



Lesbian, Gay, Bisexual, and Transgender Rights in the United States

This shadow report on lesbian, gay, bisexual, transgender and intersex rights in the United States was coordinated by the Council for Global Equality and Global Rights, in cooperation with Human Rights Campaign, Human Rights First, National Center for Lesbian Rights, and Immigration Equality.

Executive Summary

The founding documents of the United States speak of equality and inalienable rights, and in that spirit, the United States proudly contributed to the founding of the United Nations and the birth of the modern human rights movement. However, in the year 2010, lesbian, gay, bisexual, and transgender (LGBT) Americans remain decidedly second-class citizens in the United States. Deprived of basic Constitutional protections at the federal level and denied essential family recognition in most state and local jurisdictions, LGBT Americans are still waiting for the long arc of the moral universe to bend toward justice, as it has for other historically disadvantaged communities in the struggle for fully equal civil rights in the United States. Although several crucial pieces of LGBT equality legislation are winding their way slowly through the U.S. Congress, the daily reality for far too many LGBT citizens remains discrimination, violence, and disrespect.

We are proud that our country has announced its commitment to the UN General Assembly Statement on Human Rights, Sexual Orientation and Gender Identity. However, it must also ensure that those same protections are afforded to LGBT Americans in this country. It is time for the United States to adopt legislation that will give full human rights to all LGBT Americans, while simultaneously standing squarely for human rights protections on the world stage. Based on U.S. obligations under the International Covenant on Civil and Political Rights (ICCPR), the United States should move now to provide remedies that address the following human rights concerns in the United States.

- Hate crimes based on sexual orientation and gender identity must be actively deterred. Those that occur must be prosecuted with the full force of the law and with a conviction that reflects the harm that such crimes impose, not just on a victim but on an entire community. State and local jurisdictions must continue to pass laws to protect victims from hate crimes, as well as report hate crimes to federal authorities.
- Private and governmental employers in the United States must be prohibited in law from discriminating against individuals because of their sexual orientation or gender identity. This protection should apply to hiring and firing, training and promotion, and employee benefits.

- LGBT individuals must be allowed to form secure and stable families in the United States. Restrictions at both federal and state levels must be removed in order for families to be allowed equal protections and responsibilities. Unchecked majority rule through referenda should not be allowed to strip away rights from minority groups.
- LGBT individuals in detention need greater protections because they are subject to far more sexual violence by guards and fellow prisoners than heterosexual individuals in prison.
- Changes are needed in both asylum practices and other immigration rules that unfairly discriminate against LGBT asylum seekers and immigrants.
- State laws should be streamlined and updated to permit transgender persons to change their names or legal sex on official documents without requiring invasive surgeries.
- LGBT youth and children of LGBT parents are particularly vulnerable to violence, abuse, and discrimination. Protections should be implemented for their benefit.

Substantive Violations of the Convention

Articles 2(1) and 26 (Non-discrimination)

The principle of non-discrimination provides a cross-cutting frame of protection for lesbian, gay, bisexual and transgender people under the ICCPR. In the case of *Toonen v. Australia*¹, the Human Rights Committee considered the criminalization of private sexual activity between consenting, same-sex adults and found such laws violated articles 2(1), 17 and 26 of the Covenant. That decision has been referenced many times by the Committee, by other treaty bodies and by the UN special procedures when affirming that articles 2(1) and 26 of the Covenant prohibit discrimination based on sexual orientation.

Employment Discrimination

In considering the last periodic report of the United States in 2006, the Human Rights Committee's concluding observation "notes with concern the failure of the U.S. to outlaw employment discrimination on the basis of sexual orientation in many states." The Committee called on the United States to "acknowledge its legal obligation under articles 2 and 26 to ensure to everyone the rights recognized by the Covenant, as well as equality before the law and equal protection of the law, without discrimination on the basis of sexual orientation." It also specifically asked the United States to ensure that "federal and state employment legislation outlaw discrimination on the basis of sexual orientation."²²

¹ Communication no. 488/1992.

Unfortunately, qualified, hardworking Americans are still denied job opportunities, fired or otherwise discriminated against – just because they are LGBT. There is no federal law that consistently protects LGBT individuals from employment discrimination. It remains legal in 28 states to discriminate in employment based on sexual orientation, and in 36 states to do so based on gender identity or expression. As a result, LGBT people face serious discrimination both in the job market and within the workplace.

Such discrimination is not only legal in the private sector, but it is also legal for many state and local governments. For example, according to her testimony before the U.S. Senate Health, Education, Labor and Pensions Committee on September 23, 2009, Ms. Vandy Beth Glenn was fired in 2007 from her job working for the General Assembly in Georgia because of her gender identity. Glenn, who served in the U.S. Navy as a lieutenant, had been hired by the Georgia General Assembly in 2005 as an editor in the Office of Legislative Counsel, where she edited bills and resolutions during the annual legislative session. At that time, Glenn was still living as a man – despite having understood since childhood that her gender identity was female. In the fall of 2007, after telling her friends and family that she was transgender, she was ready to come to work as female. When she told her supervisor that she would be transitioning, her immediate boss called her into his office and told her that her decision was immoral and inappropriate and that she was fired. In her testimony before the Committee, Glenn emphasized:

“My editorial skill had not changed. My work ethic had not changed – I was still ready and willing to burn the midnight oil with my colleagues, making sure that every bill was letter-perfect. My commitment to the General Assembly, to its leaders, and to Mr. Brumby [her boss] had not faltered. The only thing that changed was my gender – and because of that, the legislature I’d worked so hard for no longer had any use for my skills. I was devastated.”

The State of Georgia fired Glenn because of her gender identity, and there is no law that explicitly protects Glenn from being fired for that reason.

Employment Discrimination in the Armed Forces

While legislative change appears imminent, the U.S. Armed Forces, which is the largest employer in the United States, still statutorily discriminates against lesbian and gay individuals. The U.S. Code currently prohibits lesbians and gays from serving openly in the U.S. Armed Forces. This law, commonly referred to as “Don’t Ask, Don’t Tell” (DADT), is the only law in the country that requires people to be dishonest about their personal lives or face the possibility of being fired. Since DADT was enacted in 1993, over 14,000 lesbian and gay service members have been discharged from the Armed Forces because their sexual orientation was exposed against their will or because they were open and honest about their sexual orientation.

