statutory rape, child abuse, and sexual misconduct. See, *infra*, section on case law. Regarding the trial and conviction of a polygamist, see Cantera, *supra* note 13 at A1.

²⁶ Utah State Legislature 2000, House Bill 62 and Senate Bill 8, Utah State Leg., 1999, Senate Bill 99.

²⁷ Gillett, *supra* note 14, at 504.

²⁸ See, e.g., *Town Split by Church Fight*, THE ARIZONA REPUBLIC, August 29, 2000 at <http://www.gospelcom.net/apologeticsindex/news/an200830.html#30>.

- whom was 13 at the time of the marriage. Although the New York state court declared that polygamy was just as “repugnant” to public policy as incest, and cited New York State Domestic Relations Law stating that the condemnation of a plural marriage was “settled public policy,”²⁹ the defendant was charged only with rape of the 13-year-old girl. Although this case does not involve fundamentalist Mormons, it is interesting to note the fact that no bigamy charges were brought.
16. *Kingston v. State of Utah* (UT App 103 Case Number: 20000751-CA, 2002). Daniel Kingston and his brother were charged and convicted of child abuse, incest and unlawful sexual conduct arising out of their family’s strict adherence to polygamous practices. The Kingston clan was founded by Daniel Kingston’s grandfather and ordered to marry and conceive only within the family in order to preserve the family bloodline. Despite her vehement objections, Kingston’s 15-year-old daughter was forced to marry her 32-year-old uncle, David Ortell, becoming his 15th concurrent wife. The girl tried to escape from her uncle on two occasions. After the first attempt, Kingston returned his daughter to her uncle/husband immediately. The second time, she ran away to her mother, who turned her over to Kingston. Kingston drove his daughter to a remote barn on the border of Utah and Idaho that was used by the Kingston males to discipline wives’ transgressions. Kingston beat his daughter until she was unconscious. He eventually pled no contest to third degree felony child abuse charges, while Ortell was found guilty of sexual misconduct and one count of incest.³⁰
 17. *Tom Green v. State of Utah* (Fourth Judicial District, Juab County, Utah 2002). Green received a five-year sentence on four counts of bigamy and one count of criminal non-support.³¹ He was later prosecuted separately for statutory rape for having sex with one of his wives in 1986, when she was 13.³² His wife, now 29, has said she was not forced to marry Green and is seeking to sue the state for depicting her as an unwilling victim.³³ This case received substantial public attention, in part, because the Winter Olympics were being held in Utah and, in part, because Green “paraded” his polygamous lifestyle on several local and national television shows as well as in print publications.³⁴
 18. *Luis Gonzales v. State of California* (Sacramento Superior Court, Case Number: 02F05565, 2002). Gonzales, an ex-Mormon bishop who lived with six wives

²⁹ Richard Vazquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. OF LEG. & PUBLIC POL’Y 225, 234 (Jan. 4, 2002) at <http://www.nyu.edu/pubs/jlpp/articles/vol5num1/vazquez.pdf>.

³⁰ *Id.* at 240-242.

³¹ *See*, The Principle at www.polygamyinfo.com (section on law).

³² *Id.*

³³ *Id.*

³⁴ Michael Vigh, *Polygamy Case Turns Focus to Magazine Interview*, SALT LAKE TRIBUNE, January 26, 2001 at <http://www.polygamyinfo.com/plygmedia%2001%2015sltrib.htm> See also Suzan Mazur, *Mormons in the Olympic Spotlight: Polygamy and Scripture Threaten to Steal Some of the Thunder from the Winter Games in Utah*, FINANCIAL TIMES (London), Feb. 9, 2002, at 2.

and twenty children, was charged with twenty counts of child molestation, battery, rape, bigamy, stalking, and fraud. Tammy Doe, Gonzales' third wife, stated, "The Church of Jesus Christ of Latter Day Saints has been fully aware of this man's illegal activities since 1998 and failed to do anything until the child molestation became public. In this country we have the freedom to believe in any religion we want but we are not free to hurt others in the name of God."³⁵ On July 11, 2002, a jury found Gonzales guilty of bigamy, spousal abuse (battery) and child molestation.³⁶

Recommendation

We encourage the next Special Rapporteur on Violence Against Women to undertake an investigation of polygamy in the United States and report those findings, along with any recommendations, to the United States government.

³⁵ See, *Tapestry Against Polygamy*, Press Release, July 9, 2002 at <http://www.polygamy.org/releases.shtml>

³⁶ See, www.polygamyinfo.com/plygmedia%2002%2071sacbee.htm

SECTION 9

IMMIGRANT WOMEN IN THE UNITED STATES

Narrative Summary

The U.S. government has taken significant steps to safeguard the interests of battered women who are not citizens and have limited access to legal, economic, and social resources. Nevertheless, gaps in protection remain, and other forms of violence, including harassment and sexual violence by border patrol agents, have not been adequately addressed. Although the government has committed itself to monitoring and enforcing the rights of female domestic workers, the results of this effort have yet to be seen within the communities that are most affected.

To counter many of the issues faced by battered or abused immigrant women, initiatives must be taken to accommodate their cultural, linguistic, and economic needs, without alienating them or adding to the insecurity of their legal status. Training judges and law enforcement officials to deal with these cases is a step in the right direction, but needs to be more widespread and consistent. Community groups and non-governmental organizations play a particularly crucial role, because such groups often have necessary linguistic and cultural expertise. Federal and state governments should therefore consider increasing funding or sponsorship of community groups.

Introduction

1. The United States admitted 849,807 permanent legal immigrants in FY 2000, of which approximately 55 percent were women.¹ Immigrant women may face social and economic disadvantages beyond those faced by non-immigrant women that magnify the difficulties of responding to an abusive family situation.²
2. Immigrant women who are victims of domestic violence often fall between the cracks of legal safeguards and welfare support systems. By giving male citizens and lawful permanent residents control over their wives' immigration status, U.S. immigration law has historically aggravated domestic abuse.³ Immigrant women may be wary of reporting crimes against them and seeking assistance for redress, because of their immigration status, language barriers, discrimination, cultural

¹ IMMIGRATION AND NATURALIZATION SERVICES, 2000 STATISTICAL YEARBOOK, at 48, available at <http://www.ins.gov/graphics/aboutins/statistics/IMM00yrbk/IMM2000.pdf>. Data on illegal immigration is not available. *Id.* at 5.

² See, e.g., Mary Ann Dutton, et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. POVERTY L. & POL'Y 245, 249 (2000) (noting that battered Latinas "often marry younger, have larger families, are more economic and educationally disadvantaged, have been victims of violence for longer periods of time, and stay longer in a relationship than Caucasian or African-American battered women").

³ Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History Of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL'Y & L. 95, 100 (2001).

- differences, and lack of access to the legal or economic resources needed to survive outside the family.
3. Immigrant women also face abuse by Border Patrol agents of the Immigration and Naturalization Service (INS). Frequent sexual assault and harassment of female immigrants, both legal and illegal, during border crossings have been reported.⁴
 4. The international matchmaking industry may also lead to abuse of immigrant women.⁵ The INS estimates that each year, about 4,000 to 6,000 marriages between American men and foreign women are arranged through these correspondence agencies. Critics fear these industries may serve as fronts for trafficking, and anecdotal evidence suggests that the women may be at increased risk for domestic abuse and sexual assault.
 5. Immigrant women employed as domestic housekeepers often suffer severe abuse at the hands of their employers, particularly international officials and foreign nationals.⁶ These women are admitted to the United States on special work visas, usually A-3 or G-5 diplomats' visas or B-1 visas for foreign nationals. They are cut off from effective legal recourse for crimes committed against them, because of such impediments as employers' diplomatic immunity, unwillingness to report abuse (due to dependence on employers or a fear of being sent home), and limited government monitoring or protective programs for abused immigrant women.
 6. Laws such as employer sanctions and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)⁷ that effectively criminalized the hiring of illegal immigrants have made immigrant women, especially those who immigrated illegally, more vulnerable to workplace abuse and exploitation.⁸ Some of these concerns have been addressed by the Violence Against Women Act of 2000 (VAWA 2000).⁹ The obstacles faced by immigrant women workers are further compounded by discrimination based on race, gender and national origin.

