



EXECUTIVE SUMMARY

A Summary of U.S. NGO responses to the U.S. 2007 Combined Periodic Reports to the International Committee on the Elimination of All Forms of Racial Discrimination

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7. The Periodic Report all but admits that this definition of discrimination is inadequate to address contemporary manifestations of racism and racial discrimination. In ¶¶52 and 53, for example, the government notes that “overt discrimination is far less pervasive than it was in the early years of the second half of the Twentieth Century.” The Report then notes that this “less pervasive” discrimination is addressed by an “extensive constitutional and legislative framework that provides for effective civil rights protections.” It does not, however, address the virtually non-existent constitutional protections afforded to those injured by the racially disparate impact of racially neutral laws. It attributes this more common discrimination to “attitudes that persist from a legacy of segregation, ignorant stereotyping and disparities in opportunity and achievement.” It appears to reject any obligation either to remedy the injuries caused by this type of discrimination or “to prohibit and to eliminate” this type of discrimination.”
8. The United States also contends that discrimination as a matter of constitutional law is not inconsistent with the Convention’s definition of discrimination. The States party supports its position with an interpretation of “unjustifiably disparate impact,” which posits that “unjustifiably disparate impact” within the meaning of General Recommendation XIV requires claimants to demonstrate both statistically significant racial disparities and that those disparities are “unnecessary,” i.e. not caused by some justifiable governmental consideration. Read in this way, disparate impact is not an independent basis for recovery. Rather, it is actionable only if there is also evidence of discriminatory intent.
9. The United States is under an obligation to prohibit and eliminate laws, policies, and programs “which [have] the purpose *or effect*” of impairing rights or freedoms based on race.” The United States did not reserve to this definition of discrimination. However, plaintiffs alleging racial discrimination in United States courts must prove that the defendant was motivated by racial animus, and that this discriminatory intent caused the plaintiff’s harm.
10. Efforts to locate causation at a decision point within a specific domain understate the cumulative impact of discrimination. Serious discriminatory outcomes as a result of institutional interactions are often unintended but nonetheless predictable, and it is the responsibility of the State party under the Convention to pursue a different policy of addressing them. [article 2] Racial impacts that result from cumulative racial discrimination over time and across domains are not remediable through a simple individualistic intentional discrimination model.
11. ¶¶319 and 320 of the Periodic Report identify the Voting Rights Act, as well as Titles VI and VII of the Civil Rights Act of 1964 as vehicles through which disparate impact claims may be litigated. It fails, however, to note how recent Supreme Court cases have limited the extent to which these statutes provide viable remedies for individuals injured by the racially disparate impact of racially neutral laws.

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12. Unlike discrimination as a matter of U.S. constitutional law, the Convention defines discrimination to reach both public and private actors. Although the U.S. has reserved to the Convention with respect to the regulation of private conduct beyond what is required under domestic law, it remains responsible for addressing unjustifiable racial impacts that result from public, as well as private actions.
13. U.S. law fails to recognize that racial discrimination in American society often arises from interactions, both public and private, over time and across domains. Although article 1 and General Recommendation XIV of CERD are concerned with racially disparate effects of policies and practices involving this intersectionality, U.S. courts have been increasingly reluctant to redress discrimination in one domain that is caused by interactions in other domains.
14. Although the Committee recommended that the United States “take all appropriate measures to review existing legislation and federal, state, and local policies,” the government notes that it has reviewed “legislation and policies,” where such a review was deemed necessary and “to determine if new enforcement priorities are appropriate in areas involving disparate impact.” The enforcement efforts highlighted in the Periodic Report are, in no way, the type of comprehensive review the Committee’s recommendation appears to require.

Art. 1(2) & (3) Citizens and non-citizens; nationality, citizenship and naturalization

15. Since the U.S. last reported to the Committee, immigrant and refugee communities in the U.S. have been subjected to a range of systematic human rights violations directed by the federal government, local, county and state governments, law enforcement agents, employers and private citizen groups. Since September 11, 2001, new federal laws and policies have limited non-citizens’ access to due process rights, while at the same time creating an atmosphere of elevated fear and mistrust of those who are foreign-born, as well as those who are perceived to be of a particular religious or ethnic background. In an increasingly anti-immigrant climate, authorities have collaboratively advanced hundreds of measures denying immigrants and refugees access to employment and a living wage, labor protections, access to public benefits, health care, and education, and adequate public safety.
16. The humanitarian crisis at the border has reached new heights as migrant deaths hit record numbers and the federal government pours billions of dollars into militarizing the region. In the interior, workers are increasingly subject to violent and disruptive immigration raids at their workplaces and in their homes, typically targeting a population of ethnic minorities that is hugely disproportionate to the number of people actually charged with violations.

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17. Discrimination against migrants, immigrants, refugees and asylum seekers of color in violation of the Convention, as interpreted by the Committee's General Recommendation XXX, is increasingly fueled by legislation, administrative regulations and enforcement policies framing immigration as an assault on the public purse, and immigrants as illegitimate interlopers rather than substantial contributors to the nation's economy. Immigrant women of color suffer disproportionately from anti-immigrant government policies rendering them more vulnerable to, and in some cases facilitating, abuse through denial of access to shelters and services, social assistance, housing, and health benefits which can enable immigrant women of color to leave abusive relationships.
18. Moreover, government policies continue to discriminate *among* immigrants - promulgating policies and practices which disproportionately adversely affect immigrants of color. For instance, access to asylum is disproportionately denied to refugees and asylum seekers from Haiti compared to those from Cuba or China.
19. The experiences and discrimination faced by immigrants - both those residing in New Orleans and those who were brought to the area under temporarily relaxed immigration regulation - following Hurricane Katrina are notably absent from the U.S. Report. Yet immigrants living in New Orleans experienced devastation and toxic contamination of their communities, and Latino/a workers brought from Central America by contractors rebuilding the city continue to suffer significant violations of their employment and other human rights.

Art. 1(4) Special measures for “adequate advancement” to ensure equal enjoyment or exercise of human rights and fundamental freedoms

20. Article 1(4) requires a States party to adopt special measures, i.e. affirmative action, as long as circumstances warrant such measures. In 2001, this Committee noted “the persistence of the discriminatory effects of the legacy of slavery, segregation, and destructive policies with regard to Native Americans.” This legacy led the Committee to conclude that African Americans and Native Americans are especially vulnerable to contemporary manifestations of past discrimination. These are the types of circumstances for which the Convention deems “special measures” to be warranted to ensure “adequate advancement” for these especially vulnerable populations.
21. Special measures, however, are currently under attack based on notions of rights that are at odds with the Convention’s requirements. The use of voter referenda to prohibit states from adopting race-based affirmative action measures is on the rise. While the States party claims its ability to act is limited by the principles of federalism and states rights, it is the duty of all U.S. Government authorities to act in

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conformity with and to take *affirmative measures* to meet the requirements under the Convention.

22. Although the Committee emphasized that the adoption of special measures in cases of persistent disparities is an obligation of the state,² the U.S. has attempted to rationalize policy-based discrimination as resulting from conditions beyond its control, either private decision making or courts interpreting U.S. laws.³ For example, the Federal Government most recently argued for, and the Supreme Court ruled in favor of, the elimination of race-conscious student assignment policies in elementary and secondary education, despite a finding that the government had a compelling interest in addressing racial isolation.⁴ The Court not only failed to remedy the harmful effects of racial discrimination, but also severely limited the capacity of other governmental entities to voluntarily address them. By adopting this “color-blind” approach, both the executive and judicial branches of government exacerbate the effects of discriminatory practices and policies, thwarting integration efforts of local governing bodies.
23. The legal profession provides a particularly sharp picture the continuing need for “special measures.” In California, one of the most multi-racial states in the United States, the legal profession is now more than 80% white although whites comprise only 45% of the population. The numbers in California are consistent with national trends and data. Persistent barriers to inclusion of racial minorities in the legal profession in the United States constitute race discrimination in education and in employment and lack of equality before the law and in the administration of justice. The serious under-representation of racial minorities in the legal profession is caused in part by continuing overuse of law school admissions and attorney licensing tests with significant disparate impacts on African Americans, Hispanics, and Asian-Americans. Instead of addressing the racial imbalance in the legal profession or the misuse of these discriminatory tests, the United States government, through the Department of Education and, ironically, the Civil Rights Commission, is using its control over accreditation of law schools to undermine efforts to establish greater racial diversity in legal education and in the legal profession.

² Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, A/56/18, ¶ 399, 14/08/2001.

³ Under U.S. law, courts not only apply law, but also play a role in interpreting law both as a matter of the judicial function and as a matter of judicial review. *See* *Marbury v. Madison*, [5 U.S. \(1 Cranch\) 137 \(1803\)](#). Judicial review is the power of a court to review laws for their Constitutionality. Although Congress may reverse or overturn judicial interpretation of a statute, the U.S. Supreme Court has the final authority to interpret the Constitution itself. *See* The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) for an instance in which the Congress modified some of the basic procedural and substantive rights provided by federal law in employment discrimination cases in response to a series of Supreme Court decisions that limited the rights of employees who had sued their employers for discrimination.

⁴ *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738 (2007).

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42. According to the Periodic Report, the United States supports the Convention's goals, but believes that its reservations, understandings and declarations are compatible with the Treaty's objectives and purposes. Rather than review the reservation the United States chose to respond by referencing the very constitutional limits about which the Committee was concerned. Rather than attempt to redress the concerns raised by the Committee, the U.S. chose to reiterate its interpretation of the limited nature of its obligations under article 4.
43. Despite their many contributions to the prosperity of this nation, people of color have suffered egregious acts of violence by hate groups espousing this skewed ideology simply because of their color. The Equal Protection Clause under the Fourteenth Amendment affirms "equal protection of the laws" for both white supremacy groups and those whom their ideologies adversely affect; those identities based on actual or perceived status characteristics that may be motive for a crime. Throughout the history of the U.S., indigenous people and immigrant populations of color have been the victims of this faction of society that espouses "white nationalism" and advocates the extinction of the "mud races" – hence, all people of color. Homogenized as the "far right," this dissonant faction espouses an ideology of racial superiority that denounces the human rights of people of color. Their belief system is grounded in the notion that "race is real and entails significant human group differences in behavioral genetics and social identity. White Nationalists believe that these differences lead to inevitable conflicts of interest between racial groups living in the same society. They argue that multiracial and multicultural societies are inherently less stable than mono-racial and mono-cultural ones, and that the only way to minimize ethnic and racial conflicts is to minimize ethnic and racial differences within nations. To White Nationalists, race is nation – they believe that a healthy nation is one based upon a common culture and heredity."
44. The Supreme Court's exposition of First Amendment law consistently holds that not all uses of words are covered by "freedom of speech or of the press". If a use of words has "the effect of force" inciting a murder-prone person to murder, those words in those circumstances are not considered protected by the Constitution. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words- those which at their very utterance inflict injury or tend to incite an immediate breach of the peace.⁶ While these groups hold the same First Amendment protections in regards to free speech, if the status based legal protections of race, national origin, gender, sexual orientation, and religion are attacked based on an ideology of blatant hatred, then white supremacy groups are in jeopardy of forfeiting their free speech rights based on the basic premise of First Amendment Jurisprudence.