Mike Almy serves as an example of the many individuals discharged from the Armed Forces under DADT. Almy joined the U.S. Air Force in 1993. He served a total of

thirteen years on active duty as a communications officer before he was discharged under DADT in 2006. During his career in the Air Force, Almy was stationed in both the United States and Germany. He was deployed to the Middle East four times during his career, supporting Operation Desert Fox, Operation Southern Watch and Operation Iraqi Freedom. As a service member, Almy was awarded the Joint Commendation Medal, the Air Force Commendation Medal and the Humanitarian Service Medal. He was also named Officer of the Quarter and Officer of the Year several times throughout his career. In 2005 he was named the top communications officer for the Air Force in Europe, and in 2006 he was recommended for promotion to Lieutenant Colonel. Despite these accomplishments, Almy was discharged from the Air Force because of his sexual orientation.

During his time in Iraq, the Air Force restricted service members from accessing private email accounts. As such, service members were authorized to use work email accounts for personal or morale purposes. Shortly after Almy left Iraq, someone in the unit that replaced Almy's unit did a routine search of computer files and found Almy's personal emails, which were written from a combat zone to family and friends, including a person he had dated. Because Almy is gay, and his emails documented this, Almy was discharged from the Air Force – losing his career and his access to certain benefits.

Using Popular Votes to Deny the Rights of Minorities

Twenty-eight states in the United States have ballot initiatives or popular referenda whereby citizens, collecting a minimum number of signatures on a petition within a specified time, place statutes or constitutional amendments on the ballot for citizens to adopt or reject. These mechanisms increasingly have allowed voters to limit the rights of LGBT people and other minority populations – sometimes taking away rights previously enjoyed and allowed by State legislatures or courts. Popular votes have been held in 30 states, enshrining discrimination into state constitutions regarding same-sex relationship recognition. For example, in November 2008, California voters approved Proposition 8, which amends the state constitution to prohibit same-sex marriage. Proposition 8 reverses the California Supreme Court's 2008 decision allowing same-sex marriage. Other states have held popular votes on other LGBT family recognition issues such as adoption. For example, in Arkansas in the 2008 election, the citizens stripped away the rights of same-sex couples to adopt or be foster parents.

When unchecked majority rule goes too far, and rights are removed from a particular group in society, this violates the principle of non-discrimination that is upheld in the ICCPR Article 26. It also violates Article 3 of the Inter-American Democratic Charter, which claims, "Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms..." Simply stated, when the United States allows a majority of citizens to take existing rights away from a minority group, it is not applying equal protection under the law for all of its citizens and is not respecting the human rights and fundamental freedoms of those citizens.

Concluding Observations

Employment discrimination by the private sector, by state and local governments, and by the U.S. Armed Forces could become a relic of the past if a range of legislation currently pending in the U.S. Congress were to be passed. The Administration of President Obama supports enactment of the following federal statutes and should indicate as much in its report under the ICCPR:

ENDA. The Employment Non-Discrimination Act (ENDA) would provide basic protections against workplace discrimination on the basis of sexual orientation and gender identity. ENDA, which would apply to both the public and private sectors, simply provides all Americans with basic employment protection from discrimination based on irrational prejudice.

Repeal Legislation. According to legislation currently being debated in the U.S. Congress, the DADT law would be repealed after the Executive Branch of the U.S. government certifies that repealing the law is consistent with the military standards for readiness, effectiveness, unit cohesion, recruitment, and retention. The executive branch must act swiftly in order for this discriminatory law to be repealed.

Limiting the Referenda Process. When states recognize the relationships of LGBT citizens, it should not be permissible to take away those rights through a majority vote of the electorate – nor should referenda be allowed to preemptively limit those rights. In the same manner that the U.S. government has opposed limitations on the civil rights of minority populations in other countries, a ballot vote should not be allowed to take away the civil rights of minority populations in this country. The federal government must oppose ballot initiatives that strip same-sex couples of relationship and family protections.

Article 3 (Equal Rights of Men and Women)

The extent to which sexual orientation is a ground of inequality that uniquely affects women has been considered by the U.N. Special Rapporteur on Violence Against Women. In her January 2005 report, she noted that sexual orientation discrimination, combined with other factors of discrimination, creates “multiple forms of oppression that keep women subordinated.” Lesbians, and more generally women who do not live according to the requirements of heterosexist norms, are subjected to violence and rape, as denounced by the Special Rapporteur in many of her reports. The compounded impact of discrimination against women because of their sexual orientation and gender has also been reported by the Special Representative of the Secretary General on the Situation of Human Rights Defenders and in several concluding observations issued by the U.N. Committee on the Elimination of Discrimination Against Women.

One particular area of concern is that lesbian and transgender women face significantly heightened risk of sexual violence from male officers upon arrest and in custodial detention. For example, one study of sexual coercion in Midwestern prisons found that

gay, lesbian, and bisexual inmates were disproportionately represented among the subgroup of sexually victimized inmates, with lesbian and bisexual women making up 38 percent of the women victimized². According to a South Florida newspaper, a transgender woman in a Florida Immigration Detention Center was repeatedly sexually abused while she held in solitary confinement, where she was placed because officials were unsure whether to house her with men or with women. The officer was ultimately convicted of having sex with a detainee, but not of rape.³

Many lesbian and transgender women are harassed or sexually assaulted by state and non-state actors for their failure to conform to gender stereotypes. The crimes committed against them often manifest an intention by the perpetrator to “punish” the victim for transgressing gender roles. For example, on March 18, 2010, Autumn Sandeen, a retired U.S. Navy officer and transgendered woman, was arrested for civil disobedience at a DADT protest in Washington, D.C. Sandeen was repeatedly identified as male and subjected to taunts of “shim” and “it” by U.S. officials while in custody⁴. When such crimes are committed by police, prison personnel or other state actors, or when investigations of these crimes are downgraded, dismissed or trivialized, they also constitute torture under article 7 of the ICCPR.

