

**The U.S.A.'s Breach of its Obligations under the
International Covenant on Civil and Political Rights
to Protect the Rights of Sexual Minorities, including Lesbian,
Gay, Bisexual, and Transgender People**

Respectfully submitted to the

United Nations Human Rights Committee

***on the occasion of its consideration of the
Second and Third Periodic Reports of the United States of America
pursuant to Article 40 of the
International Covenant on Civil and Political Rights***

**Hearings of the United Nations Human Rights Committee
Geneva, Switzerland
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The Program in International Human Rights Law and this “Shadow Report” to the United Nations Human Rights Committee

The Program in International Human Rights Law, Indiana University School of Law at Indianapolis, was established in 1997 to further the teaching and study of international human rights law, to promote scholarship in international human rights law, to assist human rights governmental, inter-governmental, and non-governmental organizations on international human rights law projects, and to facilitate the placement of students as law interns at international human rights organization domestically and overseas.

The Program in International Human Rights Law welcomes the United States Government’s Second and Third Periodic Reports to the United Nations Human Rights Committee. In these Reports, the U.S. asserts that it has provided adequate legislative, judicial, administrative, and other mechanisms that fulfill its obligations under the International Covenant on Civil and Political Rights (ICCPR). This shadow report reveals that the U.S. has not complied fully with ICCPR mandate to protect the rights of sexual minorities, including lesbian, gay, bisexual and transgender people.

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Executive Summary

The purpose of this submission is to provide information on the United States' obligations under the International Covenant on Civil and Political Rights (ICCPR) to provide sexual minorities, including Lesbian, Gay, Bisexual and Transgender people (LGBT) equal protection under the law, freedom from discrimination, and freedom from incursions on the right to privacy. Further, this report seeks to provide insight into how the past obligations of the United States under the ICCPR have been discharged, including examining shortcomings and providing recommendations.

A. Relevant Legal Issues – Why Sexual Minorities are Protected under the ICCPR

As a party to the ICCPR, the United States is bound to fulfill all obligations that arise under the terms of the Covenant. Under Articles 2, 17, and 26, these obligations include protecting all persons from discrimination, ensuring equal protection of the law, and ensuring freedom from incursions on the right to privacy. Further, the decisions of the Human Rights Committee in the *Toonen* and *Young* cases, as well as past Committee Concluding Observations presented to States parties, extend protection of those articles to sexual minorities. Accordingly, the United States is required to ensure that LGBT people are protected from discrimination on the basis of their sexual orientation and gender identity. In violation of these obligations, the United States has failed to adequately protect LGBT people from discrimination in the following areas: hate crimes/violence; employment; education; military; health care; marital and partnership rights; parenting, adoption, and foster care; immigration; and transgender rights.

B. Specific Rights of LGBT People Violated on the Basis of Sexual Orientation and Gender Identity

Based upon these findings, the Committee is required to evaluate United States laws and practices relating to sexual minorities, specifically LGBT people. This report was prepared to inform the Committee, the United States, and other interested parties that the laws, policies and practices of the United States perpetuate discrimination and disparately impact LGBT people. The following paragraphs highlight issues that will be described further in this report.

Hate Crimes/Violence

LGBT people in the United States often feel vulnerable in public for fear that they might be harassed or violently assaulted. LGBT people constitute 15.5% of hate crimes victims in the United States, the third highest category of victims of hate crimes. Although the government tracks statistics for hate crimes based on sexual orientation, current legislation does not provide LGBT victims or their kin with a cause of action when they are violently attacked. Further, violence and hate crimes based on sexual orientation are often underreported, in part because LGBT people are often victims of abuse by police officers themselves.

Employment

Gainful employment directly affects an individual's self worth, providing people with a sense of accomplishment and allowing them to make positive contributions to society. However, employment discrimination often makes the workplace more tenuous for LGBT people. Laws in the United States continue to allow employers to hire or fire employees solely based on sexual orientation or gender identity, which perpetuates de facto discrimination and makes it increasingly difficult for LGBT people to stand up for their equal rights. Without federal legislation explicitly prohibiting discrimination on the basis of sexual orientation and gender identity, LGBT people continue to suffer from employment discrimination.

Education

For many young people, schools are a safe place where students can learn, grow, and succeed. However, for many LGBT youth, or even those students perceived to be LGBT, schools are just another place where discrimination and harassment exist. LGBT students are often targeted for harassment by their classmates, or even school administrators and teachers. When school policies and officials offer little protection from harassment, education often becomes secondary to survival. Until the federal government implements laws and policies that explicitly protect LGBT students from harassment and discrimination, many LGBT youth in the United States will continue to be vulnerable to discrimination based solely on sexual orientation or gender identity.

Military

For many, service to one's country through military participation is more than a job; it is an important aspect of being American. By actively discriminating against Lesbian, Gay, and Bisexual (LGB) people through the "don't ask, don't tell" policy, the United States government essentially denies LGB people from serving in the military unless they deny their sexual orientation by keeping it secret. Unfortunately, military personnel report that the "don't ask" portion of U.S. policy is continually violated by military servicemembers and officers. This refusal to protect the privacy of LGB military servicemembers, and the failure of military officers to protect LGB servicemembers from violence, harassment, and discrimination based on sexual orientation, continues to deny LGB servicemembers rights that the "don't ask, don't tell" policy was intended to convey.

Health Care

When a person is ill or needs health care treatment, family and friends generally gather in support of their loved ones. In times of sickness, both patients and families are often vulnerable and need support. Nonetheless, many LGBT people often encounter health care workers who exhibit blatantly discriminatory attitudes towards the LGBT population and are uninformed of the issues of sexual minorities. In addition, LGBT people often go uninsured or underinsured due to discrimination in regards to health care coverage policies. Because United States federal law does not explicitly prevent discrimination in health care based on sexual orientation or gender identity, LGBT individuals frequently suffer discrimination in regards to available health services at clinics, doctor's offices, hospitals, and other health care service providers.

Marital and Partnership Rights

Unlike heterosexual couples, LGBT couples are denied many of the rights, responsibilities, and privileges that legal marriage provides. Lack of legal recognition of same-sex relationships not only denies couples benefits, but also denies the ability to participate in a very important ritual of life, which has both social and cultural significance. By denying legal recognition of marital or partnership commitments for same-sex couples, the United States continues to deny LGBT people basic fundamental rights that are available to the heterosexual community.

Parenting, Adoption, and Foster Care

In states where LGBT people are forbidden from adopting, or where discriminatory attitudes and laws put potential LGBT adoptive parents at a disadvantage, children are denied protections afforded children in other households, including the legal and psychological benefits that come with adoption. Further, many LGBT parents and children suffer because some courts still use sexual orientation as a factor in determining custody and visitation of the LGBT person's biological or adoptive children. The United States must reverse these discriminatory laws and policies against LGBT people so that LGBT parents and their children are treated equally before the law.

Immigration

Immigration is based on a priority system in the United States. Family-based immigration, which represents one priority status, is denied to many LGBT people because United States federal law does not recognize same-sex marriages. Lack of knowledge about or sensitivity toward sexual minorities also contributes to acts of discrimination by immigration officers and judges during the immigration process. Further, immigration policies stigmatize HIV-positive people, which includes a significant number of LGBT people, by denying them entry into the United States.

Transgender Rights

Because the United States government has failed to take adequate measures to explicitly provide the transgender population with equal protection from violence, harassment, and discrimination based on gender identity, a large number of transgender people continue to suffer from discrimination in areas such as health care, employment, and law enforcement responses to criminal activity.

C. Summary of Recommendations – What the U.S. Must Do to Comply with the ICCPR

Although the United States has made progress in recognizing its obligations to protect sexual minorities from discrimination based on sexual orientation and gender identity in some jurisdictions, it remains accountable for the inadequacy of some laws and for the continued existence and promulgation of other laws that blatantly discriminate against LGBT people. In accordance with Concluding Observations that the Human Rights Committee made, encouraging other States parties to take actions to protect sexual minorities, this report requests the Committee to urge the United States to:

- ***Recognize the right of sexual minorities not to be discriminated against by specifically removing and prohibiting discrimination against LGBT people;***
- ***Investigate and punish discriminatory acts and attitudes against people on the ground of sexual orientation or gender identity; and***
- ***Provide legal remedies for LGBT people who are victims of hate crimes, violence, or other forms of legal or de facto discrimination.***

Although these recommendations apply to all laws and policies of the United States, this report provides specific recommendations for the United States to take in order to comply with the ICCPR in the following areas: hate crimes/violence; employment; education; military; health care; marital and partnership rights; parenting, adoption, and foster care; immigration; and transgender rights.

Proposed Recommendations to the United Nations Human Rights Committee Regarding U.S.A.'s Obligations under the International Covenant on Civil and Political Rights to Protect Lesbian, Gay, Bisexual, and Transgender People from Discrimination

We respectfully request the United Nations Human Rights Committee adopt the following recommendations and urge the United States to comply fully with the ICCPR and to afford fully all rights thereunder to lesbian, gay, bisexual and transgender people:

Hate Crimes/Violence

Recommendation #1: *The Human Rights Committee urges the United States to support the enactment of comprehensive federal hate crimes legislation, including provisions for statistics collection, a cause of action, and enhanced criminal sentencing for hate crimes based on sexual orientation and gender identity.*

Recommendation #2: *The Human Rights Committee urges the United States to enact federal legislation that would support the training of local law enforcement on sexual orientation and gender identity issues to prevent police from engaging in discriminatory practices against LGBT people.*

Employment

Recommendation #3: *The Human Rights Committee urges the United States to enact comprehensive federal legislation that protects all employees from discrimination on the basis of sexual orientation and gender identity.*

Recommendation #4: *The Human Rights Committee urges the United States to enact federal legislative reform that extends equal employment benefits to same-sex partners in both the private and public sectors at the federal, state, and local levels.*

Education

Recommendation #5: *The Human Rights Committee urges the United States to enact federal nondiscrimination legislation that explicitly protects students from harassment and discrimination on the basis of sexual orientation and gender identity.*

Recommendation #6: *The Human Rights Committee urges the United States to utilize the U.S. Department of Education to monitor school districts for compliance with nondiscrimination principles and to ensure LGBT students have access to supportive resources with respect to sexual orientation and gender identity.*