⁶ Growth of Klan membership Virginia v. Black: Hard-Core Hate Speech, Hard Core Porn and The First Amendment. The Good Society 14:1-2 (2005) 44-49.

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45. Historically, those persons of European descent have been the greatest benefactors of the U.S. Constitution and remain in control of mainstream commercial and governmental entities. Despite the gains made in the progress of the nation, there remains an insidious form of racism tearing at the core of the fabric of this nation. An ideology espousing hatred of non-whites belies a dangerous undercurrent ready to rise and destroy our common goal of “life, liberty and the pursuit of happiness.”
46. The United States also draws the Committee’s attention to that fact that “in cases such as hate crimes, the racial element of the crime may yield more severe punishment. The United States enforces against all such crimes to the fullest extent of the law.” See also CERD/C/351/Add.1 10 October 2000. This statement, however, obscures the evidentiary and proof barriers faced by individuals seeking to vindicate their rights to be free from discrimination caused by propaganda and organizations of racial superiority. It also does not address the difficulties faced by state and local governments seeking to outlaw symbols of racial hatred.
47. An analysis of the 9,035 hate crime offenses reported by law enforcement agencies in 2004 showed that intimidation accounted for 31.3 percent. Racial bias motivated crimes against 5,119 hate crime victims of single-bias incidents. 67.9 percent of the victims were the object of an anti-black bias⁷. As intimidation increasingly becomes the motive to invoke physically or emotionally violent acts, the exceptions to the First Amendment pose a greater need for analysis in determining the scope of violent, hate based acts. “Criminal law in general, and Hate Crime laws in particular, adjust punishment among instances of seemingly similar conduct according to the type of victim, the context of the offense, the offender's motive, the severity of the result, and the effect on the overall community”⁸. Regardless how heinous a crime, there is a need for law enforcement officials to provide a careful balance between the rights of each group. The problem exists in creating equality in rights guaranteed by the First and Fourteenth Amendments in juxtaposition with State ordinances regarding bias-motivated crimes for both victim and aggressor. However, in times of economic and social upheaval, people of color have been subjected to rampant and escalating violence by members of the dominant white culture with little to no punishment to the perpetrators.
48. Today the U.S. is experiencing unprecedented levels of intolerance, racism, xenophobia, anti-Semitism, nationalism, bigotry and homophobia as the ideologies of white supremacists gain greater public acceptance. The rhetoric of the new right-wing has become almost indistinguishable from mainstream politicians, public policy makers, talk radio and our next door neighbors. Stepping outside the democratic process with guns and threats of violence has become the norm in some areas of our

⁷ Hate Crime Statistics 2004. U.S. Department of Justice

⁸ From Slavery to Hate Crime Laws: The Emergence of Race and Status-Based Protection in American Criminal Law. *Journal of Social Issues* 58:2 (2002) 227-245.

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- country. The new faces of white supremacy are succeeding where the old Klan had failed.
49. There has been a 40% increase since 2000⁹ as a result of the backlash from non-white immigration and the subsequent change in demographics in America. White supremacist ideologies of racial hate and intolerance have moved into the mainstream of the body politic, furthering a climate of hate in America.
50. In addition, celebrations of historically racist events such as “Columbus Day” are not only still permitted by official bodies, but also marked as national holidays. Such observances are inconsistent with the duty to “declare illegal and prohibit...activities, which promote and incite racial discrimination” and to “recognize participation in such organizations or activities as an offense punishable by law”.

Art. 5(a) Equal treatment before tribunals and other justice organs

51. As suggested by the Committee’s General Recommendation XXXI, criminal justice systems are locations of some of the most blatant and egregious forms of persistent racial discrimination. In the United States, the criminal justice system has historically served as an instrumental and indispensable tool for maintaining colonialism, chattel slavery, racial segregation, racialized gender and sexual norms, and selective immigration policies, and remains central to perpetuating their ongoing effects. As noted by the Committee’s 2001 Concluding Observations with respect to the United States, people of color are grossly overrepresented in the U.S. prison population – African Americans and Latino/as together make up over 60% of the over 2 million people incarcerated in the U.S., but only a quarter of the general population. This dramatic picture is the product of cumulative effects of racial disparities at every stage of the criminal justice system, from arrests through prosecution and sentencing. According to General Recommendation XXXI, such stark racial disparities are strong indicators of racial discrimination in the administration and functioning of the criminal justice system. The U.S. government’s suggestion that such disparities are the result of differential rates of involvement in crime rather than systemic discrimination at all stages of the criminal justice system, in combination with racial disparities in access to effective representation of counsel, education, employment, and mental health care, are contradicted by data indicating similar rates of involvement in criminalized activity, including use of controlled substances, across racial groups, and significantly disproportionate law enforcement efforts in communities of color.

⁹ “The Year in Hate,” a report by the Southern Poverty Law Center, Intelligence Report, Spring 2007.

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52. Although not discussed in any detail in the U.S. government report, the juvenile justice system increasingly serves as the initial point of contact with the criminal justice system for many youth of color. Racial disparities in school discipline and drop-out rates, in combination with increasing presence of law enforcement in public schools attended predominantly by low income youth of color and heightened “gang policing” efforts targeting youth of color, have contributed to significant racial disparities in youth arrests and incarceration. For instance, African American youth are 16 % of the overall population, but represent 28 % of children arrested in the U.S. Native youth enter the juvenile justice system at twice the rate of their representation in the general population. Youth of color are disproportionately sentenced to placement outside the home in secure facilities and therefore disproportionately experience the impacts of overcrowded and often violent and abusive conditions of confinement in juvenile detention facilities. Moreover, youth of color are disproportionately tried and sentenced as adults and held in adult detention facilities, in violation of international norms. Additionally, youth of color represent the vast majority of juveniles condemned to die in prison under sentences of life without the possibility of parole. Despite the documented success of several initiatives aimed at addressing the root causes of juvenile arrests and providing alternatives to incarceration, the U.S. government has failed to take action at the national level to address these disparities.
53. Disparities generated by racial profiling and concentration of law enforcement efforts in communities of color are exacerbated by racially discriminatory exercises of broad prosecutorial discretion in charging, plea bargaining, and prosecution of criminal offenses. Disadvantages faced by defendants of color are aggravated by profound failures in the fragmented, patchwork public defense system in the U.S. Notwithstanding the U.S. government’s claims that the right to counsel is guaranteed to all without discrimination based on race, public defense services in most parts of the United States, disproportionately relied up on by people of color, are dramatically under-funded and lacking in oversight. The federal government provides minimal to no financial support for indigent defense in state courts. Finally, since its initial report to the Committee, the U.S. government has not taken any steps consistent with its obligations under the Convention to address persistent and significant structural racial disparities in sentencing, including those arising from legislated disparities in sentencing for offenses involving crack and powder cocaine.
54. As previously noted by the Committee in ¶401 of the 2001 Concluding Observations, people of color are disproportionately represented in the incarcerated population in the United States. Women of color represent the fastest growing prison population. For instance, between 1986 and 1999, the number of women incarcerated in state facilities for drug related offenses increased by 888%, surpassing the rate of growth in the number of men imprisoned for similar crimes. Black women were incarcerated in prison or jail at nearly 4 times the rate, and Hispanic women at twice the rate, of white women. As a result of these profound disparities, violations of human rights

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arising from conditions of confinement, denial of adequate medical care, sexual and physical violence at the hands of correctional authorities, and lack of access to educational programs have profoundly discriminatory effects, in violation of the Convention. Additionally, prisoners of color, including lesbian, gay, bisexual and transgender prisoners of color, are disproportionately subject to cruel and inhuman conditions of confinement in isolation or “super-max” facilities, in which overt and egregious racial and gender-based discrimination abound. Furthermore, criminal justice, prison and child welfare policies promulgated by federal and state governments combine to deny incarcerated parents, and particularly incarcerated mothers of color, the rights guaranteed by the Convention, as articulated in General Comment XXXI, to maintain family relations during incarceration. Moreover, current federal legislation increases the likelihood that parents who are incarcerated for more than 15 months will permanently lose their parental rights as a collateral consequence of a criminal conviction. The U.S. government continues to deny the racially disparate impacts of its prison policies, relying on legislation that does not offer remedies for such racially discriminatory effects of its policies on incarcerated people as evidence of its compliance with the Convention.

55. The U.S. has failed to take any action to address the substantial racial disparities in the administration of the death penalty, about which the Committee, along with other U.N. Treaty Bodies as well as several Special Rapporteurs, has expressed grave concern. The population of individuals against whom the death penalty is sought, as well as the death row population itself, continue to reflect significant racial disparities. New research further supports the well-known fact that the race of the victim and race of the defendant have a significant effect on whether the death penalty will be pursued or imposed for similar death eligible crimes. Several recent studies have also confirmed that racial bias in jury selection in capital cases persists, and that race plays a significant role in jury deliberations concerning whether to impose the death penalty. State and federal governments have failed to act on recommendations of state and nongovernmental agencies to document and address the sources of racial discrimination and disparity in the administration of the death penalty in the U.S., in violation of their obligations under articles 2 and 5 of the Convention.
56. Race and mental illness conspire to worsen the conditions of incarceration. In New York, for example, as many as 70% of prisoners who commit suicide also have a history of mental illness. Prison psychiatric wards have only enough space for a fraction of the mentally ill inmates, forcing many of them into the general prison population. Disturbed inmates will spend on average seven times longer in solitary confinement as compared to other inmates. Reliance on solitary confinement as a method of management for mentally ill prisoners reveals the failure of the mental-health system as a whole. Inmates are entering into the system sick and becoming even worse while incarcerated.

