

# **WOMEN OF COLOR**

Response to the Periodic Report of the United States  
to the United Nations Committee on the Elimination  
of Racial Discrimination

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**Prepared by:**

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# **HUMAN RIGHTS VIOLATIONS AGAINST WOMEN OF COLOR IN THE UNITED STATES:**

## **A Report on U.S. Government Compliance with the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (CERD)**

Produced in partnership by WILD for Human Rights, Justice Now, and the Transgender, Gender Variant and Intersex Justice Project

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*Submitted to the United Nations Committee on the Elimination of Racial  
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## EXECUTIVE SUMMARY

**This report will examine the treatment of women from racial minorities in the United States (“women of color”). We will show violations of CERD articles 2 and 5 by highlighting three specific situations:**

- violations of the right to education and health for girl child farm laborers, who are primarily Latina;
- violations of the right to work for transgender women of color; and
- violations of the right to bodily security and health for women of color in prison.

We focused on women of color to support the Committee’s effort to explicitly recognize how gender shapes the way racial discrimination affects different people, and to make marginalized women of color more visible. In fact, these communities are so invisible that, except for women of color in prison, no accurate numbers exist to describe their situations. They need the international community’s oversight and intervention to recognize the human rights that are being violated and provide recommendations for redress.

### **Violations of Rights to Health and Education for Girl Child Laborers in U.S. Agriculture**

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.

Child farmworkers 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 farmworkers 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 farmworkers also face significant obstacles in education. Because of their long working hours they often arrive in class tired and unprepared, and their frequent migration makes 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.

### **Violations of Right to Work for Transgender Women of Color**

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.

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

### **Violations of Right to Bodily Integrity and Health for Women of Color in Prison**

Women in prison are often forgotten when discussing the need for reproductive justice. As noted in the Committee's Concluding Observations to the U.S. 2001 report, racial minorities are disproportionately imprisoned in the United States. As of December 2007, the racial distribution of women in prisons, including federal prisons, was approximately 34 percent African American, 16 percent Latina, 45 percent white and 5 percent other. A recent government study found that African Americans accounted for 44 percent of the women in local jails and 48 percent of the women in state prisons. The majority of people in women's prisons are between 25 and 34 years, the prime childbearing years.

Prison medical facilities are administering hysterectomies and other procedures that result in sterilization when less extreme treatments may have sufficed, often without giving women adequate information, and sometimes even without a woman's clear consent. In addition, pregnant women in U.S. prisons, many of whom are high risk due to past histories of poverty, malnutrition or abuse, face rampant violations of their human rights.

Thus, we call on the U.N. CERD Committee and international community to listen to voices of these women and to hold the U.S. accountable to uphold international human rights.

## INTRODUCTION

U.S. organizations WILD for Human Rights, Justice Now and the Transgender Gender Variant and Intersex Justice Project welcome the opportunity to comment on the fourth, fifth and sixth Periodic Report of the United States of America submitted in April 2007 to the United Nations Committee on the Elimination of Racial Discrimination (the “Committee”) concerning its compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). **This report will examine the treatment of women from racial minorities in the United States (“women of color”). We will show violations of CERD articles 2 and 5 through highlighting three specific situations:**

- violations of the right to education and health for girl child farm laborers, who are primarily Latina;
- violations of the right to work for transgender women of color; and
- violations of the right to bodily security and health for women of color in prison.

We focused on women of color to support the Committee’s effort to explicitly recognize how gender shapes the way racial discrimination affects different people, and to make marginalized women of color more visible. For the purposes of this report we define “women” to include both people who identify as women as well as people who experience specific discrimination because others define them as women. In addition, we highlight other identities such as age, class, and sexual orientation that can impact discrimination. These issues and topics are also integrated throughout other U.S. shadow reports.

The Committee in General Recommendation XXV recognized that some forms of racial discrimination have a unique and specific impact on women, but the U.S. government still has not done so. The U.S. report rarely mentions the specific experiences of women of color despite the Committee’s request that State Parties describe “in quantitative and qualitative terms, factors affecting and difficulties experienced in ensuring the equal enjoyment by women, free from racial discrimination, of rights under the Convention.”<sup>1</sup> Moreover, the Committee’s Concluding Observations to the U.S. in 2001 requested that the U.S. provide socio-economic data disaggregated by race, ethnic origin and gender. This information was not included in the U.S.’s most recent report.

Not only did the U.S. fail to fulfill the Committee’s request to provide disaggregated data, but many of the human rights violations highlighted in this report have been discussed in front of United Nations Committees in the past. Just last year the UN Human Rights Committee questioned the U.S. government on its record of gender identity discrimination and called on the U.S. government to cease shackling pregnant women in prison. Yet, to our knowledge, the U.S. government has taken no steps to remedy these violations. In fact, in many cases, the U.S. government has used its federal system to abdicate much of its responsibility to ensure human rights. Under its “federalism understanding” the U.S. government pledges that it will implement CERD only to the extent that it has direct jurisdiction and indicates that state and local governments should implement the treaty where they have jurisdiction. However, the U.S.

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<sup>1</sup> UN Committee on the Elimination of Racial Discrimination, General Recommendation XXV, Para. 6

government has not identified the articles where state and local governments have specific jurisdiction and thus must comply with obligations under the treaty. Throughout its periodic report the U.S. asserts that it cannot remedy certain human rights violations because of federalism.

We selected the topics for this report based on a few criteria. The abuse needed to be national in scope and had to illuminate a larger issue of racial animus. For example, while examining the treatment of young female farmworkers, we also highlight the failure to value the childhood of young Latinos. Similarly, when looking at economic opportunities for transgender women of color, we also highlight the damaging policing of gender. And while examining the problem of reproductive justice for women of color in prison, we also highlight the racially discriminatory notions of who should be a mother and how that impacts women in prison. We also needed the topic to be discreet enough that we could describe it accurately and vividly in a few pages. Finally, and most importantly, we sought topics that impacted the most marginalized populations, thus providing them an opportunity to be heard and acknowledged by the international community.

