



THE HUMAN RIGHTS PROJECT
AT THE URBAN JUSTICE CENTER

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NYC CERD Working Group

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EXECUTIVE SUMMARY

AND RECOMMENDATIONS

RACE REALITIES IN NEW YORK CITY

New York City is home to enduring race disparities. New Yorkers of color are less likely to graduate from high school, to have health coverage, or to own a home yet are more likely to live in poverty, to get arrested, to lack voting rights, or to live in foster care. Discrimination in any of these arenas can lead to discrimination in another—as witnessed, for example, by the link between arrest rates and voter disenfranchisement. The result is a nearly systematic experience of discrimination borne disproportionately by people of color. These race disparities, which persist even after controlling for income, are often the direct or indirect consequences of government policies and practices. Under the **International Convention on the Elimination of all forms of Racial Discrimination (CERD)**, to which the United States and thus New York City is party, New York City has an obligation to remedy this problem.

CERD AND GOVERNMENT OBLIGATIONS

CERD is one of the few international human rights treaties that the United States has ratified. As one of its obligations under CERD, the US government submitted a second report (US Report) to the Committee that oversees implementation of CERD—the Committee on the Elimination of Racial Discrimination or the “CERD Committee”—in April 2007. This report had several glaring omissions. For example, it failed to mention the government’s disgraceful response to Hurricane Katrina, nor did it discuss police brutality, one of the most obvious race problems in the United States. It did, however, mention the movie “Crash” as an example of how the US is combating racial prejudice. Moreover, despite persistent racial discrimination that affects thousands of New Yorkers, the US Report contains very little New York City-specific information.

THE NEW YORK CITY CERD SHADOW REPORTING PROCESS

To aid its review of the US Report in February 2008, the CERD Committee is also accepting additional information from non-governmental groups in the form of “shadow reports.” In an effort to supplement and critique the US Report, a coalition of New York City advocates came together to write and submit a shadow report that addresses race problems specific to New York City. The Human Rights Project of the Urban Justice Center coordinated this effort, beginning with training sessions that explained CERD, the United States’ and New York City’s obligations under CERD, and an analysis of the US Report. The coalition met several times over the course of six months to draft the shadow report, dividing into several smaller issue-area working groups, each of which contributed a chapter to the shadow report. Over the next year, the coalition will meet to develop a strategy for holding New York City accountable to its CERD obligations and plans to send a delegation to Geneva.

SUMMARY OF FINDINGS

The persistent discrimination against people of color and immigrants detailed in this report violates the City's obligations under CERD. The most frequent violations cited are of CERD Articles 2, 3, 5 and 6, as well as General Recommendations (GR) 19, 25, and 30. **Article 2** mandates that the government take all appropriate measures to eliminate discrimination; **Article 3** prohibits racial segregation and apartheid; **Article 5** guarantees enjoyment of all rights without discrimination; and **Article 6** guarantees effective legal protection and remedies against racial discrimination. **GR 19** clarifies that while some conditions of racial segregation "arise without any initiative or direct involvement by public authorities," governments "should work to eradicate the negative consequences that ensue;" **GR 25** addresses the gender-related dimensions of racial discrimination; and **GR 30** states that xenophobia against non-citizens, including migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism. In particular, the report found some of the following forms of discrimination, each of which violates a particular component of CERD:

EDUCATION

- In 2006, 43% of Black students and 41% of Latino students in New York City graduated on time, compared to 67% of White students and 68% of Asian students. For students with limited English proficiency (LEP), the graduation rate dropped to 22%. **Article 5.**
- New York City schools disproportionately suspend poor and minority students, for the same infractions: 8.3% for Blacks, 4.8% for Latinos, compared to 2.5% for whites. More than 90 percent of students in Second Opportunity Schools for students serving lengthy suspensions are Black or Latino. **Article 5.**

EMPLOYMENT

- Almost 80% of the City's higher paying administrative and managerial job positions are held by Whites. In contrast, while Blacks, Latinos and Asians make up 37%, 16% and 4%, respectively, of the city's workforce, they only account collectively for 19% of the total senior and executive staff of city agencies. **Article 2.**

HEALTH

- Black and Latino New Yorkers are more than twice as likely as White residents to be either uninsured or publicly insured, which also means that they are steered towards public hospitals or offered differential treatment in private hospitals. **Article 3.**
- The proportion of African Americans in a community is a strong predictor of whether a hospital will be closed, notwithstanding the community's health needs. **Article 5.**
- Although the city-wide infant mortality rate is 5.9, for African Americans it is 10.5. **Article 5.**

MENTAL HEALTH

■ In New York State, Blacks are almost three times as likely as their White counterparts to be subjected to court-ordered mental health treatment, and Latinos are twice as likely.

Article 5.

HOUSING

■ African Americans are over 5 times as likely, and Latino borrowers almost 4 times as likely, as White borrowers to receive high-cost home purchase loans. These sub-prime loans increase the likelihood of home foreclosure. Not surprisingly, 90% of people living in home-less shelters are Black and/or Latino. **Article 2.**

■ New York is the most segregated major metropolitan area for Latinos in the United States, and the eighth-most segregated area for African-Americans. **Article 3.**

CRIMINAL JUSTICE

■ Blacks and Latinos make up about half the general New York City population, but constitute 91% of the jail population. Over 92 percent of those serving drug-related sentences are Black and Latino. The majority of youth arrested for marijuana possession are black and Latino, yet the City's own statistics show that White youth are more likely to use illegal substances—such as marijuana—than Black youth. **Article 2.**

■ Last year, over half of police stops involved black suspects, 29% involved Latinos, while only 11% involved whites. When stopped, 45% of Blacks and Latinos were frisked compared to 29% of white suspects, even though white suspects were 70% more likely than black suspects to have a weapon. **Article 5.**

CHILD WELFARE

■ Black and Latino children constitute an overwhelming 86% of the child welfare system. In fact, half of the City's caseloads come from 15 community districts that are primarily Black and Latino. Furthermore, a study of Black children in New York City showed that they are also more than twice as likely as White children to be removed from the home after a substantiated substance abuse claim. **Article 2.**

DOMESTIC VIOLENCE

■ Women of color are arrested more often than White women when the police arrive at the scene of a domestic violence incident. In particular, police are more likely to arrest Black women due to stereotypes of them as overly aggressive. In New York City, one study found that more than 70% of the cases in which both partners in a domestic dispute were arrested involved racial minorities. **Article 6.**

IMMIGRATION AND NATIONAL SECURITY

■ Despite laws that mandate the availability of language assistance services by health care providers to LEP patients, 75% of hospitals in New York City do not provide consis-

tent and meaningful language access along key points of the health delivery process.

Article 5.

■ The informal sector, which is characterized by exploitative working conditions and very few labor protections, is composed predominantly of people of color. One in five of the immigrant population in New York City is undocumented, and must therefore work in the informal sector. An overwhelming 95% of domestic workers are people of color, 99% are foreign-born, and 93% are women. **Article 5**

VOTING RIGHTS

■ One in five New Yorkers is disenfranchised because of their status as non-citizen, and 78% of all non-citizens are people of color. Likewise, a disproportionate number of people disenfranchised due to incarceration or parole are Black and Latino. **Article 2.**

RECOMMENDATIONS

The City is encouraged to adopt the following recommendations in order to remedy discrimination and comply with its obligations under CERD. Prompt passage of the proposed Human Rights in Government Operations Audit Law (Human Rights GOAL) is a first and crucial step to adopting these recommendations. Please note that each chapter of this report also contains recommendations specific to its subject area.

■ ADOPTION OF CERD'S DEFINITION OF DISCRIMINATION

The definition of discrimination in CERD is more expansive than the definition of discrimination in the City's current civil rights laws. The City should adopt this more expansive definition.

■ GATHERING AND DISSEMINATING DISAGGREGATED DATA

One of the most difficult challenges in analyzing race disparities and the disparate impact of government policies and practices on people of color is the unavailability of racially disaggregated data. The City should develop a city-wide database to collect and publish performance and service data disaggregated at least by race and gender, and appropriately disaggregated by immigration status, sexual orientation, and gender identity. Furthermore, the City should institute separate categories for the four largest Asian groups in New York City, as well as for the Middle-Eastern and Arab populations.

■ DEVELOPING A COMPREHENSIVE PLAN TO COMPLY WITH CERD

The City should develop a comprehensive and proactive plan to identify and remedy discriminatory policies and practices that have a disproportionate effect based on race, gender, and immigration status, as well as all the protected classes in current New York City civil rights laws. The plan should include the creation of an independent agency to monitor and enforce compliance with CERD.

GLOSSARY

CERD: International Convention on the Elimination of all forms of Racial Discrimination

CERD COMMITTEE: Committee on the Elimination of Racial Discrimination

CIVIL SOCIETY: The non-governmental sector including non-governmental organizations, voluntary groups, professional associations, religious groups, labor unions, and other non-profits.

GR: General Recommendations, also called “General Comments” are the CERD Committee’s interpretation of the content of human rights provisions, organized around thematic issues.

LEP: limited English proficiency



LGBT: Lesbian, gay, bisexual and transgender

NYC: New York City, also called “the City” in this report

NGO: non-governmental organization

RATIFY: an act of formal acceptance in which a country indicates its consent to be bound to a treaty

SHADOW REPORT: reports submitted by NGOs to the CERD Committee to supplement the periodic state party reports

STATE PARTY: countries that have signed and ratified CERD

UDHR: Universal Declaration of Human Rights

UN: United Nations

US REPORT: submission by the United States government to the CERD Committee combining its fourth, fifth and sixth Periodic Reports and describing its compliance with its CERD obligations



DEMOGRAPHIC TABLE NYC



	Total	Black	Latino	Asian	White
NYC Population	7,930,854	2,002,787	2,221,906	921,453	2,743,160
Foreign born Population	2,915,722	640,372	908,722	676,829	665,199
Household Income	\$43,434	\$35,641	\$30,005	\$48,229	\$59,727
Poverty Rate	1,500,000	*21.4%	28.6%	17.9%	10.9%

*Refers to percentage of people within each racial group living in poverty
Source: 2005 American Community Survey

INTRODUCTION



There is a fundamental race problem in New York City. Race discrimination is evident in the disparities seen in almost all spheres of life including education, employment, housing, health, child welfare, criminal justice, mental health, domestic violence, immigration, and voting. Among other things, New Yorkers of color are less likely to graduate from high school, to have health coverage, or to own a home. They are however more likely to live in poverty, to get arrested, or to live in foster care. More importantly, the effects of such discrimination are not experienced individually, but instead have a compounding effect that serves to deny people of color some of their most basic human rights, entrapping many in a cycle of poverty. Over 1.5 million people—a population roughly eight times that of Geneva's—live below the federal income poverty level in New York City (“the City”).¹ People of color constitute over 80 percent of that population. While poverty is linked to the discrimination faced by people of color, it does not account for it in full: studies show that racial and ethnic disparities in social indicators persist even when controlling for income. And yet, overall, the extent and depth of the problem largely goes unacknowledged.



More importantly, racial disparities persist despite the fact that New York has one of the most comprehensive civil rights laws in the country. In fact, disparities are often the direct or indirect consequences of existing government policies and practices. Under the **International Convention on the Elimination of all forms of Racial Discrimination (CERD)**, which the United States and thus New York City has formally accepted, New York City has an obligation to remedy these disparities.

The following report titled ***Race Realities in New York City*** will be submitted to the United Nations Committee on the Elimination of Racial Discrimination (CERD Committee), the body set up to oversee implementation of CERD. The report highlights:

- Situations of persistent discrimination against people of color and immigrants in New York City that violate the City's obligations under CERD;
- Current disparities based on race and ethnicity in New York City, and government policies and practices that create or aggravate these disparities;
- Federal, state, and local government shortcomings in addressing and eliminating race disparities and discriminatory practices; and
- Recommendations for what governments at the local, state, and federal levels can do to remedy discrimination and comply with their obligations under CERD.

US REPORT ON CERD COMPLIANCE

CERD is the primary international human rights treaty on eliminating racial discrimination. It is also one of the few human rights treaties that the United States has formally accepted. The government of the United States has an obligation under CERD to submit a periodic report to the CERD Committee on steps the US has

taken to address racial discrimination at the federal, state and local levels. In April 2007, the United States submitted a report (US Report) to the CERD Committee that will be reviewed in February 2008, in Geneva, Switzerland. This US Report combined the government's overdue fourth, fifth and sixth periodic reports, and is the second report that the United States has submitted since it ratified CERD in 1994.

The US Report provides almost no specific information about New York City and fails to address key issues that are relevant to New Yorkers of color, such as police brutality, child welfare, and domestic violence. The US Report also lacks any meaningful information and analysis on some of the issues—health, housing, employment, and education—that it does cover, and does not account for persistent race disparities in these areas. Instead, in its report, the United States government repeatedly reminds the CERD Committee that federal and state constitutions and laws provide sufficient protection for compliance with CERD, and that United States law does not recognize the social, economic and cultural rights guaranteed in international law.⁸

GOALS OF THE SHADOW REPORTING PROCESS

Recognizing the potential for deficiencies in the periodic reports that governments submit, the CERD Committee also accepts reports from non-governmental organizations (or civil society). These reports are called “shadow reports.” The CERD Committee uses shadow reports to guide its questioning of the US during oral presentations. In an effort to supplement and critique the US Report, a coalition of New York City advocates came together to write and submit to the CERD Committee a shadow report that provides information specific to New York City.

This report is intended to assist the CERD Committee in its preparations for the review of the US Report in February 2008. Its ultimate goal is to hold the United States and New York City accountable to their obligations under CERD. It does this by providing the CERD Committee with supplementary information on race disparities and racial discrimination in New York City. Specifically, this Shadow Report examines race disparities and discrimination in nine different areas: education, employment, housing, health, criminal justice, child welfare, domestic violence, immigration, and voting rights. The Shadow Report also recognizes that men and women of color experience discrimination differently, and that the experience of discrimination is often exacerbated by membership in other marginalized groups including

immigrants, lesbian, gay, bisexual and transgender (LGBT) people, and youth. To the extent that data were available, this report provides an intersectional analysis of race, gender, age, immigration status, and sexual orientation. The information in this report has also been submitted to the US Human Rights Network for inclusion in the national CERD Shadow Report, to be filed with the CERD Committee. On the local level, this Report will be used to monitor New York City's compliance with CERD, and to push for an action plan to address race disparities in New York City.

UNAVAILABILITY OF DISAGGREGATED DATA

One of the greatest challenges in analyzing race disparities and the disparate impact of government policies and practices on people of color is the dearth of data disaggregated by race and ethnicity. The need for disaggregated data cannot be over-emphasized, as it is the first step in appropriately addressing the problem. Yet, New York City agencies do not regularly publish performance and service data disaggregated by race. In fact, the New York City Police Department ("NYPD") appears more disposed to publishing disaggregated data for dogs than it does for human beings.¹¹ It is even more difficult to obtain data disaggregated by both race and gender, or data that accounts for immigration status, sexual orientation, and gender identity.

When race data is available, it is often disaggregated according to racial definitions used by the US Census. However, these categories are overly broad and blatantly omit important racial and ethnic groups, making it difficult, if not impossible, to obtain an accurate picture of racial disparity. According to the 2000 Census, New York City is home to approximately 200 ethnic groups who speak some 115 languages.¹² Yet disaggregated data provided by the City is mostly confined to five major racial



groups — Caucasian, Latino/Hispanic, African American, Asian, and Native American.^v There are often no sub-categories for the four largest Asian ethnic groups in New York City—Chinese, Indian, Korean, and Filipino—which makes it difficult to assess the differential impact of policies on one Asian ethnic group compared to another.

One of the most serious data omissions is that of a specific category for Middle Easterners, Arabs and North Africans. The United States Census Bureau defines “White” as people “having origins in any of the original peoples of Europe, the Middle East, or North Africa.”^{vi} Thus even those who choose to write in Arabic, Iranian, Near Easterner, or Lebanese are considered part of the White racial category.^{vii} Even though discrimination against Middle Easterners in New York City and the rest of the nation has intensified since 9/11, becoming a major human rights concern, there is no way to measure such discrimination effectively since Middle Easterners are still officially classified as White. The CERD Committee noted this omission in its Concluding Observations to the first report submitted by the United States in 2001.^{viii} While the United States attempted to respond to this, and acknowledged that New York City has one of the largest Arab populations in the country, it is unclear that a specific category will be created for Middle Easterners in the next Census.^{ix}

NEW APPROACH OFFERED BY CERD: EFFECTS RATHER THAN INTENT

In its report to the CERD Committee, the United States asserts that there are sufficient laws to address discrimination domestically, but neglects to mention that these laws have been rendered ineffective for most victims of discrimination.^x Recent court decisions such as *Alexander v. Sandoval* have prevented people of color from obtaining remedies to racial-



ly discriminatory actions committed by entities that receive federal funds.^{xi} And while people can still sue for *intentional* discrimination, it is very difficult to meet the high burden of proof required to show that the discrimination was intended.^{xii}

CERD defines racial discrimination as any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Discrimination, as it is defined under CERD, includes any government policy that has the effect of discriminating against people of color.^{xiii} A policy can *result* in a distinction, exclusion, or restriction “based on” the fact of one’s race without that policy being *intentionally directed towards* members of one particular race or national origin. Under CERD, such a policy would be discriminatory and the CERD Committee has explicitly maintained this interpretation.^{xiv}

Domestic anti-discrimination laws require most victims of discrimination to prove the discriminatory intent of the policy that they seek to remedy. Because intent can be cloaked behind apparently even-handed practices, this burden of proof is extremely difficult to meet

whose negative consequences disproportionately affect people of color.

In general, CERD offers a stronger set of protections than those currently in use under US law. These protections include a broader definition of discrimination, an affirmative obligation on government to address racial discrimination, an emphasis on the collection of disaggregated data, and an allowance for special temporary measures to address disparities. The breadth of protections in CERD makes it a better instrument for tackling contemporary forms of discrimination, which tend to be indirect and characterized by their consequences rather than founding intentions. Yet the United States and New York City governments refuse to acknowledge the superiority of CERD protections.

In particular, the present mayoral administration under Michael Bloomberg has stated that current laws are sufficient to address and avoid racial discrimination.^{xv} While it is true that New York City has strong civil rights laws that protect against racial discrimination, enforcement of some of these laws has been limited by recent court cases, as mentioned earlier. When one examines how prepared the City is to deal with the possible discriminatory effects of current policies, one often finds that its ability is compromised. For example, the New York City Commission on Human Rights, the city agency primarily responsible for investigating and prosecuting discrimination complaints, is understaffed and underfunded. Despite a brief period of reinvestment in 2002, the agency has seen budget cuts since 1991, with staff falling from a high of 152 about 15 years ago to only 80 last year.^{xvi} Moreover, the Commission’s bureau responsible for the investigation, mediation, and enforcement of possible violations of the City Human Rights Law has only 26 employees, including 13 attorneys—half of what it had been in 2002.^{xvii}

Nevertheless, under CERD, the US govern-

the poverty rate for
people of color, is almost

2.5

times that of Whites

successfully under domestic law. In comparison, the standard for equality and fairness created by CERD insists on looking at the evidence of discriminatory effects as opposed to determining foggy notions of intent.

For example, the disenfranchisement of felons may not be intended to exclude or restrict any particular racial group, yet the effect falls disproportionately on people of color and is thus a human rights violation under CERD. In the face of restrictive domestic law, CERD’s more expansive definition of discrimination allows victims to seek redress for a wider range of policies and practices

ment is required to address disparate impact through “effective review [of] governmental, national and local policies, and [through the] amend[ing], rescind[ing] or [nullification of] any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”^{xviii} Moreover, CERD’s requirements apply to all levels of government—federal, state and local. Like the federal government, the City has no effective means of addressing facially neutral policies and practices that have the sometimes unintended consequence of discriminating against people of color. As evidenced in the following chapters of this Report, such unintended consequences are pervasive, constituting a *de facto* state of discrimination that the Federal, State and local governments have failed to address. The City in particular relies too heavily on expensive litigation as a remedy, which is a reactive strategy. By contrast, embracing the standards in CERD would allow the United States and New York City to tackle discrimination and race disparities *proactively and systematically*, reducing the need to point fingers or identify scapegoats once victims have suffered.

NEW YORK CITY’S OBLIGATIONS TO COMPLY WITH CERD

CERD makes clear that both national and local government actors are required to comply with its terms. Article 2 of CERD states that “Each State Party undertakes to engage in no act or practice of racial discrimination . . . and to ensure that all public authorities and public institutions, *national and local, shall act in conformity with this obligation.*” The article goes on to say that “each State Party shall take effective measures to *review governmental, national and local policies*, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”^{xix}

Article 4 declares that “[States] [s]hall not

permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”^{xx} State parties to CERD have thus committed not only national governments, but also local actors to actively uphold and enforce CERD provisions.

In General Comment 13, the CERD Committee elaborates its notion that national and local actors are bound by the treaty: “In accordance with [article 2(1) of CERD], States parties have undertaken *that all public authorities and public institutions, national and local, will not engage in any practice of racial discrimination.*”^{xxi}

Moreover, upon ratifying the provisions of CERD, the United States explicitly committed itself to acting on both a national and local level to end discrimination. In its reservations and understandings submitted to the CERD Committee upon ratification in 1994, the United States explicitly agreed that federal, state, and local actors are obliged to implement CERD to the extent to which their respective jurisdictions are capable: “[T]he United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.”^{xxii}

Because the United States is obliged to ensure enforcement of CERD by local, state, and federal actors, the Federal government, the State of New York, and the City of New York have an affirmative legal duty to monitor local laws, policies, practices, and regulations to ensure that they are consistent with CERD provisions. Adopting the recommendations in this Report will be an integral step towards compliance with CERD.

EDUCATION

This chapter details racial discrimination in New York City's education system, including: the persistent segregation of New York City schools; racial disparities in educational attainment, school resources, and school disciplinary policies; limited availability of translation services for English Language Learners; and military recruitment that targets minority students in low socioeconomic status schools

1. High school graduation rates for Blacks, Latinos, American Indians, Native Alaskans and Native Hawaiians across the country are consistently lower than for Whites and Asians.¹ In New York City, Black and Latino students are far more likely than white students to attend lower performing schools that have fewer resources, less qualified teachers, harsher disciplinary measures, and inferior educational outcomes. Graduation rates in the city are also much lower for Blacks and Latinos, as are reading and math test scores. In addition, New York City has one of the most segregated school systems. The educational laws, policies, and practices that result in widespread racial discrimination in the city's schools are in violation of CERD.

2. The US Report does not provide a complete picture of race discrimination in education, and contains no New York City-specific information. As correctly asserted in the US Report, racial segregation in education has been prohibited by law in the United States since the 1954 landmark case of *Brown v. Board of Education*, 347 U.S. 483 (1954). Nevertheless, the actual racial composition of New York City schools is almost as segregated as it was in the South in the 1950s.² This section of the report provides additional information on racial discrimination in New York City, including: the persistent segregation of New York City schools; racial disparities in educational attainment, school resources, and school disciplinary policies; limited availability of translation



services for English Language Learners; and military recruitment that targets minority students in low socioeconomic status schools.

SEGREGATION

Under Article 3, the U.S. must “undertake to prevent, prohibit and eradicate all practices” of racial segregation. General Recommendation 19 further clarifies that while some conditions of racial segregation “arise without any initiative or direct involvement by public authorities,” governments “should work to eradicate the negative consequences that ensue.”

3. Although racially segregated, New York City schools are not subject to *Brown’s* mandate because the Supreme Court held that only state-mandated segregation (de jure segregation) is unconstitutional.³ School segregation that is not mandated by the state (de facto segregation) is

constitutional. Thus, because New York City's segregated school system is largely based on housing patterns,^{iv} and therefore not mandated by the state, federal courts cannot order New York City schools to desegregate.

4. According to a study by the Lewis Mumford Center at the State University of New York at Albany, Asians and Latinos in New York State are more segregated from whites than in any other school system in the country.^v Similarly, 60 percent of all black students in New York State attend schools that are at least 90 percent black.^{vi} As studies show, segregation is strongly related to low graduation rates, even after controlling for poverty.^{vii} Segregation in schools can also affect test scores and the array of classes to which children in those schools have access. A comparison of two schools, P.S. 6 on the Upper East Side in Manhattan, and P.S. 6 in Brooklyn's East Flatbush neighborhood provides a striking example. P.S. 6 in Manhattan, which is overwhelmingly white, offers foreign languages and a joint program with the Museum of Natural History. More than 92% of students there meet the state standards of reading and math at their grade level.^{viii} Compare this to P.S. 6 in Brooklyn: 92% of the school is Black, 90% qualify for a free school lunch, but only 40% meet the state standards for reading.^{ix}

5. Research has documented that in some neighborhoods in New York City educational segregation is even worse than residential segregation. For example, in one district in New York City, the total population of elementary school students is 38.2% black, 33.52% Latino, and 22.84% white.^x However, individual elementary schools in the district show a clear pattern of racial concentration.^{xi} Whereas the white population for some schools in this district ranges between 39 and 64%, there are elementary schools where over 95% of the student body is of color.^{xii} Segregation like this occurs because school administrators exclude low-income families of color from certain elementary schools.^{xiii} Nevertheless, CERD has held that governments, in this case New York City, should address the

negative effects of segregation even if they are not linked to government policies or practices.

6. In June 2007, the United States Supreme Court announced a constitutional barrier to voluntary school desegregation programs. In *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007), the Court rejected voluntary desegregation plans in the Seattle, WA and Louisville, KY school districts, holding, in part, that public schools may not use race as the sole determining factor for assigning students to schools. Thus, even if New York City decided to dismantle its segregated school system, it would have to carefully craft a voluntary desegregation program that did not violate the recent decision. The laws, policies, and practices of New York City and the United States have resulted in segregated schools, and the government has failed to eradicate this segregation—in violation of CERD Article 3 and General Recommendation 19.

EQUAL RIGHT TO EDUCATION

Under Article 5, the U.S. must “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the . . . right to education.”

7. In 1973, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Supreme Court of the United States held that education is not a “fundamental right” protected by the United States Constitution. Under this decision, a state can provide an unequal education to children without violating the Constitution. Thus, there is no federal remedy for children of color who disproportionately attend schools with grossly inadequate resources.

8. Nonetheless, the Education Article of the New York State Constitution does provide a right to education, stating that “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”^{xiv} New

York's highest court has interpreted this provision as requiring the State to "ensure the availability of a 'sound basic education' to all its children" by providing "the opportunity for a meaningful high school education, one which prepares them to function productively as civic participants."^{xv} In addition, several federal laws prohibit discrimination in education on the basis of race, national origin, sex, and disability;^{xvi} and provide federal funding for schools with high poverty and other children in need of assistance.^{xvii}

9. Unfortunately, despite these provisions, New York City continues to violate Article 5 of CERD. New York is far from ensuring that all students have access to the quality education they deserve. New York City schools continue to fail the populations of students that are most in need, as minority and poor students are disproportionately concentrated in schools that have lower test scores, higher drop-out rates, less qualified teachers, harsher disciplinary policies, fewer demanding classes, and lower percentages of students who will finish college.^{xviii}

DISPARITIES IN EDUCATIONAL ACHIEVEMENT

10. Sharp racial disparities in education are present even before children enter school.^{xix} These racial disparities *expand* with each year children attend school.^{xx} For example, while African American children begin elementary school approximately one year behind white children in vocabulary knowledge, they finish high school approximately four years behind white children.^{xxi} As described later in this section, one major cause of disparities is the difference in state funding. Students of color are likely to attend schools with dramatically fewer resources, which results in lower teacher quality, larger class size, and inadequate facilities.^{xxii} Other causes include the lower expectations that teachers and administrators have for students of color;^{xxiii} the greater likelihood that minority students will be retained a grade or placed in spe-

cial education classes where they will pursue a less demanding curriculum;^{xxiv} shorter school days and less time devoted to enrichment activities that comparable white students receive;^{xxv} and underperforming schools that perpetuate minority students' underachievement.^{xxvi} Research shows that these factors are the result of discriminatory policies and practices that assign the poorest, least prepared minority children to the least prepared instructors in the poorest quality schools where the racial disparity only increases.^{xxvii} These disparities have affected communities across the country, and have had a negative impact in New York.

11. In New York City, schools with higher test scores tend to have greater numbers of white and Asian students, while schools with lower test scores are more likely to be composed primarily of Black and Latino students.^{xxviii} In fact, the high-performing middle schools are more than 30 percent white and nearly 20 percent Asian, while the low-performing middle schools serve a student body that is nearly 100 percent black and Latino.^{xxix} New York City's most selective high school, Stuyvesant, admits students based on a test but less than 10 percent of students at Stuyvesant are black or Hispanic.^{xxx} In general, Black and Latinos students score significantly lower than whites and Asians on standardized tests and are less likely to graduate from high school. For example, across the state of New York, approximately 94 percent of white students who began high school in 1999 were seniors in June 2003, while only 61 percent of Hispanic students and 65 percent of black students were seniors at that time.^{xxxi} In 2005, white and Asian high school seniors in New York State graduated at almost twice the rate of black and Hispanic students.^{xxxii} For Black and Latino males in particular, graduation rates are alarmingly low.

12. Compare this with 2006 New York State Department of Education figures for New York City: 43% of Black students and 41% of Latino students in the city graduated on time, com-

pared to 67% of White students and 68% of Asian students.^{xxxiii} For ELL students, the rate drops to 22%. While the City saw a modest increase in overall graduation rates, it was accompanied by a 5% increase in student dropouts.^{xxxiv} It should be pointed out that the graduation numbers provided by New York State are generally lower than the ones provided by New York City, the result of different methods of calculation, with New York City counting GED towards its graduation rates.^{xxxv}

13. New York schools provide Regents diplomas to students who pass a certain number of basic tests. While 57 percent of white and Asian students graduate with Regents diplomas, only 25 percent of Black students and Latino students acquire a Regents diploma.^{xxxvi}

14. By assigning students to classes that cannot prepare them for college, discriminatory tracking works to keep students of color out of college. This is a clear violation of CERD Article 5.^{xxxvii} Many parents and students are not told what college prep classes are required for college eligibility.^{xxxviii} Thus many Latino parents, accustomed to Latin American schools that prepare all students equally^{xxxix}, become angry and concerned when they discover that their children will not be eligible for university because counselors and teachers either did not provide them with the option to take college prep and honors classes or excluded them from such classes because of prior grades.^{xl} A lack of universal access to a college preparatory curriculum has a disproportionate effect on low-income and minority students. Parents of color traditionally have fewer resources for challenging discriminatory tracking and thus even high-achieving students of color may find themselves ineligible for direct enrollment to university.^{xli}

15. Though researchers devote a lot of attention to racial, ethnic, and socioeconomic disparities in the school system, gender disparities must also be considered, especially within the minority population. In New York City public high schools,

where the majority of the population is nonwhite (86%), a disproportionate number of women graduate as compared with men.^{xlii} Overall, the graduation rate for girls was higher: 56% compared to 43% for boys.^{xliii} At the City University of New York (CUNY), women comprise the majority of black and Latino undergraduates.^{xliv}

LACK OF TRANSLATION AND INTERPRETATION SERVICES

16. For many minority students, language can be a barrier to educational opportunities. Approximately 43% of public school students in New York City—some 500,000 students—speak a language at home other than English.^{xlv} Approximately 140,000 students are enrolled in English Language Learner programs because they do not speak English proficiently.^{xlvi} While Spanish and Chinese are the most commonly spoken foreign languages, almost 200 languages are routinely spoken in New York City.^{xlvii} For parents too, language can be a barrier to participating in children's education. The challenges include obtaining parents' signatures for consent forms, communicating with parents in an emergency, addressing disciplinary matters, deciding whether to enroll their children in English Language Learner programs, parent-teacher communication, parents' involvement in parent-teacher associations, parents' ability to understand report cards and to assist their children with their homework.^{xlviii} Yet, state law does not require the Department of Education to provide translation from English except for a very limited set of documents concerning special education evaluation and placement.^{xlix}

DISPARITIES IN SCHOOL RESOURCES AND EXPENDITURES

17. A study found that the New York City Department of Education inequitably distributes educational resources associated with positive behavior.^l For example, strong teacher qualifications, which were statistically associated with

positive student behavior regardless of race or poverty, were much more likely to be found in schools with higher concentrations of white, Asian, and non-poor students.^{li} Rather than investing in teachers with strong qualifications, New York has devoted considerable resources to creating stricter disciplinary policies with harsher penalties in schools with large populations of students of color and low-income students.^{lii}

18. In the case of *Campaign for Fiscal Equity v. State of New York*^{liii}, testimony and reports from various educational experts highlighted the blatant disparities in the state's allocation of funding to New York City schools, which have a student population with a disproportionately high number of students of color.^{liv} Hamilton Lankford, Professor of Economics at SUNY Albany, presented evidence that teachers in New York City are not nearly as qualified as those in the rest of the state, testifying that 14% of New York City's teachers are uncertified.^{lv} His report also found that those students with the greatest educational needs are usually taught by the least-skilled teachers.^{lvi} Evidence demonstrating that more money, well spent, can have a direct and dramatic effect on student achievement was also presented. For example, Ronald Ferguson of Harvard's Kennedy School of Government presented compelling evidence linking better-qualified teachers to higher teacher salaries and higher student performance.^{lvii} Additionally, Former Schools Chancellor Harold Levy reviewed over 10 years of school funding allocations and found that, in almost every year, New York City received precisely the same funding increase, regardless of the City's student needs, wealth, enrollment, or attendance.^{lviii} New York City spends half the amount per pupil that the affluent, largely white, Long Island suburb of Manhasset spends.^{lix} Furthermore, unlike most other major urban districts nationwide, New York City spends less than the statewide average.^{lx} This funding disparity existed despite the fact that, as New

York's highest Court observed, "a substantial number of New York City students are said to be at risk of doing poorly in school because of socioeconomic disadvantages, including poverty, race, and limited English proficiency. The record establishes that these students need more help than others in order to meet educational goals, such as extended school programs, remedial instruction, and support services."^{lxi}

19. In 2003, in *CFE v. State*, New York's highest court struck down the state's school-funding system as unconstitutional.^{lxii} The court found that New York City's schools were insufficiently funded by the state to provide a sound basic education as required by state constitution.^{lxiii} After the decision, then-Governor Pataki and the New York State Legislature blatantly failed to enforce the decision. Despite a budget surplus of \$3.3 billion, Governor Pataki recommended that a mere \$637 million be added to school aid. That figure would barely allow school districts to maintain the services they were already providing.^{lxiv}

In April of 2007, the New York State Legislature and Governor Elliot Spitzer enacted an education law to provide school funding through a new funding formula, Foundation Aid, designed to distribute state aid based on the needs of students.^{lxv} The law also established a new accountability system that requires the fifty-six high-needs districts to complete an annual Contract for Excellence that describes how the district will spend the new state aid^{lxvi}, particularly with respect to creating or expanding programs that are proven to improve student performance.^{lxvii} These programs must be targeted toward students with the greatest educational needs — those in poverty, with disabilities, and with Limited English Proficiency.

20. Nonetheless, the Contract's lack of specificity and transparency make anything but a cursory review and analysis difficult.^{lxviii} The Campaign for Fiscal Equity has assessed the Contract and found that significant sums

of money are being distributed to high-performing schools within high-performing districts. Moreover, the contracts fail to show how the \$225 million is being distributed to particular schools on the basis of poverty and performance.^{lxxix}

21. In 2006, the New York City Department of Education (DoE) recommended a 1,703-seat reduction in planned school construction in the Bronx.^{lxxx} While the DoE claims this will “end overcrowding,” the reduction actually plans for failure, by counting on 54% of incoming New York City 9th graders not reaching the 12th grade.^{lxxxi} By using such failure projections, the DoE is able to show a net decrease in the demand for high school seats in the Bronx, which in turn allows it to recommend that the New York City Council reduce high school construction, even though high schools in the Northwest Bronx remain severely overcrowded.^{lxxxii} According to the projections, in all of New York City only 46% of 9th graders will make it to the 12th grade; in the Bronx, only 36%; in Brooklyn, only 42%; in Manhattan, 50%; in Queens, 51%; and in Staten Island, the borough with the least

number of minority students, 64%.^{lxxxiii} This assessment does not take into account the DoE’s goal of graduating 70% of its high school students in four years, which will actually require more than 26,000 additional seats in all of New York City.^{lxxxiv} This planning formula is particularly problematic for New York City public schools, which consist of roughly 85% minority students.

22. The City appears to be more disposed to directing resources to stricter disciplinary policies that have a disproportionate effect on students of color, such as the New York City Impact Schools Initiative. Begun by the Mayor’s office, the New York City Police Department, and the Department of Education, the Initiative targets schools with high levels of reported crime, using increased policing and zero tolerance policies. Impact Schools have higher percentages of Black students, lower percentages of students performing at grade level in math, and lower average spending per student.^{lxxxv}

23. A study found that after a semester under the impact designation, school suspensions and reported police incidents had increased, while attendance had decreased^{lxxxvi}, to 4.2 percent.^{lxxxvii}



This equaled 10.1 fewer days on average, per student, than in non-Impact Schools.^{lxviii} Experts fear that the increased police presence that comes with the Impact program might heighten stress, take away dignity, and transform schools into unwelcoming places.^{lxix} Although some decline in crime in Impact Schools was reported, it was not statistically significant.^{lxx} Given that the Impact Schools enroll significantly higher percentages of African American students, the program sends a dangerous message about who the City is or is not willing to educate.^{lxxi}

SCHOOL TO PRISON PIPELINE AND DISPARITIES IN SCHOOL DISCIPLINE

24. The School to Prison Pipeline is a nationwide system of policies that pushes students from the school system into the juvenile and criminal justice systems.^{lxxii} While safety is a valid concern for school students, including in New York City, the system disproportionately targets youth of color and youth with disabilities.^{lxxiii} In New York City, these policies include over-policing in schools with disproportionately black, Latino, and low-income students; zero tolerance policies that involve police personnel in minor incidents; and over-reliance and disproportionate use of suspensions.^{lxxiv}

25. At the start of the 2007 school year there were approximately 5,000 school safety agents (SSAs) and 200 armed police officers in New York City's public schools, especially in schools with predominantly minority student populations.^{lxxv} These numbers would make the NYPD's School Safety Division the 5th largest police force in the country – larger than the police forces of Washington D.C., Detroit, Boston, or Las Vegas. In fact, New York City has more SSAs per student than other cities have police officers per citizen^{lxxvi}—for example, twice as many per student than San Antonio has police officers per citizen.^{lxxvii} This burden weighs most heavily on the city's most vulnerable children, who are disproportionately poor, black and

Latino.^{lxxviii} School police personnel are not directly supervised by school administrators and are often not adequately trained to work in an education setting, which means they often extend their authority beyond issues of safety. The New York City Civil Liberties Union has received hundreds of complaints from students and teachers about rough treatment of students and unwarranted arrests by the SSAs.^{lxxix}

26. During the 2004-2005 school year, the proportion of black and Latino students in the average high school in New York was 71%. Yet, in schools with metal detectors, that number rises to 82%.^{xc} The disparities between schools with and without permanent metal detectors are striking. The former see police and SSAs get involved in twice as many non-criminal incidents, have 48% more suspensions, and receive less funding: \$9, 601.87 per student, compared to the citywide average of \$11,282.^{xcii} At schools with metal detectors and a student body of more than 3,000, that amount actually drops to \$8,066.^{xciii} Increasing over-reliance on school suspensions also contributes to the School to Prison Pipeline. Moreover, New York City schools often subject students to excessive and inappropriate punishments and suspensions for minor infractions, further excluding them from the learning process and ultimately pushing them out of schools.