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57. The U.S. report fails to acknowledge that two thirds of the 650,000 prisoners who return to their communities each year are people of color. As a result, formerly incarcerated people of color are disproportionately impacted by the lack of programs designed to facilitate transition from prison to communities, and the lack of resources in communities in which returning prisoners are concentrated. Additionally, the federal government has enacted legislation denying individuals convicted of crimes access to social assistance, public housing and financial aid for post-secondary education, all critical to successful re-entry into communities. Moreover, existing law permits discrimination in employment against individuals who have been arrested or convicted of a crime. Research indicates that the effects of such discrimination are more pronounced for people of color as it is compounded by racial discrimination in hiring. The convergence of these multiple barriers to successful reintegration into communities upon release from prison present significant and often insurmountable obstacles to formerly incarcerated people of color which the U.S. is under an obligation to remedy and redress under the Convention.
58. While the U.S. Constitution has been construed to provide a right to counsel at state expense for those accused of a crime, there is currently no such federal constitutional right for litigants in civil cases, even when the litigant is indigent and even when the case involves critical needs such as child custody, housing, food or health. Instead, civil counsel is provided through legal aid and pro bono programs that are severely underfunded, such as the Nevada civil assistance program cited favorably at ¶152 of the Periodic Report. Many states provide a right to counsel at state expense for parents when they stand to lose their parental rights, and for children in abuse and neglect cases. Indeed, more than half the states have established such a right for indigent parents, even though the U.S. Constitution does not mandate it.¹⁰ But nowhere in the United States is the right to civil counsel comprehensive. A recent survey of civil legal aid in the U.S. estimated that less than 20 percent of indigent civil litigants' legal needs are met under the current system.¹¹
59. Since racial minorities are disproportionately poor, they are disproportionately harmed by the lack of civil counsel.¹² This violates article 5 which includes civil matters and explicitly requires States to take positive steps to ensure effective access to the apparatus of the State's justice system. The Committee has underscored the importance of counsel in realizing these rights. General Recommendation XXXI highlights the importance of making it easier for victims of acts of racism to seek *civil*

¹⁰ John Nethercut, "This Issue Will Not Go Away": Continuing to Seek the Right to Counsel in Civil Cases, 38 CLEARINGHOUSE REV.481-490, 484 (Nov.-Dec. 2004)

¹¹ Alan Housman, *Civil Legal Aid in the United States: An Update for 2007* (Center on Law and Social Policy, Aug. 22, 2007), at p.9.

¹² See generally Wade Henderson and Jonathan M. Smith, *The Right to Counsel and Civil Rights: An Opportunity to Broaden the Debate*, 40 CLEARINGHOUSE REV. 210, 211 (July-Aug. 2006) (African Americans and Latinos are more than twice as likely as whites to be poor; nearly 40% of families headed by African American or Latino women are poor).

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redress in the courts by, inter alia, providing free assistance of counsel.¹³ General Recommendation XXIX addressing “Discrimination based on Descent” recommends more generally that State Parties “take the necessary steps to secure equal access to the justice system for all members of descent-based communities, including providing legal aid, facilitating group claims and encouraging non-governmental organizations to defend community rights.”¹⁴

60. Against tremendous opposition from the U.S. Government, those who survived Hurricanes Katrina and Rita in 2005 continue to struggle to return home and to rebuild their communities. The government’s failure to protect the rights of these displaced people, who are predominantly African American violates the Convention and is contrary to the United Nations’ *Guiding Principles on Internal Displacement*, which specifically prohibits ethnic cleansing and racial discrimination. During the 87th Session (July 10-28, 2006) of the United Nations’ Human Rights Committee, the Committee issued *Concluding Observations* regarding the U.S. Government’s compliance with the International Covenant on Civil and Political Rights that urged the U.S. Government to implement the *Guiding Principles on Internal Displacement*. By its actions the U.S. Government has rejected the UN Human Rights Committee’s recommendation and has delayed by several months the submission of a follow-up report, as instructed by this Committee.
61. Victims of domestic violence do not enjoy equal access to civil orders of protection. In New York, for example, the following groups cannot secure civil orders of protection: (1) unmarried individuals living with an abuser or who have left an abuser; (2) young people living at home, with friends, or alone, who are abused by someone they date; (3) elderly people living with an unrelated caregiver or intimate partner they have not married than any other state; and (4) lesbian, gay, bisexual and transgendered people who cannot marry under either state or federal law. All 49 other states provide civil protection orders to cohabitants who are victims of domestic violence. Almost 40 other states offer civil protection orders to dating or intimate partners.
62. Domestic violence victims with limited English proficiency face many obstacles to accessing both the law enforcement system and the judicial system. In addition to the social stigma or fear that often accompany incidents of domestic violence, the NYPD and New York courts do not offer sufficiently multilingual services or sufficient protections for confidentiality with interpreters. The Supreme Court has interpreted the Constitution to prohibit Congress from providing federal remedies based on discriminatory functioning of local courts in handling domestic violence cases.¹⁵

¹³ Gen. Rec. XXXI, at 103, ¶C (17)(b)

¹⁴ Gen. Rec. No. IXXX, at 111, ¶ 5(u)

¹⁵ *U.S. v. Morrison*

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63. Over 300,000 cases are filed annually in the Housing Part of the Civil Court of the City of New York, which serves to litigate disputes between landlords and tenants.¹⁶ Fifty judges are assigned to adjudicate the entire caseload.¹⁷ The decisions made in the Housing Court often determine whether tenants will be evicted from their homes or whether landlords will be forced to make repairs to dangerous conditions on their property. However, when 97.6 percent of landlords and only 11.9 percent of tenants have legal representation, it is clear that tenants are at a substantial disadvantage within the system.¹⁸
64. Poor women of color make up a large proportion of unrepresented tenants, many are not native English speakers. They often do not have the resources to hire an attorney. The limited legal resources for poor unrepresented litigants¹⁹ also compromise the likelihood that tenants will or can effectively participate in housing court proceedings.²⁰ Moreover, structural barriers often preclude tenants' participation.²¹ The disparity between landlord and tenant resources makes it easier for landlords to evict poor tenants or to avoid keeping apartment buildings in good repair, resulting in violations of tenants' rights equal access to the courts and to housing.

Art. 5(b) Security of person and protection by state against violence or bodily harm

65. In 2001, this Committee “note[d] with concern the incidents of police violence and brutality, including cases of deaths as a result of excessive use of force by law enforcement officials, which particularly affect minority groups and foreigners.” It was recommended “that the State party take immediate and effective measures to ensure the appropriate training of the police force with a view to combating prejudices which may lead to racial discrimination and ultimately to a violation of the right to security of persons.”
66. Additionally, as acknowledged by the United States government in its report, since 9/11, Arab, Muslim, South Asian and Middle Eastern people in the United States have increasingly been racially profiled and targeted for abusive law enforcement

¹⁶ “Welcome to the New York State Unified Court System, New York City Civil Court Housing Part,” <http://www.courts.state.ny.us/courts/nyc/housing/index.shtml> (last visited October 5th, 2007).

¹⁷ *Id.*

¹⁸ NEW YORK COUNTY LAWYERS ASSOCIATION, *NEW YORK CITY HOUSING COURT IN THE 21ST CENTURY: CAN IT BETTER ADDRESS THE PROBLEMS BEFORE IT?* (2004).

¹⁹ See, e.g., New York State Unified Court System, New York City Civil Court Housing Part, Resource Center, <http://www.courts.state.ny.us/courts/nyc/housing/resourcecenter.shtml> (last visited October 5th, 2007); New York State Unified Court System, New York City Civil Court Housing Part, Volunteer Lawyers Project, <http://nycourts.gov/courts/nyc/housing/vlp.shtml> (last visited October 5th, 2007).

²⁰ RUSSELL ENGLER, *And Justice For All Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *Fordham L. Rev.* 1987 (1999).

²¹ Joe Lamport, *Hallway Settlements In Housing Court*, *GOTHAM GAZETTE*, December 19, 2005, <http://www.gothamgazette.com/article/housing/20051219/10/1681>.

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- practices. On the United States-Mexico border, broad enforcement measures have led to an increase in racial profiling, vigilantism, violence and death of Latina/os.
67. The government's response to this racially discriminatory abuse of power by law enforcement personnel has been inadequate. The sum total of the federal government's response of this type of abuse and violence is providing technical assistance to 19 of thousands of law enforcement agencies across the country over the past 6 years, developing training materials for discretionary use by state and local law enforcement agencies, and adopting federal guidelines applicable only to federal law enforcement agencies.
68. The United States government relies on several domestic laws to demonstrate compliance with the Convention's requirement that it take affirmative steps to punish and redress racial discrimination by law enforcement agencies. However, all relevant statutory provisions require proof of intent to discriminate, in contravention of the Convention's definition of racial discrimination, which includes both intentional discrimination and neutral measures with a discriminatory impact.
69. The UN Special Rapporteur on contemporary forms of racism states that "[t]he use of excessive force by police against African Americans, Asian Americans, Arabs and Indians has been cited as one of the most pressing human rights problems facing the United States." [1] Police brutality and racial profiling by law enforcement officers continue to rank among the most entrenched and visible forms of racial discrimination in the U.S. and remain persistent and pervasive across the country. African Americans and Latinos/as not only continue to make up a disproportionate number of individuals against whom police use deadly and excessive force, the introduction of TASERS has resulted in disproportionate use of these electro-shock weapons against people of color. Rape, sexual assault, and abusive searches of women of color, and particularly of women of color perceived to be involved in the drug and sex trades, take place with alarmingly frequency. A recent increase in the presence of law enforcement officers in public schools has exacerbated the disproportionate use of excessive force against youth of color.
70. Nonetheless, officers known to have engaged in even the most egregious forms of racist police torture and violence often go unprosecuted and unpunished, and lack of transparency and effectiveness in complaint and disciplinary mechanisms allows widespread abuses to go undeterred. Since the Committee expressed concern in 2001 regarding "incidents of police violence and brutality, including cases of deaths as a result of excessive force by law enforcement officials, which particularly affect minority groups and foreigners," the U.S. has taken little action to redress these violations. The racial profiling and law enforcement training initiatives cited in the U.S. Report are neither mandatory nor comprehensive, and the legislative remedies the U.S. relies on as evidence of compliance with the Convention are limited by

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requirements that victims of police brutality and racial profiling prove intent to discriminate.