The communities we focus on in this report cannot access society's protections: farm workers are not included under safe labor law legislation; transgender people often have no recognized identity because of gender identity-based discrimination; and people in prison have had their ability to access U.S. Constitutional protections severely limited. At the same time, these communities play a critical, but usually unacknowledged role in supporting the very social and economic systems that fail them. In fact, these communities are so invisible that, except for women of color in prison, no accurate numbers exist to describe their situations. They need the international community's oversight and intervention to recognize the human rights that are being violated and provide recommendations for redress.

**Thus, we call on the U.N. CERD Committee and international community to listen to voices of these women and to hold the U.S. accountable to uphold international human rights.**

## **GIRL CHILD LABORERS IN U.S. AGRICULTURE**

### **Violations of CERD Article 5(e) i, iv and Article 5(e)v**

*“Damaris was 13 years old when she began working in the broccoli fields of Arizona. During peak season, she would often work 14 hours a day in 100-degree temperatures. For months on end she suffered frequent nosebleeds and nearly passed out on several occasions. Despite illness from exposure to dangerous pesticides, she kept on working.”<sup>2</sup>*

### **BACKGROUND**

Agricultural work is recognized as the most dangerous industry for children and yet, it is the least protected.<sup>3</sup> 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 are 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 benefit from health and safety protection that most people are entitled to when they are in their workplaces.

To date, no comprehensive accounting exists of children working in U.S. fields. Different institutions have produced very rough estimates. In 1998, the U.S. General Accounting Office estimated that as many as 300,000 children work in the agricultural industry.<sup>4</sup> In its 2007 report, the Association of Farmworker Opportunity Programs estimated a range between 400,000 to 500,000 child farmworkers in the U.S.<sup>5</sup> and the United Farm Workers estimated as many as 800,000 children work on U.S. farms.<sup>6</sup> These estimates, do not include national statistics on gender/sex and thus we cannot accurately identify the percentage of boys and girls in the fields.

Children of Latina/o backgrounds are most at risk. Eighty-three percent of the adult workers identified themselves as members of a Latino group, with 72 percent self-identifying as Mexican, seven percent as Mexican-American, one percent as Chicano/a, and three percent as another Latino group.<sup>7</sup> Consequently, a significant percentage of the youth labor force in agriculture probably is also largely made up of Latinos/as as they follow their parents to find work in the fields.

### **DESCRIPTION OF RIGHTS VIOLATIONS**

#### **Dangerous Working Conditions and Environmental Impact**

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<sup>2</sup> Victoria Riskin and Mike Farrell, *Profiting on the Backs of Child Laborers*, L.A. TIMES, Oct. 12, 2000.

<sup>3</sup> Mining is considered to be the most dangerous industry and agriculture ranks second. However, children below 18 are not permitted to work in mining. Child Labor Coalition “Children in the Fields Campaign Fact Sheet” available at <http://www.stopchildlabor.org/Consumercampaigns/fields.htm>. The National Consumers League ranks agricultural work as the worst teen jobs in 2007. <http://www.nclnet.org/labor/childlabor/jobreport.htm#ag>.

<sup>4</sup> U.S. GEN. ACCOUNTING OFFICE, CHILD LABOR IN AGRICULTURE: CHARACTERISTICS AND LEGALITY OF WORK 2 (1998).

<sup>5</sup> ASSOCIATION OF FARMWORKER OPPORTUNITY PROGRAM, CHILDREN IN THE Fields 6 (2007) [hereinafter CHILDREN IN THE FIELDS].

<sup>6</sup> HUMAN RIGHTS WATCH, FINGERS TO THE BONE (2000).

<sup>7</sup> U.S. DEP’T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKER SURVEY (NAWS) 2001-2002 [hereinafter NAWS]. Chapter 1 provides detailed information on birthplace, employment eligibility, and migrant categories.

*“Seventeen-year-old Gloria was picking oranges when she began to complain of nausea, dizziness, blurred vision and stomach cramps. The orchard had been sprayed with pesticides the day before. No warning signs had been posted.”*<sup>8</sup>

**Dangerous Conditions:** Child farmworkers work stooped over, using knives and other dangerous tools in scorching temperatures for long hours. Twelve to fourteen-hour days are not uncommon during peak harvesting seasons. Yet, despite the rigors of their labor, they are exempted in most cases from receiving minimum wage and overtime compensation.<sup>9</sup> Many are exposed to pesticides and other toxic chemicals, affecting their growth and development. Agriculture has one of the highest rates of injury and death of all occupations in the United States. The U.S. Department of Labor’s June 2000 report, for example, noted that “[t]he characteristics of youth job fatalities in agriculture are quite distinctive in a number of ways. In agriculture, [deaths] are more likely to occur among the youngest workers. About three-quarters of all deaths to young workers under the age of 15 occurred in agriculture.”<sup>10</sup> The same report also noted that “the risk of a fatality (per hour worked) in an agricultural wage and salary job is over 4 times as great as the average risk for all working youth.”<sup>11</sup>

*Through not taking actions to reduce this fatality level, the U.S. government violates article 5(e)(i) by failing to protect the right to “just and favorable conditions of work.”*

**Pesticide Damage:** To date, we do not have comprehensive documentation of the health impact of farm work on children. In its 2000 report to the U.S. Congress, the General Accounting Office noted that “no comprehensive national data exist on the extent to which farmworkers (and farm children) are experiencing acute pesticide incidents or illnesses.”<sup>12</sup> However, some research has shown that children are disproportionately affected due to their size, developmental stage, and body weight. In 1998, for example, the Natural Resources Defense Council found that these children are “disproportionately exposed to pesticides compared with adults due to their greater intake of food, water, and air per unit of body weight.”<sup>13</sup> Consequently, many experience acute illnesses, respiratory infections, and other severe chronic conditions.

