

Lesbians, Gay Men, Bisexuals, and Transgendered People

Part I - Needs

Lesbians, gay men, bisexuals, and transgendered people (LGBT) face discrimination daily in every aspect of their lives. The federal government and the majority of state governments have sanctioned discrimination by, among other things, criminalizing behavior, refusing to recognize same gender marriages, and creating obstacles in terms of arranging finances for gay and lesbian couples which has led to financial hardships. In general, American law continues to reflect the moralistic notion that homosexuality is a sinful and unnatural disorder.

Discrimination against LGBTs often results from sodomy laws. Although these laws only criminalize the acts themselves, they work to brand lesbian and gay men as criminals, deny employment, child custody and visitation rights, and are used as a rationale against enacting laws barring discrimination based on sexual orientation.¹ Additionally, anti-gay bias has been found to be prevalent in the court system.²

Among LGBT individuals, those who are transgendered have an even greater battle. The American Psychiatric Association classifies transgendered people as those who

have “gender identity disorder.”³ However, the only recognized treatment is medical, consisting of hormone therapy that is designed to create the characteristics of another sex including the physical anatomy of that sex.⁴ Although transgendered people suffer discrimination similar to gay men, lesbians, and bisexuals, they have less legal protection. They also often face greater obstacles in terms of the availability of health care and access to public accommodations.

Understanding the vast number of inequities that LGBTs face is made more difficult because many LGBTs remain silent about their sexual orientation. Recent 2000 census figures do show a dramatic increase in same-sex partner households.⁵ The census numbers still fail to reflect total population because single LGBTs are not recorded on the census.

Impact of the Refusal to Recognize Same-Sex Marriage

Refusal to recognize marriage creates financial hardship for gay men and lesbians that impacts every aspect of life. Alternatives such as Vermont’s “civil unions”⁶, Hawaii’s “reciprocal benefits”⁷ for

³ Shannon Minter, *Representing Transsexual Clients: An Overview of Selected Legal Issues*, National Center for Lesbian Rights, at http://www.nclrights.org/publications/pubs_tgclients.html (2000).

⁴ *Id.*

⁵ National Gay and Lesbian Task Force, *New Census Figures*, at <http://www.nglftf.org/news/release.cfm?releaseID=399> (June 27, 2001). The number of people reporting to be in a same-sex household in Delaware was up 781% from 1990 and up 400% in Vermont from 1990. The figures also show that same-sex couples live in both rural and urban areas. *Id.*

⁶ See *Baker v. Vermont*, 170 Vt. 194 (2000); Lambda Legal Defense and Education Fund, *National Overview: The Fight to Win the Freedom to Marry*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=50> (May 17,

¹ Lambda Legal Defense and Education Fund, *State-by-State Sodomy Law Update*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=275> (May 11, 2001).

² Lambda Legal Defense and Education Fund, *Anti-Gay Bias Prevalent in CA Court System*, *New Report Says*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=780> (Feb. 2, 2001).

same-sex couples laws, and domestic partner benefit laws,⁸ are a tremendous step in granting protection to lesbians and gay men, but these approaches do not offer the same comprehensive benefits, nor the same legal or social implication, as civil marriages.⁹ Denial of marriage entrenches societal treatment of lesbians and gay men as second-class citizens, not deserving of the same privileges as the rest of society. Alternative approaches to marriage are also not widely available. Civil unions, for example, are only recognized in Vermont and it unclear whether the benefits will be accorded in other states.¹⁰ Without a marriage, gay and lesbian couples are not entitled to:¹¹

- share such government benefits as Social Security and Medicare
- file joint tax returns and get special marriage or family rates or exemptions
- have joint parenting, adoption, foster care, custody, and visitation

2000).

⁷ See *id.*; see also *Baehr v. Lewin*, 74 Haw. 645 (1993).

⁸ Human Rights Coalition. *San Francisco's Pioneering Domestic Partner Benefits Law Upheld by Federal Appeal Court*, at <http://www.hrc.org> under news section (May 15, 2001).

⁹ Lambda Legal Defense and Education Fund, *Marriage and Domestic Partnership: A Fact Sheet*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=436> (May 17, 1999).

¹⁰ Lambda legal Defense and Education Fund, *Vermont Civil Unions Law to Take Effect, Putting Fairness in Full Swing*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=656> (May 30, 2000).

¹¹ Lambda Legal Defense and Education Fund, *Legal/Economic Protections: Marriage Project Fact Sheet*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=45> (Sept. 26, 1997).

- obtain joint insurance policies for home and auto, as well as family health coverage
- inherit automatically in the absence of a will
- secure equitable division of property and determine child custody and support in case of divorce
- obtain veterans' discounts on medical care, education, and housing loans
- enter jointly into rental leases with automatic renewal rights
- make medical decisions on a partner's behalf in the event of illness
- choose a final resting place for a deceased partner
- take bereavement or sick leave to care for partner or child
- receive spousal exemptions to property tax increases upon the death of a partner
- obtain wrongful death benefits for a surviving partner and children

Marriage: Special Issues for Transgendered People

When two individuals are married and one of the spouses is in transition, usually they can remained married as same-sex married couples.¹² However, when one spouse dies, the surviving spouse may have difficulty collecting survivorship benefits or claiming inheritance or other tax benefits that are only

¹² See source cited *supra* note 142. There are no published decisions on this issue to date. *Id.*

given to married couples.¹³ Employers can also challenge the legitimacy of a marriage by excluding a spouse from an employer-provided health plan.¹⁴ Those individuals who get married after transition will most likely be denied the ability to marry a person of the opposite sex because they are still considered their pre-operative sex.¹⁵ Many states do, however, allow transsexual persons to change their sex designation on their birth certificate. This allows a male to become a female, or a female to become a male, for legal purposes including marriage.¹⁶

Finally, transgendered people who are lesbian, gay, or bisexual have the same problems with the inability to marry as other lesbian, gay, or bisexual individuals. Greater difficulties are presented for transgendered people who do not have genital surgery because most states require this surgery as a prerequisite of changing one's birth certificate. Therefore, transgendered individuals would also greatly benefit from the legalization of same-sex marriages.¹⁷

1. Income

Identifying the number of low income LGBTs is difficult because often those who are in a position of economic insecurity fear stating their sexual orientation in surveys. Also, surveys are frequently placed in magazines, distributed through mailing lists of gay and lesbian organization, and through polls of persons attending gay and lesbian events.¹⁸

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*; see also *M.T. v. J.T.*, 355 A.2d 204 (N.J. App. Div. 1976) (an exception to the general rule that marriage will be denied).

¹⁶ *Id.*; see also *Littleton v. Prange*, 9 S.W.3d 233 (Tex. App. 1999), *rev. denied* (post-operative transsexual woman, obtaining a female birth certificate, was still considered a male for marriage purposes).

¹⁷ *Id.*

¹⁸ Darren Huchinson. *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 Conn. L. Rev. 561, 603

Therefore, surveys are often not accessible to impoverished gay men and lesbians and when they are accessible, poor gay men and lesbians are often afraid to answer the surveys. This has perpetuated the belief that all lesbian and gay men are wealthy.

A University of Maryland study, focusing on "sexual behavior" instead of requiring participants to identify themselves as "gay or lesbian,"¹⁹ revealed that those who are "behaviorally" gay and lesbian have lower incomes than their heterosexual counterparts.²⁰ Additionally, a 1993 survey conducted by the Dublin based Combat Poverty Agency with European Union funding, found that 21% of lesbians and gay men live in poverty in Ireland as compared to a 10% poverty level in the general population.²¹ The American Civil Liberties Union claims that "the only thing close to a representative survey suggests that lesbians and gay men generally earn less than their heterosexual counterparts."²²

The inability to marry directly impacts income. Many government programs, such as Social Security, Veteran's Benefits, and some disability insurance, provide payments that are larger for married recipients.²³ For

(1997).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Stuart Elliott, *A Sharper View of Gay Consumers*, N.Y. TIMES, June 9, 1994, at D1

²² Religious Tolerance.org., *Employment Discrimination Against Gays and Lesbians*, at www.religioustolerance.org/hom_empl.htm (May 12, 2000).

²³ Social Security Online, *Spotlight on Living Arrangements*, at <http://www.ssa.gov/pubs/136.htm> (last visited July 3, 2001); see also Department of Veterans Affairs, *Disability Compensation Benefits*, at <http://www.vba.va.gov/bln/21/Milsvc/Docs/Compdoc.doc> (Dec. 2000); see also Department of Veterans Affairs, *Death Pension Benefits*, at <http://www.vba.va.gov/bln/21/Milsvc/Docs/Dpe neg.doc> (Dec. 2000); see also Social Security Online, *Social Security Disability Benefits*, at <http://www.ssa.gov/pubs/10029.html> (Aug. 21, 2001).

example, if unmarried partners live together, this may be construed by the government as one person living in someone else's household and paying only part of the food and shelter costs and, therefore, social security benefits may be reduced by up to one-third.²⁴ These programs also allow benefits to the surviving spouse or children²⁵ in the event of the primary beneficiary's death or disability.²⁶ Such benefits are not available to the principle beneficiary's unmarried partner.²⁷

2. Housing

LGBTs need affordable housing and are frequently targets of discrimination by landlords, homeowners or realtors who refuse to rent or sell to lesbians and gay men. Equal access constitutes only part of the problem.

