The Persistence of White Privilege and Institutional Racism in US Policy

A Report on US Government Compliance with the
International Convention on the Elimination of All Forms of Racial Discrimination

COMPILED BY **TRANSNATIONAL RACIAL JUSTICE INITIATIVE**
March, 2001

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Executive Summary

This is a shadow report filed to provide additional information and analysis to supplement the US Government's *Initial Report of the United States of America to the UN Convention on the Elimination of Racial Discrimination.* Although it documents several areas of non-compliance and makes recommendations for improvement, it is not intended to be exhaustive.

Our focus is on the persistence of white privilege, a system that accrues to whites (or European Americans) greater wealth, resources, more access and higher quality access to justice, services, capital—virtually every form of benefits to be reaped from US society—than other racial groups. Conversely, white privilege has resulted in impoverishment and injustice for the vast majority of those belonging to racial minorities. White privilege is more than a set of attitudes or individual opinions. It is an overarching, comprehensive framework of policies, practices, institutions and cultural norms that undergird every aspect of US society. Too often, discussion of racial discrimination focuses solely on the effects on those who are oppressed as if there are no oppressors or beneficiaries. In this analysis, racial minorities are cast as "problems to be solved" instead of victims of an unjust system. Yet, as 19th century African American freedom fighter Frederick Douglass put it nearly a century ago, " There is no negro problem. The problem is whether the American people have loyalty enough, honor enough, patriotism enough, to live up to their own constitution..." The US will come into compliance with CERD provisions—and other human rights conventions—only when it dismantles white privilege and makes the promise of "equality and justice for all" the letter and *effect* of the law.

KEY FINDINGS AND RECOMMENDATIONS

- This report found gross inequities and discrimination along racial lines in every area of investigation. Contrary to Government claims, the US Constitution does not offer adequate or clear protection, assurances or remedies for victims. A complete review and revision of US law, at every level, is required to adequately address issues of discrimination.

- The US legal standard requiring that victims of discrimination prove "intent" to discriminate as a condition of remedy is a major barrier to addressing racial inequity in general and meeting CERD obligations in particular. The US must move to making dis-

criminatory effect the standard and develop an appropriate legal and policy framework for actualizing such a standard at every level of government.

- There is currently no central office responsible for providing oversight, coordination, and management of the CERD reporting, evaluation and implementation process. The Government should fund this work adequately and identify such an agency (preferably an NGO with expertise and competency in this arena) to undertake these responsibilities.

- The failure to undertake any assessment at the state and local levels provides an incomplete and inaccurate picture of US CERD compliance. The Government should establish a process with clear timelines and milestones for engaging state and local government in a comprehensive reporting and evaluation process for CERD and other human rights convention to which the Government is a signer.

- The Government's efforts to address hate violence are inadequate. In the US and elsewhere, ethnic and racial minorities, migrants, refugees and displaced people are increasingly victims of violence and repression by the state as well as private, sometimes quasi-government groups (sometimes known in the US as militias). Operating from a political framework of white supremacy and racism, these state agencies and private organizations are contributing to the development of a global "hate" movement. Strong measures must be developed to deal with these issues including:

  Standardized reporting and data collection should be established to better track and make public the prevalence and character of these crimes. This data collection and reporting should be adequately funded and undertaken by appropriate non governmental organizations in collaboration with affected communities.

  Clear laws, with clear consequences when appropriate, must be established to create disincentives for committing these crimes. Policies and prohibitions must be established to prevent state violence and repression in particular including but not limited to training, remedial hiring and personnel practices, videotaping and other forms of monitoring, civilian review, and a ban on "raids" and similar militaristic tactics.

- We understand that there is a clear difference between free speech, which many nations value, and speech with the purpose of inciting violence against individuals or groups based on their race. Such "hate speech" should not receive any legal protection as it does in the United States. The right to live free of violence and intimidation should certainly outweigh any "right" to speech that threatens the safety of others and incites violence. As such, we urge the United States to remove its RUDs concerning Article 4 of CERD and implement CERD fully.

- The current system of white privilege has its roots in the US conquest and oppression of indigenous peoples and the US role in the Trans-Atlantic slave trade. The inequality and injustice originating from these historic phenomena were maintained and exacerbated by government policies like Jim Crow laws, forced relocation, protective covenants, etc. The US Government must recognize its culpability as related to these issues and immediately institute comprehensive remedies and reparations that address the deep and abiding racism, repression and discrimination that result from these acts and continue to fundamentally affect and shape present contemporary social problems.

I. Introduction

(Paragraphs 1-28)

In this section:

SUMMARY OF OUR CRITIQUE OF THE INITIAL US CERD REPORT (PARAGRAPHS 4-8)

- Report ignored the CERD framework
- Failed to address government beyond the federal level
- Makes several misleading claims and rationalizes policy based discrimination

Summary of US CERD Non Compliance (Paragraphs 9-13)

- No effective measures to review governmental action at the federal, state and local level including failure to establish a central body charged with CERD implementation.
- Government is out of compliance with several provisions of the CERD including the failure to promulgate measures that effectively prohibit and eliminate discrimination and the assurance of effective protections and remedies.

OVERVIEW OF US RACIAL CONTEXT (PARAGRAPHS 14-27)

- The centrality of white privilege to the US political, legal and social context.
- Major legal barriers to the elimination of discrimination.
- The importance of the past including the legacy of conquest and the Trans–Atlantic slave trade.

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The Persistence of White Privilege and Institutional Racism in US Policy

A Report on US Government Compliance with the
International Convention on the Elimination of All Forms of Racial Discrimination

I. Introduction

1. As a national collaborative of non governmental organizations dedicated to advancing racial justice, we welcome the filing of the *Initial Report of the United States of America to the UN Convention on the Elimination of Racial Discrimination*. However, the Government report is quite incomplete in a number of key areas. This shadow report provides additional information on US progress with regard to the International Convention on the Elimination of Racial Discrimination (CERD) and suggests an alternative analytical framework that, we believe, is more closely aligned with the letter and spirit of the Convention.

2. To this end, this report provides a relatively brief but substantive examination of institutional racism, white privilege and the historical, political and legal contexts that shape present day racism and racial discrimination. Such context is critical to any assessment of US policy in this area. Unfortunately, the government report provides little in the way of such critical analysis. Therefore, this report is structured as follows: The first section provides a brief critique of the government report and examines the larger context of racism and racial discrimination in the United States. The second section provides a number of case studies that illustrate how racism and racial discrimination affect life and governance in the US, along with a set of recommendations for US government action to address the problems outlined in this report. The third section provides recommended questions for the CERD Committee to consider in their review of the US government's CERD report along with appendices for further reading.

3. It is important to note that we anticipate the filing of several "shadow reports" from other US NGOs therefore, this document is not intended to be exhaustive. We do hope that it will offer a useful, complementary *framework* for understanding discrimination and white privilege through which to assess US progress overall. We are grateful to the Committee for its consideration.

A. OVERVIEW OF PROBLEMS WITH THE INITIAL US CERD REPORT

4. *The Government report ignored the CERD framework.* Although the Government report asserts that "US law is in conformity with the obligations assumed by the United States under the treaty", the government assessed itself against a much narrower definition of racial discrimination. The US definition focuses on issues of intent and motives for discrimination when the CERD is quite clear: racially disparate outcomes and effects must be of primary concern.

5. *The Government failed to undertake an adequate assessment of policies and practices as outlined by the Convention. Furthermore, it limited what examination it did undertake to the federal or national level.* The US has been undergoing massive devolution in many policy arenas. By devolution we mean that many forms of power and governance previously within the purview of the federal government have been ceded to state and local governments. Given the increasingly significant role of local government in social policy, the omission of state and local activity flouts provisions in Article 2.

6. In its report, the Government raises the issue of states rights as a barrier to holding state and local government accountable to CERD obligations. In the US context, the doctrine of states rights has provided significant structural support to racism as an institution. The doctrine was conceived in the 19th century as a vehicle for southern states to maintain slavery despite federal law and public opinion to the contrary. It was under the guise of states rights that Mississippi state voting officials were able to bar African Americans from registering to vote with impunity. States rights made it possible for the Texas (state) Rangers to prevent Latino farm workers from attending union meetings. It provided legal cover for Montana (state) social workers to forcibly remove Native American children from their families for adoption by white families. And it permitted California (state) legislators to forbid Asian immigrants from owning land. In short, there can be no adequate assessment of US compliance with the CERD without a review of state and local government activity because of the critical role these levels of government play with regard to progress toward eliminating discrimination.

7. The report makes several misleading claims including:

   a. *The government claims that it has met its obligations outlined in Article 7. There has been no government public education campaign on these issues.* The Government has not undertaken any effort to communicate information on the CERD to the public or government agencies beyond those staff specifically charged with drafting the report. Governments at the state and local levels have not been contacted at all.

   b. *Throughout the document, the government describes the role of courts to limit and proscribe policies that address racial discrimination as if courts operate independently, away from government influence and outside of the framework of law and public debate.* Several of the cases cited in the report as barriers to effective implementation of the CERD were lawsuits designed to reverse anti-discrimination law – and were mounted and augmented with government support. Relatedly, there has been very little advocacy or even public education to advance and strengthen anti-discrimination measures. This violates Article 2.

   c. Article 2 of the CERD is also clear on the affirmative duty of governments to actively address racial discrimination. Governments have an obligation to nullify or change laws "which have the effect of creating or perpetuating racial discrimination wherever it exists." The government report asserts that the US already has in place the legal framework with which to address any problems with regard to discrimination and that the primary arena where discrimination exists is in the private arena—the arena of individual attitudes. *We will demonstrate throughout the body of this document that there are a number of laws that are inconsistent with US obliga-*

tions under the CERD and further, that government action has played a primary role in "creating or perpetuating racial discrimination."

8. Throughout the US report, the government has attempted to rationalize what is actually policy-based discrimination (e.g., its failure to address disparate racial impact in public education, health and more) as a result of legal conditions beyond its control (decisions made by "independent" courts) and even the purview of the CERD. Governments should not be able to sweep away standards requiring assessment of the effects of its laws by simply claiming that the law is a force that the very government that enacts it and appoints its jurists has no power to shape. The CERD is designed to hold nations to a higher standard, and help nations examine how, with vision and commitment, they can advance a public framework to eventually eliminate racial discrimination—not justify it. Below are examples and recommendations that, through policy, public education and good governance, will move the US toward more effective implementation of the CERD.

B. SUMMARY OF ISSUES IN US NON COMPLIANCE WITH THE CONVENTION RAISED IN THIS REPORT

9. *The US government has not undertaken any "effective measures to review governmental, national and local policies"* (Article II (1)(c). There is no central body charged with the administration of US compliance with the Convention. No standards have been established for review and reporting at the national, state or local levels, and the Government has not informed governmental bodies of any obligations under the Convention.

10. *US government has not undertaken "special and concrete measures to ensure the adequate development and protection of certain racial groups"* (Article II) (2) *despite a preponderance of evidence of racism from both non-governmental organizations and government agencies.* There are many documented examples of bias, racial discrimination and disparate racial impact in a wide range of policy arenas. There has been both governmental and private opposition to nearly every measure that would reduce white privilege and create greater development and advantage for disenfranchised racial groups. More detailed examples are found below.

11. *The US Government has not acted in compliance with provisions in Article 5 to prohibit and eliminate discrimination* in such areas as equal treatment before the law; right to housing, public health, medical care and other social services; and equal access to public services. Although Government participation in discrimination cases such as the *Adams Mark* case cited in their report is certainly positive, federal action to prohibit and eliminate discrimination has been less than adequate. Problems and shortcomings in voter protection under the Voting Rights Act was made abundantly clear in the last presidential election where African Americans and Hispanics were effectively and illegally blocked from exercising their right to vote in the many thousands. (See Appendix B) In the area of public services, federal laws like the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) greatly exacerbate racial disparities in access to health care and social services (see Section II). Examination of the public record when these laws were debated and enacted reveals that it was, in large part, opposition to supporting programs that benefited racial minority groups that formed the impetus for public action on these issues. Policies that advance or maintain white privilege simply do not engender the same kind of concern. Please see Section IV for a brief case example of how this double standard is affecting equal access to public education.

12. *The US government does not assure "effective protection and remedies" or "adequate reparation or satisfaction for any damage suffered"* (Article 6). The few agencies designed to monitor and investigate discrimination have experienced significant decreases in funding despite marked increases in complaints. Remedies are few and ineffective. Victims of discrimination must not only prove injury, they must first prove there was intent to harm. A costly civil suit (out of the reach of most victims) is the only recourse under these circumstances. And in these proceedings, the law requires in most cases that there is no consideration of the injury unless the 'heart and mind' of the violator can be discerned with regard to intent toward individual victims. This focus on intention versus injury is clearly designed to protect white privilege and make challenges to this system prohibitive. In addition, US law provides little opportunity for the remedy of past discrimination. Again, this narrow focus on present day discrimination and intentional, individual injury works to protect the spoils of white privilege and absolve institutional and individual perpetrators of their historic role in creating present day inequities. This kind of legal framework is certainly inconsistent with obligations under the Convention.

13. The US government has not undertaken *"effective measures particularly in the fields of teaching, education, culture and information, with a view to combating prejudices."* Although we recognize efforts under the Clinton Administration to establish a dialogue on race, the federal government (including initiatives by the Clinton Administration) has not provided any mandate or much guidance in this arena. The limited dialogue that exists serves mainly to reinforce white supremacy and render invisible victims and perpetrators of prejudice and racism—especially as it relates to injury at the institutional level. Those federal mandates in public education that are issued (like zero tolerance laws) often ironically exacerbate discrimination and injury against people of color (see Section IV).

C. THE US RACIAL CONTEXT: AN OVERVIEW

14. The US government report gave a detailed summary of the country's demographics so we will not repeat this information here. It is important to note, however, that the "concentration" of racial minorities in certain areas and whites in others is not simply a matter of personal preference as implied by the Government report or even the result of individual racism alone. Segregation, like other effects of discrimination is the result of an intricate web or system of discriminatory policies affecting access to wealth, transportation, capital, education, criminal justice, viable employment and even rights of inheritance and ownership.

White Privilege is a Central Issue

15. At the center of this system is white privilege. Being "white" (or of European descent) constitutes a powerful asset in the United States and globally. For example, the ability to own property and have that property gain in value is closely linked to the "possession of whiteness" in the United States. When whites are concentrated in a geographic community and there are no other mitigating factors, the relative value of their property increases. By contrast, the concentration of people of color in a geographic area (regardless of income or the absence of external mitigating factors) nearly always results in a decrease of property values—or a lower rate of increase when compared to similarly situated whites.

16. The reasons for this phenomenon are many. Property value is tied to perceptions of safety, security and access to jobs, goods and services. Racial stereotypes perpetuated by the academy and the media influence these perceptions. Then, private and public policies codify these negative perceptions. For example, there are national retail outlet chains with policies that require them to relocate when the percentage of whites in the area drop below a certain point. The rationale is that crime and vandalism tend to rise and income levels tend to drop when whites leave an area, making it an undesirable place in which to do business. Banking and loan policies also reinforce the concentration of whiteness as a real asset as decisions concerning property capitalization are often based on value assessments where the presence or absence of whites near the property is a central factor.

17. The National Housing Act of 1934 had provisions that encouraged both redlining, a practice of refusing to grant mortgages in racially diverse neighborhoods, and restrictive covenants that banned nonwhites from purchasing homes in selective neighborhoods. While restrictive covenants were dropped from the Act in 1949, the practice of refusing to grant mortgages in nonwhite neighborhoods continues today. Under these policies, whites could receive government money to buy property, an important source of wealth and stability in US society. Conversely, African Americans, Latinos and Native Americans were mostly restricted to limited cash support for low cost rental housing in racially segregated neighborhoods. There was no chance to develop equity for family stability or to acquire value to pass on to descendants. Given the pivotal role of home ownership in such quality of life issues as the ability to save money, provide for children to attend college (an important factor in moving out of poverty), and to help one's children to own property, the effects of these policies on present day inequities are significant. Yet, there is no program to repair or remedy the effects of these inequities—past or present.

18. As scholar Robert Westley notes in *Many Billions Gone: Is It Time To Reconsider the Case for Black Reparations?*: "Based on discrimination in home mortgage approval rates, the projected number of creditworthy Black home buyers, and the median white housing-appreciation rate, it is estimated that the current generation of Blacks will lose about $82 billion in equity due to institutional discrimination. All things being equal, the next generation of Black homeowners will lose $93 billion. As the cardinal means of middle class wealth accumulation, this missed opportunity for home equity due to private and governmental racial discrimination is devastating to the Black community."

19. Federal housing policy is only one example of how white privilege, wealth, and unequal treatment interrelate to create injustice for racial minority groups in the US. An examination of public education, health care, land use, welfare and more reveal that the retention and expansion of white privilege are central to the promulgation of policy in the United States. In fact, it is difficult to understand racism in the US without grasping some of the incredible breadth and depth of white privilege. Even the Government's "intent" based standard for proving discrimination (discussed in the next section below) is an attempt to frame issues of discrimination in ways that focus on the interests of perpetrators and not victims. Although we will provide a number of examples of this phenomenon throughout this submission, we have also attached (as Appendix A) additional readings that will hopefully further elucidate this key point.

Focus on Individual Acts of Racism Limits Accountability

20. In the US context, the government has taken a limited role in addressing racial discrimination. At the root of this inaction is a philosophy of separation between private and public acts of racism and discrimination. According to this rationale, private actors are the main perpetrators of discrimination because proof of discriminatory injury requires proof of the perpetrator's *intention* to discriminate *plus* proof that the perpetrator lacked a compelling, rational reason for discriminating by race. This intent standard obscures the discriminatory impact of government and other institutional policies and places the emphasis on private action where intent or behavior is more easily discerned. The government has severely limited its regulation of "private" discrimination so there is no regulatory infrastructure or redress. This context makes effective application of the CERD, which has an "effects" standard, difficult.

21. Under this narrow definition of discrimination, the US report to the CERD only detailed instances of private discrimination. Thanks to public defunding and dissolution of the regulatory infrastructure that "polices" discrimination, both public and private discrimination are on the rise. Unfortunately, government characterization of the problem as mainly individual hate and violence (and therefore beyond the bounds of regulation) will only make progress with regard to the CERD more difficult.

22. *Public-private separation*. Although there is a distinct focus on individual acts of racism, many anti-discrimination laws do not apply to "private actors." A case in point: people who live in and own a building of four or fewer units and rent out the rest are exempt from the provisions of the Fair Housing Act. The private views of officials that affect public decision-making are not imputed to public actors (a problem exacerbated by devolution). If a discriminatory zoning decision, for example, is made at a city council meeting where residents made explicitly racist comments, the decision is still presumed to be non-racist unless plaintiffs could prove discriminatory intent on the part of the council members.