This developmental issue may have a particular impact on young women. Two recent studies in 2006 on two different continents have pointed to possible linkage between agricultural work and breast cancer. Dr. James Brophy and colleagues in Ontario, Canada conducted a 2-year case-controlled study to explore risk factors for cancer based on occupation. “The results indicate that women with breast cancer were nearly three times more likely to have worked in agriculture when compared to the controls.”<sup>14</sup> Another study conducted by Scotland’s Stirling University cites similar statistics. The report “found that women with breast cancer were three times as

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<sup>8</sup> Occupational Health Program, University of California at Berkeley, 2001

<sup>9</sup> Under Fair Labor Standards Act, the primary federal legislation regulating child labor, “small” farms are exempt from minimum wage requirement.

<sup>10</sup> U.S. DEP’T OF LABOR, REPORT ON THE YOUTH LABOR FORCE 60 (2000).

<sup>11</sup> *Id.* at. 66.

<sup>12</sup> U.S. GEN. ACCOUNTING OFFICE, PESTICIDES: IMPROVEMENTS NEEDED TO ENSURE THE SAFETY OF FARMWORKERS AND THEIR CHILDREN 11 (2000).

<sup>13</sup> NATURAL RESOURCES DEFENSE COUNCIL viii (1998)

<sup>14</sup> James T. Brophy, *Occupation and Breast Cancer: A Canadian Case-Control Study*, ANNALS N.Y. ACAD. SCI. 765, 1076 (2006).

likely to have grown up on a farm or worked in agriculture.”<sup>15</sup> Researchers involved in both studies acknowledge that the link is not conclusive. But exposure to chemicals and toxins is known to negatively impact women’s breast tissue development. More studies are needed to confirm this link. In the meantime, Dr. Brophy observes that extra care should be given to protect the health of farmworkers, particularly the girl child farmworkers. “We think something is definitely at play in the agricultural environment.”<sup>16</sup>

***Through not preventing the dangerous of pesticides the U.S. government violates article 5 (e)(iv) by failing to protect the right to public health.***

### **Inadequate Access to Education**

*“I think the worst part of working in the fields is that you know you’re always going to be behind. You get your credits back this year [by doing extra work], but next year it’s going to be the same thing.”<sup>17</sup>*

**Unstable Housing:** Children laboring in the agricultural industry face uphill battles in academic achievement. Migrant laborers move around the country looking for work depending on crops and seasons. A study of migrant students for the Michigan Department of Education, for example, found that on average, farmworkers move from one residence to another around six times per year, each time taking their children with them.<sup>18</sup> Each move interrupts children’s academic instruction and other related school activities such as building and maintaining meaningful relationships with their peers and teachers. Some children of farmworkers start school much later than their peers while others leave school earlier as they and their parents move to find a new place to work. Furthermore, child workers endure long hours in extreme conditions. Consequently, they often arrive in class tired, sleepy and unprepared. At times, they also arrive in ill health. As a result, they experience a high level of interruption in instruction and often are not able to maintain meaningful relationship with peers and build important social networks.

**Limited Parental Education:** In addition, their parents generally have very low levels of education. In 1991, the U.S. Department of Education found that 80 percent of adult farmworkers function at 5<sup>th</sup> grade or lower level of literacy.<sup>19</sup> A recent U.S. Department of Labor survey released in 2005 showed only a slight improvement with farmworkers having about a 6<sup>th</sup> grade level education on average.<sup>20</sup> Their low educational achievement hinders their capacity to help their children academically. Furthermore, they are among the poorest of the poor. Fifty-six percent live in households below the Federal poverty threshold and depend on their children to help supplement their household income.<sup>21</sup>

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<sup>15</sup> “Breast Cancer Farm Workers ‘link’,” BBC News, [http://news.bbc.co.uk/2/hi/uk\\_news/scotland/6045852.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/6045852.stm)

<sup>16</sup> “Breast Cancer More Likely in Farm Workers: Study” CTA.ca, [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061012/breastcancer\\_farming\\_061012?s\\_name=&no\\_ads](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061012/breastcancer_farming_061012?s_name=&no_ads)

<sup>17</sup> Elda Hernandez, a former child farmworker, *quoted in* CHILDREN IN THE FIELDS, *supra* note 5 at 18.

<sup>18</sup> EDGAR LEON, EDUCATION RESOURCES INFORMATION CENTER, CHALLENGES AND SOLUTIONS FOR EDUCATING MIGRANT CHILDREN 18 (1996).

<sup>19</sup> CHILD LABOR COALITION, CHILDREN IN THE FIELDS CAMPAIGN FACT SHEET.

<sup>20</sup> NAWS, *supra* note 7 at 17.

<sup>21</sup> U.S. DEP’T OF LABOR, REPORT ON THE YOUTH LABOR FORCE 53 (2000). The Federal poverty line for a family of one is \$10,210. 72 Fed. Reg. 3147-3148 (Jan. 24, 2007).

