

The State of

THE FAMILY

Laws and Legislation Affecting Gay, Lesbian, Bisexual and Transgender Families



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The Human Rights Campaign Foundation is the educational arm of the Human Rights Campaign, the nation's largest gay and lesbian political organization. HRC envisions an America where lesbian, gay, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community.

About HRC FamilyNet (www.hrc.org/familynet)

The Human Rights Campaign Foundation's FamilyNet is the most comprehensive and up-to-date resource for and about lesbian, gay, bisexual and transgender families. It is maintained in collaboration with more than 20 other national lesbian, gay, bisexual and transgender organizations. HRC FamilyNet provides information and resources about adoption, civil unions, coming out, custody and visitation, donor insemination, family law, families of origin, marriage, money, parenting, religion, schools, senior health and housing, state laws and legislation, straight spouses and transgender issues.

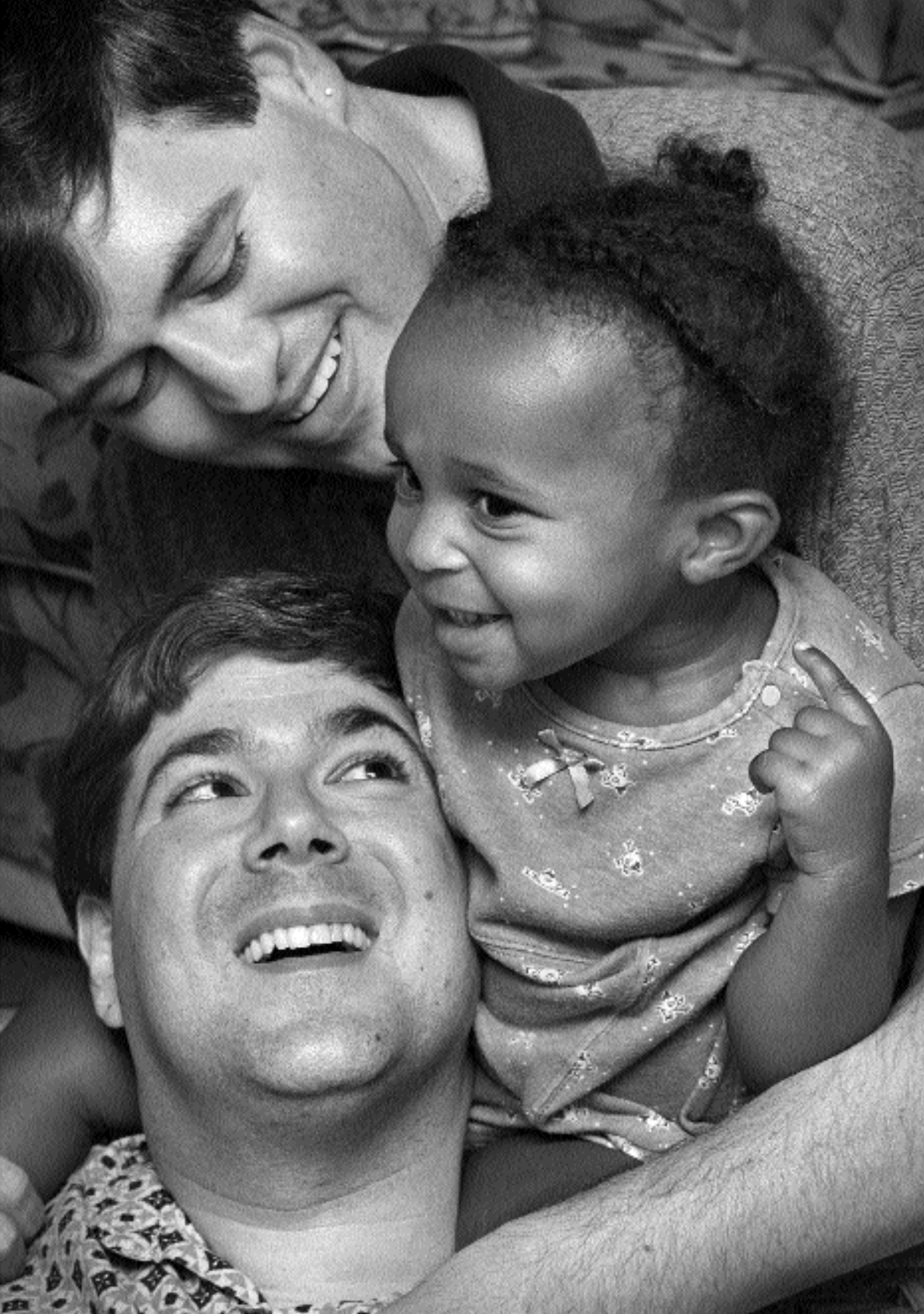
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LAWS AND LEGISLATION AFFECTING GAY, LESBIAN, BISEXUAL AND TRANSGENDER FAMILIES



Kimi Takahashi

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EXECUTIVE SUMMARY

LAWS AND LEGISLATION AFFECTING GAY, LESBIAN, BISEXUAL AND TRANSGENDER FAMILIES

The 2000 census revealed that same-sex couples live in 99.3 percent of all counties in America.¹ There also have been reports of a rise in gay and lesbian parenting since the early 1990s.² Yet the Human Rights Campaign Foundation’s FamilyNet project has found that although same-sex families are a growing and ubiquitous part of the social fabric of this nation, they are not treated like all other families under law.

Today, no same-sex or transgender family can rely on the same legal protections granted to all other families in America.³ Rather, they live on a fault line. The protections offered gay, lesbian, bisexual and transgender (GLBT) families vary dramatically from state to state, county to county and often judge to judge. Only one state, Vermont, provides parity under state law for gay people. GLBT families in no state enjoy equal protection under federal law. And even the most expensive and carefully crafted safety net leaves couples, parents and children vulnerable — and will continue to do so until the law catches up with the realities of the changing family.

But there is good news. As our society has historically considered the family unit something that deserves special legal protection, there has been a trend in recent years toward recognizing that all families — including those headed by gay, lesbian, bisexual or transgender adults — merit these protections under law. The result, thanks to the fair-minded actions of judges and state legislators nationwide, has been an increase in rights, protections and responsibilities for GLBT families, even as anti-gay forces have attempted to tear them down.

In 2001, 13 new GLBT family-related laws were enacted by state legislatures or overturned by state courts. Eleven of these were supportive of GLBT families, and only two sought to restrict protections. More broadly, at least 86 GLBT family-related bills were introduced in state legislatures, and 80 percent of them were supportive of GLBT families. And in Congress, six bills that would affect GLBT families were introduced or reintroduced in 2001, all of them supportive.

Still, with progress comes backlash. And in some states and a number of communities, anti-gay groups have attempted to roll back legal protections for GLBT families through court

challenges or referendums driven by well-funded albeit misleading campaigns. Their argument is typically that same-sex and transgender families seek “special rights” and that extending legal protections to them will threaten “the traditional American family.”

This HRC FamilyNet report makes clear, however, that there is nothing “special” about the rights same-sex and transgender families seek. The fact is that members of every same-sex and transgender family in America are treated as second-class citizens, and what they seek is only the most basic protections for their loved ones: equality under law.

For the purposes of this report, we defined laws and legislation that directly affect or could affect GLBT families to include: marriage, civil unions and domestic partnership; adoption and second-parent adoption; safe schools; immigration; discrimination; hate crimes and sodomy. For each of these areas, we examined state and federal laws and legislation, including both statutory laws and state supreme court decisions. Lower court decisions, which typically apply only to a certain case or county or region of a state, and local legislation were not examined.

What follows is a roundup of the inadequacies and inconsistencies in the laws and legislation that affect GLBT families nationwide.

MARRIAGE, CIVIL UNIONS AND DOMESTIC PARTNER PROTECTIONS

No state explicitly allows same-sex couples to marry, and the validity of marriage involving a transgender spouse is uncertain if challenged.⁴

TABLE 1. Best Places for Gay, Lesbian, Bisexual and Transgender Families

District of Columbia	Rhode Island
Vermont	Massachusetts
California	New York
Connecticut	New Hampshire
New Jersey	Oregon
Minnesota	Washington

Only one state, Vermont, permits same-sex couples to obtain a civil union license, which makes them eligible for the state-provided benefits and protections of marriage. However, a civil union does not make a couple eligible for any of the more numerous federal benefits of marriage, nor is there a guarantee that a civil union obtained in Vermont will be recognized anywhere else.

Eight states and 129 local governments and quasi-governmental agencies have laws that provide health insurance benefits to the domestic partners of government employees, for a total of 137 state and local governments and quasi-governmental agencies.⁵

Thirty-six states and the federal government have laws that purport to prohibit recognition of marriages of same-sex couples that may be performed in other countries or, should one permit it, another American state. Fourteen states and the District of Columbia have no such laws.

The result: All same-sex families are denied the more than 1,000 federal benefits⁶ and protections of marriage and, in 49 out of 50 states, they are denied most of the state rights and responsibilities that come with marriage.

2001 Action. State legislators introduced 29 bills in 22 states that would have affected the legal status of same-sex couples. About half would strengthen protections for same-sex couples, and half would restrict them. A total of six were signed into law. In four states (Alabama, California, Maine and Rhode Island), they extended protections to same-sex families; in two states (Michigan and Missouri), they restricted them.

At the federal level, the Domestic Partnership Benefits and Obligations Act of 2001 (H.R. 638) was introduced to provide benefits to domestic partners of federal employees.

ADOPTION

Three states, Florida, Mississippi and Utah, have laws that explicitly prohibit gay and lesbian individuals and/or couples from adopting children.⁷

Courts in 10 states tend to discriminate against same-sex parents who wish to adopt.⁸

Courts in 20 states and the District of Columbia have demonstrated an openness to same-sex parents' adopting.

In the remaining 17 states, it is not possible to definitively determine whether courts would discriminate against same-sex parents because the records are mixed or there are too few cases to indicate a trend.

No state or federal law explicitly bars a transgender person from adoption. However, a transgender person may be met with prejudice by an adoption agency, child welfare workers or judges.⁹

Result: In some states, children awaiting adoption are denied the opportunity to find a permanent home and loving family.

2001 Action. Bills concerning adoption by gay and lesbian parents were introduced in three states. In Arkansas and Indiana, they were designed to restrict adoption by same-sex parents. In New Hampshire, the legislation was designed to extend joint adoption privileges to same-sex and unmarried heterosexual couples. None of the bills passed.

SECOND-PARENT ADOPTION

Six states (Connecticut, Illinois, Massachusetts, New Jersey, New York and Vermont) and the District of Columbia have made second-parent adoption available statewide. This provides the equivalent of step-parent adoptions to gay and lesbian couples.

Courts in 20 other states have awarded second-parent adoption at the trial court level, although there is no guarantee that judges in other counties within those states would do the same.

In the remaining 24 states, there appear to be no recorded cases of courts' permitting second-parent adoptions.

