# America can't ignore the needs of working women

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By SEN. BOB DOLE
Republican — Kansas

It is unfortunate that many of the women risking their lives in Operation Desert Storm will return to a civilian workplace where they are underpromoted, and neighborhoods and courtrooms where they are underprotected. We owe these soldiers, and all Americans, much better.

That's why I have authored the Women's Equal Opportunity Act of 1991 a legislative package for the 102nd Congress that covers everything from sexual harassment on the job to stiffer penalties for those who sell drugs to pregnant women. It is high time we updated civil and criminal law to reaffirm our commitment to equal opportunity, to reflect the realities of today's workplace, and to crack down on those who terrorize millions of American women every year.

Violence against women is a national disgrace. The Department of Justice recently reported that a staggering 2.5 million violent crimes are committed against women each year. No doubt about it, we can't be serious about equal opportunity if our citizens are afraid to leave their homes.

My legislation starts with a wide array of crime-fighting initiatives, aimed specificially at those criminals who prey on women. It imposes tougher penalties for federal sex offenders, and expands the federal death penalty for murders in connection with sexual assaults and child molestations. It reforms the Federal Rules of Evidence to make absolutely clear that evidence of past acts of sexual abuse and child molestation are admissible in court. It doubles jail sentences for illegal drug dealers who sell to pregnant women. It requires universities to inform parents and local police authorities, as well as students, of campus crime statistics. It offers several model rules of professional conduct that would prohibit lawyers from harassing or embarrassing persons who allege sexual assault. And it increases funding and programs aimed at assisting the estimated 3 million women who are victims of domestic violence each year.

Since 1982, we have created more than 21 million new jobs, half of which have been filled by women. Small businesses owned by women are growing at a rate five times faster than those owned by men. And the number of women in managerial jobs has almost tripled since 1972.

If America's employers are to compete in an increasingly complex and competitive global market, then they must recruit and retain skilled employees. And since fully two-thirds of new workforce entrants this decade will be women, they can't afford to discriminate. They — and Congress — simply can't afford to ignore the needs of working women and the very real barriers which stand in their way.

One unfortunate fact of the workplace which unites women, regardless of salary or position, is sexual harassment. My legislation seeks to deter harassment by establishing, for the first time in our nation's history, a monetary remedy for intentional sexual harassment in the workplace — up to $100,000 for first offenses and up to $150,000 for subsequent offenses. It also directs the courts to give expedited "fast track" relief to persons alleging sexual harassment and establishes educational programs for small employers on the law of sexual harassment.

Unfortunately, many women and minorities in corporate America are finding their reach limited by the presence of a barrier called the "glass ceiling." This invisible and impenetrable barrier blocks advancement to the high echelons of management. A recent study of the nation's 1,000 largest corporations by the Korn-Ferry management firm and the UCLA Anderson Graduate School of Management revealed that minorities and women, who account for more than half of the workforce, hold less than 5 percent of top managerial positions.

Additionally, *Fortune* magazine recently studied the top managements of 800 large U.S. companies. Of the 4,012 people listed as the highest-paid offices and directors, only 19 were women. That's less than one-half of 1 percent.

My legislation, which has nothing to do with quotas and everything to do with equal opportunity, establishes a Glass Ceiling Commission and charges it with the mission of taking a close look at the practices and policies in corporate America which impede the advancement of women and minorities.

Along with removing barriers at the top of the ladder, we must also focus on women beginning their careers in traditionally male-dominated skilled trades. These jobs offer good wages, good benefits, good pensions and a good start to a lifetime of productive employment. And only 7 percent of individuals presently enrolled in skilled trade apprenticeship programs are women.

My legislation directs the Department of Labor to take a number of actions aimed at expanding the opportunities for women and minorities in registered apprenticeship programs.

America can be no stronger abroad than she is at home. And an America that refuses to tolerate barriers in her workplaces, and fear in her streets, is the only America that our soldiers, and all our citizens, deserve.

THE WOMEN'S EQUAL OPPORTUNITY ACT: PROTECTING WOMEN IN THE WORKPLACES, NEIGHBORHOODS AND COURTROOMS OF AMERICA

BY SENATOR BOB DOLE

America is praying for the day when our mission in the Gulf will be successfully completed, and our soldiers can come home. While we are unsure when this will occur, one certainty is that, for the first time, a large number of these soldiers will be women.

It is unfortunate that many of the women risking their lives in Operation Desert Storm will return to a civilian workplace where they are underpromoted, and neighborhoods and courtrooms where they are underprotected. We owe these soldiers, and all Americans, much better.

That's why I have authored the "Women's Equal Opportunity Act of 1991," a legislative package for the 102nd Congress that covers everything from sexual harassment on the job to stiffer penalties for those who sell drugs to pregnant women. It is high time we updated civil and criminal law to reaffirm our commitment to equal opportunity, to reflect the realities of today's workplace, and to crack down on those who terrorize millions of American women every year.

Violence against women is a national disgrace. The Department of Justice recently reported that a staggering 2.5 million violent crimes are committed against women each year. No doubt about it, we can't be serious about equal opportunity if our citizens are afraid to leave their homes.

My legislation starts with a wide array of crime fighting initiatives, aimed specifically at those criminals who prey on women. It imposes tougher penalties for federal sex offenders, and expands the federal death penalty for murders in connection with sexual assaults and child molestations. It reforms the Federal Rules of Evidence to make absolutely clear that evidence of past acts of sexual abuse and child molestation are admissible in court. It doubles jail sentences for illegal drug dealers who sell to pregnant women. It requires universities to inform parents and local police authorities, as well as students, of campus crime statistics. It offers several model rules of professional conduct that would prohibit lawyers from harassing or embarrassing persons who allege sexual assault. And it increases funding and programs aimed at assisting the estimated three million women who are victims of domestic violence each year.

Since 1982, we have created more than twenty-two million new jobs -- half of which have been filled by women. Small businesses owned by women are growing at a rate five times faster

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than those owned by men. And the number of women in managerial jobs has almost tripled since 1972.

The importance of women in the workforce will only increase in the years to come. Our workforce is growing at only 1% annually -- the slowest rate in forty years -- and a rate that is expected to continue into the next century.

If America's employers are to compete in an increasingly complex and competitive global market, then they must recruit and retain skilled employees. And since fully two-thirds of new workforce entrants this decade will be women, they can't afford to discriminate. They -- and Congress -- simply can't afford to ignore the needs of working women, and the very real barriers which stand in their way.

One unfortunate fact of the workplace which unites women, regardless of salary or position, is sexual harassment. My legislation seeks to deter harassment by establishing, for the first time in our nation's history, a monetary remedy for intentional sexual harassment in the workplace -- up to $100,000 for first offenses and up to $150,000 for subsequent offenses. It also directs the courts to give expedited "fast track" relief to persons alleging sexual harassment and establishes educational programs for small employers on the law of sexual harassment.

One guiding principle of my legislation is that women, like all Americans, must be able to reach as high and advance as far as their talents can take them.

Unfortunately, many women and minorities in corporate American are finding their reach limited by the presence of a barrier called the "glass ceiling." This invisible and impenetrable barrier blocks advancement to the high echelons of management. A recent study of the nation's 1,000 largest corporations by the Korn-Ferry management firm and the UCLA Anderson Graduate School of Management revealed that minorities and women, who account for more than half the workforce, hold less than 5% of top managerial positions.

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My legislation -- which has nothing to do with quotas and everything to do with equal opportunity -- establishes a Glass Ceiling Commission and charges them with the mission of taking a close look at the practices and policies in corporate America which impede the advancement of women and minorities.

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must also focus on women beginning their careers in traditionally male-dominated skilled trades. These jobs offer good wages, good benefits, good pensions, and a good start to a lifetime of productive employment. And only seven percent of individuals presently enrolled in skilled trade apprenticeship programs are women.

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**STATEMENT OF SENATOR BOB DOLE**
**WOMEN'S EQUAL OPPORTUNITY ACT OF 1991**
**JANUARY 23, 1991**

MR. PRESIDENT, I JOIN TODAY WITH MY DISTINGUISHED COLLEAGUES, SENATORS ROTH, D'AMATO, McCAIN, MURKOWSKI AND BURNS, IN INTRODUCING THE "WOMEN'S EQUAL OPPORTUNITY ACT OF 1991."

COMPREHENSIVE IN APPROACH, THIS BILL SEEKS TO REAFFIRM OUR NATION'S HISTORIC COMMITMENT TO AN IMPORTANT PRINCIPLE -- THE PRINCIPLE OF EQUAL OPPORTUNITY FOR ALL AMERICANS.

MR. PRESIDENT, WE CANNOT DENY THE FACTS. AND THE FACTS ARE THAT BARRIERS TO EQUAL OPPORTUNITY STILL EXIST TODAY -- IN 1991 -- FOR MILLIONS OF AMERICAN WOMEN.

IT'S JUST PLAIN COMMON SENSE THAT THE WOMEN OF AMERICA CANNOT SHARE FULLY IN THE PROMISE OF EQUAL OPPORTUNITY IF THEY ARE SEXUALLY HARASSED IN THE WORKPLACE.

THEY CANNOT HAVE EQUAL OPPORTUNITY IF THEY ARE THE VICTIMS OF VIOLENT CRIME -- AT HOME AND ON THE STREETS.