⁴ See HUMAN RIGHTS WATCH, BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO, (June 1992) and CROSSING THE LINE: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO PERSIST AMID CLIMATE OF IMPUNITY, (April 1995), available at <http://www.hrw.org/reports/world/usdom-pubs.php>.

⁵ International Matchmaking Organizations: A Report to Congress, Immigration and Naturalization Services (February 1999), available at <http://www.ins.gov/graphics/aboutins/repstudies/Mobrept.htm>

⁶ HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES, (June 2001), available at <http://www.hrw.org/reports/2001/usadom/usadom0501.pdf>.

⁷ Illegal Immigration Reform and Immigrant Responsibility Act, PL 104-208 Div. C, September 30, 1996.

⁸ See NATIONAL NETWORK FOR IMMIGRANT AND REFUGEE RIGHTS, HANDS THAT SHAPE THE WORLD: REPORT ON THE CONDITIONS OF IMMIGRANT WOMEN FIVE YEARS AFTER THE BEIJING CONFERENCE (1999) available at <http://www.nnirr.org/projects/handsthat.htm>

⁹ See Orloff & Kaguyutan, *supra* note 3.

7. Female genital mutilation (FGM) is also a growing problem in immigrant communities. An estimated 160,000 females have been subjected to the procedure in the United States.¹⁰

Constitutional Provisions

8. Violence perpetrated against immigrant women in the United States is a violation of the Fourteenth Amendment, which grants all persons, including non-citizens, the right to life, liberty and equal protection under the law.
9. The abuse of domestic workers often violates the Thirteenth Amendment, which prohibits slavery and involuntary servitude.

Legislation

10. Congress first acknowledged the special problems of immigrant women suffering from domestic violence when it enacted a “battered spouse waiver” in 1990.¹¹ The next major piece of legislation affecting immigrant women was the 1994 Violence Against Women Act (VAWA 1994). In addition to providing important additional funding for domestic-violence victim services generally, Congress created additional means for immigrants suffering from violence in the family to secure lawful immigrant status without abusers’ cooperation or knowledge.¹² This removed the dilemma of having to choose between residency in the United States and an abusive marriage. Between January 1997 and November 1999, 9,614 battered immigrants filed self-petitions for lawful permanent residency under VAWA.¹³
11. VAWA 1994 also provides for abused spouses to obtain suspension of deportation orders that would allow them to remain in the United States, rather than having to return to their home countries and apply for visas from there.¹⁴
12. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)¹⁵ expands the definition of “qualified alien” to include certain categories

¹⁰ Female Genital Mutilation Outlawed in U.S. as of March 29, 1997 at www.feminist.org/news/newsbyte/uswirestory.asp?id=4032.

¹¹ See Orloff & Kaguyutan, *supra* note 3, at 105-106. This law exempted immigrants suffering from domestic violence who are married to citizen or permanent resident spouses from having to petition for residency jointly. Immigration Act of 1990, Sec. 701, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended at 8 U.S.C. 1186a(c)(4)). However, few battered immigrant women were able to take advantage of this change, due to the INS’s narrow implementation of the statute and the scarcity of trained, bilingual mental health professionals. Orloff & Kaguyutan, *supra* note 3, at 107.

¹² See VAWA 1994 Sec. 40701(a) (codified at 8 U.S.C. Sec. 1154(a)(1)) (amending INA Sec. 204(a)(1) (allowing unclassified aliens to petition on behalf of their children and themselves).

¹³ Leslye Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM. & MARY J. WOMEN & L. 597, 598 (2001).

¹⁴ VAWA 1994 40703(a) (codified at 8 U.S.C. 1254(a) (repealed 1997) (amending INA 244(a)) (enumerating conditions that unclassified aliens were required to meet in order to petition for a stay of deportation); see also Orloff & Kaguyutan, *supra* note 3 at 115.

- of battered aliens.¹⁶ It also provides welfare benefits for battered immigrants who can meet a four-prong eligibility test (more stringent than the test for other categories of qualified aliens), despite the fact that they are undocumented at the time they file for and receive benefits. Section 431(c) allows this limited group of battered immigrant women and children to become “qualified aliens,” eligible for public benefits after the filing of their VAWA or family-based visa applications that contain *prima facie* evidence of eligibility.¹⁷
13. VAWA 2000 expanded a number of protections, including protection for right of a woman to self-petition for lawful permanent residency after divorcing an abusive husband.¹⁸
 14. In 1996, Congress enacted the Federal Prohibition of Female Genital Mutilation Act,¹⁹ making FGM a federal crime punishable by up to five years in prison. The statute expressly forbids any exemption for FGM performed as a “matter of custom or ritual.” The IIRIRA requires the INS to educate new immigrants from areas where FGM is practiced about the risks associated with the practice and its illegality within the United States.²⁰
 15. In response to the growing awareness of FGM in the United States, the states of California, Illinois, New York, and Texas, have passed specific legislation criminalizing FGM.²¹ The majority of states do not specifically criminalize FGM, although presumably such practices could be prosecuted in state court under general child abuse prohibitions.²²

Case Law

16. In *United States v. Alzanki*,²³ the First Circuit Court of Appeals affirmed the conviction of the Alzankis, the employers of Vasantha Katudeniye Gedara, a Sri Lankan domestic worker, for involuntary servitude. The court found that Gedara reasonably believed that she had no choice but to remain in the employ of the Alzankis. During the four months she worked for them, Gedara was assaulted twice, forced to work 15-hour days at hard, repetitive tasks with dangerous cleaning products, and suffered from malnutrition. Her employer prevented Gedara from leaving their residence by retaining her passport and threatening her.

¹⁵ *Supra* note 7.

¹⁶ 8 U.S.C.A. §1229(b).

¹⁷ Orloff, *supra* note 13 at 622.

¹⁸ *See* Orloff & Kaguyutan, *supra* note 3.

¹⁹ 18 U.S.C. § 116.

²⁰ 8 U.S.C. § 1374.

²¹ Cal. Penal Code § 273.4 (West 1999); 720 Ill. Comp. Stat. 5/12-34 (1998); N.Y. Penal Law § 130.85 (McKinney 2000); Tex. Health & Safety Code Ann. § 166.001 (Vernon 2000). *See also* Feminist Majority, Female Genital Mutilation Banned in New York, at www.feminist.org/news/newsbyte/uswirestory.asp?id=2808.

²² Allen E. White, *Female Genital Mutilation In America: The Federal Dilemma*, 10 TEX. J. WOMEN & L. 129, 143 (2000).

²³ *U.S. v. Alzanki*, 54 F.3d 994 (1995).