The result: Many two-parent households can have only one legal parent: the parent who gave birth to or legally adopted the child, which leaves both parents and children at risk. For example, in a medical emergency, the nonbiological or non-adoptive parent may be unable to authorize treatment without a power of attorney or other authorization from the legal parent. And in the case of a breakup, the relationship between the children and the nonbiological or nonadoptive parent may be severed.

2001 Action. No bills addressing second-parent adoption were introduced. However, a state appeals court, the 4th District Court of Appeal in San Diego, issued a controversial

opinion that second-parent adoptions are not permitted under California law, although such adoptions have been granted there for many years. On Jan. 29, 2002, the California Supreme Court agreed to review the lower court ruling, which was challenged on appeal.

SCHOOLS

Seven states (California, Connecticut, Massachusetts, Minnesota, New Jersey, Vermont and Wisconsin) and the District of Columbia have safe school laws that prohibit harassment or other discrimination based on sexual orientation.

Two states (California and Minnesota) have safe school laws that expressly prohibit harassment based on gender identity. The District of Columbia also appears to prohibit harassment of transgender students under the personal appearance provision of the D.C. Human Rights Law.

At the federal level, the Equal Protection Clause of the U.S. Constitution and Title IX of the Education Amendments of 1972 have been used with some success to provide legal recourse in cases of harassment or discrimination based on sexual orientation in schools. But many argue that these provisions are insufficient to provide comprehensive remedies for this type of discrimination and harassment.

Result: Many students who experience harassment and discrimination based on sexual orientation or gender identity do not have clear legal recourse in many states.

2001 Action. Legislators in seven states (Maine, Michigan, Nevada, New York, Oregon, Texas and Washington) introduced bills that would have established new safe schools laws that include sexual orientation. In two of these states (New York and Texas), the bills also addressed gender identity. None passed.

At the federal level, S. 1357 was introduced to examine how schools are implementing the policy guidance of the Department of Education's Office for Civil Rights relating to sexual harassment directed against gay, lesbian, bisexual and transgender students.

EMPLOYMENT DISCRIMINATION

Twelve states, the District of Columbia and 122 municipalities prohibit employment discrimination based on sexual orientation in private workplaces and public-sector jobs while 38 states have no such law.¹⁰

Two states (Rhode Island and Minnesota) have explicit statutes against discrimination based on gender identity. Courts and administrative agencies in four additional states (Connecticut, Massachusetts, New Jersey and New York) have interpreted either their sex, disability or sexual orientation discrimination statutes to prohibit certain forms of discrimination against transgender people.

There is no federal law that explicitly forbids employment discrimination based on sexual orientation or gender identity. Discrimination based on sexual orientation is prohibited among federal civilian employees, but only by an executive order that could be abolished by any U.S. president.

Result: An employee can be fired, not hired or denied a promotion based on sexual orientation or gender identity in most states.

2001 Action. Legislators in 22 states introduced GLBT-related employment discrimination bills, all of them to outlaw discrimination based on sexual orientation and/or gender identity. Two states passed new laws: Maryland expanded its law to prohibit discrimination based on sexual orientation in employment, housing and public accommodations; Rhode Island expanded its law to prohibit discrimination based on gender identity.

At the federal level, the Employment Non-Discrimination Act, S. 1284, H.R. 2692, was reintroduced in an effort to make it illegal to discriminate in employment based on sexual orientation.

HATE CRIMES

Twenty-seven states and the District of Columbia have laws that address hate crimes motivated by sexual orientation. Twenty-three states, however, lack such laws, even though most of these states already have hate crimes laws that address crimes motivated by race or religion.

Four states (California, Minnesota, Missouri and Vermont) and the District of Columbia have laws that address hate crimes motivated by prejudice against gender identity. Forty-six states lack such laws.

The federal statute used to prosecute hate violence (18 U.S.C. Section 245) also fails to include violence based on sexual orientation or gender identity.

Result: The current state of the law suggests that crimes motivated by race, religion or other personal factors should be treated one way, and those motivated by sexual orientation and/or gender identity should be treated another way.

2001 Action. Legislators in 19 states introduced 22 hate crime bills. All of them sought to add sexual orientation and/or gender identity to existing hate crimes laws or to establish new inclusive hate crimes laws. In two states (Texas and Hawaii), new hate crimes laws were enacted that include crimes motivated by bias against sexual orientation.

At the federal level, the Local Law Enforcement Enhancement Act (formerly known as the Hate Crimes Prevention Act), S. 625, H. 1343, was introduced. It would define hate crimes as including those based on real or perceived sexual orientation, gender and disability.

SODOMY

Thirteen states still have sodomy laws that outlaw private same-sex relations between consenting adults, even in their own homes, although 37 states and the District of Columbia have repealed or overturned these laws over the past several decades.

Result: Although these laws are rarely enforced, courts and legislators have used sodomy laws as a basis to justify denial of equality for GLBT people.

2001 Action. Legislatures or courts overturned sodomy laws in three states: Arkansas, Arizona and Minnesota.

OTHER FEDERAL LAWS

Immigration. U.S. citizens or permanent residents are not permitted to petition for their same-sex partners to immigrate under the U.S. Immigration and Nationality Act. As a result, thousands of same-sex couples are forced to live apart or are left with no choice but to migrate with their partners to one of the 15 countries with more equitable immigration laws.

2001 Action. The Permanent Partners Immigration Act, H.R. 690, was reintroduced in an effort to provide same-sex partners of U.S. citizens and lawful permanent residents the same immigration rights that legal spouses of U.S. residents enjoy.

Social Security. Individuals in same-sex relationships are denied survivor benefits when a life partner dies. A child also is ineligible for survivor benefits if the deceased parent was not the biological parent or was unable to obtain a second-parent adoption and thus become a legal parent of the child.

2001 Action. None.

Tax Law. Same-sex couples are denied many of the savings provided married couples through the federal tax law. For example, they are taxed on the value of employer-provided insurance benefits for domestic partners although married spouses receive those benefits tax-free.

2001 Action. None.

Medical Leave. The Family and Medical Leave Act allows workers to take up to 12 weeks of unpaid leave to care for a seriously ill spouse or family member. It does not extend this same right to GLBT workers who may need leave to care for a seriously ill partner or parent of such a partner.

2001 Action. H.R. 2287 was introduced to amend the Family and Medical Leave Act to permit leave to care for a domestic partner if he or she has a serious health condition.

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INTRODUCTION

“We come from the same place. Gay or straight, this whole issue of sexuality is about two people who see each other, and just like everyone else, get a crush, have a little glint in the eye, want to go out on a date, want to hold hands, want to kiss, hope that the other likes them, hope they think they’re attractive. There’s nothing that goes on between a gay couple that doesn’t go on between a heterosexual couple.”

— actress Kathy Najimy in conversation with Betty DeGeneres on HRC FamilyNet (www.hrc.org/familynet)

When a same-sex or transgender couple falls in love, they embark on a family life cycle that is, in all fundamental ways, like that of every other family. After the first “glint in the eye” grows into true commitment, many think about settling down and all that comes with it: whether and how they should have a commitment ceremony, buy a home, have children and protect themselves and their loved ones in the event of ill health, old age and death.

But what GLBT families encounter as they pursue such ordinary needs and desires is extremely different from what many opposite-sex couples encounter. For example, when heterosexual couples fall in love, they can get married. They do not have to worry about whether they happen to live in an area where the law will permit both of them to be the legal parents of any child they might raise (or uphold a marriage involving a transgender spouse). They do not have to weigh whether their employers will provide the benefits that would recognize them as a family. They do not have to pay attorneys to draw up the legal documents that will allow them to visit each other in the hospital, make decisions on each other’s behalf in an emergency and assume many of the other basic protections that married couples take for granted. And they do not have to figure out how to guard their loved ones without the array of federal and other protections designed for just that purpose, such as Social Security, family and medical leave privileges, tax benefits, disability benefits, low-income housing benefits, rights provided through immigration and naturalization programs, military spousal benefits, veteran spousal benefits and more.

The federal government and every state in the nation grant substantial legal rights and protections to heterosexual couples and their children from birth to marriage to death. Same-sex and transgender families, in contrast, are met by the absence of ordinary protections and numerous obstacles every step along the way. Numerous laws block access to

marriage for same-sex couples, and legal marriages of transgender couples may be vulnerable. These families also are likely to restrict their choices of where to live — if the conditions of their lives permit them to — by assessing laws, schools and other institutions that are less likely to discriminate against them. They must assume added costs in insurance premiums, taxes and attorney fees. And, even at the end of their lives, they may be prevented from living together as a couple in a retirement, assisted living or nursing home and are unlikely to be able to rely on their deceased partner’s pension benefits.

In sum, GLBT families are not in themselves radically different from heterosexual and non-transgender families. In their simple human impulses to settle down with someone they love, and in the big and small rites of passage they face throughout a lifetime together, they are inherently the same as their heterosexual neighbors. The radical difference is in how the law treats them.

Among the inequities that face GLBT families today:

- > Same-sex couples are denied the more than 1,000 federal benefits and protections of marriage and, in all states but Vermont, are also denied the state rights and responsibilities that come with marriage.¹¹
- > Many children of same-sex couples are permitted to have only one legal parent of each sex, which leaves both parents and children vulnerable. For example, the children may be unable to count on financial support from a non-biological or nonadoptive parent if the couple separates. And the nonbiological or nonadoptive parent may be unable to continue to raise the child if the biological or adoptive parent dies while the child is still a minor.
- > Same-sex couples are denied many of the savings provid-

ed married couples under federal tax law, including the right to file jointly; reduce estate taxes by exempting amounts transferred to a surviving spouse; combine medical and dental expenses with a partner to reach the minimum requirement of 7.5 percent of adjusted gross income; and receive health insurance coverage for domestic partners without paying income taxes on the benefits.

- > GLBT people can be fired, denied a promotion or otherwise discriminated against based on their sexual orientation or gender identity in most states, which could leave their families financially vulnerable.
- > If a same-sex partner or parent of a same-sex partner becomes seriously ill, gay, lesbian and bisexual employees are not entitled to unpaid leave to care for them under the Family and Medical Leave Act.
- > Gay, lesbian and bisexual individuals are prohibited from petitioning for their same-sex partners to immigrate, forcing thousands of couples to live apart or to migrate to one of the 15 counties with more hospitable immigration laws.
- > Gay and lesbian individuals are denied Social Security survivor benefits when a life partner dies. Their children also are likely to be denied survivor benefits if a deceased parent was denied the opportunity to become a legal parent through second-parent adoption.

For the purposes of this report, we defined laws and legislation that directly affect or could affect GLBT families to include: marriage, civil unions and domestic partnership; adoption and second-parent adoption; safe schools; immigration; discrimination; hate crimes and sodomy. For each of these areas, we examined state and federal laws and legislation, including both statutory laws and state supreme court decisions. Lower court decisions, which typically apply only to a certain case, or county or region of a state, and local legislation were not examined.