Military

Recommendation #7: *The Human Rights Committee urges the United States to replace the “don’t ask, don’t tell” policy with a policy that allows LGB individuals to serve freely and openly in the military, with rights and protections equal to those of heterosexual servicemembers.*

Recommendation #8: *The Human Rights Committee urges the United States to take effective steps to prevent verbal or physical acts of harassment or abuse on the basis of sexual orientation, such as training officers on LGB issues and including language in non-discrimination clauses of military policies that explicitly mention sexual orientation.*

Recommendation #9: *The Human Rights Committee urges the United States to suspend all discharges of servicemembers for acknowledging non-heterosexual orientation or engaging in non-heterosexual conduct that does not otherwise violate military rules applicable to heterosexual conduct.*

Health Care

Recommendation #10: *The Human Rights Committee urges the United States to enact federal legislation that explicitly protects members of the LGBT population from discrimination on the basis of sexual orientation and gender identity in regards to health care.*

Recommendation #11: *The Human Rights Committee urges the United States to remove or revise laws and policies that promote stigmatization of the LGBT population based on sexual orientation and gender identity, such as reconsidering the Food and Drug Administration policy that denies men who have had sex with other men from donating blood.*

Recommendation #12: *The Human Rights Committee urges the United States to create and implement education campaigns designed to inform and sensitize health care professionals and insurance providers to the needs of LGBT people.*

Marital and Partnership Rights

Recommendation #13: *The Human Rights Committee urges the United States to repeal the federal Defense of Marriage Act and to grant to same-sex married couples the same federal rights, responsibilities and privileges that flow from legally recognized marriage.*

Recommendation #14: *The Human Rights Committee urges the United States to encourage legislation at the state level that provides for legal recognition of same-sex marriage.*

Recommendation #15: *The Human Rights Committee urges the United States to support the Family and Medical Leave Inclusion Act, which would amend the Family and Medical Leave Act to include provisions for domestic partners and same-sex married partners.*

Recommendation #16: *The Human Rights Committee urges the United States to call on the President to cease support of the Federal Marriage Amendment.*

Parenting, Adoption, and Foster Care

Recommendation #17: *The Human Rights Committee urges the United States to encourage enactment of legislation that ensures non-discrimination in adoption, foster care, custody, and visitation based on sexual orientation and gender identity.*

Recommendation #18: *The Human Rights Committee urges the United States to support stronger legal relationships between children and their same-sex parents by enacting same-sex marriage legislation so that children are granted the same rights, and parents the same responsibilities, that flow from heterosexual marriage.*

Recommendation #19: *The Human Rights Committee urges the United States to encourage enactment of second-parent adoption statutes that protect all children and grant them the same rights, and the parents the responsibilities, that flow from legal parentage.*

Immigration

Recommendation #20: *The Human Rights Committee urges the United States to implement immigration policies that recognize same-sex marriage for immigration purposes and allow LGBT individuals in same-sex partnerships to sponsor the immigration of their partners/spouses.*

Recommendation #21: *The Human Rights Committee urges the United States to train immigration judges and immigration officers on sexual orientation and gender identity issues to prevent discriminatory practices and provide protection and accommodations for LGBT people within immigration detention facilities.*

Recommendation #22: *The Human Rights Committee urges the United States to remove the HIV ban and any restrictions that discriminate against people living with HIV in United States immigration policies.*

Transgender Rights

Recommendation #23: *The Human Rights Committee urges the United States to enact or amend federal legislation to explicitly protect transgender individuals from harassment and discrimination on the basis of gender identity in areas such as employment and health care.*

Recommendation #24: *The Human Rights Committee urges the United States to ensure that transgender crime victims are treated with dignity and respect and that law enforcement and judicial officials are adequately trained to sensitize them to the rights of the transgender population.*

Recommendation #25: *The Human Rights Committee urges the United States to remove the transgender population from exempt status under the Americans with Disabilities Act.*

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The U.S.A.'s Breach of its Obligations under the International Covenant on Civil and Political Rights to Protect the Rights of Sexual Minorities¹, including Lesbian, Gay, Bisexual, and Transgender People

I. Introduction

1. The International Covenant on Civil and Political Rights² is Relevant and Binding on the United States

1.1. The International Covenant on Civil and Political Rights (ICCPR) is the principal international treaty setting out fundamental civil and political rights for all people. The ICCPR provides for numerous individual rights, including the rights of equal protection under the law,³ the right to be free from discrimination,⁴ and freedom from incursions on

¹ This report considers "sexual minorities" to include, *inter alia*, lesbian, gay, bisexual, and transgender persons (LGBT) and follows the description and purpose for using this term as outlined in *International Human Rights Law and Sexual Orientation*, 18 Hastings Int'l & Comp. L.Rev.1, 1 (1994). In his article, Professor James Wilets describes "sexual minorities" as including "all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behavior or gender identity" and does not include "individuals whose sexual identity is based upon non-consensual sexual behavior." Prof. Wilets draws the link between sexual minorities and sexual orientation in stating "oppression based upon on sexual orientation is predicated on more than simply the existence of same-gender sexual relations...the oppression...is fueled by any group who challenges traditionally defined gender roles." *Id.* at 4. This report primarily uses the terms sexual minorities, LGBT, and sexual orientation interchangeably. However, there are distinctions between these terms and the authors recognize the weakness in combining the terms without a thorough analysis of the distinctions between them. Amnesty International defines "sexual orientation" as referring "to a person's 'emotional, sexual, romantic, or affectional attraction. It exists along a continuum that ranges from exclusive homosexuality to exclusive heterosexuality and includes various forms of bisexuality. It is different from sexual behavior because it refers to feelings and self-concept....Transgender is used as an umbrella term. It can be used broadly to describe individuals that do not conform to the gender role expectations of their biological sex. It encompasses people who seek sex reassignment, sometimes involving hormones or surgery, to bring their physical characteristics into conformity with their gender identity." Amnesty International, *USA: Stonewalled – still demanding respect. Police abuses against lesbian, gay, bisexual, and transgender people in the USA* (2006) at 9. [hereinafter *Stonewalled*], available at <http://web.amnesty.org/library/Index/ENGAMR510012006?open&of=ENG-347> (last visited July 1, 2006).

² International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, U.N. Doc. A/6316 (1966) [hereinafter ICCPR], available at <http://www.ohchr.org/english/law/ccpr.htm> (last visited July 1, 2006).

³ "Equal protection is the principle that all individuals have the right to have the laws of a specific jurisdiction apply to them in the same manner as those laws are applied to others similarly situated." Wilets, *supra* note 1 at 48.

⁴ "Non-discrimination is the principal that instruments of the state or private parties shall not discriminate among individuals based upon arbitrary criteria." *Id.* See also *General Comment #18: Non-Discrimination*, U.N. Human Rights Committee, U.N. Doc. CCPR General Comment #18, (1989) available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument) (last visited July 1, 2006).

the right to privacy⁵ on the basis of sexual orientation.⁶ The United States has signed and ratified the treaty and, consequently, is bound by its provisions.⁷

2. The ICCPR Imposes Obligations on the United States under Articles 2, 17, and 26 and the *Toonen*⁸ and *Young*⁹ Cases to Protect LGBT¹⁰ People from Discrimination Based on Sexual Orientation

2.1. Article 2, paragraph 1 of the ICCPR requires the United States to guarantee all rights protected under the ICCPR without distinction of any kind, including discrimination based on sexual orientation¹¹ and other categories. Article 2 (1) provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.2. Article 17 of the ICCPR protects all persons, including sexual minorities, from arbitrary or unlawful interference with privacy,¹² family, home or correspondence, and from unlawful attacks on honor and reputation. Article 17 provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

⁵ The various kinds of privacy rights include “spatial areas where the government is prohibited from intruding, such as the home, the bedroom, or a person’s body.” It may also include “intangibles with which the government or other individuals are prohibited from interfering, such as one’s reputation or right to marry and found a family...and certain protected activities, such as oral communication or sexual activities.” *Wilets*, *supra* note 1 at 59-60.

⁶ “There are at least three bases upon which to find that the rights of sexual minorities to equal protection and non-discrimination have been violated. The first is if a state makes certain acts between members of the same sex illegal while permitting the same acts between heterosexuals. The second basis is if a state discriminates against sexual minorities in its application of a law which is neutral on its face in terms of its application to heterosexuals or homosexuals. The third basis is if certain rights are granted to individuals or withheld from individuals on the basis of their sexual orientation.” *Wilets*, *supra* note 1 at 48-49.

⁷ For a thorough discussion of general international law principles and U.S. obligations arising thereunder, see George E. Edwards, *International Human Rights Law Violations Before, During, and after Hurricane Katrina: An International Law Framework for Analysis*, 31 *Thurgood Marshall Law Review* 353-425 (2006); *Expert Witness Affidavit of Professor George E. Edwards on International Human Rights Law, International Humanitarian Law, and International Criminal Law: U.S.A. v. David M. Hicks, U.S. Military Commissions, Guantanamo Bay, Cuba* (tendered to the Military Commissions at Guantanamo Bay on 14 November 2005). See Vienna Convention on the Law of Treaties, art. 1(a), May 23, 1969, 1155 U.N.T.S. 31 and Restatement (Third) of the Law on the Foreign Relations Law of the United States 3 (1987).

⁸ *Nicholas Toonen v. Australia*, U.N. Human Rights Committee, No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (04/04/94), [hereinafter *Toonen*], available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/d22a00bcd1320c9c80256724005e60d5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d22a00bcd1320c9c80256724005e60d5?Opendocument) (last visited July 1, 2006).

⁹ *Edward Young v. Australia*, U.N. Human Rights Committee, No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (18/09/03), [hereinafter *Young*], available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3c839cb2ae3bef6fc1256dac002b3034?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3c839cb2ae3bef6fc1256dac002b3034?Opendocument) (last visited July 1, 2006).

¹⁰ In this submission, the term “LGBT” or “LGBT people” refers to lesbian, gay, bisexual, and transgender people.

¹¹ The Human Rights Committee has interpreted Articles 2 and 26 to include sexual orientation in “sex.” See *Toonen*, *supra* note 8.