Many housing discrimination cases result from lack of legal recognition of LGBT families and relationships.²⁸ Lesbian and gay life partners are often discriminated against by co-op boards, landlords, and homeowner's associations.²⁹ Some banks and lenders refuse to give LGBTs loans because they view LGBTs as inherently unstable and therefore financially unreliable. Further, city and county taxing authorities have rules that protect only

²⁴ Social Security Online, *Spotlight on Living Arrangements*, at <http://www.ssa.gov/pubs/136.htm> (last visited July 3, 2001).

²⁵ Social Security Online, *Benefits for Children*, at <http://www.ssa.gov/pubs/10085.html> (last visited July 3, 2001).

²⁶ Human Rights Campaign, *Retirement Planning for Gay and Lesbian Couples*, in <http://www.hrc.org/familynet/chapter.asp?article=148> (last visited July 3, 2001).

²⁷ *Id.*

²⁸ Lambda Legal Defense and Education Fund, *Housing: In Depth*, in <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=37> (Sept. 28, 1997).

²⁹ *Id.*

heterosexual "spouses" from displacement after the death or departure of a life partner.³⁰

Public and subsidized housing programs give priority to families. Gay and lesbian couples are not considered a family. As such, they go to the bottom of the list, below the heterosexual married couples that are considered "families."

Additionally, one-third to one-half of all people with AIDS are either homeless or in imminent danger of losing their homes.³¹ Gay men or lesbians with HIV/AIDS face numerous barriers to obtaining and maintaining affordable, stable housing. Many people face illegal eviction from their homes when it is discovered that they have HIV/AIDS.³² Others lose their housing when, as a result of illness and lost wages, they are unable to pay their rent or mortgage. More information pertaining to HIV/AIDS can be found under "People with Disabilities."

3. Health

Daily discrimination in access to health care and health insurance is a reality for many LGBT people who are in desperate need of affordable quality medical care. In addition to limitations on family and partner health insurance because same-sex marriages have yet to be legalized, health insurers often have AIDS-specific payment 'caps' and coverage exclusions of life-prolonging treatments.³³

Educational materials, clinic intake forms and hospital visitation policies presume heterosexuality.³⁴ For example, providers

³⁰ *Id.*

³¹ Human Rights Campaign, at www.hrc.org under issues HIV/AIDS (June 25, 2001).

³² *Id.*

³³ Lambda Legal Defense and Education Fund, *AIDS Project*, at <http://www.lambdalegal.org/cgi-bin/pages/issues/record?record=1> (June 25, 2001).

³⁴ Human Rights Campaign, *Advancing a*

often ask women what form of birth control they are using, forcing lesbian patients to come out to their provider.³⁵ In a 1998 survey of nursing students 8-12% said they despised lesbian, gay, and bisexual people.³⁶

Safeguarding the confidentiality of medical data has been targeted as a method critical for minimizing discrimination in the health care system.³⁷

LGBT individuals face a number of health issues. The AIDS epidemic has hit the gay population hard. Societal discrimination and ostracism has led to a higher percentage of alcoholism and other substance abuse disorders.³⁸ Further, the effects of homophobia seem to fall disproportionately on lesbian and gay youth, who are more likely to attempt suicide than heterosexual youth.³⁹

Enduring varying degrees of state-sanctioned discrimination affects the stability of relationships and individuals.⁴⁰ Failing to recognize same-sex marriages

works to reinforce prejudice against LGBT individuals.⁴¹ Same-sex parents often feel as though they must hide their sexuality for fear that their children will be discriminated against or because they are afraid of losing benefits to care for their children.⁴²

Psychological and medical research on the health needs of GBLT is lacking. Specifically, the Human Rights Campaign has noted that medical research on women has failed to document what may be distinct and different health needs of lesbians.⁴³ Certain health behaviors of lesbians may put this group greater risk for certain diseases like cancer and heart disease than heterosexual women.⁴⁴

Special Issues for Transgendered People

Transgendered people endure discrimination in the health care industry, resulting in mistreatment and denial of treatment.⁴⁵ Insurance companies discriminate against transgendered individuals by excluding them from coverage for procedures related to reassignment surgery. Medicare, Medicaid programs⁴⁶ and most private health insurances⁴⁷ don't cover reassignment surgeries.⁴⁸ Some of the exclusionary

Lesbian Health Agenda, at www.hrc.org under Issues: Lesbian Health (June 25, 2001).

³⁵ Public Health- Seattle and King County, *Culturally Competent Care for LGBT People: Recommendations for Health Care Providers*, at <http://www.metrokc.gov/health/LGBT/providers.htm> (Aug. 9, 2000)

³⁶ *Id.*

³⁷ National Gay and Lesbian Task Force, *Issues: Health*, at <http://www.nglft.org/issues/issue.cfm?issueID=16> (June 25, 2001).

³⁸ *LGBT Health Resources*, at <http://www.edmannix.com/LGBThealth.html> (last visited July 5, 2001); see also National Clearinghouse for Alcohol and Drug Information, *Substance Abuse Prevention and Treatment Issues*, at <http://www.health.org/features/lgbt/subtreat.htm> (last visited July 5, 2001).

³⁹ American Psychiatric Association Committee on Gay, Lesbian, and Bisexual Issues, *Resource Document on Same-Sex Marriage*, at <http://www.aglp.org/pages/position.html> (Dec., 1998).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See source cited *supra* note 36.

⁴⁴ *Id.*

⁴⁵ Paisley Currah and Shannon Minter, *Transgender Equality- A Handbook for Activists and Policymakers*, at http://www.nclrights.org/publications/pubs_tghandbook.html (Nov. 14, 2000).

⁴⁶ See *Smith v. Rasmussen*, 57 F.Supp.2d 736 (N.D. Iowa 1999)(holding that that states cannot categorically exclude sex reassignment surgeries from Medicaid coverage); *J.D. v. Lackner*, 80 Cal. App. 3d 90 (Cal. Ct. App. 1978) (holding that CA cannot categorically exclude sex reassignment surgeries from MediCal coverage). However, most state Medicaid statutes contain a blanket exclusion. See source cited *supra* note 49.

⁴⁷ See *Davidson v. Aetna Life & Casualty Ins. Co.*, 420 N.Y.S. 2d 450 (N.Y. Sup. Ct. 1979).

⁴⁸ See source cited *supra* note 3.

policies are so broad that transgendered people are completely excluded from any medical treatment including emergency care.⁴⁹ Doctors who do treat transgendered people often stop serving these individuals because they are stigmatized by their peers.⁵⁰

4. Employment

Private

No federal laws protect LGBT workers from discrimination on the basis of their sexual orientation or gender identity.⁵¹ Statewide protections against private workplace discrimination exist in only thirteen states and the District of Columbia.⁵² In 80% of the states, an employer has the right to fire, refuse to hire, or refuse to promote an employee solely because of their sexual orientation.⁵³

A few municipalities⁵⁴ have their own anti-discrimination ordinances. Some employers⁵⁵ have begun to take steps to make their workplace more hospitable to LGBT workers through adopting non-discrimination policies. A number of state and local laws also affect the manner in which employers provide benefits to their

lesbian and gay employees and their partners.⁵⁶ Equal Benefits Ordinances in cities such as San Francisco, Seattle and Los Angeles and the Vermont Civil Unions Law all require employers to have equal benefit policies.⁵⁷

Public

Only twenty-two states, the District of Columbia, and a few municipalities have laws prohibiting discrimination by public employers.⁵⁸ However, even in states where there are non-discrimination policies covering public employees, such as school teachers, employees are still often frightened to reveal their sexual orientation.⁵⁹

Federal guidelines prohibit employment discrimination based on the supposed characteristics of an entire class of individuals.⁶⁰ Although federal agencies require that each candidate be examined on an individual basis, there is evidence of explicit discrimination against LGBT individuals in the military, CIA, and FBI.⁶¹ Discrimination is also prevalent in occupational licensing such as the area of the operation of day care centers, due to the myth that LGBTs prey on children.⁶²

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Human Rights Campaign, *Discrimination in the Workplace*, at <http://www.hrc.org> under WorkNet (June 27, 2001).

⁵² Human Rights Campaign, *States Prohibiting Anti-Gay Discrimination in the Workplace*, at <http://www.hrc.org> under WorkNet (April 13, 2001).

⁵³ See source cited *supra* note 23.

⁵⁴ Human Rights Campaign, *States, Cities and Counties that Ban Anti-Gay Job Discrimination*, at <http://www.hrc.org> under WorkNet (June 27, 2001). This website includes a full list of cities, states and counties with anti-discrimination laws.

⁵⁵ Human Rights Campaign, *Which Employers Have LGBT-Friendly Policies*, at <http://www.hrc.org> under WorkNet (June 27, 2001). This website includes a searchable database to find employers who have anti-discrimination policies.

⁵⁶ See source cited *supra* note 56.

⁵⁷ *Id.*

⁵⁸ Human Rights Campaign, *Employers with Non-Discrimination Policies that Include Sexual Orientation: State & Local Governments*, at <http://www.hrc.org> under WorkNet and then Non-Discrimination Policies (June 27, 2001).

⁵⁹ See *Murray v. Oceanside USD*, 79 Cal. App. 4th 1338 (Cal. 2000) (Anti-gay harassment on the job case where the CA Supreme Court unanimously rejected the school district's attempt to have the case dismissed).