71. Although data regarding representation of indigenous people in the criminal justice system is masked by their racial categorization as “other,” what information is available indicates significantly higher representation in arrest, incarcerated and death row populations than in the general population. For example, according to the 2000 U.S. Census, Native Americans comprise just 6.2 percent of the state of Montana's population but 20 percent of those in correctional institutions, and nearly one-third of incarcerated women in the state are Native American.
72. Domestic violence advocates in New York City note that the New York Police Department (NYPD) often either “under-responds” or “over-responds” to domestic violence. In the “under-response” scenario, police underestimate the violence. The police neither thoroughly investigate the allegations nor arrest the batterer, even when New York’s mandatory arrest law directs them to make such an arrest. Police response times to domestic violence emergency calls are slow, particularly in areas with high concentrations of racial and ethnic minorities. Moreover, although NYPD officers are legally obligated to serve temporary orders of protection on domestic violence perpetrators, they often shirk this responsibility, despite victims’ repeated requests for service. In the “over-response” scenario, advocates report that the police use domestic violence as an excuse to enter peoples’ homes (especially individuals from racial and ethnic minority communities), and arrest them for a variety of reasons (child neglect/abuse, weapon or drug possession). This scenario results in disproportionate arrests of racial and ethnic minorities, as well as the overwhelming problem of dual arrests, in which both the victim and perpetrator are both arrested.
73. Immigrant women with limited English proficiency are especially disserved by the police. Fear of deportation or detention makes many immigrants choose not to seek police assistance. This fear is exacerbated by a national effort to deputize local police as Immigration and Customs Enforcement (ICE) officers. In Texas, for example, female domestic violence victims have been arrested, and some of those women were subsequently turned over to ICE. Limited English language skills also compromise the effectiveness of immigrant women’s interactions with the police. .
74. The Department of Justice has taken no action to launch a comprehensive investigation into the abusive treatment of hurricane evacuees by law enforcement and military personnel, which has been documented by law enforcement agencies and non-governmental organizations. Federal courts have dismissed claims associated with these events without reaching the claims’ merits.
75. Mental illness, poverty, and race make people of color especially vulnerable to invasive court orders. In New York, Kendra’s Law, permits courts to order mentally-ill individuals to be involuntarily committed and drugged. At a basic level, the law

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violates the human rights of competent, non-dangerous persons with psychiatric disabilities. Beyond this, evidence indicates the law has been enforced in a racially discriminatory way. According to the New York Civil Liberties Union, Blacks are almost five-times as likely as whites to receive Involuntary Outpatient Commitment (ICO) orders. Latino/as were two-and-a-half times as likely as non-Latino/a whites to receive ICO orders. The racial/ethnic discrimination is apparent when enforcement is viewed from a different angle. “When compared with a similar population of mental health service recipients, the percentage of IOC order recipients who are men of color is disproportionate to the percentage of men of color whom the state has characterized as suffering from severe and persistent mental illness.” Moreover, geographic disparities mean “New York City leads the state in using a state law that disproportionately takes away the freedom of certain people of color who are mentally ill.”²² There is also evidence that the orders to which this group, which includes a disproportionate number of people of color, is subjected to are particularly intrusive. 99% of the orders mandated medication while only 27% and 9% committed individuals to specified housing and education or vocational programs, respectively.²³

Art. 5(c) Political rights

76. In recent years, there have been numerous reports by organizations across the United States of violations of the right to participate in elections and to vote on the basis of universal and equal suffrage.²⁴ Many African-American, Latino/a, Asian, and Native American communities have challenged existing federal and state laws and programs as discriminatory, while also reporting serious violations of the national Voting Rights Act.
77. The Periodic Report references “problems with balloting in the 2000 election”²⁵ but fails to note that there have been no prosecutions or penalties imposed in response to those problems. Nor have there been prosecutions or even investigations into many other violations of article 5, paragraph (c), including cases in Florida, Georgia, Louisiana, Ohio, New York, and Texas.

²² Statement of Beth Haroules Before the Assembly Standing Committee on Mental Health, Mental Retardation and Developmental Disabilities and the Assembly Standing Committee on Codes “New York State’s Assisted Outpatient Treatment (AOT) Program,” NYCLU (April 8, 2005).

²³ OMH Final Report at 11

²⁴ See, for example, reports from the Lawyers Committee for Civil Rights Under Law found at <http://www.lawyerscommittee.org/2005website/projects/votingrights/votingrights.html> (last viewed December 4, 2007); from the Leadership Conference on Civil Rights found at <http://www.civilrights.org/issues/voting/> (last viewed December 4, 2007); and from the NAACP Legal Defense Fund found at <http://www.naacpldf.org/content.aspx?article=1200> (last viewed December 4, 2007);

²⁵ Periodic report of the United States of America to the U. N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, April 2007, paragraph 200, p. 69.

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78. The U.S. Government report does address the Committee's concerns about the denial of voting rights to U.S. citizens residing in the nation's capital, Washington, D.C.²⁶ However, the Government does not provide information about actions taken to restore the right to vote to these citizens. In fact, the Administration has rejected recent legislative proposals to grant the right to vote to D.C. residents. People of color account for 69% of those who reside in the District of Columbia, and African Americans make up 57% of the city's residents. Consequently, denying the District of Columbia's residents the right to vote is a clear violation of article 5(c) to ensure universal suffrage and equality in the right to vote. The racial makeup of the District of Columbia's population
79. In 2001, this Committee expressed its concern "about the political disenfranchisement of a large segment of the ethnic minority population who is denied the right to vote by disenfranchising laws and practices based on the commission of more than a certain number of criminal offenses, and also sometimes by preventing them from voting even after the completion of their sentences. The Committee recalls that the right of everyone to vote on a non-discriminatory basis is a right contained in article 5 of the Convention."
80. The Periodic Report claims that there is a "lively debate within the United States" on the question of voting rights for persons convicted of serious crimes, but that the practice of felon disenfranchisement does not violate U.S. obligations under the Convention.²⁷ In fact, because the practice of disenfranchising persons convicted of a felony has a well-documented racially disparate impact²⁸, the U.S. government is in violation of its obligations under Article 1 to review and eliminate all laws and policies that result in racially discriminatory impact.
81. The Periodic Report also states that, "[i]n all cases, the loss of voting rights does not stem from a person's membership in a racial group or on the basis of race, color, descent, or national or ethnic origin, but is based on the criminal acts perpetrated by the individual for which he or she has been duly convicted by a court of law pursuant to due process of Law." [¶ 208, U.S. Periodic Report]
82. Because they regulate matters at the intersection of suffrage and crime, rules regarding felon disenfranchisement are a matter of state, not federal law. A patchwork of state measures currently disenfranchises more than five million citizens who are legally prohibited from voting due to felony conviction. Approximately two million of these individuals live in one of 10 states in which a single felony conviction can result in a lifetime ban on voting. In 35 states, people who are under community supervision on probation and/or parole are denied their voting rights. Because

²⁶ *Id.* at paragraphs 211-212, p.72-73.

²⁷ *Id.* at paragraphs 208-210, p. 72.

²⁸ See, for example, information and reports from The Sentencing Project found at <http://www.sentencingproject.org/IssueAreaHome.aspx?IssueID=4> (last viewed December 4, 2007).

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African Americans are disproportionately represented at every stage of the criminal justice system, from arrest through conviction, sentencing and supervision, this policy has a profound effect on the political voice of the African American community. As a result, more than two million African Americans are disenfranchised, and in seven states, one-quarter of African American males are permanently denied the right to vote due to a felony conviction. In New York City, felon disenfranchisement deprives 122,000 New Yorkers of their right to vote, nearly 87 percent of whom are African American and Latino/a.

Art. 5(d)(v) Right to own property (alone and with others)

¶¶ 65, 243 U.S. Periodic Report (2007)

83. In 2001, this Committee expressed its concern “that treaties signed by the Government and Indian tribes can be abrogated unilaterally by Congress and that the land they possess or use can be taken without compensation by a decision of the Government. It further expresses concern with regard to information on plans for expanding mining and nuclear waste storage on Western Shoshone ancestral land, placing their land up for auction for private sale, and other actions affecting the rights of indigenous peoples. The Committee recommends that the State party ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights..., and draws the attention of the State party to General Recommendation XXII on indigenous peoples, which stresses the importance of securing the ‘informed consent’ of indigenous communities and calls, *inter alia*, for recognition and compensation for loss.”
84. Continued application of historical judicial doctrines purporting to divest indigenous peoples of their sovereignty rights and rights to land discriminatorily denies Native people the right to equal treatment in U.S. courts, as well as the ability to adjudicate and remedy wrongs against Indians in tribal courts. For instance, a recent Amnesty International report, *Maze of Injustice*, documents the impacts of denial of tribal jurisdiction over rape of Native women, who experience sexual violence at rates two and a half times that of the general population. Additionally, the U.S. government continues to maintain that it has the right to unilaterally abrogate treaty obligations and take land from indigenous peoples without compensation, discriminatorily divesting Native people of legal rights guaranteed to all citizens under the U.S. Constitution.
85. The Periodic Report states that “[t]he rights to housing and mortgage financing without discrimination are enjoyed in practice throughout the United States, and where violations of these rights occur, federal and state authorities prosecute the offenders.” (¶ 243, U.S. Periodic Report). However, the State party does not describe any fair housing enforcement activity, policy initiatives, or programs that target discriminatory practices by mortgage brokers or lenders, nor does it describe any

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actions taken based on reports or data collection concerning mortgage lending discrimination like those generated by the Department of Housing and Urban Development's (HUD) Office of Policy Development and Research on housing discrimination (¶ 65, U.S. Periodic Report).

86. A number of studies have shown a link between predatory and subprime lending and race.²⁹ The subprime mortgage market clearly adversely impacts members of minority groups seeking mortgages within the United States. Women of color have been victimized by subprime lending abuses more than any other group of homeowners. Multiple actors -- including federally regulated depository institutions, state regulated institutions, non-regulated independent mortgage bankers and brokers, secondary market institutions, private investors, rating agencies, and appraisers -- are involved in subprime and predatory lending. Predatory lending has led to an epidemic of foreclosures, with particular impact in minority communities. In 2006 there were 1.2 million foreclosure filings, up by 25% from 2005, with another 25% increase projected in 2007. The growth results from the expansion of subprime loans, which have higher rates and fees. Fannie Mae and Freddie Mac have estimated that between a third and half of all borrowers in subprime loans could have qualified for a better loan, and minorities are offered subprime loans at disproportionate rates, regardless of their actual financial status. Foreclosures harm not only individual families but also entire neighborhoods due to the increase in vacant houses and the decrease in property values.³⁰ Because home equity is the largest pool of wealth for most families in the United States, disparities in homeownership are a major component of persistent racial inequality.