- She was paid \$120 a month. The holding relied in part on 18 U.S.C. §1584, which provides that actual or threatened use of physical or legal coercion that intentionally causes a person to believe she has no alternative but to remain in a service position constitutes the requisite involuntariness for a violation of the statute.
17. In *Mulyono v. Nilam*, a 1997 case in the Superior Court of California, an Indonesian domestic worker brought into the United States on a six-month tourist visa was awarded \$47,000 in back pay to make up for working 65 hours a week without a full day off for three years.²⁴
 18. In a 1999 civil lawsuit, a Bangladeshi domestic worker, Shamela Begum, who claimed that she was effectively enslaved by a high-ranking official of the Bahraini Mission to the United Nations and his wife, obtained a settlement from the defendants.²⁵ Begum claimed to have been physically abused by the wife and to have been paid only \$800 for ten months of work. The FBI investigated the situation as a criminal matter, but the State Department argued during the civil trial that the case should be dismissed because the defendants had diplomatic immunity. The case was settled for an undisclosed sum.

Administrative Agencies and Guidelines

19. The IIRIRA²⁶ included a provision directing the Attorney General to conduct a study of the international matchmaking industry as an initial step toward developing legal solutions to the immigration and abuse problems posed by this phenomenon. The resulting 1999 INS report provided information on the scope and proliferation of this phenomenon, incidents of physical, sexual, and emotional abuse, and the groups involved in assisting in the immigration of these women.²⁷ The statute also requires international matchmaking organizations to provide information about U.S. immigration laws to the women that they recruit.
20. In December 2000, the Attorney General and the Commissioner of the INS proposed an amendment to INS regulations that would provide greater consistency in the consideration of asylum claims and would clarify that asylum could be granted based on gender-related persecution, including domestic violence.²⁸ This proposed amendment has not yet been promulgated.
21. Although the State Department does not enforce contracts between migrant domestic workers and their U.S. employers, it has started to disseminate, through

²⁴ Unreported case, cited in Melanie Ryan, Note, *Swept Under the Carpet: Lack of Legal Protections for Household Workers – A Call for Justice*, 20 WOMEN'S RTS. L. REP. 159, 164-65 (1999).

²⁵ Douglas Pasternak, *Slavery in the Capitol's Shadow: Protecting Rights Abroad, Ignoring Them Here*, U.S. News and World Report (November 13, 2000).

²⁶ *Supra* note 7.

²⁷ *Supra* note 5.

²⁸ 65 Fed. Reg. 76588 (Dec. 7, 2000) 8 C.F.R. 6208; see also Report Section 10, Refugee and Asylum Law.

- consulates with the highest volume of demands for such visas, brochures about U.S. immigration law for domestic workers.²⁹
22. The National Workers Exploitation Task Force,³⁰ developed by the Department of Justice for trafficking issues, is also taking up the problem of exploitation of migrant domestic workers. The Task Force coordinates the handling of cases, runs a hotline for immigrants, and educates law enforcement officials on the special needs of migrant domestic workers.
 23. The U.S. Department of State has pledged to tighten oversight of visas that allow foreign diplomats to bring domestic workers into the United States. Since 2001, the State Department has required employers to submit a contract spelling out the working hours and wages for prospective employees.³¹
 24. The Department of Health and Human Services provides funding for battered immigrant women's programs, including shelters, through the Family Violence Prevention and Services Act.³² As recipients of federal financial assistance, shelters must comply with Title VI and other civil rights laws; that is, they must not discriminate on the basis of race or national origin.³³
 25. Despite the fact that most immigrants in the United States are denied access to public welfare assistance, certain battered immigrants qualify for welfare benefits under the IIRIRA.³⁴ However, women who arrived in the United States after August 22, 1996, must wait five years before obtaining most major federal means-tested benefits, even if they otherwise qualify as victims of domestic violence.³⁵

Advocacy and NGO Activity

26. In 1990, the Family Violence Prevention Fund created a division within its organization for battered immigrant women to develop and advocate effective federal and state legislation, increase public awareness through pamphlets and information sessions, organize networks and coalitions of service providers and advocacy groups, and produce culturally and linguistically accessible resources for battered immigrant women.³⁶
27. The NOW Legal Defense and Education Fund (NOW LDEF), based in New York, sponsors an Immigrant Women Program to protect and expand the rights of

²⁹ HIDDEN IN THE HOME, *supra* note 6. Regions with a high demand for such visas include Central and Eastern Europe, East Asia, and the South Asian subcontinent.

³⁰ <http://www.usdoj.gov/crt/crim/tpwetf.htm>

³¹ HIDDEN IN THE HOME, *supra* note 6, at 45.

³² 42 U.S.C. § 10406.

³³ 42 U.S.C. § 2000d *et seq.*

³⁴ Orloff & Kaguyutan, *supra* note 3, at 120.

³⁵ *Id.* at 126-27.

³⁶ <http://www.endabuse.org/programs/immigrant>.

- immigrant women and their children.³⁷ The program includes advocacy for legal reform by Congress and the INS, *amicus curiae* briefs, coalition building, technical assistance and training, and research and development. It focuses on improving access to immigration laws, social services and health care reform, and on the economic empowerment of immigrant women.
28. AYUDA, founded in 1971, is a community-based organization offering comprehensive legal services on immigration and domestic-violence law to the immigrant community in the Washington, D.C., area. AYUDA works at local, regional and national levels to strengthen the legal rights of battered immigrant women and children.
 29. The Northern California Coalition for Immigrant Rights in San Francisco³⁸ emphasizes women's needs. The Coalition has organized a highly effective program known as Mujeres Unidas y Activas, which brings together Latinas from the Bay Area to address issues of domestic violence, unemployment, health care, and political and civil rights. The group offers leadership training, support groups and self-esteem workshops, educational campaigns to assert the rights and voices of immigrant women, and a home health-care job-training program for women who speak only Spanish. The Coalition also has an Immigrant Assistance Helpline, which provides advice and information in Vietnamese, Tagalog, Chinese, and Spanish. In 1997, during the anti-immigration sentiment associated with Proposition 187,³⁹ the Helpline provided assistance to 12,000 immigrants of varying status.
 30. Live-in migrant domestic workers have begun to organize within their own ethnic/national communities. Examples include Andolan, serving South Asian women in greater New York City since 1998,⁴⁰ and the Committee against Anti-Asian Violence Women Workers Project in New York City.⁴¹ These organizations assist abused immigrant workers to leave their employers and file lawsuits for back pay.
 31. The Campaign for Migrant Domestic Worker Rights is a national coalition of legal and social service agencies, ethnically-based organizations, social action groups, and individuals, formed in Washington D.C.⁴² The Campaign seeks policy reform and collects information regarding the abuse of migrant domestic workers in the United States. It also organizes training sessions for policy-makers and social service providers on the situations faced by migrant domestic workers,

³⁷ NOW LDEF, at <http://www.nowldef.org/html/issues/imm/index.shtml>.

³⁸ See www.nccir.org.

³⁹ Proposition 187, a 1994 California voter initiative that was passed in 1994, prohibited public social services, including education, to families who could not prove their status as legal residents of the United States.

⁴⁰ Referenced at www.fcny.org/scripts/usq/getpage.pl?orgid=0102.

⁴¹ See www.caaav.org.

⁴² See www.ips-dc.org/campaign.