⁶⁰ Dr. Tom O'Conner, *Understanding Discrimination Against Gays and Lesbians*, North Carolina Wesleyan College, at <http://faculty.ncwc.edu/toconnor/soc/355lect07.htm> (Feb. 14, 2001).

⁶¹ *Id.*

⁶² *Id.*

LGBTs are refused employment because employers fear that LGBTs will bring contempt to public service, manifest behavior that affects job fitness, or imply possible embarrassment to the governments.⁶³ LGBTs are cited as security risks and federal agencies subject LGBTs to excessive background checks.⁶⁴ The military, one of the country's largest employers, has a "Don't Ask, Don't Tell" policy which prohibits any off-duty sexual and affectionate conduct by LGBTs and prohibits gay personnel from making statement indicating sexual orientation.⁶⁵ This policy has been upheld.⁶⁶ All branches of the military contend that homosexuality is incompatible with service in the military and it is estimated that 100 soldiers are discharged every year because of their sexual orientation.⁶⁷

Special Issues for Transgendered Individuals

For those who are transgendered, the lack of protection under federal and most state employment discrimination laws, creates an obstacle for obtaining employment.⁶⁸ Difficulty in finding employment also impacts obtaining housing and other benefits because it is often a prerequisite.⁶⁹

Under federal law, neither the American Disability Act or the Rehabilitation Act protect those who are transgendered and are discriminated against because of their transsexualism.⁷⁰ Florida and Oregon

administrative agencies and a Washington court found that transgendered people *may* be protected under a state disability law.⁷¹

Until recently, courts found uniformly that Title VII, which prohibits sex discrimination, did not protect transsexual people. However, the Ninth Circuit concluded that transsexual persons are protected from discrimination under Title VII and other sex discrimination statutes.⁷²

5. Civil Rights

Freedom of Association

Attempts to stifle free speech occur when, for example, schools ban gay supportive clubs.⁷³ U.S. Supreme Court support for excluding LGBT people from the Boy Scouts of America (BSA)⁷⁴ exemplifies the continuation of anti-gay discrimination.⁷⁵ Fortunately, many communities have convinced local BSA councils to create guidelines that preclude sexual orientation from being a factor in selecting members by cutting financial support for councils that discriminate, creating parent-supported groups advocating the teaching of non-discrimination, and through growing demands to reverse BSA policy.⁷⁶

Rehabilitation Act of 1973 explicitly exclude "transsexualism" and "gender identity disorders not resulting from physical impairments." *Id.*

⁷¹ *Id.*; *See also* Doe v. Boeing Co., 846 P.2d 531 (WA 1993).

⁷² *See* source cited *supra* note 3; *See also* Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000).

⁷³ *See* University of Wisconsin v. Southworth 529 U.S. 217 (2000).

⁷⁴ *See* Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

⁷⁵ Lambda Legal Defense and Education Fund, *Supreme Court Ruling Yields Unexpected Lesson for Boy Scouts of America*, at

<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=849> (June 21, 2001).

⁷⁶ *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Lambda Legal Defense and Education Fund, *Second Circuit Court of Appeals Upholds 'Don't Ask, Don't Tell'*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=290> (Sept. 23, 1998).

⁶⁶ *Id.*; *See also* Able v. U.S.A., 155 F.3d 628 (2nd Cir., 1998).

⁶⁷ *See* source cited *supra* note 64.

⁶⁸ *See* source cited *supra* note 49.

⁶⁹ *Id.*

⁷⁰ *See* source cited *supra* note 3. The ADA and

Disclosures regarding sexual orientation also raise First Amendment issues. These disclosures have been interpreted by some as a person's expressed political view rather than a statement similar to that of a person's race. This has arisen in cases where teachers have been unfairly punished for revealing their sexual orientation.⁷⁷

Hate Crimes

Hate crimes are unlawful acts motivated by bias and those based on sexual orientation make up the third highest category after race and religion.⁷⁸ In 1999, there were 1,300 reported⁷⁹ hate crimes based on sexual orientation.⁸⁰

Special Issues for Transgendered Individuals

Although anti-transgender violence accounted for only 2-4% of the reported incidents of hate violence between 1995 and 1999, those incidents accounted for 20% of all reported anti-LGBT murders and 40% of the total incidents of police-initiated violence.⁸¹ It is not rare for violent crimes against transgendered individuals to go uninvestigated or fail to be prosecuted.⁸²

6. Child Custody and Visitation Rights

Traditionally, American courts and child welfare agencies have accepted historic prejudices against lesbians and gay men

based on insupportable theories that a child that grows up in a household with lesbian or gay parents will be homosexual and abnormal.⁸³ Studies have clearly shown these theories to not be the case.⁸⁴

When a legally married couple adopts or gives birth to a child, they are both considered legal parents of the child -- they have the right to be with a child and make decisions about the child's education, health, and well-being.⁸⁵ Lesbian and gay couples are not afforded the rights that married couples are since no state currently recognizes same-sex marriage.

Repercussions occur when the non-legal parent is denied the ability to make legal decisions for his/her child, this includes situations where the legal parent dies or a non-legal parent ends his or her relationship with the legal parent of the child. In any one of these circumstances, a non-legal parent is often left without custody or visitation rights of the child of a former-partner even if the non-legal parent was a equally contributing caretaker.⁸⁶

While homosexuality has remained an impediment in many states to child custody, some courts have begun to establish custody and visitation rights for lesbian and gay parents.⁸⁷

Special Issues for Transgendered Individuals

Transgendered people who had children before transitioning are potentially at risk as a parent. The other parent may be able to argue that the marriage was never valid and

⁷⁷ See Murray v. Oceanside Unified School District, 79 Cal. App. 4th 1338 (Cal. 2000).

⁷⁸ Human Rights Campaign, *Quick Facts: Hate Crimes*, at <http://www.hrc.org> under Hate Crimes.

⁷⁹ *Id.* Hate crimes are often unreported and estimates usually are lower than the actual number of occurrences. *Id.*

⁸⁰ *Id.* Statistics from the FBI collected in 1999, the last year for which the FBI has statistics. *Id.*

⁸¹ See source cited *supra* note 49. Statistics are from the National Coalition of Anti-Violence Programs Annual Report on Anti-Lesbian, Gay, Bisexual, and Transgender Violence (1999). *Id.*

⁸² *Id.*

⁸³ See source cited *supra* note 43.

⁸⁴ *Id.*

⁸⁵ National Coalition on Lesbian Rights, *Fact Sheet: legal Recognition of LGBT Families*, at http://www.nclrights.org/publications/pubs_lgbtfamilies.html (April 3, 2001).

⁸⁶ *Id.* See also Nancy S. v. Michele G., 228 Cal. App. 3d 831(1991); Curiale v. Reagan, 222 Cal. App. 3d 1597 (1990).

⁸⁷ See source cited *supra* note 93.

this would put the transgendered individual's parental rights in jeopardy.⁸⁸ Parental rights have been taken away in at least one case.⁸⁹ In terms of custody and visitation, transgendered parents face tremendous discrimination. Many courts have given custody to transgendered parents only when the parent has agreed to hide his or her transgendered status.⁹⁰

Those who are gay, lesbian, or bisexual, they face similar struggles as other gay, lesbian, or bisexual individuals who are parents and want to have parental rights.

7. Elders

LGBTs also need protection against discrimination and receive treatment that respects their individuality, dignity, and privacy. Discrimination against older LGBTs is rampant in terms of housing, public accommodation, and medical treatment.⁹¹ Nursing homes and nursing home aides have discriminated against older LGBTs, often forcing those in nursing homes to hide their sexual orientation.⁹² Many older LGBTs, as a result, are forced to remain silent as to their sexual orientation.⁹³

Legal planning is an important issue for LGBTs. Executing legal documents to ensure that desires about medical decisions at the end of life and property distribution after death is vital due to the fact that marriage is not legal and LGBT partners are often denied the rights that other married couples would have in terms of inheritance and decision making.

⁸⁸ See source cited *supra* note 3.

⁸⁹ *Id.*; See *Daly v. Daly*, 715 P.2d (Nevada 1986).

⁹⁰ See source cited *supra* note 3; See *In re V.H.*, 412 N.W. 2d 389 (Minn. Ct. App. 1987).

⁹¹ Doni Gewirtzman, *Better Respect for Lesbian and Gay Elders*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=377> (Feb. 18, 1999)

⁹² *Id.*

⁹³ *Id.*

For additional information on general issues impacting 'Elders,' see the 'Elders' section.

8. Youth

Youth that are LGBT face physical violence and verbal harassment as a result of their sexual orientation at an extremely high rate. Fear of harassment has kept LGBT youth from not only revealing their sexual orientation, but it also has the result of keeping LGBT children from attending school.