Chapter One begins with an overview of the GLBT family-related laws that were enacted and bills that were introduced in 2001. The remainder of the report then examines each of the major areas of law that affect same-sex and transgender families by addressing, first, the significance of the law; second, the current state of the law; and, third, the new laws enacted and legislation introduced in 2001.

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CHAPTER 1

New laws and legislation in 2001

In 2001, lawmakers responded positively to the severe lack of protections available to GLBT families. For example, 80 percent of the 86 bills introduced in state legislatures were supportive of these families. Moreover, 11 out of the 13 new laws passed or old laws overturned also were supportive of GLBT families by either adding protections or removing restrictions on these families. The progress has perhaps not been as widespread as might be hoped for but clearly demonstrates that many state lawmakers have taken a step in the right direction.

Here is a snapshot of new bills introduced, laws enacted and backlash from anti-gay groups, legislators and judges in 2001.

NEW LAWS ENACTED OR OVERTURNED

With 11 of the 13 new laws enacted or overturned in 2001 being supportive of GLBT families, only Missouri and Michigan stand out as having passed laws to deny them protections. Specifically:

- > **Missouri** passed a law purporting to prohibit recognition of marriages between same-sex couples.
- > **Michigan** passed a law that prohibits the use of state funds to pay for health insurance benefits for unmarried domestic partners of legislators and legislative employees.

Of the 11 laws that extended protections or rescinded restrictions on same-sex and/or transgender couples, nine were passed by state legislatures and two were the result of court decisions.

- > **Alabama** passed a bereavement leave law allowing permanent state employees to take leave for the death of a person related by blood, adoption or marriage or any other person residing in the employee's immediate household at the time of death.
- > **Arizona's** sodomy law was overturned by the Legislature.
- > **Arkansas' and Minnesota's** centuries-old sodomy laws were overturned by judges who declared they were unconstitutional. (The Arkansas attorney general has since filed a brief challenging this ruling.)
- > **California** passed an enhanced domestic partner law to

extend health care, estate planning and adoption benefits to unmarried couples who register as domestic partners.

- > **Maine** passed a domestic partner law that requires health insurance carriers to offer policies providing coverage for domestic partners under the same terms and conditions as spouses. (Anti-gay forces launched a referendum effort to overturn this law but failed to collect enough signatures to place the question on the ballot in 2002.)
- > **Rhode Island** passed a law that prohibits discrimination based on gender identity in employment, housing, public accommodations and credit.

Rhode Island also passed a law providing domestic partner benefits to state employees.

- > **Texas and Hawaii** passed hate crimes laws that include crimes motivated by bias against sexual orientation or preference.¹²
- > **Maryland** passed a law to prohibit discrimination based on sexual orientation in employment, housing and public accommodations. In early July, an anti-gay coalition gathered signatures aimed at forcing a referendum on the law, thereby temporarily suspending its enactment. But on Nov. 21, the law went into effect when its opponents conceded that they failed to obtain enough valid signatures to bring the law before voters in a 2002 referendum.¹³

NEW BILLS

Of the 86 bills introduced in state legislatures in 2001 that would affect same-sex and/or transgender families, 69 were designed to extend protections, while 17 were written to deny or restrict protections.

Moreover, 17 of the supportive bills were designed to extend protections to transgender people and no bills were introduced that attempt to deny them protections.

Among the issues most frequently addressed were:

- > Marriage, civil unions and domestic partner benefits (29 of 86).
- > Employment discrimination based on sexual orientation and/or gender identity (22 of 86); and

- > Hate crimes based on sexual orientation and/or gender identity (22 of 86).

FEDERAL BILLS

Several important bills also were introduced or reintroduced in the U.S. Congress in 2001. All would extend protections to same-sex families.

- > A bill to amend the federal Family and Medical Leave Act of 1993, H.R. 2287, would permit leave to care for a domestic partner if he or she has a serious health condition.
- > The Domestic Partnership Benefits and Obligations Act of 2001, H.R. 638, would provide health insurance and other employee benefits to domestic partners of federal employees.
- > The Permanent Partners Immigration Act, H.R. 690, would modify the federal Immigration and Nationality Act to provide same-sex partners of U.S. citizens and lawful permanent residents the same immigration rights that legal spouses of U.S. residents enjoy.
- > A bill, S. 1357, to examine how schools are implementing the policy guidance of the Department of Education's Office for Civil Rights relating to sexual harassment directed against gay, lesbian, bisexual and transgender students.
- > The Employment Non-Discrimination Act, S. 1284, H.R. 2692, would make it illegal to discriminate in employment based on real or perceived sexual orientation.
- > The Local Law Enforcement Enhancement Act (formerly known as the Hate Crimes Prevention Act), S. 625, H. 1343, would define hate crimes as including those based on real or perceived sexual orientation, gender and disability.

BACKLASH FROM ANTI-GAY GROUPS

In addition to the situation in Maryland discussed above, anti-gay groups have advocated for or are expected to lobby for anti-gay state-level referendums during the next several years in:

- > **Maine.** An anti-gay group filed a petition with the Maine secretary of state to prohibit all state and local governments from providing domestic partner benefits. They failed, however, to collect enough signatures to place the question on the ballot in 2002.¹⁴

- > **Massachusetts.** An anti-gay group has begun pushing for a ballot initiative in 2004 that would bar marriages between same-sex couples by changing the state constitution to define marriage as a union between a man and a woman. It also would bar the government from extending any "benefit or incident" of marriage to unmarried families. Gay & Lesbian Advocates & Defenders has filed suit challenging the certification of this ballot question in the Supreme Judicial Court, contending that it fails to adhere to the constitutional rules for ballot initiatives.¹⁵
- > **Nevada.** In 2002, voters will cast ballots on a proposed amendment to the state constitution that would define marriage as a union between a man and a woman, even though there already is a law prohibiting recognition of same-sex marriage in that state.¹⁶
- > **Oregon.** In 2002, it is expected that there will be a repeat of the 2000 referendum that would bar public schools and state-subsidized colleges from "encouraging, promoting or sanctioning" homosexuality — or cause them to lose funding.¹⁷

In the November 2001 elections, meanwhile, voters defeated anti-gay ballot initiatives and approved supportive ones in four out of five cities. They took place in:

- > **Kalamazoo and Traverse City, Mich.,** where voters rejected two ballot initiatives that would have prohibited the cities from passing laws that would protect gay and lesbian residents;¹⁸
- > **Huntington Woods, Mich.,** where voters upheld an ordinance banning anti-gay and anti-transgender discrimination;¹⁹ and
- > **Miami Beach, Fla.,** where voters approved two ordinances: one to provide health care coverage to the domestic partners of gay and lesbian city employees and another to extend pension benefits to the domestic partners of police and firefighters.²⁰
- > **Houston,** where voters approved a ban on health insurance and other benefits for unmarried domestic partners of municipal workers.²¹

By being denied access to the right to marry in every state in the nation, same-sex couples are deprived of the most fundamental and comprehensive rights, protections and responsibilities available to heterosexual families. This includes more than 1,000 federal laws in which rights, protections and responsibilities depend on an individual's marital status, according to the General Accounting Office, and up to several hundred state rights and responsibilities.

RIGHTS AND PROTECTIONS DENIED SAME-SEX PARTNERS

Among the marriage-related rights, protections and responsibilities available to married heterosexual couples but not currently available to same-sex couples who cannot marry are:

- > The right to make decisions on a partner's behalf in a medical emergency. Specifically, the states generally provide that spouses automatically assume this right in an emergency. If an individual is unmarried, the legal "next of kin" automatically assumes this right. This means, for example, that a gay man with a life partner of many years may be forced to accept the financial and medical decisions of a sibling or parent with whom he may have a distant or even hostile relationship.
- > The right to take up to 12 weeks of leave from work to care for a seriously ill partner or parent of a partner. The Family and Medical Leave Act of 1993 permits individuals to take such leave to care for ill spouses, children and parents but not a partner or a partner's parents.
- > The right for same-sex partners to immigrate on the same basis as spouses.
- > The right to assume parenting rights and responsibilities when children are brought into a family through birth, adoption or surrogacy.
- > The right to a fair and predictable division of all jointly held property and debt in the event of a breakup.
- > Family-related Social Security benefits, income and estate tax benefits, disability benefits, family-related military and veterans benefits and other important benefits.
- > The right to inherit property from a partner in the absence of a will.

Such inequities impose added costs on these families, such as increased health insurance premiums, higher tax burdens and the absence of pension benefits or Social Security benefits in the event of a partner's death.

Some same-sex and transgender families consult attorneys to draw up legal documents such as powers of attorney, co-parenting agreements and wills, that will at least permit them to declare whom they wish to make health care and financial decisions for them if they become incapacitated; how they wish to share parenting responsibilities or, in the event of a breakup, how they would like to handle custody of a child; and what they want to happen to their property when they die. However, these are not a substitute for legal protection under law and cannot provide the broad range of benefits and protections provided by law.²²

STATE EFFORTS TO PROVIDE SOME PROTECTIONS TO SAME-SEX COUPLES

While no state has yet gone so far as to explicitly provide legal marriage for same-sex couples, a handful of states have taken steps to provide gay and lesbian families with at least some of the benefits, protections and responsibilities of marriage. These include:

Vermont. Vermont is the only state that offers same-sex couples the right to join in a civil union, a legal status parallel to marriage for the purpose of state law. This is the most substantial recognition of same-sex unions in the United States to date. The civil unions law, passed in 2000 in response to a court ruling, offers couples who obtain a civil union access to all of the state-based rights and responsibilities of marriage. These include protections in probate, government programs such as workers' compensation and unemployment, state taxes, parenting rights and the laws concerning separation and divorce.

But civil unions still fall significantly short of marriage as they fail to create eligibility for any of the more than 1,000 federal protections that married couples are eligible to receive.

Moreover, it remains unclear whether a civil union performed in Vermont will be honored outside the state. The first test case of whether a Vermont civil union will be recognized outside the state was announced in 2001. Susan

Freer, a formerly married mother of three boys who had a civil union in July 2000, has asked the state of Georgia to treat her civil union as the equivalent of a marriage for purposes of a child custody consent decree in an effort to win back visitation rights to her children. (On Jan. 25, 2002, the Court of Appeals rejected Freer's petition, saying that a civil union is not the same as marriage. It did not, however, say whether a civil union might be treated as the legal equivalent of a marriage in circumstances where the court is not bound by a custody decree, which in Freer's case, specifically forbids the children to stay overnight with a parent who is living with someone to whom he or she is not married or related.²³)

California. In October 2001, Gov. Gray Davis, a Democrat, signed the most comprehensive domestic partner bill in the country. A.B. 25 extends to registered unmarried couples the right, among other things, for partners to make medical decisions and file disability claims on behalf of an incapacitated partner, to adopt the other partner's child using the step-parent adoption process and to file wrongful-death lawsuits on behalf of a partner.²⁴ This significantly expands an earlier domestic partner law that provided same-sex couples the opportunity to formalize their relationships in a way that affords them rights, such as hospital visitation and some employment benefits for the partners of public-sector employees.