- focusing specifically on visas granted for employees of foreign diplomats and international agencies.
32. Life Span, an organization dealing with battered women in the Chicago and Cook County area since 1978, created an Immigration Project to provide legal support to battered immigrant women under the 1994 VAWA provisions.⁴³ The organization has helped a number of women seek lawful immigration status without fear of deportation.
 33. The National Immigration Project of the Massachusetts chapter of the National Lawyers Guild has created and disseminated resources to immigration lawyers regarding provisions of the Battered Immigrant Women Protection Act of 2001.⁴⁴ The organization also published an analysis of the immigration provisions in VAWA 2000 and reported on local police enforcement of immigration laws and its effects on victims of domestic violence.⁴⁵

RAINBO, the Research Action and Information Network for the Bodily Integrity of Women, created the African Immigrant Program, a direct-service program that works directly with immigrant and refugee populations and their service providers.⁴⁶ The program's long-term objectives include promoting and protecting the sexual and reproductive health and rights of African immigrant and refugee women, with particular emphasis on the practice of female genital mutilation; developing appropriate training, counseling and education materials for service providers, women, and the community-at-large; and facilitating the exchange of information.

⁴³ See www.life-span.org/legal.html.

⁴⁴ See www.nationalimmigrationproject.org/domestic-violence/domvioindex.htm

⁴⁵ See *id.*

⁴⁶ See www.rainbo.org.

SECTION 10

VIOLENCE AGAINST WOMEN & U.S. ASYLUM AND REFUGEE LAW

Narrative Summary

Since 1994, the United States has made significant progress in addressing the specific needs of refugee women through the development of its asylum law. The 1995 Immigration and Naturalization Service (INS) *Gender Guidelines*, for example, represent a progressive understanding of particular problems women face in countries around the world, including discriminatory laws, systematic sexual violence, repressive population control laws, female genital mutilation (FGM) practices, and domestic violence ignored by state authorities.

Nevertheless, the evolution of U.S. domestic law in federal courts has not kept pace with changing international norms in this area. Judicial opinions addressing controversial questions, such as when domestic violence can provide a basis for an asylum claim, and to what extent women should be considered a distinct social group for the purposes of asylum claims, are inconsistent and inconclusive, offering little guidance or predictability for asylum applicants. This is due to confusion over both the extent of persecution required and the content of the required nexus with a cognizable ground such as membership in a social group or political opinion. To rectify these inconsistencies, the Department of Justice, through the INS, should adopt its proposed rule to clarify women's status as a social group and to elaborate upon the conditions under which domestic violence can provide a basis for an asylum claim.

Introduction

1. Refugee and asylum law represents an important means for women victims of gender-related persecution to find a safe haven in the United States and avoid future persecution.
2. Federal legislation sets the standards for receiving political asylum in the United States. The meaning and intent of this legislation has been elaborated in judicial decisions and the Code of Federal Regulations, the administrative rules that govern U.S. executive agencies, such as the INS. As such, recent gender-related asylum law approaches have been addressed by the INS and the judicial system.
3. Some gender-related asylum law approaches take as their starting point the claim that persecution based on "membership in a social group" can include gender as a relevant social group. Other asylum claims that are not always gender-based but that frequently implicate gender-related issues include religious claims and claims based on coercive population practices such as forced sterilization. The past ten

- years have seen a significant expansion in the recognition, for the purposes of asylum claims, of the persecution of women.¹
4. Nevertheless, even with expanding protection of women asylum-seekers in the Code of Federal Regulations and guidelines issued by the INS, the number of gender-based asylum cases in the United States appears to be small.² This may be due in part to cultural and other influences that make women reluctant to disclose details about prior abuse. Moreover, the INS has shifted its policy from that of previous administrations by postponing indefinitely the consideration of gender-based claims founded on membership in a social group, leaving many female asylum-seekers in limbo and without an indication of when their claims will be resolved.

Legislation

5. Asylum in the United States is governed primarily by 8 U.S.C. §1158. This section establishes that asylum is discretionary. It provides three major forms of relief for persons fleeing persecution in their home countries – asylum, withholding of removal, and protection under the Convention against Torture. Both asylum and withholding of removal are subject to specific grounds of ineligibility or exclusion from status. Withholding of removal does not result in an immigration status under U.S. law, but simply codifies the obligation of *non-refoulement*, i.e., the obligation not to return an alien to a state where the probability of persecution or torture exists.
6. The definition of a refugee is located in 8 U.S.C. § 1101, more commonly referred to as §101(a)(42)(A) of the Immigration and Nationality Act (INA). A refugee is a person “unable or unwilling to return to [her country of origin or last habitual residence] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”³ This standard departs from and expands upon treaty bases for asylum in that asylum seekers can make a successful claim solely by demonstrating past persecution without necessarily having to demonstrate a well-founded fear of future persecution. However, according to this standard, mere proof of gender-based violence is not sufficient to establish eligibility for asylum or withholding; there must also be a nexus to a cognizable ground such as membership in a social group or political opinion.⁴

¹ One example of this normative shift can be seen in the attitude towards sexual assault, now generally accepted to be a legitimate basis in certain circumstances for an asylum claim. *See* paragraph 8, *infra*.

² DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 254 & n.405 (1999) (noting only approximately 75 women’s claims in the one-year period from October 1995 to October 1996 based on Anker’s interviews). An official and current count has been difficult to ascertain; this number is the result of Anker’s interviews with INS officials from that period.

³ 8 U.S.C. § 1101(a)(42)(A).

⁴ ANKER, *supra* note 2, at 255.

7. In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act amended the INA to include coercive population-control practices within the meaning of persecution “on account of . . . political opinion.” People eligible for asylum on the basis of such practices include anyone who “has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure, or for other resistance to a coercive population control program.”⁵ The Act also extends legal immigration status to the spouse and children of anyone who has already received asylum.⁶
8. The Victims of Trafficking and Violence Protection Act of 2000 created two new categories of non-immigrant visas, available to certain non-citizen crime victims. See Report Section 11, Trafficking, paragraph 6, *infra*.

Case Law

9. Before the *INS Gender Guidelines*⁷ came out in 1995, U.S. courts often treated rape as a private matter. In *Campos-Guardado v. INS*,⁸ for example, the Fifth Circuit Court of Appeals upheld the denial of asylum to a Salvadoran woman who, following the political assassination of her uncle and cousins, was gang-raped while her assailants shouted political slogans. Now, however, U.S. courts are more receptive to treating rape as a form of persecution. For example, in *Lopez-Galarza v. INS*,⁹ the Ninth Circuit held that a rape victim was eligible for asylum because her rape constituted persecution inflicted on account of her perceived opposition to the then-governing Sandinista party of Nicaragua.
10. With the 1996 amendment to the INA recognizing that coercive population-control laws amount to persecution and that resistance to them satisfies the definition of “on account of political opinion,”¹⁰ the BIA overruled its prior position¹¹ and now grants withholding and asylum, subject to numerical limitations, to individuals such as Chinese applicants who have been forcibly sterilized or compelled to undergo abortions for violating the “one-child” law.¹² In the case of *In re C – Y – Z –*,¹³ the BIA granted relief to a male applicant whose spouse was forcibly sterilized. This opened the possibility for claims of past persecution based on non-repeatable harms such as sterilization.

⁵ 8 U.S.C. § 1101(a)(42)(B).

⁶ *Id.*

⁷ Memorandum from Phyllis Coven, Office of International Affairs, to all INS Asylum Officers and HQASM Coordinators, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women* (May 26, 1995) [hereinafter *INS Gender Guidelines*] reprinted in Deborah Anker, *Women Refugees: Forgotten No Longer?*, 32 SAN DIEGO L. REV. 771, 794-817 (1995).

⁸ 809 F.2d 285 (5th Cir. 1987).

⁹ 99 F.3d 954, 960 (9th Cir. 1996).