**Limited English Proficiency:** To compound the situation, the majority of adult farmworkers have limited proficiency in English. About 81 percent of the crop workers surveyed by the U.S. Department of Labor in 2001 to 2002 reported that their native language is Spanish. Forty-four percent could not speak English “at all” and an additional 26 percent could speak just “a little.” Fifty-three percent reported not being able to read English “at all” and an additional 20 percent reported that they could read “a little” English. Combined, over 70 percent of the worker population have extreme English language difficulty.<sup>22</sup> Consequently, these children face immense challenges in U.S. schools where bilingual instruction is rare and English is currently the primary medium of instruction. The result of these combined factors is that many youth not only fall behind academically, but also drop out of school altogether. According to a fact sheet put together by Student Action with Farmworkers, approximately 60 percent of the farmworker children drop out of school.<sup>23</sup>

*Through not providing appropriate measures, including bilingual education, to redress this situation, the U.S. government violates article 5(e)v by failing to fulfill the right to education.*

## RELEVANT DOMESTIC LAW AND POLICY

*“Hundreds of thousands of children work as hired labor in America’s fields and orchards. These children are among the least protected of all working children.”<sup>24</sup>*

According to the U.S. Department of Labor (DOL), the 1938 Fair Labor Standards Act (FLSA) is the “most sweeping federal law that restricts the employment and abuse of child workers.”<sup>25</sup> The child labor provisions in the FLSA, according to the DOL, are “designed to protect the educational opportunities of youth and prohibit their employment in jobs that are detrimental to their health and safety.” But children working in the agricultural industry do not benefit from this protection the same degree as children working in other sectors, resulting in a much lower level of protection for poor children of color.

**Unequal Age Restrictions:** The standard age for working children in most sectors of the economy is set at 16 whereas the minimum age for agriculture at 14 years of age. Furthermore, loopholes and exceptions allow younger children to work on farms with fewer restrictions.<sup>26</sup> Children as young as 12 and 13 may legally work on a farm performing non-hazardous jobs. In other industries, the age limit is set at 14. Furthermore, a 14 year-old child may only work up to 18 hours per week in a retail industry during school while a child of the same age may work unlimited hours harvesting crops so long as the work is not performed during school hours. In most industries, a child may not begin work before 7 a.m. while a child working on farms may start at any hour. Some farm work begins as early as 4 a.m.

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<sup>22</sup> NAWS, *supra* note 7 at 21.

<sup>23</sup> STUDENTS ACTION WITH FARMWORKER, UNITED FARMWORKER FACTSHEET (undated).

<sup>24</sup> CHILDREN IN THE FIELDS, *supra* note 5 at 4.

<sup>25</sup> U.S. Dep’t of Labor website, [www.dol.gov/dol/topic/youthlabor](http://www.dol.gov/dol/topic/youthlabor)

<sup>26</sup> For in-depth analysis of this issue, please see U.S. GEN. ACCOUNTING OFFICE, CHILD LABOR IN AGRICULTURE: CHANGES NEEDED TO BETTER PROTECT HEALTH AND EDUCATIONAL OPPORTUNITIES 29-36 (1998).

**Outdated Law:** The United States adopted the FLSA at a time when more small family farms depended on family labor for cultivation and harvesting. The FLSA provisions on child labor may have reflected this historical context and allowed children to work at younger ages with fewer restrictions. But now U.S. agriculture is dominated by large commercial farms. In effect, by not updating FLSA to reflect the current context, Congress is sanctioning unequal protection for youth in the agricultural industry.

In addition to the FLSA, a number of federal and state regulations have been adopted to protect working children. The U.S. Department of Labor and the Environmental Protection Agency are the two primary federal organs responsible for enforcing federal regulations. Both agencies, according to the U.S. Government Accounting Office and NGOs working on this issue, have been ineffective at carrying out their responsibilities.

**Inadequate Enforcement of Existing Law:** Multiple problems have contributed to ineffective enforcement of child labor laws, including inadequate data about children working in the agricultural industry. The U.S. Government has not developed an effective system to identify and track the issue and has no disaggregated data on age, gender and race. This absence of data serves as a major obstacle to formulating effective policies and enforcement.

Another area of weakness is inspection. An inadequate number of federal and state labor inspectors hinders appropriate review of all work places, and poor coordination between federal and state labor agencies exacerbates the problem. The enforcement attention given to child labor in agriculture is disproportionately low and, in recent years, a notable decline in the number of investigations of child labor in the agricultural industry has occurred. The Child Labor Coalition, in a 2006 report to the International Labor Organization, found that in fiscal year 2005, the U.S. Department of Labor investigated only 25 cases of child labor in agriculture, compared to 192 cases investigated in fiscal year 1999. This huge decline in efforts and resources to address the most dangerous industry for young workers is extremely problematic.<sup>27</sup>

## CONCLUSION

The United States government has failed to provide effective protection for a significant percentage of children engaged in agricultural work. It needs to take action on multiple fronts, including, legislative, administrative, and budgetary measures, to ensure equal protection for the predominantly Latino children engaged in one of the most dangerous industries in the country.

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<sup>27</sup> For analysis of inadequate enforcement, please see CHILD LABOR COALITION, PROTECTING WORKING CHILDREN IN THE UNITED STATES: THE GOVERNMENT'S STRIKING DECLINE IN CHILD LABOR ENFORCEMENT ACTIVITIES (2006). The CLC also conducted comprehensive survey in 2003 that revealed similar trend across the nation. Darlene Adkins, the Coordinator of the CLC, concludes that the annual survey "shows that most states are providing limited personnel to conduct inspections of workplaces. We have a handful of states with no enforcement whatsoever." CHILD LABOR COALITION, 2003 CHILD LABOR STATE SURVEY.