Art. 5(d)(vii) Freedom of thought, conscience and religion

87. Islam is one of the fastest growing religions in the United States. It is especially attractive to youth of African descent seeking moral, spiritual and political orientation in a racist society. The federal government has a long history of targeting those associated with Black militancy and/or Islam. To this end, prisons have increased their use of behavior modification techniques, including the use of long term isolation and the establishment of supermax prisons for incarcerated Black militants and Muslims. These tools of behavior modification are used to suppress political and religious activity, to quash legitimate discussion about real problems in prison life and on the outside, and to make it difficult for prisoners to exercise their associational rights upon reentry.

²⁹ See e.g., Debbie Gruenstein Bocian, Keith S. Ernst & Wei Li, *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages* (Center for Responsible Lending, May 2006) available at <http://www.responsiblelending.org/issues/mortgage/reports/page.jsp?itemID=29371010>; Margaret Austin Turner, *All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions* (April 2002).

³⁰ See <http://www.responsiblelending.org/issues/mortgage/briefs/page.jsp?itemID=28012048>.

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primarily in terms of hiring issues³¹ and acknowledges the racial disparities in the different labor sectors, noting that Asian-Americans and whites had higher percentages of workers in management and professional occupations while Blacks and Latino/as represent a greater percentage of those employed in service professions.³²

93. What the report does not acknowledge, however, is how labor and employment violations pervasive in certain industries have a disparate impact on racial and ethnic minorities, and the role U.S. immigration and labor policies as well as the legal system play in sanctioning and perpetuating those violations. The history of U.S. labor law is similarly racialized. Explicit exclusions that date back to the New Deal continue today in some form and the impact of exclusions on racial and ethnic minorities is compounded in those sectors where the United States fails to enforce its labor laws, which has serious implications for U.S. compliance with the CERD. The U.S. fails to examine the causes of such occupational segregation, or appear to acknowledge that such segregation presents violations of the Convention and a concomitant duty to address these issues.
94. African-Americans, who were first brought to the United States for the purposes of slavery's labor exploitation, suffer from poor educational attainment due to persistent patterns of racial segregation, poor access to full-time, good paying jobs, and a consequent inability to join the middle class. After a short period of growth in the 1990s, the ensuing years have seen job growth stagnate, unemployment rates climb, real wages for low-skilled workers decline, and poverty rates edge up again for African-Americans.³³
95. Along with other people of color, immigrants in the U.S. today are the heirs of this history, as well as a long history of racialized immigration policy.³⁴ In many periods of our nation's history, immigrant workers have been welcomed for their labor, often in the most dangerous and lowest paying jobs, but excluded from full participation in society and full coverage under labor laws. Immigrants from China and Mexico share this type of history and relationship with the United States. As a contemporary matter, immigrants comprise 14 percent of the U.S. labor force and 20 percent of the

³¹ Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of all Forms of Racial Discrimination (April 2007) [hereinafter *U.S. periodic report*] (Employment Enforcement Actions are described in ¶¶ 60-63; nine out of the twelve enforcement actions described relate to discriminatory hiring).

³² *Id.* at ¶¶ 222-223.

³³ Margery Austin Turner, Marla McDaniel, with Daniel Kuehn, *Racial Disparities and the New Federalism*, (Washington, DC: The Urban Institute, October 2007), available at <http://www.urban.org/publications/411563.html>.

³⁴ As migration experts Stephen Castles and Mark J. Miller have pointed out, "Assimilation of newcomers is part of the 'American creed,' but in reality this process has always been racially selective." Stephen Castles and Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World*, 3rd Edition, (New York and London: The Guilford Press, 2003), p. 222.

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nation's low-wage labor force.³⁵ There were 17.9 million foreign-born workers in the United States in 2002 and 8.6 million were low-wage workers.³⁶ Special issues arise for those mostly Latino/a and Caribbean immigrants who have been abused, exploited and discriminated against by government contractors working in New Orleans and elsewhere on the Gulf Coast.

96. Likewise, many of the industries employing migrants, including unauthorized migrants – such as agriculture, building construction, landscaping, the garment industry, hotels and restaurants, domestic services, janitorial and cleaning services, home health care and meatpacking – are the same industries that receive special industry-based exclusions from labor protective laws, or where violations of existing laws frequently go unredressed. The United States' failure to protect the labor rights of migrants with particular immigration statuses has left them prey to extreme levels of exploitation. Furthermore, as the United States Department of Labor acknowledged in 1989, the proliferation of immigrant workers with diverse legal statuses has the potential to become a new source of social and economic stratification.³⁷ As illustrated in the statistics above, that stratification has happened for immigrants and people of color, and the U.S. is treaty-bound to take measures to address this stratification.
97. Racial and ethnic minorities are concentrated at the low end of the wage scale. While non-whites make up 19% of the U.S. population,³⁸ they make up 43% of the working poor.. According to the U.S. Department of Labor, “Black and Hispanic or Latino workers [are] more than twice as likely as their white counterparts to be among the working poor.”³⁹ Of people who work 27 weeks or more in the year and are below the poverty line, the percentages of Black and Latino workers are far higher than the same statistics for whites and Asians. Five percent of white men and 6.2% of white women workers are below the poverty line, whereas the numbers are 8.2% and 12.5% for black men and women, respectively, and 10.3% and 10.9% for Latino/a men and women.⁴⁰ In particular, Black women with less than a high school diploma are among the working poor at about one and a half times as their Black male counterparts.⁴¹
98. Despite gains, some of which were noted in the Committee's 2001 Concluding Observations, occupational segregation persists. According to a 2006 government survey of employed persons by occupation, sex, and race, only 13.6% of the total

³⁵ Randy Capps et. al., *A Profile of the Low-Wage Immigrant Workforce*, (Washington DC: The Urban Institute, 2003) available at http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf

³⁶ *Id.*

³⁷ Castles and Miller, p. 183.

³⁸ U.S. Periodic Report, Table 1a.

³⁹ *A Profile of the Working Poor, 2004*, U.S. DEPT. OF LABOR, Report 994, at 1.

⁴⁰ *A Profile of the Working Poor, 2004*, U.S. DEPT. OF LABOR, Report 994, at 7 tbl.2.

⁴¹ *Id.* at 2.

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- workforce is Latino/a, but they are disproportionately represented in low-wage and often dangerous industries. For example, Latino/as represent 36.7% of dishwashers, 40.9% of grounds maintenance workers, 39.2% of hand packers and packagers, 39.7% of workers in farming, fishing, and forestry, 29.3% of construction workers, 32.1% of laundry workers, and 49.5% of workers in press, textile, garment, and related material.⁴²
99. Likewise, 10.9% of the workforce is Black, but African Americans make up 15.9% of service industry workers, 15.6% of building and grounds maintenance workers, 23% of food service workers, 18% of janitors, 19.9% of maids, 21.7% of workers in press, textile, garment, and related material, and 28.0% of refuse and recyclable material collectors, and 49% of sales and related occupations.⁴³
100. Although Asian Americans are overrepresented in some professional occupations such as physicians and medical scientists, this population, which makes up 4.5% of the workforce, represents 15.3% of sewing machine operators, 14% of electronics assemblers, 12.6% of taxi drivers and chauffeurs, and 45% of personal service workers. A look at two specific industries shows how work is further racially segmented within industries. Seventeen percent of the restaurant industry workforce is of Hispanic origin,⁴⁴ and immigrants of color are further discriminated against within the industry
101. Blacks and Hispanics are also disproportionately represented in the meat and poultry industries, where approximately 42 percent of the workers are Hispanic or Latino/a and 20 percent are Black, while only 32 percent were white.⁴⁵ Similarly, foreign-born workers comprise a disproportionate percentage of the workforce in the meat and poultry industries, and as with the restaurant workers in New York, they are often relegated to the lower-paying, dirtier and more dangerous of jobs within the industry. Approximately 26 percent of all workers in this industry are foreign-born noncitizens, as compared with approximately 10 percent of all manufacturing workers in the United States. Within the meat and poultry industry, an even larger percentage of the production and sanitation workers— 38 percent—are foreign-born noncitizens.⁴⁶

⁴² *Characteristics of the Employed*, U.S. DEPT. OF LABOR BUREAU OF LABOR STATISTICS, Current Population Survey tbl.11, available at <http://www.bls.gov/cps/cpsaat11.pdf>.

⁴³ *Id.*

⁴⁴ *Beth Boston New Study Offers Workforce Insight*, FOODSERVICE WORKFORCE SOLUTIONS (2003) available at, http://foodserviceworkforcesolutions.org/content/0024_Stateoftherestaurantindustry.asp

⁴⁵ United States Government Accountability Office, *Workplace Safety and Health: Safety in the Meat and Poultry Industry, while Improving, Could Be Further Strengthened* at 20 (January 2005) available at <http://www.gao.gov/new.items/d0596.pdf>

⁴⁶ *Id.* at 21.