AND THE WOMEN OF THIS COUNTRY CANNOT HAVE EQUAL OPPORTUNITY IF THEY MUST CONSTANTLY STRUGGLE TO OVERCOME ARTIFICAL -- AND SOMETIMES INSURMOUNTABLE -- BARRIERS TO JOB PLACEMENT, JOB PROMOTION, AND JOB ADVANCEMENT.

MR. PRESIDENT, THE WOMEN'S EQUAL OPPORTUNITY ACT OF 1991 CONFRONTS THESE ISSUES HEAD-ON. IT EXPANDS FEDERAL CIVIL RIGHTS PROTECTIONS AGAINST SEXUAL HARASSMENT. IT ATTACKS DOMESTIC AND STREET CRIME VIOLENCE. AND IT TAKES A HARD AND CLOSE LOOK AT EXPANDING EMPLOYMENT OPPORTUNITIES FOR WOMEN -- NOT ONLY IN THE EXECUTIVE BOARD ROOMS, BUT ALSO ON THE CONSTRUCTION SITES.

**SEXUAL HARASSMENT IN THE WORKPLACE**

AS SOMEONE WHO WAS SMACK IN THE MIDDLE OF LAST YEAR'S DEBATE ON THE SO-CALLED CIVIL RIGHTS ACT OF 1990, I CAN ATTEST TO THE INTENSITY OF CONVICTION ON BOTH SIDES OF THE AISLE.

THE CIVIL RIGHTS DEBATE GOT HOT, AND AT TIMES, IT WAS ANYTHING BUT CIVIL.

BUT DESPITE ALL THE PARTISAN BICKERING AND ALL THE HEATED RHETORIC, I MUST ADMIT THAT I LEARNED A FEW THINGS LAST YEAR THAT I DIDN'T KNOW BEFORE.

I LEARNED, FOR EXAMPLE, ABOUT THE MEANING OF "PARITY." I LEARNED THAT FEDERAL LAW TREATS VICTIMS OF SEXUAL HARASSMENT DIFFERENTLY -- LESS FAVORABLY -- THAN THE VICTIMS OF RACIAL HARASSMENT.

AND I LEARNED THAT -- IN MANY CASES -- THE ONLY REMEDY THAT A VICTIM OF SEXUAL HARASSMENT CAN OBTAIN UNDER THE CIVIL RIGHTS ACT OF 1964 IS DECLARATORY AND INJUNCTIVE RELIEF -- A REMEDY THAT IS HARDLY ADEQUATE, AND ONE THAT IS PARTICULARLY UNFAIR FOR THOSE VICTIMS OF SEXUAL HARASSMENT WHO MAY SUFFER MEDICAL AND PSYCHOLOGICAL HARM.

TITLE I OF THE WOMEN'S EQUAL OPPORTUNITY ACT ATTEMPTS TO CLOSE THIS GAP IN THE LAW BY PROVIDING -- FOR THE FIRST TIME IN OUR NATION'S HISTORY -- A COURT-ORDERED MONETARY REMEDY FOR INTENTIONAL SEXUAL HARASSMENT IN THE WORKPLACE -- UP TO $100,000 FOR FIRST OFFENSES, AND UP TO $150,000 FOR EACH SUBSEQUENT ACT OF SEXUAL HARASSMENT. THESE ARE MAXIMUM PENALTIES -- PAYABLE TO THE AGGRIEVED PARTY -- THAT A COURT MAY, AND SHOULD, REDUCE IN LIGHT OF THE EMPLOYER'S FINANCIAL CONDITION AND ITS HISTORY OF

RESOLVING SEXUAL HARASSMENT COMPLAINTS.

TITLE I ALSO RECOGNIZES THAT PROLONGED EXPOSURE TO WORKPLACE SEXUAL HARASSMENT CAN HAVE SERIOUS AND LASTING DETRIMENTAL EFFECTS ON THE VICTIM. AS A RESULT, TITLE I DIRECTS THE COURTS TO GIVE EXPEDITED -- FAST-TRACK -- RELIEF TO THOSE PERSONS CLAIMING SEXUAL HARASSMENT ON-THE-JOB.

AND, FINALLY, TITLE I DIRECTS THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO ESTABLISH TECHNICAL ASSISTANCE PROGRAMS TO EDUCATE OUR SMALL EMPLOYERS ON THE LAW OF SEXUAL HARASSMENT. UNLIKE LARGE CORPORATIONS, MOST SMALL EMPLOYERS CANNOT AFFORD THE COST OF COMPLIANCE ADVICE FROM PRIVATE LAW FIRMS AND CONSULTANTS. AN EEOC TECHNICAL ASSISTANCE PROGRAM FOR SMALL EMPLOYERS WILL HELP REDUCE THE NUMBER OF SEXUAL HARASSMENT COMPLAINTS AND, AS A RESULT, WILL HELP REDUCE THE QUANTITY OF LITIGATION FOR AN ALREADY OVER-BURDENED COURT SYSTEM.

**VIOLENCE AGAINST WOMEN**

MR. PRESIDENT, THE SECOND TITLE OF THIS BILL ADDRESSES THE HORRIFYING PROBLEM OF VIOLENCE AGAINST WOMEN.

MY DISTINGUISHED COLLEAGUE FROM DELAWARE AND CHAIRMAN OF THE JUDICIARY COMMITTEE, SENATOR BIDEN, CONDUCTED SEVERAL HEARINGS ON THIS ISSUE LAST YEAR. I COMMEND SENATOR BIDEN FOR HOLDING THESE HEARINGS, WHICH HAVE HELPED TO MAKE VIOLENCE AGAINST WOMEN AN ISSUE OF TRULY NATIONAL CONCERN.

MR. PRESIDENT, IF ANYONE DOESN'T THINK THAT VIOLENCE AGAINST WOMEN IS A SERIOUS PROBLEM TODAY, THEY SHOULD READ THE STORY OF AILEEN HEFFERREN, WHO -- AS A JOGGER IN WASHINGTON'S ROCK CREEK PARK LAST AUGUST -- WAS KNOCKED TO THE GROUND BY A 12-YEAR OLD ASSAILANT, TAUNTED, AND THEN LEFT SHAKING, BLEEDING, FALLING IN-AND-OUT OF CONSCIOUSNESS, ONLY TO BE PICKED UP ALMOST AN HOUR LATER BY AN EMERGENCY ROOM AMBULANCE.

A MINOR EVENT IN A BUSY CITY. PERHAPS.

AN EVENT THAT IS REPEATED HUNDREDS OF TIMES EACH DAY THROUGHOUT THIS COUNTRY. YES.

BUT AN EVENT THAT THIS NATION SHOULD COUNTENANCE AS ROUTINE, AS THE PRICE WE PAY FOR LIVING IN A FREE SOCIETY? ABSOLUTELY NOT.

MR. PRESIDENT, THOSE WHO DON'T THINK THAT VIOLENCE AGAINST WOMEN IS A SERIOUS NATIONAL PROBLEM SHOULD ALSO READ THE TESTIMONY OF NANCY ZIEGENMEYER -- A GRINNELL, IOWA, HOMEMAKER -- WHO WAS ABDUCTED AND RAPED IN A SUPERMARKET PARKING LOT, ONLY TO THEN SUFFER 13 MONTHS OF INDIGNITIES AND DELAY IN A COURT SYSTEM THAT TREATED HER MORE LIKE A SUSPECT ON TRIAL THAN THE REAL-LIFE VICTIM OF A BRUTAL CRIME.

AND THEY SHOULD READ THE RECENT REPORT OF THE JUSTICE DEPARTMENT'S BUREAU OF JUSTICE STATISTICS, WHICH ESTIMATED THAT A STAGGERING 2.5 MILLION VIOLENT CRIMES HAVE BEEN COMMITTED AGAINST WOMEN EACH YEAR FROM 1979 THROUGH 1987.

MR. PRESIDENT, VIOLENCE AGAINST WOMEN IS A NATIONAL DISGRACE. IT'S A DISGRACE THAT WE MUST HAVE THE COURAGE TO RECOGNIZE, AND THE COMMITMENT TO REFORM.

WE CAN, AND MUST, DO BETTER.

WHILE TITLE II OF THIS BILL DOES NOT HAVE ALL THE ANSWERS TO THE PROBLEM OF VIOLENCE AGAINST WOMEN, IT DOES OFFER A FEW PROPOSALS THAT, I BELIEVE, DESERVE OUR CONSIDERATION.

FIRST, TITLE II ADDRESSES THE ISSUE OF SAFETY ON OUR UNIVERSITY CAMPUSES.

LAST YEAR, CONGRESS PASSED LEGISLATION REQUIRING UNIVERSITIES TO INFORM STUDENTS OF CAMPUS CRIME STATISTICS. TITLE II BUILDS ON THIS APPROACH BY REQUIRING THE DISCLOSURE OF THESE STATISTICS TO THE PARENTS OF STUDENTS AND TO THE LOCAL POLICE AUTHORITIES.

IT GOES WITHOUT SAYING THAT MORE DISCLOSURE, MORE INFORMATION, LEADS TO BETTER EDUCATION AND MORE SAFETY.