Concluding Observations

The compounded impact of discrimination against women because of their sexual orientation requires additional attention and documentation in subsequent reports, as do other intersecting forms of discrimination based on race, disability, health status, gender identity, gender expression, and sexual orientation.

Article 6 (Right to Life)

“The impact of human rights abuses goes beyond the loss of human life.... Human rights abuses are wounds on our collective sense of purpose and harmony. Only by addressing their root causes – through government and community action – can we hope to build a future in which, even if our own wounds are not completely healed, wounds such as ours are much more rare.”

Testimony of Sylvia Guerrero at the UPR Listening Session in San Francisco, March 26, 2010. Sylvia’s daughter, Gwen Araujo, was brutally murdered in 2002 at the age of 17 in Newark, CA for being transgender.

Extrajudicial killings of persons because of their sexual orientation, either by state authorities or non-state actors, as well as deaths in prison that may be attributed to the

²C. Struckman-Johnson & D. Struckman-Johnson, *A Comparison of Sexual Coercion Experiences Reported by Men and Women in Prison*, 21 J. INTERPERSONAL VIOL., 15911597 (2006)

³“Case Haunts Detainee INS Guard Will Be Sentenced After Pleading Guilty to a Lesser Charge,” by Jody A. Benjamin, Staff Writer, South Florida Sun – Sentinel, Jul 23, 2001, pg. 1.

⁴<http://www.pamshouseblend.com/diary/15940/president-obama-a-transgender-veteran-is-not-impersonator-it-or-shim>.

failure of prison officials to adequately protect LGBT persons, raise serious concerns under Articles 6, 7, 9 and 10 of the ICCPR.

Bias-motivated hate crimes against LGBT Americans represent unique concerns under Article 6 of the ICCPR. In particular, the ICCPR requires the United States to take appropriate measures to prohibit acts of violence or bodily harm, whether inflicted by government officials or by any individual or group, and to guarantee the security of the person for everyone, regardless of sexual orientation or gender identity.

In 2006, during a review of U.S. compliance with the ICCPR by the UN Human Rights Committee, the Committee noted that the United States “should ensure that its hate crime legislation, both at the federal and state levels, address sexual orientation-related violence.” Fortunately, the United States has made substantial progress in achieving federal-level protection, although a number of states still refuse to adopt state-level protections.

Hate crimes occur when a perpetrator of a crime intentionally selects a victim based on a bias-based motivation against a protected group. Under recent U.S. law, these crimes may be motivated by the victim’s actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. Such crimes are generally motivated by extreme prejudice and often visceral animus toward the protected group to which the perpetrator assumes the victim belongs. As such, a hate crime affects not only the victim and his or her family but an entire community or category of people and their families. The LGBT community, both in the United States and abroad, historically has been victimized by these types of bias-motivated crimes.

The U.S. Federal Bureau of Investigation (FBI) produces an annual report on hate crimes statistics within the United States. At the end of 2009, it released its report on hate crimes committed in 2008. This report – a compilation of the hate crimes that states, cities, towns, colleges, and universities have reported to the federal government – revealed that hate crimes are at their highest reported level in America since 2001, with a total of 7,783 crimes reported.

According to the report, hate crimes based on an individual’s sexual orientation have increased every year since 2005. (The FBI was not required to collect statistics on hate crimes based on gender identity until 2009). FBI statistics report that there was an 11% increase in victims of hate crimes based on sexual orientation from 2007 to 2008. In all, 1,617 offenses against lesbian and gay victims were reported to the FBI in 2008.

Clearly, FBI statistics only represent a sample of the actual number of hate crimes that occurred in 2008. By way of example, the National Coalition of Anti-Violence Programs, a non-profit organization that tracks bias incidents against lesbian, gay, bisexual and transgender people, reported 1,677 incidents for 2008 in only four states and 10 cities, which starkly contrasts with the 1,617 reported to the Federal Bureau of Investigation in 2008 by 13,690 local and state agencies. This discrepancy reflects the fact that many victims do not report their victimization to authorities. In addition, state and local

authorities are not required to report hate crimes to the FBI as participation in the federal statistics program is voluntary. Thus, countless incidents are not represented in the FBI's annual hate crimes statistics report.

Of the 1,617 offenses against lesbian and gay victims reported to the FBI in 2008, there were five murders, six rapes, 733 assaults, and 50 robberies. Seven bias-motivated murders were reported to the FBI in 2008, and five of those murdered victims were murdered because of their sexual orientation. This is just one of many pieces of evidence demonstrating that the LGBT community is often subjected to the most gruesome and violent of bias-motivated crimes.

The Matthew Shepard and James Byrd, Jr. Act

After 12 years winding through the legislative process, the U.S. Congress passed the first federal law protecting LGBT individuals from bias-motivated crimes in 2009 – the Matthew Shepard and James Byrd, Jr. Hate Crimes Protection Act (HCPA). This legislation was quickly signed into law by President Obama, making it the first federal law in the U.S. to protect LGBT individuals.

The HCPA gives the federal government power to investigate and prosecute bias-motivated violence where a perpetrator selects a victim because of the victim's actual or perceived sexual orientation or gender identity, as well as other characteristics. It also provides federal funding opportunities for local law enforcement agencies to help them investigate and prosecute these crimes, since the nature of the crime may require additional forensic attention that can stretch state and local budgets. Furthermore, the HCPA requires the Federal Bureau of Investigation to track statistics on hate crimes based on gender identity (statistics for sexual orientation were already tracked). The HCPA also requires that the Attorney General's annual summary of the data acquired under the Hate Crimes Statistics Act include a report on hate crimes committed by, and hate crimes directed against, juveniles.

Concluding Observations

Implement the HCPA. In order for the HCPA to have its intended effect, the law must be implemented effectively by the federal government. This requires the federal government to train federal and state investigators and prosecutors on the new authority provided under the law, and about the concomitant availability of new resources to address hate violence. In addition, it requires the federal government to begin collecting statistics on hate crimes based on gender identity.