A Note on the Implications of Colonialism, Conquest and the Trans-Atlantic Slave Trade

23. At the center of white privilege and the accompanying concentration of wealth in white communities are assets derived from conquest, the Trans-Atlantic slave trade and their aftermath. Other CERD shadow reports will deal more extensively with these issues but its important to note how important this shameful epoch in history is to understanding present day inequalities.

24. Slavery meant the complete and absolute denial of humanity and all the rights and privileges associated with it for Africans in the US. From the right to be compensated fairly for one's work, to have and belong to a family, own land, inherit the wealth of one's predecessors, and even to defend oneself against aggression, slavery was a brutal system that cost the lives of millions of Africans. After nearly three centuries of slavery in the United States, the practice was finally made illegal in 1865. In its place, the present system of segregation and institutionalized white privilege was erected.

25. There have been some efforts, in the less than 150 years after slavery was legally banned in the USA, to provide limited redress to those who were enslaved and their offspring. These programs are insignificant compared to the staggering benefits that US whites in

general and government in particular have reaped from slavery and its aftermath. As the work of the National Coalition Of Blacks for Reparations in America (NCOBRA) and others have shown, nearly every company and every white individual based in the US has benefited in some way. Roads, public buildings and railroads were built by uncompensated slave labor. Slave labor even built much of the US capital in Washington, DC and provided income and assets for some of the US' most distinguished companies.

26. Whites continued to benefit from the aftermath of slavery through restrictive covenants, segregation and discrimination that kept aside the best jobs, schools, neighborhoods, services and consumer goods for them. When necessary for advancing white privilege, African Americans were forced from their property, denied voting rights, restricted from jobs with decent pay, and held hostage by public policy that never fully recognized their humanity. Even when blacks miraculously moved out of poverty through the development of small businesses and small business districts in African American communities in the early 20th century, government stepped in to strip blacks of these assets using discriminatory tax law, aggressive eminent domain claims and violent repression. In virtually every case, black business districts that emerged in the first half of the 20th century were dismantled by the rerouting of public roads to force merchants off their property, biased application of tax law, vigilante violence or a combination of all three. These and other discriminatory practices greatly affect the accumulation of black wealth and explain much of the racial disparity in wealth today.

27. Land, the primary form of wealth for most US residents is completely based on the conquest, extermination and dislocation of indigenous peoples. In the US, as elsewhere, indigenous communities have and continue to be victimized by racism, colonialism, forced assimilation, the appropriation of their land and resources, and other forms of injustice. Contrary to the US Government CERD report, Government actions, policies and programs with regard to indigenous peoples are not in conformity with CERD obligations. The US government should move swiftly to address these issues through the promulgation of appropriate policies, land grants, the honoring of relevant treaties and other forms of reparations including resolutions and actions outlined by the Working Group for Indigenous Populations.

28. Meeting the challenge of discrimination and white privilege requires that the Government expand its notion of formal equality to include a broader, more accurate definition of *actual* equality. Only this kind of fundamental redefinition of equality as equity of *outcomes* that address both past and present bias, will move the US Government toward compliance with the CERD and other related human rights agreements. A model tool for such a policy assessment at the local level is included as Appendix H.

II. Welfare Policy
(Paragraphs 29-69)

KEY FINDINGS

- The US policy in this arena is inconsistent with several provisions of the CERD, particularly much of Article 2 and Article 5.
- Welfare policy in the US has always been highly racialized and this affects equal access to services. Given the pervasiveness of employment discrimination in the US, current policy trends to tie access to social services to employment have only exacerbated racial bias and discrimination in these programs.
- Discrimination in social services is heightened for those with limited proficiency in English.

KEY RECOMMENDATIONS

- The Government should allocate more resources to effective data collection by race and ethnicity and effective regulation and monitoring in order to track discriminatory effects of these policies. These data need to be analyzed for their discriminatory effects, rather than the intent driving the changes in policy.
- Clear federal standards for equal treatment and access should be established with special attention to racial discrimination and addressing the needs of those who have limited proficiency in English (reading and speaking).
- Addressing discrimination and bias will require that the US undergo serious revisions in policy and practice at all levels of government. A list of best practices and a model welfare policy written within the context of existing law is attached as Appendix D.

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II. Welfare Policy

SUMMARY OF CERD COMPLIANCE ISSUES

29. Welfare policy is out of compliance with the CERD in a number of areas. The Temporary Assistance to Needy Families (TANF), the newest incarnation of US welfare policy, limits the ability of many people of color to exercise rights outlined in Article 5 of the Convention. Welfare policy provides perhaps the most egregious example of the intersection or multiple impacts of racism, sexism and poverty. Women and children are particularly affected as mothers raising children lose access to health care, public health and other social services and are forced to work for low wages. Women of color are routinely discriminated against in these programs as devolution (ceding program management to state and local government) has meant greater discretion on the part of program staff to discriminate against clients of color without much regulatory oversight to which they are accountable. For example, one study by Virginia Polytechnic University found that certain discretionary benefits such as training and transportation allowances were rarely offered to African American participants in one Virginia welfare program but always offered to white program participants.

30. In violation of Article 2, the Government has collected little data on the racial impact of welfare policies although it is widely understood that wealth and income are inextricably linked to addressing the impact of racial discrimination. The little data we do have shows incredible disparities in the impact and administration of these policies. People of color are more likely to lose their benefits than whites for the same violations. Whites are often better treated and receive more information about gaining access to social services than people of color. Immigrants with limited English proficiency are most likely to receive misinformation and ill treatment while trying to access social services. Oftentimes, this misinformation leads to the denial of benefits.

31. By tying aid to strict work requirements, the laws trap people in the lowest wage and benefit sectors of the economy, typically with little opportunity for advancement, job protection, or unionization. Formidable barriers to enrolling in public benefit programs such as long and confusing applications discourage people from applying for assistance. These requirements aggravate the racial discrimination already rampant in the labor market. Welfare recipients work for their benefits, at a rate far lower than the minimum wage, creating a secondary class of workers for whom discrimination is considered justified. These policies are inconsistent with Subsection (e) of Article 5 and compound the

effects of discrimination in other areas such as education, healthcare, employment and labor rights.

32. Recipients of color face discrimination and a lack of due process in the application of sanctions related to their work requirements and failure to collect child support. These policies and institutional practices are in violation of provisions in Articles 2 and 5 with regard to the elimination of discriminatory policies and equal treatment before tribunals.

HISTORICAL OVERVIEW

33. In the United States, welfare policy has been used as a tool in the social construction of white supremacy and racial domination, both historically and contemporarily. How benefits are distributed, by whom and for whom are tied to racial hierarchies. As in the rest of the world, support for welfare policy is closely tied to societal homogeneity. In other words, public support for welfare programs erodes when these programs become associated with racial or ethnic minorities perceived to be more different or more "foreign" than the majority group. Here in the United States, Yale University professor Martin Gilens found that negative racial stereotypes of African Americans held by whites and the perception that welfare programs largely served African Americans and immigrants of color were major factors in the erosion of white public support for these programs. (*Why Americans Hate Welfare*, University of Chicago Press, 1999)

34. Indeed, the politics of white privilege and racial exclusion has occupied a central place in every major US welfare policy from its beginnings in the Social Security Act of 1935 to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

35. It was with the Great Depression of the 1930's that the first national programs to address poverty were adopted in the US. Whether they dealt with cash assistance to families, old age pensions, housing subsidies, or worker rights, they shared in common provisions designed to reinforce racial inequality and a rigid color line. The Social Security Act of 1935, which included provisions for old–age assistance, unemployment insurance, and aid to single mothers with children, was the most universal of these welfare programs.

36. As a result of political opposition from powerful US southerners, agricultural workers (the overwhelming occupation of Black men) and domestic servants (primarily the work of Black women) were excluded from the core benefits provided by the Social Security Act. Since 75% of the Black population still lived in Southern states in the 1930's and were primarily employed as sharecroppers or domestic servants, economic stratification by race was strengthened as a result of a welfare program that was supposedly universal.

37. Blacks were not alone in their exclusion from social security on the basis of race. The growing numbers of Asian and Latino immigrants employed as farm workers and house cleaners were systematically denied retirement pensions and other social security benefits, even as their numbers grew to surpass those of Blacks. This practice of using occupational patterns to reinforce racial exclusion was replicated in the exemption of farm and domestic labor from coverage under federal minimum wage provisions.

38. Unfortunately, the regulatory mechanism for monitoring this discrimination has not improved much since the 1930s. Furthermore, recent changes in welfare policy provide more opportunities for unregulated discretion and less federal oversight.

39. In 1996, the US Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). According to Congressional Budget Office projections, the new law would result in $55 billion in cuts in low-income programs over six years. Forty percent of the projected spending cuts would come from denying benefits to legal immigrants. It is important to note that welfare reform has created tremendous savings in public budgets, as a result of cutting off benefits for immigrants, discouraging applicants, and pushing people off the rolls. These savings are now in danger of being used to provide tax relief to upper and middle-income families and corporations, which are all disproportionately white—further advancing white privilege.

40. The 1996 law was comprehensive, reaching far beyond the traditional realm of "welfare" issues. In short, the PRWORA made three fundamental changes in social welfare policy. Specifically, it:

41. *Cut spending for anti-poverty programs and slashed food subsidy benefit levels.* Those remaining services are difficult to access with race an important factor. Studies show that certain discretionary benefits such as training and transportation allowances are more often offered to whites than participants of color. Although staff interviewed in these studies do not cite race as a factor, perceptions of recipients' "worthiness" or "likelihood to succeed" are key factors that are more than likely influenced by racial stereotypes.

42. *"Devolved" responsibility from the federal government to the states.* The PRWORA converted the federal Aid to Families with Dependent Children (AFDC) program into a "block grant" program in which states receive a fixed level of federal resources for income support and work programs. This new program, Temporary Assistance to Needy Families (TANF), is administered at the state and local level.

43. *Required states to deny access to families that have received benefits for five years and encourage states to further restrict access through their own legislation.* At its center, PRWORA is a forced work program that requires participants to find work whether they receive training or not as part of their obligation as participants in the program. Therefore, the policy shifts the burden of income support for the poor, mostly minority participants to the marketplace without providing adequate protections against employment discrimination. As employment discrimination is a major barrier to people of color finding and keeping jobs, this policy has negative racial impact. Initial evaluations of the policy show that it is indeed people of color that fare worst under this policy:

44. A 1999 study comparing the treatment of black and white welfare recipients, conducted by Dr. Susan Gooden of Virginia Tech University, found that black women earn less than whites, are less likely to be employed full-time, and are overrepresented in lower paying occupations. Gooden also found that black job applicants were asked twice as often as whites to complete a pre-application and that blacks were less likely to receive thorough interviews (45 percent as opposed to 71 percent for whites). Furthermore, 36 percent of African American respondents were subjected to drug tests and criminal record checks, while the 24 percent of whites that were asked to take any test at all were merely asked "character questions."

45. A 1999 study conducted by the Poverty Research and Training Center at the University of Michigan School of Social Work found that 14 percent of participants in employment programs reported four or more instances of discrimination.

46. A recent survey conducted by the Idaho Community Action Network in the cities of Lewiston, Burley, and Nampa on the availability of the Child Health Insurance Program found language barriers and racial bias in the administration of the program.

47. Respondents to the National Partnership for Women and Families' 1999 survey of employment service providers in Tennessee, Florida, New York, California, and Pennsylvania reported employer biases against either women or welfare recipients, or both. The survey also uncovered individual cases in Iowa where a welfare-to-work participant reported having to endure a co-worker's racially derogatory comments on a daily basis. In Indiana, a woman left her job at a fast food restaurant after a co-worker made sexual comments and touched her inappropriately over several months.

48. In a New York City survey of over 700 welfare recipients, 65% of Spanish-speaking respondents had problems communicating with their caseworkers. Reasons for this language discrimination include lack of city translators as well as racism on the part of caseworkers, many of whom have rejected recipients' own translators or simply neglected cases involving non-English speakers.

49. Women of color also face persistent and widespread labor market discrimination. In the most comprehensive study in decades (the Multi-City Study of Urban Inequality), researchers surveyed and interviewed thousands of employers in Atlanta, Boston, Detroit, and Los Angeles and found that racism plays a role in everything from employers' perception of workers' skills to employers' decisions about where they locate their business. This same study also surveyed 9,000 households, documenting enormous race differences in labor market experiences. For example, in Detroit, unskilled, unemployed whites put in an average of 91 hours of searching to land a job. By contrast, unskilled, unemployed blacks need to spend an average of 167 hours in order to find work.

CASE STUDY IN UNEQUAL TREATMENT IN WELFARE LAW: RACIALLY DISPARATE PROSECUTION OF WELFARE PAYMENT CASES IN ALAMEDA COUNTY, CALIFORNIA

50. Between 1995 and 2000, the county of Alameda, California criminally prosecuted 8,000 women for welfare overpayments. Five thousand of these women were actually arrested. At any given time 800 women are being prosecuted by a 32 person welfare fraud unit in the county district attorney's office. Overpayment is when welfare recipients unintentionally collect benefits they are not qualified to receive. Overpayment occurs when welfare recipients either do not know or have difficulty interpreting the myriad of arcane, often conflicting, regulations specifying the difference between "supplementary" income they must report to authorities, and income they are not required to report.

51. While state and federal laws require counties to notify recipients of reportable income within 45 days, Alameda routinely fails to notify clients for several years, allowing tiny overpayments to balloon to several thousand dollars. As a result, Alameda County's rate of prosecution for overpayment is more than four times that of most counties with comparable populations and even exceeds the rate for Los Angeles county—the state's most populous county (with nine times the number of program clients). In fact, Alameda County leads the state in prosecution caseloads. (Living Income Project and Evenson, R., Lawyer's Committee for Civil Rights, 2001) It's important to note that counties with smaller numbers of prosecutions also have smaller minority populations.

52. The story of Jenni Villanueva provides one example of how bias, lack of access to language rights and lack of due process result in unfair enforcement. Jenni Villanueva is a 27-year-old Latina mother of four. Although Jenni is a Spanish speaker, she has never had a Spanish speaking caseworker, making it extremely difficult for her to understand the complicated applications and reporting forms required of her.

53. From mid-1996 through 1997, Jenni worked and received welfare for her three children. Her caseworker never adequately explained that she had to report all of her outside earning on a certain form every month. Because Jenni had never received welfare benefits for herself, only for her children, she believed that the reporting requirements for her outside income did not apply to her. She was never told any differently.

54. Jenni unknowingly received close to $9,000 in overpayments over a year and a half. She received no notification that she was doing anything wrong and had no contact with the welfare fraud division until 1998.

55. "My first contact with the welfare fraud office was in 1998 when some inspectors showed up at my aunt's house looking for me." Jenni was then called in for an "interview" in which she was told to "accept that you are guilty and sign the paper. You will only be in jail for 90 days, and your case will be cancelled." Jenni said, "No, that I had made a mistake, but that I didn't do it on purpose, and that I would pay the money back for my mistake. After arguing over this for some time, the Fraud Division official made me sign a statement saying that I received the overpayment intentionally."

56. After the meeting, Jenni began paying back the overpayment. Later the government began deducting the overpayment from her children's welfare benefits.

57. In 2000, Jenni began working again, and reporting her income on the required form. After a month and a half, she received a letter from the District Attorney's office telling her that there was an outstanding warrant for her arrest and that she would need to pick a day to surrender and be booked in court. (From *Criminalizing the Poor: The Human Causalities of Welfare Reform. The Unjust Prosecution of Welfare Overpayment in Alameda County*. People United for a Better Oakland/Center for Third World Organizing, October 24, 2000.)

58. As Jenni's story illustrates, the Alameda County welfare system is prosecuting welfare overpayment as criminal fraud. By treating overpayment as fraud, the County is hurting poor families, specifically working mothers of color who must pay the harsh consequences of having a criminal record, and for immigrant mothers, facing the threat of deportation.

59. In Alameda County, a local coalition, known as the Living Income Project is organizing around this issue to end criminal prosecution of welfare recipients for welfare overpayments, create national awareness over deficiencies and injustice in welfare policy and administration, and form a coalition of groups around these issues that will have national, long-term policy impact.

CONCLUSION

60. Welfare policy in the US has always fixed certain roles for people based on their race, class and gender. But the 1996 laws took these limitations to new extremes. While the

authors of the 1996 welfare reform laws cloaked their agenda in the language of economic self-sufficiency, personal responsibility, and freedom from "dependence," their underlying intention was far more insidious.

FINDINGS

61. Welfare policy has been used as a political vehicle to exploit and control large numbers of women, poor people and people of color in the US. These laws are based on racist and sexist assumptions about the roles of women and people of color in the US economy and society. Consistent with similar "structural adjustment" policies throughout the world, welfare policy in the US reduces government responsibility for community needs in the name of bolstering the free market. Specifically, welfare reform laws have transformed political, social and economic relations in the US by:

Increasing the economic exploitation of women (and some men) and reducing their choices within the labor market.

62. By tying aid to strict work requirements, the laws trap people in the lowest wage and benefit sectors of the economy, typically with little opportunity for advancement, job protection, or unionization. Formidable barriers to enrolling in public benefit programs such as long and confusing applications discourage people from applying for assistance.

Expanding patriarchy by setting more rigid gender roles, denying women economic and social opportunity, and controlling reproductive decisions by women.

63. Welfare reform laws increase the control by men over the lives of women in the workplace, in policy-making arenas and in the household. By capping aid levels regardless of family size and by failing to provide public benefits for caregiving work, welfare reform laws use a parent's decision to have children as leverage to force them into the wage labor market. Some states even take children from their parents as punishment for straying from welfare regulations. These policies are primarily targeted to poor women of color as the prevalence of certain policies like family caps and the availability of certain forms of long term birth control and even "abstinence only" sex education are targeted to communities where people of color are the majority. Recent initiatives that focus on fatherhood and sanctions for families without fathers (referred to as "marriage" policies) are also disproportionately targeted to women of color and represent some of the more extreme forms of control.

64. These policies are a poignant example of the double impact of race and gender in this arena. Many of these laws target women of color and are grounded in stereotypic views of these women's competency to raise children and control their own lives. As Dorothy Roberts points out in *The Child Welfare System's Racial Harm* (in Davis, ed., *Families in a Free Society*, forthcoming, 2001; see Appendix C for the full text of Roberts' essay):

65. "Black children enter the child welfare system in grossly disproportionate numbers—and the racial disparity is increasing. In 1986, Black children, who were only 15 per cent of the population under age eighteen, made up about 26 per cent of the children entering foster care and 35 per cent of children in foster care at the end of that year. They were three times more likely than white children to be placed in foster care. By 1998, the segment of the foster care population who were Black had risen to nearly half… Constitutional jurisprudence shields family autonomy against the encroachment of the state. Yet the previous discussion demonstrates a disturbing rate of government inter-

vention in Black families. Why have courts and lawmakers countenanced this excessive degree of state interference in the family? The disregard of Black family autonomy is supported by the devaluation of Black motherhood."