SECOND, TITLE II IMPOSES TOUGHER PENALTIES FOR FEDERAL SEX OFFENDERS -- CAPTIAL PUNISHMENT FOR MURDERS COMMITTED IN THE COURSE OF SEXUAL ASSAULTS AND CHILD MOLESTATIONS, INCREASED PENALTIES FOR RECIDIVIST SEX OFFENDERS, AND A DOUBLING OF THE PENALTY FOR DISTRIBUTING ILLEGAL DRUGS TO PREGNANT WOMEN.

THIRD, IT INCREASES THE OPPORTUNITIES FOR RESTITUTION BY SEX CRIME VICTIMS, AND INCORPORATES THE PORNOGRAPHY VICTIMS COMPENSATION ACT, WHICH WAS INTRODUCED LAST YEAR BY MY DISTINGUISHED COLLEAGUE FROM KENTUCKY, SENATOR MITCH McCONNELL.

FOURTH, IT REFORMS THE FEDERAL RULES OF EVIDENCE TO MAKE ABSOLUTELY CLEAR THAT EVIDENCE OF PAST ACTS OF SEXUAL ABUSE AND CHILD MOLESTATION ARE ADMISSIBLE IN COURT. A RECENT DELAWARE SUPREME COURT DECISION OVERTURNED A DEFENDANT'S CONVICTION FOR RAPING HIS 11 YEAR-OLD DAUGHTER BECAUSE EVIDENCE OF PAST MOLESTATIONS WAS IMPROPERLY ADMITTED.

MR. PRESIDENT, THIS DECISION -- A DECISION BASED ON LEGAL TECHNICALITIES -- IS AN OUTRAGE THAT SHOULD NEVER BE REPEATED IN ANY COURT, ANYWHERE.

FIFTH, TITLE II OUTLINES SEVERAL MODEL RULES FOR PROFESSIONAL CONDUCT BY LAWYERS. THESE RULES MAKE ABSOLUTELY CLEAR THAT LAWYERS SHOULD NEVER ENGAGE IN A TRIAL TACTIC DESIGNED SOLELY TO -- HARASS, EMBARRASS, HUMILIATE -- A SEX CRIME VICTIM. LAWYERS HAVE A LOT OF TRICKS IN THEIR LITIGATION BAGS, BUT THIS IS ONE TRICK THAT SHOULD BE BAGGED.

SIXTH, TITLE II REQUIRES THE AIDS-TESTING OF AN INDIVIDUAL CHARGED WITH A FEDERAL SEX OFFENSE AT THE TIME OF THAT INDIVIDUAL'S PRE-TRIAL RELEASE HEARING. WOMEN WHO HAVE BEEN SEXUALLY ABUSED, ASSAULTED, OR RAPED SHOULD NOT HAVE TO ENDURE THE PAIN OF WAITING 6 MONTHS, A YEAR, EVEN TWO YEARS, TO LEARN WHETHER OR NOT THEY HAVE BEEN INFECTED WITH THE HIV-VIRUS. AIDS-TESTING AT THE PRE-TRIAL RELEASE STAGE WILL GIVE SEX CRIME VICTIMS THE INFORMATION THEY NEED, AND THE INFORMATION THEY WANT.

AND IN THIS SENATOR'S VIEW, AN AIDS-TEST ON A PERSON ACCUSED OF A SEX OFFENSE IS ONLY A MINOR INTRUSION INTO THAT PERSON'S PRIVACY -- AN INTRUSION THAT IS FAR OUTWEIGHED BY THE PALPABLE EMOTIONAL BENEFIT THAT FULL INFORMATION WOULD OFFER THE SEX CRIME VICTIM.

AND FINALLY, MR. PRESIDENT, TITLE II ADDRESSES THE HIDDEN SIDE OF VIOLENCE AGAINST WOMEN -- DOMESTIC VIOLENCE -- THE VIOLENCE THAT OCCURS IN THE FAMILY HOME.

FOR THE SKEPTICS, LET ME CITE SOME FRIGHTENING STATISTICS.

AN ESTIMATED 3 MILLION AMERICAN WOMEN ARE BATTERED EACH YEAR BY THEIR HUSBANDS OR PARTNERS.

MORE THAN 1 MILLION WOMEN SEEK MEDICAL ASSISTANCE ANNUALLY FOR INJURIES CAUSED BY BATTERING.

AND THE FBI REPORTS THAT 30% OF FEMALE HOMICIDE VICTIMS ARE KILLED BY THEIR HUSBANDS OR BOYFRIENDS.

TO ASSIST THOSE WHO ARE ON THE FRONTLINES AGAINST DOMESTIC VIOLENCE -- THE SHELTERS AND LOCAL COMMUNITY GROUPS THAT PROVIDE CARE TO THE VICTIMS -- TITLE II ADOPTS MANY OF THE PROVISIONS CONTAINED IN THE DOMESTIC VIOLENCE PREVENTION ACT OF 1990, WHICH WAS INTRODUCED LAST YEAR BY MY DISTINGUISHED COLLEAGUE, SENATOR DAN COATS.

TITLE II ALSO AUTHORIZES $75 MILLION EACH YEAR -- OVER THE NEXT THREE FISCAL YEARS -- FOR THE FAMILY VIOLENCE SERVICES AND PREVENTION ACT. THIS ACT HAS BEEN THE LIFE-BLOOD FOR HUNDEREDS OF SHELTERS THROUGHOUT THE COUNTRY, AND ADDITIONAL FUNDING IS WELL-DESERVED.

**EQUAL EMPLOYMENT OPPORTUNITIES**

MR. PRESIDENT, THE THIRD TITLE OF THE BILL IS DIRECTED AT IMPROVING EMPLOYMENT OPPORTUNITIES FOR WOMEN AND MINORITIES.

WHAT I AM TALKING ABOUT IS MAKING THE PLAYING FIELD LEVEL TO ENSURE THAT WOMEN AND MINORITIES HAVE EQUAL ACCESS TO THE SAME CAREER-ENHANCING EXPERIENCES, THE SAME JOBS, AND THE SAME PROMOTIONS. IT'S A MATTER OF SIMPLE FAIRNESS, AND AN ISSUE THAT DESERVES MUCH CLOSER ATTENTION AND REVIEW.

**THE GLASS CEILING**

SUBTITLE A OF TITLE III IS DIRECTED AT THE "GLASS CEILING".

THE ISSUE IS ONE OF ACCESS TO UPPER-LEVEL DECISIONMAKING POSITIONS THAT WOMEN AND MINORITIES WHO ARE QUALIFIED TO MOVE UP THE CORPORATE LADDER CAN SEE, BUT ALL TOO OFTEN SEEM UNABLE TO REACH. INSTEAD, THEY FIND THEMSELVES BUMPING THEIR HEADS ON AN INVISIBLE -- AND IMPENETRABLE -- CEILING THAT BLOCKS THEIR ADVANCEMENT TO THE MOST COVETED MANAGEMENT POSITIONS.

A RECENT UCLA JOHN E. ANDERSON GRADUATE SCHOOL OF MANAGEMENT - KORN/FERRY INTERNATIONAL STUDY FOUND THAT DURING THE PAST DECADE LITTLE PROGRESS HAS BEEN MADE IN BREAKING THROUGH THAT CEILING. INDEED, WHILE WOMEN AND MINORITIES CURRENTLY ACCOUNT FOR OVER HALF THE WORKFORCE, THEY HOLD ONLY FIVE PERCENT OF UPPER LEVEL POSITIONS IN FORTUNE 500 COMPANIES WHICH REPRESENTS A MERE TWO PERCENT INCREASE SINCE 1979.

WHILE THERE IS, OF COURSE, NO "RIGHT" OR "CORRECT" NUMBER AND I STRONGLY OPPOSE ANY NOTION OF EMPLOYMENT OR PROMOTION-RELATED QUOTAS, SUCH FIGURES DO SUGGEST THAT ARTIFICIAL BARRIERS EXIST WITH RESPECT TO THE UPWARD MOBILITY OF WOMEN AND MINORITIES.

WHILE THIS LEGISLATION IS ONLY A FIRST STEP FORWARD IN IDENTIFYING, UNDERSTANDING, AND REFORMING BUSINESS ATTITUDES AND PRACTICES THAT HAVE KEPT THE GLASS CEILING IN PLACE, IT IS AN IMPORTANT STEP FORWARD TO ENSURING THAT THE GLASS CEILING MEETS THE SAME FATE AS THE BERLIN WALL.

FIRST, THIS SUBTITLE ESTABLISHES THE GLASS CEILING COMMISSION WHICH IS PROVIDED WITH THE RESOURCES AND POWERS TO FULLY INVESTIGATE AND EVALUATE THOSE PRACTICES AND POLICIES IN CORPORATE AMERICA WHICH IMPEDE THE ADVANCEMENT OF WOMEN AND MINORITIES.

SECOND, THIS LEGISLATION SPECIFICALLY CHARGES THE COMMISSION WITH PREPARING A REPORT FOR THE PRESIDENT AND CONGRESS DUE 15 MONTHS AFTER ENACTMENT ADDRESSING WHY THE GLASS CEILING EXISTS

AND MAKING RECOMMENDATIONS WITH RESPECT TO POLICIES WHICH WOULD ELIMINATE ANY IMPEDIMENTS TO THE ADVANCEMENT OF WOMEN AND MINORITIES.