¹² The Human Rights Committee concluded that an Australian law prohibiting sodomy was arbitrary and violated the privacy provisions of Article 17 of the ICCPR. See *Toonen*, *supra* note 8.

2. Everyone has the right to the protection of the law against such interference or attacks.

2.3. Article 26 of the ICCPR prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground based on sexual orientation¹³ and other categories. Article 26 provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.4 Toonen¹⁴ Decision

In *Toonen v. Australia*, the Human Rights Committee ruled that a Tasmania sodomy law was arbitrary and violated the privacy and non-discrimination provisions under Articles 2, 17 and 26 of the ICCPR. Most significantly, the Committee determined that the reference to “sex” in Articles 2 and 26 of the ICCPR includes sexual orientation.¹⁵

2.5 Young¹⁶ Decision

In *Young v. Australia*, the Human Rights Committee ruled that Australia violated Article 26 by denying pension rights to a surviving same-sex partner of a war veteran. The Committee concluded that the State failed to show a justifiable distinction between same-sex and heterosexual couples and that excluding same-sex partners from pension benefits was neither reasonable, nor objective.¹⁷

3. The Human Rights Committee Challenges States to Account for Government Measures to Protect LGBT Persons from Discrimination

3.1 Human Rights Committee Concluding Observations¹⁸

In Concluding Observations, the Human Rights Committee has expressed concern to States parties about practices that discriminate on the basis of sexual orientation and has urged countries bound by the ICCPR to remove and prohibit any discrimination on the

¹³ See *Toonen*, *supra* note 8.

¹⁴ *Id.*

¹⁵ Alex Conte, Scott Davidson & Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* 167-168 (2004) (citing *Toonen* at para 8.7).

¹⁶ *Young*, *supra* note 9.

¹⁷ *Id.* para. 10.4.

¹⁸ “The final phase of the Committee’s examination of the State report is the drafting and adoption of its concluding observations. For this, the country rapporteur prepares, with the assistance of the secretariat and based on the constructive dialogue held during the plenary session, draft concluding observations for the consideration of the Committee...This draft is discussed by the Committee in private session with a view to adopting it by consensus. The concluding observations, once adopted, are usually not made public until the day preceding the end of the session. They are forwarded to the State party concerned and included in the Committee’s annual report.” U.N. Human Rights Committee, *Human Rights Committee - Working Methods*, available at <http://www.ohchr.org/en/glish/bodies/hrc/workingmethods.htm#a2c> (last visited July 1, 2006).

grounds of sexual orientation. The Committee has also extended its appreciation when States parties take steps to secure equal protection for LGBT people. These countries have included Austria,¹⁹ Chile,²⁰ China,²¹ El Salvador,²² Finland,²³ Greece,²⁴ Namibia,²⁵ Philippines,²⁶ Poland,²⁷ Slovakia,²⁸ Trinidad and Tobago,²⁹ and the United Kingdom of Great Britain and Northern Ireland.³⁰ The following are examples:

- i. In its Concluding Observations to China, El Salvador, Namibia, Philippines, Slovakia, Trinidad and Tobago, and the United Kingdom, the Committee has urged the enactment of legislation including protection from discrimination based on sexual orientation.³¹
- ii. The Committee has urged Greece and Poland to recognize fully the right of sexual minorities not to be discriminated against, and to adequately investigate and punish discriminatory acts and attitudes against persons on the basis of sexual orientation. The Committee also urged the implementation of appropriate training

¹⁹ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Austria*. CCPR/C/79/Add.103 (19/11/98), at para. 13, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/873443bcd091d2da802566c8005e7609?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/873443bcd091d2da802566c8005e7609?OpenDocument) (last visited July 1, 2006).

²⁰ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Chile*. CCPR/C/79/Add.104 (30/03/99), at para. 20, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/c1804ad46b00b64880256763004abebe?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/c1804ad46b00b64880256763004abebe?OpenDocument) (last visited July 1, 2006).

²¹ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee (Hong Kong): China*. CCPR/C/79/Add.117 (12/11/99), at para. 15, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/d3f40053e45c17fd8025682005cfd6?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/d3f40053e45c17fd8025682005cfd6?OpenDocument) [hereinafter *China*] (last visited July 1, 2006).

²² U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: El Salvador*. CCPR/CO/78/SLV (22/07/2003), at para. 16, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/3557ff1fd8be8377c1256db200552abe?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/3557ff1fd8be8377c1256db200552abe?OpenDocument) [hereinafter *El Salvador*] (last visited July 1, 2006).

²³ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Finland*. CCPR/CO/82/FIN. (02/12/2004), at para 3(a), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6d5bb984e19b576ec1256f6b0052fe35?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6d5bb984e19b576ec1256f6b0052fe35?OpenDocument) [hereinafter *Finland*] (last visited July 1, 2006).

²⁴ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Greece*. CCPR/CO/83/GRC (25/04/2005), at para. 5, 19, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/0b0fece5de7503b0c1256ffc00489e4b?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/0b0fece5de7503b0c1256ffc00489e4b?OpenDocument) [hereinafter *Greece*] (last visited July 1, 2006).

²⁵ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Namibia*. CCPR/CO/81/NAM (30/07/2004), at para. 22, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/685cd776fea41fafc1256ee1004c3160?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/685cd776fea41fafc1256ee1004c3160?OpenDocument) [hereinafter *Namibia*] (last visited July 1, 2006).

²⁶ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Philippines: Philippines*. CCPR/CO/79/PHL (01/12/2003), at para. 18, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/5c1a26dde6327ef0c1256df300525589?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/5c1a26dde6327ef0c1256df300525589?OpenDocument) [hereinafter *Philippines*] (last visited July 1, 2006).

²⁷ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Poland*. CCPR/CO/82/POL (02/12/2004), at para. 5, 18, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/66db176cab27b16c1256f43005ba2e7?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/66db176cab27b16c1256f43005ba2e7?OpenDocument) (last visited July 1, 2006); U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee : Poland*. CCPR/C/79/Add.110 (29/07/99), at para. 23, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/a61db0e519524575802567c200595e9c?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/a61db0e519524575802567c200595e9c?OpenDocument) [hereinafter *Poland 1999*] (last visited July 1, 2006).

²⁸ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Slovakia..* CCPR/CO/78/SVK (22/08/2003), at para. 4, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/dfb4fef7e44230e3c1256d7a0044c29c?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/dfb4fef7e44230e3c1256d7a0044c29c?OpenDocument) [hereinafter *Slovakia*] (last visited July 1, 2006).

²⁹ U.N. Human Rights Committee, *Concluding observations of the Human Rights Committee: Trinidad and Tobago*. CCPR/CO/70/TTO (03/11/2000), at para. 11, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/34eab73064e6d232c125698c0047b14a?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/34eab73064e6d232c125698c0047b14a?OpenDocument) [hereinafter *Trinidad and Tobago*] (last visited July 1, 2006).

³⁰ U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee (Crown Dependencies): United Kingdom of Great Britain and Northern Ireland*. CCPR/C/79/Add.119 (27/03/2000), at para. 14, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/981284eaf88fd518c12569fc00485004?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/981284eaf88fd518c12569fc00485004?OpenDocument) [hereinafter *the United Kingdom*] (last visited July 1, 2006).

³¹ See *Namibia*, supra note 25; *Trinidad and Tobago*, supra note 29; *Slovakia*, supra note 28; *Philippines*, supra note 26; *the United Kingdom*, supra note 30; *China*, supra note 21; and *El Salvador*, supra note 22.

for officials in order to reduce de facto discrimination and sensitize them to the rights of sexual minorities.³²

- iii. The Committee positively reinforces States parties that have taken measures to comply with their obligation to protect sexual minorities. For example, the Committee has expressed appreciation to the government of Finland for enacting legislation that creates equal protection from discrimination based on sexual orientation.³³

3.2 Human Rights Committee Lists of Issues³⁴

The Human Rights Committee has requested States parties to account for measures their respective governments have taken to protect LGBT people from discrimination and other human rights violations. The following are examples:

- i. In 2002, the Committee asked Egypt to “provide information on the existence, in law and in fact, of discrimination based on sexual orientation” and to explain further how “‘debauchery’ and ‘attacks on religion’ on the basis of sexual orientation are justified in the light of Articles 17 and 26 of the Covenant.”³⁵
- ii. In 2004, the Committee asked Barbados if it envisioned, “adoption of legislation which would prohibit discrimination on any ground such as race, colour, sex, including sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status as well as against persons with disabilities in employment, education, and other services?”³⁶
- iii. In 2005, the Committee requested that Brazil discuss one of its programs entitled “Brazil without Homophobia” and “explain action taken at the level of the States in response to reported cases of discrimination based on sexual orientation and acts of violence against affected groups.”³⁷

³² See *Greece*, *supra* note 24; and *Poland*, *supra* note 27.

³³ See *Finland*, *supra* note 23.

³⁴ “First, the country rapporteur presents the draft list of issues for discussion to the Country Report Task Force. Once the members have made their observations, the list of issues is adopted by the Task Force as a whole. The Task Force then allocates to each of its members principal responsibility for a certain number of questions included in the list of issues, based in part on the areas of particular expertise or interest of the member concerned. Once the list of issues is adopted and edited, it is transmitted to the State party.... It should be noted that States parties are encouraged to use the list of issues to better prepare for a constructive discussion, but are not expected to submit written answers.” U.N. Human Rights Committee, *Human Rights Committee - Working Methods*, available at <http://www.ohchr.org/english/bodies/hrc/workingmethods.htm#a4> (last visited July 1, 2006).

³⁵ U.N. Human Rights Committee, *List of Issues: Egypt*. CCPR/C/76/L/EGY (05/08/02) at para. 26, available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6570c78e33bd94a9c1256c1d002639cf/\\$FILE/G0243847.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6570c78e33bd94a9c1256c1d002639cf/$FILE/G0243847.pdf) (last visited July 1, 2006).

³⁶ U.N. Human Rights Committee, *List of issues: Barbados*. CCPR/C/83/L/BRB (01/12/2004), at para. 15, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/8469c9684cb6bdf5c1256f6b004f6299?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/8469c9684cb6bdf5c1256f6b004f6299?Opendocument) (last visited July 1, 2006).