66. This "excessive degree of state interference" is not limited to Black families. Native American families and other communities of color have also been subjected pervasive encroachment of the state. These policies, as Peggy Cooper Davis points out in her seminal book *Neglected Stories: The Constitution and Family Values*, are rooted in the legacies of conquest and slavery upon which the denigration of victims' humanity (including their family bonds) was significantly dependent.

Advancing white supremacy by further entrenching the existing racial hierarchy within the US.

67. Welfare policy contributes to greater rigidity of racial hierarchy within the economy, government institutions, and society as mobility options are reduced and as people are funneled into specific economic and social roles. Media portrayals of welfare stigmatize people of color in general and Black women and immigrants of color in particular. The welfare system often punishes and intimidates people who apply for benefits, subjecting them to humiliating, personal scrutiny.

Popularizing xenophobia and anti-immigrant sentiments and punishing newcomer communities

68. Welfare reform laws punish immigrants by reducing or eliminating access to already meager public benefit levels while continuing to demand immigrants' presence in the low-wage sectors of the labor market. The laws have reintroduced legalized discrimination, based on language and immigration status.

Limiting access to critical services in ways that exacerbate racial divisions in general.

69. By failing to provide benefits such as child care, paid maternity/paternity leave, expanded unemployment insurance, health, housing and food benefits to a broad group of people, oppressed communities are left to struggle with one another to access the limited public assistance that is available. Furthermore, instead of advancing greater cooperation among racial groups, these policies promote negative stereotypes, exacerbate racial inequalities and block development in racial minority communities by limiting access to income and wealth.

RECOMMENDATIONS

- The Government should develop effective data collection by race and ethnicity in order to track discriminatory effects of these policies.

- Resources should be increased for more effective regulation and monitoring of discrimination and bias in these programs.

- Clear federal standards for equal treatment and access should be established with special attention to racial discrimination and addressing the needs of those who have limited proficiency in English (reading and speaking).

- Addressing discrimination and bias will require that the US set higher standards for program funding, management and effectiveness. This will require serious revisions in policy and practice at all levels of government. A list of best practices and a model welfare policy written within the context of existing law is attached as Appendix D.

III. Health Care Policy
(paragraphs 70-117)

KEY FINDINGS

- US health policy is inconsistent with several provisions of the CERD including virtually all of Articles 2 and 5.
- The Government's own federal agencies have repeatedly found discrimination and bias in health care but have consistently failed to address these problems.
- Disparities and bias range from treatment and diagnosis to access, funding, training and representation of racial minorities in the health care system.
- Millions suffer and thousands lose their lives each year as a result of discrimination in health. Current trends toward "managed care" only exacerbate disparities.

KEY RECOMMENDATIONS

- The current law has proven ineffective in eliminating racial discrimination in health care. The Government should act now to develop a health policy, practice and program infrastructure that brings it in compliance with the CERD.
- The US should define "justifiable" discrimination to exclude racial discrimination resulting from policies and practices that limit access and quality of health care received; and racial discrimination resulting from policies and practices that have a disparate impact.
- The US should require significant progress to be made in eliminating disparities in health and health care.
- The US should require a unified data collection system in government programs (e.g., Medicaid, Medicare, Child Health Insurance Program and military) which would allow easy determination of discriminatory practices.

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III. Health Care Policy

SUMMARY OF CERD COMPLIANCE ISSUES

70. In the area of health care, the United States has failed to meet its obligation under Article 2(1)(a), Article 2(1)(c), Article 2(1)(d) and Article 5(e)(iv) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

71. **Article 2(1)(a)**

The United States has failed to "ensure that all public authorities and public institutions, national and local, shall act in conformity" with its obligation under Article 2(1)a. Throughout out its 1999 report to the President and Congress, the United States Commission on Civil Rights (the US oversight agency) found significant weaknesses in the government's enforcement efforts. Specifically, the commission noted that:

72. "The deficiencies in the [government's] enforcement efforts... largely are the consequences of [a] fundamental failure to recognize the tremendous importance of its mission and to embrace fully the opportunity it has to eliminate disparities and discrimination in the health care system. Although [the government through the] Office of Civil Rights (OCR) has attempted to identify noncompliance with the Nation's civil rights laws over the years, it has failed to understand that all of its efforts have been merely reactive and in no way have they remedied the pervasive problems within the [health care] system. [The government's] failure to address these deeper, systemic problems is part of a larger deficiency ...a seeming inability to assert its authority within the health care system. As a result of the myopic perspective... the [government] appears unable to systematically plan and implement the kind of...'redevelopment' policy that it so clearly needs." [1]

73. Through its 1999 study, the Commission on Civil Rights found significant weaknesses in the Office for Civil Rights' enforcement efforts. In particular, the Commission noted the government's failure to implement many of the recommendations indicated by the Commission in its report on Title VI enforcement issued in 1996:[2]

74. "Despite some focus on minorities' health generally the government has failed to enforce civil rights laws vigorously and appropriately. The failure of the government to be proactively involved in health care issues or initiatives has resulted in the continuance of poli-

cies and practices that, in many instances, are either discriminatory or have a disparate impact on minorities and women."[3]

75. Thus, there remain disparities in access to health care and in health care research, and unequal distribution of health care financing in the United States as a result of the US failure to meet its obligation under Article 2(1)(a).[4]

76. **Article 2(1)(c)**

Under Article 2(1)(c), the United States has failed to meet its obligation. While the United States has undertaken extensive measures to review national laws and regulation which have the effect of creating or perpetuating racial discrimination, it has failed to make necessary revisions and modification in the law as recommended by the US Commission on Civil Rights. As noted by the Commission:

77. "In the United States today, there remain tremendous racial and gender disparities in access to quality health care services and health care financing, as well as in the benefits of medical research. Many of these disparities continue to plague the Nation's health care system because the [government] ... has failed to enforce the crucial nondiscrimination provisions of the Federal civil rights laws with which it is entrusted. The ... enforcement operation is lacking in virtually every key area ... Most significantly, . . .[the government] generally has failed to undertake proactive efforts such as issuing appropriate regulations and policy guidance, allocating adequate resources for onsite systemic compliance reviews, and initiating enforcement proceedings when necessary."[5]

78. The United States, while undertaking measures to review the national effect of creating or perpetuating racial discrimination, has failed to "amend, rescind or nullify any laws and regulations" that have such effects. There has been little or no judicial activity in reviewing and shaping anti-discrimination law in health care. The government's report fails to identify this lack of oversight. The United States, despite taking five years to submit a report under its obligation, has failed to review state and local laws and regulations.

79. **Article 2(1)(d)**

Under Article 2(1)(d), the United States has failed to meets its obligation to "bring to an end, by all appropriate means, including legislation" racial discrimination in health care. Although Congress has enacted civil rights laws designed to address specific rights, such as equal opportunity in employment, education, and housing, it has not given health care the same status. ...Unequal access to health care is a nationwide problem that primarily affects women and people of color.[6] According to the Commission on Civil Rights:

80. "...for 35 years, [the government through] HHS and its predecessor agency, the Department of Health, Education, and Welfare (HEW), have condoned policies and practices resulting in discrimination against minorities and women in health care. In many ways, segregation, disparate treatment, and racism continue to infect the Nation's health care system. [The government] . . .has pursued a policy of excellence in health care for white Americans by investing in programs and scientific research that discriminate against women and minorities. [The government]... essentially has condoned the exclusion of women and minorities from health care services, financing, and research by implementing an inadequate civil rights program and ignoring critical recommenda-

tions concerning its civil rights enforcement program. The Commission, the HHS Office of Inspector General, and the HHS Civil Rights Review Team have offered many recommendations for improving civil rights enforcement ... However, failure to implement these recommendations has resulted in failure of the Federal Government to meet its goals of ensuring nondiscrimination and equal access to health care for minorities and women."[7]

81. **Article 5(e)(iv)**

Under Article 5(e)(iv), the United States has failed to "prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, [including] the right to public health, medical care, social security and social services." This failure has been noted by the US Commission on Civil Rights:

82. "Over the past 35 years the US Commission on Civil Rights has been monitoring health care access for minorities and women, focusing primarily on the important role civil rights enforcement efforts can play in providing equal access to quality health care. Although there have been some improvements in accessing health care over the last three decades, the timid and ineffectual enforcement efforts of the [government through the] Office for Civil Rights (OCR) at the US Department of Health and Human Services (HHS) *have fostered, rather than combated, the discrimination that continues to infect the Nation's health care system.* This is evident in the segregation, disparate treatment, and racism experienced by African Americans, Hispanic Americans, Native Americans, Asian Americans and Pacific Islanders, and members of other minority groups, as well as in the persistent barriers to quality health care that continue to confront women."[8] [emphasis added]

83. According to the US Commission on Civil Rights, there is substantial evidence that discrimination in health care delivery, financing, and research continues today. Such evidence suggests that Federal laws designed to address inequality in health care have not been adequately enforced by Federal agencies. The Commission noted that Health and Human Service's inability to enforce civil rights laws and the Office of Civil Right's isolation from the rest of the agency, as well as the civil rights community, have resulted in a failure to remove historical barriers to quality health care for minorities. This, in turn, has perpetuated these barriers.[9]

84. For nearly 20 years, from 1980 to 1999, the government has neglected its civil rights enforcement responsibilities to an almost unprecedented degree. Neglect of its civil rights enforcement responsibilities has been well documented.[10] The consistently weak record has resulted, in part, from the lack of commitment to civil rights enforcement in the United States.[11] According to the Commission on Civil Rights, the government's steadfast refusal to address concerns about the quality of its efforts indicates a fundamentally limited view of the role of civil rights enforcement in the health care industry—a view that is deeply ingrained within the culture of the Department of Health and Human Services (HHS).[12] "What makes this disregard of recommendations for vigorous civil rights enforcement efforts particularly shameful is that HHS provides federal assistance to medical programs and facilities that *save lives every day*."[13] While the activities of agencies charged with protecting the rights of equal access to education and employment are matters of tremendous importance, the failure to conduct strong civil rights enforcement in health care literally means the difference between *life and death* for many people of color. [14]

85. However, the responsibility for this shameful record does not lie with HHS alone. The rest of the federal Government, namely Congress and the President, has failed to offer the oversight, support, and assistance to civil rights enforcement activities that HHS so desperately needs.[15]

86. Congress has not conducted an oversight hearing on OCR's civil rights enforcement activities since 1987. Congress also has drastically reduced the agency's annual appropriation to a point where it is extremely difficult for the agency to perform its responsibilities effectively. While the [former] Administration has worked with HHS to implement minority health initiatives, none of these efforts contained a strong civil rights enforcement component or attempts to develop the key role that OCR should be playing in these efforts."[16] The commission notes that this lack of civil rights enforcement is "particularly ineffective when compared with some of the more sophisticated civil rights enforcement programs the Commission has evaluated." [17]

87. Finally, the Commission on Civil Rights notes that this lack of enforcement is of particular concern "because many new forms of discrimination against minorities have emerged as the Nation has moved from "fee-for-service" medicine to managed care. Without appropriate ... [civil rights enforcement] ...neither recipients or beneficiaries of Federal funding, nor OCR investigative staff can develop a clear understanding of what constitutes discrimination by managed care and other health care organizations"[18]

88. One such form of discrimination is embedded in the "business necessity" rationale where, under the guise of cost cutting and fiduciary risk reduction, policies and practices that are biased against racial minorities are considered "justifiable discrimination." The CERD's use of the term "unjustifiable disparate impact" indicates that the Convention also covers those practices that appear race-neutral but create statistically significant racial disparities and are unnecessary, i.e., unjustifiable.

OVERVIEW OF RACIAL DISPARITY IN HEALTH CARE

"Of all the forms of inequality, injustice in health is the most shocking and the most inhuman."

– Martin Luther King, Jr.

89. Equal access to quality health care is a crucial issue facing the United States. For too long, too many Americans have been denied equal access to quality health care on the basis of race, ethnicity, and gender. Cultural incompetence of health care providers, socioeconomic inequities, disparate impact of racially neutral practices and policies, misunderstanding of civil rights laws, and intentional discrimination contribute to disparities in health status, access to health care services, participation in health research, and receipt of health care financing.[19]

90. The need to focus attention on racism inherent in the institutions and structures of health care is overwhelming. Racial minorities are sicker than white Americans; they are dying at a significantly higher rate. The many examples of disparities in health status between racial/ethnic groups and between men and women are indisputable proof.

- Infant mortality rates are 2.5 times higher for blacks and 1.5 times higher for American Indians, than for Whites.

- The death rate for heart disease for blacks is higher than for whites.

- Individuals from racial and ethnic minority groups account for more than 50 percent of all AIDS cases although they only account for 25 percent of the US population.

- The prevalence of diabetes is 70 percent higher among blacks and twice as high among Hispanics as among whites.

- Asian Americans and Pacific Islanders have the highest rate of tuberculosis of any racial/ethnic group.

- Cervical cancer is nearly five times more likely among Vietnamese American women than White women.

- Women are less likely than men to receive life-saving drugs for heart attacks and more women than men require bypass surgery or suffer a heart attack after angioplasty.[20]

91. In their seminal work, *An American Dilemma: A Medical History of African Americans and the Problem of Race, Beginnings to 1900,* Drs. Michael Byrd and Linda Clayton lay out the long history of racism in medicine. In this book along with numerous other studies, it is clearly shown that the problems of minority health status and minority access to health care are part of a long continuum of racism and racial discrimination dating back almost 400 years. Since colonial times, the racial dilemma that affected America also distorted medical relationships and institutions.[21] There has been active assignment of racial minorities to the underfunded, overcrowded, inferior, public health-care sector.[22] Furthermore, medical leadership helped to establish and maintain slavery, created and sustained myths of racial inferiority, built a segregated health subsystem, and maintained racial bias in the diagnosis and treatment of patients.[23] Only after 350 years of active discrimination and neglect, were efforts made to admit racial minorities into the "mainstream" health system.[24] However, these efforts were flawed as since 1975 minority health status has steadily eroded and minorities continue to experience racial discrimination in access to health care and quality of health care received.[25]

92. Current issues in health disparity are not isolated to problems in the health system. They are the cumulative result of both past and current racism throughout US culture. For instance, because of institutional racism, minorities have less education and fewer educational opportunities. Minorities are disproportionately homeless and have significantly poorer housing options; and due to discrimination and limited educational opportunities, minorities disproportionately work in low pay, high health risk occupations (e.g., migrant farm workers, fast food workers, garment industry workers). Historic and present racism in land and planning policy also plays a critical role in minority health status. Minorities are much more likely to have toxic and other unhealthy uses sited in their communities than whites regardless of income. For example, overconcentration of alcohol and tobacco outlets as well as the legal and illegal dumping of pollutants pose serious health risks to minorities. Exposure to these risks is not a matter of individual control or even individual choice. It is a direct result of discriminatory policies designed to protect whites at the expense of minority health.

INSTITUTIONAL RACISM IN US HEALTH CARE

93. Compounding the racial discrimination experienced generally is institutional racism in health care. In spite of 30 years of government efforts to reduce these disparities, the US Commission on Civil Rights finds that, "Failure to recognize and eliminate differences in health care delivery, financing, and research presents a discriminatory barrier that creates and perpetuates differences in health status.[26] Racial barriers to quality health care manifest themselves in a number of ways including:

94. *Lack of economic access to health care.* Over 42 million Americans are uninsured with no economic access to health care. As access to health insurance in the United States is most often tied to employment, racial stratification of the economy due to other forms of discrimination has resulted in a concentration of racial minorities in low wage jobs. These jobs are almost always without insurance benefits. As a result, disproportionate numbers of the uninsured are racial minorities.

95. The "safety net," the network of policies and public services designed to provide low-wage and no-wage workers (stay-at-home mothers, recipients and others) access to health care and other social services has been drastically reduced. Government cutbacks and other policies limiting access to translation, requiring additional applications and/or interviews, work-for-benefit rules and more have dramatically decreased minority access to healthcare benefits. One of the direct effects of welfare reform has been a reduction in the use of Medicaid by those who qualify because of unawareness of eligibility requirements which has also increased the number of uninsured. In addition, increased poverty as a result of cutbacks has resulted in a worsening of health status and an increase in the need for health care services.[27]

CASE STUDY: DISCRIMINATION IN THE IDAHO CHIP PROGRAM

(Adapted from "Leading with Race" by Gary Delgado in *Grass Roots Innovative Policy Program*, Applied Research Center 2000)

96. The Idaho Community Action Network (ICAN), a grassroots, member based organization in the state of Idaho received numerous complaints from their members about the application process for the federal Child Health Insurance Program (CHIP). ICAN took testimony from members and reviewed the evidence. Although nearly all applicants were treated poorly, there was clearly a pattern of discrimination that needed further investigation. ICAN developed a project that tested the accessibility of the program in three Idaho cities. They sent white and Latino families to apply for the CHIP and documented how people were treated. The testing program uncovered clear evidence of discrimination: lack of translators; intrusive questions by eligibility and caseworkers; requirements of proof of citizenship for Latino applicants; and unduly long processing time for all applicants that was even longer for Latino applicants. Mounting a publicity and organizing campaign, ICAN forced the state to standardize application procedures and reduce the written application form for both Medicaid and CHIP from twelve to four pages.

97. *Barriers to hospitals and health care institutions.* The institutional/structural racism that exists in hospitals and health care institutions manifests itself in (1) the adoption, administration, and implementation of policies that restrict admission; (2) the closure, relocation or privatization of hospitals that primarily serve racial minorities; and (3) the

continued transfer of unwanted patients (known as "patient dumping") by hospitals and institutions to underfunded, over burdened public care facilities. Such practices have a disproportionate effect on racial minorities banishing them to distinctly substandard institutions or to no care at all.

98. *Barriers to physicians and other providers.* Areas that are heavily populated by minorities tend to be medically underserved.[28] Disproportionately few white physicians have their practices located in minority communities. Minority physicians are significantly more likely to practice in minority communities, making the education and training of minorities extremely important. Yet, due to discrimination in post-secondary education, racial biases in testing and quality of life issues affecting school performance, minorities are seriously under represented in health care professions.[29] The shortage of minority professionals affects not only access to health care but also access to the power and resources to structure the health care system leaving its control almost exclusively in white hands. The result is a system that benefits whites at the expense of racial minorities.