FINALLY, THIS LEGISLATION PROVIDES FOR THE ESTABLISHMENT OF THE "NATIONAL AWARD FOR DIVERSITY AND EXCELLENCE IN AMERICAN EXECUTIVE MANAGEMENT" TO BE MADE BY THE PRESIDENT ON AN ANNUAL BASIS TO A BUSINESS WHICH HAS MADE SUBSTANTIAL EFFORTS TO PROMOTE THE OPPORTUNITIES FOR WOMEN AND MINORITIES TO ADVANCE TO TOP LEVELS.

MR. PRESIDENT, IT IS MY FIRM BELIEF AND MY FIRM COMMITMENT THAT BY RAISING THE NATIONAL AWARENESS OF THE EXISTENCE OF THE GLASS CEILING FROM THE ASSEMBLY LINE TO THE BOARD ROOM, BY STUDYING AND BETTER UNDERSTANDING WHY THE GLASS CEILING EXISTS AND WHAT KEEPS IT IN PLACE, AND FINALLY BY HAVING RECOMMENDATIONS IN HAND AS TO HOW CORPORATE AMERICA CAN BREAK THAT CEILING, WE WILL HAVE ENSURED THAT EVERYONE HAS ACCESS TO THE SAME EMPLOYMENT OPPORTUNITIES.

THE STEEL DOOR

SUBTITLE B OF THE THIRD TITLE FOCUSES ON PROMOTING EQUAL OPPORTUNITY FOR WOMEN AND MINORITIES IN APPRENTICESHIP PROGRAMS REGISTERED WITH THE DEPARTMENT OF LABOR.

APPRENTICESHIP PROGRAMS ARE A WELL-RECOGNIZED AND TIME-TESTED MEANS OF GETTING WORKERS OFF THE UNEMPLOYMENT AND WELFARE ROLLS AND OUT OF LOW PAYING, SUBSISTENCE-LEVEL JOBS. THEY ARE, IN SHORT, THAT TICKET TO OPPORTUNITY TO THE SKILLED TRADES JOBS WHERE WAGES ARE TYPICALLY IN THE $14 TO $25/PER HOUR RANGE AND WHERE FRINGE BENEFITS ARE HIGHER, WORK SCHEDULES ARE MORE FLEXIBLE, AND ADVANCEMENT OPPORTUNITIES ARE GREATER.

AND YET, MR. PRESIDENT, WHERE UPWARDLY MOBILE WOMEN AND MINORITIES ARE OFTEN BLOCKED FROM UPPER-LEVEL MANAGEMENT JOBS BY THE GLASS CEILING, WOMEN AND MINORITIES SEEKING ACCESS TO APPRENTICESHIP PROGRAMS IN THE SKILLED TRADES JOBS OFTEN FACE A STEEL DOOR.

NOTHING ILLUSTRATES THIS STEEL DOOR BETTER THAN THE FACT THAT WHILE WOMEN AND MINORITIES ACCOUNT FOR MORE THAN HALF THE WORKFORCE, ONLY SEVEN PERCENT OF INDIVIDUALS PRESENTLY ENROLLED IN APPRENTICESHIP PROGRAMS REGISTERED WITH THE DEPARTMENT OF LABOR ARE WOMEN, AND IF A BREAKDOWN IS MADE OF PARTICIPATION BY WOMEN AND MINORITIES IN PARTICULAR TRADES, THE NUMBERS BECOME EVEN MORE DISTURBING.

AS WITH THE GLASS CEILING, THESE TYPES OF NUMBERS SUGGEST THAT VERY REAL BARRIERS EXIST WITH RESPECT TO THE RECRUITMENT AND PARTICIPATION OF WOMEN AND MINORITIES IN APPRENTICESHIP PROGRAMS.

SOME OF THESE BARRIERS MAY RELATE TO THE SOCIALIZATION PROCESS AND THE "PERCEIVED UNACCEPTABILITY" OF WOMEN WORKING IN NONTRADITIONAL JOBS.

UNFORTUNATELY, MR. PRESIDENT, SUCH "PERCEIVED UNACCEPTABILITY" TRANSLATES IN THE REAL WORLD INTO DISCRIMINATORY RECRUITMENT AND PLACEMENT PRACTICES AND SEXUAL HARASSMENT ON THE JOB.

ANOTHER REASON IS THE LACK OF INFORMATION ABOUT APPRENTICESHIP PROGRAMS.

IN ADDITION, RECENT STUDIES SUGGEST THAT EVEN WITH ADEQUATE EDUCATION AND OUTREACH EFFORTS, WOMEN AND MINORITIES OFTEN LACK

THE NECESSARY SKILLS NEEDED TO QUALIFY THEM FOR PARTICIPATION IN A PARTICULAR PROGRAM.

MR. PRESIDENT, THIS SUBTITLE SEEKS TO BREAK DOWN THE STEEL DOOR AND TO ADDRESS SOME OF THESE PROBLEMS BY

(1) DIRECTING THE SECRETARY OF LABOR TO ESTABLISH AN EXTENSIVE AND WELL-TARGETED OUTREACH AND PUBLIC RELATIONS PROGRAM DESIGNED TO EXPAND THE OPPORTUNITIES FOR WOMEN AND MINORITIES IN REGISTERED APPRENTICESHIP PROGRAMS,

(2) PROVIDING FOR THE AUTHORIZATION OF $8 MILLION FOR GRANTS TO BE MADE TO EDUCATIONAL INSTITUTIONS, EMPLOYERS, EMPLOYER ASSOCIATIONS, UNIONS, STATE APPRENTICESHIP COUNCILS, SPONSORS OF APPRENTICESHIP PROGRAMS, AND OTHER RELATED GROUPS AND INDIVIDUALS IN CONNECTION WITH THE SECRETARY'S OUTREACH PROGRAM,

(3) PROVIDING FOR THE AUTHORIZATION OF $15 MILLION FOR GRANTS TO BE MADE TO SPONSORS OF REGISTERED APPRENTICESHIP PROGRAMS FOR PREAPPRENTICESHIP TRAINING OF WOMEN AND MINORITIES,

(4) PROVIDING THAT THE SECRETARY OF LABOR MAY RESERVE UP TO FIVE PERCENT OF FUNDS APPROPRIATED UNDER THE SUBTITLE TO CARRY OUT THE ENFORCEMENT OF THE NONDISCRIMINATION AND AFFIRMATIVE ACTION REQUIREMENTS RELATING TO REGISTERED APPRENTICESHIP PROGRAMS, AND

(5) REQUIRING THE DEPARTMENT OF LABOR TO CONDUCT A STUDY RELATING TO THE PARTICIPATION OF WOMEN AND MINORITIES IN APPRENTICESHIP PROGRAMS FOCUSING ON SUCH ISSUES AS BARRIERS TO ENTRY, RECRUITMENT, SEXUAL HARASSMENT, AND DISCRIMINATION.

WITH WOMEN AND MINORITIES EMERGING AS THE MAJOR SOURCE OF NEW ENTRANTS INTO THE LABOR FORCE BETWEEN NOW AND THE YEAR 2000 -- AN ESTIMATED 85 PERCENT OF NET NEW ENTRANTS TO BE EXACT, IT IS CRITICAL THAT SUCH INDIVIDUALS NOT ONLY BE EMPOWERED WITH THE NECESSARY SKILLS TO MEET THE LABOR CHALLENGES OF THE FUTURE, BUT THAT THEY BE AFFORDED THE SAME OPPORTUNITIES -- EQUAL OPPORTUNITIES -- WHEN IT COMES TO EMPLOYMENT AND TRAINING.

ONE AREA URGENTLY IN NEED OF CHANGE IS EQUAL OPPORTUNITIES IN THE SKILLED TRADES JOBS.

EVERYONE DESERVES EQUAL ACCESS, AND THIS LEGISLATION WORKS TO ENSURE THAT ACCESS.

**ALTERNATIVE WORK ARRANGEMENTS**

THE LAST SUBTITLE RELATES TO ALTERNATIVE WORK SCHEDULES.

AS MORE AND MORE HOUSEHOLDS FIND BOTH PARENTS WORKING INSTEAD OF JUST ONE PARENT, THE NEED TO ACCOMMODATE AN EMPLOYEE'S FAMILY AND CHILD CARE RESPONSIBILITIES HAS INCREASED DRAMATICALLY.

IN RESPONSE TO THIS SITUATION, CONGRESS AUTHORIZED FEDERAL AGENCIES IN 1982 TO ESTABLISH ALTERNATIVE WORK SCHEDULES TO ASSIST FEDERAL EMPLOYEES WHO ARE TRYING TO MANAGE THE PRECARIOUS BALANCING ACT BETWEEN WORK AND FAMILY.

SINCE THAT TIME, THE OFFICE OF PERSONNEL MANAGEMENT HAS BEEN INSTRUMENTAL IN ENCOURAGING FEDERAL AGENCIES TO ESTABLISH ALTERNATIVE WORK SCHEDULE PROGRAMS SUCH AS FLEXITIME, COMPRESSED WORKDAY SCHEDULING, AND JOB SHARING.