27. Most recently, attention has focused on the October 9, 2007 arrest of an honor student and her principal by school safety officers.^{xciii} The student, Ismar Gonzales, 17, arrived to school early to speak with her teachers. The officers told her to leave and return at a later time. She became confrontational and ended up hitting one of the safety officers. Her principal, Mark Federman, tried to intervene and was arrested for obstruction of government activity. The principal and student were then led away in handcuffs, before the entire student body entering for the day.^{xciv} Mr. Federman's arrest was reminiscent of the 2005 arrest of Michael

Soguero, a principal at a Bronx high school accused of interfering with an attempted arrest of a student who had been cursing in a hallway. Mr. Soguero was kept out of the school for two months, but the charges were later dropped.^{xcv}

28. New York City schools disproportionately suspend poor and minority students, for the same infractions^{x cvi} : 8.3% for Blacks, 4.8% for Latinos, compared to 2.5% for whites.^{x cvii} In fact, more than 90 percent of students in New York City's Second Opportunity Schools for students serving lengthy suspensions are black or Hispanic.^{x cviii}

29. Researchers from the National Economic and Social Rights Initiative (NESRI) conducted qualitative interviews and focus groups in New York City schools. They found that because teachers often do not have the training and support needed to foster a positive climate for students they resort to degrading and abusive comments, as well as disciplinary action.^{x cix} Moreover, teachers and school administrators often stereotype students based on how they dress, and even make disparaging comments based on those stereotypes, such as that students will "end up in the ghetto like everyone else" from their neighborhoods.^c

30. Drawing on five months of participant observation in an under-funded, over-crowded New York City public high school that is 90% Latino, one researcher found that both formal and informal institutional practices within schools perpetuate race and gender stereotypes in ways that significantly affect students' outlook on education.^{ci} School staff tended to view young men as threatening and potential problem students, while treating young women in a more sympathetic fashion.^{cii} For example, security guards were more likely to manhandle and apprehend students involved in an altercation if the students were male.^{ciii} Furthermore, teachers commonly defined male students who wanted to participate in classroom dialogue as disruptive.^{civ} In many overcrowded urban

schools, "so-called feminine traits, such as silence and passivity, are valued and rewarded." The "good" student is profiled as a "young lady," whereas the "bad" student is constructed as a male troublemaker.^{cv}

MILITARY RECRUITMENT IN SCHOOLS

31. The passage of the No Child Left Behind Act (NCLB) in 2001 granted substantial privileges to the Department of Defense (DOD) to collect contact and educational information about students, ages 17 or older.^{cvi} Under a provision of NCLB, schools are required to submit lists of students to the DOD or the schools lose federal funding. The DOD is then allowed to receive information about each student, unless the student opts-out. The opt-out must be written and signed by a parent. In addition to the submission of student information, the schools must also allow the DOD access to the school that is equivalent to that of prospective employers and colleges.^{c vii}

32. The DOD launched a new recruitment program, Joint Advertising and Market Research Studies, or JAMRS, through which it collects information such as students' social security numbers, ethnic origin, and gender.^{c viii} By adopting these practices, the DOD goes beyond the provisions in NCLB and demands access to information to which no other agency or department is allowed. The New York Civil Liberties Union (NYCLU) has stated that the DOD values ethnicity information because it traditionally targets African-American and Latino populations.^{c ix} Military recruiters especially target working-class youth and communities of color because these communities lack access to good schools and jobs.^{c x} Recruiters frequently and inappropriately use instructional time for recruiting, intentionally misinform students about the requirements and realities of enlistment, and exceed the prescribed limits on their presence in schools, actions which would not be tolerated in schools with predominantly white, middle class students.^{c xi}

RECOMMENDATIONS

In their current state, New York City public schools fail to support children of color in their full and equal enjoyment of the right to education, as guaranteed by Article 5. For the City to remedy this, it should re-examine the assumptions that guide its current policies and acknowledge the existence of racial disparities in its schools. The City should also adopt policies, with commensurate funding, that reflect proven best practices in closing the achievement gap, including:

- **Encouraging the creation of smaller class size**, to foster the instructional support needed to increase student achievement and reduce the achievement gap. Schools should also encourage long-term relationships between adult professionals and students, and should create an environment in which counselors work closely with teachers and families to ensure proper educational support for students. Reduction of class size must be accompanied with the hiring of more professionals.

- **Creating school environments that are safe, orderly, and child-friendly learning centers** for children and their communities. To achieve this, the City should adopt alternative security measures that foster dignity, trust, and community building rather than police presence in schools. Schools should be used to promote community involvement and learning after school hours.

- **Acknowledging the right of parents and guardians to substantial decision-making power with respect to their children's education.** Along with community members, parents and guardians should also be involved in policy-making throughout the entire education system. To that end, strong and informed parent leadership should be supported. Parent participation must be based on a human rights model, with the creation of a city-wide parents union and a parent academy to support informed and empowered participation. Parent Coordinators, if hired, should report to School Leadership Teams (SLT) and not to principals. Additionally, parents should comprise majority membership of the School Leadership Teams, all SLT members should be adequately trained in the consensus process and in issues of education pertinent to their schools, and the principal's vote should be eliminated from such Teams.

- **Shifting curricula and assessment policies away from high stakes testing.** School curricula should provide strong, culturally appropriate and well-rounded intellectual work; should emphasize research and problem solving; and teach students how to defend their ideas orally and in writing.

- **Ensuring that administrators and key decision-makers on educational policy in the City are experienced educators with a track record of research in race and class.** To address the disparate impact of policies and practices on children of color in the education system, such educators should develop a five-year plan, which should be incorporated into the strategic plans of each school district.

EMPLOYMENT

The following chapter examines racial discrimination and disparities in employment, including: discriminatory hiring practices; concentration of people of color in low-wage employment; racial disparities in the provision of job benefits; discrimination in the informal sector; and lack of protections for undocumented workers.

1. The labor market in New York City illustrates the persistence of racial inequality in the United States. New York City has one of the widest income gaps in the country, a divide running along racial and ethnic lines: while the top fifth earners in the City are disproportionately white and male, the lowest income earners are primarily black and Latino.ⁱ The median income for Black and Latino families is substantially below the average income in New York City, with a Latino family earning about half the median income of a white family. According to the New York City Center for Economic Opportunity, the community district with the highest poverty rate is Mott Haven in the Bronx, and it is 96% Black and Latino.

2. As noted in the US Report, employment discrimination is prohibited in the United States by a number of federal statutes, including the Civil Rights Act of 1964.ⁱⁱ Under CERD, state parties are charged with ensuring that local governments and institutions conform to the prohibition against racial discrimination, as broadly formulated by CERD.ⁱⁱⁱ New York City is bound by employment discrimination laws not only at the federal level, but also at the state and city levels. Equal employment opportunity laws promulgated by the federal government essentially set a minimum national standard of protection against employment discrimination.

3. The New York City Council has recognized that local anti-discrimination laws should be construed independently from similar state and



federal laws, which are meant to provide a floor below which protections cannot fall, but not a ceiling above which they cannot rise.^{iv} As such, New York City also has in place its own mechanisms to enforce anti-discrimination laws and to monitor employers. The Human Rights Law is the City's comprehensive antidiscrimination statute, and makes discriminatory employment practices illegal for employers, employment agencies, labor organizations, and other relevant actors in the employment arena.^v The Human Rights Commission of New York City (Commission) is charged with enforcing the City Human Rights Law with regard to discrimination.^{vi} The Commission's mandate includes researching prejudice and discrimination, issuing reports, and investigating complaints, as well as initiating its own investigations, in order to advance the City's human rights goals.^{vii} Additionally, the Equal Employment Practices Commission (EEPC), an independent city agency, was created to monitor compliance with federal and local employment regulations for all city agencies.^{viii}

4. The persistence of inequality in the labor

market—despite all the available legal protections to fight racial discrimination—speaks to the increasingly subtle forms of contemporary discrimination. Such discrimination is frequently demonstrated, not in explicitly racist policies and practices, but in hiring and advancement practices that enable racial prejudice to affect employment decisions. Recent studies have revealed widespread employer prejudice in hiring based sometimes on nothing more than a “black” sounding name. In one study, applicant resumes were assigned white sounding names such as Emily Walsh, and others assigned black sounding names like Lakisha Washington. The results of the study revealed that applicants with white sounding names received a call back for every 10 resumes sent out, while the applicants with the black sounding names got a call back for every 15 resumes.^x According to the study, a white name was as effective as an additional eight years of experience in yielding a call back.^x

5. The results of this study demonstrate the need for increased enforcement of disparate treatment discrimination in addressing contemporary discrimination in the labor market. Title VII, which is enforced by the Equal Employment Opportunity Commission (EEOC), protects against both intentional discrimination and practices which have the effect of discriminating against individuals because of their race, color, religion, sex or national origin.^{xi} However, a 1973 Supreme Court decision determined that if an employer has an explanation for a challenged practice, then the plaintiff in disparate treatment discrimination case must show that the employer’s nondiscriminatory explanation is a false argument or otherwise prove that the employer’s actions were based on illegal discriminatory parameters.^{xii} Thus, although a disparate treatment argument is permitted in the realm of employment discrimination, in reality it is difficult for the plaintiff to prove.

UNEQUAL TREATMENT AND OPPORTUNITIES IN EMPLOYMENT

Under Article 2, the U.S. must take effective measures to review and amend or rescind governmental, national and local policies, which have the effect of creating or perpetuating racial discrimination...and adopt special and concrete measures to ensure the adequate enjoyment of full and equal human rights.

6. Under CERD, the government has an obligation to take proactive measures to eliminate racial discrimination and race disparities even when they exist as indirect consequences of seemingly neutral practices or policies. The landscape of the employment sector in New York City since 2000 makes it clear that the government is not doing enough to mitigate and eliminate the consequences of past and present discrimination. The effects of discrimination are most clearly evident in the numbers, which show that people of color are consistently in a disadvantageous position regardless of larger employment and economic trends in the City. Racial disparities are particularly evident in unemployment figures, relative earnings and industry representation, as well as in opportunities for promotion.

OBSTACLES TO EMPLOYMENT

7. New York City experienced a period of recession from 2000 to 2003, followed by subsequent recovery and a period of growth. However, relative to their white counterparts, people of color took on a heavier burden during the recession but benefited less during growth. In 2006, the unemployment rate was 4.9%—the lowest unemployment rate in recent history.^{xiii} Despite this, many traditionally disadvantaged groups were still suffering from recession-level unemployment rates, including Blacks (7.4%), Latinos (6.1%), and young adults (10.9%).^{xiv} Black men in particular have been disproportionately burdened by economic

fluctuations over the years, as illustrated by a report from the Community Service Society. The report found that because job growth for black men was meager during the prior expansion, they lost more ground during the recession than other groups. As result, the unemployment rate among Blacks jumped 5.3 percentage points to 12.9% in 2003, the highest among the city's major racial and ethnic groups for that year.^{xv} During this time, the unemployment rate for Whites only rose 2.6 percentage points to 6.2%, thereby widening the black/white unemployment disparity from 3.9 percentage points in 2000 to 6.7 percentage points in 2003.^{xvi} Also, from 2000 to 2003, the employment-population ratio for black men went down 12.2 percentage points, and only increased 8.5 percentage points during the period from 2003 to 2006.^{xvii}

8. Discrimination clearly makes it much more difficult for people of color to get hired. In an illuminating recent study, researchers matched teams of young men with similar physical and professional attributes and had them apply for 1,470 real entry-level jobs in and around New York City.^{xviii} The researchers then analyzed the impact of various combinations of race, criminal background, and educational attainment in the employment chances of these young men. The results of the study showed a clear racial hierarchy, with blacks only slightly more than half as likely to receive consideration by employers in comparison to equally qualified white applicants, and Latinos slightly less likely than white applicants.^{xix} The study also found that even white men with prison records received more positive consideration, being offered jobs at least as often as black men who had never been arrested.^{xx} As the study points out, these results suggest that employers view minority job applicants as essentially equivalent to white applicants with prison records.^{xxi}

9. While individual experiences of the test applicants did not reveal any outward racism

or discrimination, the study showed that contemporary discrimination occurs in a more subtle form, in which people's race-based assumptions guide their discretion in hiring.^{xxii} Little has been done to mitigate the role of subconscious racial preference and favoritism in employment opportunity. Thus, while employment discrimination is illegal, it is clear that discriminatory forces in New York City are still taking a toll on the employment rates of minorities. Under Article 2, the government is obligated to proactively implement measures to equalize rates of employment, rather than confining its role to reacting to specific cases of discrimination.

PEOPLE OF COLOR WORKING FOR LESS

10. The income gap in New York City has substantially widened in recent years; a Census analysis by the New York Times found that in 2005, the top fifth of earners in Manhattan made 52 times what the lowest fifth made, placing New York on a par with income disparity in Namibia.^{xxiii} Relative to others, those in the top fifth are disproportionately male and non-Hispanic whites.^{xxiv} While the service industry in the city is expanding and offers job possibilities for those without a college degree, very few of these jobs pay a livable wage.^{xxv} Additionally, due to the high cost of living in New York City, it is estimated that a dollar in the city is only worth 76 cents in comparison to other cities within the U.S.^{xxvi} The minimum wage in New York State was raised to \$7.15 at the beginning of 2007^{xxvii}—well above the federal minimum wage of \$5.85^{xxviii}, but still insufficient for many city dwellers whose money is undervalued. Those who primarily suffer in these conditions are people of color, who make up 80% of the city's minimum wage labor.^{xxix}

11. In addition, immigrants are more likely to earn low wages than other residents of the city, with 35% of foreign-born workers earning less than ten dollars an hour, as compared to 19%

of native-born workers.^{xxx} A majority of recent immigrants to New York City are people of color, coming predominantly from the Dominican Republic, China, Jamaica, Guyana and Mexico.^{xxxi} Given this background, it is not surprising that while the poverty rate for the City as a whole is 19.1%, it is drastically higher for Latinos, at 28.6%, and somewhat higher for blacks, at 21.4%.^{xxxii}

12. In addition to being overrepresented in certain undervalued industries, people of color are often placed in lower paying jobs within industries as well. For instance, employment in the restaurant industry is bifurcated into the front of the house and the back of the house, with better earnings, benefits, and work conditions for the former category.^{xxxiii} In New York City, white restaurant workers are employed predominantly in the front of the house, while a greater proportion of workers of color are concentrated in the back of the house.^{xxxiv} Nearly

83% of non-Hispanic white restaurant workers in New York City work in the front of the house, as compared to about 65% of the non-Hispanic black population, 55% of Asian workers, and 52.4% of Hispanic workers.^{xxxv} Additionally, white immigrants are more likely to have experiences similar to their native-born white counterparts than with immigrants of color.^{xxxvi}

13. The discrepancy in the racial composition of the front of the house as compared to the back is related to employer criteria, which is seemingly neutral, but which actually allows considerable discretion and space for racial preferences and stereotypes to influence decisions. When interviewed, New York City restaurant employers stated that they look for “attractiveness” and “personality” for the coveted front of the house restaurant jobs. While these criteria do not directly discriminate, it is clear from the racial disparities in the restaurant industry that employers find white workers to possess these traits more frequently than workers of color.^{xxxvii}

14. Wage disparities reflect not only these processes of indirect discrimination, but also insufficient job training, lack of educational resources, and systematic devaluation of industries traditionally comprised of people of color. In order to fulfill its Article 2 obligation to rectify the effects of discrimination, the government must address the larger picture and take measures to ensure that people of color are able to secure higher paying jobs at the same rates as others.

CONCENTRATION IN LOW-WAGE INDUSTRIES

15. People of color have lower average wages than their white counterparts largely due to their concentration in lower paying industries. For example, while minorities make up only 38% of the management, business and financial sector, they comprise 72.8% of the transportation sector, 74.5% of the service sector, and 63% of the



laborer sector.^{xxxviii} These discrepancies lead to dramatic wage inequality, since the financial sector pays the highest wage, and leisure and hospitality (a subset of the service sector) pays the lowest wage of all sectors in Manhattan.^{xxxix}

16. This concentration is troublesome, especially because these sectors are undervalued and more easily affected by economic fluctuations.^{xl} For example, nearly one out of five black men works in the public sector (19%), while government and the next top four private sector industries concentrate a total of 64% of the black male working population.^{xli} This concentration places black men as a group in a disadvantageous position in relation to groups that work in a wider diversity of industries. The immigrant population in New York City is also concentrated in low-wage industries. The top five employers of low-wage immigrant labor are the restaurant industry, health services, apparel manufacturing, grocery stores, and private households. The share of immigrant labor in these industries ranges from 64%-89%.^{xlii}

THE GLASS CEILING

17. For the minorities in New York City that do have stable long-term jobs, getting promoted often becomes the new obstacle. Due to the pervasiveness of unconscious, and sometimes conscious, racism and stereotyping, it is more difficult generally for people of color to get promoted.^{xliii} City agencies in particular have come under attack for discrimination in their promotion practices. While the ethics code of the New York City Charter prohibits public servants from using their position to obtain a benefit for someone with whom they are associated,^{xliv} the symbolic prohibition is clearly insufficient to address discrimination and favoritism that keep people of color out of management positions.

18. Since the government itself is a large employer, it is particularly important for governmental entities to uphold the principles and obligations of CERD and to critically monitor its

own implementation. Unfortunately, the government of New York City has had a disappointing track record as an employer in relation to employment discrimination. Research by the New York City Municipal Chapter of Blacks in Government (BIG) has shown that 79% of the city's higher paying administrative and managerial job positions are held by Whites, although they only comprise 41% of the city agencies' workforce.^{xlv} In contrast, while Blacks, Latinos and Asians make up 37%, 16% and 4%, respectively, of the city's workforce, they only account for 19% of the total senior and executive staff of city agencies. In addition, 62% of blacks and other people of color are concentrated in the lowest paying clerical jobs.^{xlvi} The findings of the BIG report led to a City Council hearing before the Committee on Governmental Operations, in which the refusal of several city agencies to testify on the issue^{xlvii} suggested that there was no sense of accountability.

19. Racial justice advocates have criticized the "one-in-three" provision of the Civil Service Law, which allows city agencies to pick one person to promote among the three candidates that score highest on promotion exams.^{xlviii} By opening the door for subjective discretion rather than mandating decisions based on the candidate's merit and exam score, the policy invites favoritism and discrimination.^{xlix} The rule exists despite the official recognition of a merit system of civil service in the New York State Constitution.^l Given the racial disparities in management positions of city agencies, the rule unnecessarily permits discretion and paves the road to maintenance of the status quo for those already at the top.

20. Doing undervalued work is not the only way that people of color are affected by unequal treatment and opportunities in city agencies. For example, after two police officers were killed in an undercover operation in 2003, the National Latino Officers Association joined with 100 Blacks in Law Enforcement to demand changes

needed to make undercover work safer. The groups claimed that the vast majority of officers who were put on the front lines to conduct buy-and-bust operations were Black and Latino, thus making their work more risky and dangerous than that of their white counterparts.¹¹

21. Discriminatory employment practices of New York City agencies have recently come under legal scrutiny, thanks largely to the initiative of the NAACP Legal Defense Fund (NAACP-PLDF). In 2006, a Federal District Court judge upheld key job benefits given to minority and female employees of the Board of Education to rectify past discrimination in the hiring of school custodians. The benefits were the product of a settlement between the Justice Department and the Board of Education when the latter was sued in 1996 for employment discrimination. The benefits, including civil service appointments and retroactive seniority, were deemed by the judge to be a permissible remedy in light of the past discriminatory practices of the agency.¹² The NAACPPLDF was also successful against the New York City Parks Department. A 2006 District Court decision determined that black and Latino plaintiffs had presented sufficient evidence that the New York City Parks Department engaged in retaliation against those who opposed discriminatory practices, and thereby allowing the plaintiffs to go to trial.¹³ Under CERD, the State has an obligation to ensure that local courts are able to provide effective remedies for injustices associated with discrimination. While these cases are steps in the right direction to realizing the requirements under CERD, broader changes in policy, such as explicit approval of affirmative action policies, have the potential to impact larger change and conserve judicial resources.

DISCRIMINATION IN THE INFORMAL SECTOR

Under Article 5, the U.S. must “undertake to prohibit and to eliminate racial discrimination in all

its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equal treatment before the law in the enjoyment of the right to work, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration . . . and to form and join a union.”

22. While employment discrimination limits the enjoyment of and access to several guaranteed rights enumerated in Article 5 of CERD, the one most obviously implicated is the right to work. The right to work explicitly includes the rights to free choice of employment, just and favorable working conditions, protection against unemployment, equal pay for equal work, just and favorable remuneration, as well as the right to organize and join trade unions.¹⁴ In New York City, the most obvious segment of the employment market which lacks these rights is the informal sector.

23. The Article 5 rights of those working in the informal sector are at a much greater risk than formal workers, due largely to the fact that undocumented immigrants are more likely to work for lower wages and under worse conditions than others.¹⁵ Despite the diversity and large size of the informal sector in New York City, two commonalities shared among the various industries are exploitative working conditions and a large composition of immigrants of color. Thus, the lack of protection and attention to the informal sector ignores the obligation to protect the rights of immigrants and people of color to the same extent as the rights of others.

DISCRIMINATION IN THE TAXI INDUSTRY

24. According to the Taxi Workers Alliance, the taxi industry is composed of approximately 55-60% South Asian, 10-15% West African, and 25% Haitian/Arab/Eastern European drivers.¹⁶ A current proposal by the Taxi and Limousine Commission has promulgated new

requirements to go into effect by the end of 2007, which include equipping all cabs with tracking devices.^{vii} The Taxi Workers Alliance has protested the tracking device requirement as an invasion of privacy, and has asked that people “respect the privacy of taxi cab drivers just like you would of any other American.”^{viii} Imposing this invasion of privacy on cab drivers not only violates the government’s obligation to ensure favorable working conditions for everyone, but also reflects and perpetuates post 9-11 stereotypes that certain immigrants are inherently suspicious.

DISCRIMINATION AGAINST SEX WORKERS

25. A particularly vulnerable industry within the informal sector whose Article 5 rights are continuously violated is sex work. Research by the Sex Workers Project of the Urban Justice Center has found that the street-based sex worker population in New York City is comprised predominantly of people of color.^{lix} Both indoor and outdoor sex workers reported not being able to make a living wage in the jobs that they held prior to their involvement in sex work, jobs which included waitressing, food service, retail work and domestic work. In addition, there is serious concern around the problem of youth who are involved in sex work, particularly those who work within a system of pimping. The problem of youth in the sex industry has been dealt with through racial stereotypes, with the false idea of quick-fix solutions that put minority males into prison without getting to the root causes of why young girls seek out sex work in the first place.

26. The presence of high numbers of people of color in the sex work industry is connected to the difficulty many have in making a living wage in New York City. Low wages and wage disparities violate the inalienable right to work for many by providing a mini-

mum wage standard significantly below the wage needed in order to maintain a life above poverty. Ultimately, this pushes persons to work in sex work by circumstance. Additionally, for sex workers who choose the profession without regard to financial sustenance, the criminalization of sex work violates the rights of consenting adults to work and earn a livelihood. In the U.S., sex workers’ right to a livable wage and livelihood is being undermined by the criminalization and harassment of consenting adults in the commercial sex industry.

27. By refusing to implement the same protections for workers in the informal sector, the government is primarily compromising the Article 5 rights of people of color and immigrants. Under CERD, one’s immigration status or skin color does not warrant a different standard of labor protection. In order to fulfill its obligation under CERD, New York City needs to make an active and aggressive effort to improve the working conditions and the rules that apply to those working in the informal sector.

LIMITED LEGAL PROTECTIONS FOR UNDOCUMENTED WORKERS

Under Article 6, the U.S. must “assure to everyone effective legal protection and remedies against any acts of racial discrimination”

28. In recent years, the rights of undocumented workers to legal protections for workplace injustices have been eroded by court decisions at the national and local level. In the Balbuena case, a New York State trial court determined that an undocumented worker was not precluded from recovering lost wages after being injured at work. Despite this holding, the court did allow the defendant to inquire into Balbuena’s immigration status, citing other New York State cases that held that the plaintiff’s immigration status is relevant to claims

for lost earnings.^{lx} However, a New York appellate court subsequently ruled that injured undocumented workers could only recover the lost wages they would have been able to earn in their countries of origin, rather than in the U.S. Relying on a U.S. Supreme Court decision, which barred undocumented workers from receiving back pay for being fired unlawfully,^{lxi} the court reasoned that it was compelled to follow the statutory prohibitions of the Immigration Reform and Control Act of 1986, rather than to apply New York state

laws authorizing lost wages to undocumented workers.^{lxii} In other words, due to the Supreme Court's interpretation of a federal immigration policy, New York state was not able to offer its undocumented workers, who are predominantly Latino, the same protections that are available to others in the workforce. In order to fulfill its obligations under CERD, the federal government must enable, rather than limit, localities to implement policies and practices which fulfill the requirements of CERD at the local level.

RECOMMENDATIONS

The following recommendations are meant to shed light on human rights violations related to employment, and to address racial discrimination against people of color:

■ **The Department of Justice (DOJ) needs to solidify its commitment to ending discrimination in the workplace** and play a more active role in ensuring that federal laws are enforced.^{lxiii} The Lawyers Committee for Civil Rights has noted that the Employment Litigation Section of the DOJ has decreased the number of high-impact employment discrimination cases initiated under the Bush administration.^{lxiv} In addition, the Employment Litigation Section only litigates 1% of the cases referred to it by the EEOC, cases in which the EEOC has already found probable cause that there has been discrimination by state and local government actors.^{lxv}

■ Rather than having diluted labor rights, vulnerable groups such as undocumented immigrants and those working in the informal sector need bolstered labor rights in order to protect their fundamental human rights. **The New York State Assembly should urgently pass bill A00628, known as the Domestic Workers Bill of Rights**, which would improve labor standards for domestic workers and is currently pending approval.

■ **New York City must require that employers create and utilize objective criteria for hiring and promotions** that focus exclusively on merit and other relevant factors. A good place to start by setting an example is to eliminate the “one-in-three” rule in the civil service sector and do all promotions based on test scores instead.

■ The Equal Employment Practices Commission (EEOC) has the power to audit city agencies to determine compliance with the City's Equal Employment Opportunity Policy, for mayoral agencies, and its own Equal Employment Opportunity Policy, for non-mayoral agencies. However, the EEOC is understaffed and has not been able to effectively realize its broad ambit. A 2004 audit by the City comptroller determined that the EEOC had not been auditing city agencies every four years as required by the New York City Charter. **The City should increase the EEOC's budget and assign it effective enforcement powers to advance its mission.**

HEALTH

This chapter examines racial disparities in health care indicators and access to quality health care, including: hospital care; insurance coverage; primary care; infant mortality; mental health; and legal remedies in the equal enjoyment of health.

1. The US Report includes very little information on racial and ethnic disparities in health indicators. Yet, in the 21st century, grave disparities persist in the United States in virtually all indicators of health, including cancer, cardiovascular disease, diabetes, HIV/AIDS, infant mortality and life expectancy. Racial disparities in access to health care, due in large part to racial and ethnic disparities in health insurance coverage, play a major role in these health disparities. Moreover, even after controlling for health insurance coverage and income, racial and ethnic disparities in health conditions are not eliminated.

2. As noted in the US Report¹, in 1999, the U.S. Congress commissioned the Institute of Medicine (IOM) of the National Academies of Science to investigate the causes of racial and ethnic disparities in health care unrelated to known factors such as ability to pay. The IOM study released in 2003 found that certain racial and ethnic groups tend to receive lower quality health care even when controlling for financial variables. Moreover, the IOM study found that clinical encounters have sometimes led to differential treatment based on race or ethnicity, and that this phenomenon is a significant contributor to racial and ethnic disparities in health indicators. The bias in treatment uncovered by the 2003 IOM report was not limited to physicians; it included other actors in the health care delivery system, such as health care administrators and other clinicians.

3. The U.S. government has no clear agency to monitor or enforce differential racial or ethnic treatment in clinical health. Moreover,



aside from the 2003 IOM report, the U.S. government is not proactive in uncovering discriminatory treatment in health care. Yet, given the asymmetries in information between the health care providers and patients, it is vital to proactively monitor the health care industry for differential treatment.

4. As the federal government explained in the United States' first report regarding compliance with the International Covenant on Civil and Political Rights (which it ratified with the same understanding as for CERD), "state and local governments exercised significant responsibilities in many areas, including matters such as . . . public health."² A significant amount of power over New York City's health care system is centralized in the State Department of Health (DOH), which is responsible for approving or rejecting the construction, expansion, conversion, downsizing, and closure of all hospitals in the State.³

SEGREGATION IN HEALTHCARE

Under Article 3, the U.S. must “undertake to prevent, prohibit and eradicate all practices” of racial segregation. General Recommendation 19 further clarifies that while some conditions of racial segregation “arise without any initiative or direct involvement by public authorities,” governments “should work to eradicate the negative consequences that ensue.”

5. A recent study of New York City hospitals by Bronx Health REACH revealed pervasive racial disparities with respect to hospital care. As the report explains, compared with nearby private hospitals, New York City’s public hospitals care for a much higher proportion of uninsured and publicly-insured patients, the vast majority of whom are racial and ethnic minorities and immigrants.⁴ Indeed, Black and Latino/a New Yorkers are more than twice as likely as white residents to be either uninsured or publicly insured.⁵ As a result, differential treatment in public and private hospitals splits along racial lines. Moreover, the study found that even when uninsured patients and Medicaid (i.e. publicly insured) recipients were seen at the same hospitals as privately insured patients, they experienced vastly different standards of care.⁶

6. For example, at large academic medical centers, privately insured patients were often steered toward faculty practices, while publicly insured or uninsured patients were steered toward clinics.⁷ Faculty practices often have more highly-trained providers, better continuity of care, 24-hour phone access, accountability to both the patient and the referring primary care provider, and more regular communication between providers.⁸ Clinics at hospitals, on the other hand, are usually staffed by a rotating set of residents who are less able to provide the continuity of care that is critical, especially for patients with chronic illnesses.⁹

7. As a result, uninsured and publicly insured patients in New York City – predom-

inantly patients of color – act as “teaching patients” for doctors-in-training. Patients with private insurance, in contrast, receive treatment from fully trained physicians.¹⁰ This two-tiered system of care is partly attributable to public insurance reimbursement rates, which are higher in the clinic setting than in faculty practice. Hospitals therefore have a financial incentive to continue steering publicly insured recipients to clinics.¹¹ The New York City government needs to eradicate these instances of racial segregation as specified in CERD Article 3.

EQUAL RIGHT TO PUBLIC HEALTH

Under Article 5, the U.S. must “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the . . . right to public health, medical care, social security and social services”

8. Government and other public data show that the United States, through its federal, state, and local governments, is in violation of Article 5 as it relates to health and health care. Specifically, the grossly unequal distribution of health care resources across the State denies equal access to millions of New Yorkers based on race, ethnicity, and national origin.

THE UNINSURED

9. The United States does not have a national, universal healthcare system. Instead, most of the country (66.8%) is covered by private health insurance companies that contract with hospitals, clinics and other health care providers to make care available to policyholders, usually through employers. Relatively few (15.4%) are covered by government-operated public insurance.¹² The for-profit health care insurance industry is allowed in many

states to deny insurance policies to those who are sick prior to applying for insurance or unable to afford the coverage, resulting in almost 16% of all Americans and 22% of New York City residents being uninsured.^{xiii}

10. Medical insurance is a crucial factor in the access to and the quality of medical care: uninsured patients are less than half as likely as their insured counterparts to receive the care they need.^{xiv} More importantly, over 18,000 Americans die prematurely each year because they lack health insurance.^{xv} Even when uninsured patients are hospitalized, they often receive fewer services, and are more likely to die in the hospital than their insured counterparts, often because they have more severe conditions but receive care too late.^{xvi} Across the country, sixty million Americans face financial insecurity and a greater risk for poor health due to a lack of health insurance.^{xvii} Regular access is important for health, and those who lack a regular source of health care often report miscommunication, misdiagnoses, and greater frustration about their ability to receive needed care.^{xviii} Not surprisingly, the uninsured, racial and ethnic minorities, and those without proficiency in English are the most likely to report not having a regular source of health care.^{xix}

11. As noted above, New York State and City, along with the federal government, bear the primary responsibility for addressing racial disparities in health status and access to health care. As in rest of the nation, many New Yorkers lack access to basic health care because they lack access to health insurance. Nearly 2.8 million New York State residents – 15% of the State's total population – do not have health insurance.^{xx} In New York City, nearly 30% of Black, Latino, and “Other” New York City residents lack coverage, compared with white New York City residents, about 17% of whom are uninsured.^{xxi} Moreover, although persons of color make up 65% of the city's population,

they make up 75% of the population of the uninsured.^{xxii} Given the link between insurance status and health status, the racial divide in insurance coverage translates into racial disparities with respect to health.^{xxiii}

12. The health insurance crisis disproportionately hurts communities of color in large part because health insurance in the U.S. remains linked to employment. Persistent racial and ethnic employment stratification contributes to racial and ethnic gaps in quality of health insurance coverage. Comprehensive health benefits are offered by higher-paying jobs, while lower-paying jobs, which are disproportionately occupied by people of color, tend to offer limited health benefits, if any at all, which are often accompanied by high cost-sharing arrangements with employees. While many employers are increasingly unwilling or unable to offer health benefits, even where health insurance benefits are offered, over half of workers do not enroll in employer insurance plans because they are too costly.^{xxiv}

13. Lack of insurance coverage not only takes a toll on the health of the uninsured, it also negatively affects the community as a whole. Safety-net hospitals and health care providers suffer financially and are eventually forced to close due to inadequate reimbursements. The attendant strain on the health care system limits providers' ability to respond to disasters and serve the entire community.^{xxv}

PRIMARY CARE

14. Primary health care services, such as regular check-ups and non-emergency care, are crucial to maintaining good health and preventing illness and complications from illness that can reduce productivity and increase financial insecurity. Inadequate primary care services can also lead to early or premature death. Areas with high concentrations of African Americans, Latinos, and Asian Americans in New York City face serious and disproportionate

shortages of primary care physicians.^{xxvi} Nearly 60% of New York City's zip codes, in which residents are primarily people of color, have an inadequate supply of primary care physicians willing to see Medicaid patients. This inequitable distribution of health care resources is a clear violation of New York City's obligations under CERD.

15. The U.S. Department of Health and Human Services' Health Resources and Services Administration has designated 13 geographic areas in New York City as Health Professional Shortage Areas. These areas often have the highest rates of common preventable conditions (known as ambulatory care sensitive (ACS) conditions), which can be prevented through standard disease management and primary—conditions such as diabetes, asthma, and heart

disease. However, patients who do not receive these services are at greater risk of developing health complications that are more difficult and expensive to treat in the long term.^{xxvii}

16. In other words, New York City neighborhoods with the greatest health care needs also have the fewest primary care physicians. This pattern violates article 5 of CERD because the neighborhoods with the greatest health care needs and the least adequate access to primary care are disproportionately minority communities.

17. A comparison of two New York City zip codes illustrates the unfair health challenges facing people of color in the City. Highbridge and Morrisania, together comprising one zip code of the Bronx, have significant health needs but face stark shortages of services. These neighborhoods are almost entirely populated by people of color: 57% are Hispanic; 38% are African American; 1% are Asian American or Pacific Islander American; 1% are white. Three out of ten residents were born outside the United States.^{xxviii}

18. These communities have some of the highest rates of infectious and chronic diseases in the City. General hospitalization rates for these neighborhoods are 65% higher than the citywide rate. Heart disease is the leading cause of adult hospitalization among Highbridge and Morrisania residents and neighborhood admission rates for heart disease are 40% higher than the city as a whole. In 2001, the rate of childhood asthma hospitalization for this zip code was also higher than the citywide rate: 10% versus 6%.^{xxix}

19. Despite these neighborhoods' overwhelming health needs, this highly impoverished area—69.5% of its residents live under 200% of the poverty line—has severely limited health services. In fact, this zip code only has one primary care provider per 3,843 residents.^{xxx} Moreover, the beds at the sole hospital within the zip code—Bronx-Lebanon Hospital Center,



Fulton Division—are devoted solely to alcohol and drug detoxification and rehabilitation as well to psychiatric/mental illness.^{xxxvi}

20. Alternatively, consider zip code 10021 on the Upper East Side, where over four in five residents, or 82%, are white, 6% are Hispanic, 6% are Asian American, and 3% are African American. This overwhelmingly white neighborhood has 67 primary care physicians for every 10,000 people, a rate more than ten times that of zip code 10035 in East Harlem. The data conclusively establish that areas of New York City with high concentrations of African Americans or Latinos are most likely to have serious shortages of primary care physicians.^{xxxvii} Across New York City, the health impact of these racial and ethnic disparities is significant, and will profoundly affect the next generation of New Yorkers, as evidenced by the higher-than-average rates of childhood asthma in high-minority neighborhoods. Without government intervention to aggressively eradicate racial disparities in access to health care resources, communities of color will continue to face inadequate health care services. State policies and decisions leading to this inequitable distribution of health care resources therefore violate Article 5 of CERD.

HOSPITAL CLOSINGS

21. Hospital closures and downsizing in New York City have disproportionately harmed the health and health care of the City's communities of color. Two-thirds of the 12 hospitals that closed between 1995 and 2005 in New York City—each with the approval of the New York State Department of Health—served populations primarily, and sometimes overwhelmingly, comprised of people of color.^{xxxviii}

22. The pattern of hospital closures and shortages of health care services in low-income communities and communities of color cannot be attributed to a lack of health care needs. For example, Brooklyn, lost three hospitals between

1995 and 2005, and an estimated 90% of patients at these three Brooklyn hospitals were people of color.^{xxxix} Yet Central Brooklyn, which is 80% African American and 11% Latino and where over one in four people (31%) lives in poverty, has some of the greatest health care needs in New York City.^{xl} In 2004, the diabetes rate there was 33% higher, the rate of people living with HIV/AIDS 60% higher, and the number of HIV-related deaths 200% higher than in New York City as a whole.

23. Similarly, Southeast Queens has the highest concentration of minority residents in the borough of Queens and its population has significant health needs. However, there are no hospitals in most of the area.^{xli}

24. A recent report by the New York City Comptroller found that closure of Victory Memorial Hospital would, among other things, compromise access to emergency care for residents of Southwest Brooklyn, who “would spend extra minutes going instead to the nearest remaining hospital—critical minutes that could mean the difference between life and death.”^{xlii} Given that the Bay Ridge-Bensonhurst area is one of the largest immigrant communities in New York City,^{xliii} the hospital's closing will have dire ramifications for a significant number of immigrants, particularly Muslim and Arab-speaking communities that reside in the neighboring area.

25. Whether intentional or not, the State's decisions regarding hospital closures have a clear, discriminatory effect. An analysis of hospital closures since 1980 reveals that the demographic composition of neighborhoods—specifically, the proportion of African Americans in a community—is a strong predictor of hospital closure. This relationship holds true even when controlling for hospital characteristics, economic environments in which hospitals compete, and other factors. For example, large hospitals located in neighborhoods where less than 1% of the population was African American

were extremely unlikely to close; medium-sized hospitals in predominantly African-American neighborhoods were about twice as likely to close as similarly sized hospitals in predominantly white neighborhoods; and almost three-quarters of small hospitals located in overwhelmingly African-American neighborhoods (that is, over 90% African American) were likely to close.^{xxxxix}

26. Hospital closures may need to happen, but they shouldn't happen in a way that disproportionately affects minority populations. By repeatedly and systematically approving the closure and downsizing of hospitals in communities of color despite dire health care needs, the State's decisions create clear discriminatory effects and are thus in violation of Article 5.

PREVENTIVE HEALTH CARE

27. The Medicare Modernization Act was touted in the US Report as potentially reducing racial disparities, as it covered preventive care including those conditions that disproportionately affect people of color such as the components of the metabolic syndrome. However, many ethnic minority patients who are uninsured and afflicted with chronic illnesses, such as diabetes, high blood pressure, and heart disease, do not access health care and therefore may be undiagnosed until they become Medicare eligible at age 65.^{xi} When they do become eligible, they visit their doctors more frequently, and are hospitalized more often than those who had been insured prior to age 65. Significantly, it is more costly for both the patients and the federal government when preventive health measures are delayed until the elderly become chronically ill.^{xii}

28. While over 1,000,000 New Yorkers (12.5%) are uninsured, over 21% of all adults residing in the City lack a regular care provider, a group disproportionately comprised of Hispanic, non-white, and uninsured New Yorkers. Yet, having both health insurance and a

regular health care provider were shown to improve access to preventive care. For example, adults who have both received the most screenings for high cholesterol.^{xlii}

PRENATAL CARE AND INFANT MORTALITY

29. The citywide infant mortality has fallen to 5.9, according to the latest figures, released in 2006. However, a large racial disparity persists, with infant mortality rates among Blacks at 10.5 and among Puerto Ricans at 9.3.^{xliii} New York's communities of color also have a high percentage of babies born with low birth weight.^{xliv}

30. Prenatal care is essential for the health and future opportunity of a mother and her child, increasing the chances for complication-free pregnancies and health delivery. In addition, access to good prenatal care and hospital-based delivery services can improve the health outcomes of low birth-weight children.^{xlv} Yet geographic and transportation barriers pose problems for women already at risk for receiving inadequate or no care. Access to prenatal care is highly unequal among New York's racial populations. On average, communities of color in the five boroughs (Brooklyn, Queens, Manhattan, Staten Island and the Bronx) have the fewest OB/GYN providers, despite their significant health needs.^{xlvi}

31. Many low-income women and women of color in New York City lack access to quality prenatal care in their own communities. For example, in 2001, in the 11368 zip code in West Queens, a neighborhood whose population is 75% people of color and where three in five residents are foreign-born,^{xlvii} there was one OB/GYN provider for every 12,117 women of child-bearing age. Twelve percent of women in this community received late or no prenatal care between 2001 and 2003.^{xlviii}

32. By contrast, women in zip code 10021, located in Manhattan's predominantly white Upper East Side, had one OB/GYN physician for

every 194 women of child-bearing age in their community, over 60 times as many as West Queens. About 99% of pregnant women in this community received timely prenatal care, and the infant mortality rate was only half that of the City as a whole.^{xlix} For pregnant women, distance to health services can significantly affect the health of mothers and their children. A study of new mothers in New York City listed transportation problems and distance of providers from women's homes among the most commonly cited barriers to prenatal care for poor women.^l

33. Furthermore, pregnant women and women with infants in New York City have been hit hard by hospital downsizing and closures over the past several years, particularly in Central Brooklyn. Interfaith Hospital in Bedford-Stuyvesant closed its maternity ward in late 2004, followed by the closing of St. Mary's Hospital—including its maternity beds—in 2005 in Crown Heights. More than a quarter million women live in Central Brooklyn, yet there are only 104 obstetric beds in the entire neighborhood.^{li}

MENTAL HEALTH CARE

34. According to a report by the U.S. Surgeon General, the mental health field is plagued by more disparities in terms of access to and availability of services than other areas of health and medicine.^{lii} Generally, minorities have less access to mental health services, are less likely to receive services, receive poorer quality of care in treatment, and are underrepresented in mental health research.^{liii} People from marginalized communities not only experience disparate outcomes in the mental health system, but are less likely to seek mental health treatment in the first place.^{liv} Additionally, minorities are overrepresented in vulnerable high-need populations, such as the homeless and the incarcerated, where they do not receive adequate services.^{lv} These disparities are partially

attributed to the past and present struggle of minorities against racism, and how that has affected both their mental health and their socio-economic status.^{lvi}

35. When minorities do receive treatment for their mental health problems, the adequacy of treatment is often tainted by a large cultural divide between these groups and clinicians. Mental health in the U.S. is rooted in Western medicine, and this can cause ineffective diagnosis and treatment of individuals who have different cultural backgrounds.^{lvii} Cultural and social influences have been historically neglected in mental health care, but there is now ample evidence to show that cultural factors need to be considered in order to ensure that minorities receive mental health care tailored to their distinct needs.^{lviii}

36. Of particular concern is the disproportionate application of court-ordered mental health treatment to people of color. On August 9th, 1999, Governor George Pataki signed "Kendra's Law"^{lix}, which would permit court-ordered Assisted Outpatient Treatment (AOT), to ensure that individuals with psychosocial disabilities participate in community based services appropriate to their needs. In effect, Kendra's Law permits a court to order certain people labeled with mental illness to accept outpatient treatment for their labeled illnesses.