¹⁰ See *supra*, note 5.

¹¹ See, *In re Chang*, 20 I. & N. Dec. 38 (BIA, 1989) (holding that coercive population practices are non-discriminatory in their effect).

¹² See, e.g., *In re X – P – T –*, Interim Dec. 3299 (BIA 1996).

¹³ Interim Dec. 3319 (BIA 1997).

11. Although the *INS Gender Guidelines* specifically recognize that a woman may claim asylum and withholding of removal based on her failure to comply with gender-discriminatory laws,¹⁴ there are very few cases where this has formed the basis of a claim. The cases that do exist are marked by thin evidentiary records. In *Fatin v. INS*,¹⁵ the Third Circuit Court of Appeals assumed that Iranian laws imposing imprisonment on women who refuse to conform to gender-specific norms and social mores were discriminatory on account of gender,¹⁶ and that belief in women's rights was a cognizable political opinion.¹⁷ The Court went so far as to say that gender itself met the requirements of particular social group status.¹⁸ Nevertheless, the Court found that there was insufficient evidence to demonstrate either that Iranian feminists in general were subject to harsh sanctions that would amount to persecution or that Fatin's beliefs were strong enough that she would violate the laws as a matter of conscience and suffer the resulting persecution.¹⁹
12. *Fisher v. INS*²⁰ addressed the same discriminatory Iranian laws in 1996, and imposed the *Fatin* requirement of especially strong political beliefs in finding the appellant did not have strong enough political beliefs to violate the laws and suffer persecution. However, the *Fisher* court also held, in dictum, that women are not a cognizable social group for the purposes of asylum. While scholars assert that *Fisher* has been overruled by *In re Kasinga* (see *infra*, paragraphs 13 and 18),²¹ there is disagreement among courts today as to whether *Fisher* precludes them from granting claims based on gender-specific laws.²²
13. Rather than use the protected ground of political opinion, some lawyers prefer to argue that women satisfy the requirements of "membership in a particular social group." This is a more accurate category in cases of domestic violence, but the judicial methods of defining "social groups" are muddled in U.S. courts. *Safaie v. INS*²³ suggested that women are unlikely to constitute a particular social group in and of themselves under the legislative requirements for asylum claims because the category is overbroad. In *Safaie*, which involved the same Iranian laws as *Fatin* and *Fisher*, the court held that "this category is over-broad, because no fact-finder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender."²⁴ More recent decisions, by requiring additional immutable characteristics to define a distinct social group,

¹⁴ See *supra*, note 7.

¹⁵ 12 F.3d 1233 (3d Cir. 1993).

¹⁶ *Id.* at 1241.

¹⁷ *Id.* at 1242.

¹⁸ Anker, *supra* note 2, at 390, citing 12 F. 3d. at 1240.

¹⁹ *Id.* at 1243.

²⁰ 79 F.3d 955 (9th Cir. 1996) (*en banc*).

²¹ ANKER, *supra* note 2, at 369.

²² *Id.*

²³ 25 F.3d 636 (8th Cir. 1994).

²⁴ *Id.* at 639.

- tend to support this application of the statute. In *Kasinga*, the court defined the group that could receive asylum as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”²⁵ In circumscribing the social-group category in this way, judicial opinions actually import an element of political opinion into the category of membership in the group, which results in a lack of clarity as to whether persecution is resulting from status as a member of a group or from a political belief, or both.
14. In societies without specific laws that explicitly discriminate against women, political beliefs about the status and treatment of women can form the basis for an asylum claim in the United States. Despite the outcome for the petitioner, the *Fatin* Court held that a belief in the equal status of women is a cognizable political opinion.²⁶ In cases like *In re A - Z* -,²⁷ resistance to domestic violence has also been wedged into the political-opinion category in order to satisfy the legal requirements, although some commentators have noted that this requires contortions in the construction of a viable claim.²⁸
 15. A current area of controversy is how to identify circumstances where domestic violence rises to the level of persecution. In *In re A - Z* -,²⁹ an administrative judge granted asylum to a woman who was subjected to physical and mental abuse over 30 years of marriage to a wealthy and politically connected husband. The analysis was not based on the form of persecution, but on state responsibility and identifying grounds of persecution. Accordingly, domestic-violence asylum claims are more successful in U.S. courts where the government of a particular state is unable or unwilling to protect women from such violence. This was precisely the justification for awarding asylum in *In re Sharmin*³⁰ and *In re M - K* -.³¹
 16. Nevertheless, the Board of Immigration Appeals (BIA), in *In re R - A* -,³² injected a note of unpredictability into domestic violence asylum cases. The BIA denied asylum to a Guatemalan woman who had been the victim of severe

²⁵ *In re Kasinga*, Interim Dec. 3278, 1996 BIA Lexis 15, at 13. See also Anita Sinha, *Domestic Violence and U.S. Asylum Law: Eliminating the ‘Cultural Hook’ for Claims Involving Gender-Related Persecution*, 76 N.Y.U. L. Rev. 1562 (2001) (citing *In re Kasinga*, 21 I. & N. Dec. at 365).

²⁶ *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993). Moreover, in *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987), the Ninth Circuit imputed a political belief due to the appellant’s having fled her home country of El Salvador following rapes and beatings by a Salvadoran army sergeant whose actions were interpreted as expressing the political belief that “a man has the right to dominate.” *Id.* at 1435.

²⁷ *Supra* note 10.

²⁸ ANKER, *supra* note 2, at 372.

²⁹ Nos. A72190893, A72793219 (Arlington, VA., EOIR Immigr. Ct., Dec. 20, 1995), cited in ANKER, *supra* note 2.

³⁰ No. A73556833, slip op. at 15 (N.Y., N.Y., EOIR Immigr. Ct., Sept. 27, 1996), cited in ANKER, *supra* note 2, at 261, note 443.

³¹ No. A72374558, slip op. at 22 (Va., EOIR Immigr. Ct., Aug. 9, 1995), cited in ANKER, *supra* note 2, at 372, see also 392, note 733.

³² Interim Dec. 3403 (BIA 1999).

- domestic violence by her husband in Guatemala, and feared further violence if she returned. The BIA rejected the applicant's claim that Guatemala is unable or unwilling to protect women from domestic-violence. The applicant also provided an alternative claim that she was persecuted on account of her political opinion (the applicant's opposition to male domination) and as part of a distinct social group (Guatemalan women intimately involved with Guatemalan men who believe that women are subordinate). The court rejected the political claim as well, saying that R- A- was not beaten because her husband knew or even cared about her political opinions. Following significant public pressure, Attorney General Janet Reno vacated this decision in January 2000, directing the BIA to re-decide the case in anticipation of new asylum regulations.³³ Nevertheless, as of the end of 2002, the regulations had not been finalized, and the case is still unresolved.
17. Similar domestic-violence cases appear to fare better when the basis of the claim is religious persecution. In *In re S - A -*,³⁴ a 21-year-old Moroccan woman sought asylum on the grounds of being a woman with liberal Muslim beliefs. She was granted asylum after establishing with credible evidence that she suffered past persecution and had a well-founded fear of future persecution at the hands of her father on account of her religious beliefs, which differed from her father's orthodox Muslim views concerning the proper role of women in Moroccan society.
 18. Where a state fails to protect women from other forms of violence, such as female genital mutilation (FGM), such practices can form the basis of asylum claims. Yet after the narrow precedent of *In re Kasinga*³⁵ discussed above,³⁶ claiming FGM as a ground for asylum may have suffered a further setback in the case of Adelaide Abankwah. Abankwah made a fraudulent claim that she feared forced FGM if she returned to her home region in Ghana. The immigration judge initially rejected her asylum claim as not credible, but was reversed in July 1999 by the Second Circuit, noting that the INS had been "too exacting both in the quantity and quality of evidence that it required."³⁷ The Second Circuit also discussed the international recognition of FGM as a violation of women's and female children's rights and mentioned that the practice has been criminalized under U.S. federal law.³⁸ Subsequently, the INS discovered that Abankwah was actually Regina Danson, who was using a false passport, and confirmed that other key facts in her

³³ See *infra* paragraph 21.