A study of Massachusetts high school students revealed that almost one-third of gay teens had been threatened with a weapon at school, as contrasted to 7% of heterosexual students surveyed.⁹⁴ 90% of LGBT youth reported that they have heard homophobic comments at their schools and in over one-third of those instances no outside party intervened.⁹⁵

53% gay and lesbian students have heard homophobic comments made by school staff.⁹⁶ 25% of gay and lesbian teens have admitted missing school out of fear for their safety, compared to 5% of heterosexual teens.⁹⁷

In addition to school, LGBTs are more vulnerable to child abuse and neglect in the form of verbal abuse and physical and sexual assault.⁹⁸ 33% of gay men and 34%

⁹⁴ American Civil Liberties Union Freedom Network, *Doing the Math: What the Numbers Say About Harassment of LGBT Students*, at <http://www.aclu.org/issues/gay/Statistics.html> (June 27, 2001). Survey originally published in the journal *Pediatrics* 1998. *Id.*

⁹⁵ *Id.* Survey conducted by GLSEN in 1999. 496 LGBT students were surveyed from 32 states. *Id.*

⁹⁶ *Id.* Survey conducted by state of MA and entitled, "Making Schools Safe." *Id.*

⁹⁷ *Id.* Survey conducted by *Pediatrics*, 1998. *Id.*

⁹⁸ National Education Association, *Child Abuse and Neglect*, at <http://www.nea.org/issues/safescho/chldabus.html> (1998).

of lesbians reported having physical violence afflicted on them at the hands of a family member.⁹⁹ Further, as reported in a Massachusetts sample of gay and lesbian teens, more than one-third of gay and lesbian teens have admitted attempting suicide, three times the number of heterosexual teens.¹⁰⁰ Gay and lesbian youth account for 20 to 40% of homeless youth.¹⁰¹

9. Immigration

Lesbians, gay men, and people with HIV have been recognized as a distinct social group eligible since 1993 for political asylum, giving individuals entrance into the U.S. to live, if it can be demonstrated that they have a reasonable fear of persecution in their home country based on their sexual orientation.¹⁰² However, lesbians, gay men, and people with HIV are frequently held to a standard of proof that is much higher than other groups.¹⁰³ Even where persecution based on sexual orientation has already occurred, asylum has been denied.¹⁰⁴

Special Issues for Transgendered People

Transgendered people have not been recognized as a “particular social group” that is eligible for asylum, unlike gay men and lesbian women.¹⁰⁵ However, some transgendered people have been granted

asylum based on persecution due to their sexual orientation and/or gender.¹⁰⁶

In a recent promising decision in the 9th Circuit, the court rejected the Board of Immigration Appeals decision that a transgender gay man from Mexico’s persecution was based on his appearance rather than his sexual orientation and that the man should alter his appearance to become more masculine.¹⁰⁷ The 9th Circuit described the Board of Immigration Appeal’s rationale as “offensive.”¹⁰⁸

Lesbians, Gay Men, Bisexuals, and Transgendered People

Part II - Laws

On June 26, 2003, the U.S. Supreme Court handed down its decision in *Lawrence v. Texas*, finding sodomy laws to be discriminatory and unconstitutional. In an historic decision, the high court overturned Texas' sodomy law as a violation of privacy rights under the due process clause of the 14th Amendment. The decision also renders unconstitutional the sodomy laws in twelve other states - Alabama, Florida, Idaho, Kansas, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Utah and Virginia. In the past, sodomy laws have been used to justify the denial of custody and visitation rights, equal opportunities in employment and other aspects of ordinary life. In its decision, the Supreme Court declared such laws "seek to control a personal relationship that ... is

⁹⁹ *Id.* Survey conducted in PA by Philadelphia Lesbian and Gay Task Force in 1996. *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* As reported in the book by Donna Futterman and Caitlin Ryan, *Lesbian and Gay Youth: Care and Counseling*, Columbia University Press: NY, 1998. *Id.*

¹⁰² Lambda Legal Defense and Education Fund, *Immigration and Political Asylum: In Depth*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=615> (Sept. 28, 1997).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See source cited *supra* note 3.

¹⁰⁶ *Id.*; See also *Miranda v. INS*, 51 F.3d 767 (8th Cir. 1995) (deportation was not suspended).

¹⁰⁷ See source cited *supra* note 3; See also *Hernandez-Montiel v. INS* (2000) U.S. App. LEXIS 21403.

¹⁰⁸ See source cited *supra* note 3.

within the liberty of persons to choose without being punished as criminals."

In a decision written by Justice Anthony Kennedy, and joined by Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer, the Court overruled *Bowers v. Hardwick*, a 1986 Supreme Court case which upheld a Georgia sodomy law as constitutional. "Bowers was not correct when it was decided, and it is not correct today ... Bowers v. Hardwick should be and now is overruled," the Court said. The ruling removes the criminal brand that the laws have long placed on gay, lesbian, bisexual and transgender Americans.

Marriage

On June 10, 2003, the Ontario Court of Appeals upheld an ruling that established the right to marry for gay and lesbian couples and ordered same-sex marriage legalized in the Canadian province immediately.

The Massachusetts Supreme Court is poised to decide a lawsuit that could extend marriage rights to same-sex couples. *Goodridge v. Department of Public Health*, on behalf of seven same-sex couples who were denied marriage certificates solely based on their sexual orientation. Plaintiffs argued that the right to choose a marriage partner is a fundamental right protected by the Massachusetts Constitution. The emotional bonds for same- and opposite-sex couples are identical, they argued, and the legal benefits that come from marriage should be, as well. In addition, the rationale the government used for justifying the denial of marriage to same-sex couples is unfounded and cannot be used as a bar to a such a fundamental right.

Cases are also pending in New Jersey and Arizona.

Partner Benefits and Civil Unions

Since marriage between two people of the same sex has yet to be legalized, poverty may result from the inability of partners to

receive benefits that are immediately available to opposite-sex married couples. Options that provide some benefits include:

- **Civil Unions in Vermont: [VT Act 91 (H.847) (2000)].** Civil unions provide similar benefits as those given to married couples.¹⁰⁹ However, federal laws and the laws of other states may not recognize civil unions. Therefore, civil union partners may not receive the benefits provided to married couples under federal law or the laws of other states.¹¹⁰
- **California Domestic Partners Rights and Responsibilities Act of 2003** Expands California's domestic partnership law to grant registered domestic partners nearly all the rights, benefits and obligations available to spouses under state law.
- **Reciprocal Beneficiaries Law [Act 383 (1997)].** This is available in Hawaii to individuals, including non-Hawaii residents and non-U.S. residents, who cannot legally marry.¹¹¹ It requires public employers to provide health insurance coverage for partners and children of partners.¹¹² Further, reciprocal beneficiaries are able to make medical decisions for incapacitated partners and gain

¹⁰⁹ See Office of Secretary of State, Vermont, *The Vermont Guide to Civil Unions*, at <http://www.sec.state.vt.us/pubs/civilunions.htm> (June 27, 2001).

¹¹⁰ See Department of Banking, Insurance, Securities & Health Care Administration, *Civil Union Information Page*, at <http://www.bishca.state.vt.us/civilunion/defaultv.htm> (June 27, 2001).

¹¹¹ See Hawaii Department of Health, *Vital Records About Reciprocal Beneficiary Relationships*, at <http://www.state.hi.us/doh/records/rbrfaq.htm> (June 27, 2001).

¹¹² See Partners Task Force for Gay and Lesbian Couples, *Reciprocal Beneficiaries: The Hawaiian Approach*, at <http://www.eskimo.com/~demian/d-p-hawa.html> (2000). Medical insurance provided by private employers is not included in the "benefits." *Id.*

hospital visitation rights. They also have the same inheritance rights and joint property rights. Unfortunately, only 60 spousal rights¹¹³ are made available to reciprocal beneficiaries on the Hawaii state level and the law grants no rights on the federal level.¹¹⁴

- **Domestic Partnership offered by public and private employers:** Each domestic partnership arrangement varies and the benefits differ because they are employer determined.¹¹⁵ Some do not even recognize non-gay couples. Benefits are available to more than 2,000 private employers and nearly 100 public employers.¹¹⁶ Further, benefits are only given by employers who recognize domestic partnerships.¹¹⁷

- **Domestic Partnership resulting from registries in municipalities:** Over 60 cities¹¹⁸, several counties, and 7 states have domestic partner registries.¹¹⁹ Again, the benefits range

¹¹³ *Id.* 160 rights are available to individuals in Hawaii who are married and there are over 1,000 federal rights for married couples. *Id.*

¹¹⁴ *Id.*

¹¹⁵ Lambda Legal Defense and Education Fund, *Marriage and Domestic Partnerships*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=436> (June 17, 1999). Some domestic partnerships include medical and life insurance coverage, family leave and retirement. *Id.*

¹¹⁶ *Id.*; See also Lambda Legal Defense and Education Fund, *Marriage and Domestic Partnership*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=21> (June 17, 1999). This website includes list of employers providing domestic partnerships. *Id.*

¹¹⁷ *Id.*

¹¹⁸ See source cited *supra* note 9. Cities, including San Francisco, L.A., and Berkeley, have domestic partner benefit laws which requires companies with city contracts or leases to provide the same benefits to unmarried employees and their partners as they do to married couples. *Id.*

¹¹⁹ Lambda Legal Defense and Education Fund, *Domestic Partner Benefit Listing*, at www.lambdalegal.org/cgi-bin/pages/documents/record?record=21 (May 21, 2001).

from city to city and state to state. Some laws, like in New York City, treat spouses and domestic partners and equals.¹²⁰ Domestic registries are only recognized by the city in which the registry is with and benefits are not given in other cities or states.¹²¹

Options in Terms of Finances

- **Contracts:** Some lesbian and gay couples have entered into contracts to delineate their financial obligations toward one another.¹²² Courts have been traditionally reluctant to recognize they contracts and contracts of these kind are usually not legislated.¹²³ In states where sodomy is illegal, judges may not enforce contracts between gays and lesbians because they may find that the activity underlying the relationship to be illegal.¹²⁴ However, in California¹²⁵, and some other states, these agreements have been recognized as legally enforceable.¹²⁶ Contracts, in a few circumstances, have been implied by courts if the parties' conduct suggest such a contract.¹²⁷ Written agreements are safer, however.¹²⁸

¹²⁰ Lambda Legal Defense and Education Fund, *Marriage and Domestic Partnership*, at <http://www.lambdalegal.org> (June 17, 1999).