37. Kendra's Law has been problematic in its implementation, especially with respect to its disproportionate impact on people of color. In 2005, New York City accounted for 76.2% of the orders issued in the State. Throughout the State, Blacks account for 42% of court orders statewide despite being only 16% of the population; Latinos account for 21% of the orders but make up only 15% of the population; and Whites account for 34% of the orders although they make up 62% of the population. Thus, Blacks are almost three times as likely as their White counterparts to be subjected to orders, while Latinos are twice as likely.^{lx}

ACCESS TO HEALTHY FOODS

38. African Americans, Latinos and other people of color continue to face challenges accessing healthy foods in their neighborhoods, due, in part, to the higher cost of such foods. Even food pantries, utilized disproportionately by minority populations, generally give out only canned and processed foods. With the shortage of healthy foods, African-Americans and other low-income families are more likely to develop diabetes and heart disease. According to the City's health commissioner, Thomas Frieden, diabetes and heart disease cause more than a third of deaths in East and Central Harlem each year.

ACCESS TO A HEALTHY ENVIRONMENT

39. Studies have shown how policies that displace people of color to low-income urban enclaves have created de-facto refugee camp conditions, causing astronomical rates of infectious disease and behavioral pathology, including violence.^{lxv} A Study by the Women of Color Policy Network at the Robert F. Wagner School of Public Service at New York University found a geographical isolation of women of color in 15 of New York City's 59 community districts. The population of color in these districts exceeds 80 percent, while they have the highest rates of infant mortality, the highest proportions of HIV deaths, the majority of homicide deaths, and account for nearly half of the live births among teenagers.^{lxvi}

40. In addition, Black and Latino communities have been used as dumping grounds for decades. According to a landmark study, Toxic Wastes and Race in the United States, published by the Commission for Racial Justice, three out of five African Americans and Latinos live in communities with one or more toxic waste sites.^{lxviii} This pattern is apparent in New York City, where the waste transfer system results in negative health impacts borne disproportionately by popula-

tions of color in the South Bronx and Brooklyn.^{lxiv} Of equal concern is the fact that six of the Metropolitan Transit Authority's eight bus depots are located in Northern Manhattan, including East and Central Harlem.^{lxv} Pollutants that result from these types of facilities are triggers for asthma, one of the highest prevalences of which is found in Harlem.^{lxvi}

41. Likewise, lead poisoning cases are concentrated in New York City communities where the majority of residents are people of color. The New York City Department of Health and Mental Hygiene identified neighborhoods including Bedford Stuyvesant, Crown Heights, Flatbush, East New York, and Jamaica, Queens as target areas for its prevention activities but more needs to be done to hold landlords accountable for providing lead-hazard free apartments.^{lxvii}

IMMIGRANT ACCESS TO CARE

42. As referenced in the Immigration chapter of this Report, immigrants face serious barriers in accessing health care. These barriers include language access barriers, as well as over-representation in low-wage jobs that either do not offer health coverage or do not pay enough for workers to afford health insurance.

LEGAL REMEDIES IN THE EQUAL ENJOYMENT OF HEALTH

Article 6 requires that the U.S. "assure to everyone within [its] jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention."

43. In its 2007 CERD report, the U.S. points to the 14th Amendment of the U.S. Constitution and Title VI of the Civil Rights Act of 1964, as protecting against discrimination in health care. But the U.S. fails to acknowledge the ways in which these laws have been rendered ineffec-

tive for most Americans. Recent court decisions have barred people from suing under both federal civil rights law and health care law to remedy discrimination in health care. These court decisions— *Alexander v. Sandoval* and *Gonzaga v. Doe*—have created a legal system in which the rights protected by CERD are no longer enforceable.^{lxviii} By restricting the private right of action of individuals, these decisions deny an effective remedy, thereby violating Article 6.

44. Although *Sandoval* leaves open the possibility of court challenges to intentional discrimination, it is very difficult to meet the high burden of proof required to show intentional discrimination.^{lxix} Also, post-*Sandoval* there is no private right of action to enforce the Title VI discriminatory effects, or “disparate impact,” regulations,^{lxx} which were enacted to address the problem of systemic discrimination and other more subtle forms of discrimination.^{lxxi} In other words, people seeking a remedy for actions by hospitals or clinics or by the New York State Department of Health that have unjustified discriminatory effects on the basis of race or ethnicity can no longer sue in court.

45. Furthermore, the U.S. points to state and local commissions as protecting against discrimination in health care, but in New York, these commissions are ineffective. As discussed below, inefficiencies, lack of initiative, and lack of necessary funding and staffing seriously limit the ability of the commissions to investigate and bring an end to racial discrimination in health care.

MEDICAID

46. Federal law requires that New York set Medicaid reimbursement rates at “a sufficient level to attract enough providers such that health care services are available to [Medicaid recipients] at least to the extent that those services are available to the insured population.”^{lxxii} Violations of this provision, which are common

in New York State,^{lxxiii} have a discriminatory effect on communities of color, who represent a disproportionate share of the state’s Medicaid population.^{lxxiv} Until recently, Medicaid recipients were able to sue under federal law 42 U.S.C. 1983 to enforce the provisions of the Medicaid Act that guarantee equal and prompt access to care. But since the U.S. Supreme Court decision in *Gonzaga*, courts are increasingly unwilling to enforce Medicaid’s provisions under Section 1983.^{lxxv} Like the decision in *Sandoval*, the decision in *Gonzaga* limits the private right of action of individuals.^{lxxvi} Although no federal court in New York has ruled on it, recent court cases in other jurisdictions interpreting *Gonzaga* have “jeopardiz[ed] the ability of Medicaid beneficiaries to go to court.” In the many cases in which inadequate Medicaid reimbursement rates have a discriminatory effect on communities of color, the inability to enforce the Medicaid Act in court violates Article 6’s guarantee of an effective remedy.



ENFORCEMENT OF HUMAN RIGHTS LAWS BY NEW YORK STATE AND CITY

47. The 2007 U.S. Report points to state and local human and civil rights commissions as safeguards against discrimination. But the New York City and State human rights laws have been limited by the courts in their effectiveness and the New York City and State bodies responsible for enforcing the laws have not to date taken the steps necessary to protect against discrimination in health care.

STATE HUMAN RIGHTS LAW AND STATE DIVISION OF HUMAN RIGHTS

48. The New York State Human Rights Law was drafted to protect people from discrimination in places where the public is served, including doctors' offices, hospitals, nursing homes, and clinics.^{lxviii} It is unclear, however, whether the State Human Rights Law prohibits policies that have an unintended discriminatory effect in the context of public accommodations such as health care. Consequently, there appears to be a wide array of practices that violate CERD, yet cannot be remedied under state or federal law.

49. A recent case, *Levin v. Yeshiva University*, which compared the state and city human rights laws, cast some doubt on whether disparate effects can be challenged under the state human rights law outside of the employment discrimination context.^{lxviii} The troubling result is that victims of discrimination are required to show the existence of *intentional* discrimination, narrowing the protection of the law to significantly less than the "purpose or effect" guaranteed in Article 1. In order to provide victims with effective protection and remedies as required by Article 6, courts will have to interpret the State Human Rights Law as providing for discriminatory effects—or "disparate impact"—cause of action. As discussed above, discrimination in access to health care services is often subtle and systemic; the requirement that intent be shown undermines the remedy

the law seeks to provide.

50. In addition, the New York State Division of Human Rights is charged with reviewing complaints under the State Human Rights Law and enforcing the law. However, the agency has not been effective in protecting against discrimination in health care and few complaints reviewed by the State Division address discrimination in access to health care.^{lxix} However, because discrimination in health care is often covert, structural, and sometimes unintentional, review of this limited number of complaints alone is not sufficient to discover and eliminate existing racial discrimination. The State Division must reform its complaint process if it is to be an effective mechanism in providing "just and adequate reparation or satisfaction" to the victims of discrimination, as agreed to in Article 6.

NEW YORK CITY HUMAN RIGHTS LAW AND CITY COMMISSION ON HUMAN RIGHTS^{lxxx}

51. Like the State Human Rights Law, the New York City Human Rights Law also prohibits practices by hospitals, clinics, and private providers that result in inferior access or service based on race, color, or national origin. Although the City Human Rights Law clearly provides for a discriminatory effects cause of action, the City does not effectively enforce the law. As with the State Human Rights Law, courts have limited the reach of the City Human Rights Law.^{lxxxi} Additionally, the New York City Commission on Human Rights, which hears complaints under this law, is not only short staffed and under-funded, but also fails to use its mandate affirmatively to combat racial discrimination.^{lxxxii} Though it possesses tools to combat discrimination, the City thus fails to address broad violations of Article 5, and it consequently violates Article 6 as well.

52. It is also sometimes impossible for an

individual victim to realize she or he has suffered from discrimination.^{xxxxiii} As demonstrated by the significant difference in discrimination found through undercover testing and through complaints, covert and structural discrimination is still prevalent, even if unintentional and

unrecognized. Successful elimination of systemic racial discrimination requires active monitoring and testing by the City Commission. The City Commission should itself actively investigate, monitor and report on discriminatory patterns and practices.

RECOMMENDATIONS

The following recommendations are meant to bring attention to human rights violations in health and health care, and to address racial discrimination against persons of color:

■ **New York State must ultimately move to a system of universal, single-payer health coverage for all its residents.** The United States is the only industrialized country without universal health care coverage. Such a system will greatly reduce financial barriers to effective and equitable distribution of health care resources because it will equalize incentives for hospitals, health care systems, and private providers to serve a range of communities, regardless of their wealth or poverty.

■ **The federal, state and city governments could establish a health monitoring system** modeled after the audits performed by the Department of Housing and Urban Development (HUD), which determine if landlords engage in discriminatory treatment toward potential renters or buyers based on race and ethnicity. In the health care sector, testers who are similar in relevant attributes, but vary in terms of race or ethnicity, could be sent into the field to examine if race or ethnicity are contributing factors to disparities in health care treatment. Additionally, the federal government must step up civil rights enforcement considerably in the health care sphere. The Department of Justice can initiate litigation on behalf of an agency, like the U.S. Department of Health and Human Services (HHS), for a violation of Title VI.^{xxxxiv} Also, HHS's Office of Civil Rights has the power to initiate an investigation of a recipient of federal funds, and require the recipient to create a plan to remedy discrimination.^{xxxxv}

■ **The New York State Legislature should reestablish a system of health care planning** in New York to remedy the inequitable system that market forces have created. Until the 1990s, a statewide network of health systems agencies studied and recommended improvements in the delivery of health care services in local communities, specifically assessing the needs of low income communities and communities of color. However, this system was dismantled due to lack of federal and state funding.^{xxxxvi} This agency should be reinstated, fully funded, given the authority to engage in concrete health care access and planning, and mandated to address racial disparities in access to and quality of care in the State. Moreover, this agency should include representatives from a cross-section of the community, and have real decision-making authority that is independent from hospitals, the insurance industry, and other special interest groups.

■ The New York City Council's Hospital Closing Task Force issued a report in 2006, which set forth a vision for a new health care system, including: creation of a permanent infrastructure to coordinate local health care planning and expansion; a review of the Medicaid reimbursement system and the bad debt and charity care pool in order to provide adequate compensation to hospitals for caring for the low income and uninsured; development of a new method for financing health care facilities that will ensure long-term stability and a state-of-the-art health care information technology infrastructure; and establishment of an incentive program to retain primary care physicians in low-income communities.^{xxxxvii} The City should implement this system.

■ **Congress should clarify the legal right of Medicaid recipients to force state compliance with the Medicaid Act** and ensure recourse to the judicial system for Medicaid recipients facing barriers to accessing care.^{xxxxviii}

■ **The State Division must exercise its power to initiate its own investigations**, file its own complaints, and conduct studies in order to promote compliance with CERD and State Human Rights Law and to prevent and eliminate discrimination in access to health care.^{xxxxix} In addition, the Office of the Attorney General needs to significantly increase its efforts to challenge systemic inequities in the health care system. The Attorney General possesses broad authority under *parens patriae* standing, which provides states with the ability to sue to protect the health of their residents.^{xci} The State Division must make changes in policy and practice that ensure that complainants receive a speedy and effective investigation and hearing.

■ **New York can look to other states for models that combat discriminatory effects.** For example, California's anti-discrimination statute explicitly provides that the law "may be enforced by a civil action for equitable relief, which shall be independent of any other rights and remedies," such as an administrative complaint proceeding.^{xc} Creating, in New York, a right to civil action by victims would provide efficient remedies while allowing the State Division to focus on and start up its own initiatives to eliminate health care discrimination. Alternatively, Massachusetts established the Commission to End Racial and Ethnic Health Disparities, to develop a comprehensive, statewide approach to eliminating racial and ethnic health disparities, grounded in the fundamental understanding that these disparities stem from historical, interpersonal and institutional racism.^{xcii} As a result, a bill pending before the Massachusetts legislature would establish an Office of Health Equity to coordinate all efforts to eliminate racial and ethnic discrimination in health care.^{xciii}

■ **The City Human Rights Commission must use its power to require recordkeeping by hospitals and other health care providers** with respect to differences in health care access and quality on the basis of patients' race, ethnicity, immigration status, income, gender and primary language.^{xciv} With such data, the City Commission can better target systemic discrimination that has the "purpose or effect of nullifying or impairing" the enjoyment of equal health care services by racial and ethnic populations of New York City. The New York City Commission on Human

■ **Rights must also investigate practices by hospital networks** that appear to have a discriminatory effect on communities of color, and initiate its own complaints where unlawful discriminatory practices appear to be occurring.

HOUSING

The following chapter discusses discriminatory forces and elements of racial segregation that characterize the New York City housing market, with particular attention paid to: displacement of persons of color; gentrification and homelessness; housing segregation and discrimination; housing court; overcrowded or unsafe housing conditions; access to housing services; and public housing.

1. Because housing in New York City is so difficult to find and keep—even for society's most privileged members—several local mechanisms attempt to regulate the housing market. At the State level, the Division of Housing and Community Renewal (DHCR) is responsible for the supervision, maintenance and development of low and moderate-income housing in New York State.¹ Within DHCR, the Fair Housing and Equal Opportunity (FHEO) subdivision monitors access to Fair Housing Initiatives.² State efforts are supplemented by various New York City-based agencies: the Department of Housing Preservation and Development (HPD), charged with enforcing tenants' rights and creating affordable housing within the city; the New York City Housing Development Corporation (NYCHDC), which finances the creation and preservation of affordable housing throughout the city; and the New York City Housing Authority (NYCHA), an independent agency which provides housing for low and moderate income residents, in addition to administering a subsidized leased housing program in rental apartments.³ The U.S. Department of Housing and Urban Development (HUD) also plays a major role at the state and local level, with a New York regional office located in New York City.⁴

2. In relation to CERD obligations, the New York City Human Rights Law, enforced by the Commission on Human Rights, protects residents of most types of housing in New York City against discrimination in the sale, rental, or lease of housing.⁵ The Human Rights Law sim-



ilarly prohibits discriminatory lending practices by banks, mortgage brokers, and other lenders.⁶ New Yorkers also have recourse to federal courts and relevant federal laws. The Civil Rights Act of 1964 prohibits discrimination by private entities in the area of housing,⁷ and other Federal civil rights laws address discrimination in housing, including the Fair Housing Act.⁸ Federally, HUD has several offices that address problems of discrimination within housing⁹, one of which is the Office of Fair Housing and Equal Opportunity, responsible for administering anti-discrimination laws.¹⁰

3. In the US Report, the federal government claims that it is “actively engaged” in enforcing non-discrimination statutes in the area of housing.¹¹ However, the report makes it clear that the government is concerned primarily with individual instances of intentional discrimination, rather than the subtler processes which influence housing opportunities for people of color.¹² For example, the Civil Rights Division of the Justice Department utilizes a Fair Housing Testing Program, in which individuals pose as tenants in order to reveal discriminatory practices by housing providers.¹³ However, these efforts have proved inadequate in addressing the unique housing dynamics in New York City.

HOME OWNERSHIP,
DISPLACEMENT, AND
HOMELESSNESS

Under Article 2, the U.S. must “take effective measures to review and amend or rescind governmental, national and local policies, which have the effect of creating or perpetuating racial discrimination . . . and adopt special and concrete measures to ensure the adequate enjoyment of full and equal human rights.”

DISPLACEMENT AND HOMELESSNESS

4. Governmental stakeholders frequently claim that housing displacement is “impossible to quantify,” or even prove, and reflects the impacts of neutral processes beyond their power to address. A variety of indicators, however, can be used to track which neighborhoods are most negatively impacted by displacement through gentrification^{xiv}, rising rents and evictions. While gentrification often increases property values, it is criticized for pushing out lower-income minorities who can no longer afford the increased rents and who disperse into other low-income areas in the city. The City does little to ameliorate the effects of gentrification by creating more affordable housing opportunities in wealthier predominantly white neighborhoods. Furthermore, rising rents and evictions have lead to concentrated homelessness in certain neighborhoods. Available data indicate that neighborhoods disproportionately impacted by the ensuing displacement and homelessness are overwhelmingly home to people of color.

5. The Vera Institute for Justice, an independent research and policy center, was commissioned by the New York City Department of Homeless Services to investigate the characteristics of families applying for homeless shelter.^{xv} A majority of families seeking services in connection with homelessness come from neighborhoods with staggeringly high percentages of households of color:

Neighborhood	% Households Of Color
Bedford/Stuyvesant	90.9
East New York	88.2
Morris Heights, University Heights, Fordham	96.1
Highbridge, Concourse	94.3
Sound View	95.6
Central Harlem	86.7
Jamaica, S. Jamaica, Hollis	98.4
Ocean Hill, Brownsville	96.4
Mott Haven, Melrose	97.5
Melrose, Morrisania, Claremont, Crotona Park East	91.9

6. Overall, according to city statistics, 90% of people living in homeless shelters are Black and/or Latino. Consequently, the impacts of housing displacement and homelessness are much more likely to be borne by people of color. The failure of government to address this stark disparity amounts to racial discrimination at the policy level, in violation of the government’s obligations under article 2 of the Convention.

HOME OWNERSHIP AND SUB-PRIME
MORTGAGE LENDING

7. Homeownership is central to generating wealth in the United States, and is critical to reducing the racial wealth gap. The homeownership rate in New York City is considerably lower than the rest of the country, and differs drastically across racial groups, reflecting larger economic and opportunity disparities. For example, while 44% of whites in the City own their own homes, only 28% of blacks and 16% of Latinos can say the same.^{xvi} The homeownership rate for Latinos is particularly low even compared to other cities in the U.S.; for example, in Chicago their homeownership rate is 45%.^{xvii} Minorities also suffer from higher cost

burdens: while 17% of white homeowners pay 50% or more of their income on housing, the rate is about 25% for blacks and Latinos, and over one-third for Asian homeowners.^{xxviii}

8. Historically, financial institutions in the United States have perpetrated a form of financial apartheid: though reluctant to offer affordable credit to people of color and from moderate-income communities, they are quick to push a costly alternative. As a result, people of color are disproportionately targeted for high-cost, or subprime, mortgage products. In New York City, African Americans were over 5 times as likely, and Latino borrowers almost 4 times as likely, to receive high-cost home purchase loans as white borrowers in 2005.^{xix}

9. One in five subprime mortgages in the U.S. is expected to end in foreclosure, with homeowners of color disproportionately affected.^{xx} New York City has not escaped the foreclosure crisis that is devastating cities across the country: the number of homeowners in foreclosure has doubled in the last two years. At least 14,000 foreclosure actions are expected to be filed in New York City by the end of 2007.^{xxi}

10. Subprime mortgages and foreclosures in New York City are overwhelmingly concentrated in neighborhoods of color, including the Brooklyn neighborhoods of Flatbush, Bedford-Stuyvesant and East New York, and neighborhoods in Queens such as Rochdale and Jamaica.^{xxii} Discriminatory lending practices have sapped wealth and equity from these neighborhoods, while displacing longtime residents, particularly seniors and low-income families.

11. Under CERD, the City has an obligation to protect the rights of all racial groups to enjoy homeownership equally. It must do this through proactive measures. Racially distinct homeownership, predatory lending, and displacement rates demonstrate that the City has not met this obligation.

HOUSING SEGREGATION AND DISCRIMINATION

Under Article 3, the U.S. must “undertake to prevent, prohibit and eradicate all practices” of racial segregation. General Recommendation 19 further clarifies that while some conditions of racial segregation “arise without any initiative or direct involvement by public authorities,” governments “should work to eradicate the negative consequences that ensue.”

12. Its popular reputation for “diversity” notwithstanding, New York’s levels of residential segregation remain very high. The Census Bureau has found that the New York “Primary Metropolitan Statistical Area,” or “PMSA” (made up of New York City plus Westchester, Rockland, and Putnam Counties) is the most segregated major metropolitan area for Hispanics and Latinos in the United States, and the eighth-most segregated area for African Americans. With respect to the isolation index^{xxiii}, a very significant measure of segregation, New York is the most segregated major metropolitan area for African-Americans.^{xxiv} In fact, the City is “more segregated now than it was in 1910”.^{xxv} A 2003 report by John Logan of the Mumford Center and John Mollenkopf of the Center for Urban Research found that “persistently high rates of segregation shape neighborhood change in New York City,” and that areas with black, Latino, and Asian concentrations are “strikingly separate from one another.”^{xxvi}

13. The Nassau-Suffolk PMSA is the third-most segregated major metropolitan area in the United States for Asians, and the tenth-most segregated for African-Americans, based on the dissimilarity index.^{xxvii} Of Westchester’s 45 municipalities, over half have Black populations of 3% or less. A map of New York City prepared for the Anti-Discrimination Center shows a stark pattern of segregation^{xxviii}, as does a map of the New York City metropolitan area.^{xxix}

14. Neighborhoods in which people of color are concentrated also feature the highest rates

of vacant buildings, the most serious housing code violations per unit, and the highest rate of environmentally-induced health problems such as asthma and lead poisoning.^{xxx}

15. Segregated neighborhoods and municipalities were created with the active assistance of federal and local governments, and as a result of those governments' failure to restrain private actors from engaging in acts of discrimination. For example, the federal government redlined "mixed" neighborhoods, and New York City refused to build public housing in areas where it was feared there would be white resistance. Exclusionary zoning, in which extreme restrictions on density make it impossible to build affordable housing in an area, was also used to enforce segregation. To this day, such zoning is used to reduce the potential availability of affordable housing, with a disproportion-

ately negative impact on racial minorities, perpetuating segregation.

16. For example, in Greenpoint and Williamsburg in Brooklyn, zoning changes allowing large new housing developments have caused the displacement of low-income people of color and transformed the areas into predominantly white enclaves.^{xxxi} Local government can proactively mitigate these racial consequences by techniques like inclusionary zoning, which requires that a portion of all new residential developments be affordable to people with low incomes. However, the City Planning Department has refused to implement inclusionary zoning in many rapidly gentrifying areas of the city.^{xxxi} This passive approach to the racial consequences of zoning has led to increased displacement and residential segregation.

17. Municipalities that receive federal funding have long been obligated to affirmatively improve fair housing. This means that New York City is obligated to conduct an analysis of impediments to fair housing and to take appropriate steps to overcome such impediments. The City has failed even to assess how its own programs and policies (like the reduction of permissible density, or "downzoning" of neighborhoods like Staten Island)^{xxxi} may perpetuate segregation, let alone take appropriate steps to see that there are adequate opportunities for people of all races and income levels to have the chance to move into any and all neighborhoods in the City. Despite the fact that many jurisdictions have not met their obligations, the United States Department of Housing and Urban Development has failed to provide the necessary oversight.

18. Inaction has also been the rule with respect to enforcement of laws prohibiting housing discrimination, even in the face of evidence that housing discrimination continues to be a problem. A 2001 report by the Committee on Civil Rights of the Association of the Bar of the City of New York, entitled *It Is Time to Enforce the Law: A Report on Fulfilling the*



Promise of the New York City Human Rights Law, stated that, “the existence of both individual instances of discrimination in housing, employment, and public accommodations, and entrenched patterns of such discrimination, remain major problems in New York City and its surrounding metropolitan area.”^{xxxiv}

19. HUD’s own Housing Discrimination study (HDS2000) showed that African-American and Hispanic renters and homebuyers continue to face significant discrimination in New York City: in rental markets, whites were consistently favored over blacks in 21.6% of tests, while 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.^{xxxv}

20. Just fifteen years ago, the City admitted to a long-standing practice of racial segregation in its public housing buildings, and agreed to take steps towards desegregation.^{xxxvi} In response to a lawsuit filed against the City for steering minorities away from predominately white buildings, NYCHA implemented a new method of assigning tenants to buildings with a goal of racial integration.^{xxxvii} However, NYCHA later appeared to backtrack by proposing a change in its assignment methods that would favor working families over those on welfare. In reviewing this proposal for compliance with NYCHA’s original agreement, a federal court found that it in fact favored white applicants over minorities.^{xxxviii} Due to its effect of perpetuating segregation in the City’s public housing, NYCHA’s proposal was eventually blocked by a judicial ruling in 2002.^{xxxix}

21. New York City acknowledges that racial segregation and discrimination in housing are “persistent and constraining features of housing markets” and that “the perpetuation of segregation [in the city] through discrimination and, in some instances, bias harassment and violence,

is an impediment to the goal of fair housing.”^{xl} In 2004, Rockland County, acknowledging housing discrimination as a problem, particularly noted “two mythical notions” that tend to obscure discussion of fair housing needs: (1) that minority clustering is substantially a function of self-segregation, and (2) that minority clustering is purely an issue of income.^{xli} The County Executives of both Nassau and Suffolk counties also recognize the fact that discrimination remains a problem, describing housing discrimination as “very real” and as Long Island’s “dirty little secret,” respectively.^{xlii}

22. In the New York area, federal, state, and local anti-discrimination agencies have routinely suffered from lack of funding, from an unwillingness to treat housing discrimination as a serious law enforcement matter, and from an unwillingness to attack the structural impediments (such as exclusionary zoning) that underlie continuing housing discrimination.

EQUAL RIGHT TO SAFE AND AFFORDABLE HOUSING

Under Article 5, the U.S. must “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the . . . right to housing.”

HOUSING COURT

23. Over 300,000 cases are filed annually in the Housing Court of the Civil Court of the City of New York, which serves to litigate disputes between landlords and tenants.^{xliii} Only fifty judges are assigned to adjudicate the entire caseload.^{xliv} 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 this overloaded system.^{xiv}

24. Poor women of color, many of whom are non-native English speakers, make up a large proportion of unrepresented tenants, since they lack the resources to hire an attorney or cannot take advantage of the limited legal resources provided by the Housing Court.^{xvi} Although the Housing Court maintains a few programs to assist unrepresented litigants,^{xvii} they are woefully inadequate and structural barriers often preclude tenants' participation.^{xviii} The resource disparities between landlords and tenants make it easier for landlords to use housing courts to evict poor tenants or to avoid keeping apartment buildings in good repair, resulting in violations of tenants' rights to housing and to equal access to the courts under the Convention.

OVERCROWDED AND UNSAFE HOUSING CONDITIONS

25. There is an acute racial disparity in the quality of housing in New York City. Although all lower-income New Yorkers are at risk of living in sub-standard housing conditions, minority groups, and especially immigrant populations, are more likely to live in overcrowded or otherwise inferior-quality housing. This is particularly true for immigrant and limited English proficient (LEP) New Yorkers, whose median incomes are substantially lower than native-born residents and who are most in need of mitigating social services.^{xix} Moreover, poverty and prejudice, as well as the integration difficulties faced by limited-English speakers, tend to force immigrants into older neighborhoods that have been vacated by groups progressing through the assimilation process, thereby channeling them into lower-quality housing.ⁱ

26. There are several markers of sub-standard housing conditions. Overcrowding, housing code deficiencies and environment hazards are particularly important indicators. According to one recent report, communities with an

approximate one in three immigrant population also tend to be areas with housing that is severely crowdedⁱⁱ high rates of asthma hospitalizations, higher infant mortality rates, and serious housing code violations.ⁱⁱⁱ Though 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.ⁱⁱⁱ In evaluating these circumstances, "immigrants, most of whom represent racial and ethnic minorities, obtain worse-quality housing than native-born households composed of white persons. . . suggest[ing] that both immigrants, especially those who are black or Hispanic, and native-born racial and ethnic minorities are disadvantaged in New York's housing market."^{iv}

27. The New York City Department of Housing Preservation and Development (HPD) is empowered to utilize various preservation, development and enforcement strategies to improve the "availability, affordability and *quality* of housing in New York City" (emphasis added).^v In service of its goals, HPD is the primary municipal governmental resource for New York residents with housing complaints or in need of housing services. However, recent reports by community housing activists and the City University of New York's (CUNY) Center for Urban Research have raised troubling questions about the extension of HPD's services to recent immigrants and people with low levels of English proficiency (LEP), two groups dominated by people of color.

28. In a Communities for Housing Equity survey of 697 immigrant and LEP tenants in New York, 60 percent of respondents reported having lived with one or more serious housing violations in the past year; however, only 18 percent of those surveyed had reported the violation to HPD. Of those who did not report violations to HPD, 43 percent claimed either unfa-

miliarity with HPD or linguistic concerns as the primary obstacle to reporting. Of those who did report violations, 46 percent had written communications in English, rather than their language of origin, while only 10 percent were informed by an HPD inspector of the language options available. Furthermore, 62 percent of those surveyed were not even aware of HPD's existence.^{li}

29. Similarly, CUNY, working with Communities for Housing Equity, found that while complaints to HPD city-wide have increased since the introduction in 2003 of HPD's 311 call-in service, this increase has been far slower in communities with high percentages of immigrant or LEP residents.^{lii}

30. In order to strengthen the enforcement function of HPD, in June 2007 Mayor Michael Bloomberg signed the "Safe Housing Act."^{liii} The legislation was passed in order to provide new tools to rehabilitate buildings with unsafe housing conditions and, according to one City Council member, with the intent that "New York City's tenants should never feel like their complaints are falling on deaf ears."^{liv} However, many low-income people of color are unaware of these legislative efforts, and many immigrant groups face linguistic and intimidation barriers stemming from their legal status that often inhibit them from acknowledging or reporting housing violations. Consequently, significant racial inequality in housing access and conditions persists, requiring a concerted effort to address these disparities. In violation of CERD requirements, the city has failed to ensure that residents are sufficiently aware of their rights and options as to obtain effective remedies.

PUBLIC HOUSING

31. Issues of race and public housing are closely connected in New York City. In general, the City's role in subsidizing housing involves two federal programs administered by the City's Housing Authority (NYCHA): conventional public

housing, which places residents in City-managed buildings; and Section 8 vouchers, which provide rent subsidies for private apartments. According to the most recent statistics from the federal Department of Housing and Urban Development (HUD), minorities constituted 94% of households living in NYCHA's conventional public housing in 2000. Moreover, 80% of households receiving Section 8 vouchers from NYCHA were comprised of people of color.^{lv}

32. Section 8 vouchers often create access problems because New York City does not have a general law prohibiting landlords from discriminating against those who rely on the vouchers or on other government assistance. In fact, only landlords who receive a specific tax abatement face such prohibitions.^{lvi} However, the limited reach of this policy means that many people of color who rely on government subsidies to find adequate housing are denied access based on landlord biases. This consequence of the Section 8 program has contributed to doubt about its efficacy in promoting racial integration, since there is no effective regulation for the discriminatory whims of the private market.^{lvii}

FUNDING OF NYCHA

33. The City's public housing programs are on the brink of financial crisis, jeopardizing the housing needs of minorities. Year after year, federal funding of NYCHA fails to adequately meet its needs: for example, in FY2007, only 83% of NYCHA's costs eligible for federal reimbursement received funding.^{lviii} To make up for this shortfall, NYCHA has been forced to pass on its increased costs to residents, raising rents for 27% of its conventional public housing tenants and imposing or increasing fees for such services as door replacements.^{lvix} Moreover, lack of financing led to a twelve-year shutdown of the Section 8 voucher waiting list, which was just re-opened in 2007, thanks to increased federal funding.^{lvi}

34. State and city initiatives have tried to

address the federal government's failure to keep pace with NYCHA's budgetary needs. In the spring of 2006, Mayor Michael Bloomberg announced an "unprecedented" \$100 million aid package to NYCHA^{lxvi}, while Governor Eliot Spitzer recently signed legislation that increased state subsidies to NYCHA for tenants receiving public assistance.^{lxvii} At the federal level, Senator Chuck Schumer and Representative

Nydia Velazquez introduced the Public Housing Equal Treatment Act, which would provide NYCHA with \$100 million more in federal funding. Although the bill was introduced in Congress in February 2007, it has yet to be acted on.^{lxviii} In the meantime, there is little improvement in NYCHA's budget crisis, as evidenced by the laying-off of 500 NYCHA employees in October 2007.

RECOMMENDATIONS

The following recommendations are meant to shed light on human rights violations within the housing market and to address discrimination against individuals and families of color who seek quality housing:

- Since lack of housing is both a consequence of and a contributing factor to the poverty that disproportionately impacts people of color, legislative and policy initiatives are needed to address the systemic racism that frustrates equal access to quality housing. **The City must proactively affirm housing as a human right**, including taking steps to hold landlords accountable for displacing low-income tenants, failing to make repairs and provide services, and keeping property available. Additionally, mechanisms must be put in place to punish municipal agencies whose operations perpetuate institutional racism, such as the NYC Department of Homeless Services, which concentrates people of color in shelters, or the NYC Department of Housing Preservation and Development, which allows patterns of neglect, abuse and harassment to persist in communities of color.
- **New York State should pass legislation, such as the 2007 Responsible Lending Act**, to curb abuses in the subprime mortgage market.
- **New York City should allocate funding to support and expand mortgage counseling and foreclosure prevention legal services for low income New Yorkers.**
- **A local law should be passed to require the City, in respect to the development and implementation of all its programs, policies, laws, and regulations**, to attempt to counteract segregation in residential housing, including the current impact of past instances of discrimination and segregation, and to refrain from acting in any way that would perpetuate segregation in residential housing. The law should require regular publication of data on the existence and scope of racial segregation.
- **The New York City Council should move to pass Int. 596**, a local law to provide language assistance and services to immigrant and LEP communities. The Act is currently under deliberation in committee.^{lxix}
- **The City should provide funding to its Human Rights Commission, to at least match the 1990 level**, as current funding is less than 85% of 1990 levels"

CRIMINAL JUSTICE

This chapter describes racial discrimination in the New York City criminal justice system, with particular attention paid to: the disparate racial impact of the state's drug sentencing laws; racial profiling in New York City street stops; the use of excessive force by the NYPD; the over-policing of New York City public schools and discrimination in the juvenile justice system; discrimination against women of color in prison; and the use of solitary confinement for inmates with mental health problems.

1. People of color are treated unfairly at every stage of the criminal justice process, resulting in gross racial disparities in arrest, detention, conviction and sentencing. In New York, Blacks and Latinos are subjected to unfair surveillance and targeting by police; inadequate defense; racially-skewed charging and plea bargaining decisions by prosecutors; and discriminatory sentencing practices. As a result of such racially discriminatory policies and practices, people of color are disproportionately represented in the criminal justice system. In New York City, the New York Police Department (NYPD) is the primary enforcer of criminal law, with a mandate to serve and protect all New Yorkers. For New Yorkers of color, the population that bears the brunt of unfair treatment by the NYPD, there is a deep gulf between this mandate and daily experience.

2. The excessive interface with the criminal justice system not only discriminates against people of color but also robs them of other basic human rights including the rights to work, to vote, to housing, and to keep their families intact as the natural and fundamental unit in society. Racial discrimination in the criminal justice system also reinforces public stereotypes concerning the propensity of people of color to be involved in criminal activity. What is



more, elected officials and other criminal justice policy-makers have failed to remedy the inequities that pervade the system.

3. The Rockefeller drug sentencing laws are particularly relevant in New York because they have led to the mass incarceration of low-level, non-violent drug offenders. With no discretion given to judges who oversee drug cases, mandatory sentences are meted out solely based on the amount of drugs involved. Consequently, Blacks and Latinos, who face higher rates of arrest for low-level drug use than Whites, are disproportionately sentenced and incarcerated in New York's criminal justice system.

4. Under CERD, governments may not ignore the need to secure equal treatment of all racial and ethnic groups, but rather must act affirmatively to prevent or end policies with unjustified discriminatory impacts. Indeed, Article 2 of CERD specifically requires that the U.S. "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations, which have the effect of creating or perpetuating racial discrimination." Given these protections, the continual racial discrimination perpetrated by the criminal justice system in New York City is in violation of CERD.

5. While the racially-biased application of the death penalty is well-documented, it is not addressed in this chapter because the New York Court of Appeals held that the state's jury instructions under the death penalty were in violation of the state's constitution and that the death penal-

ty could only be reinstated by passage of a new law. The Codes Committee of the New York Assembly has since voted against considering legislation to re-instate the death penalty.¹¹

OVER-REPRESENTATION OF PEOPLE OF COLOR IN THE CRIMINAL JUSTICE SYSTEM

Under Article 2, the U.S. “must take effective measures to review and amend or rescind governmental, national and local policies, which have the effect of creating or perpetuating racial discrimination . . . and adopt special and concrete measures to ensure the adequate enjoyment of full and equal human rights.”

6. In New York City, Blacks and Latinos make up about half the general population, but constitute 91% of the jail population.¹² Similarly, in New York State, while African Americans and Latinos only represent 15.9% and 15.1%, respectively, of the State’s population, they make up 50.4% and 28.4% of the State’s inmate population.¹³

7. The situation is equally alarming for the City’s youth of color: while constituting just under two-thirds of the general population, they constitute 90% of the young population entering the system.¹⁴ Contrast this with white youth, who comprise 25% of the general population and only 5% of detainees.¹⁵ Lesbian, Gay, Bi-Sexual, Transgendered (LGBT) youth of color are at particular risk of entering the criminal justice system, due to police interaction and misconduct that stems from homophobia, homelessness, rejection by their families, substance abuse and harassment.¹⁶ In particular, ‘Quality of Life’ policies implemented in New York City as part of a larger pattern of gentrification function to criminalize LGBT youth of color in neighborhoods such as Chelsea and the West Village, and have led to disproportionate representation of such youth in the criminal justice system.¹⁷ Numbers for this population, how-

ever, are not readily available.

8. Disproportionate representation is also an issue for women of color. In New York State, 69% of all female inmates are of color (47% being of African American descent), even though they account for only 30% of the state’s overall population.¹⁸ In the New York State female prison population, three out of five women come from New York City and its metropolitan area¹⁹; one in three was convicted of a drug related offense, and 80% are of color.²⁰

9. The disproportionate representation of people of color in the criminal justice system has not gone unnoticed, as the CERD Committee recommended that the United States government address the problem in its comments and recommendations to the first periodic report submitted by the United States to the CERD Committee in 2001. However, in its response, the government failed to explain the differential rates of incarceration related to drug law enforcement.²¹

RACIAL DISCRIMINATION IN DRUG SENTENCING

10. Since the 1970s, New York has undertaken aggressive criminal justice policies aimed at curtailing drug abuse, as part of a broader set of national policies and practices that fall under the so-called “War on Drugs”. Both in New York City and across the nation, Blacks and Latinos have been disproportionately affected, fueling their over-representation in the criminal justice system. In New York, perhaps no single mechanism is as largely responsible for this trend as the Rockefeller laws.