99. *Racial disparities in medical treatment.* Differences in health status reflect, to a large degree, inequities in preventive care and treatment. For instance, African Americans are more likely to require health care services than whites, but are less likely to receive them.[30] In fact, racial disparity in treatment has been well documented. Studies have shown racial disparity in both quality and availability of treatment in AIDS, cardiology, cardiac surgery, kidney disease, organ transplantation, internal medicine, obstetrics, prescription drugs, treatment for mental illness, and hospital care. There are marked differences in time spent, quality of care and quantity of doctor's office visits between whites and blacks. Whites are more likely to receive more and more thorough diagnostic work and better treatment and care than people of color—even when controlling for income, education, and insurance. Furthermore, researchers have concluded that doctors are less aggressive when treating minority patients.[31] At least one study indicated a combined affect of race and gender resulting in significantly different health care for African American women.[32]

100. *Discriminatory policies and practices.* Discriminatory policies and practices can take the form of "medical redlining"(excluding key medical services from predominantly minority communities and concentrating them in white communities), excessive wait times, unequal access to emergency care, deposit requirements as a prerequisite to care, and lack of continuity of care. Discriminatory practices and policies often appear racially neutral but disproportionately affect racial and ethnic minorities. For example, refusal to admit patients who do not have a physician with admitting privileges at that hospital, exclusion of Medicaid patients from facilities, and failure to provide interpreters and translations of materials, to name a few."[33]

101. One significant example, is a federal Medicaid "racially neutral" policy that limits the number of beds a nursing home can allocate to Medicaid recipients. The policy encourages these facilities to move existing patients who have spent down their assets and are now newly eligible for Medicaid into "Medicaid beds" as they become available. It is mostly white women who have the assets to afford long term care without Medicaid and live long enough to spend down those assets. The effect of this policy is that there are fewer resources spent on minority populations for nursing home care even though they represent a larger portion of the Medicaid population and have more illness. The combination of minority over-representation and government under-spending in Medicaid is

yet another example of the kind of structural and institutional racial discrimination that persists in many areas of the health care system.

102. *Lack of language and culturally competent care.* A key challenge has been to get the Government to establish clear standards for culturally competent health care. Culturally competent care is defined as care that is "sensitive to issues related to culture, race, gender, and sexual orientation." Cultural competency involves ensuring that all health care providers can function effectively in a culturally diverse setting; it involves understanding and respecting cultural differences.[34]

103. One example of institutional barriers to culturally competent care is the prevalence of linguistic barriers—particularly for Latinos and Asian Americans.[35] The failure to use bilingual, professionally and culturally competent and ethnically matched staff in patient/client contact positions results in lack of access, miscommunication and mistreatment for those with limited proficiency in English. This includes not providing education or information at the appropriate literacy level. Furthermore, "English only" laws—laws that restrict access to public services to those with proficiency in English—also have acute and racially disproportionate impact on minorities. The lack of an official government infrastructure (extending from the federal to the local level) to ensure standards of culturally competent care and equal access to services is inconsistent with Article 5 of the CERD.

104. *Double impacts of race and gender.* The unique experiences of women of color have been largely ignored by the health care system. These women share many of the problems experienced by minority groups, in general, and women, as a whole. However, race discrimination and sex discrimination intersect to magnify the barriers minority women face in gaining equal access to quality health care.[36] This intersection or "double impact" affects women of color with regard to provision of treatments, access to medical care and inclusion in research. This is partly the result of different expectations of medical care between men and women and of gender bias among health care providers. Furthermore, these barriers are exacerbated in the case of gender-specific illnesses such as breast cancer.[37]

105. Policies and practices that increase government surveillance and control of minority women are also a key factor in health status. Minority women are less likely to receive sympathetic intervention by law enforcement in the case of domestic violence. There are numerous cases of women who, after calling upon police for help in such cases, are victims of both domestic violence and police violence. Family planning is another area where public policy has had a negative impact on health status and life choices of minority women. Minority women do not have equal access to preventive medicine or the full range of birth control available. Barriers include lack of family planning services or facilities in their communities; lack of coverage of certain services, medications or procedures by Medicaid or other publicly funded health insurance programs; and disproportionately higher prescription of medically risky or unnecessary procedures such as contraceptive implants or forced sterilization. State and local policies are more likely to be discriminatory than federal policies. However, there are few standards for ensuring equal access and equal treatment at this level of government. With jurisdiction over this area increasingly devolving to the state and local level, there is a critical need for a clear regulatory infrastructure that provides redress for these barriers and remedies and consequences for policies and practices with discriminatory outcomes.

106. *Inadequate inclusion in health care research.* Despite volumes of literature suggesting the importance of race, ethnicity, and culture in health, health care, and treatment, a minute percentage of those funds are allocated to research on issues of particular importance to women and minorities (21.5 percent). Funding of research by women and minority scientists only amounts to .37 or less than one half of one percent. Although several statutory requirements have been enacted to ensure that research protocols include a diverse population[38], more must be done to address decades of exclusion. The health condition of women and minorities will continue to suffer until they are included in all types of health research.[39]

107. *Lack of data and standardized collection methods.* Current Government data collection efforts are inadequate and fail to capture the diversity of racial and ethnic communities in the United States. Disaggregated information on subgroups within the five racial and ethnic categories is not collected systematically. Further, racial and ethnic classifications are often limited on surveys and other data collection instruments, and minorities often are wrongly classified on vital statistics records and other surveys and censuses. It is important to collect the most complete data on racial and ethnic minorities, and "subpopulations" to fully understand the health status of all individuals as well as to recognize the barriers they face in obtaining quality health care.[40] The lack of a uniform data collection method makes obtaining an accurate and specific description of race discrimination in health care difficult. The existing data collection does not allow for regularly collecting race data on provider and institutional behavior.

108. *Rationing through managed care.* The health care financing system has been steadily moving to managed care (a system where a corporation intervenes and structures the health care process after standard business principles) as a means of rationing health care. As there is no proper oversight, managed care has tended over time to place increasingly stringent fiduciary requirements on providers. The impact of these largely financial interventions includes the failure to develop more expensive but culturally appropriate treatment modalities, not allocating the necessary expenditures to develop adequate health care infrastructure for minority communities. The potential for discrimination, particularly racial/ethnic discrimination, to occur in the context of managed care is significant. Leading commentators and advocates for civil rights in health care services, financing, and treatment have recognized this risk yet little has been done to protect minorities from this form of discrimination. The federal Office of Civil Rights (OCR) made the following statement on the issue:

109. "The Office of Civil Rights (OCR) also has not sufficiently prepared its investigative staff to identify and confront instances of discrimination by managed care organizations. Despite indications of discrimination prohibited under title VI, OCR has not yet developed policy guidance specifically addressing title VI compliance in the managed care context. OCR headquarters indicate that OCR has known about the potentially discriminatory activities of managed care organizations since 1995, yet the office has been loath to encourage or support the regional investigators in identifying cases."

110. Several managed care practices have disparate effects on minorities. One of the most common ways in which managed care organizations (MCOs) discriminate against minorities is in their selection of providers. A physician or other type of provider that serves mainly poor minorities may not be included in a managed care network because the provider's patients might be labeled "too costly." Some plans target suburban areas for enrollment while ignoring inner-city areas, a process known as selective marketing. In addition, some MCOs may be limiting the access of Medicaid patients to the full array

of providers by sending these patients provider lists that contain only providers that accept Medicaid resulting in "segregated" provider lists. Other methods MCOs have used to discriminate against Medicaid patients are excluding sections of urban, predominantly minority communities from the MCO's service area; applying a stricter definition of "medical necessity," the standard used to determine whether a patient will receive a particular test or treatment; and longer waiting times for new-patient or urgent-care appointments.[41]

INADEQUACY OF LEGAL EFFORTS

112. **"It might be that civil rights laws often go unenforced; it might be that current inequities spring from past prejudice and long standing economic differences that are not entirely reachable by law; or it might be that the law sometimes fails to reflect, and consequently fails to correct, the barriers faced by people of color."**

— Derrick Bell

112. Racial inequality in health care persists in the United States despite laws against racial discrimination in large part because the laws in the United States are inadequate for addressing issues of institutional racial discrimination. The US legal system has had particular difficulty addressing issues of racial discrimination that result from individuals acting on biases and stereotypes, and institutions that implement policies and practices that have a racial impact. The legal system requires individuals to be aware that the provider or institution has discriminated against them and that the provider has intentionally injured them. As discussed in previous sections of this document, this is a real barrier to legal redress. Finally, the health care system, through managed care, has actually built in incentives that may encourage "unintentional" or automatic discrimination.

113. In the case of health care discrimination, the laws do not address the current barriers faced by minorities; and the executive branch, the legislatures and the courts are singularly reluctant to hold health care institutions and providers responsible for institutional racism.

CRITIQUE OF GOVERNMENT REPORT

114. As indicated in the US Report on CERD, the Federal Government has made attempts to ensure equal access to health care through a number of statutes[42] that were enacted to fight racial discrimination. However, the report omitted federal agency findings that the Government's failure to ensure equal access to quality health care has not only been ineffective and inefficient, but also has perpetuated racial discrimination.

115. "... the Department of Health and Human Services (HHS) has faced several deficiencies, including shortage of resources and funding, which have hampered its ability to enforce civil rights laws and ensure nondiscrimination in the health care context. The result is the perpetuation of severe disparities in health status and access to health care services between minorities and nonminorities and women and men." [43]

116. Although Congress has enacted civil rights laws designed to address specific rights, such as equal opportunity in employment, education, and housing, it has not given health care the same status.[44] As a consequence, discrimination in health care is uncorrected.

CONCLUSION

117. Medicine has found cures and controls for many afflictions, improving the health of all Americans. However, the health care system has failed to extend the same magnitude of improvement in health among whites to minority populations. It has failed to eliminate the racial distribution of health care and it also perpetuates disparities among racial groups. The current law has proven ineffective in eliminating racial discrimination in health care. This is intolerable. The Government should act now to develop a health policy, practice and program infrastructure that brings it in compliance with the CERD, human rights standards and basic principles of equity and fairness.

RECOMMENDATIONS

- Define "justifiable" discrimination to exclude racial discrimination resulting from policies and practices that limit access and quality of health care received; or racial discrimination resulting from policies and practices that have a disparate impact where there is an alternative that either would not discriminate or have less of an impact.

- Require significant progress to be made in eliminating disparities in health and health care systems including but not limited to increasing the availability of facilities and training providers in communities of color; adequately funding DHH/OCR to enforce civil rights laws related to non-discrimination in health; designing specific civil rights laws, regulations, and policy guidance to address health care discrimination; developing clear standards for culturally competent health care; adequately funding research by minority and women scientists; establishing funding guidelines that promote research on women and minorities; developing policy guidance specifically addressing Title VI compliance in the health care setting (i.e. managed care); and development of specific training related to the use of race and class in research and intervention development.

- Require a unified data collection system in government programs (e.g., Medicaid, Medicare and military) which would allow easy determination of facilities, providers and organizations that discriminate in the diagnosis and treatment of illness.

IV. Education Policy

(Paragraphs 118-172)

KEY FINDINGS

- Several issues of CERD non-compliance were identified including unequal access to education and in the case of discipline policy, extreme discrimination with regard to equal treatment under the law.
- Schools are incredibly segregated with whites the least likely to attend school with other racial groups. White privilege is institutionalized in education in a myriad of ways including unequal funding and support and bias in curriculum and testing.
- Increasing policing of students of color has meant greater law enforcement involvement, which has resulted in racially disproportionate suspensions, expulsions and referrals to the criminal justice system.
- Public policy toward predominantly minority primary and secondary schools discourage integration and facilitate isolation and inequity. Policies toward predominantly minority post secondary institutions are characterized by aggressive mandates guaranteeing expanded access for whites. Predominantly white institutions of higher learning are under no such mandates for assuring access to racial minorities.

KEY RECOMMENDATIONS

- Design Racial Equity Plans at the school, district, state, and national levels that include annually quantifiable goals.
- Schools must act immediately to correct the uneven application of the most severe disciplinary actions, including suspension and expulsion.
- End academic tracking and open the way for all students to participate in a challenging curriculum, including advanced classes.
- Develop policies that guarantee the equitable distribution of resources that take into account the critical role of quality public education as one remedy for past discrimination.
- Institute more accurate and sensitive standards for measuring student progress and college aptitude and discontinue the use of biased and ineffective standardized tests.
- At the post secondary level, affirmative action programs and other special measures should be established to increase the number of minorities completing college and graduate school.

For More Information Contact

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The Persistence of White Privilege and Institutional Racism in US Policy

A Report on US Government Compliance with the
International Convention on the Elimination of All Forms of Racial Discrimination

IV. Education Policy

SUMMARY OF CERD AND OTHER HUMAN RIGHTS VIOLATIONS

118. We assert that until the recommendations below are fully enacted and the institutional practices which deny children of color their education are addressed, the government of the United States is in violation of the Convention on the Rights of Children (1989), the Convention Against Discrimination in Education (1960), and Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (1966).

OVERVIEW

119. An examination of any dimension of public education in the United States today—funding, curriculum, school discipline, or graduation and college enrollment rate—reveals vast inequities between people of color and those of their white counterparts. Together these differences make up a system of institutional racism throughout public education in this country.

120. These gross and obvious inequalities are not confined to any single city or region of the country. The research discussed in Applied Research Center's report, *Facing the Consequences: An Examination of Racial Discrimination in US Public Schools*, (See Appendix E) reveals similar results for small towns and big cities, for the North and the South, for schools where students of color are the minority and where they predominate.

121. If US public schools regularly failed to serve students of color in a single aspect of their education that would be bad enough. What the research reveals, however, is far more pernicious. It is the cumulative effect upon students of color of an education system that channels them away from academically challenging courses, punishes them more frequently and more harshly, and ultimately pushes them out of school without a diploma—all in much higher proportions than their white counterparts. We must face the consequences of racial discrimination in US public education in order to ensure educational equity, opportunity, and excellence for all students.

Outcomes Versus Intentions

122. What concerns the nation's almost 17 million students of color and their communities is that, regardless of anyone's intent, they receive an inferior education. Public policy must address these systematic inequalities in the application of discipline, in dropout, graduation, and college acceptance rates, in access to advanced classes, and to contemporary textbooks and other educational materials.

123. *Inadequate data collection.* Of the 12 school districts covered in the *Facing the Consequences* report, three-quarters failed on at least one indicator simply because they failed to collect or refused to supply the necessary data. A quarter of the districts did not report the demographics of their most recent graduates. Another quarter had no racial breakdown for advanced placement classes or programs for "gifted" students. And more than half did not know the racial composition of the graduates who went on to college.

Equity Counts

124. **"...it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."**

—Brown vs. Board of Education (1954)

125. Almost 50 years have passed since the United States Supreme Court ruled that segregated schools were "inherently unequal" and therefore unconstitutional. The data collected demonstrate that half a century later, whether segregated or not, whether by conscious design or through unconscious acceptance, public schools still offer young people of color an unequal, inferior education.

126. At the heart of the landmark Brown decision cited above was indisputable evidence that segregation in education has resulted in a system where whites have reserved the best in education—be it facilities, teachers, equipment, instructional materials and the like—for their primary use. This system of privilege or racial spoils is predicated upon the same assumptions that animate and maintain white supremacy in other areas of American life: a philosophy based on a belief in the natural entitlement of whites and the inferiority of other peoples. Unfortunately, more than a half century after Brown, these assumptions undergird discriminatory policies that, among other things, allocate a disproportionate share of funding to predominantly white schools, concentrate spending on policing and security devices for the control of students of color at the expense of the classroom needs.

127. As Gary Orfield and John T. Yun, find in *Resegregation in American Schools* (The Civil Rights Project, Harvard, University, June 1999), schools are deeply segregated and the courts, as reconfigured by appointees under the Reagan and Bush Administration, are providing no relief. In fact, court decisions of the last decade have hastened both segregation and inequity. As Orfield and Yun write, "based on the national average, the average white student is in a school with 8.6% black students, 6.6% Latinos, 2.8% Asians, and 1% American Indians. Whites are the only racial group that attends schools where the overwhelming majority of students are from their own race. Blacks and Latinos attend schools where a little more than half the children are from their own group, on average, while American Indians attend schools that are one-third Indian [excluding Bureau of Indian Affairs (BIA) schools]. Asians tend to be in schools that are only about

a fifth Asian." This intense segregation of whites enables the unequal allocation of educational resources along racial lines.

128. Unequal education is clearly a form of racial discrimination. It jeopardizes the futures of millions of young people of color in the US. It is easy to ignore race as a dynamic, even when disparities fall significantly along racial lines. It is also easy to point the finger at inequities in society overall, thereby relieving the school system of any responsibility. However, if this embedded pattern of institutional racism is to be remedied, each institution, including our school systems, must take responsibility for doing its part to change things.

CASE STUDY: ZERO TOLERANCE POLICIES

129. **"White students leave high school with diplomas. Our [African American] kids leave in police cars."**

— African American activist working to address racism in South Carolina schools

130. The proliferation of zero-tolerance policies in US public schools is one example of how public policy can have a devastating race-based affect. The collection of data on a variety of key indicators of performance and equity for a dozen school districts geographically distributed throughout the country, unearth the following findings regarding school discipline and zero tolerance:

131. *In every school district studied, there are significant racial disparities in student suspensions and expulsions.* In every city studied, African American students are suspended or expelled in numbers proportionately greater than those of any other group. For example, in Los Angeles, California and Austin, Texas, African Americans are suspended or expelled at least twice their proportion of the school population.

132. *By increasing school expulsions, zero tolerance policies have a disproportionately adverse impact on students of color.* The zero tolerance policy of the Chicago, Illinois School District went into effect in the middle of the 1995-96 school year. In the 1994-95 school year, 23 students were expelled from the Chicago schools. Two years later, the number of expulsions jumped to 571. The number continues to skyrocket—it is estimated that the district expelled 1,000 students in the 1998-99 school year. The district projects that it will expel 1,500 students in the 1999-2000 school year. If so, expulsions will have jumped 65 times since the advent of zero tolerance. (See Table 2 for actual and projected expulsions in the Chicago Public Schools from 1993 to 2000.)

133. Since Chicago suspends and expels African American students at disproportionate rates, African Americans are hurt most by the zero tolerance policies. In the 1997-98 school year, African Americans composed 54% of the student population, but represented 63% of the students suspended and 71% of the students expelled. If that same racial proportion holds for the current school year, with 1,500 projected expulsions, the district will expel 1,065 African American students. Amplified to the national level, the number of expelled African American students is staggering.

134. Numerous studies demonstrate that students who are suspended or expelled are more likely than their peers to drop out of school altogether. Thus, zero tolerance compounds

the racial inequities in school discipline by escalating the sheer numbers of students of color who are excluded from public education in the US.