# **Economic Rights Violations Against Transgender<sup>28</sup> & Gender Variant<sup>29</sup> Women of Color in the United States**

## **Violations of CERD Article 2(2) and Article 5(e)(i)**

*I co-founded a shelter for homeless families in California. We were really successful and helped a lot of people. Then the board of directors found out that I was transgender. They told me I had to leave the organization I helped create to not jeopardize our funding and “spare them the humiliation.”<sup>30</sup>*

K.K., a native Hawaiian transgender woman

### **BACKGROUND**

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 ranging from 600,000 to 1.2 million.<sup>31</sup> Assuming that U.S. racial and demographics hold the number of transgender persons of color range from just over 200,000 to 400,000.<sup>32</sup> Given that the last census showed about half of respondents identified as female, transgender women of color range between 100,000 to 200,000.<sup>33</sup>

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

### **DESCRIPTION OF RIGHTS VIOLATIONS**

#### **Lack of Meaningful Anti-Discrimination Protections**

In the fall of 2007, transgender and gender variant communities and their supporters all over the country mobilized to protest the exclusion of gender identity as a protected status under the federal Employment Non-Discrimination Act (ENDA).<sup>34</sup> At stake for the transgender and

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<sup>28</sup> “Transgender” broadly describes people who do not conform to traditional societal gender roles. This term includes transsexuals, transvestites and cross-dressers, as well as masculine women and feminine men. This term describes a person’s deeply felt sense of *gender*, and is therefore distinct from sexual orientation.

<sup>29</sup> “Gender variant” describes people who also transgress traditional gender roles and expressions, but for personal or cultural reasons do not call themselves “transgender.”

<sup>30</sup> Interview on file with the Transgender, Gender Variant Intersex Justice Project (hereinafter TJI Justice Project)

<sup>31</sup> Lynn Conway and Femke Olyslager, *On the Calculation of the Prevalence of Transsexualism* (Sept. 6, 2007) <http://ai.eecs.umich.edu/people/conway/TS/TSprevalence.html>.

<sup>32</sup> U.S. Census Bureau, “QuickFacts,” <http://quickfacts.census.gov/qfd/states/00000.html>

<sup>33</sup> Id.

<sup>34</sup> <http://www.planetout.com/news/article.html?2007/10/09/5> (protest at HRC fundraiser); <http://365gay.com/Newscon07/10/100207pelosi.htm> protest at Pelosi’s SF office

gender variant communities, and especially for those of color who experience the burden of race-based discrimination, was whether the federal government would recognize discrimination based on one's gender expression as an impermissible basis upon which to make employment decisions.

Nationwide, only seven states and the District of Columbia grant legal protections to all persons against discrimination in employment based on gender identity or expression.<sup>35</sup> In areas without these protections, transgender and gender variant persons frequently must hide their identities to find legal employment. For those who cannot hide their identities, either because they physically appear to be transgender or because they are unable to change their identity documentation to align with their true identity, extreme poverty and extra-legal income-generating activity is the only option. Even when these protections are in place, however, transgender and gender variant persons face significant obstacles to exercising their rights under these laws, such as lack of information about their rights, and lack of access to affordable legal services. As of this writing, U.S. Congressional leaders have decided to submit ENDA without protections against gender identity discrimination, much to the distress of the larger lesbian, gay, bisexual, and transgender community.<sup>36</sup>

**Employment Discrimination:** Transgender and gender variant persons report a wide range of types of discrimination against them regarding employment or in the workplace, such as:

- Candidates who are open about their transgender status out at the hiring phase have been told by employers “we can’t have your kind here”;
- Employees have been sexually harassed by other employees or by their superiors: subjected to sexually suggestive comments, inappropriate questions about what their genitalia look like, inappropriate questions about sexual practices, and in some cases, have been physically assaulted by others wanting to feel their genitalia
- People report denial of promotions based on gender identity. For example, senior attorneys at large law firms have been forced into the back offices and no longer allowed to interact with clients.
- People have been summarily fired once superiors learn of their transgender status.

*Through not effectively prohibiting these actions, the U.S. government violates article 5(e)(i) by failing to protect the right to work.*

### **High Rates of Poverty Among Transgender & Gender Variant Communities**

*I had a job working at a 7-11 in Florida, and I had no problems for two years. I became really good friends with my manager, and always got great performance reviews. Then someone I knew from many years ago outed me to the district supervisor. A week later I was fired without explanation. A couple days later, my old manager told me that it was because I was trans<sup>37</sup>.*

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<sup>35</sup> Only CA, IL, ME, MN, NM, RI, and WA offer employment protection including gender identity, (“Stop Employment Discrimination!”),

[http://takeaction.amnestyusa.org/site/c.jhKPIXPCIoE/b.3464447/k.565D/ENDA\\_Stop\\_Employment\\_Discrimination/apps/ka/ct/contactus.asp?c=jhKPIXPCIoE&b=3464447&en=kuIPK10OKgINIZPGL9IUL8MTLmLUI7PMJeJRL02KyE](http://takeaction.amnestyusa.org/site/c.jhKPIXPCIoE/b.3464447/k.565D/ENDA_Stop_Employment_Discrimination/apps/ka/ct/contactus.asp?c=jhKPIXPCIoE&b=3464447&en=kuIPK10OKgINIZPGL9IUL8MTLmLUI7PMJeJRL02KyE); <http://www.humanrights.state.mn.us/rsonline12/genderidentity.html>)

<sup>36</sup> United ENDA Coalition, [www.unitedenda.org](http://www.unitedenda.org).

<sup>37</sup> Interview on file with TGI Justice Project.

L., transwoman of color

**High Poverty Levels:** The lack of meaningful protections against discrimination in employment has resulted in transgender and gender variant people, especially women of color, as disproportionately living in poverty in the United States. Regional surveys and studies indicate that the majority of transgender and gender variant or gender non-confirming people are earning less than the federal poverty guidelines, or earning no income at all.<sup>38</sup> Such widespread poverty has left an indelible mark on the transgender and gender variant communities in the form of frequent contact with the criminal justice system, high rates of substance abuse, high rates of HIV/AIDS, severe mental health problems, and early death.