³⁷ U.N. Human Rights Committee, *List of issues: Brazil*. CCPR/C/85/L/BRA. (25/07/2005), at para. 9, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e04952da601808fac125707700569686?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e04952da601808fac125707700569686?Opendocument) (last visited July 1, 2006).

4. The U.S. Violates and Must Take Additional Steps to Comply with the ICCPR by Protecting LGBT People from Discrimination

4.1 The U.S. has failed to fulfill its obligations under the ICCPR because discrimination with respect to sexual orientation continues to pervade, including in the following areas, discussed *infra*:

- i. **Hate Crimes/Violence (see *infra*, paras 5 - 6)**
- ii. **Employment (see *infra*, paras 7 - 8)**
- iii. **Education (see *infra*, paras 9 - 10)**
- iv. **Military (see *infra*, paras 11 - 12)**
- v. **Health Care (see *infra*, paras 13 - 14)**
- vi. **Marital and Partnership Rights (see *infra*, paras 15 - 16)**
- vii. **Parenting, Adoption, and Foster Care (see *infra*, paras 17 - 18)**
- viii. **Immigration (see *infra*, paras 19 - 20)**
- ix. **Transgender Rights (see *infra*, paras 21 - 22)**

II. Hate Crimes/Violence

5. Information on Hate Crimes and Violence Based on Sexual Orientation in the U.S.

5.1. Based on the statistics that the Federal Bureau of Investigation (FBI) has collected under the Hate Crime Statistics Act,³⁸ hate crimes based on sexual orientation constituted 15.5% of all hate crimes, the third highest category after race-based and religion-based crimes.³⁹ Further, the FBI recorded the following data:

- i. "In 2004, bias against a particular sexual orientation accounted for 1,406 offenses within single-bias hate crime incidents.
- ii. Law enforcement agencies reported that 60.8 percent of these offenses resulted from an anti-male homosexual bias, 21.1 percent from an anti-homosexual bias, 14.3 percent from an anti-female homosexual bias, 2.5 percent from an anti-heterosexual bias, and 1.3 percent from an anti-bisexual bias.
- iii. Thirty-four percent of the 1,197 single-bias incidents that were motivated by a sexual-orientation bias occurred at residences or homes. Nearly one-fourth

³⁸ A measure that the U.S. has taken to protect LGBT people from hate crimes and violence includes the enactment of the Hate Crimes Statistics Act, which allows the government to investigate crimes based on a bias against race, religion, disability, ethnic/national origin or sexual orientation. Additionally, federal sentencing guidelines do include a provision for hate crimes based on actual or perceived race, color, religion, national origin, ethnicity, gender disability, or sexual orientation. However, federal hate crimes legislation that includes a cause of action for various protected categories, such as race and religion-based, does not include a cause of action for protecting LGBT people from violence on the basis of their sexual orientation. 28 USC § 534 (2006).

³⁹ In 2004, racial bias motivated more than half (53.9 percent) of the 9,021 reported offenses within single-bias hate crime incidents; religious bias accounted for 16.4 percent; bias regarding sexual orientation, 15.6 percent; ethnicity or national origin, 13.3 percent; and disability bias, 0.8 percent.. Department of Justice, *Hate Crime Statistics 2004*, available at <http://www.fbi.gov/ucr/hc2004/section1.htm> (last visited July 1, 2006).

(24.9 percent) of the incidents happened on highways, roads, alleys, or streets; and 12.5 percent occurred at schools or colleges.”⁴⁰

5.2. An Amnesty International Report has documented that LGBT people continue to be victims of abuse and violence by police officers.⁴¹ For example, Amnesty reports that in 2004, a woman from Athens, Georgia said that she was forced into her apartment at gunpoint by a former County Deputy and raped because she is a lesbian. She said the officer vowed to “teach her a lesson.”⁴²

6. Steps the U.S. Needs to Take to Comply with the ICCPR by Protecting LGBT People from Hate Crimes and Violence

6.1. The United States needs to take multiple steps to comply with the ICCPR mandate to protect LGBT people from discrimination in regards to hate crimes and violence. We respectfully suggest the following recommendations:

Recommendation #1: The Human Rights Committee urges the United States to support the enactment of comprehensive federal hate crimes legislation, including provisions for statistics collection, a cause of action, and enhanced criminal sentencing for hate crimes based on sexual orientation and gender identity.

Recommendation #2: The Human Rights Committee urges the United States to enact federal legislation that would support the training of local law enforcement on sexual orientation and gender identity issues to prevent police from engaging in discriminatory practices against LGBT people.

III. Employment

7. Information on Employment Discrimination Based on Sexual Orientation in the U.S.

7.1. Because United States federal law does not explicitly prohibit discrimination on the basis of sexual orientation and gender identity, LGBT employees frequently struggle against labor discrimination. Absent federal protection⁴³ in the United States, LGBT employees are vulnerable to discrimination in the workplace. In states and localities where anti-discrimination laws and policies have not been implemented or enforced, LGBT

⁴⁰ *Id.*

⁴¹ See *Stonewalled*, *supra* note 1.

⁴² Other incidents reported by Amnesty include: “A Native American transgender woman told AI that in October 2003 she was stopped in Los Angeles by two police officers as she was walking along the street in the early hours of the morning. According to her testimony, the officers handcuffed her and drove her in the police car to an alley off Hollywood Boulevard where she was beaten, verbally abused and raped. After her ordeal she was thrown to the ground and told ‘that’s what you deserve.’ In December 2003, a young African-American gay activist was waiting at a bus stop when Chicago police officers arrested him allegedly for loitering with intent to solicit. Despite providing identification and corroborating information from the organization he represents, he was detained for two days.” *Id.*

⁴³ Only sixteen provide statewide protections against workplace discrimination. Lambda Legal, *Employment*, available at <http://www.lambdalegal.org/cgi-bin/iowa/issues/record?record=4> (last visited July 1, 2006).

employees can be discriminated against with respect to hiring and firing, wage determination, and employment benefits eligibility.⁴⁴

7.2. The following examples illustrate the effects of employment discrimination based on sexual orientation:

- i. ***LGBT people can be fired or denied employment based on their sexual orientation or gender identity in some jurisdictions.***⁴⁵
- ii. ***Federal employees are denied recourse for harassment based on their sexual orientation in some cases.***⁴⁶
- iii. ***Same-sex partners are denied benefits, including health insurance, dental care, social security benefits, medical leave and “tax equity for domestic partners”.***⁴⁷

8. Steps the U.S. Needs to Take to Comply with the ICCPR by Protecting LGBT People from Employment Discrimination

8.1. The United States needs to take multiple steps to comply with the ICCPR mandate to protect LGBT people from employment discrimination. We respectfully suggest the following recommendations:

Recommendation #3: The Human Rights Committee urges the United States to enact comprehensive federal legislation that protects all employees from discrimination on the basis of sexual orientation and gender identity.

Recommendation #4: The Human Rights Committee urges the United States to enact federal legislative reform that extends equal employment benefits to same-sex partners in both the private and public sectors at the federal, state, and local levels.

⁴⁴ LGBT people also face similar discrimination in housing and public accommodations. In a 2001 nationwide survey, thirty-four percent of gay people were denied renting or buying a home because of their sexual orientation, or know someone who has. Some state and local jurisdictions have responded by “passing ordinances that make housing discrimination based on sexual orientation (and, in some places, gender identity) illegal. Currently, 11 states and more than 150 cities or counties have such laws. Property owners, landlords or realtors who do not follow these antidiscrimination laws may face legal and financial consequences.” Lambda Legal, *Anti-Gay Housing Discrimination: A Guide for Property Owners and Managers*, available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/282.pdf (last visited July 1, 2006).

⁴⁵ “A Georgia woman was fired from her job as an award-winning cook when her company adopted a written policy against employing gay people” and “[a] married, heterosexual Kansas man was refused a teaching job because a school employee suggested that he might be gay” Human Rights Campaign, *Employment Non-Discrimination Act Quick Facts*, available at http://www.hrc.org/Content/NavigationMenu/HRC/Get_Involved/Federal_Legislation/Employment_Non-Discrimination_Act/Quick_Facts2/ENDA_Quick_Facts.htm [hereinafter *Quick Facts*] (last visited July 1, 2006). The Human Rights Campaign is “America’s largest civil rights organization working to achieve gay, lesbian, bisexual, and transgender equality,” available at http://www.hrc.org/Template.cfm?Section=About_HRC (last visited July 1, 2006).

⁴⁶ In *Dillon v. Frank*, 952 F.2d 403 (6th Cir. 1992), a Detroit postal worker was harassed and beaten at work because of his perceived sexual orientation. The court ruled that, although he had clearly suffered discrimination, “homosexuality is not an impermissible criteria (sic) on which to discriminate” under Title VII of the 1964 Civil Rights Act. *Employment Non-Discrimination Act Quick Facts*, see *Quick Facts*, *supra* note 45.

⁴⁷ Human Rights Campaign, *GLBT Workplaces Issues*, available at http://www.hrc.org/Template.cfm?Section=Workplace_Discrimination&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=52&ContentID=22945 (last visited July 1, 2006).

IV. Education

9. Information on Discrimination in Schools Based on Sexual Orientation in the U.S.

9.1. Name-calling, sexual harassment, threats, and physical assaults frequently make it difficult for LGBT students to succeed academically or feel safe at school. The problem of verbal harassment of LGBT students in U.S. schools is pervasive. “One-third of eleventh grade students responding to a 1999 CBS poll admitted that they knew of incidents of lesbian or gay harassment” and “twenty-eight percent admitted to making antigay remarks themselves.”⁴⁸ Additionally, a 2005 National School Climate Survey⁴⁹ found that nearly two-thirds of LGBT students reported being verbally harassed in school and feeling unsafe in school because of their sexual orientation.⁵⁰

9.2. The following examples illustrate effects of discrimination in schools based on sexual orientation:

- i. ***LGBT students in public schools are inadequately protected against harassment and are susceptible to violence based on their sexual orientation.*** According to data gathered by students in a yearlong study, “the average high school student in Des Moines, Iowa public schools hears an antigay comment every seven minutes,” and school teachers intervene only three percent of the time.⁵¹ The failure of teachers and administrators to intervene creates a hostile environment in which LGBT students often feel ignored and unsafe, and sends the message to would-be harassers that it is permissible to discriminate against LGBT students based on their sexual orientation or gender identity. When discrimination is ignored, verbal harassment of LGBT students often turns into violence.
- ii. ***LGBT students are denied access to support in public schools.*** Efforts to provide a supportive environment for LGBT students in schools have been hindered by some states’ successful efforts to pass discriminatory legislation that restricts student access to information relating to non-heterosexual orientation. Under these “no promo homo” laws, teachers and school officials may not say anything that could be perceived as either neutral or positive about homosexuality, or to even acknowledge that homosexuality exists at all.⁵²

⁴⁸ Human Rights Watch, *Hatred in the Hallways: Violence and Discrimination Against Lesbian, Gay, Bisexual, and Transgender Students in U.S. Schools* [hereinafter *Hatred*], available at <http://www.hrw.org/reports/2001/uslgbt/Final-05.htm> (last visited July 1, 2006).