Expand State Hate Crimes Laws. Despite the HCPA, states governments need to continue to pass laws that protect LGBT individuals from hate crimes. The HCPA only protects LGBT victims from violent crimes where the federal government has jurisdiction over the underlying criminal act, regardless of the bias motivation. Since most crimes in the U.S. are still prosecuted at the state level, LGBT victims remain particularly vulnerable to hate crimes in the 38 states that do not provide protections for individuals

based on gender identity, and in the 29 states that do not provide protections for individuals based on sexual orientation. Passage of state-level HCPAs allows states to prosecute hate crimes without a federal nexus and in many instances crimes against property.

Improve Statistics Collection. In addition, the United States must improve hate crimes reporting. Since the enactment of the 1990 Hate Crime Statistics Act (HCSA), the FBI hate crimes statistics report has sparked improvements in hate crime response – since in order to report hate crimes effectively, police officials must be trained to identify and respond to them.

The FBI report is now the most authoritative snapshot of hate violence in America – though clearly incomplete, with thousands of police agencies reporting no hate crime data at all. As in past years, the vast majority of participating agencies (84.4%) reported that zero hate crimes occurred in their jurisdictions. This does not mean that they did not report hate crimes; it means that they affirmatively reported to the FBI that there were no hate crimes in their jurisdiction. This is difficult to believe.

In addition, thousands of police agencies across the nation did not provide statistics at all – including at least five agencies in cities with populations over 250,000 and at least 11 agencies in cities with populations between 100,000 and 250,000. Because participation is not mandatory and some agencies fail to report, the report fails to cover almost 40 million people.

While FBI statistics provide a snapshot of hate crimes in the United States, local and state law enforcement authorities should be required to provide accurate data to the FBI in order to assess with greater accuracy where the federal government can best target its resources to address hate crimes in America.

Institute Federal Education and Prevention Initiatives. The government must complement tough laws and more vigorous enforcement – which can deter and address violence motivated by bigotry – with education and training initiatives designed to reduce prejudice. The federal government has an essential role to play in helping law enforcement, communities, and schools implement effective hate crimes prevention programs and activities. Education and exposure are the cornerstones of a long-term solution to prejudice, discrimination, and bigotry against all communities. A federal anti-bias education effort would exemplify a proactive commitment to challenging prejudice, stereotyping, and all forms of discrimination that affect the whole community.

Article 7 (Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment) and Article 10 (Treatment of Individuals Deprived of their Liberty)

Worldwide, cases involving violations of article 7 of the ICCPR have been widely reported by the UN Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The UN Special Rapporteur has posited that by failing to conform to rigid gender constructions, sexual minorities worldwide face

disproportionate exposure to harassment, humiliation, and rape, violations that are intended to dehumanize the victims, leaving them even more vulnerable to acts of torture and other inhumane, cruel or degrading treatment. This is certainly reflected in available evidence from the United States.

Numerous abuses against LGBT individuals in detention have been reported by rights organizations. In many of those cases, the abuses are committed by prison or other custodial officers, as already described above with reference to other provisions of the ICCPR. In other cases, guards either fail to prevent abuses by other inmates or place LGBT detainees in particularly unsafe locations where they are likely to be attacked by other inmates.

Statistics shows that LGBT individuals in prison are subject to far more sexual violence by guards and fellow prisoners than heterosexual individuals in prison. In addition to the particular vulnerability for lesbians and bisexual and transgender women noted above, gay, bisexual, and transgender men are also disproportionately victims of sexual abuse in detention. According to the 2009 National Prison Rape Elimination Commission Report, in the culture of men's correctional facilities, "gay, bisexual, and gender-nonconforming individuals are often the targets of sexual abuse precisely because the dominant "straight" males expect and demand submission." The report further suggest that such victims of rape are often perceived by officials as consenting to the sexual violence, because of their perceived or actual sexual orientation or gender identity.⁵

Concluding Observations

Reports of UN Special Rapporteurs raise serious concerns over violations of article 9 of the Covenant, especially in situations where police or prison administrators fail to protect LGBT persons or deliberately place them in harm's way. The United States must take greater care to protect the rights of LGBT prisoners. The United States must also take steps to prevent the selective and inappropriate arrest, harassment, and prosecution of individuals who transgress stereotypical gender norms, since those individuals are also more vulnerable to abuse and torture in detention.

Article 13 (Expulsion of Aliens)

The U.N. Office of the High Commissioner for Refugees has repeatedly emphasized that persecution based on sexual orientation and gender identity should be considered as grounds for refugee status under the 1951 Convention Relating to the Status of Refugees. Moreover, the application of the principle of *non-refoulement* prevents the United States from deporting individuals to countries where they could be subjected to torture as a result of their sexual orientation, gender identity or gender expression.

⁵ 2009 National Prison Rape Elimination Commission Report, June 2009, pp. 73-4. National Criminal Justice Reference Service, U.S. Department of Justice, available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

While the case law remains uneven, the United States generally recognizes asylum claims based on past persecution or well-founded fear of future persecution as a result of an individual's sexual orientation or gender identity. Nonetheless, U.S. immigration advocates note the difficulty of proving such claims, and the insensitivity of some immigration officials to sexuality-based cases. Oddly enough, there is also an emerging trend that suggests some immigration officials are arbitrarily denying asylum claims of those who do not subjectively appear "gay enough," or who are perceived as being able to "pass" for heterosexual in the communities they are fleeing.⁶

"Mohamed" a gay, HIV-positive man from Pakistan, applied for asylum and withholding of removal after being placed in removal proceedings. He had not lived in Pakistan since he was a child and thus had not suffered past persecution. The Immigration Judge found that most Pakistanis viewed homosexuality as an abnormality and a religious sin, but went on to find that many gay Pakistanis were able to engage in homosexual conduct, as long as they also married a woman and had children. Rather than view the forced marriage Mohamed feared as persecution in and of itself, the Immigration Judge determined that it was legally acceptable for him to have to lead a double life, and never considered the ramifications of Mohamed's HIV for his potential wife. The Board of Immigration Appeals upheld this decision.

Moreover, in some instances adjudicators do not recognize the sexual violence that LGBT individuals often face as persecution.