Hawaii. In Hawaii, same-sex couples were able to formalize their relationships under the state's reciprocal beneficiary statute. While the benefits for which couples were eligible as reciprocal beneficiaries were not as extensive as those afforded married couples in Hawaii, reciprocal beneficiaries did gain certain rights and obligations associated with survivorship, inheritance, property ownership and insurance. However, the reciprocal benefits law expired in 2001, and those who had registered as reciprocal beneficiaries are no longer eligible to receive those benefits.

Eight states — California, Connecticut, Maine, New York, Oregon, Rhode Island, Vermont and Washington — and 129 local governments and quasi-governmental agencies offer health insurance benefits to the partners of state employees, for a total of 137 state and local governments and quasi-governmental agencies.

Connecticut, Maine, Oregon and Washington all offer some variety of domestic partnership registration, which is generally used to prove relationships for state employees seeking employment benefits for partners and their children.

However, in most cases, the registries confer no benefits in and of themselves. Rather, they serve merely to memorialize the relationship.

The District of Columbia created a domestic partnership and registry program in 1992 but until 2001, Congress attached a rider to the annual D.C. appropriations bill that prohibited the city from spending any money to implement the program. In 2001, however, the House and Senate voted to permit the District of Columbia to spend its own funds, and on Dec. 21, President Bush signed the measure. The law immediately went into effect, and it is expected to be implemented April 1, 2002.

ANTI-GAY-MARRIAGE LAWS AROUND THE NATION

While a handful of states have extended some limited protections to same-sex couples, 36 states have moved in the opposite direction by passing laws that purport to declare that same-sex marriages performed in any jurisdiction would not be recognized in that state. The most extreme of them not only attempt to prohibit marriages between same-sex couples within the state but also purport to prohibit the recognition of any same-sex union — through marriage, civil unions or domestic partnerships — granted by another country or, should one permit it, an American state.²⁵

Moreover, although state law historically has governed marriage, Congress stepped in to pass an anti-gay-marriage bill, the Defense of Marriage Act (DOMA), which Democratic President Clinton signed into law in 1996. DOMA declares that, for the purposes of federal benefits, marriage shall be between one man and woman only and that no state shall be required to recognize a marriage that fails to conform to that definition.

The result: Even if a state passed a law recognizing marriage between a same-sex couple, the federal government could attempt to deny the couple access to the more than 1,000 federal rights, protections and responsibilities associated with marriage, and other states could attempt to assert DOMA as a justification for refusing to recognize same-sex marriage.

Are anti-gay-marriage laws constitutional? Both the federal and state laws stand in stark contrast to the way states regard marriages between opposite-sex couples, whereby, according to the Full Faith and Credit Clause of the U.S. Constitution, a marriage performed in any one state is generally honored in all others.²⁶ For this and other reasons, many legal scholars, including Professor Laurence Tribe from

Harvard Law School, have argued that both the federal and state anti-gay-marriage laws are unconstitutional. But no one has yet been able to test the laws in the courts because no state has passed a law allowing same-sex couples to marry.²⁷

TRANSGENDER PEOPLE AND MARRIAGE

Transgender individuals often can be legally married, within a heterosexual or same-sex relationship. For example, as Shannon Minter, legal director for the National Center for Lesbian Rights, has reported:

- > A man or woman who already is married and then undergoes sex-reassignment surgery often can remain legally married, if both spouses wish it.
- > In states where people are able to change their sex medically but not legally, a man who has undergone sex-reassignment surgery can marry a woman because he is still legally considered a man.
- > In states where people can change their sex medically and legally, the individual can simply marry someone of the opposite sex. (This includes: Arizona, California, Colorado, Georgia, Hawaii, Illinois, Iowa, Louisiana, Massachusetts, Maryland, Michigan, Nebraska, North Carolina, New Jersey, New Mexico, Oregon, Utah and Wisconsin.)

But while it is possible for transgender people to marry in some situations in some states, “the legal validity of marriages involving a transgendered spouse is not yet firmly established in the great majority of states,” according to Minter.

In 1999, for example, an appellate court in Texas invalidated a seven-year marriage between Christine Littleton, a transgender woman, and her deceased husband, claiming that her sex was fixed at birth despite her female anatomy. In contrast, a trial court in Orange County, Calif., affirmed in 1997 the validity of a marriage involving a transgender man, holding that California law recognizes the postoperative sex of a transsexual person for all legal purposes, including marriage.

More recently, in May 2001, the Kansas Court of Appeals issued a positive decision in a case involving J’Noel Gardiner, a transgender woman who married Marshall Gardiner after transitioning from male to female. When Marshall Gardiner died, his estranged son challenged J’Noel Gardiner’s marriage in a probate battle and a trial court ruled that it was invalid because she had been born a man. The Court of

TABLE 2. Anti-Gay-Marriage Laws*

State	YES	NO
Ala.	●	
Alaska	●	
Ariz.	●	
Ark.	●	
Calif.	●	
Colo.	●	
Conn.		●
D.C.		●
Del.	●	
Fla.	●	
Ga.	●	
Hawaii	●	
Idaho	●	
Ill.	●	
Ind.	●	
Iowa	●	
Kan.	●	
Ky.	●	
La.	●	
Maine	●	
Md.		●
Mass.		●
Mich.	●	
Minn.	●	
Miss.	●	
Mo.	● ¹	
Mont.	●	
Neb.	●	
Nev.		●
N.H.		●
N.J.		●
N.M.		●
N.Y.		●
N.C.	●	
N.D.	●	
Ohio		●
Okla.	●	
Ore.		●
Pa.	●	
R.I.		●
S.C.	●	
S.D.	●	
Tenn.	●	
Texas	●	
Utah	●	
Vt.		●
Va.	●	
Wash.	●	
W. Va.	●	
Wis.		●
Wyo.		●

* While some of these laws do not expressly forbid recognition of same-sex relationships, they effectively do so by declaring marriage to be between a man and a woman only.

1. Missouri was the only state to pass an anti-gay-marriage law in 2001. It states: “It is the public policy of this state to recognize marriage only between a man and a woman. Any purported marriage not between a man and a woman is invalid. No recorder shall issue a marriage license, except to a man and a woman. A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted.”

TABLE 3. Marriage, Civil Unions and Domestic Partner Bills Introduced in 2001

State	to permit marriage	to permit civil unions	to provide DP benefits ²	to bar protections	to roll back DP benefits
Ala.			● ¹		
Alaska					
Ariz.					
Ark.					
Calif.		●	●		
Colo.			●	● ³	
Conn.					
D.C.					
Del.					
Fla.					
Ga.					
Hawaii		●			
Idaho					
Ill.					
Ind.					
Iowa					
Kan.					
Ky.					
La.				● ³	
Maine			● ¹		
Md.			●	●	
Mass.			●	●	●
Mich.					
Minn.			●		
Miss.					
Mo.				● ¹	
Mont.					
Neb.					
Nev.			●		
N.H.				● ³	
N.J.					
N.M.				●	
N.Y.	●		●	●	
N.C.					
N.D.					
Ohio				● ³	
Okla.					
Ore.					
Pa.					
R.I.	●		●		
S.C.					
S.D.					
Tenn.					
Texas				● ³	
Utah					
Vi.				●	
Va.					
Wash.		●			●
W. Va.				● ³	
Wis.					
Wyo.				●	

1. Passed in 2001

2. The domestic partner bills introduced in these states would provide limited benefits to a restricted number of same-sex couples. For example, Alabama’s bill would permit state employees to use bereavement leave when a domestic partner dies; Colorado’s would allow partners to inherit from their deceased partners without a will; and Maine’s would require health insurance carriers to offer policies for unmarried couples under the same terms as married couples.

3. These states introduced bills that would go well beyond alleged efforts to “preserve” the institution of marriage for heterosexual couples. Specifically, they would prohibit recognition of marriage, civil unions, domestic partnership and other forms of same-sex relationships.

Appeals rejected what it referred to as a “rigid and simplistic” view of gender, observing that biology is “no longer the sole organizing principle” of the American family.²⁸

Still, even transgender individuals who are legally married should develop a legal safety net that would include a last will and testament, financial and medical powers of attorney and a written personal agreement, according to Minter, since these marriages can be vulnerable if challenged by others.²⁹

RELATED LAWS AND LEGISLATION IN 2001

The passage of a civil unions law in Vermont in 2000 sparked a wave of new legislation in 2001 as legislators introduced 29 bills in 22 states that would have affected the legal status of same-sex couples. About half of these would have strengthened protections for same-sex couples by providing them with the right to marry, enter into a civil union or receive limited domestic partner benefits. Half would have restricted protections by barring recognition of marriage, civil unions, domestic partnerships and/or other relationships for same-sex families — or by rolling back limited protections that already exist.

A bill known as the Domestic Partnership Benefits and Obligations Act of 2001 (H.R. 638) also was introduced in Congress on Feb. 14, 2001, to provide benefits to domestic partners of federal employees.

New trend. Bills intended to restrict protections to same-sex couples in six states (Colorado, Louisiana, New Hampshire, Ohio, Texas and West Virginia) were even more restrictive than most anti-gay-marriage laws currently on the books. That is, instead of simply barring recognition of marriage, they also address civil unions, domestic partnerships and/or “other forms” of same-sex relationships. As of this writing, the Ohio Legislature was still considering an extreme anti-gay-marriage bill.

This new trend exposes the hypocrisy in the argument that anti-gay activists who oppose extending the right to marry to same-sex couples simply wish to preserve the institution of marriage for heterosexual couples. Rather, the broad language of the bills introduced since Vermont adopted civil unions strongly suggests that those who support such bills seek to oppose even the most basic protection for these families, such as the right to visit an ill or dying partner in the hospital or cover a child under a partner’s health insurance policy.³⁰

Massachusetts marriage case. In April 2001, Gay &

Lesbian Advocates & Defenders (GLAD) filed suit on behalf of seven same-sex couples who were denied marriage licenses from their cities and towns. The case, *Goodridge v. Dept. of Public Health*, claims that the state's refusal to allow qualified same-sex couples to marry violates the state constitution's promises of equality, due process and free expression. GLAD is seeking to resolve the case without a trial, and its motion for summary judgment is slated to be heard in 2002. A final decision from the state Supreme Court could come sometime in 2003.

LAWS ENACTED IN 2001

Six bills addressing same-sex relationships were signed into law in 2001. Four were designed to provide some limited protections to same-sex families, and two to deny protections:

Those that newly provide some limited protections:

Alabama enacted a bereavement leave law May 10, 2001, allowing permanent state employees to take leave for the death of a person related by blood, adoption or marriage or any other person residing in the employee's immediate household at the time of death.