¹²¹ *Id.*

¹²² NOLO Law for All, *Living Together Contracts*, at http://www.nolo.com/encyclopedia/articles/mlt/lt_contracts.html?r=00150064503202000 (last visited July 5, 2001).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See *Marvin v. Marvin*, 134 Cal. Rptr. 815 (1976) Four principles were established in *Marvin*: a) Unmarried couples can make written contracts, b) they can make oral contracts, c) a contract can be implied by the actions of the couple, and d) if an implied contract can't be found, then a judge can presume that the parties intended to deal fairly with each other. See source cited *supra* note 135. *Marvin* is the law in CA and some other states have upheld its principles. *Id.*

¹²⁶ See source cited *supra* note 135.

¹²⁷ *Id.*

¹²⁸ *Id.*

• **Durable Power of Attorney (DPA) [For CA: Cal. Civ. Code §2430 et seq.]:** A DPA allows one to confer upon another the power to make decisions and take certain actions on the behalf of the person executing the power of attorney, in the case of illness or incapacity.¹²⁹ This is a good way to ensure that financial or other important decision will be made by one's partner, should the need arise. A DPA for Health Care is also an option and allows one partner to select his/her partner to make health care decisions for the incompetent partner.

• **Wills:** Creating a will is a good option for same-sex partners given that marriage is not legally available and if no will is written, property goes by inheritance in most states.¹³⁰ Wills must be probated and courts could find the will invalidly executed.¹³¹ Wills should be prepared carefully.¹³², because courts question wills that do not give property to legal relatives and hostile relatives may attempt to contest the will.¹³³

• **Joint Property Ownership Agreements:** To avoid probate, property can be put in joint ownership so that if one partner dies, the other will automatically have legal title to the property.¹³⁴ Any asset that requires a title document can be put into joint tenancy

including: houses, cars, bank accounts, and stocks.¹³⁵

General Laws Important to Transgendered People

Birth Certificate Changes: Eighteen states have statutes that allow transgendered people to change the sex designation on their birth certificates after under-going sex-reassignment surgery.¹³⁶ The ability to change the sex on a birth certificate depends on the law in the state where the person was born.¹³⁷ California law provides for California-born transsexual residents to obtain a new birth certificate.¹³⁸ California Department of Motor Vehicles regulations allow for California transgender residents to change their sex on their driver's license even before they undergo surgery.¹³⁹ A new State Assembly Bill (formally AB 1851) may provide a means for those born in California but living elsewhere, and those new to the state to be able to also take advantage of that right.¹⁴⁰

1. Income

TANF [42 U.S.C. §§ 602, 606]. Temporary Assistance for Needy Families is available through grants given to states to implement programs for poor families with children to move from welfare to work.¹⁴¹ Each state has

¹²⁹ NOLO Law for All, *Durable Powers of Attorney*, at <http://www.nolo.com/encyclopedia/articles/ep/ep95b-98.html> (last visited July 5, 2001).

¹³⁰ Peter Berkery, *Estate Planning Strategies for Gays and Lesbians*, at <http://www.planetout.com/pno/money/article.html?sernum=9> (last visited July 8, 2001).

¹³¹ Gay Lib, *Gays and Lesbians: Making a Will*, at <http://www.gaylib.com/text/clas18.htm> (1989).

¹³² *Id.*

¹³³ See source cited note 143.

¹³⁴ Peter Berkery, *Estate Planning: Avoiding Probate through Tenants-In-Common and Beneficiary Designation*, at <http://www.planetout.com/pno/money/article.html?sernum=9> (last visited July 8, 2001).

¹³⁵ *Id.*

¹³⁶ See source cited *supra* note 3. States include AZ, CA, CO, GE, HI, IL, IA, LA, MA, MD, MI, NC, NE, NJ, NM, OR, UT, and WI. *Id.*

¹³⁷ Law Offices of Kristine W. Holt, *Transgender Law*, at www.holtesq.com/TG%20FAQS.htm (April 2, 2001).

¹³⁸ National Transgender Advocacy Coalition, *CA to Revisit Transsexual Birth Certificate Bill*, at <http://www.ntac.org/pr/010120ca.html> (Jan. 20, 2001). **Find law #**

¹³⁹ *Id.* **Find reg. #**

¹⁴⁰ *Id.*

¹⁴¹ See Welfare Information Network, *State/Tribal TANF Plans and Welfare Reform Initiatives*, at <http://www.welfareinfo.org/tanf.htm> (May 30,

different programs, such as CalWorks in California.¹⁴²

Food Stamps [7 U.S.C. § 2012(i), 2014] The Food Stamp program provides that any “household,” broadly defined as people who live and prepare food together, that satisfies the financial criteria may qualify to receive food stamps.¹⁴³

2. Housing

Federal fair housing law does not explicitly protect gay men, lesbians, bisexuals, transsexuals, or transgendered individuals. It does prohibit discrimination on the basis of gender, which may give raise to federal claims on behalf of these individuals in some circumstances.

Fair Housing Amendments Act of 1968 [42 U.S.C. §3601; 24 C.F. R. Pt. 100]

Prohibits discrimination in housing only on the basis of race, color, religion, sex, national origin, age, disability, or familial status.¹⁴⁴ This statute doesn’t include sexual orientation, but if a LGBT person fits into another one of the listed categories, it can be litigated on the federal level. Otherwise, state statutes that include sexual orientation discrimination would apply.

States protecting LGBT individuals from housing discrimination include: California, Connecticut, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont and Wisconsin.¹⁴⁵

2001).

¹⁴² *Id.*

¹⁴³ See Food and Nutrition Service, *Food Stamp Program*, at <http://www.fns.usda.gov/fsp/> (June 27, 2001).

¹⁴⁴ National Housing Law Project, *An Outline of Principles, Authorities and Resources Regarding Discrimination and Segregation*, at <http://www.nhlp.org/html/fair/outline.htm#III> (last visited July 8, 2001).

¹⁴⁵ See source cited *supra* note 632.

FEHA [CA Gov. Code Section 12955 et seq.] It is unlawful for the owner of any housing accommodation to discriminate against or harass a person based on their sexual orientation.¹⁴⁶ Sexual orientation is defined as “heterosexuality, homosexuality, and bisexuality.”¹⁴⁷ Section 12926.1 has been recently amended, as of Jan. 1, 2001, to include a preamble that declares that California’s disability discrimination statute provides protection to those who have HIV/AIDS.¹⁴⁸

Under some circumstances, the prohibition against discrimination on the basis of sexual orientation may “sunset” on January 1, 2005 unless re-enacted. Cal FEHA also prohibits discrimination on the basis of marital status, which can be used to protect unmarried couples including gay, lesbian or bisexual couples, and unmarried persons in some circumstances, even in the absence of the specific provision.

The legislative history indicates that the 1999 amendments adding “sexual orientation” as a protected class were intended to codify the court decisions in *Gay Law Students v. Pacific Telephone and Telegraph* (1979) 24 Cal.3d 458 and *Soroka v. Dayton Hudson Corp.* (1991) 235 Cal.App.3d 654, prohibiting discrimination based on sexual orientation. However, the statute provides more explicit and broader protection than those cases, which were in the employment law context.

Unruh Act [CA Civil Code Section 51]

The Unruh Act of California prohibits arbitrary discrimination in “all business establishments of every kind whatsoever.” This includes businesses and persons engaged in the sale or rental of housing accommodations. The Unruh Act has been judicially construed to apply to prohibit discrimination against persons based upon

¹⁴⁶ Cal. Gov. Code § 12955(a).

¹⁴⁷ Cal. Gov. Code § 12926(q).

¹⁴⁸ Cal. Gov. Code § 12926.1.

their sexual orientation or age, or against families with children.¹⁴⁹

Transgendered people are not explicitly protected under FEHA. They are arguably protected under the Unruh Act, Cal. Civil Code Section 51, which bars arbitrary discrimination. Under some circumstances it can be argued that they fall within the definition of Section 12926, although there is some bad legislative history.

Many jurisdictions have local fair housing ordinances that may provide additional protections and remedies.

Equal Credit Opportunity Act of 1975 [15 U.S.C. §1691]

This law prohibits discrimination in credit on the basis of an applicant's sex or marital status, among other things.¹⁵⁰ Although this law does not cover discrimination against LGBTs, it may be helpful if discrimination is also based on another of the covered categories. Since same-sex marriage is not legal, marital status discrimination may be particularly helpful.

Housing Opportunities for People with AIDS (HOPWA): Money is appropriated by the federal government to states to provide housing assistance and support services for low-income people with HIV/AIDS.¹⁵¹ \$25 million in funds was made available in 2001 for the program.¹⁵²

¹⁴⁹ USC, *Unlawful Discrimination Your Rights and Remedies*, at www.usc.edu/dept/gero/hmap/library/rights.html (last visited July 2, 2001); see also CA Department of Fair Employment and Housing, www.dfeh.ca.gov (last visited July 2, 2001)

¹⁵⁰ Legal Information Institute (Cornell U.), *Sec. 1691*, at <http://www4.law.cornell.edu/uscode/15/1691.html> (last visited July 8, 2001).