"Tomas" fled Colombia after numerous incidents of mistreatment because of his gay sexual orientation. On one occasion, he was arbitrarily detained by the police after leaving a gay club and placed in a cell with criminal detainees, where he was forced by a police officer to perform oral sex on one of the other inmates. The Immigration Judge found that these actions by the police were "disgusting" but did not find that Tomas had demonstrated past persecution and ordered him removed.

Asylum applicants must also seek protection within one year of arriving in the United States, unless they can prove changed circumstances or extraordinary circumstances and explain why they could not apply within that one-year time limit. This short timeline for filing asylum claims can be particularly burdensome for LGBT asylum applicants⁷ who may find it difficult to overcome fears of persecution, even in their new surroundings, or to reconcile the extreme persecution they faced in their home communities with the possibility of a more "open" sexual orientation or identity in the United States. Nonetheless, they must make that psychological transition and affirmatively claim specific, identity-based protection as an LGBT asylum seeker within one year of their arrival.

⁶ See Punishing Masculinity in Gay Asylum Claims, 114 Yale L.J. 913 (2005).

⁷ See The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal by Victoria Neilson & Aaron Morris, 8 New York City Law Review 233 (Summer 2005).

Individuals who miss the one-year filing deadline and cannot meet one of the narrow exceptions to the rule, may be eligible for withholding of removal, which means the U.S. government cannot return them to their country if it is more likely than not that they would face persecution. However, individuals who “win” withholding are simultaneously ordered removed from the United States and thus can never obtain lawful permanent residence or citizenship in the United States, can never travel abroad, and can never petition for family members to come to the United States.

“Abdul” a gay man from Bangladesh won withholding of removal after having escaped his country when the local imam issued a “fatwa” or death sentence against him when his homosexuality was discovered. He didn’t know that his sexual orientation could be a ground for asylum and did not file for asylum until he was placed in removal proceedings. He prevailed on his withholding case but was denied asylum because of the one-year deadline. Although Abdul had no criminal history, after winning his case, he has been required to have regular check-ins with a deportation officer. Since Abdul has an order of removal against him, Immigration and Customs Enforcement can require him to attend these check-ins indefinitely.

Non-refoulement protections may be claimed at any time, but both the administrative process and the burden of proof are more difficult outside of the affirmative asylum procedure that must generally be initiated within the first year. As a result of these expedited immigration procedures, there is substantial fear that the United States may be expelling LGBT aliens in violation of articles 7 and 13.

Furthermore, the detention of asylum-seekers and their inability to have Immigration and Customs Enforcement’s decision to detain them reviewed by an Immigration Judge presents a serious impediment to the fair and just adjudication of their asylum applications.⁸ This is of particular concern for LGBT and HIV-positive asylum seekers who face further discrimination, harassment, and even abuse at the hands of other detainees, guards, and ICE officers while in detention. The trauma and stress created by detention has led to disastrous results for LGBT and HIV-positive asylum-seekers, including giving up their claims to asylum, withholding of removal or relief under the Convention Against Torture and accepting an order of removal just so that they can be released from immigration detention.⁵

“Ahmed,” a gay man from Morocco was repeatedly raped and tortured when his family discovered his sexual orientation. He had very compelling evidence to prove his claim, including the eye-witness account by his U.S.-citizen sister. However, when he learned that to pursue his claim, he would have to spend many months in detention while his case was pending, he instructed his attorney to withdraw his claim. A protracted and indeterminate detention was more than this

⁸ See Human Rights First. *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, pp. 42-45. 2009.

victim of torture could endure.

Concluding Observations

Immigration officials should receive additional sensitivity training to assist in the adjudication of asylum and other immigration claims based on sexual orientation, gender identity or gender expression.

The U.S. must pass the Refugee Protection Act of 2010. The Act, introduced in March 2010, would eliminate the requirement that asylum seekers file their claim within one year of arrival in the United States.

Article 17 (Freedom from Arbitrary Interference with Privacy, Family, Home)

As already noted, in the case of *Toonen v. Australia* the Human Rights Committee recognized that adult consensual sexual relationships are covered by the notion of privacy under article 17. In 2003, the U.S. Supreme Court, in *Lawrence v. Texas*, outlawed the sodomy statutes still in force in many states. However, police authorities and prosecutors have in many circumstances selectively made use of other criminal provisions involving morals offenses to target LGBT individuals. The use of undercover police officers to enforce morals regulations, including statutes prohibiting lewd conduct, public obscenity, and public indecency, especially against gay men, raises concerns under Articles 2, 9, 17 and 26 of the ICCPR.

The use of lewd or disorderly conduct, anti-cruising, loitering, and other such laws against gay and bisexual men has a long history. Unfortunately, these police practices continue throughout the United States. The largest national LGBT legal help desk in the United States receives hundreds of calls from individuals and attorneys representing individuals in the area of criminal public lewdness and/or entrapment on the basis of sexual orientation.⁹ The actions of the Johnson City, Tennessee police department in one "sting" operation targeting gay and bisexual men in 2007 resulted in 40 arrests. That police department issued a press release that included photos and addresses of the 40 men involved. Of the 40 arrested, one man committed suicide and several others lost their jobs.

Gay sting operations are also not infrequent in the United States, where acts such as foot tapping, suggestive comments, flirtatious eye contact, and hand gestures are considered sufficient evidence to arrest gay or bisexual men by undercover police men posing as handsome gay men in public restrooms and other places.¹⁰ These behaviors may indicate mutual sexual attraction or desire, but not necessarily intent to engage in public sex acts. Such arrests are infringements of the rights enshrined in Articles 2, 9, 17 and 26 of the ICCPR.

⁹ According to Lambda Legal Defense and Education Fund in May 2010.

¹⁰ "Critiquing the Legality of Sting Operations," by Jordan Blair Woods, *The Journal of Gender, Race & Justice*, Spring, 2009, 12 *J. Gender Race & Just.* 545.