Transgender women of color are most heavily impacted by economic oppression within the larger transgender communities. Their status as transgender persons, women, women of color, immigrants, perceived homosexuals, and other concurrent marginalized identities create complex interacting levels of discrimination and oppression.

**Participation in Underground Economy:** However, it is important to recognize the vital role that transgender women of color play in the economy of the United States. Denied lawful employment, the majority of transgender women of color, regardless of region, earn income through illegal sex work.<sup>39</sup> Many transgender women of color supplement this income with illegal drug sales, petty theft, and credit fraud.<sup>40</sup> All these activities make up significant sectors of the underground economy in the U.S. and these activities provide support for legitimate economic activity. For example, most transgender women of color live in large metropolitan areas, and earn income (again, usually from sex work or drug sales) from business or social visitors to the region. The “consumability” of transgender women of color by visitors to a region makes transgender women of color a vital part of any region’s tourist and business industry.

For transgender women of color who are unwillingly serving in the underground sector of the economy, their lives are marked by frequent violence, instability, mental distress, and isolation because the means with which they are forced to earn income are criminalized in most U.S. jurisdictions. For example, because prostitution is illegal in most jurisdictions, transgender women of color who are attacked while doing such work cannot seek assistance from the police (or if the police are called, face further discrimination and harassment by police), thus leading to vastly underreported violence and abuse against transgender women of color. Furthermore,

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<sup>38</sup> A study in the San Francisco Bay Area conducted in 2006 of 194 transgender individuals found a 35 percent unemployment rate, with 59 percent earning less than \$15,300 annually. TRANSGENDER LAW CENTER & SAN FRANCISCO CHRONICLE, GOOD JOBS NOW! A SNAPSHOT OF THE ECONOMIC HEALTH OF SAN FRANCISCO’S TRANSGENDER COMMUNITIES (2006); A similar survey in Washington D.C. found that only 58 percent of the transgender community was employed, 31 percent with incomes under \$10,000, and 29 percent reporting no income at all. Fifteen percent of this survey’s respondents reported losing a job due to anti-transgender discrimination. JESSICA XAVIER & RON SIMMONS, THE WASHINGTON TRANSGENDER NEEDS ASSESSMENT Survey 2000.

<sup>39</sup> “Sex work” describes a range of income-earning activities that incorporate sexuality, including but not limited to prostitution, exotic dancing, escort services, phone sex, online and video pornography, etc.

<sup>40</sup> Interviews on file with TGI Justice Project.

nationally lesbian, gay, bisexual and transgender persons report frequent violence against them by law enforcement.<sup>41</sup>

Transgender women of color find themselves forced into underground economies by simultaneous layers of socially-accepted racial, economic, and gender discrimination. This further forces transgender and gender variant women of color into high dangerous and hostile environments.

***Through permitting gender-identity discrimination the U.S. government violates article 2(2) by failing to respect, protect and fulfill “the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”***

## **CONCLUSION**

As a result of socially accepted gender-identity discrimination and employment discrimination frequently find themselves forced into the underground economies. This further forces transgender and gender-variant women of color into highly dangerous situations and environments.

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<sup>41</sup> NATIONAL COALITION OF ANTI-VIOLENCE PROJECT, ANTI-LESBIAN, BISEXUAL AND TRANSGENDER VIOLENCE IN 2006 (2007).

# REPRODUCTIVE OPPRESSION OF WOMEN OF COLOR IN U.S. PRISONS

## Violations of Article 5 (b) & Article 5(e)(iv)

*“I understand I made poor choices in my life, but some experiences are sacred. I was robbed of the sacred experience of giving birth.”<sup>42</sup>*

### BACKGROUND

Women in prison are often forgotten when discussing the need for reproductive justice. As noted in the Committee’s Concluding Observations to the U.S. 2001 report, racial minorities are disproportionately imprisoned in the United States.<sup>43</sup> There are approximately 107,000 people in U.S. women’s prisons. As of December 2007, the racial distribution of women in prisons, including federal prisons, was approximately 34 percent African American, 16 percent Latina 45 percent white and 5 percent other.<sup>44</sup> A recent government study found that African Americans accounted for 44 percent of the women in local jails and 48 percent of the women in state prisons.<sup>45</sup> The majority of people in women’s prisons are between 25 and 34 years, the prime childbearing years.

Throughout the history of the United States, women of color have had their reproductive rights violated in numerous ways. Nearly thirty-five percent of all women in Puerto Rico were forcibly sterilized by 1965 due to inadequate or erroneous information about sterilization procedures performed according to U.S. policies.<sup>46</sup> In the 1970s, Native American medical practitioners observed that sterilization rates among women from certain Native American communities had increased by as much as 300 percent.<sup>47</sup> African American women have continuously experienced reproductive oppression starting from the time of slavery, including forced birth as a means of economic profit and coerced sterilization as a means to reduce the African American population.<sup>48</sup> The stated reasons for these sterilizations were that poor women and women of color were considered irresponsible and inadequate mothers.<sup>49</sup> Many of these same opinions are now heard when women in prison are discussed.

The practice of forced sterilization of women of color continues in U.S. prisons today. Prison medical facilities are administering hysterectomies and other procedures that result in sterilization when less extreme treatments may have sufficed, often without giving women adequate information, and sometimes even without a woman’s clear consent. In addition, pregnant women in U.S. prisons, many of whom are high risk due to past histories of poverty, malnutrition or abuse, face rampant violations of their human rights.

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<sup>42</sup> Interview on file with Rebecca Project for Human Rights.

<sup>43</sup> U.S. BUR. JUST. STAT., SPECIAL REPORT WOMEN OFFENDERS (1999) [hereinafter WOMEN OFFENDERS].

<sup>44</sup> U.S. BUR. JUST. STAT., PRISONERS IN 2005 (2006).