11. The Rockefeller drug laws, enacted with the support of Governor Nelson Rockefeller, established mandatory minimum sentences for drug offenses that are among the most punitive in the country. According to their rigid sentencing system, a judge’s ability to tailor sentences proportionate to the crime is relinquished and harsh prison sentences are required for even minor offenses. Moreover, under the laws, judges lack

even the authority to impose alternatives to incarceration such as substance abuse treatment.

12. Because Blacks and Latinos are disproportionately arrested and convicted for drug use, well above their actual rates of drug use, the Rockefeller drug laws have been directly responsible for channeling individuals of color into the city's and state's jail and prison populations. As part of this pattern of arrests and convictions, police practices such as street sweeps and "buy and bust" operations have been relied upon, targeting communities of color and participants in low-level drug transactions in these neighborhoods. Racial profiling plays an important role in these and other police practices and forms the basis for many racially-motivated drug arrests. In fact, the majority of all incarcerated drug offenders are from seven of New York City's poorest Black and Latino neighborhoods: the Lower East Side, the South Bronx, Harlem, Brownsville, Bedford-Stuyvesant, East New York, and South Jamaica.^{xiii}

13. The disparate rates at which minorities and whites are arrested, prosecuted, and imprisoned for drug offenses in New York raises serious concerns about the fairness of the state's drug sentencing policies and enforcement, and calls attention to the need for reforms that would minimize these disparities without sacrificing legitimate public safety objectives.

UNEQUAL AND UNFAIR TREATMENT BY THE CRIMINAL JUSTICE SYSTEM

Under Article 5, the U.S. must "undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone...to equal treatment before the law, the right to security of person and protection by the State against violence or bodily harm."

RACIAL PROFILING

14. Racial profiling – or the police practice of stopping, questioning, and searching minorities

in vehicles or on the street based solely on their appearance – has contributed significantly to the over-representation of minorities in the criminal justice system. Data from across the nation show that stopping and searching Blacks and Latinos at disproportionately high rates is not effective at fighting crime. In particular, the assumption that such methods will result in increased drug arrests has been proven invalid. Rather, "hit rates" – or the discovery of contraband or evidence of other criminal behavior – for people of color stopped and searched by police are significantly lower than for whites.

15. This pattern is equally true for New York City. The New York Attorney General's 1999 report on New York City Police Department (NYPD) stop-and-frisk practices revealed that the NYPD arrested one white New Yorker for every eight stops, one Latino New Yorker for every nine stops, and one Black New Yorker for every 9.5 stops. The NYPD Street Crimes Unit stopped 16.3 Blacks per arrest, 14.5 Latinos per arrest, but only 9.7 Whites per arrest.^{xiv} In New York City and across the country, disproportionately focusing stop and search activities on people of color is neither efficient nor effective at policing.

16. Despite this, the most recent NYPD data reveal that the police continue to disproportionately target New Yorkers of color for stop-and-frisks. In 2006 alone, the NYPD stopped, questioned and/or frisked over 508,540 people, a 500% increase from in 2002. Of those stopped, 86.4 percent were Black or Latino, even though these groups make up only 53.6 percent of the New York City population.^{xv} Despite the large number of 2006 stops, only 10 percent led to summonses or arrests, revealing the continued inefficacy of racial profiling as a policing tactic.^{xvi}

17. In November 2007, the Rand Corporation, hired by the New York Police Foundation to analyze stop-and-frisk tactics, published numbers that were only slightly different from those above. Despite having access to the NYPD's electronic database, which is not avail-

able to the public the RAND report found that the overwhelming majority (89%) of people subjected to stops due to suspected criminal involvement in 2006 were of color.^{xvii} While the report attempted to downplay the role of racial bias in these tactics, the numbers speak for themselves: 53% of stops involved black suspects, 29% involved Latinos, while only 11% and 3% involved whites and Asians, respectively.^{xviii} When stopped, 45 % of Blacks and Latinos were frisked compared to 29% of white suspects, even though white suspects were 70% more likely than black suspects to have a weapon.^{xix}

18. The discrimination inherent in the NYPD's stop and frisk practices has not been lost on New Yorkers themselves. The Civilian Complaint Review Board (CCRB) – the oversight agency charged with investigating complaints against police officers – revealed that African Americans filed close to six times as many complaints regarding street stops as whites. In the past decade, 80% of complaints filed with the CCRB have been made by people of color.^{xx} In addition, compared with whites, Blacks were twelve times as likely to have been stopped by an officer using physical force and forty times more likely to have been stopped by an officer using a gun.^{xxi} Furthermore, substantiated claims of misconduct do not carry heavy penalties; officers usually receive negative notes in their personnel file, or docked vacation days for more serious use of offensive slurs.^{xxii} This disproportionate emphasis on extreme police measures is in violation of article 5 of CERD, which requires equal treatment by the criminal justice system. When paired with the disproportionate experience of inappropriate police behavior faced by New Yorkers of color, what emerges is not only a troubling pattern of discriminatory practices in law enforcement but an increased probability of excessive force against and fatal interactions with people of color.

POLICE BRUTALITY AND THE USE OF EXCESSIVE FORCE AGAINST PEOPLE OF COLOR

19. The long and notorious history of police brutality in New York City has always been interwoven with race and racial profiling, constituting a “systematic pattern of racism” by the NYPD.^{xxiii} Under the New York State Penal Code, a police officer can only use deadly force when it is necessary to defend the officer or someone else from what is reasonably believed to be the use or imminent use of deadly force.^{xxiv} However, in practice, police officers constantly expand the bounds of their discretion in using such force, particularly against people of color, and are rarely held accountable for their actions. The City's failure to effectively address this long-term and well-known problem violates its obligation under Article 5 to guarantee the rights of people of all races to security and protection by the State against violence or bodily harm.

20. Given the pattern of persistent and often lethal police brutality, the NYPD's decade-old motto of “Courtesy, Professionalism, Respect,”^{xxv} remains but a hopeful ambition, rather than a proven practice, for many communities of color, as evidenced by recent events in New York City. The most notorious such example is the killing of Sean Bell, an unarmed 23 year-old black man who died after undercover detectives unloaded 50 rounds into his car on the night of his bachelor party.^{xxvi} In March of 2007, three of the five officers involved were indicted for their conduct, while the other two officers were released on bail.^{xxvii} In September, a New York Supreme Court judge denied the officers' motion to dismiss^{xxviii}, and the trial is now scheduled to commence in January of 2008 in Queens.^{xxix} Additionally, in May of 2007, an off-duty officer in the Bronx shot Fermin Arzu, a Honduran man who was involved in a car accident near the officer's home.^{xxx} Unfortunately, these recent shootings are by no means isolated or extraordinary

occurrences. In fact, Michael A. Hardy, the attorney representing both Bell and Arzu, demanded an investigation on whether the NYPD has violated the civil rights of minorities by repeatedly using excessive force. Hardy claims that the NYPD has killed over 100 people since 1999, most of them black and Latino.^{xxxii}

21. In the wake of the Sean Bell case, little has changed. Take, for example, the death of an 18 year-old known to have mental health problems—Khriel Coppin, shot 20 times on November 12, 2007 in the Bedford Stuyvesant neighborhood of Brooklyn by police responding to his mother’s phone call.^{xxxiii} Police claimed that they mistook a hairbrush in the victim’s hand for a weapon; according to one witnesses, Coppin had dropped the brush before the shooting began. Although a video camera in range of the

83%

of the New York City school children that must pass through metal detectors at their schools are Black and Latino

incident could be used to shed light on what really happened, the NYPD claims the camera was not working at the time of the shooting.^{xxxiii} What is revealed through such events is the ease and frequency with which police in the City use violence against people of color.^{xxxiv}

22. Because public attention seems to focus on police brutality only when it leads to fatalities, the true extent and varied forms of such brutality remain obscured. Nor does it help that the NYPD does not release racially disaggregated data on fatalities. Recent history bears wit-

ness to the scope and pervasiveness of the problem. For example, in May of 2003, misinformed police raided and set off a flash grenade at the Harlem apartment of 57-year-old Alberta Spruill, who later died of a heart attack.^{xxxv} Only a week later, police again mistakenly raided a family’s residence in the Bronx, putting a 12-year-old girl in handcuffs while pointing their weapons at her.^{xxxvi} Most recently, in September of 2007, police violently arrested and pepper-sprayed peaceful fundraisers at a celebration of the Sylvia Rivera Law Project, a group which advocates for low-income people of color who are gender non-conforming.^{xxxvii}

23. People of color whose identities intersect with other marginalized groups, such as the LGBT community and the population of sex workers, are at added risk of suffering police misconduct with no real hope for accountability.^{xxxviii} In particular, LGBT people of color in New York City report excessively harsh treatment in their interactions with police authorities, including verbal and physical abuse.^{xxxix}

24. Similarly, interviews with sex workers by the Sex Workers Project of the Urban Justice Center found significant police abuse and harassment of those interviewed, the majority of whom were of color. For example, seven out of ten the workers interviewed reported having near daily police-initiated interactions with law enforcement. Even where criminal activity was not involved, police harassment was cited, including inappropriate touching, extortion of sex and rape, violence and threats of violence, and false arrests.^{xl}

25. As previously noted, there are no effective accountability measures to prevent police brutality against people of color. For example, though there has been a steady increase of police-misconduct complaints filed with the Civilian Complaint Review Board since 2000^{xi}, numbering in the thousands every year^{xii}, the CCRB has failed to hold police accountable for patterns of racial profiling and to recommend

appropriate reforms.^{xliii} Undoubtedly, this is because the majority of the complainants are Black and Latino, while 60% of police officers in the City are white.^{xliv} ..

26. This lack of accountability measures is not for want of attempts by the City to reign in police violence. For example, in 2001, the New York City Council passed the Police Reporting Law, in response to widespread concern about the influence of race in the 1999 Amadou Diallo shooting.^{xlv} The law required that the NYPD produce a quarterly report on the racial composition of people it had stopped, questioned and frisked in that time.^{xlvi} Yet in November of 2006, the New York Civil Liberties Union discovered that the NYPD had not complied with this law for three years^{xlvii}, apparently because they did not consider it a serious problem. In fact, the NYPD has shown more interest in providing disaggregated data for dogs that have been involved in police shootings than for human beings.^{xlviii} Other efforts by the police department to train officers to deal with “sensitive situations”—such as racial disputes in restaurants—seem grossly inadequate given the undisputed history of police mistreatment of people of color.^{xlix} Measures like this are symbolic at best and do not promise to reform the problematic use of excessive force against people of color by the department. In order to guarantee that Blacks and Latinos in New York City can enjoy their Article 5 rights to security of persons and protection against violence or bodily harm to the same extent as others, the City must aggressively pursue more effective measures to hold the police accountable for their actions and to institute widespread reform.

OVER-POLICING OF NEW YORK CITY SCHOOLS

27. The NYPD’s tactics are not limited to adults and have increasingly targeted youth of color, particularly in schools, which should otherwise be safe and nurturing environments. Take for

example the so-called “school-to-prison pipeline,” a form of overpolicing that is strikingly apparent in New York City’s public schools, particularly those attended primarily by Black, Latino, and poor students.¹ Schools involved in the pipeline are patrolled by some 200 police officers and over five thousand school safety agents. These are schools in which metal detectors and other types of student searches are the norm, schools in which disciplinary policies treat even minor adolescent misbehavior as crimes. More than 93,000 New York City school children must pass through metal detectors, and are subjected to bag searches and “pat downs” by police personnel who are inadequately trained, insufficiently supervised, and often belligerent, aggressive and disrespectful. More alarmingly, the police officers who administer such searches are not employees of the city’s Department of Education, but rather of the New York Police Department and report to police official, not to school administrators. Poor black and Latino students are disproportionately affected by these search procedures, as they make up the bulk of the population of schools with metal detectors, some 82% in fact.²

28. This massive law enforcement presence within schools has serious consequences. It interferes with young people’s access to education by subordinating the education to purported concerns for security. In addition it threatens and occasions serious violations of children’s rights against unjustified searches and seizures of property. Even children’s bodily integrity is compromised: many girls have reported being ordered to squat for invasive searches with handheld metal detectors. Finally, the inundation of schools by security personnel heightens students’ risk of arrest for minor schoolhouse misbehavior, particularly given the enforcement of zero tolerance policies.

29. Indeed, the over-policing of New York City schools drives youth of color directly towards the juvenile and criminal justice system—hence

the school-to-prison pipeline. In schools with permanent metal detectors, 75 percent of incidents in which police were involved during the 2004-2005 school year were non-criminal in nature. During the following school year, there were 1,271 arrests within New York City public schools.^{li} As noted in a previous chapter, police and school safety agents get involved in twice as many non-criminal incidents in schools with permanent metal detectors as in schools without them. This increased likelihood of police action in response to minor disciplinary matters in schools serving youth of color significantly contributes to the disproportionate involvement of people of color in the New York criminal justice system.^{lii}

DISPARATE TREATMENT OF YOUTH OF COLOR IN THE JUVENILE JUSTICE SYSTEM

30. The over-policing by the NYPD and the increased tendency towards zero-tolerance policies in schools are only two examples of how youth of color in New York are negatively and disproportionately affected by facially neutral policies. Racial discrimination permeates the state and city's juvenile justice systems as well. From surveillance and arrest to incarceration, youth of color in New York suffer a "cumulative disadvantage" at every decision-making point, resulting in the vast over-representation of Black and Latino youth in New York City's juvenile justice population.^{liii}

31. In 2005, Black and Latino youth represent comprised about 90% of all arrests compared to 7.5% for whites, 2.4% for Asians and .2% for American Indians.^{liv} Increasingly, youth of color are targeted and arrested for minor offenses including criminal trespassing. And while the number of arrests for possession of marijuana in general have increased tenfold in New York City over the last decade^{lv}, the arrest rate for possession of marijuana is nearly 8 times higher for Blacks than for whites, most of

these black youths.^{lvi} Yet the City's own statistics show that white youth in New York City are more likely to use illegal substances including marijuana, inhalants and cocaine.^{lvii} This arrest trend started under former Mayor Giuliani and has continued under Mayor Bloomberg, with efforts shifting towards low-income black and Latino communities.^{lviii}

32. Similarly, arrests for criminal trespassing - entering or remaining on another's property without the owner's consent - have jumped by 25% since 2002 and there is ample evidence to indicate that youth of color in low-income neighborhoods are unfairly targeted for arrest.^{lix} "Operation Clean Halls" allows the NYPD to stop, search, question, and arrest anyone in or even near a building in an action called a "vertical." Clean Halls has been touted as a tool for keeping drugs and drug dealing out of low-income housing, but once a landlord signs a Clean Halls affidavit, the effective outcome is that no one can leave their home without identification, unduly restricting their freedom of movement. In several cases, the NYPD has made arrests when it is clear no trespass occurred. According to a *Newsday* article, a 17-year-old was arrested in February 2007 at the Drew Hamilton Homes in Central Harlem even after his friend came down from his apartment to vouch for him.^{lx}

33. The unfair treatment of black youth only increases as they advance through the juvenile justice system, particularly after arrest.^{lxi} For example, black youth represent 55% of all secure detention admissions in New York State, despite constituting only 29% of the arrest population and 11% of the state population.^{lxii} Conversely, a disproportionate number of white youth are diverted out of the system post-arrest.

34. There are three secure juvenile detention facilities in New York City, and the vast majority of youth (92%) held in detention have been charged as juvenile delinquents, not with more serious crimes that would mandate prosecution

in adult court. In 2005, only 4.4% of the City juvenile detentions admissions were white youth, while 85% were black and Latino, and another 9.4% classified as unknown.^{lxiv} Moreover, youth of color are kept longer on average than their white counterparts.^{lv}

35. Once young people are enmeshed in the juvenile justice system, their education is further disrupted and they are at greater risk of future juvenile and criminal justice involvement. Boys and girls alike suffer from the excessive use of force and other forms of abuse and neglect in the City's and State's detention facilities.^{lvi} Once incarcerated, they are denied mental health, educational, and other rehabilitative services and remain isolated from their families and communities as a result of the facilities' remote locations.^{lvii} In New York City and State, as in the rest of the United States, the majority of children subjected to these abusive conditions belong to racial minority groups.

36. Youth of color who also identify as LGBT face an additional host of difficulties once within the prison system. The combination of racism and homophobia only serves to aggravate the abuse and mistreatment already prevalent in prisons, such as verbal and physical harassment by peers and even staff, as highlighted in a report by the Urban Justice Center's Peter Cicchino Youth Project.^{lviii} Such abuse is exacerbated by that fact that transgender and intersex individuals are usually placed in holding cells based on their gender at birth rather than the gender with which they identify.^{lxx} Problems accessing gender-related medical care are also frequent among this population, due in part to the fact that individuals must have already been diagnosed with Gender Identity Disorder (GID) and have been taking hormones prior to imprisonment in order to continue treatment while in prison.^{lxx} Even for these individuals, gender-related care is inconsistent and subject to arbitrary termination.^{lxxi} Denial of such care forces prisoners to pursue high-risk alternatives, such

as buying hormones from other prisoners or self-surgeries, which, in turn, subject these individuals to disciplinary punishment.^{lxxii}

37. New York City's policies on juvenile justice not only have a disproportionately negative effect on youth of color; they are also expensive and largely ineffective in addressing the core reasons for youth entry into the juvenile justice system. On average, it costs the City at fourteen times as much to hold a child in a detention facility than to educate a child.^{lxxiii} The high cost of detention does not result in rehabilitation of youth, as almost half (46%) released from the City's detention facilities are readmitted in the same year.^{lxxiv}

38. It should be noted that in New York State, youth aged 16 and over are treated as adults, irrespective of the crime. For this age bracket, youth of color are more likely than their white counterparts to be given a sentence of incarceration. Research has found that for the Bronx, Queens and Manhattan, the largest boroughs in the city, over 94% of the youth cases that were filed in adult courts involved youth of color.^{lxxv} In Manhattan, data has shown that for some years no white youth received a sentence of incarceration while 80% of sentences were handed to black and Latino youth.^{lxxvi} One reason for this is lack of counsel: black and Latino youth are less likely (and less financially able), to retain private counsel even though those represented by private attorneys were less likely to be convicted.^{lxxvii}

39. One of the most insidious and enduring collateral consequences of unfairly targeting and incarcerating youth of color is the criminalization and consequent socialization of minority youth to the criminal justice system.^{lxxviii} The disproportionate arrest and incarceration of youth sends a message to society that youth of color are more dangerous than their white counterparts, and therefore the treatment they receive, justified. In fact, a juvenile record is often used to vilify youth of color who are victims of police injustice, as was done by former Mayor Giuliani when he

released the sealed juvenile arrest records of the late Patrick Dorismond, an unarmed black man who was shot and killed by the NYPD. Further investigation into the arrest record showed that Mr. Dorismond had been convicted of disorderly conduct for two of his three arrests, and that a third arrest was dropped.^{lxxxix} However, by then, the former Mayor had already planted the idea that the victim was deserving of the unjust treatment he received from the police.

40. As one of its four conditions for allocating funding, the federal Juvenile Justice and Delinquency Prevention Act (JJDPA), a major source of funding to improve state juvenile justice systems, requires states to assess and address the disproportionate representation of youth of color in their facilities.^{lxxx} Unfortunately, New York State has still not addressed this problem in the City, and has yet to be held accountable by the federal government for its lack of effort in this area.^{lxxxi} Nevertheless, progress in some states is proof that the problem can be

addressed, with some jurisdictions showing remarkable reductions in race disparities in their juvenile facilities. For example, the administration in Santa Cruz, California was able to reduce the proportion of Latinos in juvenile detention from 64% to 50% in two and a half years by making the reduction of race disparities in the juvenile detention population an organizational priority.^{lxxxii}

DISPARATE TREATMENT OF WOMEN IN THE CRIMINAL JUSTICE SYSTEM

41. As noted earlier, Black and Latino women comprise the majority of New York City's female inmates, with black women actually being arrested at higher rates than white men, a remarkable reversal of national trends.^{lxxxiii} This increase is largely due to the Rockefeller Drug Laws.^{lxxxiv} And because a majority of female inmates are mothers, increased incarceration of women of color has an aggravated effect on children of color.^{lxxxv} Along with the overly punitive mandatory sentencing associated with drug

SOME VICTIMS OF NYPD BULLETS IN EARLY 2003

■ January 1, 2003, Jamal Nixon, 19

Shot to death after allegedly engaging in a celebratory gunfire to ring in the New Year
No charges filed

■ January 1, 2003, Anthony Reid, 21

Shot to death in back and legs after allegedly shooting at a car outside a club
No charges filed

■ January 2, 2003, Allen Newsome, 17

Shot to death after allegedly pulling a fake gun on undercover officers
No charges filed

■ April 30, 2003, Floyd Quinones, 28

Shot to death after he fired 17 shots into the sky at a birthday celebration
No charges filed

■ May 22, 2003, Ousmane Zongo, 43

Unarmed and shot to death by NYPD during a foot chase
Officer tried but jury deadlocks resulting in a mistrial

laws, women incarcerated in New York risk losing parental rights because of the New York Adoption and Safe Families Act (ASFA)^{xxxvi}, which terminates the parental rights of women starting after fifteen months, arguing that the incarcerated parent has effectively abandoned or permanently neglected their child. Because women of color are imprisoned for three years on average, they are therefore at greater risk of losing their parental rights, if their children reside in the foster care system. Furthermore, many New York City mothers are imprisoned far away from their residence, making it difficult for them to see their children. For example, the Albion Correctional Facility, to which 41% of New York City inmates are sent, is eight hours from the City.^{xxxvii}

42. The incarceration of mothers of color has grave consequences for entire communities. For example, children with incarcerated parents are more likely to have elevated levels of anxiety, fear, loneliness, anger, loss of self-esteem, and truancy. This is particularly alarming given that Black children are nine times more likely, and Latino children three times more likely, to have an incarcerated parent than white children.^{xxxviii}

MENTAL HEALTH AND SOLITARY CONFINEMENT

43. On any given day, there are about 8,000 people with psychiatric disabilities in New York's prisons and jails. In the City alone, 15 to 20 percent of inmates have mental health problems,^{xxxix} the overwhelming majority of whom are people of color, lower-income, and formerly homeless.^{xo} New York has no process for redirecting inmates with mental health issues out of the criminal justice system and into treatment, creating a prison environment in which those with mental health problems are instead victimized and segregated.^{xci} In addition, New York has insufficient discharge planning, releasing many inmates into the community without treatment, housing, or income. These policies there-

by create a "revolving door" for those with mental disabilities, with many going back and forth between hospitalization and incarceration.^{xcii}

44. Unjust practices around mental health issues have a disproportionate effect on persons of color within the system. In particular, the use of solitary confinement has been singled out as inhumane. This practice, also known as 'punitive segregation,' frequently denies the inmate access to reading materials and hygienic products, and often exacerbates their disruptive behavior.^{xciii} In New York's prison system, inmates designated as "mentally ill" are confined to Special Housing Units (SHUs), are only allowed out of 6 by 9 foot cells for one hour a day, and receive little or no mental health treatment.

45. In July 2007, New York State Governor Spitzer agreed to sign legislation that would effectively end the placement of prisoners with severe psychiatric disabilities in solitary confinement. The legislation requires the establishment of residential treatment facilities within prisons that offer therapy and treatment outside the cells for at least four hours a day. However, the legislation would not apply to county and city jails.^{xciiv}

COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION

46. Upon serving a prison sentence, prisoners are largely left to transition back into society without any assistance from social service or government agencies. Indeed, many states have adopted harmful legal barriers that prevent those with criminal records from accessing employment, public assistance, or public housing, in addition to restricting the right to vote, to become a foster parent, or to possess a driver's license.^{xci} Without access to employment, assistance, or housing, many former inmates, the majority of whom are of color, revert to criminal activity, fueling the recidivism rate. Because these barriers disproportionately affect persons of color, they have a racially discriminatory effect.

47. With respect to voting rights in particular, over 120,000 people are currently disenfranchised in New York State due to incarceration or parole, as documented in the voting rights section of this Report. Most of those 120,000 are people of color. In addition to being disenfranchised, former prisoners are counted by the US Census Bureau as residing in the legislative district in which they are incarcerated— instead of their home communities—boosting the voting strength of those districts.^{xvii}

48. New York State prohibits the consideration of arrests that never led to convictions in making employment decisions, but it allows the

consideration of a conviction if it is considered job-related. Furthermore, in New York State, as in most other states, conviction records are available online, making them easily accessible by any employer without the consent or knowledge of the applicant.^{xviii} New York State also automatically revokes or suspends drivers' licenses for at least 6 months when individuals are convicted for drug or alcohol offenses, making it difficult for such individuals to find employment.^{xviii} Because persons of color are disproportionately convicted of drug-related crimes, such restrictions and suspension have a racially discriminatory effect.

RECOMMENDATIONS

The following recommendations are intended to shed light on human rights violations within the criminal justice system and to address discrimination against individuals of color:

■ One of the major obstacles to addressing discrimination in the criminal justice system is the lack of disaggregated racial and ethnic data on police practices. **The NYPD should collect and make publicly available racial and ethnic data on its practices**, including the number of stops, arrests and firearm incidents. These data should be further disaggregated by gender and LGBT status. The NYPD should also make its electronic database accessible to organizations that request the information for analysis. Likewise, the Department of Corrections and Department of Juvenile Justice should collect and disseminate data, disaggregated by race and gender, on their populations, including the numbers of inmates or detainees who receive treatment versus imprisonment.

■ **New York City should take effective measures to strengthen the Civilian Complaint Review Board's ability to investigate and address complaints about police misconduct.**

■ **The City should enforce the Police Reporting Law**, which requires the NYPD to produce a quarterly report on the racial composition of individuals stopped, questioned and frisked in a given period of time.

■ **New York City should follow the example of Santa Cruz, California and adopt a deliberate plan to address the over-representation of people of color in the criminal and juvenile justice system.**

■ **The Rockefeller Drug Laws should be repealed by New York State.**

■ **The federal government should enforce the provision of the Juvenile Justice and Delinquency Prevention Act (JJDP),** which is up for reauthorization, and which requires New York State to assess and address the disproportionate representation of youth of color in juvenile detention facilities as a condition of continued federal funding.

CHILD

WELFARE

This chapter looks at pervasive racial disparities in the child welfare system, including: the unconstitutional removal and over-representation of children of color in child welfare; the racial stereotypes that lead to unconstitutional removals; the inadequacy of preventive services and legal representation for families in crisis; the link between child welfare and the juvenile justice system; and the impact of child welfare on education.

1. Like the juvenile justice system, the child welfare system is plagued by over-representation and disparate treatment of people of color. New York City mirrors a national trend, which has seen the number of African American children in the child welfare system grow steadily since the 1950s and 1960s. A child's race is a strong indication of the kind of access to services, assessment, and treatment he or she will receive from the child welfare system.

2. The US Report does not mention the disparate treatment of families of color in the child welfare system. Nor does it mention government policies and practices that exacerbate, if not create, the differential experience of children of color in child welfare. These policies and practices perpetuate discrimination and are in violation of CERD. Under article 2 of CERD, the government has an obligation to review, amend or nullify them. Discrimination in the child welfare system also results in the denial of the equal enjoyment of rights protected under article 5 of CERD.

3. Despite its original goal of helping families create a safe environment for children, the child welfare system now relies too heavily on the practice of removing children from the home, even at the first sign of family crisis. As numerous studies attest, such removals disproportionately affect families and communities of



color as compared to their white counterparts. Once they enter the child welfare system, children of color remain in foster care for longer periods of time, receive fewer and lower quality services such as mental health and drug treatment services, fewer foster parent support services, maintain less contact with caseworkers, have higher placement in detention or correctional facilities, and are less likely to be returned home or adopted.¹

4. In New York City, the agency with primary responsibility for enforcing child welfare policies is the Administration for Children's Services (ACS). ACS has a mandate to protect children in New York City from abuse and neglect, provide preventive and foster care services, and ensure timely family reunification or adoption depending on a child's needs.² In the 1980's, ACS caseloads increased exponentially due to the explosion of crack use and babies born to AIDS, causing different aspects of the system to suffer, such as training of staff, organizational accountability, and dilution of services. The

result is a largely dysfunctional system.

5. ACS remains over-extended despite some commendable changes and a reduction in child removals over the last ten years that was the result of collaborative work between child and family advocates and ACS administrators and policy-makers. For example, while there are around 17,000 in foster care today, that number was more than twice as high in 1999, at 38,440.ⁱⁱⁱ However, this downward trend has begun to reverse since the tragic murder of Nixzmary Brown by her step-father in early 2006: child placement in foster care increased by over 50% in the following year.^{iv} Despite this overall reduction in child removals, the disproportion of children of color in the system has remained constant.^v

6. The overwhelming discrimination against poor families of color with respect to child welfare is only exacerbated by other structural problems in the system, such as a general lack of due process and a frequent “presumption of guilt” that can be based on nothing more than a single anonymous call. Except in extreme cases of clear and imminent danger, criminal arrest of parents for perceived child welfare offences and placement of their children in foster care not only violate CERD due to the disproportionate impact on people of color, but also violate Article 11, 12, 16, and 25 of the Universal Declaration of Human Rights (UDHR). These human rights include the right to be presumed innocent until proven guilty according to the law and in a public trial at which one has had all the guarantees necessary for defense; the right to be free from arbitrary interference with one’s privacy, family, home or correspondence; freedom from attacks upon one’s honor and reputation; the right to the protection of the law against such interference or attacks; the right to an adequate standard of living; and the right to protection of the family as the natural and fundamental group unit of society by the State.

OVER-REPRESENTATION OF CHILDREN OF COLOR AND UNCONSTITUTIONAL REMOVALS

Under Article 2, the U.S. must “take effective measures to review and amend or rescind governmental, national and local policies, which have the effect of creating or perpetuating racial discrimination... and adopt special and concrete measures to ensure the adequate enjoyment of full and equal human rights.”

7. The over-representation of children of color in the child welfare system is linked directly and indirectly to public and child welfare policies and practices, including: the targeting of impoverished neighborhoods; rash reactions to tragedies of family violence; insufficient social and economic support to poor families; and racial stereotypes that are ingrained in the minds of professionals that work with our nation’s children.

8. There is no racial disparity in rates of child abuse and neglect yet nationwide black children, who comprise approximately 15% of the child population, account for 32% of children in foster care.^{vi} In fact, this disproportion is exactly the same for Native American children in the foster care system, relative to their national population.^{vii} By contrast, White children account for 41% of the children in foster care, despite constituting 61% of the child population.^{viii} Youth of color who are also Lesbian, Gay, Bi-Sexual, Transgender (LGBT) identified, are estimated to make up a disproportionate share of the foster care.^{ix}

9. In the New York State child welfare system, black children are represented 2.63 times more than their statewide population.^x Of the entire child welfare statewide population, slightly over half (52%) are boys, and 48% are girls.^{xi}

10. In New York City, Black and Latino children constitute an overwhelming 86% of the child welfare system. Mirroring national trends, black children constitute about 30% of the gen-

eral child population in New York City yet represent 57% of the child welfare system.^{xiii} Similarly, Latino children comprise 29% of the children in child welfare, despite constituting 34% of the City's child population.^{xiii} Compare this to white children, who represent 25% of the child population in New York, yet only 4% of the child welfare system^{xiv}; or to Asian children, who make up about 3% of children in foster care.^{xv} In fact, half of the City's caseloads come from 15 community districts that are primarily Black and Latino. ACS is so pervasive in these neighborhoods that it has influenced the language used: to have "caught a case" refers to being investigated for neglect or abuse.

11. While poverty within families of color is often cited as the sole explanation for their disproportionate representation in the child welfare system, a recent government report recognized that other factors are at play, such as family difficulties in accessing the necessary support services to provide a safe home, and more importantly, racial bias and cultural misunderstanding.^{xvi}

12. In some cases, poverty is confused with neglect and people are penalized with family separation for being poor. In a recent case involving a Mexican immigrant in New York City, a mother living with her four children in a Single Room Occupancy (SRO) hotel had her children removed simply because the two children shared a bed with the mother. The children were not beaten, tortured or starved. They attended school and the school's parent coordinator vouched for the mother as a devoted parent. Nevertheless, the mother was charged with neglect for living in an overcrowded situation. Fortunately, after the intervention of advocates, ACS acknowledged the mistake and offered services that should have been provided in the first place: the family was placed in a shelter while the mother looked for permanent housing.^{xvii}

13. Stress related to living in poverty may

explain many family crisis situations, situations that often result in the intervention of the child welfare system. However, even after controlling for poverty, families of color are still over-represented in the system. Black families in particular have suffered from racial bias: in New York, the poverty rate for blacks (21.4%) is higher than the poverty rate for Latinos (28.6%), yet the proportion of black children removed from their parents is much higher than for Latinos.^{xviii}

14. A recent study comparing neighborhoods showed that poverty is not directly related to the removal rates of children, highlighting instead the role of racial bias. The first comparison examined Central Harlem, a predominantly black community, to Hunts point, a predominantly Latino neighborhood. While the two communities had a roughly equivalent single parenthood rate, Hunts Point is worse off than Central Harlem, in most categories related to poverty, including: number of households with incomes below \$10,000; percentage of births into poverty; percentage of children on public assistance; and percentage of children born to teen parents. Yet there are significantly more reports of abuse and neglect filed in Central Harlem, and three and a half times as many children in foster care than in Hunts Point.^{xix} In a second comparison, two predominantly white neighborhoods, Ridgewood and Glendale in Queens, were compared to Central Harlem and Hunts Point, where the collective poverty rate was about twice as high. The results were striking: in the white neighborhoods, only one in 200 children was in foster care compared to one in 10 for Central Harlem and one in 19 for Hunts Point.^{xx}

15. Racial profiling and interaction with law enforcement officials play a significant role in the disproportionate investigation of families of color for abuse or neglect. In New York State, 3 in 5 reports of abuse and neglect are filed by community professionals including educational, law enforcement and social service personnel,

the latter required to report suspected cases of abuse and neglect.^{xxi} And in New York City, social service personnel and law enforcement officials account for the highest and third highest number of reports, respectively.^{xxii} Low-income families and families of color are more likely than white and middle class families to come in contact with these community professionals.^{xxiii} Conversely, potential cases of abuse or neglect by white and middle class families are less likely to be reported by community professionals, and even when white children come in contact with these authorities, an injury is less likely to be reported than similar injuries for black children.^{xxiv}

16. In addition to having more reports of abuse and neglect filed against them, Black and Latino families are also more likely to have an alleged report of abuse or neglect substantiated by caseworkers. The decision to substantiate a report of abuse or neglect is subject to the discretion of the caseworker involved, and studies of decisions by case workers show that they were more likely to substantiate allegations against Black and Latino families than white families.^{xxv}

17. In similar situations, black children are 36% more likely to be removed from their home and placed into foster homes than white children. However, no statistically significant difference in maltreatment to black as opposed to white children has been found.^{xxvi} A study of Black children in New York City showed that they are also more than twice as likely as white children to be removed from the home after a substantiated substance abuse.^{xxvii} In particular, black women were 72% more likely than other women to have their babies taken away if they tested positive for cocaine, without regard to individuals' history of substance abuse.^{xxviii} Nationally speaking, this also holds true: blacks use drugs at about the same rate as whites, yet significantly more black children are removed from their homes and placed in foster care due

to parental substance abuse.^{xxix} Study after study shows the same result in New York and the US at large: a prevalent racial bias in substantiating alleged claims of maltreatment that eventually breaks up families of color.^{xxx}

18. The federal government has acknowledged this racial bias. In a recent report issued by the United States Government Accountability Office, the role of racial bias on the part of child welfare decision-makers was highlighted in accounting for disproportional representation.^{xxxi} The report also recommended that state and local child welfare agencies collect and make publicly available racially-disaggregated data as a means of addressing the problem. However, New York City does not make such data easily accessible and racially-disaggregated data are not regularly provided in its statistical documents.^{xxxii}

RACIAL STEREOTYPES OF FAMILIES OF COLOR

19. Because racial bias plays such a key role in the child welfare system, racial stereotypes of Black parents ought to be examined, since these forms the basis of such bias. Long-time New York advocates in the field have attested to a pervasive belief, among child welfare workers and others, that black families are broken and that removing black children from broken families is the proper way to save them.^{xxxiii} For this reason, government intervention in and supervision of Black families often goes unquestioned.

20. Racial stereotypes also explain the widespread belief that Black parents are more likely to have a substance abuse problem and therefore more likely to be a potential danger to their children. A survey of child welfare decision-makers ranks problems with substance abuse as the second most important factor. As was just seen, there is no significant difference in rates of substance abuse among blacks and whites.^{xxxiv} If the ranking were based on statistical reality, child welfare workers ought to be

concerned that the problem is as pervasive among blacks as whites. Given equivalent amounts of concern and equal rates of substance use, we ought to see a similar tendency for removal of white children from homes with substance abuse. Sadly, as was just seen above, this is not the case. The conclusion: racial stereotypes make it more likely that black children will be removed from the home due to substance abuse.^{xxxxv}

21. The relatively high occurrence of single parenthood among Black families also contributes to negative stereotypes. In particular, single-parent family structures are associated with increased chances of neglect or abuse.^{xxxxvi} However, research has found that there is no significant relationship between single-parent families and increased rates of abuse. The higher incident of abuse in single-parent homes is eliminated once the numbers are adjusted for family income.^{xxxxvii} Child welfare actions ought to be based on these statistics, rather than on stereotypes. Without a real understanding of family structures prevalent among blacks, where valuable assistance from the extended family is more common, caseworkers may not fully appreciate the resources available to black parents.^{xxxxviii} The issue of cultural competency among caseworkers should be raised within the child welfare system, in order to provide services that compensate for the reduced income of single parents of color who are considered at-risk.

DISPROPORTIONAL LENGTH OF STAY FOR CHILDREN OF COLOR IN FOSTER CARE

22. Children of color are not only more likely to be placed in foster care, once in foster care they stay longer than White children. In New York, a quarter of black children remained in foster care for more than six years, compared to one fifth of Latinos and less than one-tenth of Whites.^{xxxxix} Nationally, 23 percent of Black children stayed in foster care for 3 or more

years, compared to 13 percent of white children.^{xl} Moreover, in New York, black children stay on average longer in foster care than other types of children, far surpassing the national average length of stay of 2.5 years.^{xli} LGBT youth also have prolonged stays in foster care, as bias against them makes it harder for them to be placed.^{xlii}

INADEQUACY OF PREVENTIVE AND SUPPORTIVE SERVICES

23. A recent report on preventive services in New York quotes a young Latina woman as saying that she wished she knew about preventive services before she lost her daughter to foster care.^{xliii} Unfortunately, her experience is typical of Black and Latino families in New York and across the nation. Families of color tend to receive fewer and lower-quality services such as mental health and substance abuse treatment, have poorer access to housing,^{xliv} and fewer contacts with caseworkers.^{xlv} Black families in particular have limited access to the supportive services needed for reunification.^{xlvi} In New York, 65% of child welfare cases stem from neglect.^{xlvii} Yet, the circumstances that comprise neglect are precisely those that could be prevented by adequate government support. If such support were readily available, targeted preventive services could address the disproportional separation of families of color by New York's child welfare system. Unfortunately, research shows that these needed prevention programs are more readily available to white families than to the black and Latino families who need them more.^{xlviii}

24. Government funding policies and structures for child welfare have a negative effect on families of color, prioritizing the provision of out-of-home care over services that would prevent family separation in the first place. About half of state funding on child welfare comes from the federal government, which spent more than \$11.7 billion in 2004 on child welfare serv-

ices.^{xlii} Restrictions on the use of federal funds exacerbate racial disparities in child welfare. For example, federal support for preventive and family-strengthening programs is limited to roughly 11% of the amount spent on out-of-home care.ⁱ Likewise, federal funding for after-care services stops as soon as a child leaves foster care. This system, which provides significantly more to care for children once they have been separated from their parents, but limits funding to support families and prevent separation, provides little financial incentive for states to focus on the provision of preventive services. Since families of color are more likely to have child welfare cases enacted against them, the result is a disproportionately higher rate of separation among families of color.

25. New York City has increased the amount it spends on preventive services over the last two years, but the budget increase coincided with a rise in filed abuse and neglect cases since early 2006.ⁱⁱ To compensate for federal

and state restrictions on preventive care spending, and in response to pressure from advocates and ACS staff, the Bloomberg administration has redirected savings from the reduced numbers in foster care to support preventive services.ⁱⁱⁱ However, the redirected funding is not part of the City's continuing budget and is therefore at the mercy of the foster care caseload. In general, while preventive family support services work with more families than the foster care system, spending for foster care constantly outpaces spending for preventive services. According to the Child Welfare Watch, Mayor Bloomberg's proposed budget for preventive services for FY 2008 showed preventive services at less than a third of the proposed budget for the City's foster care system.ⁱⁱⁱ

26. Government policies also negatively impact children placed in the care of family members (kinship care), which is twice as likely to occur among families of color. Families providing kinship care receive fewer benefits and services, and less financial assistance than non-related families providing foster care. The majority of all families providing kinship care receive no welfare benefits, and 40% do not receive food stamps.^{iv} Government data and other studies show that black and Latino families are more likely to opt for kinship care, as opposed to foster care.^{iv} Kinship care is also recommended by advocates for Asian children, in order to maintain linguistic, religious, and cultural continuity.^{iv} As a result, policies that fund foster care more generously than kinship care have a direct negative impact on families of color, denying kin the financial, educational and parental support needed to keep children of color in familiar communities.