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102. In the U.S. labor market, people of color therefore occupy the least desirable, most dangerous jobs. This is due to several factors, including labor market segmentation that has traditionally defined certain jobs as “white” jobs and certain others as “Black” jobs, the loss of blue-color manufacturing jobs in urban locations where African-Americans live (without meaningful job training development programs to replace them), structural discrimination that results from facially race-neutral policies (such as seniority rules, plant location decisions, funding of public education) and the disparate effects of economic recession.⁴⁷
103. Agricultural work is recognized as the most dangerous industry for children and yet, it is the least protected. Hundreds of thousands of children, most of whom are racial minorities, perform long and hard labor in dangerous conditions that benefit U.S. society at large, but is of no long-term benefit to them and little benefit to their families. These children harvest the fruits and vegetables consumed in the United States yet, they do not enjoy the same health and safety protection that most people are entitled to in their workplaces.
104. Child farm workers work stooped over, using knives and other dangerous tools for long hours. Twelve to fourteen hour days are not uncommon. About $\frac{3}{4}$ of the deaths to workers under age 15 occurred in agriculture. Yet, child farm workers are exempted in most cases from receiving minimum wage and overtime compensation. In addition, agricultural pesticide has been found to have an adverse effect on development, including increasing risk for breast cancer. Child farm workers also face significant obstacles in education.
105. Transgender women of color are often rendered invisible and marginalized by profound and pervasive discrimination in U.S. society. The current U.S. census does not track the number of transgender and gender variant people currently living in the country. However, recent estimates place the number of transgender and gender variant persons in the United States as between 600,000 and 1.2 million. Assuming that U.S. racial and demographics hold the number of transgender persons of color range from just over 200,000 to 400,000. Given that the last census showed about half of respondents identified as female, there are between 100,000 to 200,000 transgender women of color.
106. Transgender and gender variant persons report similar obstacles to obtaining and retaining meaningful, lawful employment. However, for transgender women of color, discrimination and bias on the basis of race and gender status are equally significant (if not more significant in some cases) factors, culminating in high rates of unemployment, poverty, and criminalization. While racial discrimination and discrimination on the basis of sex are prohibited under federal law, significant

⁴⁷ Cedric Herring, African-Americans and Disadvantage in the U.S. Labor Market, (1995), available at www.rcgd.isr.umich.edu/prba/perspectives/spring1995/cherring.pdf

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loopholes remain that allow employment discrimination against transgender women of color to go largely unchecked.

Art. 5(e)(iii) Right to housing

107. In 2005 HUD's affordable housing outlays were only \$31 billion. Since 1996, HUD has had no funding for new public housing, while over 100,000 public housing units have been lost to demolition, sale, or other removal. Since 2001, HUD public housing operating expense funding has been slashed by \$1 billion. The U.S. Government has consistently denied residents of cities such as New Orleans their human right to housing through a host of unjust policies and programs that have created a housing crisis and a growing number of homeless people.
108. In 1987, Congress passed the Stewart B. McKinney Act, providing \$880 million in homeless assistance funding (2004 constant dollars). Since 1987, annual McKinney homeless assistance has never been more than \$1.4 billion. McKinney was supposed to be a first step in addressing homelessness, but to date it remains the only federal program directly addressing homelessness, and it can never be fully effective in the context of decreasing funding for affordable housing which creates ever-greater need for the services it provides.⁴⁸
109. Housing discrimination enforcement has also suffered from inadequate resources. The government's own data estimates 3.7 million fair housing violations annually, of which an estimated 2 million involve race discrimination.⁴⁹ The Periodic Report states that the Civil Rights Division "increased the number of fair housing tests conducted by 38 percent compared to fiscal year 2005." [¶ 67, U.S. Periodic Report] Yet in 2006, HUD processed fewer than 11,000 complaints (based on family status, disability, religion, color, race, sex and national origin discrimination), and the DOJ brought only 31 housing and civil enforcement cases in FY2006, of which eight involved claims of race discrimination. [¶ 67, U.S. Periodic Report] In addition, the DOJ has filed only 16 cases since 2001 based on results from its Fair Housing Testing Program and there is little evidence that these agencies have engaged in direct enforcement that addresses residential segregation based on race and national origin.
110. HUD's own Housing Discrimination study (HDS2000) showed that both African-American and Hispanic renters and homebuyers continue to face significant

⁴⁸ For references, see Executive Office of the President, Office of Management and Budget (nd), *Public Budget Database*, available: <http://www.whitehouse.gov/omb/budget/>. Congress of the United States (2002). *Meeting Our Nation's Housing Challenges*, Report of the Bipartisan Millennial Housing Commission, Appointed by the Congress of the United States, US Government Printing Office. Deborah Kenn, Institutionalized, Legal Racism: Housing Segregation And Beyond, 11 B.U. PUB. INT. L.J. 35, 67 (2001) www.cbefinc.org/pdf/povertyandrace.pdf

⁴⁹ <http://www.huduser.org/publications/hsgfin/hds.html>.

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discrimination in New York City: in rental markets, whites were consistently favored over blacks in 21.6% of tests; non-Hispanic whites were consistently favored over Hispanics in 25.7% of tests. In sales, whites were consistently favored over blacks in 17.0% of tests; and non-Hispanic whites were consistently favored over Hispanics in 19.7% of tests. (*HDS2000, pp. iii-iv.*)

111. Enforcement is further weakened by a widespread lack of public understanding of fair housing rights and an accompanying apathy regarding the assertion of those rights. Research undertaken for HUD by the Urban Institute indicates that a large number of people in this country have a limited understanding of many key provisions of the Fair Housing Act and state that they will take no action if they have suffered housing discrimination because they do not believe their complaints will be acted upon by the responsible agencies.⁵⁰
112. Segregated neighborhoods and municipalities were created relying both on the active assistance of federal and local governments, and on the failure of those governments to restrain private actors from engaging in acts of discrimination. Exclusionary zoning continues to operate today to reduce the potential availability of affordable housing, something that has a disproportionately negative impact on racial minorities, and consequently something that perpetuates segregation.
113. Section 8 vouchers, which in theory aid public housing residents' residential mobility, have received a mixed review of their integrative effects. In some cases, vouchers have been specifically used to counteract historically segregative public housing policies. In perhaps the most famous example, in 1969 the Chicago Housing Authority (CHA) was found to be perpetuating racial segregation through its assignment of tenants to public housing and the siting of its housing projects.⁵¹ As part of its remedial efforts, CHA issued Section 8 vouchers in the hopes that minorities would use them to move to predominately white neighborhoods.⁵² Some research, though, suggests that segregation persists, even with the Section 8 vouchers.⁵³ The doubt over the Section 8 program's efficacy in promoting racial integration is at least partly due to the fact that it essentially leaves voucher recipients subject to the whims of the private market, and its own discriminatory elements.⁵⁴
114. People of color, almost half of them women of color, comprise the majority of the 3 million people who experience homelessness in the United States every year. In New

⁵⁰ <http://www.huduser.org/publications/fairhsg/hmwk.html>.

⁵¹ See *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907, 909, 913 (N.D. Ill. 1969).

⁵² See Florence Wagman Roisman, *A Place to Call Home? Affordable Housing Issues in America*, 42 Wake Forest L. Rev. 333, 345 (2007).

⁵³ Hous. Choice Voucher Advocacy Project, Chicago Area Fair Hous. Alliance, *Putting the "Choice" in Housing Choice Vouchers (Part 3)* 1-2 (July 2004),

<http://www.state.il.us/dhr/Housenet/Private/CAFHA/Vouchers.pdf>.

⁵⁴ Matthew Zeiler Reed, *Moving Out: Section 8 and Public Housing Relocation* 247-48 (June 2007) (unpublished Ph.D. dissertation, Northwestern University).

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York City, for example, 90% of people living in homeless shelters are Black and/or Latino. Lack of affordable housing and persistent income disparities push many individuals and families into the streets, shelters, and substandard housing across the country. Rather than take affirmative measures to address the housing needs of low income people of color, many local governments have instead adopted legislation and law enforcement policies criminalizing the existence of homeless people in public spaces, and increased discriminatory enforcement of minor offenses against homeless individuals. Federal efforts to provide and promote affordable housing have undergone significant funding cuts in recent years, and are currently insufficient to meet existing needs, placing the U.S. government in violation of its obligations under the Convention.

115. Moreover, state and local governments consistently make policy decisions that criminalize rather than protect the rights of the homeless. For example, Los Angeles is spending over \$6 million per year on its Safer Cities Initiative to increase police presence and arrests in the Skid Row neighborhood. At the same time, Los Angeles spends only \$5.7 million for shelter, housing or services for homeless people in the remaining 464 square miles of the City. The racially disparate impact of these types of policies is a function of the disproportionate representation of African Americans and other people of color who live in the Skid Row neighborhood. Absent evidence that the Los Angeles initiative was enacted because of, rather than in spite of, its racially discriminatory impact, the Safer Cities Initiative is not racial discrimination as a matter of United States law.
116. There has been acute racial disparity in quality of housing in New York City. Minority groups, and especially immigrant populations, are more likely to live in overcrowded or otherwise inferior-quality housing. Poverty and prejudice, as well as the integration difficulties faced by limited-English speakers, tend to force immigrants into specific neighborhoods. These neighborhoods are often older and have been vacated by several groups progressing through the assimilation process.⁵⁵
117. Moreover, although foreign-born householders are significantly less likely than native-born residents to be homeowners and more likely to encounter affordability problems, immigrants from regions such as Europe and Russia often do not encounter the same difficulties as their counterparts from Latin America and the Caribbean.⁵⁶

⁵⁵

Id.

⁵⁶

Schilling, *supra*, at 226.

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Art. 5(e)(iv) Right to public health, medical care, social security and social services

118. The “persistent disparities” in health that were noted by the Committee in its 2001 Concluding Observations have not significantly abated. Of particular concern are widening disparities in infant mortality between black and white populations, and continuing disparities in cancer mortality, diabetes, heart disease and overall life expectancy. The US government has also failed to collect data on racial disparities in health care as required by the Convention or to provide adequate resources to federal agencies charged with monitoring compliance.
119. Racial and ethnic disparities in health outcomes in the U.S. are caused not only by structural inequities in our health care systems, but also by a wide range of social and environmental determinants of health. The Convention recognizes and encompasses this dual analysis in the area of public health. As used in article 5, “public health” includes not only health care systems but also the underlying social and environmental factors affecting health.⁵⁷
120. The U.S. government’s claim that “[s]ubstantial progress has been made in addressing disparities in . . . access to health care has been made over the years” is belied by persistent and dramatic racial disparities in infant and maternal mortality rates, life expectancy, and prevalence and survival rates of cancer, HIV-AIDS, and heart disease shocking in a country of the United States’ wealth and resources. For instance, the U.S. boasts one of the highest maternal mortality rates in the Western world, with African American women nearly 4 times more likely to die in childbirth than white women; the infant mortality rate among Native Americans in the U.S. is 150% greater than the white population; and African Americans and Native Americans’ life expectancy is a full 6 years less than that of the overall population.
121. The efforts cited by the U.S. government as evidence of its compliance with its obligations under the Convention in the arena of health care are grossly under resourced, and focus on almost exclusively on individual behaviors while failing to address systemic factors driving health disparities, including obstacles to access to health care such as lack of health insurance, unequal distribution of health care resources, and poor quality public health care.
122. Persistent effects of historical *de jure* segregation in health care facilities, ongoing racial discrimination in the provision of health care, and the effects of racial segregation in housing and persistent racial disparities in the placement and remediation of hazardous and toxic industries and facilities are also factors that

⁵⁷ Paul Hunt, *Report of the Special Rapporteur*, U.N. ESCOR, 59th Sess., Provisional Agenda Item 10 ¶ 23, U.N. Doc. E/CN.4/2003/58 (2003) (reporting on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health)(emphasis added), *available at* <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/9854302995c2c86fc1256cec005a18d7>.