THIS SUBTITLE PROVIDES THAT IT IS THE SENSE OF THE CONGRESS THAT OPM HAS MADE COMMENDABLE EFFORTS WITH RESPECT TO THE DEVELOPMENT, USE, AND EXPANSION OF ALTERNATIVE WORK SCHEDULE PROGRAMS AND THAT SUCH EFFORTS SHOULD BE CONTINUED TO HELP

FEDERAL EMPLOYEES, AS WELL AS TO SERVE AS A MODEL FOR STATE AND LOCAL GOVERNMENTS AND PRIVATE SECTOR EMPLOYERS.

MR. PRESIDENT, I ASK UNANIMOUS CONSENT THAT THE FULL TEXT OF "THE WOMEN'S EQUAL OPPORTUNITY ACT OF 1991," AND A SECTION-BY-SECTION ANALYSIS, BE INCLUDED IN THE RECORD IMMEDIATELY AFTER MY REMARKS.

Draft

DRAFT

# THE WOMEN'S EQUAL OPPORTUNITY ACT OF 1991
## SECTION-BY-SECTION ANALYSIS

**SECTION 1 -- SHORT TITLE**

The legislation may be cited as the "Women's Equal Opportunity Act of 1991."

**TITLE I -- FEDERAL CIVIL RIGHTS REMEDIES**

**SUBTITLE A -- Federal Remedies for Sexual Harassment in the Workplace**

**Section 101. Statement of Findings.**

**Section 102. Equity Civil Fines for Sexual Harassment.** Title VII currently prohibits intentional discrimination in the terms and conditions of employment, but provides inadequate remedies for certain unlawful practices, including sexual harassment in the workplace, which the Supreme Court has recognized as actionable under Title VII. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). Such harassment will frequently not be so intolerable that an employee subjected to it immediately leaves. In such circumstances, the only remedy that the victim of harassment can obtain under Title VII's current remedial scheme is declaratory and injunctive relief against the harassment.

Additional remedies for this situation are clearly appropriate and warranted. The mere threat of an injunctive order requiring the employer to stop engaging in acts of sexual harassment is clearly insufficient to deter this type of misconduct.

To deter harassment on the basis of sex, Section 102 provides that the aggrieved party or the Equal Emplyment Opportunity Commission ("EEOC") may recover, in addition to injunctive relief, an amount not to exceed $150,000 for the first offense and an amount not to exceed $250,000 for each subsequent offense, if in the discretion of the court such an award is necessary to ensure the compliance of the respondent with this Act.

The aditional remedy created by this section is available only for acts of sexual harassment engaged in with malice or conscious intent to injure.

In determining the appropriateness and magnitude of an award under this sction, the court shall consiider a) the financial status and employment history of the respondent, b) whether the

respondent has initiated compliance programs designed to ensure that the employment practices of the respondent are lawful, and c) whether the respondent has instituted programs or policies designed to prevent, and resolve complaints of, harassment on the basis of sex in the workplace.

For purposes of this title, the term "harassment on the basis of sex" is defined as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature where 1) submission to such conduct is made explicitly or implicitly a term or condition of employment of an individual, 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or 3) such conduct has the purpose or effect of unreasonably interfering with the work performance of an individual or creating an intimidating, hostile, or offensive working environment." This definition of "harassment on the basis of sex" is taken from an EEOC regulation at 29 CFR Section 1604.11(a).

**Section 103. Expedited Injunctive Relief for Sexual Harassment.** Prolonged exposure to sexual harassment in the workplace can have serious and lasting detrimental effects on the victim. As a result, persons claiming sexual harassment on-the-job should be entitled to expedited relief through the court system.

Section 103 allows an individual alleging sexual harassment to seek temporary, preliminary or permanent injunctive relief, without regard to any period of time following the filing of a charge of unlawful discrimination and without obtaining a right-to-sue letter from the EEOC. Prior to obtaining permanent injunctive relief, the charging party must first demonstrate that he or she 1) has submitted the charge of sexual harassment to any grievance procedure established by the employer, and 2) has obtained a determination through the grievance procedure. The purpose of this provision is to ensure that lawsuits seeking injunctive relief do not become a substitute for employer-established grievance procedures. The court, however, may issue an order of permanent relief and impose a fine on the employer prior to the completetion of the grievance procedure, if the court determines that the procedure has been unduly lengthy.

Section 103 also provides that a court, upon issuing an order for relief, shall also issue an order requiring the employer to make periodic reports to the court for a one-year period. These reports must include a) a description of the efforts made to comply with the order, and b) information concerning additional complaints of harassment against the employer.

Finally, Section 103 directs the courts to assign sexual harassment cases at the earliest practicable date and to cause such cases to be in every way expedited.

**Section 104. Technical Assistance.** Section 104 directs the Chairman of the EEOC, acting through the Directors of the EEOC's district offices, to establish programs to provide technical assistance on the law of sexual harassment to small employers with fewer than 50 employees. Unlike large corporations, most small employers cannot afford the cost of compliance advice from private law firms. An EEOC technical assistance program for small employers will help reduce the instances of sexual harassment in the workplace and the quantity of litigation for an already over-burdened court system.

To assist the EEOC in these technical assistance efforts, Section 104 authorizes an additional $500,000 in funding for the EEOC.

**Section 105. Effective Date.** Section 105 specifies that the provisions of Subtitle A of Title I take effect upon enactment.

**SUBTITLE B -- Expansion of Other Federal Civil Rights.**

**Section 111. Expansion of Protections against All Racial Discrimination in the Making of Contracts.** Section 111 would overrule the Supreme Court's decision in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). In Patterson, an employee sued under 42 U.S.C. 1981, alleging that her employer had harassed her on the job, failed to promote her, and ultimately discharged her, all because of her race. The Court held that Section 1981 is limited by its terms to prohibiting discrimination in "mak[ing] and enforc[ing] contracts," and does not extend to "problems that may arise later from the conditions of continuing employment." Patterson, 109 S. Ct. at 2372. Thus, the Court held, the statute prohibits discrimination -- whether governmental or private -- only in the formation of a contract and in the right of access to a legal process that will enforce established contract obligations without regard to race. While the plaintiff's allegation that she had been discriminatorily denied promotion might fall within the prohibition against discrimination in making contracts, her allegations of harassment on the job addressed only conditions of employment.

The law as interpreted in Patterson leaves a signifiacnt gap in Section 1981 coverage that should be filled. This section would also remove any possible ambiguity for future cases by codifying the holding in Runyon v. McCrary, 427 U.S. 160 (1976), that Section 1981 prohibits private, as well as governmental, discrimination.

**Section 112. Expansion of Right to Challenge Discriminatory Seniority Systems.** Section 112 would overrule the Supreme Court's ruling in Lorance v. AT&T Technologies, Inc, 109 S.Ct. 2261 (1989). In Lorance, a group of female employees challenged a seniority system under Title VII, claiming that the system was adopted with an intent to discriminate against women. Although

the system was facially nondiscriminatory and treated all similarly-situated employees alike, it produced demotions for the plaintiffs, who claimed that the employer had adopted the seniority system intentionally to alter their contract rights. The Supreme Court held that the claim was barred by Title VII's requirement that a charge must be filed within 180 days (or 300 days if the matter can be referred to a state agency) after the alleged discrimination occurred.

The Court held that the time for the plaintiffs to file their complaint began to run when the employer adopted an allegedly discriminatory seniority system, since it was the adoption of the system with a discriminatory purpose that allegedly violated their rights. According to the Court, that was the point at which the plaintiffs suffered the diminution in employment status about which they complained.

The Lorance holding is contrary to the position taken by the Justice Department and the EEOC. It would shield existing seniority systems from legitimate discrimination claims. The discriminatory reasons for adoption of a seniority system may become apparent only when the system is finally applied to affect the employment status of the employees that it covers. In addition, a rule that limits challenges to the period immediately following adoption of a seniority system will promote unnecessary litigation. Employees will be forced to challenge the system before it has produced any concrete impact or forever remain silent. Given such a choice, employees who might never suffer harm from the seniority system may be forced to file a charge -- an especially difficult choice since they may be understandably reluctant to initiate a lawsuit against an employer if the lawsuit is not clearly necessary.

**Section 113. Congressional Coverage.** Section 113 extends the anti-discrimination prohibitions of Title VII to all employees of Congress. The means of enforcing Title VII shall be determined by each House of Congress.

**Section 114. Effective Date.** Section 114 specifies that a) the provisions of Section 111 apply to all proceedings pending on, or commenced after, June 12, 1989 (the date of the Patterson decision), b) the provisions of Section 112 apply to all cases pending on, or commenced after, June 15, 1989 (the date of the Lorance decision), and c) the provisions of Section 113 are effective upon the date of enactment.

## TITLE II -- DOMESTIC AND STREET CRIME VIOLENCE AGAINST WOMEN

### SUBTITLE A -- Safety on College and University Campuses

**Section 201. Amendments to the Higher Education Act** of 1965. [Last year, the 101st Congress passed, and President Bush signed into a law, a bill called the "Crime Awareness and Campus Security Act of 1990." This legislation amended the Higher

education Act of 1965 to require colleges and universities to establish and disclose campus security policies and to inform students and employees of campuse crime statistics.

Section 201 would require colleges and universities to disclose and specify crimes involvng sexual contact, sexual assault, and rape. It would also require the disclosure of this information to local and state police authorities outside the jurisdiction of the college or university.]