California enacted an enhanced domestic partner law Oct. 14, 2001, making couples who have registered as domestic partners eligible for new benefits, including improved sick leave provisions, disability coverage, expanded employer-sponsored health care, medical decision-making authority for partners and some important state tax breaks.

Maine enacted a law June 13, 2001, that requires health insurance carriers to offer policies providing coverage for domestic partners under the same terms and conditions as spouses. (Anti-gay forces have since launched a referendum drive to overturn this law.)

Rhode Island enacted a domestic partner law July 9, 2001, to provide insurance benefits to the domestic partners of state employees.³¹

Those that limit protections:

Michigan enacted a law July 25, 2001, that prohibits the use of state funds to pay for health insurance benefits for unmarried domestic partners of legislators and legislative employees.

Missouri enacted an anti-gay marriage law July 13, 2001, that declares same-sex marriage is against state policy.

THE STATE OF THE FAMILY

THE FAMILY

CHAPTER 3

Adoption

The prevailing professional opinion is that good parenting has nothing to do with one's sexual orientation. More specifically:

- > All major research studies, including a 2001 meta-analysis of two decades of studies on the topic, show that the sexual orientation of a parent is irrelevant to the development of a child's mental health and social development and to the quality of a parent-child relationship.³²
- > The major child welfare organizations, including the Child Welfare League of America and the North American Council on Adoptable Children, have issued policy statements asserting that a parent's sexual orientation is irrelevant to his or her ability to raise a child and called upon adoption agencies to simply disregard sexual orientation when evaluating an adoptive parent.^{33,34}
- > Leading psychological organizations, such as the American Psychological Association, also have declared that sexual orientation is not a determinant of good parenting.³⁵

ADOPTION LAWS AROUND THE NATION

Yet contrary to the findings of the research and the recommendations of child welfare experts, three states (Florida, Mississippi and Utah) have laws that explicitly prohibit gay and lesbian individuals and or couples from adopting children.

Florida's law, passed in 1977 and upheld in a 2001 challenge, explicitly prohibits both gay and lesbian individuals and couples from adopting.³⁶

Mississippi's law, passed in 2000, explicitly prohibits gay and lesbian couples from adoption and second-parent adoption, and it appears that the courts would similarly prohibit gay and lesbian individuals from adopting.³⁷

Utah's law, passed in 2000, precludes gay and lesbian couples (and unmarried heterosexual couples) from obtaining state-sponsored adoptions by disqualifying any prospective parent who lives in an intimate relationship with someone other than a spouse.³⁸

Moreover, even where legislatures are not proactively involved in the passage of provisions aimed at limiting the prospects of gay and lesbian people seeking to adopt, admin-

istrative regulations sometimes hinder the efforts of gay and lesbian people to qualify for adoption or foster parenting.

On the other hand, some states have moved to remove such statutory restrictions in recognition of professional opinion that supports gay and lesbian parents and out of concern for the welfare of the children involved. For example, in 1999, the New Hampshire Legislature voted to repeal a 1988 law that prohibited gay men and lesbians from adopting children or serving as foster parents and barred heterosexual foster parents from having gay or lesbian people spend the night in the same house as the child. The move was a victory for families.

In most places, the state policy toward same-sex parents is generally defined by case law, and case law on adoption is particularly difficult to discern because many states do not publish adoption decisions made at the family court level. If the state is not one where numerous adoptions by gay and lesbian parents have been reported, or where a case has been appealed to a higher court, one must look to custody and visitation case law for an indication of how judges in that area view gay and lesbian parents. Based on this approach, our best research shows that:

Courts in 10 states have relatively poor records with respect to adoption, custody or visitation by same-sex parents.³⁹

Courts in 20 states and the District of Columbia have demonstrated an openness to same-sex parents. However, roughly half of these states have demonstrated an openness to adoption by gay and lesbian individuals only while nine states plus the District of Columbia have also demonstrated an openness to adoption by gay and lesbian couples. (New Jersey and Illinois are among the most welcoming.)⁴⁰

In the remaining states, it is not possible to determine whether courts would discriminate against same-sex parents because the records are mixed or there are too few reported cases to determine a trend.

State laws do not specifically bar transgender people from adoption. However, a transgender person may be met with prejudice by adoption agency, child welfare workers or judges.⁴¹

TABLE 4. Laws and Court Records on Adoption by Gay and Lesbian Parents

State	good court record ¹	unclear court record	poor court record	state law prohibits
Ala.			●	
Alaska	● ²			
Ariz.		●		
Ark.			●	
Calif.	●			
Colo.	● ²			
Conn.	● ²			
D.C.	●			
Del.		●		
Fla.				●
Ga.		●		
Hawaii		●		
Idaho		●		
Ill.	●			
Ind.		●		
Iowa		●		
Kan.		●		
Ky.			●	
La.			●	
Maine		●		
Md.	● ²			
Mass.	●			
Mich.	● ²			
Minn.	● ²			
Miss.				●
Mo.		●		
Mont.		●		
Neb.			●	
Nev.		●		
N.H.	● ²			
N.J.	●			
N.M.	● ²			
N.Y.	●			
N.C.			●	
N.D.			●	
Ohio	● ²			
Okla.		●		
Ore.	● ²			
Pa.	●			
R.I.	●			
S.C.		●		
S.D.		●		
Tenn.	● ²			
Texas		●		
Utah				●
Vt.	●			
Va.			●	
Wash.	●			
W. Va.		●		
Wis.			●	
Wyo.			●	

1. Although these states are generally considered open to adoption by gay and lesbian parents, this is not necessarily true in some counties since county judges make the final adoption decisions and their opinions may vary.

2. Courts in these states have good records on adoption by gay and lesbian individuals, but not necessarily couples.

RELATED LAWS AND LEGISLATION IN 2001

In contrast to the legislative activity around marriage, civil unions and domestic partnerships, there was relatively little legislation concerning adoption by same-sex parents in 2001. Bills were introduced in three states, and none passed.

Arkansas and Indiana legislators introduced bills that would have required adoption agencies and judges to reject gay and lesbian parents seeking to adopt. But the Arkansas bill was twice voted down in committee, and the Indiana bill never came up for a vote before the end of the legislative session.⁴²

New Hampshire legislators introduced a bill that would have permitted gay, lesbian and heterosexual unmarried couples to adopt jointly, but it failed to pass the House. In 1999, Gov. Jeanne Shaheen, a Democrat, overturned a ban on adoptions by gay and lesbian parents. Lawmakers described the 2001 bill as further effort to remove discriminatory barriers to adoption.⁴³

TWO GAY MEN, SEEKING TO ADOPT

The following question and answer appeared in the “Ask the Experts” section of HRC FamilyNet (www.hrc.org/familynet). The Human Rights Campaign Foundation’s FamilyNet is the most comprehensive and up-to-date resource for and about lesbian, gay, bisexual and transgender families. It hosts more than 35 experts from the law, academia and national GLBT organizations.

Q: My partner and I live in Florida. We are very interested in adopting a child but, as two gay men, wonder if we are helpless, given Florida’s adoption laws. We own a home together and have many combined assets. So, on paper, there is no mistaking us as two single people living in the same house. I agree with the advice in the HRC FamilyNet adoption article to never lie during the adoption process. But is there any advice you can offer, or contacts you can provide, that could give us advice, help or hope for successfully navigating the adoption process in our state?

Thanks very much in advance,
Jennis

A: Dear Jennis,

I would say that there is no way at this time for a lesbian or gay man to successfully adopt in Florida without hiding his or her sexual orientation, and the HRC FamilyNet article correctly advises readers that they should not lie. Any adoption includes a home study, during which the basics of a person’s private life are revealed, including who is living in the home and the nature of that person’s relationship to the adoption applicant. So if you want to adopt in Florida and do not want to be dishonest about your sexual orientation, you have no choice but to wait until the law is changed or overturned. [Editor’s note: The ACLU and the Children First Project filed a class-action lawsuit in May 1999 challenging Florida’s adoption ban on behalf of children who are being denied adoptive homes and the gay men and lesbians who wish to adopt them. But the law was upheld in 2001.]

This does not mean that you are without options. For example, gays and lesbians can serve as foster parents in Florida. In fact, some of the ACLU’s plaintiffs in the legal challenge are foster parents. Sometimes, these foster placements are long-term. Also, it might be possible for you to adopt in another state that does not limit adoption to residents. For example, both New Jersey and Texas allow people who live out of state to apply to adopt. However, under the Interstate Compact on Adoption, Florida would have to give its consent to the out-of-state adoption, and it’s not clear whether it would.

Sincerely,
Michael Adams
Deputy legal director, Lambda Legal Defense and Education Fund

TABLE 5. Scorecard of Protections Available to Gay, Lesbian, Bisexual and Transgender Families Nationwide

	Rating	Permits marriage	Permits civil unions	Lacks anti-gay marriage law	Offers DP benefits for state employees	Good record on adoptions by individuals	Good record on adoptions by couples	Good record on second-parent adoptions	Includes sexual orient. in safe schools laws
District of Columbia	86%			●	●	●	●	●	●
Vermont	79		●	●	●	●	●	●	●
California	68				●	●	●	○	●
Connecticut	64			●	●	●		●	●
New Jersey	64			●		●	●	●	●
Minnesota	61					●		○	●
Rhode Island	61			●	●	●	●	○	
Massachusetts	57			●		●	●	●	●
New York	57			●	●	●	●	●	
New Hampshire	39			●		●		○	
Oregon	39			●	●	●		○	
Washington	39				●	●	●	○	
Illinois	36					●	●	●	
Nevada	36			●		○		○	
Wisconsin	36			●					●
Maryland	32			●		●		○	
Hawaii	29					○		○	
Maine	25				●	○			
Missouri	25					○			
New Mexico	25			●		●		○	
Ohio	25			●		●		○	
Delaware	21					○		○	
Iowa	21					○		○	
Pennsylvania	21					●	●		
Tennessee	21					●			
Alaska	18					●		○	
Arizona	18					○			
Colorado	18					●		○	
Michigan	18					●		○	
Texas	18					●		○	
Indiana	14					○		○	
Kentucky	14								
Nebraska	14								
Wyoming	14			●					
Georgia	11					○			
Kansas	11					○			
Louisiana	11							○	
Montana	11					○			
South Dakota	11					○			
West Virginia	11					○			
Arkansas	7								
Florida	7								
North Dakota	7								
Alabama	4							○	
Idaho	4					○			
Oklahoma	4					○			
South Carolina	4					○			
Mississippi	0								
North Carolina	0								
Utah	0								
Virginia	0								

THE STATE OF THE FAMILY

THE FAMILY

CHAPTER 4

Second-parent adoption

TWO-PARENT HOUSEHOLDS WITH ONLY ONE LEGAL PARENT

Because same-sex couples currently are denied the right to marry — and a number of states permit adoption by gay, lesbian and bisexual individuals, but not same-sex couples — many families are forced into situations in which only one parent in a two-parent household has a legal relationship to the child or children they are jointly raising. This puts the nonbiological or nonadoptive parent at risk of having his or her relationship with the child completely severed if the couple breaks up. More significantly, it also puts the children in these families at risk in times of greatest personal need.