³⁴ 2000 BIA Lexis 12, 22 I. & N. Dec. 1328 (June 27, 2000).

³⁵ Interim Dec. 3278 (BIA 1996).

³⁶ See *supra* para. 13.

³⁷ See, ANKER, *supra* note 2.

³⁸ Pamela Goldberg, *Analytical Approaches in Search of Consistent Application: A Comparative Analysis of the Second Circuit Decisions Addressing Gender in the Asylum Law Context*, 66 BROOKLYN L. REV. 309, 360 n.1 (Summer/Fall 2000), citing 185 F.3d 18, 23 (2d. Cir. 1999).

testimony were false or incorrect.³⁹ It remains to be seen whether this case of fraud encourages courts to view FGM claims with renewed skepticism.⁴⁰

Administrative Agencies and Guidelines

19. The INS, the executive agency that deals with asylum in the United States, is within the Department of Justice. Department of Justice and INS regulations governing procedures for asylum and withholding of removal can be found at 8 C.F.R. § 208.⁴¹
20. A proposed rule, published in the December 7, 2000 edition of the Federal Register, would make an important contribution to the U.S. effort to reduce violence against women worldwide.⁴² This proposed rule would amend 8 C.F.R. § 208 to specifically include gender as a possible basis for a “social group” claim of persecution by asylum seekers. Moreover, this proposed rule would also allow claims of persecution because of domestic violence. The rule was in part a response to such judicial decisions on this subject as *Safaie*,⁴³ *Kasinga*,⁴⁴ and *In re R – A –*,⁴⁵ discussed above.
21. In 1995, the INS published the *Gender Guidelines*,⁴⁶ outlining past gender-based asylum precedent, to be used as a manual for INS employees dealing with such asylum claims. The *Guidelines* are perhaps the single most important governmental step towards protecting the interests of women asylum seekers in the United States. They affirm that women may claim asylum based on violations of gender-discriminatory laws, because women who transgress social mores may be viewed in some societies as having made a political or a religious statement. The *Guidelines* also recognize non-state actors, such as domestic partners, as agents of persecution for purposes of refugee law.
22. The INS *Gender Guidelines* also maintain that proof of gender-based violence is not sufficient to establish eligibility for asylum or withholding, because there must be a nexus to a cognizable ground. A victim of such violence is, however, eligible for protection from removal under article 3 of the Convention against Torture.

³⁹ The INS has recommended that Ms. Abankwah be prosecuted for fraud, charging that she entered the United States with a stranger’s passport and a fabricated tale. See ANKER, *supra* note 2.

⁴⁰ See Goldberg, *supra* note 38.

⁴¹ 8 C.F.R. § 208.

⁴² 65 Fed. Reg. 76588 (Dec. 7, 2000).

⁴³ See *supra*, note 23.

⁴⁴ *Supra* note 25.

⁴⁵ *Supra* note 34.

⁴⁶ *Supra* note 7.

Advocacy and NGO Activity

23. The Center for Gender and Refugee Studies (CGRS) at the University of California Hastings School of Law provides legal expertise and resources, at both the practice and policy levels, to attorneys representing women asylum seekers fleeing gender-related harm. CGRS also seeks to track these cases. Additionally, it coordinates domestic and international legal and public policy advocacy efforts and engages in efforts to educate decision makers and the public and contribute to the formulation of national and international policy and practice.⁴⁷ The CGRS website provides a unique database of summaries of individual gender-based asylum cases and decisions; domestic and international legal documents, including scholarly articles; legal advice and assistance on cases; links to country-condition documentation and related websites; and information on advocacy campaigns.
24. The Refugee Law Center (RLC) in Boston, Massachusetts, collaborates with other human rights and refugee policy and legal-representation organizations in the United States and other countries to provide positions papers, *amicus curiae* briefs, legal support, human rights and country-condition documentation, and legal representation on issues relating to refugee protection. The RLC places particular emphasis on the development of theories and the advancement of legal doctrine for asylum and related protections on gender-specific grounds.⁴⁸
25. The Women's Commission for Refugee Women and Children in New York, New York, is the only organization in the United States dedicated solely to speaking out on behalf of these refugees. Through a vigorous and comprehensive program of advocacy, supported by extensive research and technical expertise, the Women's Commission serves as an expert resource and works with governments, U.N. agencies, and international and local non-governmental organizations, on the protection of refugee women and children, including violence prevention.⁴⁹

Recommendations

26. The Department of Justice and the INS should implement the proposed amendment to the INS asylum regulations (C.F.R § 208)⁵⁰ in order to clarify women's status as a cognizable social group for the purposes of U.S. asylum law. This would remedy the current state of case law, which suffers from the incorporation of political opinion into the category of "social group" and the circularity of defining women who have suffered from persecution as a social

⁴⁷ www.uchastings.edu/cgrs/about.htm

⁴⁸ www.refugeelawcenter.org/rlc/mission.htm

⁴⁹ www.womenscommission.org. See, e.g., "Sexual Violence in Refugee Crises, A synopsis of the UNHCR Guidelines for Prevention and Response" and other advocacy papers, available on their website.

⁵⁰ *Supra* note 42 and paragraph 21.

group.⁵¹ This would also clarify the conditions under which domestic violence can provide a basis for an asylum claim in the United States.

⁵¹ The objection that such a rule would make all women potential asylum-seekers from a given country misses the requirement that each individual still make a showing that she may personally fear persecution; as such, women who are not truly at risk of persecution would not likely be granted asylum.

SECTION 11

TRAFFICKING OF WOMEN AND GIRLS

Narrative Summary

Over the past five years, trafficking of persons has become a “hot issue” in the United States. The media, the courts, the advocacy and legal communities, and Congress have devoted significant time, energy, and resources to combating the problem and punishing the perpetrators of this crime. Lawmakers have passed exemplary legislation in the form of the Victims’ of Trafficking and Violence Protection Act of 2000 (VTVPA), which effectively improves procedures and regulations in numerous federal departments and puts trafficking high on the government’s list of priorities. It also provides a base for both civil society and the government to develop further anti-trafficking initiatives. Steps taken by individual agencies that require their personnel to be adequately trained to handle trafficking cases — from manuals to language courses — will prove to be a vital resource for future cases. State Department scrutiny of the practices of other states will help the United States contribute to efforts to prevent trafficking abroad. Advocacy groups, such as the Freedom Network (U.S.A.) to Empower Trafficked and Enslaved Persons, have added to the training by bringing together various practitioners in order to better serve the victims. Together, these efforts reflect a trend towards fighting the crime of trafficking with a three-pronged approach that combines prevention and punishment on one side with rehabilitation of victims on the other.¹

What has received less attention in the United States, however, is a *governmental* focus on victims. Although the laws address the rights of victims in terms of their legal status in this country, federal and state governments have failed to create adequate services to care for victims, such as counseling, support services, education, and training. The United States has made significant progress in protecting the rights of trafficked persons, and it should be noted that the federal government does fund programs through the VTVPA, but services and resources for these victims, including psycho-social, legal, welfare and other necessary services, must be expanded.