¹⁵¹ National Low Income Housing Coalition (NLIHC), *2000 Advocate's Guide to Housing and Community Development Policy: AIDS Housing*, at

3. Health

[See also Section 5: Health]

Confidentiality of Medical Records

Medical record confidentiality is a tool to minimize discrimination in the health care system.¹⁵³ Safeguarding the confidentiality of medical data has been targeted as a method critical for minimizing discrimination in the health care system.¹⁵⁴

Many states, including California¹⁵⁵, have legislation covering confidentiality. No federal legislation protects confidentiality of medical records.¹⁵⁶ In April 2001, the Department of Health and Human Services issued guidelines for states.¹⁵⁷ Guidelines include mandatory patient consent before the release of medical records.¹⁵⁸

<http://www.nlihc.org/advocates/10.htm> (2000).

¹⁵² U.S. Dept. of Housing and Urban Development (HUD), *HOPWA*, at <http://www.hud.gov/cpd/hopwahom.html> (last visited July 10, 2001).

¹⁵³ National Gay and Lesbian Task Force, *Issues: Health*, at <http://www.ngltf.org/issues/issue.cfm?issueID=16> (June 25, 2001).

¹⁵⁴ National Gay and Lesbian Task Force, *Issues: Health*, at <http://www.ngltf.org/issues/issue.cfm?issueID=16> (June 25, 2001).

¹⁵⁵ The Foundation for Taxpayer and Consumer Rights, *The California Patient's Guide*, at http://www.calpatientguide.org/jii.html#3_8 (last visited July 10, 2001). The confidentiality law in CA is located under: Cal. Health and Safety Code §123100 et. seq. *Id.*

¹⁵⁶ Seth Kilbourn, *Why We Need Federal Law to Protect the Privacy of Medical Records*, at www.hrc.org/publications/hrcq/hrcq98wi/pg17.asp (Winter, 1998).

¹⁵⁷ U.S. Dept. of Health and Human Services, *Protecting the Privacy of Patients' Health Information*, at <http://aspe.os.dhhs.gov/admnsimp/final/pvcfact2.htm> (May 9, 2001).

¹⁵⁸ *Id.*

Partner Benefits:

Partner benefits are provided by some state and city employers, private employers, and insurance companies¹⁵⁹.¹⁶⁰ However, some employers provide solely for non-health benefits.¹⁶¹ Employees of many counties in California can receive partner health benefits.¹⁶²

Medicaid [Authorized under Title XIX of the Social Security Act]: This is a health care program for the poor and disabled.¹⁶³ Medicaid is administered by each state, funded in part by the U.S. Health Care Financing Administration.¹⁶⁴ Each states' program is different.¹⁶⁵

Medi-Cal [California's Medicaid Program]:

Medi-Cal does not consider a person in a domestic partnership as married. Therefore, each person is considered a single individual and the higher resource limits allowable under spousal impoverishment protection provisions and the spousal income allocations under those provisions do not apply.¹⁶⁶

¹⁵⁹ See Human Rights Commission: City and County of San Francisco, *Insurance Carriers Offering Domestic Partner Coverage: A State by State Reference Guide*, at <http://www.ci.sf.ca.us/sfhumanrights/insulist.htm> (Nov. 18, 1998).

¹⁶⁰ Lambda Legal Defense and Education Fund, *Domestic Partner Benefits Listing*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=21> (last updated May 21, 2001).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Murphy's Unofficial Medicaid Page, at <http://www.geocities.com/CapitolHill/5974/> (last visited July 10, 2001).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* This website provides links to each of the states' Medicaid programs.

¹⁶⁶ E-mail from Kathleen Epperson, Long Term Care Insurance, Agent to ba-sappho@queernet.org (July 1, 2001).

Transgendered People:

Transgendered people are usually precluded from obtaining sex-reassignment surgeries through Medicaid programs.¹⁶⁷ There are favorable decisions in California, Iowa, and Minnesota where courts have held that states can't categorically exclude sex reassignment surgeries.¹⁶⁸ Medicare does not pay for sex reassignment surgeries.¹⁶⁹ Many private insurance companies include contract provisions stating that they will not pay for sex-reassignment surgeries, but without an explicit contractual provision, it is possible to win a claim requiring the company to pay for surgeries.¹⁷⁰ For employees of the city and county of San Francisco, transgender medical care is a covered benefit including sex reassignment surgeries and psychotherapy.¹⁷¹

4. Employment

Civil Rights Act of 1964 [42 U.S.C. § 2000e et seq.]:

This Act prohibits discrimination on the basis of race, color, religion, sex, and national origin.¹⁷² So far, courts have ruled that "sex" does not apply to sexual orientation.¹⁷³ If the discrimination falls into

¹⁶⁷ See source cited *supra* note 3. Blanket exclusions found in Medicaid statutes in Illinois (Ill. Admin Code tit. 89 @ 140.6(1)), Pennsylvania (55 Pa. Code @ 1163.59(a)(1)), and Alaska (Alaska Admin. Code tit. 7, @ 43.385(a)(1)). *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* 54 Fed. Reg. 34555, 34572 (Aug. 21, 1989).

¹⁷⁰ *Id.*; See e.g. Davidson v. Aetna Life and Casualty Ins. Co., 420 N.Y.S. 2d 450 (N.Y. Sup. Ct. 1979).

¹⁷¹ Jamison Green, *An End to Exclusions*, at <http://www.planetout.com/pno/people/columns/green/archive/20010216.html> (last visited July 10, 2001).

¹⁷² Lambda Legal Defense and Education Fund, *Same Sex Sexual Harassment*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=149> (Sept. 1, 1997).

¹⁷³ NOLO: Law for All, *Appellate Courts Rule*

one of the above-listed categories and the employer employs 15 or more employees, this statute could be of use.¹⁷⁴ Further, same-sex sexual harassment -- perpetrated by a male on a male or by a female on a female -- has been recognized by some district courts as being covered by the Civil Rights Act of 1964.¹⁷⁵

Americans with Disabilities Act of 1990 [42 U.S.C. 12101]:

This Act prohibits discrimination on the basis of disability in many areas and is applicable to employers if they employ 15 or more employees.¹⁷⁶ HIV is considered a disability.¹⁷⁷

Public Civil Service Reform Act of 1978 [5 U.S.C. § 2302(b)(10)]:

This Act states that supervisors may not discriminate “on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others.”¹⁷⁸ Executive Order

that Title VII Does Not Protect Gays and Lesbians, at

http://www.nolo.com/update/update_84.html (April 2, 2001).

¹⁷⁴ U.S. Dept. of Labor, *Title VII, Civil Rights Act of 1964, as Amended, at*

<http://www.dol.gov/dol/oasam/public/regstatutes/2000e-16.htm> (last visited July 10, 2001).

¹⁷⁵ *Id.*

¹⁷⁶ U.S. Equal Employment Opportunity Commission, *The Americans With Disabilities Act of 1990, at*

<http://www.eeoc.gov/laws/ada.html> (last visited July 10, 2001).

¹⁷⁷ Disability Information Resources, *Questions and Answers: ADA and Persons with HIV/AIDS, at* <http://www.dinf.org/pubs/hivqanda.txt> (last visited July 10, 2001); *see also* Disability Information Resources, *Enforcement Highlights: Fighting Discrimination Against Persons with HIV/AIDS, at*

<http://www.dinf.org/pubs/hivreprt.txt> (last visited July 10, 2001).

¹⁷⁸ U.S. Equal Opportunity Employment Commission, *Federal Laws Prohibiting Job Discrimination, at*

<http://www.eeoc.gov/facts/qanda.html> (last updated March 12, 2001).

13087, created a uniform Executive Branch policy that prohibits discrimination based on sexual orientation.¹⁷⁹ Therefore, an employee cannot be fired simply for being gay.¹⁸⁰ The employer has to prove that the fact that the employee is homosexual somehow affects their ability to do the job.

State and Local Anti-Discrimination Laws

Statewide protections against discrimination on the basis of sexual harassment by private employers exist in:¹⁸¹

- California: Govt. Code §12926 (See similar protections for housing)
- Connecticut: Public Act 91-58 (5/29/91)
- District of Columbia: Human Rights Act, 1977, D.C.L. 2-38, D.C. Code §1-2541(c) 12/13/77
- Hawaii: Rev. Stats., §§ 368-1 & 378-2 (3/21/91)
- Massachusetts: Mass. General Laws 151B § 4
- Maryland: Senate Bill 205, Anti-discrimination Act of 2001 (5/15/2001)
- Minnesota: Ch. 22, H.F. No. 585 (4/2/93) amending Minnesota Statutes of 1992, Ch. 363
- New Hampshire: RSA 21 (as amended by H.B. 421, 3/19/1997)
- New Jersey: Ch. 519, L.N.J. 1991; Hum Rts. Law [C.10:5-3] (1/92)
- Nevada: NRS 610.010 et seq. (Eff. 10/1/99). 1999 Nev. Assem. Bill No. 311
- Rhode Island: 95-H 6678 Sub.A (5/22/95)
- Vermont: Human Rights Law, Chapter 5, 59 & 61 (4/23/92)

¹⁷⁹ *Id.*; *See also* United States Office of Personnel Management, *Addressing Sexual Orientation Discrimination in Federal Civilian Employment, at* <http://www.opm.gov/er/orientation.htm> (June 24, 1999).