27. There are two bills in Congress—S 661 and HR 2188—that would extend funding to kinship placements and also extend needed services to those who were once ineligible. Passage of the bills would help to reduce the racial dis-



parities in federal support offered to families of color in child welfare.

28. Federal policies promoting adoption and designed to shorten the length of stay in foster care such as the Adoption and Safe Families Act of 1997 (ASFA) have unintended negative effects on families of color. While ASFA aims to reduce the length of stay, which is typically longer for children of color, it also increases the chances that a child will never be reunited with his or her family. ASFA requires caseworkers to expedite decisions about finding a permanent home for children in care and to file a petition to terminate parental rights after a child has been in foster for 15 of the last 22 months.^{lvii} Given the over-representation of children of color, and the additional difficulties of parents of color in accessing services needed for reunification, well-intended policies like ASFA have a negative effect on families of color.

29. Likewise, federal funding policies that limit the use of funds for legal guardianship—an option for permanent placement that preserves parental rights—have a similarly negative effect on families of color.^{lviii} There are no federal funds for legal guardianship, only for those who adopt a child from the foster system.^{lix} Legal guardianship has been promoted over kinship care by some child welfare advocates in communities of color as a way to ensure the preservation of families.^{lx}

30. Not only are services less available to families of color compared to white families, but those that are available are often linguistically and culturally inappropriate. According to reports by the Committee for Hispanic Children and Families and the Coalition for Asian American Children and Families, ACS lacks culturally and linguistically appropriate services to meet the needs of the Latino and Asian community.^{lxi} Moreover, only 21% of ACS workers are bilingual, and only 4 out of 70 private agencies provide bi-lingual services.^{lxii}

COLLATERAL CONSEQUENCES OF FOSTER CARE

Under Article 5, the U.S. must “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of political, civil, economic, social and cultural rights.”

31. Ironically, in its effort to protect them from an unsafe home environment, foster care often places children in equally and sometimes more harmful, situations. The process of uprooting children from one home to another, sometimes on multiple occasions, disproportionately damages families of color, including increasing the likelihood of children entering the juvenile justice system and disruptions to education.

JUVENILE AND CRIMINAL JUSTICE

32. According to recent studies, children in foster care are more likely than other children to engage in delinquent behavior and later become incarcerated.^{lxiii} In New York, when a foster child is arrested for a delinquent act, the child is more likely than a non-foster child to be sent to detention before trial.^{lxiv} Furthermore, Black children in the child welfare system tend to have higher placements in juvenile detention. In a 2001 study in New York, an overwhelming 98% of the foster care children in juvenile detention were Black and Latino.^{lxv} This was higher than the general representation of Black and Latino children either in foster care or in juvenile detention. Not surprisingly, many advocates in communities of color view the foster care system as a pipeline to prison. According to Rolando Bini, a New York City family advocate, “It is no wonder that foster care is a main feeder of the ever growing prison, homeless and mental health institution populations. It is a racist, profit-driven industry that preys on those who offer the least resistance and in New York

City, poor parents particularly those of color are the easier prey.”^{lxvi} The percentage of girls in foster care who are in detention was also higher than the average for girls.^{lxvii}

33. The link between foster care and the criminal justice system is reinforced since incarcerated parents are likely to see their children placed in foster care, thereby risking permanent loss of their children. About 75% of the women incarcerated in New York’s prison are parents, and over two-thirds lived with their children before imprisonment.^{lxviii} The Adoption and Safe Families Act (ASFA), which mandates that foster care agencies begin to file for termination of parental rights after a child is in foster care for 15 of the last 22 months, does not make exceptions for incarcerated parents.^{lxix} Accordingly, incarcerated parents with children risk losing them if their sentence is over 15 months, and in New York about a third of incarcerated mothers lived alone with their children prior to arrest.^{lxx} Again, this has a disproportionate effect on women and families of color, who tend to serve longer terms and are more likely to be single parents, disparately increasing the risk of termination of parental rights and entrance of children into foster care.

IMPACT ON EDUCATION

34. Research has shown that children in foster care lag academically in comparison to their non-foster counterparts. For example, a study of children in the Bronx showed that children in foster care perform lower on citywide tests, scoring about 24% and 28% lower than the average in reading and math, respectively.^{lxxi} Foster children also have lower attendance rates than non-foster care children.^{lxxii}

35. Furthermore, foster care children feel stigmatized by their foster care status, find it difficult to form peer bonds, and are more likely to have behavior and discipline problems. About 50% of the foster children interviewed by the Vera Institute of Justice were uncom-

fortable revealing the fact that they lived in foster care to their friends in school, and many were withdrawn in social settings.^{lxxiii} The study also showed that even foster children who seemed to adapt socially had other behavior problems, such as fighting.^{lxxiv} The negative impact of foster care on education affects children of color disproportionately as they are over-represented in system.

INCREASED VULNERABILITY TO EXPLOITATION

36. Data from the U.S. Dept. of Health and Human Services has shown that child abuse fatalities are twice as likely in foster care than in the general population.^{lxxv} Furthermore, research has found sexual abuse in foster homes to be as high as four times the general population.^{lxxvi} Furthermore, children in foster care tend to have higher teen pregnancy rates.^{lxxvii} The negative effects of foster care have a significant impact on children of color, who comprise a disproportionate number of that population.

INADEQUATE LEGAL REPRESENTATION AND LENGTHY TRIALS

37. Family preservation advocates have long argued that poor, and in some cases non-existent, legal representation is one of the causes of the disproportionately high number of families of color in the child welfare system. Legal representation for parents has often been provided by individual private attorneys who lack the resources for comprehensive out-of-court case preparation, and who are often financially compelled by hourly pay rates to take on too many cases.^{lxxviii} Nevertheless, the City has taken steps to remedy this, and recently contracted with some institutional providers to pick up a significant number of new cases in family court. Institutional providers are better able to pool resources to provide interdisciplinary legal representation to

parents: the assistance of an attorney, a social worker, and other staff are provided to ensure that families receive the necessary services to maintain safety and stability.^{bxxx}

38. Beyond legal representation, one of the most pressing problems for parents involved in neglect and abuse cases is the routine delay of child welfare cases in family court. Many lawyers and caseworkers frequently miss court appearances, and cases in family court are regularly adjourned for two to three months, and sometimes longer, without any progress made in court.^{kxxx} The delays caused by adjournments

can stretch a hearing out for years, and requests for shorter adjournments are often met with hostility by judges.^{bxxx} Delays in child welfare cases are harmful to children and families as they can unnecessarily delay reunification for families and deny children of their right to be raised by their parents.

39. Inadequate legal representation and the undue length of child welfare proceedings have a negative effect on families in the child welfare system, and a disproportionate impact on poor families of color who are the overwhelming majority of cases.

RECOMMENDATIONS

The following recommendations are intended to bring attention to the human rights violations within the child welfare system and to address discrimination against families of color.

■ **The US federal government must fund preventive services over state custodial services,** and restructure child welfare reimbursement to fund prevention over child removal, state custodial, and foster care services. This must include revision of the current funding formula that preferences out-of-home care over preventive services.

■ **The City should increase funding for preventive services,** with the increase reflected as a permanent line item in the budget. In addition to funding, the City should ensure that preventive services are offered, administered and evaluated to further the central objective of keeping children safely with their families.^{bxxxii} Preventive services should be administered so that they meet the actual needs of families in crisis and should include a thorough and ongoing needs assessment that ends once the problems are resolved. The City should also clearly communicate the objectives of preventive services to all stakeholders.

■ **The federal court system must oversee the state family court system more efficiently** to ensure adequate legal representation, due process, and a speedy bench trial requirement. Proof of parental unfitness must be made within a short and fixed period of time after a petition has been filed in family court, especially where children are in foster care. The federal government must also eliminate the financial incentives behind endless adjournments in the family court process.

■ Youth in foster care are far more likely to enter the criminal/juvenile justice system. **The federal government must increase funding for services to youth in foster care to prevent future incarceration in the criminal justice system.** The services should insure that youth in foster care have free access to college preparatory courses, which allow them to compete for college admissions and scholarships. The government must also design programs that train and facilitate access to higher paying coveted blue-collar fields as well.

DOMESTIC VIOLENCE

This chapter examines discrimination as it relates to female victims of domestic violence, including: the gendered dimension of domestic violence; the intersection between race, class, immigration status, and gender in the domestic violence arena; language barriers that prevent immigrant women from obtaining needed assistance and services; the inappropriate response of law enforcement to minority and immigrant battered women; and jurisdictional obstacles that prevent minority and immigrant women from accessing judicial protections.

1. Domestic violence is among the most dangerous and common forms of gender-based violence in New York, and has particularly serious race-related consequences. Minority and immigrant domestic violence victims in New York City experience egregious discrimination at the intersections of race, ethnicity, class, and gender and are among those at greatest risk.¹ Their vulnerability lies in the historic and present-day failure of the police and courts to protect victims and provide assistance with escaping their abuse, accompanied by tensions and misunderstandings between their communities and government actors, especially law enforcement.

2. The vast majority of New York's domestic violence victims are women. In 1999, the New York State Division of Criminal Justice Services received over 55,000 police reports of family offenses involving adult intimate partners.² An adult female was identified as the victim in 84% of these reports.³ In 2002, 120 females were murdered by males in single victim/single offender homicides in New York State.⁴ In 2006, New York City Police ("the NYPD") responded to 221,071 domestic violence incidents (averaging over 600 incidents per day).⁵ In 2006, there were 71 reported family-related homicides in New York City.⁶



3. These figures mirror nationwide statistics on domestic violence. Approximately 26% of American women and 8% of men report having been assaulted by an intimate partner in their lifetime.⁷ In fact, between one and five million women in the United States suffer nonfatal violence at the hands of an intimate each year, with physical abuse being the principal cause of injuries in women between the ages of 14 and 45.⁸ Approximately one third of female murder victims and five percent of male murder victims are killed by an intimate partner.⁹

4. While domestic violence disproportionately affects women, racial disparities with respect to this type of violence are equally startling. Data suggest that although the domestic violence epidemic cuts across the lines of gender, race, and immigration status – affecting women and men, minorities and whites, and immigrants and U.S. citizens – it has a particularly pernicious effect on one group that lies at the intersection of these categories: immigrant and minority women.

5. Nationwide, black women report victimiza-

tion in general at a higher rate (67%) than white women (50%), black men (48%), and white men (45%).^x African American women account for 16% of the women reported to have been physically abused by a husband or partner in the last five years, but were the victims in more than 53% of the violent deaths that occurred in 1997.^{xi} A recent study found that 51 percent of intimate partner homicide victims in New York City were foreign-born.^{xii} Another study determined that forty-eight percent of Latinas reported that their partner's violence against them had increased since they immigrated to the United States.^{xiii}

6. The greater level of reported domestic violence among African-Americans, Latinos, and immigrants is attributable, in large part, to the extreme levels of poverty in minority and immigrant communities.^{xiv} African Americans, Latinas, and Latinos make up 22.8 percent of the population, but account for 47.8 percent of those living in poverty.^{xv} Poor women experience victimization by intimate partners at much higher rates than women with higher household incomes; in the United States between 1993 and 1998, women with annual household incomes of less than \$7,500 were nearly seven times as likely as women with annual household incomes over \$75,000 to experience domestic violence.^{xvi} In particular, data indicate that women are at much greater risk of domestic violence when their partners experience job instability or when the couple reports financial strain.^{xvii} Abuse has also been found to be more common among young, unemployed urban residents – a large percentage of whom are racial minorities and immigrants.^{xviii} The majority of homeless women were once victims of domestic violence^{xix} and more than half of all women receiving public assistance were once victims of domestic violence.^{xx} Moreover, the majority of the homeless^{xxi} and public assistance recipients are women of color and immigrant women^{xxii}. Thus, poverty, age, employment status,

residence, and social position – not race or culture, per se – may combine to explain the higher rates of abuse within certain ethnic communities.^{xxiii} Yet race remains salient because of the inextricable connection between race and these other factors.

7. Despite a higher proportion of reporting in minority and immigrant communities, domestic violence continues to be an underreported crime, for a host of reasons.^{xxiv} First, law enforcement may turn a blind eye to domestic violence, treating it as a private family matter, not an issue worthy of governmental intervention.^{xxv} Police fail to make domestic violence-related arrests even when mandated by law to do so.^{xxvi} This is true despite the existence of legal protections for battered women and high call volumes reporting domestic violence.^{xxvii} Such attitudes are rooted in historic bias and stereotypes against women – especially women of color.^{xxviii}

8. Second, many minority and immigrant battered women refrain from making such information public because they are ashamed of the abuse to which they are subjected and fear blame or reproach from family or friends for airing the family's "dirty laundry." Additionally, many women of color, including African Americans, Hispanics, and other racial minorities, are particularly reluctant to turn to the police and courts as a source of protection from violence because these institutions have traditionally been viewed as oppressive rather than protective of minorities and immigrants.^{xxix} Law enforcement's historic relationship with poor communities of color has been characterized by excessive use of force and brutality against men, women, and children, mass incarceration of young men of color, and growing numbers of incarcerated women of color.^{xxx} (For more on this see chapters 5 and 6) Minority women are also arrested more often than white women when the police arrive at the scene of a domestic violence incident.^{xxxi} In particular, police are more likely to arrest African-American women

due to stereotypes of them as overly aggressive.^{xxxii} Unfortunately, “many of the women most in need of government aid are made more vulnerable by these very interventions.”^{xxxiii}

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

10. Thus, while it is well known that women of color are most affected by domestic violence and inappropriate governmental response thereto, there is little publicly-available data and information on how domestic violence affects minority and immigrant women. The need for disaggregated data to fill in these gaps cannot be overemphasized. Unfortunately, while data on

the national level concerning the intersection of domestic violence, gender, race, and ethnicity is scant, it is almost nonexistent for New York City.

11. Even worse, advocates’ efforts to obtain such information have been met with silence and stonewalling on the part of the government. To gain more insight into the obstacles that minority and immigrant victims face at the local level, advocates submitted several open records requests to the NYPD between 2005 and 2007 asking for data and statistics pertaining to domestic violence crimes committed in New York City during the years 1999-2005. These requests specifically sought information on the gender, race, and ethnicity of domestic violence victims and perpetrators, the physical injuries complained of by victims, the types of crime committed, and whether or not weapons were involved. The NYPD never responded to the requests. Without this essential information, it is difficult to comprehend the full nature or extent of the state’s failures to respond to minority and immigrant women victims in New York City.

12. This shadow report is the first attempt by civil society in New York City to document a profound reality for minority and immigrant battered women and their advocates: governmental services to assist them in escaping abusive situations are scarce, flawed, and inadequately administered. Yet minority and immigrant battered women in New York City are among those most in need of domestic violence services because of their relative social, familial, and financial isolation.^{xxxv} Whether or not New York’s laws and policies are intentionally discriminatory, they have a disparate impact on women of color and thus constitute impermissible discrimination.

13. The authors of this report would ideally have provided the CERD Committee with more concrete data and information on the experiences of minority and immigrant battered women in New York City, but unfortunately that information is either nonexistent or not publicly-available. The City’s failure to provide, or alter-

natively, to gather, such information violates basic tenets of the CERD Convention. Given the limited information that is publicly available on this subject, this report draws directly upon the experiences of minority and immigrant battered women and their advocates, when necessary.

14. Given the CERD Committee's recognition in General Comment 25 that "racial discrimination does not always affect women and men equally or in the same way"^{xxxxvi} – either because the discrimination is targeted at women specifically or because racial discrimination may have consequences that primarily affect women – it is crucial to consider the intersections between gender, race, and immigration status that occur in the domestic violence arena. As it has in the past, the Committee should "take into account gender factors or issues which may be interlinked with racial discrimination"^{xxxxvii} when considering New York City's obligations under the CERD Convention. To that end, it should, as it has in the past, consider "the disadvantages, obstacles and difficulties women face in the full

exercise and enjoyment of their civil, political, economic, social and cultural rights on grounds of race, colour, descent, or national or ethnic origin."^{xxxxviii} As the CERD Committee and other United Nations treaty bodies^{xxxxix} have repeatedly stressed, States and their local actors must work to ensure that minority women have effective access to legal protections and that the police are held accountable for their failures to execute their legal duties to protect victims of domestic violence.^{xi}

LANGUAGE BARRIERS FOR MINORITY AND IMMIGRANT BATTERED WOMEN

Under Article 5, the U.S. must "undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race or national or ethnic origin, to equality before the law, notably in the enjoyment of the . . . right to security of person and against violence." Under Article 6, the U.S. must "assure to everyone effective legal protection and remedies against any acts of racial discrimination."

15. Of New York City's 19 million residents, one in four are limited English proficient ("LEP").^{xii} Despite the immigrant-rich culture of New York City, the federal, state, and local legislatures, the court system, and the police fail to provide adequately multilingual services to New York's thousands of immigrants. These state-created language barriers to accessing the courts and the police severely undermine the right of LEP individuals "to equal treatment before the tribunals" and "effective protection and remedies," in violation of CERD.^{xiii} In the context of domestic violence this failure is particularly dangerous, as it impedes immigrant battered women's meaningful access to the legal protections theoretically available for their protection in life-threatening situations.

16. Federal, state, and local governments fail



immigrant battered women in New York City in at least three significant ways related to language barriers in accessing governmental aid and protection. First, the government fails to promote multilingual education and outreach on domestic violence and the legal remedies available to battered women. Second, the government fails to guarantee enough qualified court interpreters at all stages of the process of obtaining Orders of Protection in the Family Courts. Third, the government fails to provide sufficiently multilingual police services so as to allow the police to assess a complaint of domestic violence fairly, even when one or both of the parties involved is LEP.

17. When viewed in the context of the grave danger that many immigrant women and their children face, the importance of the state's obligation to provide immigrant women access to legal information, the courts, and the NYPD, becomes clear. As was seen, immigrant women are at a higher risk of being murdered at the hands of their intimate partners than non-immigrant women; between 1990 and 1999, 51% of intimate partner homicide victims were foreign-born.^{xliii} The government's failures in this context further isolate immigrant women and sometimes cause life-threatening and unjust results — ranging from failed attempts at securing OPs in the court system, to arrests of LEP victims after they called the police to seek help^{xliv} — which may further deter immigrant and minority women from calling on the police for help.

LACK OF COMMUNITY OUTREACH

18. The government fails to provide adequate multilingual education and outreach on domestic violence and the legal remedies available to minority and immigrant battered women. The government's responsibility to provide such community education is paramount because of the social isolation that batterers create in order to maintain their partners as subjects of their power and control.

19. Many battered immigrant women migrate from their home countries to the United States at the request of their husbands or partners. By reason of their recent immigration, immigrant women tend to have little access to information and resources available for their protection. For many, English is a new language, and the American legal system is completely foreign. This situation is exacerbated when their batterers, as a control tactic, isolate them from opportunities to learn English, to build social networks, and to obtain information about legal protections for battered women in the United States.^{xlv} Moreover, batterers often use threats of deportation or retaliation to control victims.^{xlvi}

20. On the whole, batterers tend to have more information and familiarity with U.S. laws and agencies than immigrant victims, usually because they migrate before their female partners, tend to have completed more formal education, are more likely to work outside the home and have access to wider social networks, or because they were born and raised in the United States. Batterers exploit this informational advantage to keep their victims vulnerable and afraid. As a cumulative result of these informational discrepancies (many of which are the result of batterers' tactics), immigrant battered women are isolated from social or family support networks, social services providers, the court system, and the police.^{xlvii}

21. To respond to these realities, the government should promote multilingual education and outreach on domestic violence and the legal remedies available to victims. Instead, the primary multilingual initiatives by the government are limited to the advertisement of multilingual court services, the translation of English written materials on the functioning of the court system, the provision of a 24-hour multilingual domestic violence hotline, and limited public service announcements distributed through the media.^{xlviii} Unfortunately for New York City's LEP battered women, the federal, state, and local

government have not sufficiently committed to multilingual community education or public service announcement campaigns to ensure that information regarding domestic violence and related legal remedies is made available to victims, regardless of the language they speak or the community to which they belong.

LACK OF QUALIFIED INTERPRETERS IN FAMILY COURTS

22. New York's Family Court system guarantees in theory, but fails in practice, to provide interpreters to minority and immigrant battered women at all stages of the court process. According to Rule 217.1(a) of the Uniform Rules for New York State trial courts, in all cases parties and witnesses are supposed to be provided interpreters if they are needed for meaningful participation in the proceedings.^{xix} However, the number of such interpreters is far from adequate. Moreover, New York provides no standards or training for the interpreters, resulting in an overall poor level of interpreter services.ⁱ As a result, minority and immigrant battered women seeking orders of protection in family court feel marginalized and experience inordinate delays in obtaining the protection they need.

23. The first necessary step in filing for an order of protection (hereinafter, "OP") in Family court – where most minority and immigrant women turn to obtain OPs (when they are legally able to do so)ⁱⁱ – is filling out a Petition requesting an OP. Although the Family Court advertises its multilingual capacities through courthouse posters, in practice the court does not make available interpreters at this crucial stage.ⁱⁱⁱ Instead, interpreters are provided only when litigants request them to communicate with judges inside the courtroom. Accordingly, LEP victims are forced to either find a bilingual family member, friend or acquaintance to accompany them to court to help in filing a Petition, or risk not understanding the OP process. Isolated battered women may not have such contacts or

support, and even when they do, making arrangements for accompaniment to court often causes delay in a time-sensitive process.

24. Moreover, the Courts do not have a sufficient number of interpreters, and those that are theoretically available are often tied up with other court matters. This shortage of interpreters causes LEP battered women significant delays in every step of the litigation process. As a result, battered women experience lengthy delays in obtaining OPs. These delays, in turn, lengthen victims' contact with batterers.^{iv}

25. Furthermore, the few interpreters that are available often fail to perform their jobs competently. Substandard interpreting can mean the difference between a victim securing a final OP or not, and between securing an OP with greater or fewer safety-enhancing terms. Many interpreters "at best simply do not speak the language in question fluently and at worst offer legal advice, break ethical standards, and harass survivors of abuse."^v Some interpreters do not interpret everything said in the court room or do not adequately relay the meaning of key words. These inadequacies may be due to the abhorrent nature of the experiences recounted, cultural taboos, limited interpreting skills, inadequate training, misogyny, or bias.^{vi} In addition, many interpreters may feel uncomfortable translating descriptions of sexual abuse and rape, and adjust their translations to minimize the harm described and thus avoid discomfort or embarrassment.

26. New York courts do not administer language competency exams or provide training on basic translation skills, ethics, professionalism, and domestic violence issues. As a consequence, many interpreters are ill-equipped to perform basic translations, let alone deal with the particularly sensitive issue of domestic violence. Without proper training, some interpreters have themselves become traumatized when they hear and relay the horrific experiences of survivors, impeding their ability to translate individ-

ual stories effectively.^{lvii} More alarmingly, there is no clear channel for complaints about inadequate or unethical interpreters.

27. In addition to interpreting incompetently, some interpreters break legal and ethical barriers. Many clients and advocates report male interpreters communicating with batterers outside the courtroom before and after a proceeding. Many interpreters do not respect client confidentiality by communicating the details of the abuse or the courtroom proceedings to others. This confidentiality breach is particularly dangerous when the interpreter and the client belong to the same small immigrant community. Other interpreters have pressured survivors to “drop the case,” spoken with abusers during breaks or outside the courtroom, or even sexually harassed the victim.^{lviii} One survivor described her experience: “[The interpreter] didn’t translate in an accurate manner. He’d tell me the wrong thing. But I understood a little bit—that’s how I knew. I think he was in conspiracy with my husband. It seemed like they were involved in a scam—it seemed like a money thing. He’d translate in favor of whoever gave him money.”^{lviii} Another survivor described how the interpreter spoke to the other party for a long time, and then “rushed and did not explain properly.”^{lix}

28. Exacerbating these interpretation barriers, judges and attorneys often fail to take into account the needs of LEP individuals during court proceedings. They may speak quickly and refuse to slow down to give adequate time for interpretation or to ensure that LEP individuals have understood what has occurred. They may also fail to explain properly the role of the interpreter to the court user.^{lx} Many attorneys rely on fleeting moments with the court-provided interpreter immediately before or after meeting with the judge to communicate with their clients. Such practices severely undermine a victim’s ability to accurately relay her story and receive the help she needs.

LACK OF MULTILINGUAL POLICE SERVICES

29. Law enforcement plays a crucial role in protecting battered women from further violence and in enforcing OPs.^{lxi} As discussed herein, the NYPD consistently fail to respond appropriately to complaints of domestic violence by minority and immigrant women. For LEP women, police protection is further compromised by inadequate translation services at NYPD.

30. 911-operators have phone access to translators speaking over 150 languages^{lxii} and victims report that these translators are usually made available when they call for help. However, the NYPD is usually unequipped to communicate with LEP individuals at a crime scene. This failure is especially problematic because immigrant battered women are often less proficient in English than their batterers. Thus, when the police arrive at the scene of a crime, the English-conversant batterer may provide the police a one-sided narrative to the officers. Because the police and the batterer may share language, gender, and/or race, the police often arrest LEP immigrant battered women based solely on the English-conversant batterers’ allegations, without making any real attempt to speak with the LEP victim. Even when there is no arrest of the victim, or no batterer at the scene to invent an exculpatory narrative, the police often do not allow LEP battered women the opportunity to file a police report. In the rare situations when the police file a report, they often file incomplete reports, typically leaving the complainant’s section blank, vague, or ambiguous.

LAW ENFORCEMENT’S INADEQUATE RESPONSE TO DOMESTIC VIOLENCE

Articles 5 and 6 of CERD guarantee a “right to equal treatment before the tribunals and all other organs administering justice.”

31. If the government is to protect the safety and human rights of minority and immigrant domestic violence victims and their families, effective law enforcement responses to victims seeking police assistance are needed. Yet law enforcement often refuses to arrest batterers or to recognize domestic violence as a criminal matter, and often assigns domestic violence calls lower priority than non-domestic disputes.^{lxiii} The problem is particularly acute in minority and immigrant communities.

32. Moreover, Black and Latino battered women often confront a difficult choice when trying to escape their abusers. “To be protected from their abusers, they are encouraged to call the cops, but for women of color this means relying on the same police department they believe holds their communities in contempt.”^{lxiv} Given the history of police brutality and discrimination against people of color, and the general fear and mistrust of the police by immigrants and minorities, many victims are hesitant to invite police intervention into their own lives. They may fear that police intervention could result in the police blaming them instead of helping them; calling child services to remove their children; or citing them for other crimes. They may also be hesitant to invite law enforcement to enter their intimate partners’ lives, for fear that their partners might be mistreated by the authorities.^{lxv}

33. Given these circumstances, the NYPD has failed to respond effectively and appropriately to minority and immigrant battered women, and has fallen short of its obligations under CERD. The CERD Committee has repeatedly stressed the need for governments to take measures to respond adequately and effectively to the needs of domestic violence victims, particularly minority victims.^{lxvi}

INEFFECTIVE ENFORCEMENT OF ORDERS OF PROTECTION

34. Under New York law, a police officer is obligated to arrest a person, and not attempt to

reconcile or mediate, where the officer has reasonable cause to believe that: (a) an individual committed a felony against a member of the same family^{lxvii} or household; or (b) an individual violated an OP of which he had knowledge; or (c) a misdemeanor constituting a family offense has been committed by the person against a family or household member. The officer must not inquire as to whether the victim seeks an arrest of the person.^{lxviii} Consequently, those who already have orders of protection benefit most from the mandatory arrest law.^{lxix}

35. Police enforcement of protective orders through arrest and other means is crucial to protecting minority and immigrant victims’ safety, as an OP alone does not guarantee that violence will end.^{lxx} The likelihood of post-order abuse is even greater for women with children.^{lxxi} As a result, individuals who obtain protective orders depend on and expect police assistance in enforcement of these orders. One study of battered women seeking protective orders found that even though 86% of them believed that their assailant would violate the order, a full 95% were confident that the police would respond rapidly to these violations.^{lxxii}

36. Statistics show that when police *do* respond to a violation of a protective order by arresting the offender, they reduce the risk of re-offense.^{lxxiii} More broadly, available data indicate that when men are arrested for assaulting their female partners, they are approximately 30% less likely to assault their partners again than are men who are not arrested.^{lxxiv}

37. Despite the utility of arrests in reducing domestic violence offenses, the NYPD fails to provide meaningful enforcement of protective orders or otherwise respond effectively to domestic violence. When victims of domestic violence obtain emergency *ex parte* protective orders, too often law enforcement fails to serve these orders.^{lxxv} An order that has not been served on the batterer is unenforceable and thus does not provide protection. Second, when victims seek

assistance from the police, police often fail to respond.^{lxvii} Moreover, when police officers do respond to a domestic violence call, their responses are often inadequate despite the fact that half of all calls to police departments reporting violent crime arise from domestic violence.^{lxviii} Nationally, victims report that law enforcement responds within five minutes of the call for service in only 25% of cases.^{lxviii} One New York City woman, for instance, reported the violation of her

protective order thirteen times before the police came and arrested her abuser.^{lxvix}

38. Nationally, only one out of five domestic violence offenders are arrested at the scene.^{lxxx} Indeed, police are still less likely to make an arrest when a husband feloniously assaults his wife than in other felony assault cases.^{lxxx} The police are less likely to arrest in the case of poor, non-white, and urban-resident battered women than in the case of white, wealthier, and

[A CASE STUDY]

Town of Castle Rock v. Gonzales

IN JUNE 1999, JESSICA GONZALES'S ESTRANGED HUSBAND ABDUCTED her three daughters, in violation of a domestic violence restraining order. Ms. Gonzales, a Colorado woman of Latina and American Indian descent, called and met with the Castle Rock, Colorado police repeatedly to report the abduction and restraining order violation. Unfortunately, her calls went unheeded. Ten hours after her first call to the police, Ms. Gonzales' estranged husband arrived at the police station and opened fire. The police immediately shot and killed Mr. Gonzales, and then discovered the bodies of the Gonzales children – Leslie, 7, Katheryn, 8, and Rebecca, 10 – in the back of his pickup truck. Ms. Gonzales filed a lawsuit against the police alleging violations of the Due Process Clause of the U.S. Constitution, but in June 2005, the Supreme Court found in *Town of Castle Rock v. Gonzales* that, despite Colorado's mandatory arrest law, she had no constitutional right to police enforcement of her restraining order.^{cxii} This decision cut off one of the few remaining federal civil legal remedies for victims of domestic violence whose calls to the police were mishandled.

In December 2005, Ms. Gonzales filed a petition with the Inter-American Commission on Human Rights, alleging that the police's actions and the Supreme Court's decision violated her human rights. This was the first individual complaint brought by a victim of domestic violence against the United States for human rights violations. In a hearing in March 2007, Ms. Gonzales testified before the Commission and raised the troubling racial dynamics surrounding the events leading to her daughters' deaths. Importantly, Jessica and Simon Gonzales were working/middle class residents of Castle Rock, a largely white, upper middle class town about 35 miles from Denver whose residents in 2005 numbered approximately 35,000. She is a Latina and Native American and he was Mexican-American. Racial stereotypes, Ms. Gonzales thinks, may have played a role in the police department's non-response to her emergency calls for help that fateful night and to the Colorado authorities' subsequent mishandling of the situation.

The Gonzales case is currently pending before the Commission.

suburban-dweller battered women.^{xxxii} Even in mandatory arrest jurisdictions such as New York, arrests are made only half the time.^{xxxiii}

39. In New York City, out of 233,617 domestic incidents reported in 2001, only 23,905 (around 10%) resulted in arrests, despite New York's mandatory arrest law.^{xxxiv} In New York State, police made arrests fewer than 60% of the time where suspects had fled the scene, despite the fact that New York law requires arrest in these cases. Where New York law encourages but does not require arrest, the rate of arrest for suspects who flee the scene is significantly lower.^{xxxv}

40. Mandatory arrest can be particularly problematic for minority women who fight back.^{xxxvi} Although New York law obliges police officers to use a "primary aggressor" analysis when making an arrest,^{xxxvii} the NYPD still has the discretion to arrest both parties, "even when officers are able to determine who was the primary physical aggressor."^{xxxviii} The NYPD does not make statistics on dual arrests publicly available.^{xxxix} However, one study found that more than 70% of dual arrests in New York City involved racial minorities.^{xc} This is partly explained by the nature of domestic violence: much of it is cumulative in effect and ongoing in practice. Yet criminal law treats crime as a one-time occurrence. As a result, when a woman fights back in front of the police or on the day the police showed up, this is often understood as criminal activity, rather than as part of a pattern of self-defense. This is especially true where the victim is defending herself, not against a particular act of violence that happened at that moment, but rather in response to a longer pattern of violence. Police officers often misunderstand the situation or are apathetic to the victim's reality, using mandatory arrest as an excuse to arrest in this situation.

41. When police fail to comply with mandatory arrest laws and enforce protective orders, minority and immigrant battered women with

such orders gain a false sense of security and might actually be at increased risk of danger.^{xcii} Thus, the findings from one study: "A woman who has not received an OP and still believes herself to be in grave physical danger is more likely to seek other help than a woman who believes she will be protected by the state."^{xciii} In such situations, a victim might undertake more drastic steps to protect herself from an abuser, such as changing residence, job, or schedule; arranging for constant close supervision of children; going into hiding; moving into a shelter; buying a weapon for self-defense; hiring a private security guard; or filing a criminal complaint against the abuser. For low-income women and women without social safety nets, however, many of these steps are practically and financially impossible. False promises of police protection lead women not to take such steps. Without adequate police enforcement, obtaining an OP may only serve to heighten victims' danger. Such a result conflicts with the very purpose for which New York's mandatory arrest law and state protection order laws were enacted.

42. Effective enforcement of orders of protection is additionally important because domestic violence and fatality risks go up when victims try to leave abusive relationships. Statistics show that most women who are murdered are murdered after the relationship is over.^{xciii} Low-income minority and immigrant battered women, who may have diminished social and economic safety nets, are at greatest risk when police refuse to enforce orders of protection and make arrests.

NEGATIVE STEREOTYPES AND CONCEPTIONS OF DOMESTIC VIOLENCE

43. Police officers often respond inadequately to domestic violence because they rely on gender and racial stereotypes about domestic violence victims, which lead them to disbelieve and blame minority and immigrant battered women.^{xciv}

Female victims are often perceived to be hysterical, unreasonable, and simply taking out a grudge against their intimate partners.^{xv} Law enforcement is often influenced by cultural stereotypes when making decisions about how to respond to domestic violence in communities of color. Commentators have noted, for instance, that police and judges may perceive black women as aggressive – especially when they fight back or yell – and therefore not victims.^{xvii} This can lead police to arrest the victim rather than abuser, or to arrest both (known as a “dual arrest”). In a recent case, for instance, the NYPD arrested a victim after taking her abuser’s statement that she had attacked him with a knife, without ever asking for her side of the story.^{xviii} Stereotypes can also result in judges’ refusal to issue orders of protection, or to their issuance of limited rather than comprehensive orders.^{xix} Inadequate training for governmental officers on domestic violence and cultural sensitivity exacerbates this problem.^{xx}

44. The NYPD’s underestimation of the seriousness of domestic violence is also illustrated in its denial to illiterate and LEP battered women of the opportunity to fill out Domestic Incident Reports (“DIR”) – the official police reports pertaining to domestic violence. The police do not always give victims the opportunity to file a DIR, and often downplay victims’ descriptions when such forms are filed. In addition, officers sometimes do not allow the victim to describe the incident in their own words, using the form’s designated second page, which thereby limits the DIR to the officers’ rendition of what happened. LEP victims, in particular, are at risk for this sort of neglect. Illiterate women are effectively silenced by this practice.

45. Inadequate recordkeeping and reporting of domestic violence-related crimes are also commonplace within police departments.^o Accurate statistics on police response to domestic violence have proven difficult to obtain, if they exist at all. An open records

request involving a representative sample of police departments across the United States revealed that very few police departments keep specific or disaggregated data on domestic violence arrests or complaints.ⁱⁱ Domestic violence crimes are also consistently miscategorized or undercategorized by officers responding to calls for service.^{cii}

46. Ineffective police response to domestic violence in New York City violates CERD because it leaves battered women, particularly immigrant and minority battered women, unprotected and at increased risk of harm. The NYPD must take positive steps toward improving police response to domestic violence by training police officers about domestic violence and cultural sensitivity, and improving interpretation services.

LACK OF ADEQUATE AND EFFECTIVE LEGAL REMEDIES

47. As guaranteed by Article 6 of CERD, minorities and immigrants have the right to effective legal protection and remedies against any acts of racial discrimination. In the United States, federal statutes give individuals the right to seek a remedy in federal court for civil rights violations, including acts of discrimination by governmental officers.^{ciii} New York state laws, like the laws of most other states, also permit private *suit in tort*.^{civ} Victims and their advocates have turned to these legal avenues as potential ways to attain redress for law enforcement’s failure to respond appropriately to emergency calls for assistance. In recent years, however, the Supreme Court and New York courts have foreclosed many of these avenues for victims of domestic violence, effectively denying remedies to thousands of minority and immigrant victims who have been failed by the state. Such a result violates New York’s obligations under CERD.

48. In many states, the doctrine of sovereign immunity sharply limits the ability of battered

women to sue police departments for torts such as negligence when they fail to execute their legal duties. In general, sovereign immunity shields government officials from liability, with certain exceptions set out in each state's law.

49. New York State recognizes that a special relationship between the police and a domestic violence victim can imply an exception to the general sovereign immunity rule. However, the state so narrowly defines this relationship that a victim's awareness of possible inadequate police protection may immunize the police from any liability for failing to enforce an OP. In particular, a victim's attempts to protect herself can constitute such awareness.^{cxv}

50. In recognition of the failure of state courts and state law enforcement to address domestic violence effectively, Congress declared through the 1994 Violence Against Women Act (VAWA) that all citizens had a civil right to be free from gender-motivated violence. In particular, Congress created a federal cause of action permitting victims of gender-motivated violence to sue the perpetrators of this violence for denying them this right.^{cxvi} However, the Supreme Court subsequently found that violent family crime was a "local", as opposed to "national"^{cxvii} or Constitutional issue, striking down the provision in *United States v. Morrison*.^{cxviii}

51. Nor does federal constitutional law typically provide a remedy when police failure to enforce protective orders or to otherwise respond to domestic violence results in harm to women and their families, even though several attempts have been made to connect failure to respond to violations of the Due Process Clause of the Constitution. This was the case in *Castle Rock v. Gonzales*, in which the U.S. Supreme Court held that despite Colorado's mandatory arrest law, Ms. Gonzales had no personal entitlement to police enforcement of her restraining order.^{cxix}

52. Nor does Federal constitutional law provide remedies to victims of domestic violence under the Equal Protection Clause. In

order to prevail in a claim of sex discrimination in violation of the Equal Protection Clause, a litigant would have to show that a police officer chose a course of action "because of" not merely "in spite of" its adverse effect on [women]."^{cx} Evidence of a policy's adverse impact or awareness of such an impact is not enough.^{cxii} For women of color, who themselves face discrimination, to prove willful discrimination at the hands of the police is exceptionally difficult.

53. Because of this case law, battered women in many jurisdictions who are harmed by police failure to provide an adequate response to domestic violence will have no legal remedy to hold police accountable. For the reasons described above, this affects minority and immigrant battered women in a particularly pointed way.

54. The CERD Committee has recommended that States take all measures necessary to address the double discrimination faced by female victims of domestic violence from ethnic and immigrant groups.^{cxiii} Specifically these recommendations include "sanction[ing] anyone preventing or discouraging victims from reporting such incidents, including police and other law enforcement officers, tak[ing] preventive measures such as police training and public education campaigns on the criminal nature of such acts, and provide legal, medical and psychological assistance, as well as compensation, to victims."^{cxiv} Accordingly, in compliance with their obligations under CERD, New York City, New York State, and the United States must provide adequate and effective remedies to minority and immigrant victims of domestic violence, who are all-too-often ignored or mistreated by the police. Without such remedies, law enforcement gets a "free pass" and believes it can act, or fail to act, with impunity towards one of the most vulnerable segments of our society.

LACK OF EQUAL ACCESS TO FAMILY COURT ORDERS OF PROTECTION

55. New York has the most restrictive law in the country concerning the categories of individuals who can obtain civil orders of protection.^{cxvii} While not explicitly race-based, the Family Court Act's narrow definition of "family or household member" denies needed legal protections and remedies to minority and immigrant women, in



70%

of the cases in which both partners in a domestic violence dispute were arrested involved people of color

violation of CERD. Since immigrant and minority battered women tend to be those most in need of state protections, any measure that limits their access to orders of protection affects them disproportionately. Indeed, immigrant and minority individuals comprise the vast majority of litigants in New York's Family Courts, and accordingly, the vast majority of victims seeking protective aid from the Family Courts are minority and immigrant women.^{cxviii}

56. Nor do the Criminal or Supreme Courts offer alternative access to those excluded from Family Court. The Supreme Court only offers OPs in the context of divorce, and thus only to those whose relationship status would grant them access to Family Court anyway while the Criminal Court only issues them in rare cases where the District Attorney decides to prosecute.^{cxix} As discussed below, many people of

color are hesitant to turn to the police because of historic racial tensions or fear of increased state involvement in their lives. As a result, members of minority communities may never obtain an OP – civil or criminal – or receive the concomitant additional state protection that such orders are designed to afford, and thus are susceptible to heightened risk.