Transgender Rights

With only a few exceptions, state legislation generally prevents transgender individuals from legally changing their sex unless they have undergone sex-reassignment surgery. In some cases, transgender individuals who have not undergone surgery are even prevented from legally changing their names. This places unreasonable burdens on the transgender person, encouraging discriminatory behaviors, especially at the workplace, and intrusion into the person's private life both by state and non-state actors.

In several states, courts have invalidated marriages by transgender persons and deprived transgender parents of legal recognition. In addition, family courts in some states have removed custody from the custodial parent of a transgender child solely because the parent supports the child's gender identity and expression.

Concluding Observations

State laws should be streamlined and updated to permit transgender persons to change their names or legal sex on official documents without requiring invasive surgeries. Current barriers to such identity changes place transgender persons at greater levels of risk during police questioning and identification procedures and constitutes a serious impediment to employment and equal access to public accommodations for transgender persons. The uncertain legal status of transgender persons under state law also has a significant impact on family life that must be clarified by the federal government.

The right of transgender persons to marry and be recognized as legal parents should be fully respected. The federal government should honor the marriages and parental status of transgender persons for all federal purposes. Courts should not be permitted to remove custody of a parent solely for providing appropriate support for a transgender child.

Article 19 (Freedom of Expression)

Violations of the right to freedom of expression related to LGBT persons have often been reported by the U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. Restrictions and abuses directed against individuals based on their gender expression or related to the expression of their sexual orientation have also been widely reported.

The "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy in the United States is part of a 1993 law banning homosexuals from serving openly in the U.S. military. The law fully authorizes the discharge of service members who publicly declare their sexual orientation. As such, it is a discriminatory limitation on freedom of expression that was originally intended to loosen the prohibitions against homosexuals serving in the military by allowing individuals to serve as long as they did not disclose their sexuality. Hundreds of Americans are discharged every year under this policy. While the law may be repealed this year, options should be considered to provide an effective remedy for those who have already suffered under this discriminatory restriction on freedom of expression and

provisions must be made to protect LGBT personnel from discrimination in the future.

Concluding Observations

Repeal Legislation. According to legislation currently being debated in the U.S. Congress, the DADT law would be repealed after the Executive Branch of the U.S. government certifies that repealing the law is consistent with the military standards for readiness, effectiveness, unit cohesion, recruitment and retention. The executive branch must act swiftly in order for this discriminatory law to be repealed once and for all.

Article 23 (Family Life)

Although the Human Rights Committee in *Joslin v. New Zealand*¹¹ found that the refusal of a state to open marriage to same-sex couples did not constitute a violation of the scope of article 23 of the ICCPR, Committee members Lallah and Scheinin argued that the denial to same-sex couples of benefits available to married couples could ground certain discrimination claims under article 26 of the ICCPR. Later, in *Young v. Australia*¹², the Human Rights Committee found that the lack of recognition of same-sex couples for specific pension benefits, when the government recognized those same benefits for unmarried heterosexual couples, violated article 26 of the ICCPR and that the distinction constituted an impermissible form of discrimination on the grounds of sexual orientation. Within this context, the *Young* decision by the Human Rights Committee also suggests a definition of family or of a couple that could have implications for the protection of family life under article 23 of the ICCPR.

Article 23 of the ICCPR recognizes that the “family is the natural and fundamental group unit of society and is entitled to protection by society and the state.” Evolving standards of human rights law now recognize that everyone has a right to form a family, and that no family may be subjected to discrimination on the basis of sexual orientation or gender identity. This means that same-sex partners must be provided with equal rights and responsibilities, including rights to family-related social welfare and other public benefits, employment and immigration.

Immigration

“I have a partner who is a U.S. citizen, and two beautiful children who are also U.S. citizens. But none of them can petition for me to remain in the United States with them. Because my partner is not a man, she cannot do anything to help me. I am very lucky Senator Dianne Feinstein sponsored a private bill for me. Because of Senator Feinstein’s efforts my deportation has been temporarily delayed until 2011.”

Shirley Tan’s testimony at the UPR Listening Session in San Francisco, March

¹¹ Communication No. 902/1999.

¹² Communication No. 941/2000.

Although the concept of family unification is central to the American immigration system, accounting for roughly 65% of all legal immigration¹³, lesbian and gay families are excluded altogether from this system. Under the U.S. Immigration and Nationality Act, U.S. citizens and legal permanent residents may sponsor their spouses (and other immediate family members) for immigration purposes. But same-sex partners of U.S. citizens and permanent residents are not considered “spouses,” and their partners cannot sponsor them for family-based immigration. Legislation is being contemplated to address this inequity, but it has not been adopted and its prospects remain uncertain.

In many cases this leaves many Americans with the untenable choice of giving up a life partner or giving up one’s country. Many of these couples are forced to leave family and friends, sell businesses, and abandon the community and country they love in order to keep their families together. An analysis of data from the 2000 Decennial Census¹⁴ estimated that approximately 36,000 same-sex binational couples live in the United States, approximately 46% of whom are raising children. Behind each of these statistics lies a family who struggles every day for the basic right to be together.

For example, in January 2009, Shirley Tan, the life partner of U.S. citizen Jaylyn Mercado, and stay-at-home mother to their twin sons, then aged twelve, was arrested at her home and taken into detention by agents of Immigration and Customs Enforcement because she had a removal order against her which her attorney had never informed her was final. Shirley has been in the United States for over twenty years; is the primary caretaker for Jaylyn’s elderly mother as well as the twins; and is a pillar of her community, acting as a Eucharistic minister in her church and singing in the church choir. However, under U.S. immigration law, Jaylyn is not considered Shirley’s family and so she has no ability to sponsor her for immigration benefits. The family was unusually fortunate that a U.S. Senator intervened to stay deportation for two years, but without a lasting solution, the stay will only delay Shirley’s inevitable deportation.

Concluding Observations

The Uniting American Families Act (UAFAs), a bill currently pending in the U.S. Congress, would remedy this injustice and allow U.S. citizens and permanent residents to sponsor their same-sex partners for family-based immigration. As with any opposite-sex married couple, under UAFAs permanent partners would need to prove that they are in a long-term committed relationship and that they are financially interdependent. Passage of this bill would keep thousands of families from living with daily uncertainty about their future.