135. *Zero tolerance policies are being implemented in unfair and unreasonable ways.* Martin, an African American high school student in Providence, Rhode Island, offered to help his teacher dislodge a stuck diskette from his classroom's computer. But when he pulled out his key chain knife to help release the disk, he ran afoul of Providence's "zero tolerance" rules, which mandate automatic exclusion for any student who brings a "weapon" to school. Would Martin have been suspended if he were white? Maybe. On the other hand, a white student in Danville, Vermont was neither suspended nor expelled when he explained that he'd brought a loaded shotgun to school because it was hunting season.

136. Similarly, a 1999 study by the Student Advocacy Center of Michigan found that when two white students in Olivet, Michigan were caught with a gun in their car trunk, they got off with a 10-day suspension and 40 hours of community service. By comparison, in another Michigan county, a Black student was expelled for cleaning his nails with a pocket knife-which he immediately handed to his teacher when asked to do so. The police were called and the student was expelled.

137. While zero tolerance penalties appear to be racially neutral, they can be applied in very subjective ways, influenced by racial prejudice. For example, parents involved in Indian People's Action in Missoula, Montana reported that their children were being disciplined for "defiance of authority" if they didn't look their teachers in the eye when being reprimanded, even though it is disrespectful in some Native American cultures for a young person to look directly at an elder in such an interaction.

138. Since no two incidents are exactly alike, it can be difficult to legally prove that similarly situated students of different races were treated unequally. But the weight of mounting anecdotal evidence, which is well aligned with statistical evidence of racial disparities in discipline, cannot be ignored.

139. *Zero tolerance policies curtail the expression of reasonable professional judgment by school educators and administrators, and limit students' and parents' right to equality before tribunals (Article 5).* In the case of Martin in Providence, the African American high school student caught with a small utility knife, the police, rather than the school district, notified the parent. Though a hearing was allowed, neither Martin, nor his mother, was permitted to be present while witnesses testified against him. There are countless cases of students, especially students of color, being suspended or expelled for non-violent and non-threatening offenses. Many states and school districts have implemented zero tolerance policies that exceed the scope and intent of the 1994 Gun-Free Schools Act. (Table 3 shows how the Providence schools exceed federal and state zero tolerance policies.)

140. Now, in addition to weapons possession, schools are expelling students for fighting, violating school dress codes, possessing drugs and alcohol, or carrying anything that resembles a weapon or could be used as a weapon. Students have even been punished for possessing cough medicine, mouthwash, art tools or toy guns. Even after they are confronted and it becomes clear that there is no safety threat or intent to harm anyone, school administrators proceed to substitute their professional judgment for rigidly-prescribed zero tolerance penalties. Often, due process is bypassed. Evidence suggests that schools are more willing to recognize mitigating circumstances when they perceive the student involved in an incident as having "a real future" that would be destroyed by expulsion. Overwhelmingly, it is African American and Latino students whose futures are wrecked

by zero tolerance policies. Too often, we receive reports of cases where white students are given the benefit of the doubt, while students of color (due to prevailing stereotypes and negative imagery) are presumed guilty until they can prove themselves innocent—if they are even afforded the privilege of a defense.

141. *There is a huge reporting deficiency in disciplinary actions in US public schools.* Some school districts collect comprehensive data, while others collect minimal data. For example, some districts collect discipline data that is fully broken down by race, gender and age, while others simply collect total disciplinary actions. Some districts do not have data that distinguishes the suspensions from expulsions. Some do not distinguish which suspensions are in-school from those that are off-campus. Most have no way of tracking which offenses and penalties fall within the zero tolerance policies. This makes accurate assessment difficult.

142. Even when the data is collected, there can be inconsistencies. For example, if you ask for discipline data in San Diego, California, the racial categories are different than the categories used in San Francisco, California. What's more, the racial categories for discipline used in both of these school districts differs from the racial categories for student enrollment used by the state of California. This makes cross-district comparisons difficult. Some school districts use different terminology to describe their disciplinary actions. For example, one community organization recently tried to get data on "in-school suspensions" from its local school district. Unlike previous years, the school district reported having zero "in-school suspensions" during the last school year. The community organization inquired further and discovered that the school district could claim to have no "in-school suspensions" only because they had changed the name to "in-school supervisions."

143. With heightened public awareness and scrutiny of school safety issues, zero tolerance policies, and inequities in school disciplinary actions, it is critical that all school districts in the US have sufficient information to assess the effectiveness and fairness of its disciplinary policies and practices.

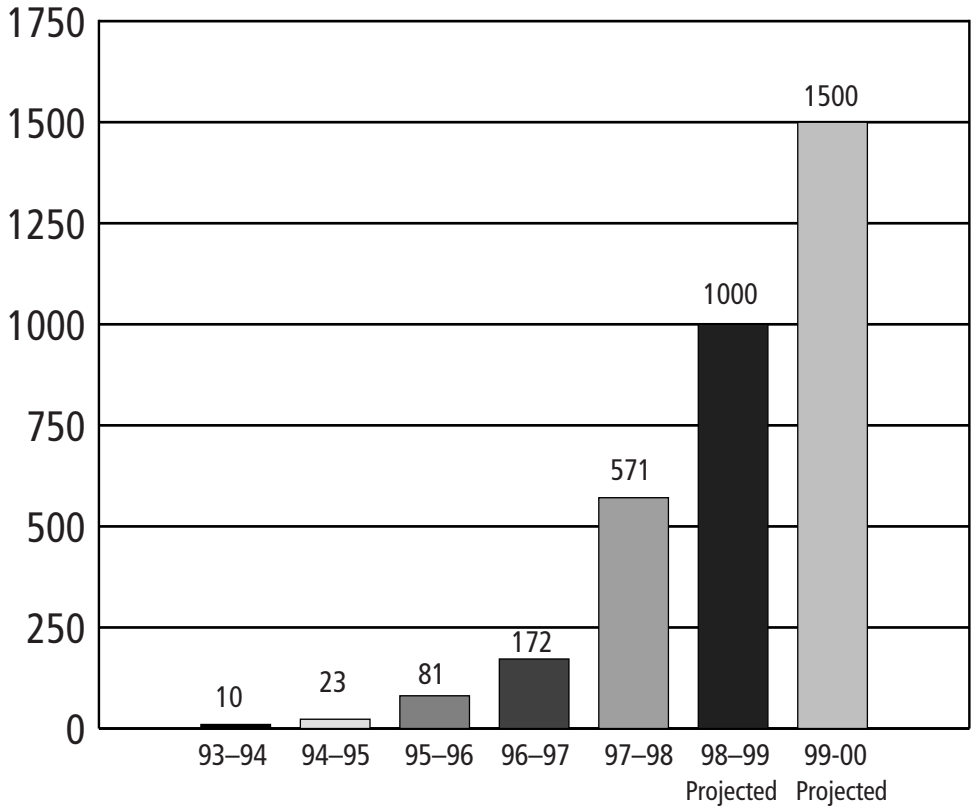
TABLE 1
Applied Research Center
USCCR Testimony, 2/18/00

SUSPENSION AND EXPULSION DATA BY RACE

	AFRICAN AMERICAN	LATINO	ASIAN/PI	NATIVE AMERICAN	OTHER	WHITE	
Austin	18%	43%	2%	0%	0%	37%	All Students
TX	**36%**	**45%**	**0%**	**0%**	**0%**	**18%**	**Susp./Exp.**
Boston	55%	23%	8%	0%	0%	13%	
MA	**70%**	**19%**	**2%**	**1%**	**0%**	**9%**	
Chicago	53%	33%	3%	0%	0%	10%	
IL	**63%**	**27%**	**1%**	**0%**	**0%**	**8%**	
Columbia	78%	0%	0%	0%	2%	20%	
SC	**90%**	**0%**	**0%**	**0%**	**1%**	**9%**	
Denver	21%	50%	3%	1%	0%	24%	
CO	**36%**	**45%**	**2%**	**1%**	**0%**	**16%**	
Durham	58%	4%	2%	0%	0%	36%	
NC	**79%**	**2%**	**0%**	**0%**	**0%**	**18%**	
Los Angeles	14%	69%	7%	0%	0%	11%	
CA	**30%**	**58%**	**3%**	**0%**	**0%**	**8%**	
Miami-Dade	33%	53%	1%	0%	0%	12%	
County, FL	**48%**	**43%**	**0%**	**0%**	**0%**	**8%**	
Missoula	0%	1%	2%	3%	0%	94%	
MT	**NA**	**NA**	**NA**	**NA**	**NA**	**NA**	
Providence	23%	46%	11%	1%	0%	21%	
RI	**39%**	**45%**	**3%**	**0%**	**0%**	**13%**	
Salem	1%	10%	3%	1%	0%	84%	
OR	**4%**	**22%**	**3%**	**2%**	**0%**	**69%**	
San Francisco	18%	24%	43%	1%	0%	14%	
CA	**56%**	**19%**	**13%**	**1%**	**0%**	**11%**	

TABLE 2
Applied Research Center
USCCR Testimony, 2/18/00

STUDENT EXPULSIONS PER YEAR, CHICAGO PUBLIC SCHOOLS, 1993–2000



Source: Chicago Public Schools, "Measuring Progress Toward Goals" (http://www.cps.k12.il.us/Trending_Up/Measuring_Progress_Toward_Goal/o7-p41-C.PDF); Chicago Public Schools, FY 2000 Final Budget.

TABLE 3
Applied Research Center
USCCR Testimony, 2/18/00

ZERO TOLERANCE POLICIES IN PROVIDENCE, RHODE ISLAND PUBLIC SCHOOLS

Federal Gun Free Schools Act, 1994	Rhode Island State Law 16-21-18, 1995	Providence Zero tolerance Policy, 1996
• Guns • Explosive devices that expel projectiles • Silencers and mufflers • Bombs, grenades, rockets, missiles, and mines	• Guns • Explosive devices that expel projectiles • Silencers and mufflers • Bombs, grenades, rockets, missiles, and mines	• Guns • Explosive devices that expel projectiles • Silencers and mufflers • Bombs, grenades, rockets, missiles, and mines
	And... • Realistic replicas of firearms	**And...** • Realistic replicas of firearms
		And... • Knives • Razors • Gas repellent • Mace • Martial arts devices • Objects that could inflict bodily harm, such as: black-jacks, chains, clubs, brass knuckles, night sticks, pipes, studded bracelets, etc. • *Any object which, by virtue of its shape or design, gives the appearance of any of the above.*

Report on Providence School Department's Zero Tolerance Policies by Direct Action for Rights and Equality (DARE), Providence, Rhode Island.

CASE STUDY: WHITE PRIVILEGE AND JUVENILE JUSTICE IN LOUISIANA BY SARAH XOCHITL BERVERA*

144. *Zero tolerance policies have resulted in increased involvement in school discipline by law enforcement which in turn has contributed significantly to minority youth overrepresentation in both the juvenile and adult criminal justice systems. As a number of US NGOs are submitting shadow reports on racial discrimination in the criminal justice system, this report will not go into great detail in this area. However, this brief case study from the state of Louisiana is included to help further illustrate the tragic consequences of discrimination and white privilege on the life chances of minority youth.*

145. The racial discrimination that pervades the American juvenile justice system has a profound effect on the lives and families of all young people who come into contact with it. A look at a Louisiana-based group for parents of incarcerated children illustrates the extent of this impact and illuminates how the statistics and numbers are actually experienced by youth and their families.

146. Louisiana is located in the southeastern part of the United States bordered by the Gulf of Mexico to the south, the state of Arkansas to the north, Texas to the west and Mississippi to the East. Louisiana's population of 4,219,973 is divided almost exclusively between African-Americans and Whites. While 38% of Louisiana's youth (under the age of 18) are African-American, African-Americans comprise 81.2% of the youth detained in Louisiana's four "secure care" correctional facilities for juveniles. The average African-American juvenile living in Louisiana is more than 7 times more likely to find himself committed to a secure care facility than a white juvenile.**

147. The Juvenile Justice Project of Louisiana's newly formed Parents Group brings parents of incarcerated children together for support and advice. They have also begun to strategize around how families and communities can organize to affect the policies and practices of the juvenile justice system that so profoundly affect their children. The parents who attend are overwhelmingly African-American, an honest reflection of the overrepresentation of minority youth in the state's juvenile correctional facilities.

148. Invariably, among the first things listed when the parents conduct a brainstorm of problems they have encountered in the system, someone loudly and clearly says, "Racism." The first time the group met, it was raised by an elementary school teacher, a mother whose son had recently been released after a year of incarceration at the Tallulah Correctional Center for Youth. At the next meeting, it was a father whose son is still serving his sentence of three years for bicycle theft. For families in Louisiana, the racial disparities in the system are glaring. Statistics are not available, nor are they necessary, for families to see the plainly discriminatory ways their children are treated.

149. After the subject has been broached, other parents join in. Laverne, a nurse whose son is almost finished with his yearlong sentence in the Swanson Correctional Center for Youth, recalls her courtroom experience with pain. She remembers that in the waiting room there was only one white mother. All the other family members of arrested juveniles were African-American. In the courtroom, however, she and her son were the *only* African-Americans present. Judge, bailiff, prosecutor, probation officer, defense attorney – all of them were white. Laverne and other African-American parents indicate that this phenomenon – which is not uncommon in Louisiana - has at least two effects.

150. First, it alarms parents to the very real possibility that their child might be treated unfairly solely because of the color of his skin, and secondly, it furthers the intense alienation that minority parents feel when navigating the juvenile justice system. Many parents talk of feeling excluded from the process, or worse, treated as though they are part of the problem. These parents specifically attribute this to the stereotypes and prejudices that white judges and lawyers have about minority families.

151. Parents who have worked hard to find alternatives to incarceration that would allow their child to stay at home, and are better suited for their child find themselves ignored at hearings. They are never given a chance to speak. Often parents say that they feel that the judges and lawyers treat their children as if they were adults, and approach them with fear, regardless of what crime was committed or the demeanor of the child. This can be directly attributed to racist assumptions and stereotypes of young black men. Their children are not given the second chances that white children are given, and are sent away more frequently to secure care facilities.

152. Once the state takes custody, parents say, the disparities are even more blatant. At one Parent's Group meeting, an African American mother told the one white mother present that she felt for her son's predicament. "It must be hard to be the only white boy in that entire dorm." Parents who travel four and five hours to visit their children observe that there are even fewer white children in the facilities than there were in court. Whites serve shorter sentences and are released much faster than the African-American children. The fact that African-American children often serve longer sentences than white children for the same crime is intensely painful for parents who anxiously await their children's return. A longer stay in one of Louisiana's juvenile correctional facilities – known for violence and neglect of children in their custody - can mean many things. At best, it is more time for the child to fall behind in school, jeopardizing his chance to successfully transition back into the "real world." At worst, it means a broken leg, a broken jaw or worse.

153. The racism that is felt and experienced first hand by these parents who have had to navigate the system is repeated by the statistics which show vast racial disparities of incarcerated juveniles based on race. Yet, the statistics cannot tell the stories of the families who pay the price for both the individual and institutionalized racism that unjustly contribute to the incarceration of their children.

154. *Case study was written by Sarah Xochitl Bervera (email: sxb2000@nyu.edu). Stories are composites of real people and their stories/retelling of their experiences.

155. **Statistics are based on 1990 Census Report and Louisiana's Department of Corrections data, updated in October, 2000.

CASE STUDY: WHAT HAPPENS WHEN A SCHOOL TAKES A RACE-CONSCIOUS APPROACH TO DISCIPLINE?

155. That is exactly what staff at James Lick Middle School in San Francisco, California decided to find out. Heidi Hess is Focused Effort Coordinator at James Lick. She says that teachers at her school were concerned that African American students, who make up less than a third of the student body, receive almost half the referrals for discipline.

156. "The first thing we had to do," to address this disparity, says Hess, "was to really become rigorous about collecting the data. We developed forms for teachers to use that documented when a student was sent out of class (for a disciplinary referral), who sent them out, and why." Collecting this data yielded some surprising results. "We found that over 75% of the referrals given out last school year were for defiance of authority or disruption of class." Furthermore, most cases involved conflicts between students and teachers, rather than between students. More serious offenses, such as possession of a weapon, were rare.

157. Collecting the data was just the first step. "We developed a system to feed the data collected directly back to the teaching staff," Hess says, "so they can better understand what is going on" and gauge their progress. "We looked at how teachers set the rules in their classrooms, and whether and how teachers involved students in defining classroom rules." They found that when students participate in forming the rules, they are less likely to perceive them as unfairly applied.

158. James Lick staff began holding monthly professional development meetings to work out alternative strategies for de-escalating conflict. They sought to emphasize teachers' roles in these interactions, rather than focusing solely on methods of changing students' behavior.

159. Although most of the power resides with the teachers, "it was a paradigm shift for the teaching staff to buy into the idea that it is their responsibility to minimize defiance situations," Hess continues. "We had to ask, 'What might be going on in the students minds? What's going on for the teacher? And what would be alternative practices?'"

160. "One of the best exercises we did was to role-play the beginning of a defiance scene. For example, a student walks into class and puts a soda on the table, even though no drinks are allowed in the classroom. The teacher asks the student to remove the drink. Just acting out different possible responses to this scene, with the staff taking not only the teacher's role, but also trying on the student's role. It was profound."

161. James Lick's revamped approach to discipline is still too new to determine whether these interventions will reduce the racial disparities in suspension referrals. But already teachers are experiencing some success. Hess offers an example: "One teacher reported that she was just about to yell, from across the room, at two African American girls who appeared to be talking and carrying on excessively. But she gave herself a few seconds to think of an alternative strategy for dealing with them. Instead, she walked over to them, and much to her surprise, found that they were talking about their work assignment. Far from yelling at them, she realized she didn't need to say anything at all."

WHITE PRIVILEGE AND ACCESS TO HIGHER EDUCATION*

162. Access to higher education is critical to moving out of poverty. According to the US Census Bureau, earnings for college graduates average more than 50% higher than earnings for high school graduates. The disparity is more marked between those who stop at high school and those who complete some graduate school. Indeed, earning a graduate degree is an important factor in earning power. Post-secondary education is especially important for racial minorities who are about twice more likely than whites to be stuck in poverty if they can not earn a college degree.

163. Therefore, bias and discrimination in higher education form a critical barrier to living wage and high wage jobs, which in turn affects virtually every facet of quality of life. This bias takes many forms. It begins in secondary education where minorities are denied access to courses that are required for college admission or that will better prepare them for success in post secondary education. For example, a study by the UCLA Graduate School of Education has found that minority students are systematically excluded from Advanced Placement classes. A study on race and education by the Applied Research Center, *No Exit? Testing, Tracking, and Students of Color in US Public Schools,* (Appendix E) found that tracking is most common in schools with "significant numbers of African American and/or Latino students." Further, white students regardless of test scores, grades or behavior were much more likely to be placed in "higher tracks" or academic programs. Students of color - especially African Americans and Latinos - were more likely to be placed in "lower" tracks.