**SUBTITLE B -- Stronger Penalties for Federal Sex Offenses**

Section 211. **Capital Punishment for Murders in Connection with Sexual Assaults and Child Molestations.** Section 211 authorizes capital punishment for murders committed in connection with sex crimes that occur in the course of federal offenses. For example, in a case in which a kidnapping was committed in violation of 18 U.S.C. 1201, and the kidnapper raped and murdered the victim, the death penalty could be imposed pursuant to the provisions of this section.

This section adds a new section 1118 to the criminal code (title 18). Subsections (a)-(b) generally provide federal jurisdiction to prosecute murders committed in the course of otrher federal offenses. The basic definition of murder in subsection (a) -- causing death intentionally, knowingly, or through recklessness manifesting extreme indifference to human life -- is similar to the corresponding definition in the Model Penal Code (MPC & 210.2) and various state codes. See, e.g., Ala. Code & 13A-6-2(a)(1)-(2); N.D. Cent. Code & 12.1-16-01(1)(a)-(b).

Subsection (a) also covers deaths resulting from the intentional infliction of serious injury. This is substantially the same as a clause in the definition of capital murder in title I of S. 1970, as passed by the Senate in the 101st Congress. There is also support in state law for the inclusion of this category of homicides in potentially capital murders. See Ill. Ann. Stat., ch. 38, & 9-1; N.S. Stat. Ann. & 2C:11-3.

Under subsection (c), murders in violation of proposed section 1118 would be Class A felonies, punishable by up to life imprisonment. The death penalty could be imposed for a subcategory of these murders as provided in subsections (d)-(1).

Subsection (e) identifies the classes of murders for which the death penalty would be available. Under the procedures of the section, a finding of at least one of the aggravating factors specified in subsection (e) would be a prerequisite to the jury's consideration of capital punishment. These aggravating factors are as follows:

First, under paragraph (1) of subsection (e), the death penalty could be considered if the conduct resulting in death occurred in the course of an offense defined in chapters 109A,

110, or 117 of the criminal code. Chapter 109A defines the federal crimes of sexual abuse, including the crimes within federal jurisdiction that would commonly be characterized as rape or child molestation. Chapter 110 defines the federal crimes relating to sexual exploitation of children, including crimes involved in the production of child pornography. Chapter 117 includes crimes involved in the management of interstate prostitution, "white slavery" and child prostitution operations.

Second, under paragraph (2), the death penalty could be considered if the conduct resulting in death occurred in the course of a federal offense, and the defendant committed a crime of sexual assault or child molestation in the course of the same offense. For example, as noted above, if the victim were kidnapped in violation of 18 U.S.C. 1201, and the kidnapper raped and murdered the victim, the death penalty would be available under this paragraph.

Third, under paragraph (3), the death penalty could be considered if a defendant committing a murder in violation of this section had a prior conviction for sexual assault or child molestation. Subsection (x) defines the terms "sexual assault" and "child molestation" for purposes of this paragraph and paragraph (2).

If the jury found that at least one of the aggravating factors specified in subsection (e) existed, and further found that there were no mitigating factors or that the aggravating fctors outweighed any mitigating factors, then the death penalty would be imposed pursuant to subsections (j) and (1).

The remaining provisions of the section set out the general procedures required for conducting a capital sentencing hearing, and for reviewing and carrying out the death penalty in cases in which it is imposed. These procedural provisions take the same approach as the Administration's death penalty legislation of the 101st Congress. They are substantially the same in almost all respects as the death penalty procedures passed by the House of Representatives in title II of H.R. 5269 in the 101st Congress, and the death penalty procedures passed by the Senate in title XIV of S. 1970 in the 101st Congress. They are also the same or similar in may respects to the death penalty procedures passed by the Senate in title I of S. 1970.

**Section 212. Increased Penalties for Recidivist Sex Offenders.** Section 212 amends the penalties applicable under the sexual abuse chapter (chapter 109A) of title 18 of the United States Code by providing that second or subsequent offenses are punishable by a term of imprisonment of up to twice that otherwise authorized. The prior conviction may be either a violation of the chapter or a violation of state law involving a type of conduct proscribed by chapter 109A. This amendment, which was passed by the Senate in S.1970 (section 2425), is designed to correct the inadequacy of current penalties with

respect to recidivist sex offenders.

**Section 213. Definition of Sexual Act for Victims below the Age of 16.** Section 213 amends the definitional section for federal sexual abuse offenses to provide greater protection for victims below the age of 16. Recently, the maximum penalty for engaging in a sexual act with a minor between the ages of 12 and 16 (by a person at least 4 years older than the victim) was raised from five to fifteen years' imprisonment (& 322 of the Crime Control Act of 1990). Both the original Senate-passed and House-passed versions of this legislation -- section 2425 of S. 1970 and section 2919 of H.R. 5269 -- also contained amendments addressing deficiencies in the definition of the term "sexual act" in relation to victims below the age of 16. However, the enacted bill did not contain these amendments, presumably because of other differences in the sections in which they appeared.

Section 213 is the same as the corresponding amendments to the definition of "sexual act" in S. 1970 and H.R. 5269. It would extend the definition of "sexual act" to include intentional touching, not through the clothing, of the genitals of a person who is less that 16 years of age, provided the intent element common to the other touching offenses is present. This form of molestation can be as detrimental to a young teenager or child as the conduct currently covered by the term sexual act.

The current definitions of sexual act and sexual contact also involve a gender-based imbalance that effectively tends to give more lenient treatment to cases in which the victim is a boy. Under the current definitions, sexual touching that involves even a slight degree of penetration of a genital or anal opening constitutes a sexual act, rather than just sexual contact, and the former is punished more severly than the latter under the existing statutory scheme. Since penetration is more likely with female than male victims, such conduct would more likely constitute sexual acts when committed with females than with males.

The amendment corrects this gender-based imbalance by treating all direct genital touching of children under the age of 16, with intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person as sexual acts, regardless of whether penetration has occurred. Moreover, it eliminates the difficulties of proving penetration for many sexual abuse offenses against children -- both boys and girls -- in which there are typically no adult witnesses.

**Section 214. Drug Distribution to Pregnant Women .** 21 U.S.C. 845 prescribes enhanced penalties for the distriution of controlled substances to persons below the age of twenty-one. Section 214 amends 21 U.S.C. 845 to make the same enhanced penalties apply to the distribution of controlled substances to pregnant women.

Conduct convered by this amendment frequently involves exploitation by the drug dealer of the pregnant mother's drug dependency or addiction to facilitate conduct on her part that carries a grave risk to her child of pre-natal injury and permanent impairment following birth. Such conduct by a trafficker in controlled substances is among the most serious forms of drug-related child abuse and plainly merits the enhanced penalties provided by 21 U.S. C. 845.

**SUBTITLE C -- Enhanced Restitution for Victims of Sex Crimes**

**Section 221. Mandatory Restitution [To be Supplied].**

**Section 222. Pornography Victims Compensation.** Section 222 creates a federal cause of action against a producer, distributor, exhibitor, or seller of sexually explicit material by a victim of a rape, sexual assault, or sexual crime. Section 222 conditions recovery of damages on proof by a preponderance of the evidence that: a) the victim was a victim of a rape, sexual assault, or a sexual crime, b) the material is sexually explicit and was a proximate cause of the offense, and c) the defendant is a producer or distributor of the material or exhibited or sold it to the sexual offender and should have known that the material was sexually explicit.

The Pornography Victims Compensation Act was orginally introduced by Senator Mitch McConnell in the 101st Congress.

**SUBTITLE D -- Reform of Federal Civil and Criminal Procedure in Sex Offense Cases**

**Section 231. Admissibility of Evidence of Similar Crimes in Sexual Assault and Child Molestation Cases.** In cases where the defendant is accused of committing an offense of sexual assault or child molestation, courts in the United States have traditionally favored the broad admission at trial of evidence of the defendant's prior commission of similar crimes. The contemporary edition of Wigmore's treatise describes this tendency as follows (IA Wigmore's Evidence sec. 62.2 (Tillers rev. 1983)):

> [T]here is a strong tendency in prosecutions for sex offenses to admit evidence of the accused's sexual proclivities. Do such decisions show that the general rule against the use of propensity evidence against an accused is not honored in sex offense prosecutions? We think so.
>
> [S]ome states and courts have forthrightly and expressly recogniz[ed] a "lustful disposition" or sexual proclivity exception to the general rule barring the use of character evidence against an accused . . . [J]urisdictions that do not expressly recognize a lustful disposition exception may effectively recognize such an exception by expansively interpreting in prosecutions for sex offenses various well-

established exceptions to the character evidence rule. The exception for common scheme or design is frequently used, but other exceptions are also used.

More succinctly, the Supreme Court of Wyoming observed in Elliot v. State, 600 P. 2d 1044, 1047-48 (1979):

> [I]n recent years a preponderance of the courts have sustained the admissibility of the testimony of third persons as to prior or subsequent similar crimes, wrongs or acts in cases involving sexual offenses ... [I]n cases involving sexual assaults, such as incest, and statutory rape with family members as the victims, the courts in recent years have almost uniformly admitted such testimony.

The willingness of the courts to admit similar crimes evidence in prosecutions for serious sex crimes is of great importance to effective prosecution in this area, and hence to the public's security against dangerous sex offenders. In a rape prosecution, for example, disclosure of the fact that the defendant has previously committed other rapes is frequently critical to the jury's informed assessment of the credibility of a claim by the defense that the victim consented and that the defendant is being falsely accused.