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contribute to racialized health disparities. Laws such as the 1946 Hill-Burton legislation, which provided federal funding for construction of racially exclusionary hospitals, produced grossly unequal services subsidized with tax dollars, leaving a legacy of segregated health care. Moreover, since its initial report to the Committee, the U.S. government has adopted legislation further limiting access to quality health care for low income people of color, in violation of its obligations under the Convention.

123. The disproportionate lack of health insurance among minority families and children is a critical element contributing to these disparities; moreover, a substantial body of evidence demonstrates that racial and ethnic minorities receive a lower quality and intensity of health care than white patients, even when they are insured at the same levels and present with the same types of health problems.⁵⁸ There is also increasing evidence that race-based discrimination itself is not only emotionally hurtful, but also physiologically damaging to minority Americans thereby leading to unique adverse health impacts.
124. A particularly egregious example of this type of rights violation is experienced by Native people. They are subject to disproportionate impacts of toxic industries, including gold and uranium mines, sited near or on reservation lands. They are also affected by significant under resourcing of federally funded Indian Health Services both on reservations and in urban centers.
125. Another example is found in the state of health rights in those Gulf Coast communities devastated by Hurricanes Katrina and Rita. The U.S. Department of Health and Human Services and other governmental authorities have failed to re-open public health care facilities, and have contributed to an increase in the number of deaths due to the lack of medical services. Hurricane-related environmental impacts, such as arsenic contamination of sediment and debris disposal, have been a burden on communities of color who have been denied public health protection by the US Environmental Protection Agency.
126. Contrary to the Committee's General Recommendation No. XXV, the Periodic Report largely fails to address the intersection between racial and gender discrimination, contrary to the Committee's General Recommendation No. XXV. For example, women of color in the United States fare significantly worse than white women in every aspect of reproductive health. African American women are nearly four times more likely to die in childbirth than white women and 24 times more likely to be infected with HIV/AIDS. These disparities result from a range of government actions and inactions, from the failure to address high rates of uninsured women of color to restrictions on public funding for sexual and reproductive health services. Women of

⁵⁸ INST. OF MEDICINE, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (2003).

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- color, who are more economically disadvantaged than white women and more likely to rely on government funded health insurance, are disproportionately impacted by federal and state policies that restrict access to and public funding for sexual and reproductive health care. For example, black women are four times more likely to die in childbirth than white women because of restricted access to prenatal care – a disparity the U.S. report fails to even mention.
127. U.S. environmental policies have also failed to address racial disparities in health. The key federal civil rights law addressed to “unintentional” racial disparities in government programs (Title VI of the Civil Rights Act of 1964) was recently rendered unenforceable by the U.S. Supreme Court in a 2001 decision, and Congress has not yet responded to repair the law.⁵⁹ In addition, the federal Environmental Protection Agency has failed to implement the 1994 Executive Order on Environmental Justice,⁶⁰ and its own internal complaint system for adjudicating race-based complaints is ineffective.
128. Recent government policies have further perpetuated disparities in health care access for many racial and ethnic minorities. Although the government funds Medicaid and other health insurance safety net programs, recent federal laws such as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), i.e. welfare reform, and the Deficit Reduction Act of 2005 (DRA) have negatively affected the health insurance status of low-income people of color. Rather than increasing access to health care for racial minorities, these policies have restricted access and are exacerbating racial disparities in health care, particularly for women and children
129. Other violations of article 5(e)(iv) are caused by the inadequacy of income support programs ostensibly designed to help people move out from poverty to economic stability and independence. These programs are directed at a population that has a disproportionate number of people of color. In Illinois, for example, 44.3% of black and 43.5% of Hispanic single female headed households with children are living in poverty compared to 28.9% of white non-Hispanic single female headed household with children. The poverty rate for children is equally as disparate. 8.6% of white non-Hispanic children live in poverty compared to 38.8% of black and 23.0% of Hispanic children in Illinois⁶¹. Of the 37,895 families receiving Temporary Assistance for Needy Families benefits in Illinois 74.1% are black and 17.8% are

⁵⁹ Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (“Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.”) (footnote omitted). The case involved a Title VI challenge to Alabama state policy that administered driver’s license examinations in English only. *Id.* at 275.

⁶⁰ *Infra* Part E(2)(a).

⁶¹ U.S. Census Bureau, American Community Survey 2006. calculation conducted by Mid-America Institute on Poverty of Heartland Alliance

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white non-Hispanic⁶². The increased work requirements for TANF participants combined with the general increase in demand for affordable child care among low-wage workers currently exceeds existing resources⁶³.

130. Poor families of color are particularly affected by the child welfare system in ways that violate the Convention. Children of color are more likely to be removed from their families, receive fewer vital services and lower financial support, remain in care for longer periods of time, and are less likely to be reunified with parents. Although minority children comprise of approximately 40% of the children in this nation, they make up 50% of the children in foster care.⁶⁴ Minority children are not shown statistically to receive maltreatment more than white children, however, they are being reported and placed in foster care at higher rates. The causes of this range from targeting impoverished neighborhoods to heavy caseloads to racial stereotypes that are ingrained in the minds of professionals that work with our nation's children.
131. Race, poverty and age mark a gap among American seniors that has grown over the past two decades. The gap in median net worth (the difference between household assets and household liabilities) between minority seniors and white seniors is \$93,590. In Illinois 20.1% of black and 17.3% of Hispanic seniors are living in poverty compared to 6.8% of white non-Hispanic⁶⁵. The disparity in the median net worth reflects the vulnerability of minorities to survive economic downturns and personal crisis.
132. Race, poverty and disability mean that, in states such as Illinois, the poverty rate for people with disabilities varies depending on race. African Americans with disabilities experience poverty at a rate of 44.8% and Hispanics 32.7%, compared to white non-Hispanics 14.3%. Supplemental Security Income is the main government program for people with disabilities with little or no income to meet basic needs. However, Illinois' average annual SSI income is \$7,294 –less than the poverty line for one person and not enough to meet basic needs⁶⁶. Minorities with disabilities are disproportionately affected by poverty and SSI is not providing enough assistance to keep these individuals out of poverty and is therefore contributing to prolonged racial disparities.

Art. 5(e)(iv)

Right to marriage and choice of spouse

⁶² Temporary Assistance for Needy Families. (2003). TANF Seventh Annual Report to Congress. Washington, DC: Author.

⁶³ Heartland Alliance for Human Needs and Human Rights. (2007). Freedom from Poverty in America: A National Agenda. Chicago: Author.

⁶⁴ Robert B. Hill, Casey—CSSP Alliance for Racial equity in the Child Welfare System, *Synthesis of Research on Disproportionality in Child Welfare: An Update*, 13 (Casey Family Programs, 2006).

⁶⁵ U.S. Census Bureau, American Community Survey 2006. calculation conducted by Mid-America Institute on Poverty of Heartland Alliance.

⁶⁶ Heartland Alliance for Human Needs and Human Rights. (2007). 2007 Report on Illinois Poverty. Chicago: Author.

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133. The 2006 Bureau of Justice Statistics (BJS) report stated that 1.5 million children have a parent behind bars, (1 in 40 children). African-American and Latino children are nine and three times, respectively, more likely than their white counterparts to have an incarcerated parent. The BJS also reports that, 11.7% of black males between the ages of 25 and 34 were in prison or jail in 2006. The uneven geographic distribution of incarceration in communities of color means that broader communities are suffering profound long-term consequences for family formation and integrity.
134. Children, parents and corrections officials value strong family bonds during incarceration. Unfortunately, current policies and practices undermine the maintenance of family ties. The majority of incarcerated parents have limited to no contact with their children because of the location of prisons, exorbitant cost of collect calls from prison, prison transfers, and lack of child-friendly prison practices. Approximately 75% of prisoners are housed 100 miles or more from where their children live, and many prison facilities are inaccessible by public transportation. For low-income families of color the location of prisons and the cost of collect calls is an economic strain, restricting parent-child contact, and at times forcing people to sever important family connections. To add insult to injury, under federal child welfare law a parent-child relationship can be permanently severed after a child has been in foster care for 15 months. Given the excessively long prison sentences, the possibility of facing the termination of parental rights is a frightening reality for many families dealing with imprisonment.

Art. 5(e)(v) Right to education and training

135. More than five decades since the U.S. Supreme Court's landmark decision in *Brown v. Board of Education*,⁶⁷ the United States has failed to provide equal educational opportunity and a high quality, inclusive education to all students. Public schools today are more segregated than they were in 1970,⁶⁸ as federal court decisions and government inaction have contributed to the persistence of apartheid conditions in schools. Indeed, the continued racial inequities and segregation of U.S. schools is evidenced in large gaps in achievement and access, high rates of suspension,

⁶⁷ *Brown v. Board of Education*, 347 U.S. 483 (1954). In 1954, after a series of legal victories challenging racial segregation in higher education, the US Supreme Court declared "separate but equal has no place in education." In that year, the Court unanimously held that segregated public primary and secondary schools are "inherently unequal" and unconstitutional under the equal protection provisions of the Fifth and the Fourteenth Amendments. See Appendix A of this chapter, "The History of Racial Disparities in Educational Opportunities in the United States."

⁶⁸ GARY ORFIELD and CHUNGMEI LEE, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES (August 2007), Civil Rights Project/*Proyecto Derechos Civiles* at UCLA, available at http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf.