<sup>45</sup> WOMEN OFFENDERS, *supra* note 43.

<sup>46</sup> Helen Rodriguez-Trias, *Puerto Rico, Where Sterilization of Women became ‘La Operacion,’* 1 POL. ENV’T (1994).

<sup>47</sup> Mondana Nikourkari, *Gradations of Coercion: the Plight of Women of Color and their Informed Consent in the Sterilization Debate*, CONN. PUB. INT. L.J. 58 (2001)

<sup>48</sup> Jael Silliman Marlene Gerber Fried, Loretta Ross & Elena R. Gutierrez UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE 49-51 (2004).

<sup>49</sup> Nikourkari, *supra* note 47 at 52

## DESCRIPTION OF RIGHTS VIOLATIONS

### Destruction of Reproductive Capacity

*“I wanted to bring a drug free baby into this world and raise him, but that chance was taken away from me.”<sup>50</sup>*

-A woman who received a hysterectomy when there were no orders or consent forms signed.

The reproductive capacity of women in prison is damaged through the overly aggressive use of hysterectomies and removal of ovaries. Too often, hysterectomies appear to be the first choice as a solution to medical problems that have more effective and less drastic cures. Out of the more than 10 women we spoke with in California who had partial or full hysterectomies, for the majority of them, the operation was later deemed or appeared unnecessary or more invasive than necessary. In addition, all of them were women of color.

**Aggressive Hysterectomies:** Many women report being told by prison doctors that they must have a hysterectomy in response to what they are told are fibroid tumors, which generally cause no problems and seldom require treatment unless there are complications such as extreme pain and heavy bleeding.<sup>51</sup> A twenty-two year old African American woman that we spoke with refused a recommended hysterectomy in 2006 after a fibroid was allegedly found during a pelvic exam. A later ultrasound confirmed that there was no fibroid.

We have also spoken with two women, who learned after their complete hysterectomies that they did not have the cervical cancer that was the purported reason for the hysterectomy. One, an Asian-American woman who was twenty-two years old when she had her hysterectomy, told us that when she found out that she did not have cancer, “I didn’t say anything. I was just in shock.”<sup>52</sup>

**Lack of Information:** In one case, a 25 year old African American woman had her ovaries removed during a 2001 surgery to remove ovarian cysts. She did not learn this until 2004 when her attorneys reviewed her medical records to discover why her period stopped after her surgery. In several cases, women who did not sign consent forms or were not fully coherent when they signed the forms. In one case, the woman was sedated.<sup>53</sup> Although in some cases exigencies may require the provision of only cursory information before attempting to receive consent, very few of the cases we have heard fall into that category and almost none of these women were provided full information or support after they received the hysterectomy. Finally, almost none of the women we spoke to who received hysterectomies experienced counseling or medication needed to address the emotional and physical loss of one’s uterus and reproductive capacity.

Although most cases described here occurred in California, conversations with advocates in other states strongly suggest that this abuse is happening throughout the United States. Advocates in another western state specifically mentioned seeing questionable hysterectomies conducted right after childbirth on healthy women in their twenties.

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<sup>50</sup> Interview with prisoner in Central California Women’s Facility, in Chowchilla, Cal. (Apr. 22, 2004).

<sup>51</sup> According to the Mayo Clinic at [www.mayoclinic.com](http://www.mayoclinic.com)

<sup>52</sup> Interview with prisoner in Central California Women’s Facility, in Chowchilla, Cal, (June 25, 2005).

<sup>53</sup> Interview with prisoner in Central California Women’s Facility, in Chowchilla, Cal, (May 19, 2003).

Even more troubling is the fact that members of a California government prison advisory committee considered formalizing this procedure. In July 2006, members of this committee considered evaluating the cost effectiveness of doing “voluntary sterilizations” on people in prison who have recently given birth and installing IUDs in women in prison.

***Through not preventing the state prison system’s use of aggressive hysterectomies and ovary removals on women of color the U.S. government violates of article 5(b) and article 5(e)(iv) by failing to respect the right to bodily security and the right to public health.***

### **Violation of the Right to Safe Motherhood**

*“The prison medical doctors are not helping us pregnant women at all. We don’t get the right treatment that we need. I was really sick one day and it took them almost a week to see me.”<sup>54</sup>*

Pregnant women in U.S. prisons (2200 people in 1997-98, according to Amnesty International) face rampant violations of their human rights. Doctor visits are infrequent and erratic and in some cases, prison medical staff has ignored obvious warning signs of complications, such as extensive bleeding and cramping. Based on interviews and surveys in California, women receive erratic doctor visits that are disrespectful, and special dietary requirements are not met. And post-partum care is virtually non-existent. Even more troubling, although pregnant women are under enormous stress especially due to the uncertainty of not knowing what will happen to their child once born, mental health support is rarely, if ever, provided. Although these abuses impact all pregnant women in prison, the disproportionate imprisonment of women of color and certain comments by doctors strongly suggest that these abuses are worthy of consideration by the CERD Committee.

**Shackling:** Although Illinois and California recently changed their laws to prohibit shackling during labor, the other abuses remain unabated. In the other 48 states, federal prisons, and the District of Columbia and women may still be shackled during labor and after delivery, despite the American College of Obstetricians and Gynecologists’ (ACOG) specific opposition to the practice as dangerous to the well-being of the mother and the child.

In one case in Florida, a young woman was shackled while laboring for sixteen hours with an 8 pound baby. When the baby’s head started to crown, her doctor requested that guard remove the shackles. The guard cited protocol but still removed the shackles just as the baby was born. He put them back as soon as the baby fully emerged. In another case in Ohio, one woman remained in shackles during labor and birth, which was by caesarean section. The shackles remained on for the entire two days that she was in the hospital, limiting her ability to walk, which is one of the most important tools for recovering from a c-section.