¹⁸⁰ *Id.*

¹⁸¹ Lambda Legal Defense and Education Fund, *Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation, at* <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=217> (May 22, 2001).

- Wisconsin: Laws of 1981, Ch. 112

Anti-discrimination laws in public employment are found in the above states and the following.¹⁸²

- California (anti-discrimination based on sexual orientation in the executive branch of state gov't): Exec. Order No. B-54-79
- Colorado: Executive Order 90-13-98 (1990)
- Delaware: Executive Order No. 83 (12/00)
- Iowa: Executive Order No. 7 (September 14, 1999)
- Illinois: Administrative Order No. 2, 1996
- Montana: Montana Operations Manual (MOM) Policy No. 3-0630
- New Mexico: Executive Order 85-15 (4/1/85)
- New York: Executive Order 28.1 (11/18/93)
- Pennsylvania: Executive Order No. 1988-1 (1/20/88)
- Washington: Executive Order 85-09 (12/24/85)

Federal law prohibits discrimination of the basis of sexual orientation in federal public employment under Executive Order 11478 EEO (Amended 5/28/98).¹⁸³

Numerous cities have ordinances that prohibit sexual orientation discrimination in employment in either the private or public realm or both.¹⁸⁴ Included is:¹⁸⁵

- San Francisco (public and private): San Francisco Admin. Code, Art. 33, §3301, et seq., 10/87
- Los Angeles (public and private): Municipal Code, Ch. IV, Art. 12 6/1/79

Equal Benefits Ordinances:

State government employers offering domestic partner benefits include:¹⁸⁶

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Human Rights Campaign, *WorkNet*, at <http://www.hrc.org/worknet/index.asp> (last visited July 10, 2001).

California, Connecticut, Maine, New York, Oregon, Vermont and Washington.

A total of 3,848 additional city government employers¹⁸⁷, private employers, and colleges currently offer equal benefits.¹⁸⁸

Employment- Transgendered People:

Minnesota and California are the only states that explicitly include transgendered people as protected under discrimination laws.¹⁸⁹

On August 2, 2003, California expanded its prohibition on sexual discrimination and harassment by including gender, as defined, in the definition of sex in Fair Employment Housing Act (Govt. Code § 12926). This prohibits discrimination based on gender identity in employment and housing. Employers would be able to require employees to comply with reasonable workplace appearance, grooming and dress standards consistent with state and federal law, provided that employees are allowed to appear or dress consistently with their gender identity.

Only thirty-two municipalities and the District of Columbia protect people under sex discrimination laws by prohibiting sex discrimination based on gender identity.¹⁹⁰ Although a few state courts have departed from Title VII precedents to interpret state and local sex discrimination laws to include transsexual people,¹⁹¹ generally if there is no

¹⁸⁷ This includes the city and county of San Francisco. See City and County of San Francisco Human Rights Commission, *Equal Benefits/Domestic Partners*, at <http://www.ci.sf.ca.us/sfhumanrights/12ordi.htm> (last visited July 11, 2001).

¹⁸⁸ See *id.* for a list of these employers.

¹⁸⁹ See source cited *supra* note 3; See also Minnesota Stat. Ann. § 363.01(45) (1996).

¹⁹⁰ Human Rights Campaign, *Jurisdictions that Prohibit Employment Discrimination Based on Gender Identity*, at <http://www.hrc.com> under WorkNet and then Transgender Issues (June 27, 2001).

¹⁹¹ See *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y. S. 2d 391 (N.Y. Sup. Ct. 1995)(city ordinance prohibiting “gender discrimination

evidence that transgendered people are explicitly intended to be covered by laws prohibiting sex discrimination, courts will interpret these laws as not including transgendered individuals.¹⁹²

5. Civil Rights

First Amendment

Freedom of speech and association, including the right to form social and political organizations, to socialize, to produce works of art with gay and lesbian themes, and to speak out, is guaranteed by the First Amendment.¹⁹³ State schools, as protected by the First Amended, have the right to collect money to fund a variety of services and activities that enhance the school's academic program, such as gay student centers.¹⁹⁴ Further, hotels, stores, and landlords cannot discriminate against customers based on their sexual orientation due to the religious beliefs of the owners of these public accommodations.¹⁹⁵ However, organizations, like the Boy Scouts of America, can claim that they have a message to convey and can discriminate if they can show that complying with an anti-discrimination law would disable them from disseminating their message.¹⁹⁶

protects transsexuals); *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996) (refused to dismiss transsexual's claim that she had been discriminated against in violation of NY Human Rights Law and NYC Human Rights Law).

¹⁹² *Id.*

¹⁹³ ACLU of Washington, *Lesbian/Gay Rights*, at <http://www.aclu-wa.org/issues/lesbiangay/> (last visited July 11, 2001).

¹⁹⁴ Lambda Legal and Education Fund, *Gay Equality and the First Amendment*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=670> (June 1, 2000); see also source cited *supra* note 78.

¹⁹⁵ *Id.*; see also *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134 (9th Cir. 2000).

¹⁹⁶ *Id.*; see also source cited *supra* note 79.

Hate Crime Laws in States Including Sexual Orientation¹⁹⁷

Arizona, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Tennessee, Texas, Washington, Wisconsin

Hate Crime Laws in States Including Gender Identity¹⁹⁸

California, District of Columbia, Minnesota, Missouri, Vermont

Eighteen other states have hate crime laws that do not explicitly include sexual orientation.¹⁹⁹ Five other states (Arkansas, Indiana, New Mexico, South Carolina, and Wyoming) do not have hate crime laws.²⁰⁰

Hate Crimes Statistics Act [Pub. L. No. 101-275, 104 Stat. 140 (1990)]

This Act authorizes the Department of Justice to collect data regularly on crimes motivated by the victim's race, religion, sexual orientation or ethnicity. While limited to its face to gathering statistics, it is at least an official declaration by the U.S. government that violence against LGBTs is worthy of attention.

Federal Sentencing Guidelines [USSG, § 3A1.1, 18 U.S.C.A]

These provide for a dramatic increase in penalties for perpetration of crimes against persons that are, or were perceived to be, homosexual by the defendant.

Civil Actions and Damages

In addition to criminal penalties for bias-

¹⁹⁷ See source cited *supra* note 83.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* The Georgia statute refers to victims or property selected "because of bias or prejudice. *Id.* "The Utah statute ties penalties for hate crimes to violation of the victim's constitutional or civil rights. *Id.* These statutes would probably be more favorable for LGBTs who have been subjected to hate crimes.

²⁰⁰ *Id.*

motivated conduct, about 24 states allow some form of civil punishment for bias-motivated conduct.²⁰¹ These statutes, which appear both in the criminal codes and civil codes of various states, generally allow a victim of bias-motivated conduct to sue the perpetrator for monetary damages and may also allow the victim or the state to seek an injunction or restraining order against the perpetrator.²⁰² Many of these provisions allow for the prevailing plaintiff to recover reasonable attorney's fees and costs for filing such a lawsuit.²⁰³

6. Child Custody and Visitation Rights

Child Custody Laws²⁰⁴

States have implemented different laws concerning child custody rights for LGBTs. Some states do not grant custody to LGBT parents. In other states, LGBT parents must prove their sexual orientation will not harm the child. Finally, some states have rejected any per se rule forbidding custody by LGBTs. Generally, courts award custody based on what is in the best interest of the child. This gives the court great latitude and discretion.

Further, often courts interpret state law schemes to give authority to even bring a lawsuit only to those people that the law defines as "parents."²⁰⁵ Under these restrictive laws, "parents" are only persons related through birth, marriage, or

adoption.²⁰⁶ Therefore, it may be a good idea for non-legal parents to attempt to gain legal rights before custody situations even arise.

Options for Non-legal Parents to Gain Parental Rights:

- Courts in six states have recognized the *in loco parentis* doctrine (or "de facto" parent theory), formerly approved for use in the heterosexual context to give a person rights over a child if they have assumed the role of a parent, for children with same sex parents.²⁰⁷ *In loco parentis* has given custody and visitation rights to a few LGBT parents.

- Second parent adoption is another option and has been the most common means of establishing a legal relationship between a non-legal parent and their child.²⁰⁸ In general, when a biological parent approves to an adoption of his or her child, the biological parent must renounce his or her own parental rights. A broader reading by state courts of adoption statutes, bi-passing the renounce-ment of rights, has allowed for "second parent adoptions."²⁰⁹ Second parent adoptions are available by statute only in Connecticut and Vermont.²¹⁰

On August 4, 2003, In *Sharon S. v. San Diego County*, the California Supreme Court

²⁰¹ NGLTF, *Overview of Hate Crime Laws*, at <http://www.nglrf.org/statelocal/hatecrimes.htm> (last updated April 26, 2000).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See Human Rights Campaign FamilyNet, *Legal Center: Custody and Visitation*, at <http://www.hrc.org/familynet/chapter.asp?chapter=67> (last visited July 11, 2001).

²⁰⁵ Family Pride Coalition, *Protecting Families: Standards for Child Custody in Same-Sex Relationships*, at <http://www.familypride.org/issues/custody.htm> (April 11, 1999).