¹³ Department of Homeland Security, Annual Flow Report, March 2009, Table 2, at 3 http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2008.pdf.

¹⁴ *Family, Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples Under U.S. Law*, joint report by Human Rights Watch and Immigration Equality, 2006, at 17 and 176, available at <http://www.hrw.org/en/reports/2006/05/01/family-unvalued>.

Relationship Recognition

Only 14 states and the District of Columbia provide any form of relationship recognition for same-sex couples (through marriage, civil unions, domestic partnerships, or a similar status), and in 6 of these states, benefits are substantially limited. The remaining 32 states treat same-sex couples as legal strangers. While couples can obtain some degree of protection through private agreements, such agreements cannot confer most of the rights and protections that are provided through marriage or other forms of official relationship recognition. Moreover, even when same-sex couples execute these agreements, they often are not respected. For example, in 2010, a Florida hospital refused to allow Janice Langbehn and her children to visit her partner of 18 years, Lisa Pond, even though the partner had executed an advanced directive and power of attorney naming Janice. Lisa passed away after collapsing with an aneurysm while her family was kept in a waiting room.

In addition, in California, voters used the initiative amendment process to enact a state constitutional amendment stripping same-sex couples of a previously established right to marry. A challenge to this measure is currently pending in federal court.

Even if a same-sex couple lives in one of the states that recognize their marriage, civil union, or domestic partnership, the couple is denied the numerous federal protections provided to married couples. In 2004, the U.S. General Accounting Office identified 1,138 federal rights and responsibilities that turn on marital status. These include federal tax benefits, the ability to sponsor same-sex partners in family-based immigration, spousal benefits for federal employees, and marital protections in federal benefit programs. For example, when one spouse receives Medicaid coverage for nursing home care, a same-sex spouse who is not institutionalized could end up losing the couple's home because federal Medicaid spousal protections do not apply to same-sex couples. Under current federal law, none of these rights, benefits, or protections are available to same-sex couples – even if a couple is legally married or in another type of legally recognized relationship under state law. In addition, the federal government does not provide spousal-equivalent benefits, including with regard to health insurance coverage and pension conferral, to the partners of homosexual federal employees.

Concluding Observations

States should remove discriminatory amendments and legislation that prohibit same-sex couples from marrying. The federal government should recognize marriage between same-sex couples and provide these couples with the attendant federal rights and benefits.

DPBO. The Domestic Partnership Benefits and Obligations Act should be passed so that the same-sex spouses of federal employees can be provided with the benefits available to different-sex spouses.

RMA. The Respect for Marriage Act should be passed. The RMA would repeal the Defense of Marriage Act, which prohibits the federal government from recognizing

marriages of same-sex couples, and require the federal government to provide federal benefits to all validly married same-sex couples regardless of where the couple lives.

Hospital Respect for LGBT Relationships. Following the Lisa Pond incident, President Obama issued a memorandum directing the Secretary of Health and Human Services (HHS) to promulgate regulations prohibiting hospitals from discriminating on the basis of sexual orientation and gender identity in visitation and requiring hospitals to respect patients' healthcare directives. HHS must swiftly promulgate these regulations.

Article 24 (Special Protection of Children)

Discrimination, abuse and misconduct against LGBT youth raise additional cross-cutting issues that may be linked to multiple violations of the provisions of the ICCPR. LGBT teenagers are particularly vulnerable to hate crimes. And the government's failure to guarantee adequate protections for LGBT youth in school, foster care and juvenile detention also raises serious concern.

LGBT teenagers are particularly vulnerable to domestic violence. According to a 2007 report by the National Coalition of Anti-Violence Programs, 35% of domestic violence victims/survivors were age 29 and under, up from a similar study in 2006 which had 21.6% of victims age 29 and under. And within that group, teenagers are particularly vulnerable to physical and verbal violence when they disclose their sexual orientation or gender identity to their families. As indicated by the National Center for Lesbian Rights and the Transgender Law Center, domestic violence is extremely common against children who begin to express a gender that is different from the one assigned at birth, and parents sometimes subject their children to harmful "mental health" practices in such cases.¹⁵

Like heterosexual individuals, LGBT individuals experience intimate partner violence. Unfortunately, a 2009 nationwide survey by the National Center for Victims of Crime and the National Coalition of Anti-Violence Programs found that LGBT individuals have limited access to effective prevention and recovery services for intimate partner violence. As a result, LGBT individuals suffer disproportionately from intimate partner violence and its effects.

Physical, verbal, and sexual abuse against underage LGBT individuals is also common within juvenile correctional facilities. Testimony by the National Center for Lesbian Rights before the National Prison Rape Elimination Commission raised the case of a 17-year-old gay boy in a Louisiana facility who was regularly forced to have sex with ten other juvenile inmates. He was forcibly raped at least four times, and the staff of the facility constantly refused his requests to be placed in protective custody.¹⁶ According to testimony, staff at the facility assumed that because the youth was gay, he desired sexual

¹⁵ National Center for Lesbian Rights, Transgender Law Center, *Trans Realities* (2003) at <http://www.nclrights.org/publications/transrealities0803.htm>

¹⁶ National Center for Lesbian Rights, Testimonies submitted to the National Prison Rape Elimination Commission on August 15, 2005.

activity and so refused to intervene even when requested to do so. When staff in juvenile facilities do intervene in sexual violence cases, at-risk LGBT youth are often placed in extended isolation for their own protection.¹⁷

The problem of harassment and violence against LGBT teenagers is particularly commonplace in schools. According to a 2005 report of the Gay, Lesbian and Straight Education Network, 33% of teens reported that students in their schools were harassed because of their real or perceived sexual orientation, while 52% of all students overheard other students making homophobic remarks. LGBT students are three times as likely as other students to feel unsafe at school, and 90% of LGBT students report having been verbally or physically abused at school.¹⁸

Human Rights Watch also documented abuses in schools in its 2001 report *Hatred in the Hallways*. That report highlights a 1996 case brought by a Wisconsin student who was verbally and physically assaulted from middle-school onward. The details of the case are shocking. The student was sexually humiliated, beaten and urinated on, and he sustained internal injuries on at least one occasion. He attempted suicide twice. The school district was ultimately held responsible for the abuse, since the school principal failed to intervene even though she was aware of the violence. While the details of that case were especially alarming, the patterns of abuse in the case are not unusual.