In addition, pregnant women of color in California state prisons face consistent degrading treatment. In one case, an African-American pregnant woman was told by a prison officer that she was a “black twenty dollar infested ho.” This woman was told by prison medical staff that her baby would only be born with two or three fingers total, though her baby was ultimately born with all ten fingers. Despite being low-security with a minimal disciplinary record and no history of escape attempts, she was shackled to the bed at the ankle all day and all night for two days

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<sup>54</sup> Interview with prisoner in Valley State Prison for Women in Chowchilla, Cal. (Jan. 31, 2007).

unless she had to use the bathroom. She received no mental health care or treatment for post-partum depression, and was told by prison staff that “If you were out there, you wouldn’t have a baby anyway.”<sup>55</sup>

**Aggressive Deliveries:** According to advocates in another western state, women are not allowed to rest for sufficient time after birth, including caesarean sections. They also see evidence of rushed obstetric care, such as vaginal tearing, extreme episiotomies and possible cervical tears, including one African American woman being stitched up prior to giving birth to the placenta.<sup>56</sup> All of these can lead to permanent damage of reproductive organs. These advocates describe prenatal care as substandard at best, which is a description repeated by advocates from across the country.

*Through allowing this treatment of pregnant and birthing women by the state and federal prison systems the U.S. government violates of article 5(e)(i) by failing to respect the right to health.*

## **RELEVANT DOMESTIC LAW AND POLICY**

**Inadequate Legal Protection:** Domestic U.S. law requires that prison authorities provide adequate medical care to prisoners for serious medical needs, as a necessary means of avoiding cruel and unusual punishment prohibited by the Eight Amendment to the U.S. Constitution.<sup>57</sup> A violation occurs when there is deliberate indifference to a serious medical need. A serious medical need has been defined as one even a layperson would easily recognize as requiring for a doctor’s attention; one that causes substantial pain, significantly affecting an individual’s daily acts; or one that poses a risk of a lifelong handicap or permanent loss. Women with a history of complications during pregnancy or severely debilitating illnesses such as cancer are among those who are considered to have serious medical needs. Federal law also requires that prisons ensure that each pregnant woman is provided medical services, case management, and counseling.<sup>58</sup> However, there is no mention of the standard of care or if the law extends to post-partum care. Currently an effort in the U.S. Congress to prohibit shackling in federal prisons is underway but it is not certain that bill will pass, and even if passed it will have no effect on the 48 states that do not prohibit shackling.

**Non-enforcement of Existing Protections:** Sterilization also falls under U.S. Constitutional law, which holds that the ability to procreate is a fundamental right deserving of strict scrutiny.<sup>59</sup> In light of that fact and sterilization’s eugenics past, the federal government and ACOG have developed many regulations to protect people’s reproductive capacity. For example, federal and ACOG regulations state that no decisions about sterilization can be made in times of stress or undue pressure, that there must be a 30-day waiting period, and that valid consent to sterilization cannot be given during labor or within 24 hours of giving birth.

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<sup>55</sup> Interview with prisoner in Valley State Prison for Women in Chowchilla, Cal. (Jul. 16, 2004).

<sup>56</sup> Interview on file with Justice Now.

<sup>57</sup> *Estelle v. Gamble*, 429 U.S. 97, 102

<sup>58</sup> 28 CFR 551.22(a)

<sup>59</sup> *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

Despite these above mentioned legal protections and regulations, the federal government and the U.S. courts have done little to nothing to end these human rights violations and to provide any remedies to those who have experienced such abuses.

## **CONCLUSION**

U.S. Prisons do not provide adequate labor and birthing, prenatal and post-partum care, and have medical practices that amounts to violations to the right to bodily security and health, leading to the destruction of the reproductive capacity of women of color, and violates Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination.

## CONCLUSION

Based upon the case examples included in this report we strongly urge the Committee on the Elimination of Racial Discrimination to pay special attention to U.S. government's obligation to respect, protect, and fulfill the human rights of the most marginalized members of racial minorities, including but not limited to young Latina farmworkers, women of color in prison, and transgender women of color, in terms of its compliance with CERD articles 2 and 5.

### General Recommendations

- **Pass implementing legislation to give effect to CERD** including the identification of states and all branches of government under the treaty, and the obligation of the federal government to enforce compliance.
- **Ratify the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)**, thereby fulfilling the minimum standard for the respect of human rights asked of all nations.
- **Provide disaggregated data**, including, but not limited to, race, gender, age and sexual orientation, to better expose racial discrimination and develop remedies

### Girl-Child Laborers

- Amend the Fair Labor Standards Act to provide equal protection for all working children by modifying the provisions related to children working in agriculture by raising the age limit to 18 for hazardous jobs and a minimum age of 14 to perform other duties. Such an amendment would equalize protection for all working children.
- Develop procedures and mechanisms to effectively enforce existing rules and regulations at the national and state levels.
- Provide more accurate statistics and data on children working in the agricultural industry, including disaggregated data by gender.

### Transgender Women of Color

- Ensure that all transgender and gender variant youth, especially youth of color, are protected against harassment and discrimination, and provide funding for special programs intended to retain them in formal education.
- Immediately ban discrimination in employment based on gender identity at the federal level. Allow individuals and groups to sue for their rights under this law, and provide funding for government agencies to disseminate information on these protections to transgender and gender variant communities, schools, service providers, and employers.
- Provide funding for job placement, career counseling, and job creation opportunities and programs targeting transgender women and youth of color.

### Women of Color in Prison

- Ensure that all pregnant women in prison must receive adequate healthcare, including mental health support and should not be shackled during birth.
- Prohibit the performance of elective sterilizations on people in prison and ensure the approval of all medical sterilizations by a second doctor unconnected to the Corrections department.