For example, the children denied a legal relationship to both parents may be:

- > Denied access to insurance on the nonbiological or nonadoptive parent's health insurance policy (which is particularly important if he or she is the primary income-earner);
- > Denied medical treatment in an emergency (if, for example, the child is with the nonbiological or nonadoptive parent when an accident or illness occurs and the legal parent is not immediately available);
- > Denied financial support from, or even the opportunity to visit with, the nonbiological or nonadoptive parent if the couple separates;
- > Denied the opportunity to remain with the nonbiological or nonadoptive parent if the legal parent dies while the child is still a dependent;
- > Denied Social Security and other benefits should the nonbiological or nonadoptive parent die before the child turns 18;
- > Denied an inheritance from the nonbiological or nonadoptive parent if he or she dies without a will.

Because of these risks, many same-sex couples have tried to establish a framework of protections for their children and themselves — most adequately, through second-parent adoption. In a second-parent adoption, the partner of the biological or adoptive parent also adopts the child, thereby providing the child with two legal parents rather than one.

However, this alternative is not without obstacles. It can impose a significant financial burden and time delay since the same-sex partner seeking a second-parent adoption must hire an attorney, go through a home study and petition and appear before the court before he or she is awarded legal parent status. Yet there is a still more significant obstacle: Many states do not allow second-parent adoptions.

SECOND-PARENT ADOPTION LAWS AROUND THE NATION

Only six states and the District of Columbia have made second-parent adoption available statewide by either a statute or state appellate court ruling. Judges in 20 other states have awarded second-parent adoptions at the trial court level, meaning judges have granted them in select counties but there is no guarantee judges in other counties would do the same. In the remaining 24 states, our research has not revealed any second-parent adoptions, which means it is difficult to predict whether they would be granted there. The result: Whether two parents and their children can have a legal relationship depends upon where they happen to live and what judge they happen to get.

Even where second-parent adoptions have been granted, at least one state has reversed direction and stopped granting them. Specifically, while judges in 14 of Pennsylvania's 67 counties had once granted second-parent adoptions to same-sex couples, in November 2000, the state Superior Court ruled that same-sex couples are ineligible for second-parent adoption.⁴⁴

On Feb. 4, 2002, the American Academy of Pediatrics issued a policy statement supporting the legal and legislative efforts to provide second-parent adoption to same-sex parents and their children. "Children deserve to know that their relationships with both of their parents are stable and legally recognized," the association said. "This applies to all children, whether their parents are of the same or opposite sex." The statement, "Coparent or Second-Parent Adoption by Same-Sex Parents," appeared in the February 2002 issue of *Pediatrics*.

RELATED LAWS AND LEGISLATION IN 2001

No bills specifically addressing second-parent adoption were introduced in 2001. However, on Oct. 25, the 4th District Court of Appeal (San Diego) issued an unprecedented opinion in which two out of three judges indicated their position that second-parent adoptions are not valid under California law and that second-parent adoptions granted years ago may be found invalid. But in response to a request to reconsider its decision, the court issued a modified opinion Nov. 21, omitting the suggestion that previously granted second-parent adoptions may be invalid. On Jan. 29, 2002, the California Supreme Court agreed to review the lower court ruling, although it did not say when it would hear the case.⁴⁵

TABLE 6. States that Have Granted Second-Parent Adoptions

State	in some counties ¹	statewide ²
Ala.	●	
Alaska	●	
Ariz.		
Ark.		
Calif.	●	
Colo.	●	
Conn.		●
D.C.		●
Del.	●	
Fla.		
Ga.		
Hawaii	●	
Idaho		
Ill.		●
Ind.	●	
Iowa	●	
Kan.		
Ky.		
La.	●	
Maine		
Md.	●	
Mass.		●
Mich.	●	
Minn.	●	
Miss.		
Mo.		
Mont.		
Neb.		
Nev.	●	
N.H.	●	
N.J.		●
N.M.	●	
N.Y.		●
N.C.		
N.D.		
Ohio	●	
Okla.		
Ore.	●	
Pa. ³		
R.I.	●	
S.C.		
S.D.		
Tenn.		
Texas	●	
Utah		
Vt.		●
Va.		
Wash.	●	
W. Va.		
Wis.		
Wyo.		

1. In these states, second-parent adoptions have been granted at the lower state court (or county) level only. These rulings have no bearing on other counties within the state.

2. In these states, access to second-parent adoption proceedings has been guaranteed statewide by statute or state appellate court rulings.

3. Until recently, Pennsylvania granted second-parent adoptions in 14 of 67 counties. But in November 2000, the state Superior Court ruled they were no longer available to same-sex parents.⁴⁶

WHEN A STATE ROLLS BACK SECOND-PARENT ADOPTION

The following exchange was originally posted in HRC FamilyNet's "Ask the Experts" section.

Q: My partner and I live in Pennsylvania. She is pregnant with our first child, who is expected in February 2001. We have wills and durable powers of attorney for each other. What other legal documents can we get to protect our family? We understand that second-parent adoption is not an option in Pennsylvania at this time but what about guardianship?

Sincerely,
Justus

A: Dear Justus,

Unfortunately, you are correct that second-parent adoptions currently are not available in Pennsylvania. On Nov. 8, 2000, the Pennsylvania Superior Court held that a same-sex partner couldn't adopt her partner's legal children under state law without extinguishing the existing legal parent's rights. [See *In re Adoption of R.B.F.*, 2000 WL 1673363 at ¶ 14 (Pa. Super. 2000)]

You and your partner already have executed two important documents to protect your family in the absence of the possibility of a second-parent adoption: wills and durable powers of attorney. Another important document, which you also mentioned, is a nomination of guardianship or conservatorship. A nomination of a guardian or conservator assigns the care and custody of the child to another responsible adult in the event that the child's legal parent dies or becomes physically or psychologically unable to care for the child. While the nomination is not legally binding, most courts will give great defer-

ence to a clear nomination of guardianship in cases where there is no other legally recognized parent. Because the required format of these documents varies significantly from state to state, you are strongly urged to have the nomination drafted by an attorney who is aware of the requirements in your state.

In many states, this nomination can be included in the biological mother's will. In an attempt to stave off challenges by other relatives, the biological mother also should include a statement that she intentionally failed to name any of these relatives as the guardian of her child because she does not believe it would be in the best interest of the child to be placed in their custody.

You and your partner also may want to enter into a co-parenting agreement. You can find sample co-parenting agreements by going to HRC FamilyNet's Legal Center. You also can find these documents in the National Center for Lesbian Rights publication, "Lesbians Choosing Motherhood," which is available on our website. While a judge is not legally required to enforce these agreements, some courts have looked to these types of agreements as evidence of the parties' intent.

Sincerely,
Kate Kendell
Executive director, National Center for Lesbian Rights

THE FAMILY

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CHAPTER 5

Safe schools

HARASSMENT AND DISCRIMINATION

In the early 1990s, an Ashland, Wis., student named Jamie Nabozny was harassed in school because he was suspected of being gay. In the seventh grade, he was called names. In the eighth grade, he was pushed, beaten up, tripped, spit upon and pinned to a classroom floor in a mock rape. He studied in darkened hallways so other students wouldn't find him. But they found him anyway and one boy kicked him in the stomach so badly that he needed surgery. By the 11th grade, after repeated appeals to administrators for help, he finally dropped out of school — “battered, terrified, heartsick.”⁴⁶

This was not an isolated case of harassment or discrimination against a gay, lesbian, bisexual or transgender student or the child of same-sex or transgender parents. Indeed, four of five students report that they have experienced some type of sexual harassment in school, according to the American Association of University Women Educational Foundation.⁴⁷

LAWS AROUND NATION

Despite the fact of harassment and discrimination based on sexual orientation and gender identity in schools, only seven states and the District of Columbia expressly prohibit harassment or discrimination based on sexual orientation in school. These states are: California, Connecticut, Massachusetts, Minnesota, New Jersey, Vermont and Wisconsin.

Only California and Minnesota also expressly protect students from harassment or discrimination based on gender identity. The District of Columbia also appears to cover discrimination based on gender identity under the personal appearance provision of the D.C. Human Rights Law. And in some states, lower courts are using sex discrimination protections to protect transgender students.

A number of other states have policies that can be interpreted to ban harassment and/or discrimination based on sexual orientation, including: Alaska, Connecticut, Florida, Hawaii, Pennsylvania and Rhode Island.

FEDERAL LAWS

Two federal laws have been successfully used to hold schools responsible for protecting students from such harassment based on sexual orientation. They are:

- > The Equal Protection Clause of the U.S. Constitution. In 1996, the Equal Protection Clause was used successfully for the first time to ensure a student's right to freedom from discrimination. The case was filed by Lambda Legal Defense and Education Fund on Jamie Nabozny's behalf — and, in it, the jury found the Wisconsin school's principals liable for violating his constitutional rights to equal protection from harm by repeatedly refusing to come to his aid. Following the ruling, the school district agreed to a more than \$900,000 settlement.⁴⁸
- > Title IX of the Education Amendments of 1972. More commonly known as simply Title IX, this law prohibits discrimination or harassment on the basis of sex or gender in school programs or activities that receive federal financial assistance.

The law defines sexual harassment as situations in which “a student is subjected to unwanted verbal or physical conduct of a sexual nature which has the purpose or effect of unreasonably interfering with an individual's education by creating an intimidating, hostile or sexually offensive educational environment.”

Harassment under Title IX might include sexual harassment incidents against students because they are perceived to be gay, lesbian or bisexual, as Lambda attorney David Buckel has written, or, by extension, because their parents are gay or lesbian.⁴⁹

RELATED LAWS AND LEGISLATION IN 2001

Legislators in Maine, Michigan, Nevada, New York, Oregon, Texas and Washington introduced bills in 2001 that would have established new safe schools laws that include sexual orientation. The New York and Texas bills also addressed gender identity. None of these bills passed.

At the federal level, Sen. Paul Wellstone, D-Minn., introduced a bill, S. 1357, in 2001 that would provide for an examination of how schools are implementing the policy guidance of the Department of Education's Office for Civil Rights relating to sexual harassment directed against gay, lesbian, bisexual and transgender students.

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CHAPTER 6

Discrimination

RISK OF BEING FIRED

Although federal law prohibits employment discrimination based on race, religion, sex and other characteristics, there is no federal prohibition against discrimination based on sexual orientation, except among federal civilian employees.⁵⁰ Moreover, in 38 states, a person can be fired, barred from renting an apartment or turned away from hotels, restaurants and other public accommodations just for being — or being perceived to be — gay, lesbian or bisexual.