Introduction

1. Trafficking in women and children (and men) is the new form of slavery in the 21st century. Out of the 700,000 to 2 million women and children worldwide trafficked each year, approximately 45,000 to 50,000 come to the United States.² They are trafficked into and within the country for: forced labor; slavery;

¹ Note that, with the proviso mentioned in the next paragraph, this approach generally falls in line with the United Nations’ Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council (E/2002/68/Add.1, May 20, 2002), *available at* www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/caf3deb2b05d4f35c1256bf30051a003?Opendocument

² AMY O’NEILL RICHARD, STATE DEPT. BUREAU FOR INTELLIGENCE AND RESEARCH, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME 3 (1999).

involuntary servitude and peonage into domestic work; prostitution; servile marriages; farm labor; sweatshops; and street vending. They are typically individuals who either are migrating to improve their lives, but are misled regarding the real conditions of the proposed work by traffickers whom they trusted, or are trafficked through illicit foreign adoption or international matchmaking organizations. Some traffickers are large, organized, sophisticated criminal groups, but as many, or even more, are small groups, often run by families, and sometimes individuals. Trafficking almost always involves high-level corruption in the countries of origin and transit, and often in countries of destination.³

2. Persons trafficked to the United States have come primarily from Southeast Asia and Latin America, but are now increasingly arriving from the Newly Independent States of the former Soviet Union and from central and eastern Europe. Key origin countries include China, Korea, Thailand, Burma, India, Nepal, Mexico, Guatemala, Latvia, Russia, Ukraine, and the Czech Republic.⁴
3. Trafficking in persons violates U.S. and international laws against slavery, forced labor, involuntary servitude, peonage, rape, kidnapping, false imprisonment, assault, battery, pandering, fraud, extortion, and immigration.

Constitutional Provisions

4. Trafficking violates the Thirteenth Amendment of the United States Constitution, which prohibits slavery and involuntary servitude in the United States.
5. Trafficking also violates the Fourteenth Amendment, which grants all persons the right to life, liberty, and property and equal protection under the law.

Legislation

6. The Victims of Trafficking and Violence Protection Act (VTVPA)⁵ was passed in October 2000. Division A of the VTVPA constitutes the Trafficking Victims Protection Act of 2000 (TVPA), while Division B constitutes the Violence Against Women Act of 2000 (VAWA 2000). The TVPA establishes within the federal government an Inter-Agency Task Force to Monitor and Combat Trafficking, requires the State Department's country reports to include statistics on trafficking in countries receiving U.S. aid, and makes it mandatory for the president to consult NGOs in taking international initiatives to enhance economic opportunity for potential trafficking victims as a method of preventing trafficking. The Act also extends to any trafficking victim eligibility for benefits and services under any federal or state refugee benefit program.

³ *Id.*

⁴ Department of State: <http://secretary.state.gov/www/picw/trafficking/source.htm>

⁵ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (October 28, 2000).

7. The TVPA created two new categories of non-immigrant visas, the “T” and “U” visas.⁶ T visas are available to victims of a “severe form of trafficking,” including those subjected to forced labor or those under the age of 18 subjected to sex trafficking, and entitle holders to stay in the United States and possibly adjust to legal permanent residence status after three years. The Department of Justice has issued interim regulations regarding eligibility and the process for applying for T visas.⁷ “U” visas are available to non-citizen victims of a broader range of crimes, including domestic violence, nannies subjected to abuse by employers, and trafficking. To be eligible for U visas, victims must certify that a criminal investigation or prosecution would be harmed without the assistance of the immigrant.⁸
8. The VTVPA also allocates grants to groups providing services for victims of trafficking, and charts out a path for law enforcement regulations that protect victims of trafficking who are in custody. It also provides for training of government personnel.
9. Section 110(a) of the VTVPA states, “It is the policy of the United States not to provide non-humanitarian, non-trade-related foreign assistance to any government that (1) does not comply with minimum standards for the elimination of trafficking; and (2) is not making significant efforts to bring itself into compliance with such standards.”
10. In December 2000, the United States signed the UN Convention against Transnational Organized Crime, including its two supplementary protocols on trafficking in persons and migrant smuggling.⁹ The protocols together provide a framework for countries to: criminalize trafficking, protect and address the status of the trafficked person in the receiving state, impose law enforcement measures against the traffickers, prevent trafficking through public information campaigns, and strengthen border controls. This Convention and the two protocols have yet to be ratified by the U.S. Senate.
11. In July 2000, the United States signed the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography.¹⁰ This is an important step, since many of the persons being trafficked into the United States are under 18.

⁶ *Congress Creates New “T” and “U” Visas for Victims of Exploitation*, Immigrants’ Rights Updates, Vol. 14, No. 6 (Oct. 19, 2000), available at <http://www.nilc.org/immlawpolicy/obtainlpr/oblpr039.htm>.

⁷ 67 Fed. Reg. 4784 (2002) (to be codified at 8 C.F.R. Parts 103, 212, 214, 274a and 299) (interim rule with request for comments, Jan. 31, 2002).

⁸ U Visas for Victims of Crimes (March 2002), available at <http://www.nationalimmigrationproject.org/domestic-violence/Uvisas/U%20Strategy%202002.doc>.

⁹ U.N. Doc. A/55/383 (November 2, 2000).

¹⁰ U.N. Doc. A/RES/54/263 (May 25, 2000). The U.S. Senate has not yet ratified the Convention or the Optional Protocol. For a list of signatories and ratifications, see <http://www.unhchr.ch/html/menu2/6/crc/treaties/status-opsc.htm>

Administrative Agencies and Guidelines

12. In October 2001, the Office to Monitor and Combat Trafficking in Persons was established in the Department of Justice to support the president's Inter-Agency Task Force to Monitor and Combat Trafficking in Persons.
13. In March 2001, the Department of Health and Human Services initiated a certification process to assist trafficked persons. The Department provides letters to such persons that serve as official documentation that they are trafficking victims, which makes them eligible to apply for federal and certain state benefits to the same extent as refugees.
14. In 2000, the Department of Justice released the Attorney General's Guidelines for Victim and Witness Assistance. The Guidelines identify, among others, victims of sexual offenses and child victims as being especially vulnerable, and require Department of Justice employees' best efforts to respect their privacy and dignity. They give victims the right to restitution, to confer with a government attorney, to be reasonably protected from the accused offender, and to be present at all public court proceedings. The Guidelines also permit the Department of Justice to provide victims investigation-related services, including sexual-assault examinations. Responsible officials in the Department of Justice must submit reports to the Attorney General on their compliance with the Guidelines. The Guidelines also require all employees who will be interacting with victims to undergo training.
15. In April 1998, Attorney General Janet Reno established the Worker Exploitation Task Force. The Task Force created a manual on investigating and prosecuting cases involving the exploitation or abuse of workers and is conducting training programs for federal, state, and local law enforcement agencies faced with worker-exploitation issues.
16. The Departments of State and Justice are planning to establish a Migrant Smuggling and Trafficking in Persons Center to serve as a gathering and dissemination point for information from the intelligence and law enforcement communities.¹¹
17. The Department of Justice plans to conduct comprehensive anti-trafficking training for federal prosecutors and INS and FBI personnel before the end of 2002.