Lesbian teenagers are particular targets of sexual harassment. A 2002 report by the National Gay and Lesbian Task Force (NGLTF) provides accounts of eight “gang rape” incidents involving eleven students, some as young as sixth grade. In one case, a lesbian teenager who had been harassed for a sustained period of time was severely beaten and raped by a group of students who wanted to teach her to “stay away from their girls.”¹⁹

The National Coalition of Anti-Violence Programs details the case of a 13-year-old boy with developmental disabilities who was verbally and physically harassed in a small Catholic middle-school because of his perceived sexual orientation. Despite his mother’s reports, the principal did not intervene in the case.²⁰ The lack of intervention by teachers and administrators in school violence cases involving LGBT youth was also widely reported by Human Rights Watch in its 2001 report on the subject.

According to another study by the Human Rights Campaign, children are also discriminated against and face unique economic challenges because of the failure of the government to recognize same-sex relationships involving their parents, or their same-sex de facto step-parents. If a parental figure is unable to establish a legal relationship, the

¹⁷ R. Estrada, J. Marksamer, *Lesbian, Gay, Bisexual and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice System Safe for all Youth through Litigation, Advocacy and Education*, forthcoming on Temple Law Review, Summer 2006.

¹⁸ Gay, Lesbian and Straight Education Network, *From Teasing to Torment: School Climate in America* (2005), at 7

¹⁹ National Gay and Lesbian Task Force, *Family Policy – Issues affecting Gay, Lesbian, Bisexual and Transgender Families* (2002), at 107.

²⁰ National Coalition of Anti-violence Programs, *Anti-lesbian, gay, bisexual and transgender violence in 2002* (2003), at 19.

child may not be entitled to health insurance or to social security survivor benefits. Same-sex parenting is becoming more common, so these legal prohibitions are also becoming increasingly harmful to the special protection of children.

According to the 2008 American Community Survey, 20.5% of same-sex couples are raising children. Unfortunately same-sex parents face a wide variety of legal obstacles, including a state-level ban on adoption by gay parents in Florida and significant obstacles to the recognition of same-sex parents in other states. In a number of states, there is no way for both parents in a same-sex parent family to establish a legally protected relationship with their child.

Given this legal environment, children with LGBT parents often lack a legal relationship to at least one of their parents. As a result, they can be denied social security benefits or separated from their non-biological parent if their parents separate or their biological parent dies. LGBT parents who are not legal parents may not be able to consent to medical care for the child or even have the authority to approve common activities like school field trips, and may have no ability to claim the child as a dependent for health insurance. In the absence of a will stating otherwise, a child generally has no right to inherit from a person who is not a legal parent or relative.

States that permit same-sex couples to marry (or enter another officially recognized relationship) also recognize both partners in the couple as the legal parents of any children born into the relationship. In addition, some states recognize that couples who use assisted reproduction to have a child are both legal parents, regardless of the parents' gender or marital status. Many states also allow joint or second-parent adoptions, which allow a co-parent to adopt his or her partner's biological child without terminating the rights of the biological parent. Sixteen states have a statute or appellate decision allowing second-parent adoption, a process that allows both parents in a same-sex couple to be legally recognized as parents. At least 15 additional states have allowed second-parent adoptions by same-sex couples in certain counties. However, 8 states do not permit joint adoption by same-sex couples, and one state even prohibits adoption by lesbian or gay individuals.

Even where parents have been able to protect their parental rights through an adoption or parentage judgment, some states have refused to recognize such judgments from other states. Under the Full Faith and Credit Clause of the U.S. Constitution, all states are required to recognize judgments from other states, but in practice, many states have refused to recognize adoptions granted to same-sex couples. For example, a Florida judge refused to recognize a second-parent adoption completed in Washington by a same-sex couple after the couple moved to Florida and broke up. A Florida Court of Appeal held that Florida must recognize this adoption, but the adoptive mother was separated from her child for years while this case was pending.

In addition, LGBT employees must often pay from their own salary to receive domestic benefits for their same-sex partners or their partners' children, while married heterosexual

employees in the same situation are more often exempt from such payments.²¹ Even when health and other benefits for same-sex partners and their children are provided by employers, that support is treated as a taxable benefit to the employee. The Human Rights Campaign notes that similar benefits are not taxed by the federal government when provided to married heterosexual couples.²²

Concluding Observations

Youth Violence. Widespread discrimination and abuse against LGBT youth pose significant human rights concerns. Current levels of verbal, physical and sexual violence directed at LGBT youth in schools, juvenile detention facilities and foster care are legally unacceptable under the Covenant. The United States must take immediate steps to protect LGBT youth from all forms of violence.

Educational Improvements. The U.S. government should pass the Safe Schools Improvement Act (SSIA) and the Student Non-Discrimination Act (SNDA). SSIA requires school districts receiving federal funds to adopt policies expressly prohibiting harassment in schools, including harassment based on sexual orientation and gender identity. SNDA prohibits any school receiving federal funds from discriminating against a student based on the student's sexual orientation and gender identity or the sexual orientation and gender identity of a person with whom the student associates.

Family Recognition. All states should provide legal recognition to LGBT families by recognizing the legal status of both parents in a same-sex couple who have a child together through assisted reproduction, providing joint adoptions to same-sex couples and second parent adoptions to a non-biological parent who has functioned as a child's parent, and protecting de facto parent-child relationships. In addition, states should recognize adoption and parentage judgments issued by other states. The federal government should provide child-based benefits to children of de facto parents. The federal government should also revise rules for children born abroad to same-sex parents to allow children born abroad to have U.S. citizenship through their non-biological parents.

²¹ Human Rights Campaign, *The Cost of Marriage Inequality to Children and their Same-sex Parents* (2004), at 9-11.

²² www.hrc.org/Template.cfm?Section=Homeownership1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=18619.