CHOOSING BETWEEN CRIMINAL AND FAMILY COURT

57. Individuals deprived of access to Family Court are denied an important tool available to many other domestic violence victims seeking to escape their abuse. While some victims may prefer a Criminal Court OP, others may find the civil OP a preferable alternative.

58. A victim who brings a case in Family Court has the ability to control that case, including decisions as to what evidence to put forth and whether to withdraw the case.^{cxx} Because victims have been subjected to the controlling behavior of their abusers, this can be very empowering and may be a first step for many toward regaining control of their lives.^{cxxi} Additionally, in Family Court, a victim has a right to counsel as a party to the action,^{cxviii} and may, as a result, learn more about her legal rights and remedies from the process. In a criminal setting, on the other hand, the prosecutor represents the state rather than the victim. As the victim is not a party to the criminal action, she is neither entitled to counsel nor able to control the prosecutor's course of action, including the decision to pursue charges or particular remedies.^{cxviii}

59. Furthermore, in Family Court, victims face an easier evidentiary burden ("preponderance of the evidence")^{cxv} and a wider range of remedies than they do in Criminal Court.^{cxv} Civil Orders offer a potentially wide range of relief, including, inter alia, ordering the abuser to stay away from specific places and to temporarily pay child support in emergency situa-

tions.^{ccxvi} Moreover, Civil Orders often last for a longer period of time: for two to five years rather than the typical one-year Criminal Court OP. Such significant differences result in disparate treatment of victims who lack access to Family Court.

NEGATIVE IMPACTS OF JURISDICTIONAL BARRIERS

60. Due to widespread discrimination against people of color in the criminal justice system, minority and immigrant battered women may feel reluctant to secure an OP or seek justice for their situation and thereby rely on that system.^{ccxvii} As discussed earlier, minority and immigrant women are especially susceptible to inappropriate or abusive government involvement. Among other risks, women of color with children are particularly vulnerable to involvement by the Administration for Children's Services, which disproportionately removes children from minority women.^{ccxviii} Black and Latina women in particular know the impact of a criminal conviction could potentially be devastating, especially in a community like Harlem where a disproportionately large number of men already have a felony conviction.^{ccxix}

Minority victims may be further deterred from reporting abuse if they feel their abusers will face unfair treatment, such as longer sentences, due to racial bias in the system.^{ccxx} Immigrant battered women may fear that having the batterer arrested will lead to unacceptable immigration consequences, such as deportation for themselves, their batterers, or family members. Victims' fear of deportation – which batterers often exploit – is a powerful incentive to refrain from turning to the courts or the police for help.^{ccxxi}

61. Racial minorities, who already comprise the majority of litigants in New York City's Family Courts, are disparately impacted by unreasonable barriers to accessing Family Court.^{ccxxii} Victims in the lowest income bracket, who are more likely to report domestic violence,^{ccxxiii} have less access to private resources or alternatives, only increasing the need for state intervention.^{ccxxiv} Racial and ethnic minority victims currently barred from Family Court are therefore in particular need of the specialized services and remedies available in the Court and should be given the choice of forum – Criminal or Family Court – that those eligible for civil OPs receive.

RECOMMENDATIONS

The following recommendations are meant to shed light on human rights violations with respect to victims of domestic violence, as well as to address discrimination against women of color:

- With respect to language barriers faced by immigrant women of color, New York State and **New York City should: implement citywide multilingual community education programs on domestic violence; provide** funding for more interpreters for courts and police; guarantee interpreters at all stages of the litigation process in family court, including the stage at which victims complete petitions for OPs and other relief;
- **provide clear testing, training, and monitoring procedures for court interpretation** that teach and assess interpretation proficiency, professionalism, and ethics in the domestic violence context;
- **provide specialized training on domestic violence and sexual assault to interpreters**

that emphasizes the need for confidentiality and the ways that batterers use the court process to continue to abuse their partners;

- **provide a clear channel of complaint** regarding inadequate or unethical interpreting;
- **provide trainings on language interpretation to judges and attorneys** so that they can recognize when interpreters are not performing their duties appropriately;
- **guarantee that NYPD is equipped to communicate with LEP individuals**, especially at crime scenes;
- and **provide trainings to the NYPD on communicating with LEP victims**, using available language resources at the scene of the crime.
- With respect to the inadequate response and ineffective measures by law enforcement to domestic violence, **New York City must: improve training for police on domestic violence issues**, in particular on listening to and recognizing the needs of battered women;
- **improve multilingual services to facilitate communication between law enforcement and LEP/immigrant domestic violence battered women**;
- **compel the NYPD to respond to open records requests and generate disaggregated data on domestic violence** that accounts for the gender, race, and ethnicity of domestic violence victims and perpetrators, including whether the complainant or victim is LEP, the physical injuries complained of by victims, the types of crime committed, and whether or not weapons were involved;
- **pass State legislation that breaks down immunity barriers and allows for a suit in tort against the police** when they fail to enforce orders of protection, regardless of whether a victim believes the police will enforce the order;
- **pass State legislation that provides women a civil cause of action** permitting victims of gender-motivated violence to sue perpetrators of the violence;
- and **amend New York City Human Rights Law** to include a new, separate cause of action against police for non-enforcement of orders of protection.
- With respect to the lack of equal access to family court orders of protection, **New York State must: take steps to ensure equal access to civil OPs for all victims of domestic violence**;
- **amend New York Family Court Act Article 8** to allow pregnant women and couples (including gay, lesbian, transgender, and bisexual couples) who are dating, engaged, or living together to seek civil orders of protection;
- **make progress to ensure that both victims and perpetrators of domestic violence are treated fairly by the criminal justice system**, regardless of race or immigrant status;
- and **collect data on the demographics of Family Court users** that should be used to develop strategies for ensuring that victims of domestic violence of all races are able to access the resources and protection they need.

IMMIGRATION AND NATIONAL SECURITY

This chapter highlights a number of contexts in which *de jure* and *de facto* discrimination against non-citizens and undocumented immigrants violates internationally recognized rights and freedoms, including: the right to seek asylum and citizenship; access to health care and public benefits; and access to labor rights.

1. The vast majority of the foreign-born in the United States are people of color.¹ For example, more than a third of the population in New York City is foreign-born, and of that proportion, nearly 80% identify as being of color, according to the 2006 US Census.² As noted in CERD General Recommendation 30, *Discrimination Against Non-Citizens*, “xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism.”³ Moreover, such discrimination against immigrants and non-citizens in the United States violates numerous CERD provisions. In New York City, these issues are of heightened concern, given the city’s historical legacy and contemporary reality as a city of immigrants.

2. Although CERD Article 1(2) provides for differentiation based on citizenship status, the subsequent General Recommendation 30 maintains that this paragraph “must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from [recognized] rights and freedoms.” The Recommendation continues, “States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of [civil, political, economic, social and cultural rights] to the extent recognized under international law. Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are *not applied pursuant to a legitimate aim*, and are *not proportional to the achievement of this aim*.”⁴



3. In paragraph 54, the US Report identifies “the impacts of the changing demographic caused by high rates of immigration into the United States – both legal and illegal” as one of two major issues creating “on-going challenges for the institutions in the United States that are charged with the elimination of discrimination.” For the reasons noted above, in New York City the question of non-citizen rights is even more pronounced.

4. While the City has implemented a number of important protections for immigrants at the local level, including Executive Order 41* (protecting as confidential a person’s immigration status) and Local Law 73* (ensuring that persons eligible for and attempting to

access social services do not face discrimination based upon the language they speak), there remain challenges in compliance.

THE LEGAL LANDSCAPE OF IMMIGRATION LAW IN THE UNITED STATES

5. In the United States, the ultimate authority on matters relating to immigration—such as entry requirements, immigration categories, bases for deportation, recourse to courts, etc.—rests with the federal government. Today, some highlights of the legal framework of immigration include: birth-right citizenship, as guaranteed by the Constitution; a system of preferences for admission categories based primarily on family ties and secondarily on employment skills; extremely low numerical limits for admission of low-skill workers; punitive provisions for employers hiring undocumented laborers, accompanied by haphazard and arbitrary enforcement; deportation for a wide range of criminal offenses, including for various minor offenses; streamlined and accelerated removal of non-citizens with criminal records; and limited judicial review of immigration matters.^{xi}

6. In violation of Article 2(1)(c), a number of current United States laws and regulations have specific discriminatory effects on refugees/asylum seekers from particular countries of origin. For example, the Illegal Immigration and Immigrant Responsibility Act 1996 (IIRAIRA) introduced a new policy of “expedited removal,” which deprives non-citizens arriving in the United States believed to be “inadmissible” of the right to a hearing before an immigration judge. Excludable immigrants thus lack the due process guarantees available to non-citizens under the United States Constitution. Bona fide asylum seekers are being erroneously returned to countries where they face persecution because of inadequate procedural safeguards in the expedited removal process.^{xii}

7. Access to the civil courts is not contingent on immigrant status, yet the United States severely limits non-citizens’ access to federal welfare and other public benefits, and renders them nearly nonexistent for undocumented immigrants. In addition, as it relates to judicial review, United States courts are extremely deferential to the political branches of gov-

ernment, long recognizing a “plenary” authority of the federal government over immigration.^{xiii} As a result, the federal government faces few constitutional limitations on its actions, and if at all applicable, very weakened ones.^{xiv} In addition, federal law preempts state legislation relating to immigration.^{xv} The end result: immigrants are arguably the most vulnerable population within the United States today.

THE EFFECT OF 9/11

8. After the terrorist attacks of September 11, 2001, the situation worsened for immigrants. The enactment of the Homeland Security Act of 2002^{xvi} resulted in a change in the structure of the immigration system. The Immigration and Naturalization Service (INS) became subsumed by the Department of Homeland Security (DHS) which is now comprised of the United States Citizenship & Immigration Services (USCIS), Customs & Border Patrol (CBP), and Immigration & Customs Enforcement (ICE). ICE is charged with the enforcement of US immigration laws by “. . . targeting illegal immigrants: the people, money and materials that support terrorism and other criminal activities.”^{xvii}

9. States and localities saw an enhanced role in immigration law enforcement, opening the door to xenophobic provincial regulations and practices against immigrants.^{xviii} While months prior to 9/11 the United States Congress had considered a significant liberalization of immigration laws, after 9/11 immigration became intimately tied to national security. For example, Operation Absconder led to the special registration, arrest, detention, interrogation, and selective deportation of large numbers of Arab and Muslim non-citizens,^{xix} which in turn dramatically increased the prison population, particularly through the creation and use of immigrant detention centers.^{xx} Only several years after 9/11 did the United States Congress begin immigration reform talks anew, and even then all discussions remained sharply framed within the national security framework.^{xxi}

10. Post 9/11 policies have had particularly harsh effects on Arab and Muslim immigrants. Despite the fact that the US Report^{xxii} rules out the use of racial profiling as a law enforcement technique,^{xxiii} it notes that for efforts concerning national security and bor-

der integrity “race and ethnicity may be used, but only to the extent permitted by the applicable laws and the Constitution.”^{xx} The notion of a separate standard for profiling related to national security, along with increased conflation of immigration and counter-terrorism policy and institutions^{xxi}, has resulted in increased use of such profiling and discrimination in immigration as a counter-terrorism measure.^{xxii} The profiled group consists of immigrants perceived to be Muslim, Arab, Middle Eastern, or South Asian on the basis of their name, race, religion, ethnicity, or national origin,^{xxiii} amounting to clear violations of Articles 2(1)(b) (sponsoring and supporting racial discrimination) and 5 (failing to ensure equal treatment under the law).

11. But policy consequences have not only affected immigrants from certain predominantly Arab and Muslim nations. Following 9/11, “record numbers of deportations, aggressive enforcement of the immigration laws, citizenship requirements for certain jobs, and a general immigration crackdown [have affected all] immigrants, with the largest cohort of immigrants being from Mexico.”^{xxiv} For example, the Real ID Act of 2005^{xxv} severely limits habeas corpus remedies, increases evidentiary burdens on asylum seekers, restricts judicial review of immigration decisions,^{xxvi} and even prevents undocumented immigrants from obtaining a driver’s license, all in the name of national security.

12. These policies have harshly affected refugees as well. The United States PATRIOT Act excludes anyone from asylum or refugee resettlement who may have provided “material support” to a terrorist organization. The new definition of “material support” penalizes support regardless of its effect and whether it was intended to encourage or discourage violence, thus providing a blank check for executive discretion and bias.^{xxvii} While some parts of this provision have been struck down in federal court,^{xxviii} the definitions of “material support” and “terrorist organization” remain so vague that any resistance activity against any oppressive government can be included.^{xxix} Due to these new provisions, even forced association with an alleged terrorist organization may render an asylum

seeker ineligible for relief. It is estimated that refugee admissions in 2006 were reduced by 13,000 due to the “material support” bar, and 621 asylum applications are currently on hold for the same reason.^{xxx} Those most affected include the Burmese, Colombians, Congolese, Cubans, Ethiopians, Hmong, Indians, Liberians, Montagnards, Nepalese, Sierra Leons, Sri Lankans, and Filipinos.

13. Other consequences of this myopic focus have included:

- Broadened national security grounds for inadmissibility and deportability.
- Greater reliance on nationality in decisions involving immigration law enforcement priorities.
- Restructuring of the federal immigration authority, including assigning the new Department of Homeland Security most responsibility for immigration.
- Limited number and delays in processing of refugee admissions.
- Limited public access to removal hearings and non-citizen access to the evidence against them in removal hearings.^{xxxi}

GOVERNMENT RESPONSIBILITY TO ELIMINATE RACIAL DISCRIMINATION

Article 2 states that the United States government must “pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.”

FAILURE TO PROVIDE A PATH TO LEGALIZATION

14. As of 2005, there were approximately 652,000 undocumented immigrants living in New York City, constituting about 6% of all undocumented immigrants nationwide and 20% of the immigrant population in New York City.^{xxxii} None of these immigrants has a path to legal status, which as explained above, may in various instances mark the difference between equal or unequal treatment before the law.^{xxxiii} An immigration policy that does not provide a meaning-

ful path to legalize one's status leaves an entire subset of the population vulnerable to socioeconomic exploitation, in particular, unfair and harmful working conditions, and unlivable wages. Because this subset of persons is disproportionately of color, the United States has failed to *"pursue by all appropriate means a policy eliminating racial discrimination,"* in contravention of Article 2(1).

SUBSTANTIAL AND DISCRIMINATORY DELAYS IN NATURALIZATION

15. A large number of individuals are currently waiting for a decision on their citizenship applications. Keeping in mind New York City's 2.8 million foreign-born persons, these delays substantially affect New York City residents. These delays are evident on two levels. First, there are delays in the time between filing an application and United States Citizenship and Immigration Services' (USCIS) decision. Since 2001, approximately 776,000 applications nationwide were not decided for more than a year, 158,000 for more than two years, and 41,000 for three years or more.^{xxxiv} Second, there are delays in the time between the examination^{xxxv} and the USCIS decision. While federal law requires that a decision be made within 120 days of an applicant's examination, approximately 348,000 applications did not receive a decision within that period, and for 175,000 applications the delay was of twice that length.^{xxxvi} In the most extreme cases—approximately 33,000—the time period between interview and decision exceeds 720 days.^{xxxvii}

EQUAL ENJOYMENT OF GUARANTEED HUMAN RIGHTS

Under Article 5, the U.S. must "undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race or national or ethnic origin, to equality before the law, notably in the enjoyment of . . . the right to security of person and against violence, the right to freedom of movement, the right to freedom of thought, conscience and religion, the right to

just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration, the right to public health, and the right to education and training."

VIOLATIONS AFFECTING ASYLUM SEEKERS

16. Expedited removal, which affords no right to due process in the form of a hearing, seems to depend, arbitrarily, on the point of entry into the United States and is in violation of Article 5(a). New York City has the highest expedited removal rate at airports (29.4%, compared to 11.1% in LA) as well as a low rate of credible fear referrals (6.4%, compared to 20.8% in LA).^{xxxviii} The protection asylum seekers receive before the law varies significantly "depending upon where the alien arrived, and which immigration judges or inspectors addressed the alien's claim."^{xxxix} Likewise, the outcome of an asylum claim appears to depend on which particular officials in which city consider the claim. Compared to the national average, the New York asylum office has a very low asylum approval rate, approving only 26% of applications in 2002 and 20% in 2005, compared to a national average of 50% in 2002 and 38% in 2005.^{xl} Moreover, because asylum seekers are not entitled to legal representation at public expense, only the few who can afford (or access pro bono) counsel appear with an attorney. Lack of representation reduces an asylum seeker's chance of being granted asylum to 2% (compared to 25% with attorney).^{xli}

17. Asylum seekers are subject to mandatory detention upon their arrival in the United States. They are included among the nearly 300,000 men, women, and children detained each year by United States Immigration and Customs Enforcement (ICE) in over 400 detention facilities. For asylum seekers, detention is largely arbitrary, as it does not depend on the circumstances of the individual asylum seeker's case.^{xlii} This is evident, for example, in the inconsistency in how requests for parole are treated^{xliii} and in the wide variations in release rates across the country, despite national criteria set by the Department of

Homeland Security (DHS). New York is one of the three districts with the lowest release rate: only 8.4% of asylum seekers were released prior to their asylum decision, compared to 81% in Chicago.^{xiv} There is no appeals process, and no set length for detention. This can lead to indefinite detention, for example when removal proceedings cannot be completed for reasons of *non-refoulement*—the principle of international law that protects refugees from being returned to places where they would be in danger of their lives.

18. Detention of non-criminal asylum seekers is a mandatory administrative procedure, yet generally takes place under penal conditions and often in correctional facilities shared with convicted criminals, facilities which are “inappropriate for non-criminal asylum seekers”^{xv} and in violation of Article 5(b)’s “right to security of person and protection by the State against violence or bodily harm.” Several county jails in New York serve as such detention

facilities. New York City’s Queens Contract Detention Facility, in particular, was found to be structured and operated much like a traditional jail. In 2003 this facility, which closed in 2005 for financial reasons, was the site of a hunger strike by detainees, whose complaints included the lack of parole grants and the jail-like conditions of detention.^{xvi} According to Human Rights Watch, United States immigration centers experience “overcrowding, inadequate access to legal materials and assistance, and poor medical services.”^{xvii}

19. ICE detention standards are non-binding, and compliance is rarely inspected. When the U.N. Special Rapporteur on the Human Rights of Migrants was invited in 2007 by the United States State Department to observe immigrant detention in the United States, he was denied access to key detention facilities. Moreover, the DHS’s Office of Inspector General (OIG) reported the lack of both independent and government inspection of detention facilities and criticized ICE for inadequate inspections of such facilities and for wide-spread non-compliance with its own detention standards.^{xviii}

20. Significant evidence exists of the bodily harm caused by detention and prison-like detention conditions, with particular harm suffered by detained women, in violation of the right to security embodied by Article 5(b). Since 2004, approximately 62 immigrants have died in detention nationwide^{xix}, and abuses are prominent in detention facilities in the New York City area.ⁱ Evidence shows that inadequate medical care is a common contributory factor in detainee deaths. The Office of Inspector General concluded that most of the audited detention facilities failed to provide adequate medical care, identifying “instances of non-compliance at four of the five detention facilities, including timely initial and responsive medical care.”ⁱⁱ Severe and widespread problems of access to chronic and emergency medical care have also been reported, including long delays prior to medically necessary surgical procedures and unresponsiveness to requests for medical care.ⁱⁱⁱ Evidence shows that asylum detainees experience “high levels of psychological distress and difficulties accessing medical and



mental health services.”ⁱⁱⁱ In addition, and in the absence of disaggregated data, anecdotal reports suggest that the many of the female immigration detainees are asylum seekers fleeing persecution, and that they suffer disproportionately from inhumane detention conditions. One study found that “the problems of isolation, inhumane conditions, and lack of reliable access to legal counsel and health care that characterize immigration detention in general are particularly problematic for women.”^{iv} Furthermore, detainees have no recourse: ICE detention standards do not address detainee rights for the reporting of abuse and civil rights violations and grievance procedures at the audited facilities are inadequate.^v These conditions affect nearly all audited detention facilities, including those in the New York City area.

DISCRIMINATION IN LEGALIZATION AND NATURALIZATION

21. In addition to violating the prohibition on discrimination in access to citizenship, substantial delays and uncertainties in naturalization deny a number of substantive rights guaranteed to non-citizens under international law^{vi} as well as under provisions of Article 5, which guarantee the right to freedom of movement and residence within the border of the State and to leave any country, including one’s own, and to return to one’s country. As detailed in the context of Article 2, these delays particularly affect Muslim, Arab, Middle Eastern, and South Asian immigrant men. Many have practically lost their freedom of movement—feeling unable to travel to their home countries on account of a legitimate fear that they may be refused entry to the United States on return, or subjected to lengthy and intimidating security checks, questioning or even detention, which may jeopardize their pending applications.^{vii}

22. In order to avoid possible investigation and detention, Muslim, Arab, Middle Eastern, and South Asian immigrant men are forced to curtail their freedom to practice their religion by refraining from prayer in public, changing their appearance and even their names out of concern that they will be profiled or face harassment which may put their applications

at risk.^{viii} For example, a New York immigration lawyer noted that many people wanted to change their ethnic- or religious-sounding names after September 11, 2001 in order to avoid being arbitrarily pulled into the government’s investigation and detention scheme.^{ix} The United States has in effect failed to protect their freedom of religion.

23. Excessive delays deny access to numerous substantive rights that attach to citizenship in the United States, such as the right to vote, to obtain United States passports, to file visa petitions for immediate relatives, to protection by the United States while abroad and to obtain life-sustaining federal benefits.^x They also seriously impede the profiled group’s ability to participate in the political process and erect barriers to family unity, employment prospects and economic wellbeing.^{xi} As long as the United States government fails to address these delays and their discriminatory impact, it stands in violation of its duty under CERD to eliminate discrimination.

DISCRIMINATION IN RAIDS AND DETENTION CENTERS

24. As part of its mission, ICE conducts raids of workplaces, homes, and shopping centers.^{xii} ICE’s Operation Community Shield^{xiii}, which aims to deport transnational street gangs, has conducted raids on Long Island, NY that specifically targeted Latino immigrant communities. In Nassau and Suffolk Counties, on September 27, 2007 an armed ICE police force raided homes without warrants. ICE does not need a judicial warrant to enter a home and detain suspected criminal aliens. As a result of the raid, 186 men were rounded up and taken to different detention facilities across the country. ICE collaborated with local law enforcement whose intelligence on suspected gang members was limited to tattoos, style of dress and company suspected gang members kept.^{xiv} The ICE police came from all over the country with varying degrees of knowledge and experience in the local area. Some were seen brandishing shotguns as well as automatic weapons.^{xv} The raids were conducted in the early morning and there were reports of ICE agents drawing their weapons on local law enforce-

ment, not sharing information with local police, and frightening children with inappropriate behavior.^{lxvii}

25. In response to the increasing concerns over the rise in raids, the New York City Council issued a resolution,^{lxviii} urging Congress to end the raids aimed at deporting undocumented immigrants. The City Council recommended an end to the criminalization of the estimated 625,000 undocumented immigrants that are living in the NYC metropolitan area.^{lxviii} The resolution also addressed the needs of the 230,000 non-citizens currently in detention for immigration violations.

26. ICE raids have resulted in the arrest and detention of thousands of immigrants. In addition to raids on homes and workplaces, a non-citizen is at risk for being detained and deported most commonly when trying to re-enter the country, applying for citizenship or adjustment of status, being stopped by the police, and upon finishing a criminal sentence.^{lxix} The US detains approximately 230,000 immigrants per year.^{lxx}

27. Detention facilities routinely fail to provide some of the most basic services. The Department of Homeland Security's Office of the Inspector General released an audit report in late 2006^{lxxi} that looked at ICE's compliance with detention standards at five detention facilities. The report found four of the five facilities to be non-compliant with ICE Detention Standards regarding health care, including timely medical care. ICE also identified environmental health and safety concerns at three of five detention facilities reviewed. With respect to reporting abuses and civil rights violations, the audit reported the lack of a process that detainees could use to file complaints. Further, two out of the five facilities audited did not even issue handbooks explaining the detainees' rights. The report also found that staff physically, sexually, or verbally abused detainees in all five facilities that were investigated.^{lxxii}

THE SITUATION OF UNDOCUMENTED WORKERS

General recommendation 30 specifically obliges State parties to "[t]ake measures to eliminate

discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects."^{lxxiii}

28. While detailed and reliable statistics about undocumented immigrants are, by nature, difficult to collect, it is clear that, nationwide, undocumented workers are disproportionately concentrated in low-wage employment and consistently face labor rights violations. In 2005, undocumented workers comprised 5% of the workforce but nearly 10% of low-wage workers.^{lxxiv} Moreover, the exclusion of people of color, foreigners, and women from the labor movement in the United States has yielded labor laws that exclude the types of work in which such groups have historically been employed, such as agricultural or domestic work. Several recent studies of jobs in New York City where undocumented workers are concentrated serve to illustrate the common challenges facing overworked and underpaid immigrants of color.

DAY LABORERS

29. According to a study by Abel Valenzuela and Nik Theodore, *On the Corner: Day Labor in the United States*, three-quarters of the day-laborer workforce is undocumented. More than half of day laborers surveyed experienced wage theft, and many suffer harassment from merchants, area residents, and arrests by police. Forty-four percent were denied food, water or breaks while on the job, twenty percent had suffered a work-related injury, and less than half of those injured in the past year had received medical care.^{lxxv}

RESTAURANT WORKERS

30. The Restaurant Opportunities Center of New York found that immigrants of color, many of them undocumented, are concentrated in the restaurant industries' worst jobs. In addition to frequent wage and hour law violations, 33% of workers surveyed reported experiencing verbal abuse on the basis of race, immigration status or language. Similar numbers also

reported that they or a co-worker had been passed over for a promotion based on race, immigration status, or language.^{lxxvi}

DOMESTIC WORKERS

31. General Recommendation 30 explicitly highlights the need for protecting domestic workers, requiring States to “[t]ake effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault.”^{lxxvii} New York-based Domestic Workers United recently published a report detailing the egregious rights violations suffered by domestic workers in New York, including the prevalence of low wages, long hours, and wage violations.^{lxxviii} One-third of the workers surveyed had experienced verbal or physical abuse or been otherwise harassed by their employers. The demographics of the survey are indicative of the intersection of race, immigration status, and gender: 99% of New York’s domestic workers are foreign-born, 76% are non-citizens, 95% are people of color, and 93% are women. Of the one-third of workers who reported mistreatment by their employers, 32% felt race was a factor in their employer’s actions, 33% felt immigration status was a factor, and 18% thought that language contributed to the abuses.^{lxxix}

INADEQUATE HEALTH CARE

32. In New York City and State, immigrants face serious barriers to accessing health care, particularly federally-funded health care, which is contingent upon one’s immigration status. Those without status and/or with low incomes must go without health care services. Restricted access to health insurance and language barriers deny immigrants the right to equal enjoyment of medical care, as guaranteed under Article 5.

33. Immigrants in the United States are three times more likely to lack health insurance than native-born Americans. This situation is due in large part to their disproportionate representation in low-wage jobs that do not provide health benefits, and

also to the government’s severe reduction in access to public health care for non-citizens.^{lxxx} In 2002, of the 33.5 million foreign born individuals in the United States, 33% did not have health insurance.^{lxxxi} Today, one in five of the 46 million uninsured persons living in the United States, or 9.2 million persons, are non-citizens.^{lxxxii} Approximately half of low-income legal immigrant children residing in this country are uninsured.^{lxxxiii} In New York State alone, about 29% of all immigrants and 41% of recent immigrants are uninsured, compared to 13.3% for the United States-born population. In New York City, 33% of all immigrants and 41.7% of recent immigrants are uninsured, compared to 17.1% for the United States-born population.^{lxxxiv} In addition, a recent study found that “foreign-born adults younger than 65 [in New York City] are over *twice* as likely to be uninsured.”^{lxxxv} As a result, immigrant New Yorkers tend to have less access to important primary and preventive care services than their non-immigrant counterparts.^{lxxxvi}

34. Stipulations under the State Children’s Health Insurance Program^{lxxxvii} (SCHIP), Title X of the Public Health Service Act,^{lxxxviii} and the Hyde Amendment create burdensome obstacles for immigrants to access the care that they need. Under the SCHIP program, the government does not provide specific provisions for legal immigrant children to have health care insurance, leaving many immigrant children without health insurance and without access to health care services. As a consequence, many immigrant children develop health conditions that can become severe, chronic, and often, untreatable.^{lxxxix} Even among immigrants who are eligible for SCHIP, the rates of participation are lower than the general population due to fear that applying may have immigration consequences for themselves and their family.^{xc}

35. Immigrants are also more likely to work in unsafe working conditions and handle hazardous and toxic substances and materials, to lack employment-based health insurance, and earn unlivable wages that preclude them from purchasing health insurance or paying out of pocket for medical services. Hence, health disparities exhibited among newly-arrived immigrants tend to be chronic conditions associated

with working in agriculture, domestic services, nail salons, construction and factories. While many industries predominantly comprised of immigrant labor feature hazardous working conditions, in New York City the two that particularly stand out are sweatshops and industries involved in the cleanup after the World Trade Center bombings.^{xci} Immigrants are also at higher risk of fatalities on the job in the construction industry and of homicides in industries prone to robberies, such as driving taxis and working as gas station attendants.^{xcii}

36. Immigrant women face greater health disparities than their U.S.-born counterparts, including unintended pregnancies, lack of access to prenatal care, lack of abortion access, and increased incidences of cervical cancer and sexually transmitted infections—all as a result of lack of access to reproductive health information, health services, and family planning. In New York City, the teen birth rate is higher among adolescent immigrant women than among U.S.-born women—45 versus 32 per 1,000 teen girls per year between 2001 and 2003. Teens from Mexico have the highest teen birth rate, four times that of the overall foreign-born population.^{xciiii} Immigrant women also face a greater health risk from domestic violence, with a rate of intimate partner homicide of 1.27 per 100,000 versus 0.75 per 100,000 U.S.-born women annually.^{xciiv}

37. These physical health disparities may be exacerbated by the psychological stress and acculturation difficulties that come with immigration to the U.S.^{xciv} In New York City, two populations have been identified as suffering from particularly high rates of depression and suicide: Latina teens, hospitalized for attempting or threatening suicide at a rate of 95.5 per 100,000 (compared with 88.5 for teenage white girls), and Asian women 65 and older in the city, whose suicide rate is more than twice the rate for non-Hispanic white women in that age group.^{xciiv}

38. As immigrants build a life in the United States, over time they exhibit different health disparities than their newly arrived counterparts, due in part to psychological stress and/or acculturation difficulties.^{xciiv} Moreover, immigrants who suffer from depression are

60% more likely to be undiagnosed than U.S.-born New Yorkers.^{xciiii} Other health disparities exhibited by immigrants include obesity,^{xciix} diabetes,^{cx} cardiovascular disease,^{cx} hypertension, increased alcohol consumption,^{cx} and sexually transmitted infections.^{ciii} Although many of these conditions are preventable, immigrants are less likely to receive routine screenings for physical illnesses. In New York, immigrants are also less likely than United States-born adults to receive colon cancer screenings (44% versus 53%), Pap tests (73% versus 84%) and mammograms (74% versus 79%).^{civ} Immigrants who are HIV-positive also face delayed diagnoses, with foreign-born persons 11% more likely to be diagnosed concurrently with a diagnosis of AIDS.^{civ} Because our private health care system necessitates obtaining health insurance or relying upon public assistance in order to access preventive care, many immigrants simply go without these services. In addition, some immigrant groups may resort to self-medication and home remedies due to structural, linguistic and cultural barriers to health care.^{cvi}

39. Even after immigrants legalize their status access to health care is precarious. Because of the 1996 welfare reform, which severely limited immigrant access to publicly-funded health care, legal immigrants must reside in the United States for five years continuously before they can access public assistance. Only in the case of an emergency, where care in hospital emergency rooms will be covered by emergency Medicaid at the federal level, will health care be available.^{cvi} And before immigrants can qualify for federal health care programs, states must use their own funds, if they decide to do so, to provide care to this population.^{cvi}

40. New York State has had a mixed record of extending public health benefits to those immigrants who do not receive private health insurance through their jobs. In 1996, the federal government enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and, among other things, denied access to Medicaid for all immigrants, with limited exceptions.^{cix} New York State attempted to follow suit with its Welfare Reform Act of 1997, but

the highest court in the state found the denial of Medicaid coverage to legal immigrants violated the New York State constitution and benefits to this group were subsequently restored.^{cx} Undocumented immigrants, however, continue to be ineligible for public health insurance in New York except in cases of emergency or for prenatal and postpartum care, as well as undocumented children under SCHIP.^{cxii}

41. For undocumented immigrants, Medicaid has long provided publicly-funded emergency care, although what constitutes an “emergency” has long been in dispute.^{cxiii} In August 2007, federal health officials determined that chemotherapy for immigrants with cancer does not qualify and they will no longer help cover such costs, further directing states to limit coverage. New York Governor Eliot Spitzer called the “new federal directive to limit coverage ‘morally and clinically and legally wrong’...[saying] he was prepared to sue the federal government over it.”^{cxiii} New York State health officials announced in September 2007 that they would cover all the costs no matter

what the federal government does. In addition to emergency Medicaid, undocumented immigrants in New York are entitled to a number of city services including prenatal care, HIV testing and counseling, and immunizations.^{cxiv} In 2003, New York Mayor Michael Bloomberg signed Executive Order 41, which prohibits city agencies from inquiring into or disclosing the immigration status of New Yorkers attempting to access these services.^{cxv}

42. Federal laws impinge on immigrant women’s right to choose, a right protected under international customary law and also under *Roe v. Wade*, which set United States legal precedent for protecting women’s reproductive rights. For example, the Centers for Medicare and Medicaid Services issued a rule on October 2, 2002, declaring that undocumented immigrant women can receive prenatal care under the State Children’s Health Insurance Program^{cxvi} only by defining child as “unborn child”—thereby giving personhood to a fetus. Although giving undocumented immigrant women prenatal care coverage was laudable, it was at the cost of their human right to make autonomous reproductive health choices.

43. Immigrant women’s right to choose is also infringed upon as a result of the Hyde Amendment. The Hyde Amendment was passed in 1976, three years after *Roe v. Wade*. Senator Hyde, who drafted the amendment, stated during floor debate in 1976: “*I would certainly like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle class woman, or a poor woman. Unfortunately, the only vehicle available is the Medicaid bill.*” According to the amendment, women can receive a Medicaid-funded abortion only in the case of rape, incest or health or life endangerment. Due to the prohibitive cost of getting an abortion and the lack of public assistance to do so, many immigrant women face huge economic barriers terminating unwanted pregnancies.

44. Likewise, Title X provides funding to community health centers (CHCs), a principal form of health care access for *all* immigrants seeking *all* forms of primary care services.^{cxvii} However, such funding cannot go toward providing abortions. Title X funding is



desperately needed by CHCs, not only because they serve immigrant populations, but because they provide services to all medically under-served communities. Instead of providing funding to programs and providers for services needed by medically under-served immigrant populations, federal funding has increased for Community Based Abstinence Education (CBAE) programs^{cxxvii} as well as for pregnancy crisis centers. Neither program provides comprehensive and scientifically adequate information and services that would allow immigrants to make informed choices about their reproductive health and general health.

45. Linguistic discrimination has furthered eroded immigrants' access to health care. Close to one million New York City residents are "Limited English Proficient" (LEP), and one out of every two New Yorkers speaks a language other than English at home.^{cxxix} Since English continues to be the dominant language of the United States health care delivery system, linguistic minorities are at a significant disadvantage when it comes to accessing the same high-quality health services as English speakers. For example, English-speaking immigrants are significantly more likely to have a primary care provider (74%) than Spanish-speaking immigrants (52%). Moreover, an extensive body of medical literature has developed over the last fifteen years documenting how language barriers impede access to health care for language minorities and perpetuate racial and ethnic disparities in health outcomes. Researchers have found, for instance, that the lack of competent language assistance services can result in the poor delivery of health care, including: substantial risk of misdiagnosis,^{cxx} higher likelihood of adverse drug events or serious medical events,^{cxxi} lower patient satisfaction^{cxxii} and difficulty obtaining patient compliance with treatment regimens.^{cxxiii} Failing to provide language assistance services has also been shown to be inefficient for the health care system as a whole, since language barriers have been associated with the higher utilization of costly or invasive procedures^{cxxiv} and lower utilization of preventative and primary care.^{cxxv}

46. Although federal, state, and local laws mandate that health care providers make language assistance services available to LEP patients, non-compliance is widespread.^{cxxvi} For instance, a recent government-sponsored study found that nearly 75% of hospitals in New York City did not provide consistent and meaningful language access along key points of the health delivery process.^{cxxvii} Similarly, a recent study by the New York Academy of Medicine found that two-thirds of New York City pharmacies fail to translate drug labels so that patients who do not speak English well can understand them. These failures occurred despite the fact that the vast majority of pharmacies (80%) reported that they have the capacity to produce labels in languages other than English and most (88%) stat-



of the immigrant population in New York City is undocumented

ed that they served LEP patients every day.^{cxxviii} Advocates and community-based organizations have also documented the lack of compliance with language access laws throughout the city's Medicaid offices.^{cxxix}

DENYING OUR YOUTH THE RIGHT TO EDUCATION AND TRAINING

47. Every year approximately 65,000 undocumented students, brought to the United States by their parents, graduate from high school.^{cxxx} The City University of New York estimates that there are anywhere from 2,000 to 3,000 undocumented stu-

dents enrolled at its campus.^{cccc} New York City, as a city of immigrants, is likely home to a substantial population of undocumented students. Undocumented higher education students, who include many of those most successful in their secondary education, face unique barriers: while they have to pay international student rates of tuition (often three times as high as in-state tuition rates), they are denied most federal and state financial assistance for higher education, and even most private scholarships are limited to citizens and permanent residents. Students with legal status but no permanent residence are also barred. New York is one of ten states that have taken action to allow such students to receive in-state tuition, but it has not extended to undocumented students the opportunity for state grants and financial aid. Also, these benefits are endangered by recent arguments that claim they contravene federal law. Since states have no power to grant legal status to these students, and since undocumented students are unable to work legally in the United States, they are effectively denied any venue to higher education—in contravention of Article 5.

48. The Development, Relief, and Education for Alien Minors Act (DREAM Act) could address this situation in higher education, by granting undocumented students an opportunity to obtain a degree and to earn legalization over a period of six years.^{ccccv} Despite being introduced numerous times in the US Congress, as recently as October 2007, the DREAM Act has not yet proceeded to a debate on the Senate floor. If it were passed, this legislation would allow the United States to meet its obligations, under Article 5, to prevent discrimination against immigrant youth in educational benefits.

LEGAL PROTECTIONS AND REMEDIES AGAINST DISCRIMINATION

LACK OF DUE PROCESS RIGHTS

49. As previously mentioned, the United States government fails to adhere to the Constitution when

dealing with persons seeking admission or asylum upon entry into the country. Removal hearings and expedited hearings, additionally, are not subject to the same due process requirements citizens enjoy.

LACK OF RECOURSE FOR UNDOCUMENTED WORKERS

50. Article 5 and 6 guarantee a “right to equal treatment before the tribunals and all other organs administering justice,” and the United States Report explicitly states that “immigration status is not a factor in access to courts.”^{ccccvi} Yet almost all examples of resources for addressing discrimination discussed in the Report are available for legal immigrants only.^{ccccvii} Unfortunately, this theoretically equal treatment is currently both legally and logistically compromised.

51. For example, as mentioned above, certain sectors of employment explicitly exempted from both Federal and New York State wage and hour regulations are those with a disproportionately high number of undocumented immigrants—these include domestic and agricultural work.^{ccccviii} In addition, cases such as the 2002 *Hoffman Plastics v. NLRB*^{ccccix} have set dangerous precedents limiting compensation to undocumented immigrants in certain labor rights cases.^{ccccx} Fortunately, other federal courts have continued to bar discovery concerning the immigration status of plaintiffs in employment discrimination cases,^{ccccxi} while former New York Attorney General Spitzer offered an explicit ruling “that *Hoffman* does not preclude enforcement of State wage payment laws on behalf of undocumented immigrants.”^{ccccxii} Nonetheless, most undocumented immigrants have not read this Opinion, and fear persists that bringing a case against an employer will increase chances of deportation.

52. In addition to lack of full legal protection based on immigrant status, undocumented workers often lack knowledge of their rights, faith in the efficacy of the naturalization process^{cdi}, and fear retaliation from employers.^{cdii} All of these require proactive enforcement initiatives by the government, on both the federal and state levels.^{cdiii}

RECOMMENDATIONS

The following recommendations are meant to shed light on human rights violations that relate to immigration and naturalization, and to address racial discrimination against immigrants of color.