⁴⁹ The Gay, Lesbian, and Straight Education Network, *The 2005 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, and Transgender Youth in Our Nation’s Schools (2006)*, available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/585-1.pdf (last visited July 1, 2006).

⁵⁰ *Id.* at 21.

⁵¹ See *Hatred*, *supra* note 48.

⁵² *Id.* at <http://www.hrw.org/reports/2001/uslgbt/Final-04.htm> (last visited July 1, 2006).

- iii. ***LGBT students are denied opportunities to create school-sanctioned clubs associated with their sexual orientation.*** When faced with students requesting permission to create gay-straight alliance clubs that promote “awareness, safety, respect and tolerance of all sexual orientations,” several schools have attempted to quash club formations by imposing bans on all “non-curricular” student groups.⁵³ In some instances, schools initiating such bans have continued to allow other non-curriculum-related clubs such as “shooting clubs” and school dance teams to meet while denying the gay-straight alliance clubs the same right to hold meetings using school facilities.⁵⁴
- iv. ***LGBT students are not protected against discrimination in the same way that other students are protected.*** Federal legislation in the United States does not explicitly protect students from harassment and discrimination based on sexual orientation and gender identity. Accordingly, while some LGBT students are afforded protection by their local laws or school policies,⁵⁵ the lack of explicit federal legislation means that many LGBT youth in the United States are left vulnerable to discrimination on the basis of their sexual orientation due to the lack of laws or policies protecting LGBT students in the areas where they live.

10. Steps the U.S. Needs to Take to Comply with the ICCPR by Protecting LGBT Youth from Discrimination in Schools

- 10.1. The United States needs to take multiple steps to comply with the ICCPR mandate to protect LGBT youth from discrimination in schools. We respectfully suggest the following recommendations:

Recommendation #5: The Human Rights Committee urges the United States to enact federal nondiscrimination legislation that explicitly protects students from harassment and discrimination on the basis of sexual orientation and gender identity.

Recommendation #6: The Human Rights Committee urges the United States to utilize the U.S. Department of Education to monitor school districts for compliance with nondiscrimination principles and to ensure LGBT students have access to supportive resources with respect to sexual orientation and gender identity.

⁵³ Although, with the assistance of Lambda Legal, the gay-straight alliance settled their federal case, which allowed the gay-straight alliance to have equal protection for the club, schools continue to discriminate against gay-straight alliance clubs necessitating continued litigation to enforce these protections. *Lambda Legal and Noble Street Charter School in Chicago Jointly Announce Agreement: Gay Straight Alliance Will Have Full Support*, available at <http://www.lambdalegal.org/cgi-bin/iowa/news/press.html?record=1969> (last visited July 1, 2006). Lambda Legal is “a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work.” <http://www.lambdalegal.org> (last visited July 1, 2006).

⁵⁴ American Civil Liberties Union, *PRIDE v. White County School District - Case Profile*, <http://www.aclu.org/lgbt/youth/24277res20060227.html> (last visited July 1, 2006).

⁵⁵ Human Rights Watch has noted that, as of 2001, five states had enacted laws that explicitly forbid harassment of and discrimination against LGBT students. In jurisdictions where students lack explicit protection under state law, many schools have implemented codes of conduct that explicitly prohibit harassment and violence against LGBT youth. See *Hatred*, *supra* note 48, available at http://www.hrw.org/reports/2001/uslgbt/Final-04.htm#P544_74276 (last visited July 1, 2006).

V. Military

11. Information on Discrimination in the Military Based on Sexual Orientation in the U.S.

11.1. In 1993, Congress passed legislation⁵⁶ commonly referred to as the “don’t ask, don’t tell” policy.⁵⁷ Under “don’t ask, don’t tell,” the United States military allows lesbian, gay and bisexual (LGB) individuals to serve in the military as long as those servicemembers do not reveal their sexual orientation by word or deed. In return for maintaining silence and celibacy, LGB servicemembers have been promised protection against unwarranted intrusions into their private lives.⁵⁸ The White House has declared that these don’t ask, don’t tell policies are “well established.”⁵⁹

11.2. The following examples illustrate effects of allowing discrimination in the military based on sexual orientation:

- i. ***The privacy of LGB military personnel is violated.*** The “don’t ask” aspect of the policy has failed to prevent officers and servicemembers from invading the privacy of individuals and making unwarranted and unjustified efforts to uncover the sexual orientation of other servicemembers. Each year, members of the military have filed hundreds of incident reports documenting that the “don’t ask” portion of the policy has been violated either explicitly or in spirit.⁶⁰ Nevertheless, no servicemember was held officially accountable for asking, pursuing, or harassing another servicemember for the policy’s first six years.⁶¹
- ii. ***LGB discharges continue to occur since the policy’s implementation.***⁶² In 2001, a record 1,256 servicemembers were discharged from the military because of their actual or perceived sexual orientation. This number nearly doubled the discharge rate of 730 servicemembers from 1992, a year prior to the policy’s enactment.

⁵⁶ 10 USCS § 654 (2006).

⁵⁷ Human Rights Watch, *Uniform Discrimination: The “Don’t Ask, Don’t Tell” Policy of the U.S. Military* [hereinafter *Uniform Discrimination*], available at <http://www.hrw.org/reports/2003/usa0103/USA0103FINAL.htm> (last visited July 1, 2006).

⁵⁸ *Id.*

⁵⁹ At a White House press briefing, the press inquired in to the President’s support of the current policy on homosexual serving in the military. Mr. Snow responded that the President’s policies in this area are well established. *White House Press Briefing* by Tony Snow, June 30, 2006, available at <http://www.whitehouse.gov/news/releases/2006/06/20060629-6.html> (last visited July 1, 2006).

⁶⁰ See *Uniform Discrimination*, *supra* note 57.

⁶¹ In 2000, only three officers were punished for violating the “don’t ask, don’t tell” policy after their involvement was publicized. *Id.*

⁶² Discharges happen even though the “don’t ask, don’t tell” policy was intended to facilitate an increase in the number of gay, lesbian, and bisexual members who were allowed to serve in the United States military. In fact, based on data obtained by the Servicemembers Legal Defense Network, despite the crisis with military personnel since the attacks on 11 September 2001, two servicemembers a day are still discharged from military service based on sexual orientation, even though generally there is a shortage of military personnel. Servicemembers Legal Defense Network, *Military Discharges Two Service Members Per Day For Being Gay, Despite On-Going War and Recruiting & Retention Woes*, (24/05/2006) available at <http://www.sldn.org/templates/pres/s/record.html?record=2979> (last visited July 1, 2006).

- iii. ***LGB military personnel are not protected from harassment and stigmatization.*** The “don’t ask, don’t tell” policy of the United States military has perpetuated prejudice against LGB servicemembers by stigmatizing homosexuality. LGB servicemembers are faced with discrimination in the form of name-calling, threats, and physical violence on a regular basis. According to a Department of Defense survey, eighty percent of servicemember respondents admitted that they had overheard offensive speech, derogatory names, jokes, or negative comments about homosexuals during a yearlong period, and eighty-five percent of the respondents believed that military officials tolerated such discriminatory behavior to some extent.⁶³
- iv. ***LGB military personnel are not protected from employment discrimination.*** Currently, “don’t ask, don’t tell” is the only United States law that specifically authorizes the firing of a person from his or her job solely for acknowledging a homosexual or bisexual orientation.⁶⁴ While heterosexuals in the military are allowed to go on dates, hold hands, kiss publicly, have sexual relations, and talk to other servicemembers about their personal lives with limited restrictions,⁶⁵ LGB personnel are absolutely forbidden from such behavior if they wish to remain a member of the armed forces.

12. Steps the U.S. Needs to Take to Comply with the ICCPR by Providing Equal Protection to LGB People in the Military

- 12.1. The United States needs to take multiple steps to comply with the ICCPR mandate to protect LGB servicemembers from discrimination in the military. We respectfully suggest the following recommendations:

Recommendation #7: The Human Rights Committee urges the United States to replace the “don’t ask, don’t tell” policy with a policy that allows LGB individuals to serve freely and openly in the military, with rights and protections equal to those of heterosexual servicemembers.

Recommendation #8: The Human Rights Committee urges the United States to take effective steps to prevent verbal or physical acts of harassment or abuse on the basis of sexual orientation, such as training officers on LGB issues and including language in non-discrimination clauses of military policies that explicitly mention sexual orientation.

Recommendation #9: The Human Rights Committee urges the United States to suspend all discharges of servicemembers for acknowledging non-heterosexual orientation or engaging in non-heterosexual conduct that does not otherwise violate military rules applicable to heterosexual conduct.

⁶³ See *Uniform Discrimination*, supra note 57.