This does not necessarily mean that gay and lesbian families are routinely discriminated against in all these states, although the evidence shows that many are.⁵¹ But, in four out of five states, gay and lesbian families are extremely vulnerable to discrimination because they are dependent not upon the protection of law but the good will of individual employers, landlords, hotel managers and others.

LAWS AROUND THE NATION

Currently, only the District of Columbia and the following 12 states outlaw discrimination based on sexual orientation in employment, housing and public accommodations. Those with asterisks also prohibit discrimination in credit.

California*	Nevada
Connecticut*	New Hampshire
Hawaii	New Jersey*
Maryland	Rhode Island*
Massachusetts*	Vermont*
Minnesota*	Wisconsin*

TRANSGENDER PEOPLE

There is no federal law explicitly prohibiting discrimination based on gender identity although a few courts have found Title VII of the Civil Rights Act to apply to certain kinds of discrimination based on gender nonconformity. Only two states have explicit statutory provisions against discrimination based on gender identity. Courts and administrative agencies in four additional states have interpreted their sex, disability or sexual orientation discrimination statutes to prohibit certain forms of discrimination against transgender people. These states are:

Connecticut, where the state Commission on Human Rights and Opportunities ruled in 2000 that transgender

people may pursue claims of discrimination under the “sex” category in that state’s non-discrimination law.

Massachusetts, where the Massachusetts Commission Against Discrimination in October 2001 interpreted the state’s anti-discrimination and disability laws to provide protections to transgender people.⁵²

Minnesota, which has a non-discrimination law that explicitly forbids discrimination based on gender identity.

New Jersey, where an appeals court found in July 2001 that the state’s non-discrimination law also prohibits discrimination based on gender identity.

New York, where a federal district court and New York County court held that the New York Human Rights Law covers discrimination based on gender identity.

Rhode Island, where Gov. Lincoln C. Almond, a Republican, allowed a non-discrimination law that explicitly forbids discrimination based on gender identity to become law without his signature in 2001.

The District of Columbia also protects transgender people from discrimination under the “personal appearance” sections of its civil rights law.

RELATED LAWS AND LEGISLATION IN 2001

On July 31, 2001, the federal Employment Non-Discrimination Act (ENDA) was reintroduced in the U.S. Congress. If passed, it would make it illegal to discriminate in employment based on real or perceived sexual orientation.

Legislators in 22 states introduced bills related to discrimination in employment in 2001.

- > In 20 states, bills were introduced that would have outlawed discrimination based on sexual orientation. Among these, nine also would have outlawed discrimination based on gender identity.
- > In two states where discrimination based on sexual orientation already is prohibited, legislators introduced bills to prohibit discrimination based on gender identity.

TABLE 7. Non-discrimination Bills Introduced in 2001

State	based on sexual orient.	based on gender ID.
Ala.		
Alaska		
Ariz.	●	●
Ark.		
Calif.		●
Colo.	●	●
Conn.		
D.C.		
Del.	●	
Fla.		
Ga.	●	●
Hawaii		
Idaho		
Ill.	●	●
Ind.		
Iowa	●	
Kan.		
Ky.	●	●
La.	●	●
Maine		
Md.	●	
Mass.		
Mich.	●	
Minn.		
Miss.		
Mo.	●	●
Mont. ¹	●	
Neb.	●	
Nev.		
N.H.		
N.J.		
N.M.	●	
N.Y.	●	●
N.C.		
N.D.		
Ohio		
Okla.		
Ore.	●	
Pa.	●	
R.I.		●
S.C.		
S.D.		
Tenn.		
Texas	●	●
Utah		
Vt.		
Va.	●	
Wash.	●	
W. Va.		
Wis.		
Wyo.		

1. Montana legislators also sought to repeal a ban on discrimination among state employees.

LAWS ENACTED

Two states passed non-discrimination laws in 2001:

Rhode Island expanded its existing non-discrimination law to prohibit discrimination based on gender identity in employment, housing, public accommodations and credit; and

Maryland expanded its existing non-discrimination law to prohibit discrimination based on sexual orientation in employment, housing and public accommodations. In early July, an anti-gay coalition gathered signatures aimed at forcing a referendum on the law, thereby temporarily suspending its enactment. But on Nov. 21, the law went into effect when its opponents conceded that they failed to obtain enough valid signatures to bring the law before voters in a 2002 referendum.

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CHAPTER 7

Hate Crimes

“Matt is no longer with us today because the men who killed him learned to hate. Somehow and somewhere, they received the message that the lives of gay people are not as worthy of respect, dignity and honor as the lives of other people.”

— Judy Shepard, mother of Matthew Shepard, slain University of Wyoming student⁵³

CRIMES AGAINST ALL FAMILIES

When white mobs lynched blacks in the South — hanging them from trees and bridges as crowds eerily laughed in the face of their suffering and death — harm was inflicted not only to the murdered individuals and their families. An intimidating and dangerous message also was transmitted to every other living black person that warned: Your life is worthless. You could be attacked or killed because of the color of your skin.

The same holds true when a young man is pistol-whipped and left to die on a fence in Wyoming because someone didn't like that he was gay, or when a young black transgender woman dies on a New York City street after thugs slashed her throat while cabdrivers cheered and applauded. Such crimes send an intimidating warning to every other living gay, lesbian, bisexual and transgender person because these crimes are motivated not merely by hatred against the individual victim but an entire class of people.

LAWS AROUND THE NATION

Recognizing that crimes motivated by hatred for a particular group sends an intimidating message to other members of that group, the federal government and all but five states have passed hate crimes laws that declare that certain crimes — such as those motivated by racism — should be treated differently from similar crimes not motivated by prejudice.

Yet the federal statute used to prosecute hate violence (18 U.S.C. Section 245) fails to include violence based on sexual orientation or gender identity and the two federal hate crime statutes that include “sexual orientation” do not accomplish what is needed. One of these authorizes the collection of hate crimes statistics and the other addresses sentencing for hate crimes but is rarely used because it applies only in the narrow instances in which a hate crime is committed on federal property.

The Hate Crimes Statistics Act, U.S.C. 524, which became law in 1990 and was reauthorized in 1996, authorizes the FBI to collect statistics on hate crimes on

the basis of race, religion, ethnicity, sexual orientation and disability.

The Hate Crimes Sentencing Enhancement Act, U.S.C. 994, which was passed as a part of the Violent Crime Control and Law Enforcement Act of 1994, directs the U.S. Sentencing Commission to provide sentencing enhancements of “not less than three offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes.” The provision defines a hate crime as “a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.” Because its definition of a hate crime is so narrow, the Hate Crimes Sentencing Enhancement Act is rarely enforced.

Moreover, 46 states lack laws that address crimes motivated by prejudice against the victim's gender identity; 23 states lack hate crime laws that address crimes motivated by prejudice against the victim's sexual orientation; and the federal hate crimes law fails to include either crimes motivated by sexual orientation or gender identity.

Eighteen states already have hate crimes laws on the books that address crimes motivated by prejudice against race and other personal factors but not sexual orientation, despite the fact that gay and lesbian people are the third most frequent targets of hate crimes, according to the FBI.⁵⁴

The FBI does not collect statistics on the number of transgender people who are the victims of hate crimes. However, there was a 30 percent increase in reported hate crimes against transgender people from 1999 to 2000, according to the National Coalition of Anti-Violence Programs, a non-profit organization that tracks bias incidents against gay, lesbian, bisexual and transgender people.

TABLE 8. Hate Crimes Laws that Include or Exclude Crimes Motivated by Sexual Orientation or Gender Identity

State	includes sexual orient.	includes gender I.D.	excludes both
Ala.			●
Alaska			●
Ariz.	●		
Ark.			
Calif.	●	●	
Colo.			●
Conn.	●		
D.C.	●	●	
Del.	●		
Fla.	●		
Ga.			●
Hawaii	● ¹		
Idaho			●
Ill.	●		
Ind.			
Iowa	●		
Kan.	●		
Ky.	●		
La.	●		
Maine	●		
Md.			●
Mass.	●		
Mich.			●
Minn.	●	●	
Miss.			●
Mo.	●	●	
Mont.			●
Neb.	●		
Nev.	●		
N.H.	●		
N.J.	●		
N.M.			
N.Y.	●		
N.C.			●
N.D.			●
Ohio			●
Okla.			●
Ore.	●		
Pa.			●
R.I.	●		
S.C.			
S.D.			●
Tenn.	●		
Texas	● ¹		
Utah			●
Vt.	●	●	
Va.			●
Wash.	●		
W. Va.			●
Wis.	●		
Wyo.			

1. Passed in 2001

RELATED LAWS AND LEGISLATION IN 2001

In July 2001, the U.S. Senate Judiciary Committee voted in favor of sending the Local Law Enforcement Enhancement Act (formerly known as the Hate Crimes Prevention Act) to the full Senate and urged that a vote be scheduled promptly. The bill, S.625, which has significant support in Congress, would define hate crimes as including those based on real or perceived sexual orientation, gender or disability.

It also would remove a burdensome requirement that the victim was attacked because he or she was engaged in a federally protected activity. In addition, it would provide federal technical and financial assistance to state and local law enforcement agencies to investigate and prosecute hate crimes.

Meanwhile, legislators in 19 states introduced 22 hate crimes bills in 2001. Specifically:

- > In 13 states, bills would have added sexual orientation to an existing hate crimes law: Alabama, Alaska, Colorado, Illinois, Indiana, Michigan, Mississippi, Montana, North Carolina, Pennsylvania, Texas, Virginia and West Virginia.
- > In five states, bills would have established new hate crimes laws that included crimes based on sexual orientation: Arkansas, Hawaii, Kansas, New Mexico and South Carolina.
- > In four of these states, Colorado, Illinois, Pennsylvania and Washington, where sexual orientation already is included in the hate crimes law, bills also were introduced to add gender identity.

LAWS ENACTED

Texas and Hawaii became the 26th and 27th states to pass hate crimes laws that included crimes motivated by bias based on sexual preference or orientation in 2001. No state passed a hate crimes law in 2001 that included crimes motivated by gender identity.⁵⁵

THE STATE OF THE FAMILY

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CHAPTER 8

Sodomy laws

Thirteen states still outlaw private consensual sexual relations between adults of the same sex even in the privacy of their own homes. In 10 of those states, the laws technically apply to opposite-sex couples as well. Historically, however, sodomy laws have been disproportionately enforced against same-sex couples, a fact that is so widely recognized that many people think they only apply to gay and lesbian people.

A holdover from the time of Henry VIII (see p. 32), sodomy laws have been overturned in 37 states since the late 1960s. As Republican Gov. Jane Hull said as she signed a bill in 2001 to overturn Arizona's sodomy law: "At the end of the day, I returned to one of my most basic beliefs about government: It does not belong in our private lives."⁵⁶

But the fact that sodomy laws remain on the books, even if they are rarely enforced, continues to send a strong message that same-sex couples are, *ipso facto*, lawbreakers and undeserving of the same rights and protections as other Americans. Indeed, sodomy laws have been used to justify the denial of custody and visitation rights, equal opportunities in employment and other aspects of ordinary life.