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- expulsion, and criminal sanctions, and low graduation rates for minority and English Language Learner (“ELL”) students.⁶⁹
136. Major factors contributing to racial inequality in educational opportunities include underperforming, poorly financed schools that perpetuate minority students’ underachievement due to lower teacher quality, larger class size, and inadequate facilities;⁷⁰ student assignment policies that promote segregation;⁷¹ setting of school district boundaries that are coterminous with town boundaries and local land use, zoning, and taxation powers; systems of ability grouping and tracking that consistently retain or place minority students in lower level classes where they learn less than their White peers in higher level tracks;⁷² failures to counteract differences in parental income and educational attainment, which correlate with race;⁷³ and lower teacher and administrator expectations of minority students.⁷⁴ Research shows that laws and policies have systematically placed the poorest minority children within inadequate educational environments, further perpetuating and increasing the overall racial disparity here.⁷⁵
137. For migrant workers, additional obstacles to educational opportunity and achievement include long working hours and frequent migration. Factors such as these make it difficult to build and maintain meaningful relationships with their teachers and peers. Moreover, because bilingual education is rare and English is currently the primary mode of instruction in U.S. schools, the limited English proficiency of many child farmworkers also impede academic achievement.
138. The US government has opposed voluntary and conscious efforts by communities nationwide to reduce extreme racial and ethnic isolation in grades K-12, open pathways to higher education for minority students, and promote diversity in minority and disadvantaged businesses.⁷⁶ In addition, the legislative and executive branches of the federal government have all but abandoned school integration and diversity as a matter of policy.
139. In the United States, the public school system has become an entry point into the juvenile justice system, in particular for youth of color (Black, Hispanic, Asian

⁶⁹ The term English language learner (ELL), as used throughout this chapter, indicates a person who is in the process of acquiring English and has a first language other than English.

⁷⁰ ROSLYN ARLIN MICHELSON, WHEN ARE RACIAL DISPARITIES IN EDUCATION THE RESULT OF RACIAL DISCRIMINATION? A SOCIAL SCIENCE PERSPECTIVE (2003), 105 TCHRS. C. REC at 1130.

⁷¹ *Id.* at 1062, 1069.

⁷² *Id.* at 1063.

⁷³ *Id.* at 1064-65.

⁷⁴ GEORGE FARKAS, RACIAL DISPARITIES AND DISCRIMINATION IN EDUCATION: WHAT DO WE KNOW, HOW DO WE KNOW IT, AND WHAT DO WE NEED TO KNOW? (2003), 105 TCHRS. C. REC. 1128, 1135.

⁷⁵ MICHELSON, *supra* note 4, at 1073.

⁷⁶ *See Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007)

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American, Native American). Commonly referred to as the “school to prison pipeline,” it is fed by historical inequities, such as segregated education, concentrated poverty, and racial disparities in law enforcement.⁷⁷ Racial disparities exist in suspension, expulsion and arrest rates in school which contribute to disproportionately high dropout rates and referrals to the justice system. For example, according to the United States Department of Education in 2004, Black students made up 17 percent of the United States student population, but 37 percent of students suspended from school. While national data is unavailable, data from local cities also shows increasing arrest rates in school. For example, in Palm Beach County, Florida in 2003, Black students made up only 29% of the student population, but 64% of arrests in school.⁷⁸

140. A recent case in Jena, Louisiana provides an example of the disproportionate and unjust arrest and punishment of youth of color. In December 2006, six Black boys ages 15 to 17 were arrested for attempted second degree murder for a school fight where no weapons were used and no serious injuries resulted. The first of the boys to be tried in adult court was Mychal Bell, whose charges were reduced to second degree aggravated battery and conspiracy. He was convicted by an all-white jury and faced up to 22 years in prison. Only after massive protests was his sentence vacated.⁷⁹
141. Another example of racially disparate school discipline resulting from increased collaboration between school officials and law enforcement personnel is the case of Shaquanda Cotton. In March 2006, Cotton, aged 14, was convicted in juvenile court of assault on a public servant for pushing a 58-year-old hall monitor. Cotton was sentenced to up to seven years in a juvenile detention facility. According to one teacher, the school operated according to “a philosophy of giving white kids a break and coming down on Black kids.” Three months earlier, the same judge sentenced a 14-year-old white girl to probation for an arson conviction stemming from her having burned down her family’s house. These problems, however, were not limited to one school. Indeed, Black parents in the Paris school district filed at least 12 discrimination complaints against the school district with the United States Department of Education alleging excessive discipline. The Department of Education concluded that all the complaints were unfounded even though its own evidence demonstrated that Black middle school students were written up for disciplinary infractions more than two times as often as their white counterparts. For the specific

⁷⁷ NAACP Legal Defense and Education Fund, *Dismantling the School to Prison Pipeline* (available at http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf); National Economic and Social Rights Initiative, *Deprived of Dignity: Degrading Treatment and Abusive Discipline in New York City and Los Angeles Public Schools* (March 2007) (available at <http://www.nesri.org>).

⁷⁸ See *Advancement Project* <http://www.advancementproject.org/ourwork/opportunity-to-learn/>.

⁷⁹ See NAACP <http://www.naacp.org/youth/college/jena6>

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and therefore obtain a remedy against discriminatory government policies that were not necessarily “intentional” in nature. Thus, most of the Convention’s rights were enforceable through the implementing regulations to Title VI, a fact upon which the Senate relied in its reservations and declarations to the treaty.⁸¹ However, in 2001, the United States Supreme Court ruled that individuals lacked a private right of action to enforce the regulations. As a result, individuals were required to prove discriminatory animus (intent) under the terms of the Title VI statute.⁸² Post-*Sandoval* and *Gonzaga*, there is no meaningful mechanism by which disparate impact discrimination claims can be addressed in court under current domestic law. However, these cases go well beyond Title VI and have had a far reaching impact on individuals’ rights to redress civil rights violations across a broad spectrum of statutes and regulations. Both *Sandoval* and *Gonzaga* have been used by federal courts to curtail actionable rights under 42 U.S.C. § 1983, for example including rights established to ensure access to health care (the Medicaid Act) and to protect the right to vote (the Help America Vote Act [¶ 200, United States Period Report (2007)])

150. Title VII of the Civil Rights Act of 1964 prohibits discrimination--including discrimination in wages paid to employees--by covered employers on the basis of race, color, religion, sex or national origin. But in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), the Supreme Court held that under Title VII, even if employees suffer continuing effects from past discrimination, their claims are time-barred unless filed within the statutorily prescribed period. In Ms. Ledbetter’s case, she was continuously discriminated against for 20 years before she found out about the discrimination, yet the Court held she should have filed her complaint with 180 days of the first instance of discrimination.
151. 42 U.S.C. §1983 is another statutory mechanism that allows individuals to remedy deprivations of rights secured by the U.S. Constitution and laws. Despite the prohibition on racial discrimination in employment, and despite the mechanism to remedy deprivations of rights, millions of individuals in the U.S. are denied access to competent tribunals because of recent U.S. Supreme Court decisions that have erected procedural barriers to courts and limited the means to obtain adequate remedies for discriminatory deprivations of rights. Pursuant to 42 U.S.C. §1983, United States law allows individuals to sue state actors in state or federal courts for violations of civil rights and federal statutes. [¶ 280, U.S. Periodic Report (2007)] But in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Supreme Court held there is no private right of action under 42 U.S.C. 1983 to enforce a provision of a federal privacy law. In so ruling, the Court erected a new and often nearly impossible standard for private parties to bring suit challenging violations of certain federal statutes and regulations.

⁸¹ See 140 CONG. REC. S7634-02 (daily ed. June 24, 1994) U.S. Reservations, Declarations and Understanding, International Convention on the Elimination of All Forms of Racial Discrimination).

⁸² However, the government may be able to enforce the disparate impact regulations. See *infra* note --.

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152. Victims of gender violence are without remedy in federal courts except when the direct violator is a state official. Because of discrimination in state systems, which has a disproportionate impact on women of color in this context, and the importance of recognizing violence against women as a human rights issue, the Violence Against Women Act (VAWA), the Congress included a civil rights provision entitling victims of gender violence to sue the private perpetrator in federal court. In *Brzonkala v. Morrison*, the Supreme Court invalidated this part of the VAWA as beyond the power of congress thus relegating victims to state courts. Conversely, in *City of Castle Rock v. Gonzales*, the Supreme Court has also closed the federal courts to 42 U.S.C. §1983 actions by victims of private gender violence who seek compensation where state or local officials fail to provide requested protection from domestic violence, even where the local officials are subject to mandatory court orders of protection. The theory of the decision, which flies in the face of obligations under the Convention and other human rights treaties, is essentially that officials have no positive obligation to protect people from private violence. As a result, not only compensation denied, but the deterrent effect of potential federal liability – and thus, the use of federal power to prevent local violations – are denied in violation of the Convention.
153. Although the Periodic Report discusses at length that individuals may file a complaint with federal civil rights offices that are charged with enforcing anti-discrimination laws (*see, e.g.* ¶ 281, U.S. Periodic Report), federal agencies have been largely ineffective or unwilling to address claims of racial discrimination. The Commission’s Office for Civil Rights Evaluation (OCRE), which is responsible for evaluating federal efforts to combat discrimination through enforcement activities, found all but two federal agencies with major civil rights responsibilities, were performing at acceptable levels. But even those two agencies were found to be lacking concerning such crucial factors as education and outreach.⁸³ General Recommendation XXVI requires that to meet the needs of victims of discrimination, tribunals should consider awarding financial compensation for damage to victims, rather than limiting remedies solely to punishment of the perpetrator. Yet, the three Supreme Court cases discussed above significantly curtail effective enforcement of rights violations, in contravention of Article 6, by closing off access to courts such that victims of racial discrimination will never be able to seek any form of redress. None of these issues are addressed in the 2007 Periodic Report. [See ¶¶ 281 & 289 (listing various forms of relief available to victims of discrimination)]
154. The Offices for Civil Rights (OCRs) are governmental sub-agencies developed by federal agencies to protect civil rights. Despite their mandate, the OCRs lack the political will, power, and funding to protect individuals from racial discrimination. This lack of funding has compromised the effectiveness of remedies such as Title VI.

⁸³ <http://www.usccr.gov/pubs/10yr02/vol1/main.htm>. *See also*, Marianne Engelman Lado, *Unfinished Agenda: The Need for Civil Rights Litigation to Address Race Discrimination and Inequalities in Health Care Delivery*, 6 Tex. F. on C.L. & C.R. 1, at 28-29.

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As the federal agency responsible for enforcing compliance with Title VI, OCR has been denied adequate resources to do its job. No resources have ever been allocated to a testing program, generally the only way to effectively enforce compliance. Little staffing is available, even to investigate complaints. OCR's limited budget has forced the shift in its role from what was initially envisioned as one of advocacy, investigation and enforcement to that of a passive arbitrator of disputes. This has had some of its greatest impact on the most vulnerable citizens in the United States, (i.e. those eligible for Medicaid, the public health insurance program available to the very poor).