⁶⁴ *Id.*

⁶⁵ *Id.*

VI. Health Care

13. Information on Discrimination in Health Care Based on Sexual Orientation in the U.S.

- 13.1. Federal, state and local laws, policies, and practices fail to protect LGBT people in a number of areas related to health care. Because United States federal law does not explicitly prevent discrimination in health care based on sexual orientation or gender identity, LGBT individuals frequently suffer discrimination in regards to available health services at clinics, doctor's offices, hospitals, and other health care service providers. Discrimination at the state and local levels often directly threatens the health of the LGBT people or denies them rights that the heterosexual community has been provided.
- 13.2. The following examples illustrate effects of allowing discrimination in health care based on sexual orientation:
- i. **LGBT people continue to be stigmatized because of their sexual orientation.** The Federal Drug Administration (FDA) has contributed to the stigmatization of LGBT people by banning blood donation for life for men who have had sex with other men.⁶⁶
 - ii. **Lesbian women are denied reproductive rights.** Some State agencies and other private medical providers have denied access to reproductive rights to lesbian women who want to have artificial insemination.⁶⁷
 - iii. **Same-sex couples are deprived of equal health benefits.** In many states and cities, same-sex couples do not qualify for their partners' insurance for the purpose of public health benefits.
 - iv. **Transgender inmates are denied hormone therapy.** The Wisconsin state legislature has passed a law to prevent transgender inmates from continuing to receive hormone therapy treatments during the period of their incarceration.⁶⁸
 - v. **Discrimination based on HIV status has a disparate impact on the LGBT community.** Within the LGBT population, people living with HIV face serious

⁶⁶ Human Rights Campaign, *Blood Donations*, available at <http://www.hrc.org/Template.cfm?Section=Health1&CONTENTID=25811&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited July 1, 2006).

⁶⁷ Lambda Legal has pursued legal action to force insurance companies "to relent from enforcing dangerous and irrational rules that require women to have a year of unprotected sex with a man without conception to qualify for fertility services." Further, in "*Benitez v. North Coast Women's Care Medical Group*, Lambda Legal won a landmark appeals court ruling against a fertility doctor in San Diego who, citing personal religious convictions, refused to inseminate a woman after providing months of preparatory treatment." Lambda, *Two Issues, Common Bonds: LGBT Rights and Reproductive Freedom*, available at <http://www.lambdalegal.org/cgi-bin/iowa/news/fact.html?record=1686> (last visited July 1, 2006).

⁶⁸ Lambda Legal is challenging the legislation on behalf of two transgender women. Randi Ettner, a clinical psychologist, asserts that "[i]t is well-established medical practice to prescribe hormone therapy to transgender people....Blocking people from access to hormone treatment after they have been on the treatment is especially dangerous and could cause life-threatening damage including hypertension, diabetes, muscle wasting, osteoporosis and potentially even heart failure." Lambda, *ACLU and Lambda Legal Challenge Law Barring Transgender People Access to Medical Treatment in Prison*, available at <http://www.lambdalegal.org/cgi-bin/iowa/news/press.html?record=1879> (last visited July 1, 2006).

concerns in regards to health care and insurance coverage. Many LGBT people have been denied necessary medical treatments based on their HIV positive status.⁶⁹ One United States circuit court has allowed mutual insurance companies to impose caps on insurance coverage to HIV-positive insured,⁷⁰ in spite of the fact that the same caps are not lawfully imposed over other similar diseases with similar costs.

14. Steps the U.S. Needs to Take to Comply with the ICCPR by Protecting LGBT People from Discrimination in Health Care

14.1. The United States needs to take multiple steps to comply with the ICCPR mandate to protect LGBT people from discrimination in health care. We respectfully suggest the following recommendations:

Recommendation #10: The Human Rights Committee urges the United States to enact federal legislation that explicitly protects members of the LGBT population from discrimination on the basis of sexual orientation and gender identity in regards to health care.

Recommendation #11: The Human Rights Committee urges the United States to remove or revise laws and policies that promote stigmatization of the LGBT population based on sexual orientation and gender identity, such as reconsidering the Food and Drug Administration policy that denies men who have had sex with other men from donating blood.

Recommendation #12: The Human Rights Committee urges the United States to create and implement education campaigns designed to inform and sensitize health care professionals and insurance providers to the needs of LGBT people.

VII. Marital and Partnership Rights

15. Information on Discrimination in Marital and Partnership Rights Based on Sexual Orientation in the U.S.

15.1. Many LGBT citizens in the U.S. are denied equal rights and responsibilities based on relationship status because the government in most jurisdictions does not allow same-sex marriage, or provide domestic partnership benefits. Civil marriage attaches a legal status to a couple which confers both federal and state rights, responsibilities and privileges. In addition to these legal benefits, civil marriage allows for recognition of a

⁶⁹ For example, one patient was denied a scheduled orthopedic surgery when his doctor learned about his HIV condition. Lambda Legal Complaint, *Spera v Orthopedic Associates of Milwaukee, S.C.*, available at http://www.lambdalegal.org/binary-data/LA_MBDA_PDF/pdf/624.pdf 1-12 (last visited July 1, 2006).

⁷⁰ *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Circuit, 1999). U.S. Circuit Court found for Mutual of Omaha Insurance Company that the insurance caps did not violate the Americans with Disabilities Act. The case involved two policyholders whose coverage was limited to \$25,000 for AIDS or AIDS-related conditions, where other health conditions allowed more than \$1 million in benefits. In 2000, Mutual of Omaha decided to remove its caps; however the court decision is still binding authority. Lambda Legal, *Mutual of Omaha Insurance to Lift Discriminatory Caps on AIDS Coverage*, (12/04/2000), available at <http://www.lambdalegal.org/cgi-bin/iowa/news/press.html?record=622> (last visited July 1, 2006).

couple's commitment to one another that is significant both socially and culturally.⁷¹ According to the U.S. General Accounting Office, more than 1,100 federal benefits and protections derive from civil marriage.⁷²

15.2. The Human Rights Campaign⁷³ recorded the following effects of the limitations on same-sex couples due to discrimination in marital and partner rights:

- i. ***Employees in same-sex relationships are not given the right to take care of a seriously ill partner or parent of a partner under current provisions in the federal Family and Medical Leave Act.***
- ii. ***Same-sex couples are denied Social Security benefits when a life partner dies.***
- iii. ***U.S. citizens who have same-sex partners are prohibited from petitioning for their partners to immigrate, forcing thousands of couples to live apart or to migrate to one of the 17 countries⁷⁴ with more hospitable immigration laws.***
- iv. ***Under federal tax laws, same-sex couples are taxed on employer-provided insurance benefits for domestic partners whereas married spouses receive those benefits tax-free.***

15.3. Human Rights Watch⁷⁵ listed additional limitations on same-sex couples due to discrimination in marital and partner rights. Same-sex couples cannot:

- i. ***Share equal rights and equal responsibilities for children in their care;***
- ii. ***Have their partner covered under their health or employment benefits;***
- iii. ***File joint tax returns and enjoy tax benefits for couples, obtain joint insurance policies, or even rent or own property together;***
- iv. ***Obtain a protection order against domestic violence;***
- v. ***Get a fair settlement of property when the relationship ends;***
- vi. ***Inherit from a deceased partner if he lacked a valid will;***

⁷¹ National Center for Lesbian Rights, *Marriage, Domestic Partnerships, and Civil Unions: An Overview of Relationship Recognition for Same-Sex Couples in the United States*, (September 2005), available at http://www.nclrights.org/publications/pubs/marriage_equality0905.pdf (last visited July 1, 2006).

⁷² GAO-04-353R, United States General Accounting Office, *Defense of Marriage Act: Update to Prior Report* (2004), available at <http://www.gao.gov/new.items/d04353r.pdf> (last visited July 1, 2006).

⁷³ Human Rights Campaign, *Protecting LGBT Families*, available at http://www.hrc.org/Content/NavigationMenu/HRC/Get_Info_rmed/Issues/LGBT_Families/LGBT_Families_Intro.htm (last visited July 1, 2006).

⁷⁴ The countries include: Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Israel, the Netherlands, New Zealand, Norway, South Africa, Spain, Sweden and the United Kingdom. Human Rights Campaign, *Uniting American Families Act*, available at http://www.hrc.org/Template.cfm?Section=Uniting_American_Families_Act&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=23&ContentID=27510 (last visited July 1, 2006).

⁷⁵ Human Rights Watch, *Non-Discrimination in Civil Marriage: Perspectives from International Human Rights Law and Practice* (2003), available at <http://hrw.org/backgrounders/lgbt/civil-marriage.pdf> (last visited July 1, 2006).

vii. **Choose a partner's final resting place;**

viii. **Obtain pension benefits if the partner dies.**

15.4. The Defense of Marriage Act,⁷⁶ which defines marriage as between a man and a woman, denies federal rights, responsibilities, and privileges even if a state chooses to allow same-sex marriage, and allows states to deny recognition of a same-sex marriage performed in another state.⁷⁷ Further, many states have enacted parallel legislation denying civil marriage to same-sex couples.

15.5. The proposed Federal Marriage Amendment supported by the Bush Administration discriminates against LGBT people in the same way as the Defense of Marriage Act⁷⁸ by limiting marriage to heterosexual couples in the same manner as does the Defense of Marriage Act, but this amendment would create the discrimination in the U.S. Constitution itself.

16. Steps the U.S. Needs to Take to Comply with the ICCPR by Providing Equal Protection to LGBT People in Marital and Partnership Rights⁷⁹

16.1. The United States needs to take multiple steps to comply with the ICCPR mandate to protect LGBT people from discrimination in regards to marital and partnership rights. We respectfully suggest the following recommendations:

Recommendation #13: The Human Rights Committee urges the United States to repeal the federal Defense of Marriage Act and to grant to same-sex married couples the same federal rights, responsibilities and privileges that flow from legally recognized marriage.

Recommendation #14: The Human Rights Committee urges the United States to encourage legislation at the state level that provides for legal recognition of same-sex marriage.

Recommendation #15: The Human Rights Committee urges the United States to support the Family and Medical Leave Inclusion Act, which would amend the Family and Medical Leave Act to include provisions for domestic partners and same-sex married partners.

⁷⁶ 1 U.S.C. § 7 and 28 U.S.C. § 1738C (Sept. 21, 1996).

⁷⁷ Human Rights Campaign, *What the Defense of Marriage Act Does*, available at <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=15330&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited July 1, 2006).

⁷⁸ See *supra* para 15.4.

⁷⁹ One positive measure in the U.S. to provide equal rights to gay couples includes the allowance of gay marriage in the State of Massachusetts. Vermont and Connecticut allow civil unions. Hawaii has a provision for Reciprocal Beneficiaries, but it only attaches approximately 60 state rights and responsibilities. Other states or local jurisdictions have provided for domestic partnership registries which allow for certain rights and responsibilities. See National Center for Lesbian Rights, *Marriage, Domestic Partnerships, and Civil Unions: An Overview of Relationship Recognition for Same-Sex Couples in the United States* (2005), available at http://www.nclrights.org/publications/pubs/marriage_equality0905.pdf (last visited June 30, 2006).