The importance of admitting this type of evidence is still greater in child molestation cases. Such cases regularly present the need to rely on the testimony of child victim-witnesses whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, the public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense is truly compelling.

Notwithstanding the salutary tendency of the courts to admit evidence of other offenses by the defendant in such cases, the current state of the law in this area is not satisfactory. The approach of the courts has been characterized by considerable uncertainty an inconsistency. Not all courts have recognized the area of sex offense prosecutions as one requiring special standards or treatment, and those which have adopted admission rules of varying scope and rationale.

Moreover, even where the courts have traditionally favored admission of "similar crimes evidence" in sex offense prosecutions, the continuation of this approach has been jeopardized by recent developments. These developments include the widespread adoption by the states of codified rules of evidence modeled on the Federal Rules of Evidence, which make no special allowance for admitting similar crimes evidence in sex offense cases. They also include the limitation of evidence of other sexual activity by the victim under "rape victim shield laws," which has given rise to an argument that it would be unfair or inappropriate to be more permissive in admitting

evidence of the commission of other sex crimes by the defendant.

Section 231 would amend the Federal Rules of Evidence to ensure an appropriate scope of admission for evidence of similar crimes by defendants accused of serious sex crimes. The section adds three new Rules (proposed Rules 412, 413, and 415), which state general rules of admissibility for such evidence. The proposed new rules would apply dirctly in federal cases, and would have broader significance as a potential model for state reforms.

Proposed Rule 412 relates to criminal prosecutions for sexual assault. Paragraph (a) provides that evidence of the defendant's commission of other sexual assaults is admissible in such cases. If such evidence were admitted under the Rule, it could be considered for its bearing on any matter to which it is relevant. For example, it could be considered as evidence that the defendant has the motivation or disposition to commit sexual assaults, and a lack of effective inhibitions against acting on such impulses, and as evidence bearing on the probability or improbability that the defendant was falsely implicated in the offense of which he is presently accused.

Paragraph (b) of proposed Rule 412 generally requires pretrial disclosure of evidence to be offered under the Rule. This is designed to provide the defendant with notice of the evidence that will be offered, and a fair opportunity to develop a response. The Rule sets a normal minimum period of 15 days notice, but the court could allow notice at a later time for good cause, such as later discovery of evidence admissible under the rule. In such a case, it would, of course, be within the court's authority to grant a continuance if the defense needed additional time for preparation.

Paragraph (c) makes clear that proposed Rule 412 is not meant to be the exclusive avenue for introducing evidence of other crimes by the defendant in sexual assault prosecutions, and that the admission and consideration of such evidence under other rules will not be limited or impaired. For example, evidence that could be offered under proposed Rule 412 will often be independently admissible for certain purposes under Rule 404(b) (evidence of matters other than "character").

Paragraph (d) defines the term "offense of sexual assault." The definition would apply both in determining whether a currently charged federal offense is an offense of sexual assault for puposes of the Rule, and in determining whether an uncharged offense qualifies as an offense of sexual assault for purposes of admitting evidence of its commission under the Rule. The definition covers federal offenses defined in the chaper of the criminal code relating to sexual abuse (chapter 109A of title 18, U.S. Code) in light of subparagraph (1), and other federal and state offenses that satisfy the general criteria set out in subparagraphs (2)-(5).

Rule 413 concerns criminal prosecutions for child molestation. Its provisions are parallel to those of the sexual assault rule (Rule 412), and should be understood in the same sense, except that the relevant class of offenses is child molestations rather than sexual assaults. The definition of child molestation offenses set out in paragraph (d) of this Rule differs from the corresponding definition of sexual assault offenses in Rule 412 in that (1) it provides that the offense must be committed in relation to a child, defined as a person below the age of fourteen, (2) it includes the child exploitation offenses of chapter 110 of the criminal code within the relevant category, and (3) it does not condition coverage of such offenses on a lack of consent by the child-victim.

Rule 414 applies the same rules to civil actions in which a claim for damages or other relief is predicated on the defendant's alleged commission of an offense of sexual assault or child molestaion. Evidence of the defendant's commission of other offenses of the same type would be admissible, and could be considered for its bearing on any matter to which it is relevant.

B. Background in the Law of Evidence

The common law has traditionally limited the admission of evidence of a defendant's commission of offenses other that the particular crime for which he is on trial. This limitation, however, has never been absolute. The Supreme Court has summarized the general position of the common law on this issue as follows:

> Alongside the general principle that prior offenses are inadmissible, despite their relevance to guilt . . . the common law developed broad, vaguely defined exceptions -- such as proof of intent, identity, malice, motive, and plan -- whose application is left largely to the discretion of the trial judge . . . . In short, the common law, like our decision in [Spencer v. Texas], implicitly recognized that any unfairness resulting from admitting prior convictions was more often than not balanced by its probative value and permitted the prosecution to introduce such evidence without demanding any particularly strong justification. (Marshall v. Lonberger, 459 U.S. 422, 438-39 n.6 (1983)).

The Federal Rules of Evidence -- which went into effect in 1975 -- follow the general pattern of traditional evidence rules, in that they reflect a general presumption against admitting evidence of uncharged offenses, but recognize various exceptions to this principle. One exception is set out in Rule 609 . Rule 609 incorporates a restricted version of the traditional rule admitting, for purposes of impeachment, evidence of a witness's prior conviction for felonies or crimes involving dishonesty or false statement. The other major provision under which evidence of uncharged offenses may be admitted is Rule 404(b). That rule provides that such evidence is not admissible for the purpose of

proving the "character" of the accused, but that it may be admitted as proof concerning any non-character issue:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b), however, makes no special allowance for admission of evidence of other "crimes, wrongs, or acts" in sex offense prosecutions. There was perhaps little reason for the framers of the Federal Rules of Evidence to focus on this issue, since sex offense prosecutions were not a significant category of federal criminal jurisdiction.

This omission has been widely reproduced in codified state rules of evidence, whose formulation has been strongly influenced by the Federal Rules. The practical effect of this development is that the authority of the courts to admit evidence orf uncharged offenses in prosecutions for sexual assaults and child molestations has been clouded, even in states that have traditionally favored a broad approach to admission in this area.

The actual responses of the courts to this development have varied. For example, in State v. McKay, 787 P. 2d 479 (Or. 1990), in which the defendant was accused of molesting his stepdaughter, the court admitted evidence of prior acts of molestation against the girl. The court reached this result by stipulating that evidence of a predisposition to commit sex crimes against the victim of the charged offense was not evidence of "character" for purposes of the state's version of Rule 404(b), although it apparently would have regarded evidence of a general disposition to commit sex crimes as impermissible "character" evidence.

In Elliot v. State, 600 P. 2d 1044 (1979), the Supreme Court of Wyoming reached a broader result supporting admission, despite a state rule that was essentially the same as Federal Rule 404(b). This was also a prosecution for child molestation. Evidence was admitted that the defendant had attempted to molest the older sister of the victim of the charged offfense on a number of previous occasions. The court reconciled this result with Rule 404(b) by indicating that proof of prior acts of molestation would generally be admissible as evidence of "motive" -- one of the traditional "exception" categories that is explicitly mentioned in Rule 404(b). Id. at 1048-49.

In contrast, in Getz v. State, 538 A.2d 726 (1988), the Supreme Court of Delaware overturned the defendant's conviction for raping his 11-year old daughter because evidence that he had also molested her on other occasions was admitted. The court

stated that "a lustful disposition or sexual propensity exception to [Rule] 404)b)'s general prohibitions . . . is almost universally recognized in cases involving proof of prior incestuous relations between the defendant and the complaining victim," but that "courts which have rejected this blanket exception have noted that in the absence of a materiality nexus such propensity evidence is difficult to reconcile with the restrictive language of [Rule] 404(b)." The court went on to hold that the disputed evidence in the case was impermissible evidence of character and could not be admitted under the state's Rule 404(b).

The foregoing decisions illustrate the increased jeopardy that the current formulation of the Federal Rules of Evidence has created for effective prosecution in sex offense cases. While the law in this area has never been a model of clarity and consistency, the widespread adoption of codified state rules based on the Federal Rules has aggravated its shortcomings. In jurisdictions that have such codified rules, the courts are no longer free to recognize straightforwardly the need for rules of admission tailored to the distinctive characteristics of sex offense cases or other distinctive categories of crimes. Important evidence of guilt may consquently be excluded in such cases.

Where the courts do admit such evidence, it may require a forced effort to work around the language and standard interpretation of codified rules that restrict admission, or may depend on unpredictable decisions by individual trial judges to allow admission under other "exception" categories. The establishment of clear, general rules of admission, as set out in proposed Rules 412-414, would resolve these problems under current law in federal proceedings, and would provide a model for comparable reforms in state rules of evidence.

**Section 232. Right of the Victim to an Impartial Jury.** Section 232 amends Fed. R. Crim. P. 24(b) to equalize the number of peremptory challenges that may be exercised by the defense and the prosecution in jury selection. Currently, the Rule gives the prosecution and defense 3 challenges each in misdemeanor cases and 20 challenges each in capital cases. In felony cases, however, the defense is given 10 peremptory challenges and the prosecution is only given 6.