■ **New York State and City can and should adopt measures to protect immigrants from discrimination**, particularly in the equal enjoyment of rights protected by Articles 5 and 6. Even though most of the power to enact the legal reforms necessary for such protection rests with the Federal government, there are a number of things the City and State can do.

■ For example, **the City should adopt the proposed Domestic Workers' Bill of Rights and the Human Rights in Government Operations Audit Law (Human Rights GOAL)**, soon to be introduced in City Council. To do this, the city will have to undertake improvements to the laws it enforces. In this regard, the recently-opened Bureau of Immigrant Affairs within the New York Department of Labor may hold future promise. In the end, these and a host of other initiatives could make a difference in protecting the rights of undocumented workers. Just and comprehensive immigration reform is imperative to prevent the development of a permanent underclass of exploited undocumented workers.

■ **The State must increase funding for language assistance services by drawing upon federal matching funds available through the Medicaid program.** In particular, New York State should also take advantage of the availability of federal matching funds for LEP services by passing legislation currently pending in the State Assembly and Senate that would enable Medicaid reimbursement for LEP services in a variety of health care settings. The State and City also need to increase mandates to make medically relevant information available in different languages (such as forms, pamphlets, patient bill of rights). After civil rights complaints regarding language access were filed against four New York City hospitals, the New York State Department of Health adopted regulations in September 2006 that require hospitals to offer and advertise free language assistance services, identify each patient's language of preference and language needs in the initial visit, and refrain from using a patient's family members, friends, or non-hospital personnel as interpreters, unless free interpreter services have been explicitly offered and declined. These efforts would be aided by adopting the recommendations just mentioned.

■ **The federal and New York State governments should work to implement an effective healthcare system** that provides primary and preventative care, in addition to emergencies services to all residents, regardless of immigrant status. New York's policy choices at the state and local level represent positive steps in expanding immigrants' access to health care and should be followed up with effective implementation.

■ **The State and City need to ensure that asylum seekers are not detained arbitrarily or on the basis of their particular nationality;** that detention decisions are reviewed by immigration judges; and that detention conditions for asylum seekers are improved, particularly by abolishing detention in prisons or prison-like facilities, by ensuring access to adequate medical care, and by setting a limit to the allowed length of detention.

VOTING RIGHTS

The following chapter examines racial discrimination as it relates to voting rights, including: felon disenfranchisement, including *de jure* discrimination and *de facto* discrimination in the form of misinformation about voting rights; linguistic and logistical barriers to voting; and non-citizen disenfranchisement.

1. New York City's criminal justice system, coupled with New York State's policy of felon disenfranchisement, disproportionately deprives people of color of the right to vote. Yet courts have failed to address the problem because of the difficulty in proving that such disenfranchisement is *intentional* racial discrimination—the standard of proof for such cases under domestic law.¹ As a result, state and local voting restrictions that *actually* (though perhaps not maliciously or intentionally) disenfranchise entire communities based on race can rarely, if ever, be challenged effectively in federal courts. This is true even though the federal Voting Rights Act was designed to overcome race-based disenfranchisement.²

2. The Voting Rights Act of 1965 was passed in large part as a reaction against state practices that denied African Americans the right to vote and thus violated the requirements of the Fifteenth Amendment. On its face, the statute appears to apply unambiguously to all practices resulting in the loss of the right to vote “on account of race,”³ and not necessarily only to practices that intentionally discriminate.⁴ For example, unfair redistricting schemes and language barriers are prohibited because they disproportionately deny the right to vote to racial minorities protected by the Voting Rights Act. Felon disenfranchisement laws, which by definition affect voting, should be also prohibited when they have a similarly disproportionate effect on racial and language minorities.



3. The CERD's text defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin.”⁵ A policy can *result* in a distinction, exclusion, or restriction “based on” race even if the policy did not intend to specifically affect members of particular races, colors, descents, or national origins. Patrick Thornberry asserts that the CERD Committee on the Elimination of Racial Discrimination unequivocally supports this interpretation of racial discrimination and acknowledges the need for domestic governments to address policies that result in such discrimination.⁶

4. In spite of this unambiguous definition, the U.S. Department of State interprets the “based on” language as requiring purposeful direction. For instance, the federal government asserts in the US Report that felon disenfranchisement practices do not “stem from a person's membership in a racial group . . . but [are] based on the criminal acts perpetrated by the individual.”⁷ Yet, as was just seen, for CERD, the *practices* need not be “based on” or “stem from” race in order to be considered discriminatory. Rather, the *distinction, exclusion or restriction* must be based on race. This language significantly undermines, if not rules out, the U.S. government's requirement of purposeful discrimination. Moreover, the position adopted in CERD appropriately situates the inquiry on the person suffering the

harms of racial discrimination. From the perspective of the victim of these exclusionary practices, it matters little if the actions were taken with intent to discriminate – their exclusion from the body politic is the same.

5. The U.S. government's interpretation would deprive CERD of its force as an alternative mechanism by which local, state and federal governments can be held accountable for practices that disproportionately and negatively affect the participation of particular racial, ethnic, or national groups in the political process.

6. The voting restrictions discussed in this report—felon disenfranchisement, language access and non-citizen voting—by virtue of their disparate impact on racial minorities, fly in the face of local, state, and federal obligations to eliminate racial discrimination under the CERD. Specifically, current voting conditions that discriminate against poor and minority populations, and those that perpetuate racism, raise serious concerns about compliance with Article 2, Paragraph 1(a), which requires that each State party ensure that all local authorities engage in no discriminatory conduct, as well as with Article 5, Paragraph (c), which requires State parties to eliminate racial discrimination in the enjoyment of political rights (particularly the right to participate in elections).

7. Since domestic law does not adequately protect people of color, New York City and New York State, as well as the United States government, must be held to their obligations under CERD in order to effectively eliminate racially discriminatory disenfranchisement policies.

FELON DISENFRANCHISEMENT AND RESTRICTED VOTER ACCESS

Under Article 2, the U.S. must “take effective measures to review and amend or rescind governmental, national and local policies, which have the effect of creating or perpetuating racial discrimination. . . . Under Article 5, the U.S. must “undertake to prohibit and to eliminate racial dis-

crimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the right to participate in elections. . . to vote.”

FELON DISENFRANCHISEMENT

8. One of the most blatant violations of Article 2, Section 1(a) and Article 5(c) of CERD is the disenfranchisement, in 48 out of 50 states, of citizens who have felony convictions. The US Report claims that this practice is constitutional and, “In 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.” Consequently, the US Report claims, “While there is a lively debate within the United States on the question of voting rights for persons convicted of serious crimes pursuant to due process of law, the longstanding practice of states within the United States does not violate U.S. obligations under the Convention.”^{xiii}

9. Several federal courts of appeal, including the Second Circuit, which sits in New York, have concluded that the Voting Rights Act – the country's most effective legal weapon for combating discrimination in voting – does not apply to felon disenfranchisement.^{xiv} Instead, the majority of these court decisions have left advocates with only one avenue for outlawing the practice: proof that the original enactment of felon disenfranchisement laws was the product of *intentionally* race-based discrimination.^{xv} This conclusion ignores the central harm and overwhelmingly disproportionate effect that felon disenfranchisement and vote dilution have in communities of color.

10. Moreover, the Courts' conclusion has been frequently contested by advocates and others,^{xvi} and with good reason.^{xvii} In New York State, individuals with felony convictions lose

the right to vote while incarcerated or on parole: some 65,000 and 56,000 thousand persons, respectively.^{xiii} In New York City, home to half of those sentenced to prison in the state and 61 percent of those on parole,^{xiv} the racial discrimination of the criminal justice system, detailed earlier in this report, coupled with disenfranchisement, is particularly grave.

11. Across the nation, the racial biases of the criminal justice system are clear – the federal Household Survey found that “most current illicit drug users are white,” an estimated 72% of all users. Yet African Americans comprise almost 58% of those in state prisons for drug felonies and 42% of those in federal prisons for drug violations.^{xv} In New York City, the disparities are even more remarkable; “over 92 percent of those serving drug-related sentences in New York are black and Latino. And among defendants convicted of felonies, blacks are significantly more likely than whites to be sent to prison and denied probation.”^{xvi} In many neighborhoods in New York City, nearly one in five men is imprisoned for some period of their lives.^{xvii} Not only are these men being denied the right to vote, but members of their households are consequently statistically less likely to vote as well.^{xviii}

12. Alarming, even those who are not disenfranchised fail to vote because of misinformation about their rights. A 2006 study released by Demos and the Brennan Center revealed widespread misinformation distributed by New York local election boards, including several in New York City. In particular, the study cited election board officials who claimed ineligibility for those on probation, as well as officials who illegally required documentation for the registration of formerly incarcerated individuals.^{xix} Since the publication of the report, the New York State Board of Election was commended by advocates for providing training sessions for county officials.^{xx} A separate series of interviews shed light on the effects of such misinformation: con-

ducted at arraignments in New York City,^{xxi} the interviews found that disenfranchisement often creates confusion about voting rights among those with a criminal record, indicating that the *de facto* impact of such disenfranchisement extends far beyond the *de jure*.^{xxii} A 2005 survey shed light on the effects of such misinformation: conducted by the Voter Enfranchisement Project, the study found that close to 40 percent of people who have been arrested in the Bronx incorrectly believe that one cannot vote while on probation.^{xxiii}

13. Given the general lack of information on disenfranchisement policy, it is particularly crucial for election officials to actively distribute correct information. Yet New York City’s Board of Elections website incorrectly states that one is ineligible to vote if they are in jail.^{xxiv} Ineligibility stems from incarceration in prison, not from jail. More than 200,000 people are released from New York’s jails and prisons each year, and nearly 6 million adults in New York State have a criminal record.^{xxv} Each year, this type of misinformation keeps thousands of eligible voters



from the polls. Ultimately, felon disenfranchisement laws and the misinformation that surrounds them dilute the power of poor communities of color to hold elected officials accountable to their needs.

14. This widespread disenfranchisement is the legacy of a long history in the United States of literacy tests, poll taxes, and other racially-motivated means of limiting the full democratic participation of racial minorities, particularly African Americans.^{xxvi} In New York, this legacy stems from a forgotten chapter of the state's history: the *de jure*, racially-based prohibition on the right to vote for Black men on the same terms as whites that last from 1821 to 1870. In fact, felon disenfranchisement was enacted at the very same Constitutional Convention, held in 1821. Equal manhood suffrage did not arrive in New York until after the Civil War, with the passage of the Fifteenth Amendment – which New York originally ratified, only to rescind its approval. Felon disenfranchisement, however, has remained.^{xxvii} Claims of unconstitutional, intentional discrimination in the adoption of felon disenfranchisement in New York are currently pending in an appeal before the Second Circuit.^{xxviii} The United States must be held accountable for these violations of CERD obligations at all levels of government.

15. In New York the government's adoption of felon disenfranchisement is particularly discriminatory because, as part of its process of drawing legislative districts, New York counts prisoners as residents of the communities where they are incarcerated, rather than of their home communities.^{xxix} The result is increased political power in upstate New York regions, which house the overwhelming majority of prisoners, and concomitantly decreased political power in New York City, where the vast majority of prisoners lived when they entered the system.^{xxx} This practice is pernicious and continues to dilute the voting strength of racial and language minorities in New York City.

VOTING ACCESS

16. In addition to misinformation about voter eligibility, a number of other logistical and informational barriers prevent New York City elections from being fully compliant with Article 2, Section 1(a), and with Article 5(c). As noted also in the International Covenant on Civil and Political Rights (ICCPR) independent report, these barriers are also issues of national proportion.^{xxxi} While the recently renewed Voting Rights Act has greatly improved voting access for many, especially for racial minorities, a 2006 report on voting access in the New York notes that in New York City, “election day practices that impede the full participation of racial and language minorities, unfair redistricting plans, and inadequate language assistance are repetitive barriers to the full enfranchisement of the protected classes under the Voting Rights Act.” The report provides a thorough review of these barriers.^{xxxii}

17. Telling local examples have been published by the Asian American Legal Defense and Education Fund (AALDEF), which has been particularly thorough in documenting impediments to Asian American voting. While AALDEF observers in New York City have seen a gradual improvement in compliance with Voting Rights Act Section 203 language access provisions, their poll observers have continued to witness inadequate translations, logistical misinformation and other functional irregularities, as well as hostility and disparaging remarks by poll workers towards Asian American voters.^{xxxiii}

NON-CITIZEN DISENFRANCHISEMENT

18. A last challenge to meaningful electoral accountability in New York City comes from the disenfranchisement of a full fifth of the adult population: those classified as non-citizens, the majority of whom are people of color. For example, whereas only about 12% of white New Yorkers are non-citizens, for most other ethnicities it is much higher: 84% of Japanese, over 77% of Mexicans, over 63% of Salvadorans,

and almost half of Africans, Dominicans, Columbians, Ecuadorians, Peruvians, Indians, and Chinese, among others.^{xxxiv} While a large proportion of such immigrants work in professions heavily regulated by New York City labor policies, without the right to vote in municipal elections, they have no say over the policies that have such an impact on their lives.

19. While CERD Article 1(2) and General Recommendation 30 specifically allow for differentiation between citizens and non-citizens, particularly for voting purposes^{xxxv} both federal and local governments are also required to

redress the consequent systemic marginalization of non-citizens and thus of many ethnic minority communities. Non-citizen voting was a practice found in 40 states until 1926,^{xxxvi} and remains the prerogative of local governing bodies to implement. Recently, non-citizen voting rights have been restored in several townships in Maryland, and in school board elections in Chicago. Non-citizen enfranchisement movements are now underway in a dozen other states around the country,^{xxxvii} and is one crucial means of addressing the systemic discrimination detailed throughout this report.

RECOMMENDATIONS

The following recommendations are intended to bring attention to human rights violations as they related to voting and to address discrimination against individuals of color:

■ **New York City should follow the recent leadership of Nebraska, Iowa, Rhode Island, and Florida and reduce barriers to voting for people with felony convictions.**

In Albany, partisan deadlock continues to stymie even the smallest reforms on this issue, but Governor Eliot Spitzer claimed while campaigning that he supported giving people with felony convictions who had been released on parole the right to vote.

■ **The State and the City of New York should use all the means at their disposal to change the law that prohibits persons on parole from voting.** The City and the State of New York should also begin the process of amending the New York State Constitution to end the practice of felon disfranchisement permanently.

■ **Local election boards must guarantee full compliance with the Voting Rights Act, the National Voter Registration Act and Help America Vote Act.** This should include increased language assistance at the polls, provisional ballots for voters who are not properly registered, improved communication with voters about registration and poll sites, and increased training for poll workers on voters' rights.

■ **New York City Council should pass Intro No. 245,** the proposed Local Law to amend the New York City charter, allowing lawfully-present immigrants in New York City to vote in all New York City municipal elections.

■ **The State and City of New York should demand that the Bureau of the Census adjust its population counts of prisoners to account for their home districts,** not the districts in which they are incarcerated, in order to fairly reflect the voting strength of raa so as to count prisoners where they are from, and not where they are incarcerated.

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xliii. *Id.* at 4, 41 (The CCRB did issue a report in 2001 substantiating the practice of racial profiling in New York City, but has not made any subsequent effort to help mitigate the practice).

xliv. *Id.* at 42

xl. Diallo was an African immigrant gunned down in the Bronx by four policemen who fired 41 shots. See The American Civil Liberties Union, *In Wake of Bell Shooting, NYCLU Protests NYPD Failure to Comply with Racial Profiling Reform Mandated After Diallo Shooting*, (2006), *available at* <http://www.aclu.org/racialjustice/racialprofiling/27566prs20061129.html>

xlvi. *Id.*

xlvii. *Id.*

xlviii. New York City Police Department, *Police Academy Firearms and Tactics Section, Firearms Discharge Report*, (2006), at 14-15.

xlix. Lueck, *supra* note xxii.

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ii. American Civil Liberties Union, *Criminalizing the Classroom: The Over-Policing of New York City Schools*, (2007) [hereinafter *Criminalizing the Classroom*].

iii. City Council testimony of Chief James Secreto, Chief Commanding Officer, NYPD School Safety Division

liii. *Criminalizing the Classroom*, *supra* note i.

liv. The Juvenile Justice Project of the Correctional Association of New York, *Rethinking Juvenile Detention in New York City*, (2002), at 5.

lv. <http://www.criminaljustice.state.ny.us/ofpa/pdffdocs/jjs-tateplan07.pdf>, at 69.

lvi. Testimony by Harry G. Levine, Department of Sociology, Queens College and The Graduate Center, City University of New York, at Hearing of the NY State Assembly Committees on Codes and on Corrections, Albany, NY, May 31, 2007.

lvii. *Id.*

lviii. New York City Department of Health and Mental Hygiene, *NYC Vital Signs*, March 2007, Volume 6 (1) at 2.

lix. Sheryl McCarthy, "Arrests For Pot Are Excessive," *New York Newsday*, July 16, 2007

lx. Cara Tabachnick, "Jump In Trespassing Arrests Draws Anger," *New York Newsday*, April 9, 2007

lxi. *Id.*

lxii. New York State Task Force on Juvenile Justice Indicators, *Widening the Lens: A Panoramic View of Juvenile Justice in New York State*, (2007), at 8.

lxiii. *Id.*

lxiv. <http://www.criminaljustice.state.ny.us/ofpa/pdffdocs/jjs-tateplan07.pdf>, at 70.

lxv. The Juvenile Justice Project of the Correctional Association of New York, *Rethinking Juvenile Detention in New York City*, (2002).

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lxvii. Human Rights Watch, *Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls*, (2006).

lxviii. Urban Justice Center, Lesbian and Gay Youth Project, *Justice For All? A Report On Lesbian, Gay, Bisexual and Transgendered Youth in the New York Juvenile Justice System*, (2001), at 32-33.

lxix. See Stonewalled, *supra* note vii at 53

lxx. *It's War In Here*, *supra* note xxxix at 27

lxxi. *Id.*

lxxii. *Id.*

lxxiii. *Mayors Management Report*, Year 2007, at 142, 19.

lxxiv. *Id.*, at 142.

lxxv. Building Blocks for Youth, *Youth Crime/Adult Time: Is Justice Served?* (2000), *available at* <http://www.buildingblocks-foryouth.org/statebystate/nydmc.html>.

lxxvi. *Id.*

lxxvii. *Id.*

lxxviii. Sheryl McCarthy, "Arrests For Pot Are Excessive," *New York Newsday*, July 16, 2007/McCarthy.

lxxix. Joseph Fried, "Following Up," *New York Times*, February 10, 2002

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lxxxiii. Women of Color Policy Network, *Women of Color in New York City: Still invisible in Policy*, (2003), at 20.

lxxxiv. The Coalition for Women Prisoners, *2007 Proposals for Reform*.

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lxxxix. The Correctional Association and the Urban Justice Center, *Hospitals of Last Resort*, (1999), at 4 [hereinafter "Hospitals of Last Resort"].

xc. *Id.*

xc. *Id.* at 5.

xcii. *Id.* at iv.

xciii. *Id.*, at 27-28

xciv. Joel Stashenko, *Spitzer, Lawmakers Agree to Limit Solitary for Mentally Ill Inmates*, New York Law Journal, July 19, 2007, available at http://www.correctionalassociation.org/PVP/press/2007Jul19_NYL_J_SHU.pdf

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xcvii. *Supra* note xcv.

xcviii. *Id.*

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iii. White, Andrew, and Kim Nauer, "Pivot Point: Managing the Transformation of Child Welfare in NYC," *Child Welfare Watch*, Volume 10, Winter 2004-2005, at 2; *Mayor's Management Report*, (2007) at 34.

iv. Child Welfare Watch, *Pressures and Possibilities: Supporting Families and Children at Home*, Volume 14, Summer 2007, at 1 [hereinafter *Pressures*].

v. Children's Rights Report, *At the Crossroads. Better Infrastructure, Too Few Results: A Decade of Child Welfare Reform in New York City*, (2007) at 77 [hereinafter *At the Crossroads*].

vi. Hill, at 13, 15; United State Government Accountability Office, Report to the Chairman, Committee on Ways and Means, House of Representatives, *African American Children in Foster Care: Additional HHS Assistance Needed to Help States Reduce the Proportion in Care*, (2007) at 75. <http://www.gao.gov/new.items/d07816.pdf> [hereinafter Additional HHS]

vii. *Additional HHS*, at 75.

viii. U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *The AFCARS Report, Preliminary FY 2005 Estimates as of September 2006* [hereinafter AFCARS].

ix. Lambda Legal Defense Fund, *Basic Facts about being LGBTQ, Getting Down to Basics Tool Kit*, (2006) [hereinafter *Basic Facts*]

x. *Additional HHS*, at 74.

xi. *AFCARS*.

xii. Provided by New York City Administration for Children's Services

xiii. *At the Crossroads*, at 77.

xiv. *Id.*

xv. There is a high likelihood that many Asian children are classified under "unknown" or "other" categories, making it difficult to get an estimate of the actual representation. See the Coalition for Asian American Children and Families, *Crossing the Divide: Asian American Families and the Child Welfare System*, October 2001, at 1.

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xvii. The National Coalition for Child Protection Reform, *Don't Turn Back: An Analysis of Trends in New York City Child Welfare*, (2007) at 9.

xviii. Poverty rate from New York City Center for Economic Opportunity, <http://www.nyc.gov/html/ceo/html/home/home.shtml>

xix. Child Welfare Watch, *Race, Bias and Power in Child Welfare*, Number 3, Spring/Summer 1998 [hereinafter *Race, Bias*]

xx. *Id.*

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xxii. New York City Administration for Children's Services, *Flash Report, September 2007*, at 15. Anonymous call-ins ranked second.

xxiii. *Additional HHS*, at 19; *Race, Bias*.

xxiv. *Race, Bias*.

xxv. J. Eckenrode, et. al., "Substantiation of Child Abuse and Neglect Reports," *Journal of Consulting and Clinical Psychology* 38 (1988) at 9, cited in *Child Welfare and Race* by Dorothy Roberts, for the National Coalition for Child Protection Reform Issue Paper 7 <http://www.nccpr.org/newissues/7.html>.

xxvi. *Id.* 11.

xxvii. Neuspel et al., 1993, cited in *Race, Bias*.

xxviii. Daniel R. Neuspel and Terry Martin Zingman, "Custody of Cocaine-Exposed Newborns: Determinants of Discharge Decisions," *American Journal of Public Health* 83 (1993), at 1726, cited in *Child Welfare and Race* by Dorothy Roberts, for the National Coalition for Child Protection Reform Issue Paper 7 <http://www.nccpr.org/newissues/7.html>

xxix. *Additional HHS*, at 19. According to the report, 65 percent of Black children were removed from their homes as a result of parental substance abuse compared to 58 percent of White children

xxx. See Dorothy Roberts, *Child Welfare and Race*, National Coalition for Child Protection Reform Issue Paper, at 7, available at <http://www.nccpr.org/newissues/7.html> [hereinafter *Child Welfare*]

xxxi. *Additional HHS* at 23.

xxxii. *Id.* pg 66

xxxiii. *Race, Bias*.

xxxiv. *Additional HHS*, at 19.

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xxxvi. *Id.*

xxxvii. *Child Welfare*

xxxviii. *Race, Bias*.

xxxix. *Race, Bias*.

xl. The Annie E. Casey Foundation, *2007 Kids Count Data Brief State Profiles of Child Well-Being*, at 9. Data is from 2000.

xli. *At the Crossroads*, at 92.

xl. *Basic Facts*.

xl. *Pressures* at 28

xliv. Hill, at 34.

xl. *Id.*

xlvi. *Additional HHS*, at 25.

xlvi. New York City Administration for Children's Services, *Flash Report, September 2007*, at 17.

xlvi. *Race, Bias*.

xlix. *Additional HHS*, at 12.

i. *Id.*

li. *Pressures*, at 3.

lii. *Id.*, at 6.

liii. *Id.*

liv. Hill, at 29.

lv. *Additional HHS*, at 10; Hill, at 35.

lvi. The Coalition for Asian American Children and Families, *Crossing the Divide: Asian American Families and the Child Welfare System*, (2001), at 3 [hereinafter *Crossing the Divide*.]

lvii. *Additional HHS*, at 11, 50-51.

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lix. The Annie E. Casey Foundation, *2007 Kids Count Data Brief State Profiles of Child Well-being*, at 30.

lx. Concerned Citizens for Family Preservation, available at www.ccfamilypreservation.org

lxi. *At the Crossroads*, at 77; *Crossing the Divide* at 3.

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lxiii. Hill, at 35.

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lxvii. Vera Institute of Justice, *Reducing the Foster Care Bias in Juvenile Detention Decisions: The Impact of Project Confirm*,

(2001), at 21

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lxxi. Vera Institute of Justice, *What Keeps Children in Foster Care from Succeeding in School? Views of Early Adolescents and the Adults in Their Lives*, (2002), at 13.

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lxxviii. Child Welfare Watch, *A Matter of Judgment: Deciding the Future of Family Court in NYC*, Volume 12, Winter 2005-2006, pg. 19 [hereinafter *Matter of Judgment*]

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lxxx. *Matter of Judgment*, supra note lxxviii at 21-22

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- iv. Violence Policy Center, *When Men Murder Women: An Analysis of 2002 Homicide Data*, (2004), available at <http://www.vpc.org/studies/wmmw2004.pdf>.
- v. Mayor's Office to Combat Domestic Violence, *Domestic Violence Fact Sheet 2006*, available at <http://www.nyc.gov/html/ocdv/downloads/pdf/2006factsheet.pdf>.
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Progress: the Violence Against Women Act (2004) at 30.

- viii. E. Stark and A. Flitcraft, "Violence among intimates: an epidemiological review." In V.N. Hasselt et al., eds., *Handbook of Family Violence*, Plenum, 1988, 293-319; Centers for Disease Control and Prevention, *Costs of Intimate Partner Violence Against Women in the United States* 18 (2003) (estimating 5.3 million intimate partner assaults against women in the United States each year); Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, NCJ 181867, *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Study* 26 (2000).
- ix. See Colorado Coalition Against Domestic Violence, *Law Enforcement Training Manual* 1, 1-5 (2d ed. 2003) (reporting that 42% of all female homicide victims were killed by an intimate partner); *Surveillance for Homicide Among Intimate Partners*, U.S. Centers for Disease Control and Prevention (October 2001) (finding that domestic violence murders account for 33% of all female murder victims and only 5% for male murder victims).
- x. C.M. Rennison & S. Welchans, *A Special Report of the Bureau of Justice Statistics, Intimate Partner Violence* (May 2000).
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- xxiv. Kerry Murphy Healey & Christine Smith, National Institute of Justice, U.S. Dep't of Just., *Research in Action, Batterer Programs: What Criminal Justice Agencies Need to Know* 1, 2 (1998) (noting that some researchers estimate that "as many as six in seven domestic assaults go unreported").
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xxxi. Goodmark, *supra* note xxxiii. See generally E. Assata Wright, "Not a Black and White Issue: For Battered and Abused Latinas and Black Women, Dialing 911 May Be Risky Business," *On The Issues*, Long Island City: Jan 31, 1998. Vol. 7, Iss. 1; p. 42.

xxxii. See E. Assata Wright, *supra* note xxxii at 42.

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xxxiv. The vast majority of New York City's Family Court's litigants are minority and immigrant individuals. Leah A. Hill, *Do You See What I see?*, 40 Colum. J.L. & Soc. Probs 527, 530, n4 (2007).

xxxv. Committee on the Elimination of Racial Discrimination, General Recommendation 25, Gender Related Dimensions of Racial Discrimination (Fifty-sixth session, 2000), U.N. Doc. A/55/18, annex V at 152 (2000), para. 1, reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 214 (2003).

xxxvi. *Id.*

xxxvii. *Id.* at para. 3.

xxxix. The Human Rights Committee has found that "[d]iscrimination against women is often intertwined with discrimination on other grounds such as race State parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way" Human Rights Committee, General Comment No. 28, Equality of Rights Between Men and Women (29 March 2000), UN Doc CCPR/C/21/Rev.1/Add.10.

xl. See Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada (25 May 2007), UN Doc CERD/C/CAN/CO/18 at para 20; Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Australia (2006), UN Doc CEDAW/C/AUL/CO/5 at para 19.

xli. Languages most commonly spoken in New York include Spanish, Chinese, Russian, Haitian Creole, Korean, Arabic, Bengali, French, Urdu, Polish and Hindi. New York City Department of Health and Mental Hygiene, Local Law 73 Implementation Plan Update (Mar. 31, 2006).

xlii. Convention on the Elimination of All Forms of Racial Discrimination, arts. 5(a), 6.

xliii. New York City Department of Health and Mental Hygiene, *Femicide in New York City: 1995-2002* (2004), available at http://www.nyc.gov/html/doh/downloads/pdf/ip/femicide1995-2002_report.pdf.

xliv. Sometimes, the victim is wrongfully arrested, with the batterer suffering on consequences. Other times, the police effectuate what is known as a "dual arrest," where both the victim and the complainant are arrested.

xlv. See generally Amy Gottlieb, *The Violence Against Women Act: Remedies for Immigrant Victims of Domestic Violence*, New Jersey Lawyer, (April 2004), available at <http://www.afsc.org/nymetro/immigrantRights/resources/NJLawyerArticleVAWA.pdf>; Yolanda B. Jimenez, Commissioner, Mayor's Office to Combat Domestic Violence, *Keeping our Homes Safe: Addressing Domestic Violence in New York City*, (Jan. 2, 2004), available at www.nyc.gov/html/ocdv/downloads/pdf/safe_home.pdf; see also Testimony to Matrimonial Commission, May 9, 2005. Purvi Shah, Executive Director, Sakhi for South Asian Women. Available at <http://www.sakhi.org/learn/policy.php>.

xlvi. Vivian Huelgo, et al. *The Voice of Justice: Interpreting Domestic Violence Cases*. XV Proteus: The Newsletter of the National Association of Judiciary Interpreters and Translators 4, No. 2 (Summer 2006), available at http://www.sakhi.org/pdf/VoiceofJustice_extract.pdf. [hereinafter *The Voice of Justice*].

xlvii. *Id.* at 4.

xlviii. See <http://www.nyc.gov/html/ocdv/>; <http://www.opdv.state.ny.us>; Court Interpreting in New York: A Plan of Action 10, 11 (New York State Unified Court System April 2006), available at www.courts.state.ny.us/courtinterpreter/action_plan.pdf.

xlix. Uniform Rules for New York State Trial Courts, art. 217.1(a).

i. "Overcoming Language Barriers in Law Enforcement and Court Contexts." National Center for Victims of Crime 2007 Conference. Available at <http://www.sakhi.org/learn/policy.php#cip>. Crucially, problems with interpreter competence are underreported because attorneys and judges often have no way of assessing an interpreter's quality.

ii. For a discussion of the jurisdictional barriers preventing many minority and immigrant battered women from accessing family court orders of protection, see Section V, *infra*.

iii. In October 2007, the Chief Administrative Judge of the Courts of New York promulgated Section 217 of the Uniform Rules for New York State Trial Courts, which guarantees the provision of an interpreter in court proceedings and at the court clerk's office for LEP individuals. The rule does not provide standards for the interpreters or for the provision of interpretation services in a timely way. The rule was too recently effectuated for advocates to be able to determine what positive effect it may have.

liii. Purvi Shah, Executive Director, Sakhi for South Asian Women, Testimony to Matrimonial Commission, (May 9, 2005), available at <http://www.sakhi.org/learn/policy.php>.

liv. *Id.*

lv. The Voice of Justice, *supra* note xlvii.

lvi. *Id.*

lvii. "Overcoming Language Barriers in Law Enforcement and Court Contexts." National Center for Victims of Crime 2007 Conference, available at <http://www.sakhi.org/learn/policy.php#cip>, [hereinafter *Overcoming Language Barriers*].

lviii. Shah, *supra* note liii.

lix. *Id.*

lx. Overcoming Language Barriers, *supra* note lvii.

lxi. The power of the Order of Protection rests in large part on

the duty of the police to make an arrest when they have probably cause that the OP has been violated or some other crime has been committed.

lxii. See <http://www.nyc.gov/html/ocdv/html/html/initiatives/justice/shtml>

lxiii. Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 Yale L.J. 788, 790 (1986).

lxiv. E. Assata Wright, *Not a Black and White Issue: For Battered and Abused Latinas and Black Women, Dialing 911 May Be Risky Business*, 7 On The Issues: Long Island City 1, at 42 (Jan. 31, 1998).

lxv. *Id.*

lxvi. See Committee on the Elimination of Racial Discrimination, *Concluding Observations: Ethiopia*, ¶ 19, UN Doc. CERD/C/ETH/CO/15, (June 20, 2007); Committee on the Elimination of Racial Discrimination: *Concluding Observations: Canada*, ¶ 20, UN Doc. CERD/C/CAN/CO/18 (May 25, 2007); Committee on the Elimination of Racial Discrimination, *Concluding Observations: India*, ¶ 15, UN Doc. CERD/C/IND/CO/19 (May 5, 2007).

lxvii. Under the Criminal Procedure Law, members of the same family or household include: (a) persons related by consanguinity or affinity; (b) persons legally married to one another; (c) persons formerly married to one another; and (d) persons who have a child in common, regardless whether such persons have been married or have lived together at any time. N.Y. Crim. Proc. Law § 530.11(1) (2007).

lxviii. N.Y. Crim. Proc. Law § 140.10(4) (2007).

lxix. As discussed above, jurisdictional barriers prevent many victims, a large percentage of whom are racial minorities and immigrants, from ever qualifying for civil orders of protection.

lxx. U.S. Department of Justice, National Institute of Justice, *Legal Interventions in Family Violence: Research Findings and Policy Implications* 50 (1998), available at <http://www.ncjrs.gov/pdffiles/171666.pdf> (stating that 60% of protective orders were violated in the year after they were issued; nearly a third of women with protective orders reported violations that involved severe violence).

lxxi. *Id.*

lxxii. Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 Crime & Delinquency 414, 417 (1995).

lxxiii. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843, 1854 (2002); Susan L. Keilitz et al., National Ctr. For State Courts, *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence* (1997).

lxxiv. Christopher Maxwell et al., National Institute for Justice Research In Brief, *The Effect of Arrest on Intimate Partner Violence: New Evidence from the Spouse Assault Replication Program* 9 (July 2001).

lxxv. Report to the California Attorney General, *Keeping the Promise: Victim Safety and Batterer Accountability* 1, 35-36 (2005) (finding that more than 30% of protection orders in large counties and more than 25% of protection orders in small counties were unserved); Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered*

Women, 11 Am. U. J. Gender Soc. Pol'y & L. 499, 509 (2003) (noting a study in Maryland that found that law enforcement failed to serve *ex parte* orders in 50% of the cases surveyed); T.K. Logan et al., *Protective Orders in Rural and Urban Areas: A Multiple Perspective Study*, 11 Violence Against Women 876, 889 & 899 (2005) (citing a study of rural Kentucky counties finding 47% of *ex parte* orders were not served; some counties had non-service rates as high as 91%).

lxxvi. Susanne Browne, *Due Process and Equal Protection Challenges to the Inadequate Responses of the Police in Domestic Violence Situations*, 68 S.Cal. L. Rev. 1295, 1298 (1995) (noting a Texas study demonstrating that out of 2,096 battered women's calls for service, police responded to the calls in only one-third of the cases).

lxxvii. Joan Zorza, Symposium on Domestic Violence Criminal Law, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. Crim. L. & Criminology 46, 47-52 (1992).

lxxviii. Lawrence A. Greenfeld, et al., U.S. Dep't of Justice, *Violence by Intimates* 38 (1998).

lxxix. Mary Haviland, et al., *The Family Protection and Domestic Violence Intervention Act of 1995: Examining the Effects of Mandatory Arrest in New York City*, Urban Justice Center, 35 (2001).

lxxx. Greenfeld, *supra* note lxxviii.

lxxxi. Edem F. Avakame & James J. Fyfe, *Differential Police Treatment of Male-on-Female Spousal Violence*, 7 Violence Against Women 22, 35-36 (2001).

lxxxii. *Id.*

lxxxiii. *Id.*

lxxxiv. "Mandatory Arrest: Original Intentions, Outcomes in Our Communities, and Future Directions," conference booklet, Columbia Law School 17 (June 17, 2005).

lxxxv. New York State Office for the Prevention of Domestic Violence, *Family Protection and Domestic Violence Intervention Act of 1994: Evaluation of the Mandatory Arrest Provisions, Final Report to the Governor and Legislature* (2001), available at http://www.opdv.state.ny.us/criminal_justice/police/finalreport/index.html.

lxxxvi. E. Assata Wright, *Not a Black and White Issue: For Battered and Abused Latinas and Black Women, Dialing 911 May Be Risky Business*. On The Issues. Long Island City: Jan 31, 1998. Vol. 7, Iss. 1; p. 42.

lxxxvii. N.Y. Crim. Proc. Law § 140.10 (2004); NYJur CrimLaw § 110.

lxxxviii. The Primary Aggressor Analysis is: (i) the comparative extent of any injuries inflicted by and between the parties; (ii) whether any such person is threatening or has threatened future harm against another party or another family or household member; (iii) whether any such person has a prior history of domestic violence that the officer can reasonably ascertain; and (iv) whether any such person acted defensively to protect himself or herself from injury. N.Y. Crim. Proc. Law § 140.10(4)(c) (2004).

lxxxix. *Supra* note lxxxi, at 26.

xc. *Id.*, at 27.

xci. U.S. Department of Justice, Office for Victims of Crime, *Enforcement of Protective Orders* 5 (2002), available at <http://www.ojp.gov/ovc/cvrcres/welcome.html>).

xcii. Caitlin E. Borgman, Note, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N.Y.U. L. Rev. 1280, 1309 (1990).

xciii. The risk of homicide increases when a woman leaves an abusive relationship. See *Eastside Domestic Violence Project*, http://www.edvp.org/AboutDV/barriers_to_leaving.htm.

xciv. Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help them When the Police Won't?*, 95 Yale L.J. 788, 798 (1986); Joan Zorza, Symposium on Domestic Violence Criminal Law, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. Crim. L. & Criminology 46, 47-52 (1992).

xcv. Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, Yale Journal of Law and Feminism n.260-61 (forthcoming 2008). See generally E. Assata Wright, *Not a Black and White Issue: For Battered and Abused Latinas and Black Women, Dialing 911 May Be Risky Business*. On The Issues. Long Island City: Jan 31, 1998. Vol. 7. Iss. 1; p. 42.

xcvi. Rachel Pinsky, *Breaking the Silence*: author Beth Richie studies the impact of abuse on African-American women, Hues. Duluth: July 31, 1997. Vol. 3, Iss. 1; pg 26.

xcvii. *Id.*

xcviii. Mary Haviland, et. al., *The Family Protection and Domestic Violence Intervention Act of 1995: Examining the Effects of Mandatory Arrest in New York City*, Urban Justice Center, 37 (2001).

xcix. Police response to domestic violence may be inadequate in part because many police officers in the United States are themselves perpetrators of domestic violence. Studies indicate as many as 40% of police officer families experience domestic violence, a rate approximately four times the national average. National Center for Women & Policing, *Police Family Violence Fact Sheet* (2001) (citing P.H. Nedig et al., *Interspousal Aggression in Law Enforcement Families: A Preliminary Investigation*, 15 Police Studies 30 (1992)).

c. See, e.g., Caponera, Betty, *Incidence and Nature of Domestic Violence in New Mexico V: An Analysis of 2004 Data from the New Mexico Interpersonal Violence Data Central Repository* (June 2005)

ci. In November 2005, the American Civil Liberties Union submitted open records requests to thirteen representative police departments across the United States asking for data and statistics pertaining to domestic violence crimes committed in the departments' jurisdictions during the years 1999-2005. To date, eight police departments have responded. (The NYPD never responded).

cii. Phone Conversation between Counsel for Petitioner and Kim Brooks, Legal Advisor to the Baton Rouge Police Department, Nov. 29, 2005.

ciii. See, e.g., 42 U.S.C. § 1981-85 (1991).

civ. *Mastroianni v. County of Suffolk*, 91 N.Y.2d 198 (1997).

cv. *Id.*

cvi. 442 U.S.C. § 13981 (1994).

cvi. 529 U.S. 598, 617-18 (2000).

cvi. *Id.*

cix. 125 S.Ct. 2796 (2005). See textbox included in chapter for a

discussion of the *Castle Rock* case.

cx. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); See also, *Eagleston v. Guido*, 41 F.3d 865,

(2d Cir. 1994).

cx. Eckert v. Town of Silverthorne, 25 Fed. Appx. 679, (10th Cir. Colo. 2001); *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir 1988); *Cf. Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 701 (9th Cir. 1990) (finding police officer's statement to a domestic violence victim that he did not blame her husband for hitting her because of the way she was carrying on likely sufficient to support a claim of sex discrimination under the Equal Protection Clause).

cxii. 125 S.Ct. 2796 (2005).

cxiii. Concluding observations of the Committee on the Elimination of Racial Discrimination: South Africa, 16, U.N. Doc. CERD/C/ZA/CO/3 (2006); Concluding Observations/Comments Ethiopia, 21, U.N. Doc. CERD/C/ETH/CO/15 (2007); Concluding Observations/Comments Canada, U.N. Doc. CERD/C/CAN/CO/18, 20 (2007); Concluding Observations/Comments India, U.N. Doc. CERD/C/CAN/CO/18, 15 (2007).