Recommendation #16: The Human Rights Committee urges the United States to call on the President to cease support of the Federal Marriage Amendment.

VIII. Parenting, Adoption, and Foster Care

17. Information on Discrimination Based on Sexual Orientation in the U.S. in Parenting, Adoption, and Foster Care Rights

17.1. In the United States, each state inherently has power to determine its own adoption, custody, and visitation laws. Therefore, state laws range from supporting second parent adoption to denying adoption rights of LGBT people.⁸⁰ In Florida, for example, adoption statutes explicitly prohibit any person who is “homosexual” from adopting.⁸¹ In Mississippi, gay couples cannot adopt.⁸² In Utah, same-sex couples cohabiting together may not adopt.⁸³ In other states, new bills are introduced each year that deny LGBT people the ability to adopt or to be foster parents.⁸⁴ Because of these anti-gay adoption laws, many children are removed from homes with gay foster parents based solely on the sexual orientation of the parents, not based on what is in the best interest of the child.

17.2. The following examples illustrate effects of denying legal parentage to same-sex partners and denying adoption to LGBT people:

- i. ***Children of same-sex couples are vulnerable to separation from primary caretakers if the legal parent⁸⁵ dies or becomes incapacitated.*** If these circumstances occur in a state that does not allow second-parent or joint adoption, family members of the incapacitated or deceased parent may make a claim to be awarded custody of the children, and courts are not required to adhere to a legal parent’s wishes. A court could disregard the relationship with the non-legal parent and decide to place the child with distant family members with whom the child has no bond, or to make the child a ward of the

⁸⁰ Second parent adoption “is a legal procedure that allows a same-sex parent to adopt her or his partner’s biological or adoptive child without terminating the first parent’s legal status as a parent.” National Center for Lesbian Rights, *Second Parent Adoptions: A snapshot of current law* (2003), at 6, available at <http://www.nclrights.org/publications/pubs/2pa0803.pdf> (last visited June 30, 2006).

⁸¹ Fla. Stat. § 63.042 (3). (2006). The adoption ban has been in place since 1977 and has survived legal challenges in federal and state courts. *Lofton v. Secretary of Dept. of Children and Family Services*, 358 F. 3d 804 (11th Cir. 2004); *Department of Health & Rehabilitative Servs. v. Cox*, 627 So 2d 1210(Fla 2d DCA 1993).

⁸² MISS. CODE ANN. § 93-17-3(2). (2006).

⁸³ UTAH CODE ANN. § 78-30-1(3)(b). (2006).

⁸⁴ Andrea Stone, USA Today, *Drives to Ban Gay Adoption Heat up in 16 states*, (20/02/2006), available at http://www.usatoday.com/news/nation/2006-02-20-gay-adoption_x.htm?POE=NEWISVA (last visited July 1, 2006). Three anti-gay adoption bills were introduced in Tennessee alone. The Advocate, *Tennessee lawmakers consider three antigay adoption bills*, (06/04/2006) available at http://www.advocate.com/news_detail_ektid28921.asp (last visited July 1, 2006).

⁸⁵ This report uses the term “legal parent,” because although children may consider a biological or adoptive parent’s partner his or her parent, under the law, parentage is a distinct concept that guarantees certain rights and responsibilities. See American Civil Liberties Union, *Too High a Price: The Case Against Restricting Gay Parenting*, 2nd Ed. (2006), at 8-9, available at http://www.aclu.org/images/asset_upload_file953_24098.pdf (last visited July 1, 2006).

state. If a child is separated from a parent's same-sex partner, emotional trauma and unnecessary litigation costs often result.⁸⁶

- ii. ***Children are denied adequate protection under the law.*** Another consequence of laws that do not allow second-parent or joint adoption is that children of same-sex couples are not entitled to the full range of benefits afforded children in heterosexual households, such as health or other insurance, financial support, inheritance, Social Security benefits, retirement benefits, or state worker's compensation.⁸⁷
- iii. ***A child may be denied essential health care if the legal parent is unavailable to make health care decisions.*** The provisions of the Family and Medical Leave Act do not apply to same-sex partners, leaving the non-legal parent ineligible for parental leave to care for their seriously ill child. Further, a same-sex partner of the legal parent is not able to consent to medical treatment for the child, or even to visit the child in a hospital emergency room.⁸⁸
- iv. ***Children languish in foster care systems.*** Foster care systems are overwhelmed with children who need to be placed with families that will provide for them. However, some jurisdictions disfavor placement in same-sex households and deny foster children the opportunity to join stable, caring families.

18. Steps the U.S. Needs to Take to Comply with the ICCPR by Protecting LGBT People and Their Children from Discrimination in Parenting, Adoption, and Foster Care

- 18.1. The United States needs to take multiple steps to comply with the ICCPR mandate to protect LGBT people from discrimination in regards to parenting, adoption, and foster care. We respectfully suggest the following recommendations:

Recommendation #17: The Human Rights Committee urges the United States to encourage enactment of legislation that ensures non-discrimination in adoption, foster care, custody, and visitation based on sexual orientation and gender identity.

Recommendation #18: The Human Rights Committee urges the United States to support stronger legal relationships between children and their same-sex parents by enacting same-sex marriage legislation so that children are granted the same rights, and parents the same responsibilities, that flow from heterosexual marriage.

⁸⁶ National Center for Lesbian Rights, *Adoption by Lesbian, Gay, and Bisexual Parents: An Overview of Current Law* (2004) at 8, available at <http://www.nclrights.org/publications/pubs/adptn0204.pdf> (last visited July 1, 2006).

⁸⁷ *Id.* at 9.

⁸⁸ *Id.* at 8.

Recommendation #19: The Human Rights Committee urges the United States to encourage enactment of second-parent adoption statutes that protect all children and grant them the same rights, and the parents the responsibilities, that flow from legal parentage.

IX. Immigration

19. Information on Discrimination in Immigration Based on Sexual Orientation in the U.S.

19.1. The United States government has failed to take adequate measures to explicitly provide its LGBT citizens and residents with equal protection under its immigration policy. While heterosexual citizens and residents can request visas for their spouses, LGBT citizens and residents of the United States are denied the right to sponsor their same-sex spouses or partners⁸⁹ for permanent resident status because of laws that do not recognize same-sex marriage.⁹⁰ This is further complicated by the fact that same-sex couples are not able to marry.

19.2. The following examples illustrate effects of denying equal protection to LGBT people in immigration:

- i. **Same-sex immigrant couples are vulnerable to family separation.** By denying LGBT citizens and residents the ability to sponsor their spouses and companions for citizenship or residency, current United States immigration policy often facilitates the destruction of LGBT relationships and families. If LGBT citizens and residents refuse to live separately from their spouse or legal companion, they frequently have no choice but to leave the United States and relocate to other countries where their same-sex relationship can be acknowledged. Leaving the United States often requires LGBT citizens and residents to sacrifice their career goals and live long distances from their extended families and friends.⁹¹
- ii. **Same-sex immigrant couples experience increased hardship.** Same-sex immigrant couples are forced to live in fear of possible deportation because of a lack of legal documentation,⁹² to juggle student, work, and tourist visas in order to stay with their same-sex partner,⁹³ or to live in poverty because of the amount of money spent on legal fees, immigration fees, and travel expenses incurred to

⁸⁹ Partners are included even though heterosexual partners are not included for family-based immigration because in the majority of states same-sex marriage is not allowed. If same-sex couples were allowed to legally marry, then they would be able to take advantage of family-based immigration policies. In the state of Massachusetts and in countries where same-sex marriage is legal, a binational same-sex couple is still not allowed to take advantage of family-based immigration policies. See *supra* paras. 15 – 16.

⁹⁰ These discriminatory practices implicate the rights to “privacy”, “family” and “home” protected by Article 17 of the ICCPR. See *supra* para 2.2.

⁹¹ This situation caused Martha McDevitt-Pugh, a U.S. citizen who relocated in the Netherlands, to state: “My own country has turned its back on me and many other gay and lesbian citizens.” Scot Long et al., Human Rights Watch and Immigration Equality, *Family Unvalued Discrimination, Denial, and the Fate of Binational Same-Sex Couples Under U.S. Law*, available at <http://hrw.org/reports/2006/us0506/FamilyUnvalued.pdf> (2006), 1, 88 (last visited July 1, 2006).

⁹² *Id.* at 74.

⁹³ Many U.S. citizens and residents financially support their same-sex partner in school in order to maintain their student status in the United States. Others try to change their tourist visa to a student visa or employment-based visa. *Id.* at 59.

maintain residency with their same-sex partners.⁹⁴

- iii. ***LGBT immigrants are treated disrespectfully during the immigration process.*** Because immigration officers and judges do not always fully grasp issues of sexuality and gender identity, many act disrespectfully to petitioners who disclose their sexual orientation during immigration proceedings, treating LGBT people with sarcasm and contempt.⁹⁵ At other times, immigration officers have reportedly harassed LGBT partners by asking them questions about their sexual orientation⁹⁶ or by unfairly singling out LGBT citizens and residents for immigration investigations.⁹⁷ Immigration detention facilities also fail to provide protection to LGBT people.⁹⁸ Immigration authorities often detain LGBT people in the same cells and detention centers as the general population, putting LGBT detainees in a position that leaves them vulnerable to murder or rape.
- iv. ***United States policies stigmatize HIV-positive immigrants.*** Under the “HIV Ban,” HIV-positive individuals are not able to obtain legal residence in the United States unless they provide a waiver that guarantees payment for their medical treatment.⁹⁹

20. Steps the U.S. Needs to Take to Comply with the ICCPR by Providing Equal Protection to LGBT People in Immigration

- 20.1. The United States needs to take multiple steps to comply with the ICCPR mandate to protect LGBT people from discrimination in regards to immigration. We respectfully suggest the following recommendations:

Recommendation #20: The Human Rights Committee urges the United States to implement immigration policies that recognize same-sex marriage for immigration purposes and allow LGBT individuals in same-sex partnerships to sponsor the immigration of their partners/spouses.