164. The result of these programs, besides creating inequality within a local district or even within a single school, is that racial minorities are less likely to receive adequate preparation for college regardless of academic ability. The segregation of housing, resources and wealth by race has led to a system where young people's life options can be severely limited or greatly enhanced by a single factor: where they reside.

165. Those people of color who are able to access college preparatory classes find yet another barrier to college: standardized testing designed to privilege whites. The studies showing racial bias in standardized admission tests are numerous. However, one study by the Princeton Review (Rosner, 1999) found particularly damning evidence. The Scholastic Aptitude Test (SAT), the test most often used by colleges to determine undergraduate college admission for students entering from high school, disallowed any questions on which African Americans consistently scored better than whites on the test as part of its criteria for test validity. Questions on which whites scored better than African Americans were kept on the test (see Appendix F).

166. Competition for college admission is quite high. As a result, there have been a number of lawsuits and policies at both the state and federal level designed to limit minority access to college (especially graduate school) and expand access for whites. Special outreach measures like affirmative action have been under attack in several lawsuits. In the state of California, a statewide ballot measure was passed that greatly curtailed the ability of institutions to consider racial diversity as part of their hiring and admissions criteria. In the first year of implementation of a ban on affirmative action in the University of California (UC) system, no new African Americans were admitted to Boalt Law School or UC Davis and UC San Diego medical schools. In fact, everywhere affirmative action has been eliminated, minority enrollment in schools has decreased dramatically.

167. By contrast, whites are gaining unprecedented access to Historically Black Colleges and Universities (HBCUs) so that they have expanded options for college education—especially at the graduate level. The policies that have created this access provide insight into the legal apparatus that maintains and advances white privilege.

CASE STUDY: HISTORICALLY WHITE COLLEGES AND HISTORICALLY BLACK COLLEGES RECEIVE DIFFERENT TREATMENT UNDER LAW

168. Historically Black Colleges and Universities (HBCUs) were institutions created as one of the few government sponsored remedies in the aftermath of slavery. The colleges were segregated because the government did not want to encourage black attendance at white institutions. In a number of southern states, legislatures explicitly chartered institutions to serve either whites or blacks but not both. Blacks were barred from attending or even teaching at Historically White Colleges and Universities (HWCUs) though whites could, in many cases, attend black institutions. Whites did not attend these institutions, however, because they were consistently less funded than their white counterparts, and with few exceptions were not allocated resources for graduate studies, adequate facilities or even completely accredited. However, many black colleges and universities had white faculty, staff and were sometimes headed by white presidents.

169. Still, HBCUs play a critical role in the ability of African Americans to access education and income. Facing discrimination by HWCUs, HBCUs were the main venue for African Americans to receive a college education—especially professional and graduate degrees. Before the advent of civil rights legislation prohibiting discrimination in 1964, virtually every graduate and professional degree earned by blacks was conferred by one of the elite HBCUs with graduate and professional degree programs. Even as late as 1976, HBCUs conferred more than three-quarters of all professional degrees earned by blacks.

170. As college education became increasingly linked to livelihood, and more people of color were able to attend HWCUs (either as immigrants from outside of the US or minority residents), competition for college slots increased. By the 1980s, HBCUs were placed under strict integration mandates that required that they either merge their resources and facilities with nearby white institutions or attract white student enrollment in large numbers by strict deadlines. HWCUs are not under such mandates although, unlike black institutions, they implemented policies that banned blacks from attending their institutions for more than a century.

171. Alabama State University, an HBCU chartered in the 19th century by the Alabama state legislature, is currently operating under an integration order that requires that they set aside nearly 40% of their academic grants budget for scholarships to whites. The state augments the university's $229,000 contribution with public funds bringing the "whites only" scholarship fund to a million dollars a year. There are few eligibility requirements. A student must be white and have earned at least a C average. African Americans vying for admission to the university must earn almost a full point higher to even merit consideration. In fact, as a C average is just slightly above the minimum required to pass a class, white scholarships are the only academic scholarships for entry at the university level with such low requirements. (see Appendix G)

172. Aside from the irony of such a policy that cuts off African Americans from institutions established to help address the deep inequalities of slavery and its aftermath, there are

no accompanying requirements for Historically White Colleges and Universities. On the contrary, such efforts to integrate white institutions from Harvard to the University of Texas have been under attack. Despite the fact that many colleges across this country are overwhelmingly white with little diversity, there are no mandates, no timelines, not even laws or policies requiring integration at any level. By contrast, HBCUs (which are often relatively small and underfunded) are forced to integrate although they have historically offered African Americans—and anyone who would apply—a supportive, relatively bias free environment. *Given the fact that the Government has not acted aggressively to force the integration of predominantly black schools at the K-12 level, these mandates appear to have a singular purpose—to expand post secondary education opportunities and resources for whites.*

RECOMMENDATIONS

- In testimony to the US Commission on Civil Rights, the Applied Research Center made several recommendations (See case study on race conscious discipline, above) regarding monitoring, implementation and alternatives to zero tolerance policies. In addition, we believe that the CERD has a pivotal role to play in ensuring the rights of children and communities of color in the United States and elsewhere. In this report, we include the following broader recommendations stemming from findings in the Facing the Consequences report. They are as follows:

- *Design Racial Equity Plans at the school, district, state, and national levels that include annually quantifiable goals.* Where data reveal racial divides, the responsible agencies should create, implement, and evaluate annually a comprehensive plan to solve the problem, including numerical goals and timetables. Such Racial Equity Plans must address the entire school environment, including such issues as teacher recruitment and training, learning facilities and classroom resources, class size, availability of inclusive and challenging curriculum, and clear and even-handed discipline policies.

- *Schools must act immediately to correct the uneven application of the most severe disciplinary actions, including suspension and expulsion.* Discipline policies that result in racially disparate impacts should be modified or eliminated to ensure fair treatment of all students.

- *End academic tracking and open the way for all students to participate in a challenging curriculum, including advanced classes.* Studies show that African Americans, Latinos, and Native Americans are underrepresented in advanced placement classes and other programs for "gifted" students. In fact, the practice of tracking students by perceived "ability" creates racial ghettos within nominally desegregated schools, as students of color are tracked away from college preparatory classes. Because the effects of tracking are cumulative, any successful intervention must begin at the earliest grade levels to ensure that every student has equal access to these "gatekeeper" classes.

- *Develop policies that guarantee the equitable distribution of resources that take into account the critical role of quality public education as one remedy for past discrimination.* Public education is potentially an important tool for addressing racial inequity. Unfortunately, due to inequitable funding practices, segregation of resources and facilities, and other forms of institutional white privilege schools have been more often used to institutionalize discrimination and inequity. The Government should develop a more effective regulatory and monitoring infrastructure that facilitates greater equity in public education with a central focus on the dismantling of white privilege.

- *Institute more accurate and sensitive standards for measuring student progress and college aptitude and discontinue the use of biased and ineffective standardized tests.* Current forms of standardized tests, be they "high stakes" tests which determine matriculation at the primary and secondary school level or college or graduate school admission tests, are found to be racially biased as well as poor indicators of a student's prospects for academic success. Groups like FairTest have identified more effective means of student assessment. These measures should be adopted and implemented as policy.

- *At the post secondary level, affirmative action programs and other special measures should be established to increase the number of minorities completing college and graduate school.* Given the importance of a college education to quality of life, Government must develop clear policies in this arena with specific timelines and outcomes—particularly for minority admission, retention and graduation at Historically White Colleges and Universities.

V. Exclusionary Land Use Practices

(Paragraphs 173-229)

KEY FINDINGS AND RECOMMENDATIONS:

- Exclusionary land use practices create a number of harms that unjustifiably impede the rights of people of color in the United States to housing (Art. 5.e.iii), work (Art.5.e.i.), and education (Art.5.e.v.)
- Federal legislation should be enacted that clearly defines racial discrimination in all relevant anti-discrimination statutes and should be amended to explicitly include policies and actions with unjustifiable disparate impacts on people of color.
- Federal legislation should be enacted that places an affirmative duty on states to ensure that their zoning and other land use powers are not being used in manners inconsistent with the mandates of the Fair Housing Act, the Convention on the Elimination of Racial Discrimination, and other relevant international standards. This should include the requirement that public authorities undertake a Fair Housing Impact Assessment process prior to actions with significant housing implications.
- The Government should undertake a comprehensive federal review of the presence of racial discrimination in land use practices in place throughout the United States.

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V. Exclusionary Land Use Practices

CERD COMPLIANCE ISSUES AND EXCLUSIONARY LAND USE PRACTICES

173. Exclusionary land use practices clearly fit within the definition of prohibited "racial discrimination" articulated in the Convention and clarified in the General Recommendations of the CERD Committee. As defined in Article 1 and General Recommendation XIV, racial discrimination includes distinctions and exclusions that have an "unjustifiable disparate impact" upon the rights of freedoms of particular racial or ethnic groups. As the following discussion makes clear, exclusionary land use practices create a number of harms that unjustifiably impede the rights of people of color in the United States to housing (Art. 5.e.iii), work (Art.5.e.i.), and education (Art.5.e.v.)

174. As will be discussed below, the US has failed to "adopt immediate and effective measures" with respect to discriminatory land use practices and in so doing is in violation of its duty under Article 2(1)(a) to "engage in no act or practice of racial discrimination … and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation"; and in violation of its duty under Article 2(1)(c) to "take effective measures to review governmental, national and local policies, and to amend, rescind, or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."

175. As a general statement regarding its performance under CERD, the US asserts in its report that:

> "Existing US Constitutional and statutory law and practice provide strong and effective protections against discrimination on the basis of race, color, ethnicity or national origin in all fields of public endeavor and provide remedies for anyone who, despite these protections, becomes a victim of discriminatory acts or practices anywhere within the United States or subject to its jurisdiction."[45]

176. An examination of the widespread persistence of racially discriminatory practices in areas such as land use due in large part to a lack of "strong and effective protections" shows this assertion to be false. Specifically, in the area of land use policy, US constitutional and legislative measures are inadequate because they fail to address discrimination as defined by the Convention and clarified by the CERD committee and because they fail

to adopt effective measures for remedying discriminatory practices at the state and local level.

Racial Discrimination

177. The protections against racial discrimination in the US, as interpreted by the US Supreme Court, are clearly inadequate to protect against the discriminatory effects of exclusive land use practices. In response to its Article 2 responsibilities, the US asserts that, "the Fifth and Fourteenth Amendments [to the US Constitution] guarantee that no public authority may engage in an act or practice of racial discrimination against persons, groups of persons or institutions."[46] What is not mentioned is the fact that the US Supreme Court has interpreted the prohibition against racial discrimination found in these amendments to apply only where it can be proven that the public authority intentionally engaged in discrimination.[47] Moreover, the Court has held that actions are constitutional even if the public was aware that its actions would have a racially discriminatory effect.[48] The Court has reasoned from this standard that it is entirely consistent with the US Constitution for local jurisdictions to engage in land use practices that disproportionately harm people of color so long as there is no evidence that the action was motivated by racial animus.[49] In addition to being a nearly impossible evidentiary standard for victims to meet, this definition of discrimination is clearly at odds with the definition of discrimination contemplated by the Convention, which focuses not on intent, but on whether the action has an unjustifiable discriminatory impact.

Legislative Protections

178. Federal legislation in the area of land use is also inadequate. In discussing its duty to eradicate housing policies with an unjustifiable disparate impact, the US states that "practices that have discriminatory effects are prohibited by certain federal civil rights statutes, even in the absence of any discriminatory intent underlying those practices. … [including] the Fair Housing Act." It goes on to assert that, despite no Supreme Court ruling on the issue "lower courts have uniformly held that disparate impact claims may be brought under the Fair Housing Act, even in the absence of discriminatory intent."[50] Regarding the standard articulated in General Recommendation XIV, the US asserts:

179. "The Committee's use of the term 'unjustifiable disparate impact' indicates its view that the Convention reaches only those race-neutral practices that create both statistically significant racial disparities and are unnecessary, i.e., unjustifiable. This reading of Article 2(1)(c) tracks the standards for litigating disparate impacts under … the Fair Housing Act." [51]

180. These assertions are false. Although it is true that the Supreme Court has not adopted the position that actions with disparate impacts violate the Fair Housing Act (nor has the legislature for that matter), it is not true that lower courts have uniformly held that a showing of disparate impact with no proof of intent to discriminate can be sufficient to prove discrimination under the Act. Furthermore, where lower courts do accept showings of disparate impact as sufficient proof, they do not hold that the action is justifiable only if it is "necessary."

181. The majority of federal Circuit Courts have held that a showing of disparate effect on racial minorities is sufficient to make an initial showing under the federal Fair Housing

Act.[52] However, for plaintiffs in the Seventh[53] and Tenth[54] Circuits some proof of discriminatory intent is required to make this initial showing.

182. When a disparate impact is demonstrated, the standard that the courts have required of public actors to justify their action has fallen short of "necessity." Three formulations of the evidence that a governmental defendant must produce in order to rebut a showing of discrimination have emerged. The first and now most widely used is that designed by the Third Circuit: "A justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact."[55] Requiring that the interest behind an action be legitimate and bona fide is clearly not the same as requiring that such an action be necessary.

183. The Eighth Circuit applies a more difficult burden that still does not attain the level of necessity. The specific test is: (1) whether the ordinance in fact furthers the compelling governmental interest asserted; (2) whether the public interest served by the ordinance is constitutionally permissible and is substantial enough to outweigh the private detriment caused by it; and (3) whether less drastic means are available whereby the stated governmental interest may be attained.[56]

184. On the other hand, Seventh Circuit follows a less stringent standard:

> In considering the governmental entity's interests, the Seventh Circuit noted that greater deference would be appropriate when the action attacked falls 'within the ambit of legitimately derived authority,' especially in the area of zoning, where municipalities are traditionally afforded wide discretion. But the court also implied that the strength of those interests is, at least in part, a function of the relative strength of the plaintiff's interests—including 'furthering the congressionally sanctioned goal of integrated housing.' In this sense, the test balances competing interests.[57]

Immediate and Effective Measures

185. Because of the requirement of intent, housing discrimination litigation under the US Constitution has been extremely ineffective in eradicating racial discrimination in land use practices. Because the Fair Housing Act relies largely upon private actors to bring allegations of individual acts of discrimination, it has not proven to be an immediate and effective method either. The FHA uses an enforcement model that requires the identification of a violation, the detection of a perpetrator, and proof at trial that the perpetrator's act constitutes a statutory violation. This makes exclusionary zoning litigation time consuming and expensive. The net result of these inadequacies is that only a few of the meritorious cases have actually been litigated, and even fewer have resulted in a favorable decision for the plaintiff.[58] Furthermore, even when remedies are gained they continue to be relatively inconsequential in nature:

186. "Instead of ordering a rezoning and invalidating the town's restriction on multi-family housing, the usual case will involve a remand to the trial court to weigh alternative sites. Remedies usually will be limited to one development in one jurisdiction rather than wholesale changes in zoning ordinances."[59]

187. Thus, the case-by-case approach articulated by Congress in the FHA and adopted by the judiciary continues to accommodate the overarching system of residential segregation and racial inequality.[60]

Housing and Education

188. Segregated housing patterns in the US have led to racial discrimination in the interrelated areas of educational funding and segregation. The US acknowledges as much in its CERD report:

189. "Largely because of the persistence of residential segregation and so-called 'white flight' from the public school systems in many larger urban areas, minorities often attend comparatively under-funded (and thus lower quality) primary and secondary schools."[61]

190. Schools in the US are organized into local school districts that are required to fund a substantial portion of the cost of education through local property tax revenues. Because local district boundaries mirror municipal boundaries, the economic and racial segregation resulting from exclusionary land usage creates vast discrepancies in the resources that districts are able to generate through property taxes. Districts in areas that require the construction of expensive homes, which are also predominantly White districts, have significantly more revenue to dedicate to education than districts that allow for affordable housing, which tend to have large populations of color. Despite the inequalities that result, the US has failed to put an end to this discriminatory funding system. In the landmark case *San Antonio v. Rodriguez*, the Supreme Court held that an educational funding system based on local property taxes that resulted in large disparities in per-pupil spending between predominantly White districts and predominantly Black and Latino districts[62] did not violate the Constitution because plaintiffs in this case were unable to show that the funding disparities involved were the result of intentional racial discrimination.[63]

191. The Court's deference to local autonomy in the area of education, and its failure to address the effect of residential practices on schools has also played a role in the continued educational segregation that exists between school districts in metropolitan America. In response to the aforementioned White flight and its effect on educational quality, a district court in the state of Michigan created a desegregation plan that allowed students in the segregated district of Detroit to attend quality schools in the suburbs. The US Supreme Court overruled this plan stating that only districts that had intentionally participated in the segregation of schools could be required to participate in the integration of schools.[64] In making this decision, the Court ignored the social and historical context that created such a segregated and inequitable system.

INTRODUCTION

192. Although overt racial discrimination on the part of governmental entities has declined in recent decades, a number of governmental policies and practices that have the effect of creating and perpetuating racial inequality remain prevalent in the United States. One of the most significant of these is the widespread use of land use power by local governmental entities to maintain patterns of racial inequality in a number of areas including: access to quality education, access to employment opportunities, and access to quality housing. This abuse of local decision-making power to the detriment of people of

color and the benefit of whites has a long history in the United States and is enabled by an equally long history of failure on the part of state governments and the federal government to eradicate such practices. Although the use of racially explicit land use classifications is no longer found in the US,[65] the use of economically discriminatory measures that have the effect of excluding people of color from certain municipalities and in doing so depriving them of various opportunities remains widespread.

193. This section will provide an overview of the nature and scope of exclusionary land use practices in the United States and discuss the failure of federal and state governments to adequately address the problem, using the Minneapolis-Saint Paul metropolitan area (the "Twin Cities") as a case in point. The section concludes with several recommendations that the United States should adopt to address the practice of exclusionary zoning and suggests issues that the CERD committee should consider raising with the US.