¹¹ U.S. Department of State, Fact Sheet on Future U.S. Activities Against Trafficking in Persons. <http://usinfo.state.gov/topical/global/traffic/02021402.htm> (February 14, 2002)

Adjudication and Prosecution

18. Between 1997 and 2000, the Department of Justice prosecuted trafficking cases involving more than 150 victims¹² and a variety of activities in various parts of the country.
19. The Department of Justice currently has more than 100 trafficking investigations pending, which represents a three-fold increase since it established its Trafficking in Persons and Worker Exploitation Task Force toll-free complaint line in February 2000.¹³
20. Geographic trends in federal prosecutions of trafficking offenses suggest favored points of entry into the United States. For example, two popular points for trafficking into the United States are Mexico and the Commonwealth of the Northern Mariana Islands (CNMI), a U.S. territory. *U.S. v. Cadena*¹⁴ involved the federal prosecution of traffickers of young women from Mexico into Florida and the Carolinas. The women were forced to work as prostitutes in brothels serving migrant workers, were threatened with beatings and rape, and endured forced abortions. In March 1998, 16 men were charged with a number of criminal offenses, including importing aliens for immoral purposes, visa fraud, and violation of civil rights. The defendants' sentences ranged from two and a half to six and a half years, with one ringleader receiving 15 years. The trafficking ring was also forced to pay \$1 million in restitution to the victims. *U.S. v. Kwon*¹⁵ revealed the prevalence of trafficking to the United States via CNMI. Defendants recruited and transported Chinese women (and men) from China to CNMI, forcing them to work in restaurants, factories, construction sites, homes and brothels. They were threatened with violence or death if they attempted to leave their barracked apartments. Three defendants were indicted in November 1998 and pled guilty. Their sentences ranged from two to eight years. The Department of Justice subsequently assisted the victims in acquiring jobs in Guam.
21. Organizational trends suggest the structure of criminal groups engaging in trafficking. Such criminal groups often take the form of large-scale organized crime structures, frequently run by families. *U.S. v. Paoletti*¹⁶ exemplifies this aspect of trafficking into the United States. The Paoletti family is believed to have trafficked more than 1,000 deaf and mute Mexican women and men into the

¹² Richard, *supra* note 2, at 47.

¹³ U.S. Department of State, Fact Sheet on U.S. Efforts to Combat Trafficking in Persons. <http://usinfo.state.gov/topical/global/traffic/02021403.htm> (February 14, 2002).

¹⁴ *U.S. v. Cadena*, Superseding Indictment, Case No. 98-14015-CR-RYSKAMP, U.S. District Court, Southern District of Florida, April 23, 1998.

¹⁵ *U.S. v. Kwon*, Indictment, CR 98-00044, U.S. District court for the Northern Mariana Islands, November 1998.

¹⁶ *U.S. v. Paoletti*, Indictment, CR 97-768, U.S. District Court, Eastern District of New York, August 19, 1998.

- United States to sell trinkets and beg on buses and subways. They were beaten if they failed to meet their daily quota, and stun guns were sometimes used against them. Seventy victims were found in a locked room in New York City during a raid, and a total of 20 people were indicted on charges of involuntary servitude and aiding, abetting, transporting, harboring, and inducing the entry of illegal aliens. The ringleader received 14 years in prison, and the judge ordered \$1 million in restitution in October 1998.
22. These cases highlight the challenges to prosecuting trafficking in the United States. Challenges include: lack of cooperation between international law enforcement entities; language barriers and lack of female officers willing to take investigation-related jobs; conflicting statements from victims due to a fear of deportation and recrimination; and high standards of proof.
 23. In the fiscal year 2002 budget, the Justice Department's Civil Rights Division received an increase of \$770,000 to hire seven additional prosecutors and five support staff who will work on human trafficking cases. The Division created the positions of Special Litigation Counsel for Involuntary Servitude and Special Counsel for Trafficking in Persons.

Advocacy and NGO Activity

24. Since 2000, the Department of State has been bringing experts in trafficking from around the world together for several three-week sessions under the International Visitors Program. These experts meet with their U.S. counterparts to discuss issues central to trafficking, including gender issues, border control, and international crime.¹⁷
25. The Bureau for International Narcotics and Law Enforcement Affairs has produced a brochure describing traffickers' tactics and victims' rights in the United States. The brochure is available in 24 languages at 27 U.S. embassies.
26. The Office of Refugee Resettlement of the U.S. Department of Health and Human Services funds anti-trafficking programs nationally. Recipient organizations coordinate direct emergency services, such as shelters and legal and medical assistance; conduct workshops and clinics for service providers at victim-service sites; organize local networks of partners and advisors; and heighten awareness of the issues through presentations to community and professional conferences and groups.
27. The Washington, D.C.-based International Human Rights Law Group has created an advocacy program, the Initiative Against Trafficking in Persons. Along with the Global Alliance Against Traffic in Women and the Foundation Against Trafficking in Women, the Law Group drafted Human Rights Standards for the

¹⁷ U.S. Department of State, The U.S. Government's International Anti-Trafficking in Persons Initiatives. http://www.state.gov/g/inl/rls/fs/2001/jun_aug/4051.htm (July 12, 2001)

Treatment of Trafficked Persons. This document serves as a benchmark for assessing the adequacy of legal and policy responses to trafficking. NGOs are using the Human Rights Standards to educate the media, police, prosecutors, immigration officials, other NGOs and trafficked persons, as well as to advocate for appropriate legal and policy responses by their governments. The Law Group also coordinated legislative lobbying efforts for the Victims of Trafficking and Violence Protection Act of 2000.

28. Freedom Network (U.S.A.) to Empower Trafficked and Enslaved Persons¹⁸ is a national network of service providers, lawyers, psychologists, advocates, media networks, and anti-trafficking coalitions that works to increase public awareness of trafficking issues and serves as an advocate at the national and international levels. The Network has chapters in each major region of the United States, including the Mid-Atlantic, Midwest, Northeast, Southeast, and West Coast.

Recommendations

29. The Senate should immediately ratify and implement the UN Convention against Transnational Organized Crime and its two supplementary protocols, as well as the Convention on the Rights of the Child and its Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography.
30. Intelligence, security, and border agencies should increase their coordination and their cooperation with international security agencies in order to facilitate the apprehension and prosecution of the ringleaders of international human trafficking organizations.
31. The INS should centralize the processing of U and T visas in the INS Vermont Service Center, with adjudicators who are well trained in issues of violence against women.
32. Congress should amend federal criminal statutes to increase prison sentences for convicted traffickers. Traffickers who have served their prison sentences and are released should be compelled to provide reasons and substantiation for the purpose of their visiting any of the key “export” countries from which victims of trafficking are brought to the U.S. This could help minimize trafficking by traffickers released from prison after completing their sentences.

¹⁸ www.freedomnetwork.org

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Director, Immigrant Workers Program, NOW Legal Defense and Education Fund

Section 9. Immigrant Women

Section 10. Asylum and Refugee Law

Section 11. Trafficking

Jean Koh Peters

Clinical Professor of Law, Yale Law School

Section 10. Asylum and Refugee Law

Regan Ralph

Executive Director, Fund for Global Human Rights

Country Summary

Section 1. Family Violence

Section 3. Prisons

Section 5. Workplace

Section 7. Religious Extremism and Access to Abortion

Section 8. Polygamy

Lynn Hecht Schafran

Director, National Judicial Education Program, NOW Legal Defense and Education Fund

Section 2. Sexual Assault

Donna Sullivan

Acting Assistant Professor of Clinical Law, New York University School of Law

Section 8. Polygamy