cxiv. Concluding Observations/Comments India, U.N. Doc. CERD/C/CAN/CO/18, 15 (2007).

cxv. For example, statistics show that when police *do* respond to a violation of a protective order by arresting the offender, they reduce the risk of re-offense. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843, 1854 (2002).

cxvi. See *Hernandez v. Robles*, 7 N.Y.3d 338 (2006) (upholding New York law restricting marriage to opposite-sex couples.)

cxvii. 2004 Legislative Highlights from the NYS assembly judiciary committee, *available at* <http://assembly.state.ny.us/comm/Judiciary/20040817/>

cxviii. Leah A. Hill, *Do You See What I See?*, 40 Colum. J.L. & Soc. Probs 527, 530, n4 (2007)

cxix. New York Criminal Procedure Law § 530.13 provides that "[w]hen any criminal action is pending," and the criminal court cannot issue an order of protection based on the commission of a "family offense," the court may issue an order of protection "for good cause shown." "Family offense" is defined in the same way under the Family Court Act and Penal Code.

cxx. Adrienne J. Lockie, *New York's Failure to Protect All Victims of Domestic Violence*, 18 Am. J. Family Law 234, 236 (2005).

cxxi. Elizabeth M. Schneider, *Battered Women & Feminist Lawmaking* 180-198 (2000).

cxxii. See Article 18B of New York's County Law. The legislative history specifies that the proper standard to be employed in determining eligibility for appointed counsel is financial inability to afford counsel, not "indigency." N.Y. County Law Art. 18B; Letter in Support, The Judicial Conference of the State of New York, Governor's Bill Jacket L. 1965, 878; Memorandum of the Attorney General, reprinted in New York State Legislative Annual, 1965, 32.

cxxiii. Lockie, *supra* note cxxvi, at 236.

cxxiv. *Id.* at 235.

cxxv. *Id.* at 236.

cxxvi. *Id.* at 235-36.

cxvii. *Id.* at 236.

cxviii. See Beth A. Mandel, *The White Fist of the Child Welfare System: Racism, Patriarchy, and the Presumptive Removal of Children from Victims of Domestic Violence in Nicholson v. Williams*, 73 U. Cin. L. Rev. 1131, 1157-58 (2005).

cxix. Wright, E. Assata, *On The Issues*, Long Island City, Jan 31, 1998. Vol. 7, Iss. 1 at 42.

cxx. David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & Econ. 285 (2001); Wright, E. Assata, *On The Issues*, Long Island City, Jan 31, 1998. Vol. 7, Iss. 1 at 42.

cxxi. See Trustees of Boston University, *Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Immigrant Women*, 6 B.U. Pub. Int. L.J. 589, 591 (1997). See also Amy Gottlieb, *The Violence Against Women Act: Remedies for Immigrant Victims of Domestic Violence*, New Jersey Lawyer, (April 2004), available at <http://www.afsc.org/nymetro/immigrantRights/resources/NJLawyerArticleVAWA.pdf>.

cxixii. *Id.*

cxixiii. Bureau of Justice Statistics, *Special Report: Intimate Partner Violence*, 1 (May 2000).

cxixiv. *Id.*

IMMIGRATION AND NATIONAL SECURITY ENDNOTES

i. Relying on countries of origin as rough indicators of racial identification, we find that only 13.7% of the total foreign-born population comes from Europe, and of the undocumented, only 6% came from Europe or Canada. See U.S. Census Bureau, U.S. Dep't of Commerce, Current Population Reports, The Foreign-Born Population in the United States: 2003 Population Characteristics (August 2004), available at <http://www.census.gov/prod/2004pubs/p20-551.pdf>.

ii. Census.gov, American Factfinder, Factfinder.census.gov (Fact Sheet: New York City 2006). 12% in the United States population is foreign born

iii. U.N. Committee on the Elimination of Racial Discrimination, General Recommendation No. 30: Discrimination Against Non Citizens, (Preamble), U.N. Doc. CERD/C/64/Misc.11/rev.3 (Oct. 1, 2004).

iv. *Id.* at ¶ 2-4.

v. In 2003 Mayor Bloomberg issued Executive Order 41, requiring City workers to protect the confidentiality of a wide range of personal information belonging to people seeking City services. See Mayor's Office of Immigrant Affairs, *Mayor Bloomberg's Executive Order 41 Protects All New Yorkers*.

vi. Local Laws of the City of New York from the Year 2003, No. 73, §§ 8-1001-11.

vii. See generally Thomas A. Aleinikoff et al., *Immigration and Citizenship: Process and Policy* (5th ed. 2003).

viii. See United States Commission on International Religious Freedom (CIRF), Report on Asylum Seekers in Expedited Removal (2005).

ix. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

x. See *Mathews v. Diaz*, 426 U.S. 67 (1976).

xi. See *Graham v. Richardson*, 403 U.S. 365 (1971).

xii. Pub. L. No. 107-296, Tit. IV, Subtitles C-F, 116 Stat. 2135 (2002); Homeland Security Act of 2002 Amendments Act, Pub. L. No. 108-7, 117 Stat. 11 (2003).

xiii. U.S. Immigration and Customs Enforcement, <http://www.ice.gov/about/index.htm> (last visited Dec. 5, 2007).

xiv. See, e.g., *Pennsylvania Town Enacts Strict Illegal Immigration Ordinance*, Foxnews.com, July 14, 2006.

xv. *Id.* at 1381. Operation Absconder "focused removal efforts selectively on noncitizens from nations that 'harbored' terrorists, identified for the most part as nations populated predominantly by Arabs and Muslims."

xvi. Rachel L. Swarns, *Halliburton Subsidiary Gets Contract to Add Temporary Immigration Detention Centers*, The New York Times, Feb. 4, 2006.

xvii. Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and The Future of North American Integration*, 91 Minn. L. Rev. 1369, 1369-71 (2007).

xviii. U.S. Report.

xix. *Id.* ¶ 111.

xx. US Report ¶ 112.

xxi. Center for Human Rights and Global Justice, *Americans on Hold: Profiling, Citizenship, and the "War on Terror"* 9-11 (2007) available at <http://www.chrgj.org/publications/reports.html> [hereinafter *Americans on Hold*].

xxii. See *Id.* at 27-37 (noting that "it has been affirmed on numerous occasions that the "war on terror" cannot be invoked to deny the human rights protections owed to non-citizens" and citing, *inter alia*, U.N. Committee on the Elimination of Racial Discrimination, General Recommendation No. 30: Discrimination Against Non-Citizens ¶ 10, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Oct. 1, 2004). [hereinafter CERD Committee General Rec. No. 30].

xxiii. See *Americans on Hold*, *supra* note xxi, at 9.

xxiv. *Id.*

xxv. REAL ID Act of 2005, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109 - 13, Div. B, 119 Stat 231, 302 - 23 (2005).

xxvi. Cf. American Civil Liberties Union, *Dimming the Beacon of Freedom: United States Violations of the International Covenant on Civil and Political Rights* (2006).

xxvii. Testimony of David Cole Before the United States Senate Committee on the Judiciary, May 5, 2004, available at <http://www.bordc.org/resources/cole-materialsupport.php>

xxviii. See *Humanitarian Law Project v. Ashcroft*, 309 F.Supp.2d 1185 (Cal. C.D. 2004).

xxix. Cf. Human Rights First, *Abandoning the Persecuted: Victims of Terrorism and Oppression Barred From Asylum* (2006), available at <http://www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf>.

xxx. Refugee Council USA, *The Material Support Problem: Punishing Refugee Victims of Terror* (2007), available at <http://www.rcusa.org/uploads/pdfs/ms-backgrd-info3-8-07.pdf>.

xxxi. See generally Aleinikoff et al., *supra* note vii.

xxxi. Andrew Beveridge, *Demographics: Undocumented Immigrants*, Gotham Gazette, April 2006, available at <http://www.gothamgazette.com/article/demographics/20060406/5/1809>.

xxxiii. See Americans on Hold, *supra* note xxi, at 14.

xxxiv. *Id.* At 13

xxxv. The term 'examination', within 8 U.S.C. §1447(b), has been interpreted by some federal courts to mean naturalization interview and language and civics tests. In order to circumvent such legal rulings, USCIS has adopted a practice of refusing to schedule interviews until the security checks are completed. *Id.* at 13.

xxxvi. *Id.* at 14.

xxxvii. *Id.* See also Citizenship & Immigration Services Ombudsman, Annual Report 2006 24 (2006), available at http://www.dhs.gov/xlibrary/assets/CISOmbudsman_AnnualReport_2006.pdf [hereinafter CIS Ombudsman Annual Report 2006].

xxxviii. U.S. Comm'n on Int'l Religious Freedom, 1 Report on Asylum Seekers (FY2000-2003) 32 (2003) [hereinafter CIRF Report]. A "credible fear" referral allows for further consideration of the validity of the asylum seeker's claim.

xxxix. *Id.* at 4.

xl. J. Ramji-Nogales, A.I. Schoenholtz & P.G. Schrag, "Refugee Roulette: Disparities in Asylum Adjudication," *Stan. L. Rev.* (forthcoming 2007).

xli. CIRF Report, *supra* note xxxvii, at 59.

xlii. Human Rights First, *The Detention of Asylum Seekers in the United States: Arbitrary under the ICCPR* (2007) [hereinafter Human Rights First, *Detention of Asylum Seekers*].

xliii. Cf. Human Rights First, *In Liberty's Shadow: United States Detention of Asylum Seekers in the Era of Homeland Security* (2004) [hereinafter Human Rights First, *In Liberty's Shadow*].

xliv. CIRF Report, *supra* note xxxvii, at 33.

xl. *Id.* at 4.

xli. Cf. Human Rights First, *supra* note xxix.

xlvii. Human Rights Watch, *United States: Immigration Detention Centers Need Improvement*, <http://hrw.org/english/docs/2000/10/31/UnitedStatesdom648.htm> (last visited Oct. 10, 2007).

xlviii. Office of Inspector General, Department of Homeland Security, *Audit Report: Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities* (2006).

xlix. Referring to ICE statistics, this figure was cited in N. Bernstein, "New Scrutiny as Immigrants Die in Custody," *N.Y. Times*, June 26, 2007.

l. NYU Program for Survivors of Torture, *Congressional Briefing on Medical Treatment at Immigration Detention Centers* (July 9, 2007); see also NYU Program for Survivors of Torture & Physicians for Human Rights, *From Persecution to Prison the Health Consequences of Detention for Asylum Seekers* (June 2003).

li. Office of Inspector General, *supra* note xlv, at 3ff.

lii. See ACLU, *Conditions of Confinement in Immigration Detention Facilities* (2007).

liii. See *supra* note xlvii and accompanying text.

liv. National Immigrant Justice Center, *The Situation of Immigrant Women Detained in the United States: Briefing Paper to the United Nations Special Rapporteur on the Rights of Migrants* (April 2007).

lv. Office of Inspector General, *supra* note xlviii, 28ff.

lvi. See Americans on Hold, *supra* note xix, at 25; see also CERD Committee General Rec. No. 30, *supra* note xxii, ¶ 3.

lvii. See Americans on Hold, *supra* note xix, at 33.

lviii. *Id.* at 34.

lix. "Muslim Americans Changing Arabic-Sounding Names," *USA Today*, Mar. 20 (2002) available at <http://www.usatoday.com/news/nation/2002/03/20/arab-names.htm>

lx. *Id.* at 22.

lxi. *Id.* at 22-24.

lxii. U.S. Immigration and Customs Enforcement, <http://www.ice.gov/pi/investigations/comshield/index.htm> (last visited Dec. 5, 2007)

lxiii. *Id.*

lxiv. Nina Bernstein, *Raids Were a Shambles, Nassau Complains to U.S.*, *New York Times*, Oct. 3, 2007, <http://www.nytimes.com/2007/10/03/nyregion/03raids.html?fta=y>

lxv. *Id.*

lxvi. *Id.*

lxvii. N.Y. City Council, Proposed Res. No. 842-A (June 4, 2007).

lxviii. *Id.*

lxix. NYSDA Immigrant Defense Project, Detention Watch Network, and National Immigration Project of the NLG, *Deportation 101: From Raids to Deportation*, June 26 2007, www.familiesforfreedom.org

lxx. Gitmos Across America. *New York Times*, June 27, 2007 <http://www.nytimes.com/2007/06/27/opinion/27weds1.html>.

lxxi. U.S. Department of Homeland Security, *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities*, Dec. 22, 2006, www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-01_Dec06.pdf (last visited Dec. 5, 2007)

lxxii. *Id.*

lxxiii. CERD Committee General Rec. No. 30, *supra* note xxii, ¶ 33.

lxxiv. Urban Inst., *Trends in the Low-Wage Immigrant Labor Force, 2000-2005* (2007), http://www.urban.org/UploadedPDF/411426_Low-Wage_Immigrant_Labor.pdf.

lxxv. Ana Luz Gonzalez et al., *On the Corner: Day Labor in the United States* (2006), <http://www.sscnet.ucla.edu/issr/csup/index.php>.

lxxvi. Restaurant Opportunities Ctr. of New York & New York City Restaurant Indus. Coal., *Behind the Kitchen Door: Pervasive Inequality in New York City's Thriving Restaurant Industry* (2005).

lxxvii. CERD Committee General Rec. No. 30, *supra* note xxii, ¶ 34.

lxviii. Domestic Workers United & Datacenter, *Home is Where the Work is: Inside New York's Domestic Work Industry* (2006), available at <http://www.domesticworkersunited.org/media/files/6/home-is-where-the-work-is.pdf>.

lxix. *Id.*

lxxx. See Thomas C. Buchmueller et. al., *Immigrants and Employer-Provided Health Insurance* (University of Michigan Economic Research Initiative on the Uninsured Working Paper Series, Aug. 2005), available at <http://eriu.sph.umich.edu/pdf/wp38.pdf>.

lxxxi. Migration Policy Institute, *Immigration Facts Series No.8, Health Insurance Coverage of the Foreign Born in the United States: Numbers and Trends* (2004), http://www.migrationpolicy.org/pubs/eight_health.pdf.

lxxxii. Susan Okie, M.D., *Immigrants and Health Care-At the Intersection of Two Broken Systems*, New England J. Med. (August 9, 2007), available at <http://content.nejm.org/cgi/content/full/357/6/525>.

lxxxiii. Leighton Ku, Center on Budget and Policy Priorities, *Reducing Health Disparities in Health Coverage for Legal Immigrant Children and Pregnant Women* (April 20, 2007), <http://www.cbpp.org/4-20-07health2.htm>.

lxxxiv. "Recent immigrants" refers to non-citizens who have lived in the United States for less than 6 years. United Hospital Fund, *Health Insurance Coverage in New York, 2003-2004*, 41, 43 (2006).

lxxxv. New York City Dep't of Health and Mental Hygiene, *The Health of Immigrants in New York City* (July 2006), available at www.nyc.gov/html/doh/downloads/pdf/episrv/episrv-immigrant-report.pdf.

lxxxvi. *Id.*

lxxxvii. According to the Centers for Medicare and Medicaid Services the SCHIP program is jointly financed by the Federal and State governments and is administered by the States. See Centers for Medicare and Medicaid Services, <http://www.cms.hhs.gov/NationalSCHIPPolicy> (last visited Oct. 10, 2007).

lxxxviii. "Title X of the Public Health Service Act is a 30 year-old law that authorizes federal funding for family planning services." National Latina Institute for Reproductive Health, Fact Sheet, Public Funding, <http://www.latinainstitute.org/publications/index.html> (last visited Oct. 10, 2007).

lxxxix. Ku, *supra* note lxix.

xc. See *Is There a System Supporting Low-Income Working Families?* The Urban Institute, Feb., 2006, at 25, available at http://www.urban.org/UploadedPDF/311282_lowincome_families.pdf (discussing generally barriers and difficulties in enrolling in certain government support programs, including Medicaid and SCHIP); *Getting In, Not Getting In, and Why: Understanding SCHIP Enrollment*, Urban Institute, Occasional Paper No. 66, May, 2006, available at http://www.urban.org/UploadedPDF/310793_QP-66.pdf.

xc. Testimony of Joel Shufro, Executive Director, The New York Committee for Occupational Safety and Health, New York City Council, Nov. 14, 2005, 3, available at http://immigrantvoting.org/NYTestimony/NYCOSH_testimony.doc

xcii. *Id.* at 2-3.

xciii. The National Latina Institute for Reproductive Health, Fact Sheet Series, <http://www.latinainstitute.org/publications/index.html> (last visited Oct. 10, 2007); The National Asian Pacific American Women's Forum Reproductive Justice Fact Sheet Series, <http://www.napawf.org/page.php?view=issues> (last visited Oct. 10, 2007).

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xcviii. Press Release, New York City Department of Health and Mental Hygiene, "430,000 New Yorkers Suffer from Depression" (March 12, 2007), available at <http://www.nyc.gov/html/doh/html/pr2007/pr014-07.shtml>.

xcix. Press Release, EurekAlert, "Prevalence of Obesity Among Immigrants Increases with Longer Residency in United States," (Dec. 14, 2004), available at http://www.eurekalert.org/pub_releases/2004-12/jaa-p0120804.php#.

c. American Diabetes Association Online, *Obesity Worsens for Immigrants the Longer they Live in the United States* (2004), http://www.diabetes.org/utills/printthispage.jsp?PageID=RESEARCH_RESOURCES_288162.

ci. Sarita A. Mohanty et al., "Diabetes and Cardiovascular Disease Among Asian Immigrants in the United States," *J. General Internal Med.* (May 2005), available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1490101>.

cii. EurekAlert.com, "Adapting to Life in the United States Can Increase Alcohol Consumption Among Latinas" (Dec. 2005), http://www.eurekalert.org/pub_releases/2005-12/ace-at120705.php.

ciii. Marc Lacey, "Mexican Migrants Carry H.I.V. Home," *N.Y. Times*, July 17, 2007, available at http://www.nytimes.com/2007/07/17/world/americas/17mexico.html?_r=1&ex=1189828800&en=3bc0621be3e88346&ei=5070&oref=slogin.

civ. New York City Dep't of Health and Mental Hygiene, *The Health of Immigrants in New York City* (June 2006), <http://www.nyc.gov/html/doh/downloads/pdf/episrv/episrv-immigrant-report.pdf>.

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cvi. NYU School of Medicine Center for Immigrant Health Potential, *Barriers to the Prevention and Early Detection of Cancer Among Minority Immigrants in New York City*, (2001), available at <http://www.med.nyu.edu/cih/cancer/barriers.html>

cvii. Emergency Care under Emergency Medicaid includes labor and delivery but not prenatal or postpartum care.

cviii. In New York State *all* immigrants, documented and undocumented, are eligible to participate in the following health care programs: Child Health Plus, Prenatal Care Assistance Program (PCAP), Family Planning Extension Program (FPEP), AIDS Drug Assistance Program (ADAP), and emergency Medicaid.

cix. 8 U.S.C. §1612 (2006).

cx. *Aliessa v. Novello*, 96 N.Y.2d 418 (2001).

cx. See Deborah Bachrach & Karen Lipson, *Health Coverage for Immigrants in New York: An Update on Policy Developments and Next Steps*, in Commonwealth Fund Final Report (2002).

cxii. New York State officials note that between 2001 to 2006, the federal government denied the state about \$11 million in matching funds for cancer treatment. New York City Dept of Health and Mental Hygiene, *supra* note civ.

cxiii. Sarah Kershaw, "New York, Faulting U.S., Says It Will Pay for Cancer Care for Illegal Immigrants," *N.Y. Times*, Sept. 26, 2007, available at http://www.nytimes.com/2007/09/26/nyregion/26spitzer.html?_r=1&ref=nyregion&oref=slogin.

cxiv. Mayor's Office of Immigrant Affairs, *Mayor Bloomberg's Executive Order 41 Protects All New Yorkers* (2007), <http://www.nyc.gov/html/imm/downloads/pdf/eo41english.pdf>.

cxv. Exec. Order No. 41, *City-Wide Privacy Policy and Amendment to Exec. Order No. 34 Relating to City Policy Concerning Immigrant Access to City Services* (Sept. 17, 2003).

cxvi. See *supra* note lxxxvii.

cxvii. The National Latina Institute for Reproductive Health, *Fact Sheet June 2007, Community Health Centers: Providing Essential Reproductive Health Care for Latinas* (2007), <http://www.latinainstitute.org/publications/documents/CHCfctstht-June07-FINAL.pdf>. See *Increasing Access to abortion for Women in Diverse Communities*, National Abortion Federation, 2002, available at http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/increasing_access.pdf.

cxviii. In July 2007, funding for the CBAE program increased by \$28 million, to a total of \$141 million for the 2008 fiscal year. See *Policy Updates, Sexuality Information and Education Council of the United States* (SIECUS), "House Passes Labor, Health and Human Services, and Education Spending Bill" (July 2007), <http://www.siecUnitedStates.org/policy/PUupdates/pdate0341.html>.

cxix. Census.gov, American Factfinder, factfinder.census.gov (Fact Sheet: New York City 2006).

cxx. See Glenn Flores, "Language Barriers to Health Care in the United States," 355 *New England J. of Med.* 229-31 (July 20, 2006).

cxxi. See Tejal K. Gandhi et al., "Drug Complications in Outpatients," 15 *J. of Gen. Internal Med.* 149-54 (2000); Elisabeth Wilson et al., "Effects of Limited English Proficiency and Physician Language on Health Care Comprehension," 20 *J. of Gen. Internal Med.* 800-06 (2005); Adam L. Cohen et al., "Are Language Barriers Associated With Serious Medical Events in Hospitalized Pediatrics Patients?," 118 *Pediatrics* 575-79 (Sept. 2006).

cxxii. See Olveen Carasquillo et al., "Impact of Language Barriers

on Patient Satisfaction in an Emergency Department," 14 *J. of Gen. Internal Med.* 82-87 (1999); Leo S. Morales et al., "Are Latinos Less Satisfied with Communication by Health Care Providers?," 14 *J. of Gen. Internal Med.* 409-17 (1999); Linda J. Lee et al., "Effect of Spanish Interpretation on Method of Patient Satisfaction in an Urban Walk-in Clinic," 17 *J. of Gen. Internal Med.* 641-46 (2002); Alicia Fernandez et al., "Physician Language Ability and Cultural Competence: An Exploratory Study of Communication with Spanish-speaking Patients," 19 *J. of Gen. Internal Med.* 167-74 (2004).

cxxiii. See David W. Baker et al., "Use and Effectiveness of Interpreters in an Emergency Department," *J. of Am. Med. Ass'n* 783-88 (March 13, 1996); Lynne Sears Williams, "Study of New Mothers Looks at Language and Cultural Barriers Facing Immigrant Women," *Canadian Med. Ass'n J.* 1563-64 (May 15, 1996); Joshua Sarver & David W. Baker, "Effect of Language Barriers on Follow-up Appointments After an Emergency Department Visit," 15 *J. of Gen. Internal Med.* 256-64 (2000).

cxxiv. Louis C. Hampers et al., "Language Barriers and Resource Utilization in a Pediatric Emergency Clinic," 103 *Pediatrics* 1253-56 (June 1999); Louis C. Hampers & Jennifer E. McNulty, "Professional Interpreters and Bilingual Physicians in a Pediatric Emergency Setting: Effect on Resource Utilization," 156 *Archives of Pediatric & Adolescent Med.* 1108-13 (2002); Ava John-Baptiste et al., *The Effect of English Language Proficiency on Length of Stay and In-hospital Mortality*, 19 *J. of Gen. Internal Med.* 221-28 (2004).

cxxv. Julia M. Solis et al., *Acculturation, Access to Care, and Use of Preventative Services by Hispanics: Findings from HHANES 1982-84*, 80 *American J. of Pub. Health Supp.* 11-19 (December 1990); Judith A. Stein & Sarah A. Fox, *Language Preference as Indicator of Mammography Use Among Hispanic Women*, 82 *J. of the Nat'l Cancer Inst.* 1715-16 (November 7, 1990); Linda C. Harlan et al., *Cervical Cancer Screening: Who is Not Screened and Why?*, 81 *American J. of Pub. Health* 885-90 (July 1991); Richard C. Wasserman et al., *Preschool Vision Screening in Pediatric Practice: A Study From the Pediatric Research Office in Office Settings (PROS) Network*, 89 *Pediatrics* 834-38 (May 1992); Steven Woloshin et al., *Is Language a Barrier to the Use of Preventative Services?*, 12 *J. of Gen. Internal Med.* 472-77 (1997); Glenn Flores et al., *Access Barriers to Health Care for Latino Children*, 152 *Archives of Pediatric & Adolescent Med.* 1119-25 (November 1998); Kathryn Pitkin Derosé & David W. Baker, *Limited English Proficiency and Latinos' Use of Physician Services*, 57 *Med. Care Research & Rev.* 76-91 (March 2000); Robin M. Weinick & Nancy A. Krauss, *Racial/Ethnic Differences in Children's Access to Care*, 90 *American J. of Pub. Health* 1771-74 (2000); Elizabeth A. Jacobs et al., *Impact of Interpreter Services on Delivery of Health Care to Limited-English proficient Patients*, 16 *J. of Gen. Internal Med.* 468-74 (2001).

cxxvi. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, et. seq.; Dept of Health & Human Servs., Regulations implementing Title VI, 45 C.F.R. §80.1, et. seq.; Exec. Order No. 13,166, 65 FR 50121 (Aug. 16, 2000) ("Improving Access to Services for Persons with Limited English Proficiency"); Dept of Health & Human Servs., Guidance Regarding National Origin Discrimination Affecting Limited English Proficient Patients, 68 FR 47311 (Aug. 8, 2003); N.Y. Comp. Codes R. & Regs. §405.7 (Sept. 13, 2006); New York City Human Rights Law, ch. 1, §8-107; N.Y.C. Local Law 73, Equal Access to Health and Human Services Act: New York City Emergency Room Interpreter Law, N.Y.C. Admin. Code §17-174.

cxxvii. Office of Pol'y Mgmt., New York City Office of the Comptroller, *Getting in the Door: Language Barriers to Health*

Services at New York City's Hospitals (2005).

cxixviii. See Mike Mitka, *For Non-English Speakers, Drug Label Instructions Can Be Lost in Translation*, 297 JAMA 2575-77 (2007). The New York Academy of Medicine is due to publish in a forthcoming issue of the Journal of General Internal Medicine. See Pres Release, New York Academy of Medicine, "Many New York Pharmacies Fail to Translate Prescription Labels for Patients Who Do Not Understand English" (April 27, 2007), <http://www.nyam.org/news/2878.html> (last visited Oct. 10, 2007).

cxix. Immigrant Health Care Access Collaborative, N.Y. Immigration Coal., *Seen But Not Served: The Need for Meaningful Access to Language Services for Limited English Proficient Medicaid Beneficiaries at New York City Medicaid Offices* (2003).

cxixx. Nat'l Immigration Law Ctr., Leaflet, DREAM Act: Basic Information (October 2007), http://www.nilc.org/immlawpolicy/DREAM/dream_basic_info_0406.pdf

cxixxi. See Spiros Protopsaltis, *Issue Brief: Undocumented Immigrant Students and Access to Higher Education: An Overview of Federal and State Policy* 7 (2005), <http://www.the-bell.org/PUBS/IssBrf/2005/03UndocTuition.pdf>; see also Nic Paget-Clarke, *CUNY Undocumented Students Organize To Stay In College: Interview with Angelo, Mexican American Student Alliance*, InMotion Magazine, Apr. 30, 2002, available at <http://www.inmotionmagazine.com/hrcr/nyund.html>.

cxixxii. Nat'l Immigration Law Ctr., *supra* note cxixx.

cxixxiii. US Report, at ¶ 327.

cxixxiv. The United States Report devotes considerable attention to the statistics of the Department of Justice's Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), which enforces the anti-discrimination provision of the Immigration and Nationality Act, 8 U.S.C. §1324b.

cxixxv. Wage and Hour Division, Employment Standards Administration, US Dept of Labor, WH Publication 1282, *Handy Reference Guide to the Fair Labor Standards Act* (July 2007), <http://www.dol.gov/esa/regs/compliance/whd/wh1282.pdf>.

cxixxvi. 535 U.S. 137 (2002).

cxixxvii. See "The Impact of Hoffman Plastic on Workers' Rights," in *Human Rights Watch, Blood, Sweat, and Fear: Worker's Rights in U.S. Meat and Poultry Plants* (2005), <http://www.hrw.org/reports/2005/usa0105/index.htm>.

cxixxviii. In addition, with regard to court access, several federal courts have barred discovery concerning the immigration status of plaintiffs in lawsuits alleging employment discrimination under Title VII of the Civil Rights Act, as well as under other federal laws. See, e.g., *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004), *cert. denied*, 544 U.S. 905 (2005) (Title VII); *EEOC v. Restaurant Co.*, 448 F. Supp. 2d 1085 (D. Minn. 2006) (Title VII); *Zeng Liu v. Donna Karan Intern, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002) (Fair Labor Standards Act); *Topo v. Dhir*, 210 F.R.D. 76 (S.D.N.Y. 2002) (Alien Tort Claims Act).

cxixxix. Elliot Spitzer, Office of the Attorney General, Formal Opinion No. 2003-F3 (Oct. 21, 2003), http://www.oag.state.ny.us/lawyers/opinions/2003/formal/2003_f3.html.

cxli. See National Employment Law Project, *Justice for Workers: State Agencies Can Combat Wage Theft* (October 2006).

cxlii. Undocumented workers are particularly vulnerable to workplace abuse, discrimination, and exploitation, as well as the fear of being turned over to the INS. See, e.g., *Rivera v. NIBCO*, 364 F.3d 1057, 1064 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 1603 (2005); National Employment Law Project, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability* (October 2006), available at <http://www.nelp.org/docUploads/Holding%20the%20Wage%20Floor2%20.pdf>.

cxliii. National Employment Law Project, *supra* note cxli. When the DOL does enforce its workplace laws, it makes a difference in the wage levels of more than just the workplaces it chooses to enforce against. *Id.* (citing David Weil, *Compliance with the Minimum Wage: Can Government Make a Difference?* (May 2004), available at http://www.soc.duke.edu/sloan_2004/Papers/Weil_Minimum%20Wage%20paper_May04.pdf).

VOTING RIGHTS ENDNOTES

i. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24 (1974) (holding state statutes disenfranchising felons do not violate the equal protection clause of the Fourteenth Amendment of the U.S. Constitution); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (holding state constitutional provision passed with racially discriminatory motivations unconstitutional under the Fourteenth Amendment); See also Erika L. Wood & Neema Trivedi, *The Modern-Day Poll Tax: How Economic Sanctions Block Access to the Polls*, 41 J. POVERTY L. & POLY 30, 33-35 (2007) (discussing equal protection clause and Voting Rights Act challenges to felon disenfranchisement statutes).

ii. 42 U.S.C. § 1973 (2007).

iii. 42 U.S.C. § 1973(a) (2007).

iv. Hayden v. Pataki, 449 F.3d 305, 310 (2d Cir. 2006) (Calabresi, J., dissenting); *id.* at 368 (Katzmann, J., dissenting).

v. International Convention on the Elimination of All Forms of Racial Discrimination, art. 1¶ 1, Sep. 28, 1966, 60 U.N.T.S. 195.

vi. Patrick Thornberry, "Confronting Racial Discrimination: A CERD Perspective," 5 *Hum. Rts. L. Rev.* 239, 256 (2005).

vii. U.S. Dep't of State, *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* (2007) at ¶¶ 58-59 [Hereinafter US Report] (construing existing domestic discrimination law as compliant with the requirements of CERD's Article 2); See also Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, *List of Issues to be Taken Up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America (ICCPR)* (2006) at 208 [hereinafter ICCPR Report].

viii. US Report, *supra* note vii at ¶¶ 208, 210.

ix. See, e.g., Hayden, 449 F.3d at 363.

x. *Id.*

xi. The ICCPR Committee explicitly mentioned its concern with the "the political disenfranchisement of a large segment of the ethnic minority population who are denied the right to vote by disenfranchising laws and practices." ICCPR Report, *supra* note v, at ¶ 397.

xii. Recent statistics suggest that “[t]he United States now incarcerates over 2 million people [...] If current trends continue, black males would have a 1 in 3 chance of going to prison during their lifetimes; Hispanics, 1 in 6, and whites, 1 in 17.” Laleh Ispahani, Am. Civil Liberties Union, *Out of Step with the World: An Analysis of Felony Disfranchisement in the U.S. and Other Democracies* 3 (2006), http://www.aclu.org/images/asset_upload_file825_25663.pdf.

xiii. U.S. Census Bureau, *State and County QuickFacts: New York QuickFacts*, <http://quickfacts.census.gov/qfd/states/36000.html> (2000) (last visited Oct. 31, 2007).

xiv. See National Institute of Corrections, <http://www.nicic.org/>

xv. See Common Sense for Drug Policy – National Coalition for Effective Drug Policies, <http://www.csdp.org/news/news/8steps.htm> (last visited Oct. 31, 2007).

xvi. Te-Ping Chen and Maggie Williams, “Keeping Felons from Voting,” *Gotham Gazette*, July 9, 2007, available at <http://www.gothamgazette.com/article/fea/20070709/202/2224>.

xvii. *Id.*

xviii. See Sasha Abramsky, *Remarks at the Forum of the Open Society Institute, Felon Disenfranchisement: Costs and Consequences* (June 20, 2006) (summary and recording available at http://www.soros.org/initiatives/justice/events/disenfranchise_20060620/summary).

xix. Brennan Center for Justice & Demos, *Boards of Elections Continue Illegally To Disfranchise Voters with Felony Convictions* 1 (2006), available at http://www.brennancenter.org/dynamic/subpages/download_file_34665.pdf.

xx. Press Release, Brennan Ctr. for Justice, “Progress Made in Protecting Voting Rights of New Yorkers with Felony Convictions” (May 11, 2006), available at http://brennancenter.org/press_detail.asp?key=100&sub-key=36487.

xxi. See generally Ernest Drucker & Ricardo Barreras, The Sentencing Project, *Studies of Voting Behavior and Felony Disenfranchisement among Individuals in the Criminal Justice System in New York, Connecticut, and Ohio* (2005), available at http://www.sentencingproject.org/Admin/Documents/publications/fd_studiesvotingbehavior.pdf.

xxii. *Id.*

xxiii. Voter Enfranchisement Project, *2005 Arraignment Survey* (unpublished).

xxiv. <http://vote.nyc.ny.us/register.html>

xxv. New York State Bar Association, *Re-entry and Reintegration: The Road to Public Safety*, Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings, 2006, at 47-48, available at <http://www.prisonpolicy.org/scans/CollateralConsequencesReport.pdf>

xxvi. Wood & Trivedi, *supra* note i, at 1.

xxvii. David N. Gellman & David Quigley, *Jim Crow New York: A Documentary History of Race and Citizenship 1777-1877*, New York University Press, New York (2003); David Quigley, *Second Founding: New York City, Reconstruction and the Making of American Democracy*, Hill and Wang, New York, (2004)

xxviii. Hayden v. Pataki, No. 04-3886 (2d Cir. argued Oct. 26, 2007).

xxix. See Peter Wagner et al., Prison Policy Initiative, *Phantom Constituencies in the Empire State: How Outdated Census Bureau Methodology Burdens New York Counties*, (2007), at 7, available at <http://www.prisonersofthecensus.org/nycounties/nycounties.pdf>

xxx. *Id.*

xxxi. U.S. Dep’t of State, *Independent Second and Third Periodic Reports of the United States of America to the ICCPR*, Art. 25 (2006) (“Although the U.S. Report attempts to minimize voting irregularities in 2000 and 2004, its assertions are belied by numerous independent reports and data that reveal systemic disenfranchisement and election administration failures at the state and local level during recent elections.”). See U.S. Comm’n on Civil Rights, *Voting Irregularities in Florida during the 2000 Presidential Election* (2001) (finding “widespread voter disenfranchisement” in Florida in November 2000); Press Release, Caltech/MIT Voting Tech. Project, *Up to 6 Million Votes Lost in 2000 Presidential Election* (July 16, 2001) (finding that 4 to 6 million votes were lost during the 2000 election process due to various problems), <http://www.vote.caltech.edu/news/2001-Jul-16.htm>. See generally Democratic Staff of H. Comm. on the Judiciary, 109th Cong., Status Report on What Went Wrong in Ohio (Comm. Print 2005) (chronicling unprecedented long lines and other irregularities that disenfranchised thousands of Ohio voters in November 2004); People for the Am. Way, Election Protection Coal., *Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections*, http://www.pfaw.org/pfaw/dfiles/file_477.pdf.

xxxii. Juan Cartagena, Leadership Conference on Civil Rights, *Voting Rights in New York, 1982-2006* 3 (2006), <http://www.cssny.org/pdfs/VotingRights-March2006.pdf>.

xxxiii. For detailed descriptions and analysis of language-based discrimination faced by Asian-Americans in the New York area, see Asian Am. Legal Def. & Educ. Fund, *Asian Americans and the Voting Rights Act: The Case for Reauthorization* (2006); Asian Am. Legal Def. & Educ. Fund, *Asian American Access to Democracy in the 2004 Elections* (2005); Asian Am. Legal Def. & Educ. Fund, et al., *Asian American Access to Democracy in the 2003 Elections in NYC: An assessment of the New York City Board of Elections compliance with the Language Assistance Provisions of the Voting Rights Act* (2004).

xxxiv. U.S. Census Bureau, 2000 US Census Data.

xxxv. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note v, at 60 U.N.T.S. at 195; U.N. Office of the High Commissioner for Human Rights [OHCHR], Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination Against Non Citizens*, ¶ 3 (Jan. 10, 2004).

xxxvi. In New York City, non-citizens could vote in local elections as recently as 2003, until the dissolution of the school board system.

xxxvii. See The Immigrant Voting Project, “Immigrant Voting Rights and Practices Update,” January 2006, <http://www.immigrantvoting.org/statescurrent/USoverview.html>.

SUMMARY OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD)

ARTICLE 1

Defines **racial discrimination** as any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin, which has the **purpose or effect** of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life

ARTICLE 2

Commits State Parties to use all appropriate measures including legislation to eliminate racial discrimination and ensure that all public actors conform with this obligation. The article also calls for the review and amendment of all domestic policies that have the effect of creating or perpetuating racial discrimination, and to take affirmative measures to protect against racial discrimination

ARTICLE 3

Directs State Parties to condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction

ARTICLE 4

Requires State Parties to condemn and penalize all dissemination of propaganda, and organizations, which are based on ideas of superiority of one race or ethnic origin, or which incite racial hatred and violence in any form, and to undertake to immediately enact and ensure enforcement of positive legislation designed to eradicate all such acts with due regard to the rights set forth in article 5 of this Convention

ARTICLE 5

Mandates States Parties to prohibit and eliminate racial discrimination in the enjoyment of the following rights and other rights embodied in international covenants of human rights: **political and civil rights** including the rights to equal treatment before the tribunals, to security of person and protection by the State against violence or bodily harm, to participate in elections-to vote, to stand for election, to take part in the Government, to have equal access to public service, to freedom of movement and residence within the border of the State, to leave any country, including one's own, and to return to one's country, to nationality, to marriage and choice of spouse, to own property alone as well as in association with others, to inherit, to freedom of thought, conscience and religion, to freedom of opinion and expression, to freedom of peaceful assembly and association; and **economic, social and cultural rights** including the rights to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration, to form and join trade unions, to housing, public health, medical care, social security and social services, to education and training, to equal participation in cultural activities, of access to any place or service intended for use by the general public

ARTICLE 6

Mandates States Parties to provide effective institutional protections and remedies against any acts of racial discrimination and to seek just and adequate reparation including financial compensation for any damage suffered as a result of such discrimination



ARTICLE 7

Requires States Parties to adopt measures that combat prejudices that lead to racial discrimination; promote racial understanding and tolerance; and teach the principles embodied in the Universal Declaration of Human Rights, and other human rights conventions

ARTICLE 8-16

Calls for the establishment of a Committee on the Elimination of Racial Discrimination and sets forth a mechanism for implementation of CERD including the submission of periodic reports documenting compliance with the provisions of the Convention by all State Parties

ARTICLE 17-25

Specifies elements of the operation of the treaty

BACKGROUND INFORMATION ON CERD

- CERD was adopted by the United Nations in 1965.
- It was signed and ratified by the United States in 1994.
- The State Department submitted its first

report documenting U.S. compliance with CERD in September 2000. The second U.S. report was submitted in April 2007.

- The U.S. report was reviewed by the Committee on the Elimination of Racial Discrimination (the CERD Committee) in August 2001.
- The CERD Committee is made up of 18 experts who are responsible for monitoring compliance of State Parties with CERD.
- To supplement government reports, non-governmental organizations (NGOs) are allowed to submit separate shadow reports to the CERD Committee.

OBLIGATIONS UNDER CERD

When the U.S. ratified CERD, it agreed to the following duties:

1. To publicize the text in federal, state, and local governments;
2. To submit periodic reports to the Committee as required in the treaty;
3. To participate in dialogue with the Committee as scheduled; and
4. To monitor enforcement of the treaty provisions.



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