This means that the selection process in felony cases is skewed in the direction of enabling the defense to select a jury that is biased in favor of the defendant and against the victim. Section 232 corrects this imbalance by equalizing the number of peremptory challenges provided to each side in felony cases at 6. A provision equalizing the number of peremptories for the defense and prosecution has previously been passed by the Senate as part of S. 1970 in the 101st Congress.

Section 232 amends 18 U.S.C. 243 to prohibit invidious

discrimination by the defense in using peremptory challenges. Under the decision in Batson v. Kentucky, 476 U.S. 79 (1986), a prosecutor is barred from using peremptory challenges to exclude potential jurors on the basis of race. However, courts have not generally adopted a like rule for defense attorneys. This means, for example, that a defense attorney could use his peremptories to obtain an all-white jury in a case in which white racists were charged with murdering blacks, and there would be nothing the government could do about it.

Further concerns arise from the possibility that the Batson Rule will be applied -- but only one-sidedly -- to exclusion of jurors on the basis of gender. This would mean, for example, that a defense attorney could use his peremptories to get an all-male or nearly all-male jury in a rape case, and the prosecutor would potentially be barred from using his peremptories to strike male jurors in order to obtain a more balanced jury. In general, crime victims are victimized by rules that leave the defense free to choose an unrepresentative jury, while barring the prosecutor from attempting to redress the imbalance by striking jurors from the complementary population group.

Section 232 resolves this problem by providing that a defense attorney cannot exercise peremptories on the basis of race or other grounds that would be prohibited to a prosecutor, and by giving the prosecutor the same right to challenge such misconduct by the defense that the defense has in relation to the government.

**Section 233. Rules of Professional Conduct for Lawyers in Federal Cases.** [This section would provide a set of Rules for Professional Conduct by lawyers. These rules would be set out as an appendix to title 28 of the United States Code. In a nutshell, the rules will provide that lawyers may not harass individuals testifying in sex offense cases.]

Section 234. Civil Commitment Procedures for "Sexually Dangerous Persons." [To be Supplied]

**Section 235. Statutory Presumption against Child Custody.**

**Section 236. Mandatory HIV-Testing of Persons Charged with Sex Offenses.** The trauma of victims of sex crimes may be greatly magnified by the fear of contracting AIDS as a result of the attack. Section 1804 of the Crime Control Act of 1990 created a funding incentive for the states to require HIV testing of sex offenders and disclosure of the test results to the victim. There is, however, no comparable requirement or authorization for federal sex offense cases.

Section 236 remedies this omission by requiring HIV testing in federal cases involving a risk of HIV transmission. It also includes related provisions requiring enhanced penalties for federal sex offenders who risk HIV infection of their victims,

and payment by the government for HIV testing of the victim.

Section 236 would add a new section (proposed section 2247) to the chapter of Title 18 of the United States Code that defines the federal crimes of sexual abuse (chapter 109A). Subsection (a) of proposed section 2247 would require HIV testing of a person charged with an offense under chapter 109A, at the time of the pre-trial release determination for the person, unless the judicial officer determines that the person's conduct created no risk of transmission of the virus to the victim. The test would be conducted within 24 hours or as soon thereafter as feasible, and in any event before the person is released. Two follow-up tests would alsop be required (six and twelve months following the initial test) for persons testing negative. Under subsection (d), the results of the HIV test would be disclosed to the person tested, to the attorney for the government, and -- most importantly -- the victim or the victim's parent or guardian.

In some instances testing may not be ordered pursuant to proposed 18 U.S.C. 2247(a) because the information available at the time of the pre-trial release determination indicated that the person's conduct created no risk of HIV transmission, but in light of information developed at a later time it may subsequently appear to the court that the person's conduct may have risked transmission of the virus to the victim. Subsection (b) of proposed section 2247 accordingly authorizes the court to order testing at a later time if testing did not occur at the time of the pre-trial release determination.

Subsection (c) of proposed section 2247 provides that a requirement of follow-up HIV testing is cancelled if the person tests positive -- in which case further testing would be superfluous -- or if the person is acquitted or all charges under chapter 109A are dismissed.

Subsection (e) of proposed section 2247 directs the Sentencing Commission to provide enhanced penalties for offenders who know or have reason to know that they are HIV-positive and who engage or attempt to engage in criminal conduct that creates a risk of transmission of the virus to the victim. This requirement reflects the higher degree of moral reprehensibility and depravity involved in the commission of a crime when it risks transmission of a lethal illness to the victim, and the exceptional dangerousness of sex offenders who create such a risk to the victims of their crimes.

**Section 237. Payment of Cost of HIV Testing for Victim.** Section 503(c)(7) of the Victims' Rights and Restitution Act of 1990, enacted as part of the Crime Control Act of 1990, currently provides that a federal government agency investigating a sexual assault shall pay the costs of a physical examination of the victim, if the examination is necessary or useful for investigative purposes. Section 237 in this title extends this provision to require payment for up to two HIV tests for the

victimn in the twelve months following the sexual assault.

**SUBTITLE E -- Federal Task Force on Domestic and Street Crime Violence against Women**

SUBTITLE F -- Funding for Shelters; Amendments to the Family Violence Prevention and Services Act] This section will probably authorize an additional $75 million for each of fiscal years 1991, 1992, and 1993 to provide grants under the Family Violence Prevention and Services Act.

Many of the provisions of this substitle will probably be modelled after the provisions contained in S. 3134, the "Domestic Violence Prevention Act of 1990," which was introduced last year by Senator Dan Coats.

**TITLE III -- EMPLOYMENT OPPORTUNITIES FOR WOMEN**

**SUBTITLE A -- Glass Ceiling Commission**

**Section 301. Short Title.** Section 301 sets forth the short title of the subtitle, the "Glass Ceiling Act of 1991".

**Section 302. Findings and Purpose.** Section 302 sets forth the findings and purpose of the subtitle.

**Section 303. Establishment of Glass Ceiling Commission.** Section 303 establishes the "Glass Ceiling Commission". [Appointment and composition of Commission to be supplied.]

Also specifies rates of pay for members who are not public officials, authorizes payment for travel costs, fixes a quorum for meetings, and requires that the Commission hold a minimum of four meetings and may hold additional meetings if the Chairperson or a majority of the members so request.

**Section 304. Research on Advancement and Promotion of Women and Minorities to Senior Management and Decisionmaking Positions in Business.** Section 304 requires the Commission to conduct a comprehensive study concerning the advancement of women and minorities to senior management and decisionmaking positions in business, including the manner in which business fills senior management and decisionmaking positions, the developmental and skill-enhancing practices used to foster the necessary qualifications for advancement into such positions, and the compensation programs and reward structures currently utilized in the workplace. Also requires that the report contain recommendations relating to practices and policies which promote the upward mobility of women and minorities to senior management and decisionmaking positions in business. Also requires that the report of the Commission be completed within 15 months after the date of enactment and identifies to whom it is to be sent.

**Section 305. Establishment of the National Award for**

**Excellence in the Advancement of Women and Minorities.** Section 305 establishes the "National Award for Excellence in the Advancement of Women and Minorities" to be presented on an annual basis by the President or the designated representative of the President to a business which has substantially promoted the advancement of women and minorities to senior management and decisionmaking positions within the business and is deserving special recognition as a consequence. Also requires that the award be based upon recommendations received from the Commission pursuant to a written application and upon criteria and standards determined to be appropriate by the Commission.

**Section 306. Powers of the Commission.** Section 306 prescribes the powers of the Commission, including conducting hearings, taking testimony, entering into contracts, making expenditures, and receiving voluntary service, gifts and donations.

**Section 307. Staff and Consultants.** Section 307 authorizes the Commission to appoint staff and employ experts and consultants and sets out rates of pay for such individuals. Also authorizes the Commission to obtain materials, personnel, or other support from Federal agencies.

**Section 308. Authorization of Appropriations.** Section 308 authorizes the appropriation of such sums as are necessary to carry out the provisions of the subtitle which sums are to remain available until spent, without fiscal year limitation.

**Section 309. Termination.** Section 309 provides that the Commission and the award will terminate five years after enactment.

**SUBTITLE B -- Apprenticeship and Training Programs for Women and Minorities**

[This subtitle seeks to address the lack of participation of women and minorities in Bureau of Apprenticeship and Training (BAT)-certified apprenticeship and training programs which provide access to the high paying skill trades jobs in the manufacturing and construction industries.

The subtitle will have four main provisions which would:

(a) direct the Secretary of Labor to establish an outreach and public relations program meeting certain standards designed to improve the accessibility of and opportunities for women and minorities in apprenticeship and training programs,

(b) provide for the authorization of grants to registered apprenticeship and training programs for the purpose of establishing pre-apprenticeship training of women and minorities,

(c) authorize funds for the training of the enforcement

personnel of the Office of Federal Contract Compliance Programs (within DOL) who under the Secretary's Order of November 1990, were given joint review and enforcement authority with BAT over apprenticeship programs, and

(d) require DOL to conduct a study relating to the participation of women and minorities in apprenticeship and training programs focusing on barriers to entry, lack of recruitment, sexual harassment, and discrimination.]

**SUBTITLE C -- "Flex-Time" and Job-Sharing.** This section will outline the "flex-time" and job-sharing programs currently conducted by the Office of Personnel Management. The section will express the sense of the Senate that these programs should be continued.