Recommendation #21: The Human Rights Committee urges the United States to train immigration judges and immigration officers on sexual orientation and gender identity issues to prevent discriminatory practices and provide protection and accommodations for LGBT people within immigration detention facilities.

Recommendation #22: The Human Rights Committee urges the United States to remove the HIV ban and any restrictions that discriminate against people living with HIV in United States immigration policies.

⁹⁴ *Id.* at 94.

⁹⁵ *Id.* at 45.

⁹⁶ *Id.* at 70.

⁹⁷ *Id.* at 68-69.

⁹⁸ *Id.* at 80.

⁹⁹ See Immigration Equality, *HIV Ban*, available at <http://www.immigrationequality.org/template.php?pageid=176> (last visited July 1, 2006).

X. Transgender Rights

21. Information on Discrimination against Transgender People in the U.S.

21.1. Because federal law does not provide explicit protection from discrimination for transgender individuals, transgender people must often rely on state or local laws or policies to provide them with protection.¹⁰⁰ Although two recent federal court decisions have recognized that sex discrimination can involve sexual stereotyping, most federal courts have held that Congress did not intend Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in the workplace, to include discrimination on the basis of gender identity or sexual orientation.¹⁰¹ Due to this lack of federal protection, the National Gay and Lesbian Task Force estimates that nearly seventy percent of the United States population live in jurisdictions where anti-discrimination laws are not explicitly transgender-inclusive.¹⁰²

21.2. The following examples illustrate effects of allowing discrimination against Transgender people:

- i. ***Transgender people are often targeted for particularly violent hate crimes.***¹⁰³ One expert estimates that compared to an average individual's one in 18,000th chance of being murdered, a transgender person's chances of being murdered are one in twelve.¹⁰⁴ Because of doubts within the transgender community that state and local authorities will treat them with dignity and respect, many crimes perpetrated against transgender people go unreported. Well-publicized incidents in the United States have also given transgender people reason to believe that even when crimes against transgender individuals are reported, allegations will not always be fully investigated and victims will not necessarily be protected from additional attacks or retaliation.¹⁰⁵ Transgender individuals are often leery of dealing with law enforcement because many officers lack training or an understanding of transgender people.¹⁰⁶

¹⁰⁰ Currently, eight states explicitly include the term "gender identity" in their anti-discrimination laws, while additional states have judicial or administrative rulings in which discrimination based on gender identity has been found to be actionable under sex and/or disability discrimination laws. As of April 2006, at least eighty local jurisdictions in the United States have also added gender identity to their non-discrimination ordinances. National Gay and Lesbian Taskforce [hereinafter NGLTF], *Jurisdictions with Explicitly Transgender-Inclusive Anti-Discrimination Laws*, available at <http://www.thetaskforce.org/downloads/trans/PopulationsJurisdictionsVerticalApr06.pdf> (last visited July 1, 2006); National Center for Transgender Equality, *Hate Crime Laws*, (April 2006), available at http://www.nctequality.org/Hate_Crimes.asp (last visited July 1, 2006).

¹⁰¹ Human Rights Campaign, *Transgender Basics*, [hereinafter *Transgender Basics*] available at http://www.hrc.org/Content/NavigationMenu/HRC/Get_Informed/Issues/Transgender_Issues1/Transgender_Basics/Transgender_Basics.htm (last visited July 1, 2006).

¹⁰² See *NGLTF*, *supra* note 100.

¹⁰³ See *Transgender Basics*, *supra* note 101.

¹⁰⁴ *Id.*

¹⁰⁵ Brandon Teena, a 21-year-old transgender person, was raped and later killed after two friends discovered that he was biologically female. Teena reported the crime to police but the county sheriff, referring to Teena as "it", would not allow his deputies to arrest Teena's attackers. A few days later, Teena was shot and stabbed to death when his attackers returned to the farmhouse where he was staying. *Id.*

¹⁰⁶ *Id.*

- ii. **Transgender individuals are not protected against employment discrimination.** Discrimination in regards to applying for jobs, obtaining employment, securing promotions, and remaining employed is often experienced by transgender people. When employed transgender individuals come out, transition on the job, or have their birth sex discovered, they are often left unprotected by laws that allow individuals to be dismissed on the basis of their gender identity and expression.¹⁰⁷ Chronic unemployment or underemployment of transgender people is often a consequence.
- iii. **Transgender individuals are denied adequate health care.** In addition to the difficulties that many transgender people experience as a result of their exempted status¹⁰⁸ under the federal Americans with Disabilities Act (ADA),¹⁰⁹ many transgender people also suffer discrimination by members of the medical community who refuse to treat them.¹¹⁰ Many state officials across the United States have also attempted to require proof of a “sex change” or genital surgery before they will alter the sex marker on birth certificates, limiting the ability of transgender people to travel or to apply for jobs, educational programs, or necessary government services due to inaccurate identity documentation.¹¹¹
- iv. **Transgender prisoners struggle for the right to obtain proper health care while incarcerated.** In 2005, the Wisconsin legislature passed a bill that terminated state funding of hormone therapy and sex reassignment surgery for transgender inmates in state custody.¹¹² The Wisconsin law ignored the warnings of medical experts who agree that blocking transgender people from access to hormone therapy after they have previously received treatment can cause life-threatening damage.¹¹³ Even in prisons that provide hormones to transgender individuals, inmates often have no assurance that appropriate hormone levels or necessary physical and psychological support services will be provided to them.¹¹⁴

22. Steps the U.S. Needs to Take to Comply with the ICCPR by Providing Equal Protection to Transgender People

- 22.1. The United States needs to take multiple steps to comply with the ICCPR mandate to protect transgender people in regards to their sexual orientation and/or gender identity. We respectfully suggest the following recommendations:

¹⁰⁷ *Id.*

¹⁰⁸ The United States Congress has chosen specifically to exempt the transgender community from coverage under the Americans with Disabilities Act. *Id.*

¹⁰⁹ 42 USCS § 12101. (2006)

¹¹⁰ Twenty doctors refused to treat Robert Eads, a female-to-male transsexual who lived in Georgia, for his cervical cancer. By the time Eads found a doctor willing to treat him over 100 miles away from his home, it was too late for the cancer treatment to be effective. See *Transgender Basics*, *supra* note 101.

¹¹¹ Lambda Legal, *Putting Transgender Health Care Myths on Trial*, available at <http://www.lambdalegal.org/cgi-bin/io/wa/news/publications.html?record=1961> (last visited July 1, 2006).

¹¹² *Id.*

¹¹³ American Civil Liberties Union, *Transgender Inmates are Barred from Medical Treatment*, available at <http://www.aclu.org/lgbt/transgender/24920res20060127.html> (last visited on July 1, 2006).

¹¹⁴ National Center for Lesbian Rights, *Fact Sheet: Rights of Transgender Prisoners*, available at <http://www.nclrights.org/publications/tgprisoners0804.htm> (last visited July 1, 2006).

Recommendation #23: The Human Rights Committee urges the United States to enact or amend federal legislation to explicitly protect transgender individuals from harassment and discrimination on the basis of gender identity in areas such as employment and health care.

Recommendation #24: The Human Rights Committee urges the United States to ensure that transgender crime victims are treated with dignity and respect and that law enforcement and judicial officials are adequately trained to sensitize them to the rights of the transgender population.

Recommendation #25: The Human Rights Committee urges the United States to remove the transgender population from exempt status under the Americans with Disabilities Act.

Conclusion

LGBT persons in the United States are entitled to full recognition of the rights recognized under the International Covenant on Civil and Political Rights. Unfortunately, in many areas, the current legal climate in the United States fails to afford LGBT persons equal protection under the law, freedom from discrimination, or freedom from incursions on the right to privacy.

Violations of the ICCPR in the United States are numerous. United States legislation fails to adequately provide LGBT victims with a cause of action or criminal sentencing for hate crimes based on sexual orientation or gender identity, and victims continue to suffer abuse and violence by private citizens and police officers. Many LGBT people have no legal recourse when they are harassed, fired, or denied employment based on their sexual orientation or gender identity. In public schools, LGBT students are often inadequately protected against discrimination and harassment and are denied opportunities to create school-sanctioned clubs associated with their sexual orientation and gender identity. A court could disregard the relationship with the non-legal parent and decide to place the child with distant family members with whom the child has no bond, or to make the child a ward of the state. If a child is separated from a parent's same-sex partner, emotional trauma and unnecessary litigation costs often result. In the military, LGB personnel suffer discrimination at the hands of the "don't ask, don't tell" policy, which specifically authorizes dismissal on grounds of sexual orientation and prevents LGB soldiers from displaying affection that heterosexual soldiers are allowed. Federal law fails to explicitly protect LGBT people from discrimination in health care, resulting in the perpetuation of stigmatization and the denial of numerous rights afforded to the heterosexual population. Same-sex marriages are not recognized as legal marriages, and LGBT couples are denied rights, responsibilities, and privileges available to heterosexuals. LGBT couples and parents are denied equal protection of the law in regards to adoption, foster care, and parental rights. LGBT couples are vulnerable to family separation and experience increased hardships as a result of policies that do not allow LGBT residents and citizens the right to sponsor their immigrant partners for permanent resident status. Federal protection fails to explicitly protect the transgender population, who suffer pervasive discrimination in areas such as hate crimes, employment, and health care.

The United States government maintains the international legal obligation to ensure that all people within its territory and subject to its jurisdiction, including LGBT persons, are afforded all internationally recognized human rights, which include the civil and political rights protected under the ICCPR. While the *Toonen* and *Young* decisions of the Human Rights Committee clearly demonstrate that sexual orientation is included under the protections provided by Articles 2, 17, and 26 of the ICCPR, the United States has continued to perpetuate a legal system in which LGBT persons suffer discrimination on the basis of their sexual orientation and/or gender identity.

Thus, we respectfully request that the Human Rights Committee conclude that the United States government is in violation of its obligations under Articles 2, 17, and 26 of the ICCPR. We urge the Human Rights Committee to call on the United States government to make a probing examination of its policies to protect the civil and political rights of its LGBT population, and to implement legislation and policies to ensure that all LGBT persons in the United States are afforded the human rights protections to which they are entitled.