OVERVIEW OF LAND USE IN THE UNITED STATES

194. The power to regulate land use is vested in each of the fifty states as one of their so-called "police powers."[66] There is a longstanding practice in the US, however, of states delegating land use and other related powers to local municipal governments, ostensibly because this is the best method for addressing the needs of state residents. As part of this localization of power, states have delegated to individual municipalities the power to incorporate, tax, spend tax revenues exclusively on those who live within their municipal boundaries, and to control the use of local lands, primarily through zoning power.[67]

195. The federal government played a significant role in spreading the practice of locally controlled zoning throughout the nation. In 1923, then secretary of commerce Herbert Hoover authorized the drafting and widespread circulation of the Standard State Zoning Enabling Act that provided a model framework for states to use to delegate these powers to the local level. Within a few years more than half of the fifty states had adopted the federal model, and today virtually every metropolitan area has autonomous zoning authority.[68] Zoning, the authority to create and maintain boundaries, has had a significant impact on the development of American cities—an impact that cannot be underestimated.[69]

LEGAL CONSTRAINTS ON THE EXERCISE OF LAND USE POWER

196. Although this framework for land use planning allows for the primacy of local interests, there are a number of state and federal restrictions on the use of this power that provide, at least in theory, for its equitable use.

197. Because they are a delegation of a state's police power, land use controls are governed by state constitutions and statutes. Although state constitutions vary, most include requirements that all citizens benefit from the equal protection and due process of the law (similar to the federal protection found in the 14th Amendment), and the requirement that all exercises of state police power be for the "general welfare" of the state's population as a whole.[70] These constitutional requirements are non-delegable meaning that, although the state may delegate zoning authority to local municipalities, it may not delegate liability for how the power is exercised. In addition, a number of states have passed fair housing legislation that is similar in nature to the federal Fair Housing Act discussed below.

198. At the federal level, there are also constitutional and legislative restrictions on local exercise of land use planning. The Fifth and Fourteenth Amendments to the federal Constitution provide remedies for discriminatory housing practices on the part of government actors where there is evidence of intentional racial discrimination (through the Equal Protection and Due Process clauses). The federal Fair Housing Act also declares that it is unlawful for a person or municipality to "make unavailable … a dwelling to any person because of race, color, religion, sex, or national origin."[71] Various courts have interpreted this clause to encompass exclusionary land use practices.[72]

EXCLUSIONARY LAND USE PRACTICES

199. As suggested earlier, the abuse of land use powers to maintain racial inequality has a long history in the United States. Up until they were declared illegal in the late 1940s, municipalities drafted zoning ordinances and deed covenants with explicit racial exclusions. Following this prohibition, municipalities replaced explicit racial restrictions with race-neutral restrictions that exclude affordable housing (and thus exclude people of color, who tend to be of lower economic standing).[73]

200. This widespread practice has played a central role in the segregated development of metropolitan America into over-privileged white enclaves and over-burdened communities of color. In 1950, for example, one housing expert wrote that exclusionary zoning was the most significant legal tool for maintaining residential segregation.[74] This observation is particularly striking given that it was made prior to *Brown v. Board of Education* and prior to the Fair Housing Act, at a time when many overtly racist forms of housing discrimination were still legal. Similarly, in 1968 the President's Commission on Urban Housing found local land use policies to be such a barrier to the implementation of federal low-cost housing programs that it recommended preemption of local zoning codes where necessary.[75]

201. The importance and effect of such local regulations has increased as the US population has become more urban and more suburban. Once a predominantly rural society, by 1950, 56 percent of the nation's population lived in America's metropolitan areas[76] and 60 percent of this population lived in the central cities.[77] By 1990, 66 percent of the nation's population lived in the same metropolitan areas, but two thirds of that population now lived outside the central city. Additionally, 152 new metropolitan areas were created during these four decades so that by 1990 three-quarters of the American public lived in 320 metropolitan areas.[78] At the same time, these patterns of metropolitan development had clear racial components: by 1990, 33 percent of white metropolitan residents lived in central cities, whereas 67.8 percent of African American metropolitan residents lived in central cities.

202. The proliferation of local units of governments with relatively autonomous land use powers was central to these patterns of racial segregation.[79] While a number of factors contributed to the move for increasingly localized governance (including the financial incentive to limit density and create a strong tax base because of need for local property tax revenues to fund municipal services),[80] suburbanization and localization were significantly motivated by racial animus. In fact research has found that the desire for racial exclusion was a stronger force driving incorporation of new governments in the 1950s and 1960s than the desire for better services and lower taxes.[81]

203. A recent report by the National Association of Home Builders found that exclusionary land use practices persist today and in some respects have gotten worse. Specifically, the study found that in the US:

- About 10% of the cost of building a new home can be attributed to "excessive regulation, needless red tape and regulatory delays" by local units of government.
- The complexities, time delays and costs of meeting regulatory requirements are increasing rapidly.
- Builders are often required to pay an increasing share of the cost of providing off-site infrastructure improvements such as new schools, fire stations, roads and other public facilities that benefit the entire community – not just people living in the newly constructed homes.
- Builders frequently cite delays as a contributing factor in rising housing costs, and prolonged delays in receiving construction approvals are commonplace nationwide. Delays result from seeking changes in zoning and a large number of required inspections.[82]

Typical exclusionary land use provisions employed today include excessive minimum square footage requirements for housing units; excessive minimum lot sizes and setbacks; excessive minimum street frontage requirements; moratoriums on multi-family housing; and minimum exterior material standards (e.g., the requirement that 50 percent of the exterior be brick or masonry).

204. Each of these provisions has the effect of driving up construction costs and precluding the development of housing that is affordable to many people of color.

205. In justifying the imposition of these regulations, municipalities often refer to economic, aesthetic, or "safety" concerns. Although not explicitly racist, in many instances economic discrimination has been shown to "function as a pretext for other forms of discrimination."[83] Furthermore, to the extent that such concerns are sincerely expressed by some, research has shown that they are largely fueled by racist stereotypes that create "a widespread perception that racial minorities moving in could adversely affect the value of the property, for the presence of racial minorities has come to be associated with crime, slums, and unstable families."[84]

CASE STUDY: EXCLUSIONARY LAND USE PRACTICES IN THE MINNEAPOLIS-SAINT PAUL METROPOLITAN AREA

206. Midwest region of the United States. Unlike Midwestern cities with more substantial industry (e.g. Chicago and Detroit), the Twin Cities did not experience a rapid level of population growth during the early to mid-twentieth century that included large numbers of immigrants and African Americans migrating from the rural South.[85] As a result, populations of color in the Twin Cities are small, relatively speaking. In recent years, however, the Twin Cities populations of color have grown at rapid rates due to both intra-national and international immigration.

207. According to estimates of the US Census Bureau, as of 1999 the Twin Cities metropolitan area is 87 percent White, 5 percent African American, 4 percent Asian/Pacific Islander, 2 percent Hispanic/Latino, and 1 percent Native American. With the exception of Native Americans, however, rates of growth for these populations of color over the last ten years are seven to ten times that for the white population. Within the metropolitan area, people of color tend to live in the central cities of Minneapolis and Saint Paul, while whites are more likely to live in suburban areas. In fact, according to a pair of researchers from the Census Bureau, the Twin Cities metropolitan region is one of the ten most racially segregated regions in the country.[86] As is often the case in the US, patterns of racial segregation in the Twin Cities are mirrored by patterns of economic segregation. Regardless of income, people of color are more likely to live in neighborhoods with high poverty rates and Whites are more likely to live in wealthy neighborhoods and municipalities.[87]

Exclusionary Land Use Practices in the Twin Cities

208. One of the most pressing issues in the Twin Cities is that of housing. As will be discussed in more detail below, the Twin Cities is in the midst of an affordable housing crisis. Furthermore, this crisis affects families of color disproportionately. Despite a grave need for low-income housing, however, several studies have found the persistent use of exclusionary land use provisions by suburban municipalities that are hostile to the needs of potential affordable housing residents.

209. A recent study of ten Twin Cities suburbs found the presence of a number of exclusionary zoning restrictions—restrictions unwarranted by any concern for sound building design and that have the effect of making housing production more costly.[88] For example, in areas zoned for single-family homes, all ten suburbs studied required lot sizes in excess of standards recommended by the State of Minnesota.[89] Minimum floor area requirements were also well above those recommended, and four of the ten suburbs required that each house have a two-car garage while others used excessive minimum lot widths to ensure that sufficient space for a garage existed.[90]

210. In areas zoned for multi-family buildings, the study found minimum floor areas were generally required even though the state recommended none, and in two of the suburbs, the minimum floor area requirements were equivalent to those for most single-family homes.[91] Half of the suburbs required that one garage space per unit be built and three required a conditional use permit that increased development costs through fees and created the possibility that further conditions could be imposed.[92] Furthermore, the proportion of multi-family housing in the metropolitan area was smallest in the still developing outer ring suburbs where single-family detached homes comprised more than 90% of all housing.[93]

211. A 1995 study by the Metropolitan Council, an agency created by the State of Minnesota to oversee the development of the Twin Cities metropolitan area made similar findings. The study found excessive minimum lot size and floor area requirements, garage requirements, and a proliferation of zoning for more expensive, low-density development. Also, numerous subdivision regulations, such as land-clearing obligations, street-frontage related improvements and design requirements, were found that shifted the burden of providing services typically funded by local government onto developers, who in turn passed the cost along to new home buyers. [94]

Land Use Decisions and Race

212. As mentioned earlier, discriminatory land use practices are always couched in racially neutral terms, but often fueled by animosity and/or unfounded stereotypes. In the last few years, Twins Cities newspapers have reported numerous incidents in which local opposition took on an explicit or implicit racial tone. For example:

- An affordable housing development in one suburb was opposed because it would, in the language used at public hearings, bring down "the caliber of the neighborhood."[95]

- Opposition from high-income residents of another suburban community resulted in a city council vote against an affordable housing development.[96] The stated reasons for opposing the project were that the housing would harm trees and wetlands, but one resident described his true reasoning in the press: "What's the attraction of having affordable housing in any suburb … mixing the cultures? I don't know."[97]

- In another instance, residents were warned by a widely distributed leaflet that an affordable housing development, the zoning for which was to be heard at city hall, would bring "trouble and low-income families from Minneapolis."98 The request for the zoning change was subsequently denied at a crowded hearing.[99]

- A developer seeking to build low-income housing in a suburb was told by an opponent at a city hall gathering to "keep those spooks in Brooklyn Park," and out of Elm Creek.[100]

The Effect of Discriminatory Land Use Practices

213. The most obvious effect of these exclusionary land use practices is that it restricts the supply of housing that is affordable to families with lower income levels. As mentioned above, the Twin Cities is in the midst of an affordable housing crisis. Due to constricted supply, the cost of housing, both rental and owner-occupied, has increased dramatically as vacancy rates have declined. Average rents in the metropolitan area increased 6.7 percent in 1999, following a 4.8 percent rate of increase in 1998.101 At the same time, vacancy rates remain extremely low in the metro area. The overall vacancy rate for apartments in 1999 was 1.5 percent, up slightly from 1.1 percent in 1998,102 but well below optimal vacancy rates that are generally considered to be around 5 percent.103 As a result, families find it extremely difficult to find affordable housing. According to a recent state estimate, there were *186,800 households* in the Twin Cities that paid more than 30 percent of their income for rent as of 1998 (the standard threshold for measuring affordability).104 Nationally, the supply of affordable housing shrank significantly during the 1990s. For example, between 1993 and 1995, there was a loss of 900,000 rental units affordable to very low-income families (a 9 percent reduction). There was a greater loss, 16 percent, in units affordable to extremely low-income. As of 1995, the number of low-income households exceeded the number of low-cost rental units in the US by 4.4 million, with nearly two low-income renters for every low-cost unit. [105]

214. Because of the significant correlation between income and race/ethnicity, and because of the presence of other forms of discrimination that interact with exclusionary land uses,

people of color in the Twin Cities and nationally are most harmed by these housing practices. For example, among low-income families in the Twin Cities African Americans are significantly more likely to live in unaffordable housing than their white counterparts.[106] This effect is also manifested by the fact the people of color in general, and African Americans in particular, comprise a majority of the population using homeless services in the Twin Cities.[107] On a national level, a recent study reported that 27 percent of African Americans had severe housing problems, as did 28 percent of Hispanic/Latinos compared to 19 percent of whites.[108]

The Effect of Exclusionary Land Use on other Opportunities

215. The harms of discriminatory land use practices go beyond limiting the ability of people of color to find stable, affordable housing. These practices play a significant role in maintaining racial and economic segregation, and because of the overlap of land use authority with other key local powers, these practices also significantly limit the ability of people of color to access other key opportunities and necessities such as employment and education.

216. Across the US, there is a migration of job opportunities from the central cities to the periphery of metropolitan areas. This is partly in response to demographic shifts discussed earlier and also due to the ability of exclusive suburban municipalities to offer tax incentives to business and industry.[109] A recent report by a Minnesota state agency found that approximately three-fourths of all job opportunities in the Twin Cities are located outside of the central cities where affordable housing is often scarce, while the majority of people of color live in the central cities.[110] This is consistent with national trends. In the five-year span between 1993 and 1998, 14 million jobs were created in the US, but only 13 percent of these jobs were located in central cities.[111] Similarly, by 1993, 60 percent of all offices in the US were located in suburban municipalities as compared to only 25 percent in 1970.[112] The effect of this spatial divide between residents of color and employment opportunities is exacerbated by inadequate, often discriminatory, metropolitan transportation systems in the Twin Cities and around the country.[113]

217. By creating and maintaining racial and economic segregation, exclusionary land use practices also perpetuate inequality in the educational opportunities of white students and students of color. Because a significant proportion of educational funding comes from property tax revenues at the local municipal level, significant disparities exist around the country in the resources available to educate central city students, who are more likely to be of color, and suburban students, who are more likely to be white. Furthermore, because of the numerous other challenges that poor families face in finding stable housing, caring for the health needs of their children, and so on, poor school districts and teachers within them must spend greater time and resources dealing with the basic needs of students, a burden which becomes increasingly difficult as levels of economic segregation increase.[114]

CASE STUDY: THE DESTRUCTION OF PRINCEVILLE, THE NATION'S OLDEST BLACK-GOVERNED COMMUNITY

(Adapted from *The Untold Story of the Destruction of Princeville, the Nation's Oldest Black-Governed Community* by Frank Dexter Brown, Earth Africa News)

218. Princeville, North Carolina was founded in 1865 on the banks of the Tar River by formerly enslaved Africans at the end of the Civil War. Chartered in 1885, it is the nation's first independently governed African American community. Last year, much of Princeville was lost when flooding from back to back hurricanes devastated the city. The city's 2,100 residents, many of them descendants of the original settlers, found their homes submerged under water for two weeks. They lost virtually everything.

219. The story of the Princeville flood is one of government neglect and even malfeasance. Even before the flooding, the waterfront town had been under pressure by developers and land speculators to sell its land and relocate residents further inland. After the disaster, residents were then pressured by both federal and local government to abandon the area. Residents were suspicious —particularly when similarly situated white communities in the region were receiving large sums of money for rebuilding, not relocation.

220. In Princeville it was a different story. Some six months after the storm, only 100 of the city's 875 families had moved back into their homes. More than 300 families still lived at the sprawling temporary camper park nicknamed "Camp Depression," or "FEMAville," after the Federal Emergency Management Agency (FEMA) which set up the camper park immediately after the flooding. Here the displaced made do with makeshift housing on a landfill next door to a women's prison outside of the City of Rocky Mount. Almost a year later, many were still waiting for assistance. The nearly 260 families that left the campsite were still living in campers, though this time on their own property as they began the slow process of rebuilding.

221. Princeville's business community—comprising 30 or so small businesses—was virtually leveled. And the town's historic churches were also severely affected including Mount Zion Primitive Baptist Church, founded in 1876 with the sanctuary built in 1895. Mt. Zion today remains one of the oldest African American houses of worship in the state. It was the only one of the town's six churches not to be torn-down.

222. If the destruction of homes, churches and businesses weren't enough, the town was totally devastated by the impact of the flooding on the centuries-old Dancy, Wilson and Community cemeteries: 224 caskets and crypts were dislodged. Critical emergency assistance was provided by the federal government's Disaster Mortuary Operational Response Team (DMORT), which helped to secure and rebury the caskets, and restore the cemeteries.

223. Although residents accepted that the hand of God in part dictated their fate, it was confirmed months later that God received some "assistance" from the nearby local government of Rocky Mount. The city had the flood gates opened to the upstream Tar River Reservoir Dam just 20 miles away.

224. Said Peter Varney, Rocky Mount's assistant city manager, in an interview with a UNC-TV reporter (broadcast December 6, 1999), "We were just wrapped up in an unbelievable flood of decisions, and problems, and issues. We just went ahead and dropped that,

that gate. It appeared to us that what would come by lowering the gate by two feet would not be noticeable."

225. Although the city stood by its action in subsequent interviews, it has not answered how much water had been released through their actions, or why they had not communicated with any officials downstream, or to the state that they were opening up a floodgate. So far, no official report by any government body (county, state or federal) has been issued that evaluates how much water was released, or reviews the Rocky Mount actions.

226. This lack of communication from Rocky Mount, along with the years of speculators pressuring residents to sell their property, raised residents' suspicions. The flood seemed particularly ill timed given the town's pending historic designation, a status that many residents believed would bring desperately needed tourism dollars (an effort opposed by some neighboring and statewide forces). By the time the Federal Emergency Management Agency stepped in, tensions were at a climax.

227. It has been a stormy road to recovery but Princeville residents are buoyed the outpouring of support spurred by the Black press and local leaders like Congresswoman Eva Clayton, Mayor Delia W. Perkins and others who have spoken nationally in order to raise public awareness of the community's plight. In addition to support from private individuals, faith institutions and other non-governmental organizations, Congress has provided the US Army Corps of Engineers with the $500,000 needed to repair a flood prevention levee built in 1967. Former President Clinton did establish the "President's Council on the Future of Princeville," and set-aside an additional $1.5 million to be used to further study the construction of the dike and evaluate the flow of waters along the Tar River. Although government support is welcome, it is a long way from the estimated $80 million required to complete rebuilding and flood proofing and still significantly less than the public support allocated to predominantly white communities in the region.

228. Princeville residents are concerned about equity in both recovery funding and participation in the process. "People of color communities are often left out of the land use planning piece," said Black Farmers and Agriculturalists Association (BFAA) president Gary R. Grant. Adding that African Americans have sought inclusion in such activities for years but "little regard is given to zoning rules that allow this type of unsafe development to take place in flood plains, and the impact on what is usually a community of color. It behooves the Black community to make sure that certain items are attained in any legislation passed that is going to be affecting us."

RECOMMENDATIONS

The above discussion makes clear that there are a number of steps the United States ought to undertake to achieve the mandates of the CERD convention. These should include:

- Federal legislation that clearly defines racial discrimination in all relevant anti-discrimination statutes to include policies and actions with unjustifiable disparate impacts on people of color.

- Federal legislation that places an affirmative duty on states to ensure that their zoning and other land use powers are not being used in manners inconsistent with the mandates of the Fair Housing Act, the Convention on the Elimination of Racial Discrimination, and other relevant international standards. This should include the requirement that public authorities undertake a Fair Housing Impact Assessment process prior to actions with significant housing implications.