²⁰⁶ *Id.*

²⁰⁷ See sources cited *supra* note 93. The states in which courts have recognized the *in loco parentis* doctrine are: MA, PA, WI, NJ, NM and RI. *Id.*; See also *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (explains what is required to prove *in loco parentis*).

²⁰⁸ See source cited *supra* note 78.

²⁰⁹ *Id.* Second parent adoptions have been approved by appellate courts in four states (IL, MA, NY, and NJ) and the District of Columbia. *Id.* They have been granted by lower courts in some counties in sixteen other states. *Id.* The appellate courts of five states (CO, CN, OH, PN, and WI) have denied these adoptions. *Id.*

²¹⁰ *Id.*

upheld second parent adoptions. The court stressed the importance of providing legal protections and stability for children born to same-sex and other unmarried couples: "Unmarried couples who have brought a child into the world with the expectation that they will raise it together, and who have jointly petitioned for adoption, should be on notice that if they separate the same rules concerning custody and visitation as apply to all other parents will apply to them."

Without a second-parent adoption, a child is not entitled to financial support or the right to intestate inheritance from the non-legal parent, and will be unable to claim Social Security, retirement or state worker compensation benefits if the non-legal parent dies or is incapacitated. The child may be denied health or other insurance benefits from the non-legal parent's employer, and the non-legal parent may not be able to consent to emergency medical care or visit the child in the hospital. If the legal parent dies or become incapacitated, the child may become a ward of the state.

- Parentage actions have also been used in CA, CO, and MA to establish legal parental relationships.²¹¹ Historically, parentage decrees, making a non-biological parent a legal parent, have been approved in situations where a gay male couple uses a surrogate to conceive and bear a child or a lesbian couple plans to conceive and raise a child together.²¹² In California, parentage decrees have been approved even in circumstances where two women have a child together and the non-gestational mother has no genetic ties to the child.²¹³

7. Elders

[See also Laws Governing Poor People: Elders]

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

Social Security

Elder LGBTs can collect Social Security benefits. However, the surviving gay partner of a retiree receives no Social Security survivor benefits.²¹⁴ That contrasts with the more than \$5,000 per year that widows and widowers draw, on average, in survivor benefits.²¹⁵

Medicaid

For information regarding Medicaid look above under 'Health.' When a gay elder needs Medicaid-financed nursing home care, his or her partner can lose a jointly owned home because gay couples aren't covered by rules protecting the assets of nursing home residents' spouses.²¹⁶

Medicare

See above under 'Health.'

8. Children

[See also Laws Governing Poor People: Children]

Non-Discrimination Policies In Schools:

Many schools currently have non-discrimination policies covering discrimination and harassment based on sexual orientation.²¹⁷

Equal Access Act [20 U.S.C. § 4071(a)]

This Act applies to public, federally funded schools.²¹⁸ It states that schools cannot deny equal access to students who wish to

²¹⁴ Deb Price, *Equal Rights Are Key for Elderly Gay People*, at

<http://www.theithacajournal.com/news/stories/20001106/opinion/37412.html> (Nov. 6, 2000).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Lambda Legal and Education Fund, *Improving School Policies and State Laws*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=196> (Oct. 24, 1997).

²¹⁸ Lambda Legal and Education Fund, *Equal Access Act*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=78> (Sept. 29, 1997).

conduct a meeting if the basis for the denial is the content of the speech at such meetings.²¹⁹ This only applies to meetings that are done in a limited open forum.²²⁰ A school creates a "limited open forum" whenever it provides access to any (even just one) "non-curriculum related student group to meet on school premises during non-instructional time."²²¹ Therefore, under the EAA, public secondary schools must recognize gay-related groups where the schools receive federal assistance and have a "limited open forum."²²²

State-Wide Ethical Codes Applying to Educators

Four states including, Alaska, Connecticut, Florida, and Pennsylvania, ethically oblige educators to not discriminate against students on the basis of sexual orientation.²²³ Violations of the ethical codes can jeopardize the licenses of educators, because citizens can complain to the appropriate state agency in the same way they might complain about a doctor or lawyer.²²⁴

9. Immigration

[See also Laws Governing Poor People: Immigrants]

Political Asylum

Gay men, lesbians, and bisexuals are recognized as a distinct social group and are eligible for asylum.²²⁵ Further, in a recent 9th circuit opinion, a man was granted asylum based on his appearance rather than his sexual orientation, giving hope to

transgendered individuals wanting to seek asylum.²²⁶

Resources: LGBT

American Civil Liberties Union AIDS Project and Lesbian and Gay Rights Project

132 West 43rd Street
New York, NY 10036
212/944-9400, ext. 545
www.aclu.org/issues/gay/hmgl.html

Lambda Legal Defense and Education Fund, Inc.

666 Broadway, 12th Floor
New York, NY 10012
(212) 995-8585

www.lambdalegal.org

is a great site with summaries of court opinions hyperlinked to the full case report, appellate briefs, recent legislation state by state. Great links.

National Center for Lesbian Rights

870 Market Street, Suite 570
San Francisco, CA 94102
415/392-6257

<http://www.nclrights.org/>

Great resources on lesbian and transgender issues. First Manual on Transgender Rights

National Gay and Lesbian Task Force

www.nglftf.org

has recent legislation, materials on immigration, welfare reform, affirmative action, hate laws. Good links.

Rainbow Query

www.rainbowquery.com

provides numerous links including an extensive legal and political section. ACLU Lesbian and Gay Rights Project:

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ See source cited *supra* note 260.

²²⁴ *Id.*

²²⁵ Lesbian and Gay Immigration Rights Task Force, *FAQ*, at <http://www.lgirtf.org/faq.html#SECTION5> (last visited July 11, 2001).

²²⁶ See source cited *supra* note 3; See also source cited *supra* note 116.

Human Rights Campaign:

Site with lots of great information on a wide range of issues, key issues tracked state by state. www.hrc.org

Assembly Bill (AB) 196: The Gender Non-Discrimination Act of 2003 AB 196 will prohibit discrimination in housing and employment based on gender identity and expression.

AB 196 will prohibit discrimination in housing and employment based on gender identity and expression.

AB 196 clarifies for the purposes of California's Fair Employment and Housing Act (FEHA) that discrimination in housing and employment based on "sex" includes discrimination based on gender. **AB 196** adopts the definition of gender in California's Penal and Education Code, which includes a person's "identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the person's sex at birth." 1

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AB 196 FACT SHEET -updated 05.14.03

for questions -email: email@eqca.org
phone: 415.581.0005

Formerly California Alliance for Pride and Equality (CAPE)

AB 196 will provide protection to those who are fired, evicted, or experience serious harassment because they exhibit traits not traditionally associated with their sex. Men who are seen as "too feminine" and women perceived as "too masculine." It will also protect transgender individuals who face discrimination and harassment.

Gender-based discrimination in housing and employment is a serious and well-documented problem that destroys careers, prevents employees and businesses from

functioning at their highest potential, and can lead to homelessness. A recent survey by the San Francisco Department of Public Health found that most transgender people have experienced "loss of employment, denial of employment, or underemployment." The unemployment rate for those surveyed was 70%. Nearly half of the transgender women surveyed had no stable housing.

AB 196 is good for business and property owners, as well as employees and tenants, because it will explicitly clarify what constitutes illegal discrimination. Courts, as well as the state's Department of Fair Employment and Housing, have interpreted sex discrimination laws like FEHA to include discrimination based on gender stereotyping. **AB 196** will help everyone understand the law by explicitly stating the rules which already exist.

· For example, in *Price Waterhouse v. Hopkins*, 490 U. S. 228 (1989), the United States Supreme Court found that a woman who was denied partnership in a firm because she behaved in a way the firm's partners deemed "too aggressive" for a woman was the victim of sex discrimination, based on gender stereotyping.

· The Ninth Circuit has recognized that men may be discriminated against on the job because they are perceived to have feminine characteristics. *Antonio Sanchez, in Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F. 3d 864 (9th Cir. 2001), was subjected to serious harassment by co-workers who attacked him for walking "like a woman," referred to him as "she" and "her," and derided him with vulgar name-calling cast in female terms.

· Similarly, in *Schwenk v. Hartford*, 204 F. 3d 1187 (9th Cir. 2000), the Ninth Circuit held that federal sex-discrimination laws prohibit discrimination against transgender people.

California already recognizes gender-based attacks as hate crimes, and prohibits discrimination or harassment on the basis of gender in public schools. Over 50 cities nationwide, including Los Angeles, San Francisco, San Jose, Santa Cruz, and West Hollywood, as well as the states of Connecticut, Massachusetts, Minnesota, New Jersey, New York, and Rhode Island, and Washington D. C., prohibit discrimination based on gender.

Many businesses, including a number of Fortune 500 companies, already have non-discrimination policies that include gender identity or expression. These include, for example, American Airlines, Apple Computer, IBM, Intel, and PG& E. See HRC's website for a list of companies with nondiscrimination policies that include gender identity or expression.

AB 196 does not change an employer's ability to establish gender-based dress codes, but does require that each employee be permitted to dress in accordance with the employee's gender identity.

AB 196, like all nondiscrimination provisions in California's Fair Employment and Housing Act, will not apply to companies with fewer than five employees, or to non-profit religious corporations. 2