- A comprehensive federal review of the presence of racial discrimination in land use practices in place throughout the United States.

VI. Recommended Questions to the CERD Committee for the US Government

GENERAL QUESTIONS

- When will the Government appoint a body charged and adequately funded to implement the provisions of the CERD?
- What steps will the Government take to establish effective systems for data collection and assessment of its progress under the provisions of the CERD?
- What steps will the Government take to implement an effective outreach and education campaign that raises public awareness of the CERD, and encourages and supports federal, state and local governments in meeting their obligations to the Convention.
- What steps will the Government take to reform its laws so that they are consistent with the CERD? Specifically, how will it implement an "effects" standard in principle, policy and practice?
- What procedures, tools, materials, training and other support will be provided to state and local governments to adequately assess "unjustifiable disparate impacts" and make appropriate changes in policy and law?

ISSUE SPECIFIC QUESTIONS

Welfare

- What steps will Government take to ensure equal access to social services and cash assistance, without regard to race or immigration status? Will the Government suspend time limits until due process issues have been addressed?
- How will Government address employment discrimination as a factor in job training and job placement?

- How will the Government track the well being and status of former recipients over the long term?

- What short term, anti-discriminatory measures will the Government take until the long-term consequences of reform have been fully researched and analyzed?

- How will the Government address disproportionate increases in the number of black children moving into the child welfare system as a result of increased poverty and sanctions for black recipients? Furthermore, how will the Government address racial inequities embedded in the compensation system for foster parents compared to the cash assistance available to poor birth parents?

- What regulations will the Government enact to establish due process in sanctions and overpayment investigations?

- How will the Government assess the racial and gender impacts of policies that "encourage" marriage and "responsible fatherhood"?

Health

- What steps will the Government take to collect data on the racial impact of federal, state and local health policies?

- What legislation, executive order or policy will be introduced that defines discrimination resulting in diminished health status and access to health care of minorities to be a violation of human rights?

- What actions will the government take to promote the development of new minority health care professionals?

- What actions will the government take to ameliorate the shortage and closing of hospitals and other health care facilities in minority communities?

- What actions will be taken to define health as a basic human right?

- What actions will the government take to address the distrust of health care systems by minority communities?

- Will the government require data collection systems for both ambulatory clinics/health centers and hospitals that permit detection of disparities by patients' race/ethnicity in diagnostic workup and treatment, so that accountability for any such disparities can be determined?

- Will the federal government require the implementation of data systems for capitated Medicare and Medicaid programs and other HMOs, whose present reporting requirements do not include information on specific diagnostic and therapeutic procedures, to include such data, so that comparisons by race/ethnicity can be made?

- Will the federal government continue to support affirmative action and other programs designed to increase the proportion of underrepresented minorities in the health workforce at every level, and urge that such programs be made a requirement for accreditation of the relevant educational institutions?

- Will the federal government and its various health research agencies continue to support epidemiological, behavioral science and public health research into the effects of race, ethnicity, income and wealth on health status?

Education

- What steps will the federal government take to ensure that state and local governments are not discriminating against people of color in the area of public education?

- What steps will the federal government take to ensure that actions with "unjustifiable disparate impacts" upon people of color are explicitly prohibited under federal law?

- Post secondary education policies banning affirmative action appear to conflict with CERD principles. What steps will the government take to bolster affirmative action and address "unjustifiable disparate impacts" at the post secondary level?

- Public school education has vast racial inequities in funding, application of disciplinary policies, high stakes testing and more. What steps will the government take to address these and other "unjustifiable disparate impacts" from policies at the primary and secondary level?

- What steps will the federal government take to ensure that current and future laws prohibiting racial discrimination in education are effectively and efficiently enforced at the local, state, and federal levels?

Land Use

- What steps will the federal government take to ensure that state and local governments are not using land use powers to discriminate against people of color?

- What steps will the federal government take to ensure that actions with "unjustifiable disparate impacts" upon people of color are explicitly prohibited under federal law?

- What steps will the federal government take to ensure that current and future laws prohibiting racial discrimination in land use decisions are effectively and efficiently enforced at the local, state, and federal levels?

- What steps will the federal government take to ensure that devolution of power to state and local governments does not lead to diminished accountability to refrain from discriminating against racial and ethnic minorities?

NOTES

1. Id., p. 275.
2. Id., p. 275; See also, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*. A comprehensive evaluation and analysis of the US Department of Justice's performance in its leadership and coordination responsibilities for Title VI, (1996). 677 pp. No. 910-00024-2 (Includes the US Commission on Civil Rights' analysis of the Title VI enforcement efforts of 10 federal agencies and10 sub agencies. Includes recommendations).
3. *The Health Care Challenge* I, supra. Note 1, p.190.(emphasis added)
4. Id., p. 190.(emphasis added)
5. *The Health Care Challenge II*, supra. Note 1, p. 275.
6. Id., p.1, Preface.
7. Id. chap. 1.
8. Id., p. 190.(emphasis added)
9. *The Health Care Challenge II*, supra. Note 1., p. 275-276.
   The Commission on Civil Rights Agencies is not alone in its documentation of disparate enforcement. Numerous other investigative bodies have documented this problem, both internal to the Department of Health and Human Services and external to the Department, including the General Accounting Office, the House of Representatives' Committee on Government Operations, HHS' Office of Inspector General, and the Department's own Civil Rights Review Team.
10. Id., p. 275-276.
11. Id., p. 275-276.
12. Id., p. 275-276.
13. Id., p. 275-276.
14. Id., p. 275-276.
15. Id., p. 275-276.
16. Id., p. 275-276.
17. Id., p. 275-276.
18. The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality, Volume I, The Role of Governmental and Private Health Care Programs and Initiatives. 287 pp. No. 902-00062-2. (Sept., 1999)(Hereinafter, The Health Care Challenge I); The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality, Volume II, The Role of Federal Civil Rights Enforcement 438 pp. No. 902-00063-1. (Sept., 1999) (Hereinafter, The Health Care Challenge II)
19. The Health Care Challenge I, supra. note 1.
20. Byrd, W. Michael and Clayton, Linda A., *An American Health Dilemma: A Medical History of African Americans and the Problem of Race, Beginnings to 1900* (2000)
21. Byrd and Clayton, supra. note.
22. Id.
23. Id.
24. Id.
25. *The Health Care Challenge* I, supra. Note 1, p. 196.

26. Id., p. 197.
27. Id., p. 190.
28. Id., p. 190.
29. Id., p. 196.
30. Id., p. 196.
31. Id., p. 196.
32. Id., p. 197.
33. Id., p. 190.
34. Id., p. 190.
35. Id., p. 190.
36. Id., p. 197.
37. Id., p. 197.
38. Id., p. 197.
39. Id., pp. 50–52.
40. Id., pp. 88–92.
41. *The Hill Burton Act*, title VI of the Civil Rights Act of 1964, and title IX of the Higher Education Amendments Act of 1972
42. *The Health Care Challenge I*, supra. Note 1, p. 189.
43. Id., Preface.
44. See US CERD Report, Part II.A. (p. 1).
45. See US CERD Report, Part II.C. (p. 1).
46. See *Washington v. Davis*.
47. *Personnel Administrator of Mass. v. Feeney*, 422 US 256 (1979) (a policy or statute must have been enacted "because of" a desire to bring about a discriminatory impact, not merely "in spite of" the probability of such an impact).
48. See *Metropolitan Housing Dev. Corp. v. Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), cert. den. 434 US 1025, 54 L. Ed. 2d 772, 98 S. Ct. 752 (§ 4); see also Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990).
49. See US CERD Report Part II.C. (p. 13).
50. See US CERD Report Part II.C. (p. 14).
51. See, in the D.C. Circuit, *Schmidt v Boston Housing Authority,* (1981, DC Mass) 505 F. Supp. 988 (effect establishes violation). See, in the Second Ciruit, *Robinson v. 12 Lofts Realty, Inc.*, 610 F2d 1032 (2d Cir. 1979); *United States v. Yonkers Bd.* of Education, 837 F2d 1181 (2d Cir. 1987); *Huntington Branch, NAACP v Huntington*, 844 F2d 926 (2d Cir. 1988), affd on other grounds 488 US 15, 102 L .Ed. 2d 180, 109 S. Ct. 276, reh. den. 488 US 15, 102 L. Ed. 2d 813, 109 S. Ct. 824 (effect establishes prima facie case, at least against a public defendant). In the Third Circuit, see *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), cert. den. 435 US 908, 55 L. Ed. 2d 499, 98 S. Ct .1457, 98 S. Ct. 1458; see also *Doe v Butler*, 892 F.2d 315 (3d Cir. 1989). In the Fourth Circuit, see *Betsey v Turtle Creek Associates*, 736 F.2d 983 (4th Cir. 1984). In the Fifth Circuit, see *United States v. Mitchell*, 580 F.2d 789 (5th Cir. 1978); see also *Hanson v. Veterans Admin.*, 800 F2d 1381 (5th Cir. 1986). In the Sixth Circuit, see *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986). In the Eighth Circuit, see *United States v. Black Jack*, 508 F2d 1179 (8th Cir. 1974), cert. den. 422 US 1042, 45 L. Ed. 2d 694,

95 S. Ct. 2656, reh. den. 423 US 884, 46 L. Ed. 2d 115, 96 S. Ct. 158. In the Ninth, see Gamble v. City of Escondido, 104 F.3d 300 (9th Cir. 1997).

52. See *Metropolitan Housing Dev. Corp. v. Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), cert. den. 434 US 1025, 54 L. Ed. 2d 772, 98 S. Ct. 752 (§ 4); see also Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990).

53. See *Asbury v Brougham*, 866 F2d 1276 (10th Cir. 1989).

54. See *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977), cert. denied, 435 US 908 (1978). See also the employment of this standard in *Frazier v. Rominger*, 27 F.3d 828, 832 (2nd Cir. 1994); *NAACP v. The Medical Center*, 657 F.2d 1322, 1332 (3rd Cir. 1981); *Asbury v. Brougham,* 866 F.2d 1276, 1279 (10th Cir.1989); *Huntington Branch, NAACP v Huntington*, 844 F2d 926 (2d Cir. 1988); *Robinson v. 12 Lofts, Inc*., 610 F.2d 1032, 1039 (2d Cir. 1979); *Betsey v Turtle Creek Associates*, 736 F.2d 983 (4th Cir. 1984); *Casa Marie v. Superior Court of Puerto Rico,* 988 F.2d 252 (1st Cir. 1993).

55. See *US v. City of Black Jack*, 508 F.2d 1179, 1186 (8th Cir.1974)

56. See Christopher P. McCormack, "Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act," 54 *Fordham Law Review* 563, 604 (1986) (citing 558 F.2d 1283, 1293 (7th Cir. 1977) (Arlington Heights II), cert. denied, 434 US 1025 (1978)).

57. John Charles Boger, "Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction," 71 N. C. L. Rev. 1574, 1584 (1993).

58. Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 Chi.-Kent L. Rev. 795, 836 (1991).

59. See US CERD Report, Pt.1 (p. 11).

60. See *San Antonio School District v. Rodriguez*, 411 US 1, 14 (1973) (citing Texas Research League, Public School Finance Problems in Texas 9, 13 (Interim Report 1972) (stating that Alamo Heights, because of its relative wealth, paid approximately $100 per pupil; Edgewood, on the other hand, paid only $8.46 per pupil)).

61. See *San Antonio v. Rodriguez*, 411 US 1 (1973) (N.B. There is no education law analogous to the Fair Housing Act that allows for a showing of disparate impact in such a case).

62. See *Milliken v. Bradley*, 418 US 717 (1974).

63. See *Buchanan v. Warley*, 245 US 60 (1917) (finding racialized zoning unconstitutional under the 14th Amendment).

64. See Florence Wagman Roisman and Philip Tegeler, "Improving and Expanding Housing Opportunities for Poor People of Color: Recent Developments in Federal and State Courts," 24 *Clearinghouse Review* 312, 343 (1990).

65. See Gerald E. Frug, *City Making: Building Communities Without Building Walls*, p. 143 (1999); see also, generally, Richard Thompson Ford, "The Boundaries of Race: Political Geography in Legal Analysis"107, *Harvard Law Review* 1841 (1994).

66. See Gerald E. Frug, *City Making: Building Communities without Building Walls*, p. 143 (1999).

67. See Gerald E. Frug, *City Making: Building Communities without Building Walls*, p. 134 (1999).

68. Found in varying forms in most state constitutions, the "general welfare" clause requires that the police power be exercised only to the benefit of the "general welfare" of the population.

69. See the Fair Housing Act, 42 USC. Section 3604(a).

70. See, e.g., *US v. City of Black Jack*, 508 F.2d 1179 (8th Cir.1974) (holding that the exercise by a municipality of its zoning powers in a racially discriminatory manner constituted a violation of the Fair Housing Act); see also *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d

926 (2d Cir.1988) (holding that town's refusal to rezone and accommodate a racially-integrated and subsidized housing development violated the Fair Housing Act).

71. See Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 155 (1985); Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the UnderClass* 36 (1993); see also, generally, Gerald E. Frug, *City Making: Building Communities without Building Walls* (1999)).

72. See Norman Williams, Jr., "Planning Law and Democratic Living," 20 *Law & Contemporary Problems* 317 (1950).

73. See "Exclusionary Zoning and Equal Protection" 84 *Harvard Law Review* 1645, 1647 (1971) (treatise) (citing the President's Commission on Urban Housing, A Decent Home, p. 25 (1968)).

74. See David Rusk, *Inside Game/Outside Game: Winning Strategies for Saving Urban America*, p.66 (1999).

75. See Rusk, p. 67.

76. See Rusk, p. 67-68.

77. Whereas in 1942 there were approximately 24,500 municipalities and special districts in the United States; by 1992 that number had doubled to 50,834. See Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism* 88 Georgetown Law Journal 1985, 1992 (1985) (citing Nancy Burns, *The Formation of American Local Governments: Private Values in Public Institutions* (1994) and data from the US Census Bureau)).

78. See Sheryll D. Cashin, *Localism*, *Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism* 88 Georgetown Law Journal 1985, 1992 (1985); see also, generally, Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* (1985).

79. See *Governance and Opportunity in Metropolitan America 31* (1999) (Alan Altshuler, William Morrill, Harold Wolman, and Faith Mitchell, editors) (citing Nancy Burns, *The Formation of American Local Governments: Private Values in Public Institutions* (1994)).

80. See the National Association of Home Builders, *The Truth About Regulatory Barriers to Housing Affordability* (2000).

81. See Melinda Westbrook, *Connecticut's New Affordable Housing Appeals Procedure: Assaulting the Presumptive Validity of Land Use Decisions*, 66 Conn. B.J. 169, 173-174 (1992).

82. See Bernard Ham, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 Seton Hall Const. L. J. 577, 613 (1997).

83. For example, the US census estimated the total Black population of the Twin Cities metro area in 1970 at 32,118. By comparison, Chicago's Black population had reached this size as early as 1900.

84. See Roderick Harrison and Daniel Weinberg, *Racial and Ethnic Segregation in 1990* (1992) (report for the US Census Bureau).

85. See Paul Jargowsky, Poverty and Place: Ghettos, Barrios, and the American City (1997).

86. See Barbara Lukerman and Michael Kane*, Land Use Practices: Exclusionary Zoning, de Facto or de Jure?* (1994) (Center for Urban and Regional Affairs, University of Minnesota publication).

87. These lot sizes ranged from 9,000 square feet to 22,000 square feet. See also Lukerman and Kane (1994).

88. See Lukerman and Kane (1994).

89. See Lukerman and Kane (1994).

90. See Lukerman and Kane (1994).

91. Metropolitan Council, *Minority Population Distribution Trends in the Twin Cities Metropolitan Area 175* (1993) (Publication No. 620-93-085).

92. Metropolitan Council, *Opening Gates to Affordable Housing*, (January 1995).

93. See Mike Kaszuba, "Dakota County Struggles with Housing Issue," *Star-Tribune* (May 16, 1999).

94. See Dennis Cassano, "Chanhassen Vote Shows Obstacles to Affordable Housing," *Star-Tribune* (August 18, 1996).

95. See Mike Kaszuba, "Lines Are Drawn Over Affordable Housing," *Star-Tribune* (July 14, 1996).

96. See Jim Broede, "Mahtomedi Council Rejects Rezoning for Housing Project," *Star-Tribune* (December 10, 1996).

97. See Broede, 1996.

98. See Mike Kaszuba, "Maple Grove Again Confronts the Issue of Affordable Housing," *Star-Tribune* (March 16, 1997).

99. See Maxfield Research Inc., *Apartment Market Report* 5 (2000).

100. See Maxfield Research Inc., (2000).

101. Metropolitan Council, *Report to the Legislature on Life Cycle and Affordable Housing*, p. 2 (December 1999).

102. Metropolitan Council, *Report to the Legislature on Life Cycle and Affordable Housing*, p. 11 (December 1999).

103. See National Low Income Housing Coalition, *2000 Advocate's Guide to Housing and Community Development Policy*, at http://www.nlihc.org/advocates/00.html.

104. See Urban Coalition and Roy Wilkins Center, *A Dream Deferred: The 50/30 Housing Research Initiative Final Report* (1999).

105. See Richard A. Chase et al., *Emergency Shelters, Transitional Housing, and Battered Women's Shelters Data Collection Project, Eighth Annual Report* (paper of the Wilder Research Center) (August 1999).

106. See National Low Income Housing Coalition, *2000 Advocate's Guide to Housing and Community Development Policy*, at http://www.nlihc.org/advocates/00.html.

107. Because wealthier municipalities have higher property tax bases and less need for social service spending they are able to tax business and industry at lower rates than central cities who are more dependant on this potential tax revenue for covering municipal expenses.

108. See Metropolitan Council, *Area-Wide Job Access and Reverse Commute Transportation Plan*, p. 8 (July 13, 2000).

109. See Michael Janofsky, "HUD Asks Money for Housing And Jobs for Urban Homeless," *New York Times*, Section A, page 5 (February 2, 1998).

110. Neil Pierce, *Citistates: How Urban America Can Prosper in a Competitive World* (1993).

111. See, e.g., Kristan Nalezny, *Analysis of Impediments to Fair Housing Choice in the City of Minneapolis* (1996) (Humphrey Institute of the University of Minnesota / Minnesota Fair Housing Center publication); see also Peter Polzin, Joel Rey, and Xuehao Chu, *Public Transit in America: Findings from the 1995 Nationwide Personal Transportation Survey*, National Urban Transit Institute (1998).

112. See Gary Orfield et. al., *Deepening Segregation in American Public Schools* (Harvard Project on School Desegregation publication) (1997).