LAWS AROUND THE NATION

Unless otherwise noted, the following states outlaw both opposite-sex and same-sex sodomy:

Alabama	North Carolina
Florida	Oklahoma (same-sex only)
Idaho	South Carolina
Kansas (same-sex only)	Texas (same-sex only)
Louisiana	Utah
Massachusetts	Virginia
Mississippi	

RELATED LAWS AND LEGISLATION IN 2001

Three states overturned their sodomy laws in 2001 as a result of the legislatures' repealing the laws or courts' striking them down.

- > An **Arkansas** circuit court struck down the state's law, saying it was unconstitutional.

- > The **Arizona** Legislature passed a measure to overturn the state's sodomy law that was introduced by the state's openly gay Republican Rep. Steve May, and Republican Gov. Jane Hull signed it into law.
- > A **Minnesota** state district judge also ruled that the state's sodomy law was unconstitutional because it violated the right of privacy guaranteed by the state's constitution.
- > Legislators in three other states, **Louisiana, Montana and Texas**, also introduced bills to overturn their sodomy law in 2001. Louisiana's bill came close to passing but died in conference committee on the last day of the 2001 legislative session. The other two bills also failed.

At this writing, the Texas law also was being challenged in court in *Lawrence and Garner v. Texas*, a case involving two men who in 1998 were arrested and convicted for having consensual relations in the privacy of their home. Lambda Legal Defense and Education Fund has argued that the law violates the state's Equal Rights Amendment because it prohibits behavior based on gender. Lambda lost the case in lower court but appealed to the Texas Court of Criminal Appeals, where a decision was pending.

In response to a court challenge, the Massachusetts Supreme Judicial Court upheld the state's two sodomy laws Feb. 21, 2001, but stated that the laws could only be enforced in cases where the sexual relations occurred in public or were not consensual. The challenge was brought by Gay & Lesbian Advocates & Defenders.

Other states that recently overturned their sodomy laws include:

- > Maryland, in 1999
- > Georgia, in 1998⁵⁷
- > Montana, in 1997
- > Tennessee, in 1996⁵⁸

THE ORIGIN OF SODOMY LAWS

Henry VIII established the first law against sodomy in 1533 as part of his renunciation of the Roman Catholic Church, according to William N. Eskridge Jr., professor of law at Yale Law School. Where the church once was the chief authority that sought to restrict sexual behavior that failed to lead to procreation, Henry VIII established this and other laws to gain some of the church's authority for himself, according to Eskridge.

While declaring that those who committed sodomy would be put to death, the king failed to define exactly what constituted sodomy. In his words, it was broadly “the detestable and abominable vice of buggery committed with mankind or beast.” The American colonies, and later all 50 United States, carried over similar laws — dropping the death penalty but similarly failing to define what they meant by “sodomy.”

In the 19th century, Pennsylvania became the first state to define sodomy to include oral sex, and 31 states and the District of Columbia soon followed. This definition led to two developments: First, it made clear that women as well as men could be arrested for sodomy and, second, it made it easier to arrest people for it.

In the mid-1950s, the American Law Institute declared that there was a growing consensus among legal, criminal and medical experts that sodomy caused no harm to society. In fact, the institute argued, sodomy laws caused harm because they deprived people of freedom in personal lives. They should, therefore, be overturned, they argued.

With the rise of the gay and lesbian civil rights movement in the late 1960s, a similar political energy against sodomy laws also arose, which finally led to the challenge — and overturning of — sodomy laws in most states.⁵⁹

THE FAMILY

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CHAPTER 9

Federal laws

Although the federal government has taken the lead in protecting many minority groups from discrimination, it has largely failed to do so for same-sex and transgender families, who are subject not only to prejudice in their personal lives but under law. A number of important bills were introduced or reintroduced in the U.S. Congress in 2001 that would address some of these inequities in the areas of employment discrimination, family and medical leave benefits, immigration restrictions and hate crimes.

MARRIAGE

In 1997, Congress passed the Defense of Marriage Act, creating a definition of “marriage” for the purposes of federal law for the first time in American history. The law defines marriage as “a legal union between one man and one woman as husband and wife” and purports to block same-sex couples from access to the more than 1,000 rights, protections and responsibilities that come with marriage. The law also supposedly gives states a basis for refusing to recognize marriages of same-sex couples celebrated in other countries. Many legal scholars have questioned whether this law is constitutional under the Full Faith and Credit Clause by which marriages performed in any state are generally honored in all others.

2001 Legislative Action. None.

DOMESTIC PARTNERSHIP

Federal employment benefits still favor married workers while unmarried workers with committed life partners and their children lack many protections. For example, denial of health insurance and other benefits to the life partners of lesbians and gay men is a significant form of employment discrimination. Because such benefits constitute a significant portion of an employee’s compensation, a gay person who is denied benefits for his or her partner is essentially being paid less than a married worker who receives benefits for his or her spouse.

In today’s competitive work environment, more and more states and municipalities and private companies across the country are discovering that it makes good business sense to extend such benefits to their gay and lesbian employees. Currently, eight states and 129 local governments and quasi-governmental agencies and more than 4,200 other employers do so, including over 29 percent of the Fortune 500.⁶⁰ But the federal government does not offer domestic partner benefits.

2001 Action. The Domestic Partnership Benefits and Obligations Act of 2001, H.R. 638, would provide health insurance and other employee benefits to domestic partners of federal employees.

MEDICAL LEAVE

The Family and Medical Leave Act of 1993 allows workers to take up to 12 weeks of unpaid leave to care for a seriously ill partner or family member. It does not extend this same right to GLBT workers who may need leave to care for a seriously ill unmarried or same-sex partner or parent of such a partner.⁶¹

2001 Legislative Action. H.R. 2287 would amend the Family and Medical Leave Act to permit leave to care for a domestic partner if he or she has a serious health condition.

SOCIAL SECURITY

Gay and lesbian individuals and some transgender people are denied Social Security survivor benefits when a life partner dies. Children are ineligible for survivor benefits if one of their parents dies but was not a biological parent or was unable to obtain a second-parent adoption.

2001 Legislative Action. None.

TAX LAW

Same-sex couples are denied many of the savings provided married couples through the federal tax law. For example, they:

- > Are taxed on employer-provided insurance benefits for domestic partners whereas married spouses receive those benefits tax-free.
- > Cannot reduce estate taxes by taking the unlimited deduction for amounts transferred to a surviving spouse.
- > Cannot combine their medical and dental expenses with their partner’s to reach the minimum requirement of 7.5 percent of adjusted gross income necessary to claim a deduction.

2001 Legislative Action. None.

SCHOOLS

Two federal laws have been used to hold schools responsible for protecting students from harassment based on sexual orientation. One is Title IX of the Education Amendments of 1972, which prohibits discrimination or harassment on the basis of sex or gender in school programs or activities that receive federal financial assistance. For example, harassment under Title IX might include incidents against students who are sexually harassed because they — or their parents — are perceived to be gay, lesbian or bisexual.

The other law is the Equal Protection Clause of the Constitution, which was used successfully for the first time in 1996 to ensure a student's right to freedom from discrimination. In that case, the court found a Wisconsin school's principals liable for violating a gay student's constitutional right to equal protection from harm by repeatedly refusing to come to his aid. The school district agreed to a more than \$900,000 settlement.

2001 Legislative Action. S. 1357 would examine how schools are implementing the policy guidance of the Department of Education's Office for Civil Rights relating to sexual harassment directed against gay, lesbian, bisexual and transgender students.

IMMIGRATION LAW

U.S. citizens or permanent residents are not permitted to petition for their same-sex partners to immigrate under the U.S. Immigration and Nationality Act. People living with HIV also are prohibited from immigrating to the United States. As a result, thousands of same-sex couples are forced to live apart or are left with no choice but to migrate with their partners to one of the 15 countries with more equitable immigration laws. The countries that recognize same-sex couples for immigration purposes are: Australia, Belgium, Canada, Denmark, Finland, France, Germany, Iceland, Israel, The Netherlands, New Zealand, Norway, South Africa, Sweden and the United Kingdom

2001 Legislative Action. The Permanent Partners Immigration Act, H.R. 690, would provide same-sex partners of U.S. citizens and lawful permanent residents the same immigration rights that legal spouses of U.S. residents enjoy. The bill would add the term "permanent partner" to the federal law's list of definitions of family and cover same-sex partners and unmarried opposite-sex partners of U.S. citizens and lawful permanent residents.

Under the measure, a permanent partner is any person 18 or older who is:

- (a) in a committed, intimate relationship with another adult 18 or older in which both parties intend a lifelong commitment;
- (b) financially interdependent with that other person;
- (c) not married to, or in a permanent partnership with, anyone other than that other person; and
- (d) unable to legally marry that person.

EMPLOYMENT

There is no federal law that explicitly forbids employment discrimination based on sexual orientation or gender identity. The Americans with Disabilities Act, which was signed into law in 1990, also expressly excludes "gender identity disorders." [42 U.S.C.A. 12211(b)(1)]

In 1998, President Clinton signed Executive Order 13087, prohibiting discrimination based on sexual orientation in the federal civilian work force. As an executive order, this protection could be abolished by any president. To date, President Bush has allowed this measure to stand.

2001 Legislative Action. The Employment Non-Discrimination Act, S. 1284, H.R. 2692, was reintroduced in 2001. It would make it illegal to discriminate in employment based on real or perceived sexual orientation.

HATE CRIMES

The federal statute used to prosecute hate violence (18 U.S.C. Section 245) fails to include violence based on sexual orientation or gender identity. The two federal hate crime statutes that include "sexual orientation" do not accomplish what is needed, which includes the ability of federal law enforcement agencies to investigate hate crimes based on sexual orientation and gender identity.

The Hate Crimes Statistics Act, U.S.C. 524, which became law in 1990 and was reauthorized in 1996, simply requires the FBI to collect statistics on hate crimes on the basis of race, religion, ethnicity, sexual orientation and disability.

The Hate Crimes Sentencing Enhancement Act, U.S.C. 994, which was passed as a part of the Violent Crime

Control and Law Enforcement Act of 1994, directs the U.S. Sentencing Commission to provide sentencing enhancements of “not less than three offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes.” The provision defines a hate crime as “a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.” Yet this law is rarely enforced because its definition of a hate crime is so narrow.

2001 Legislative Action. The Local Law Enforcement Enhancement Act (formerly known as the Hate Crimes Prevention Act), S. 625, H. 1343, was introduced. It would define hate crimes as including those based on real or perceived sexual orientation, gender and disability.

ENDNOTES

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2. Benkov, Laura, "Reinventing The Family: The Emerging Story Of Lesbian And Gay Parents," (New York: Crown Publishers Inc., 1994).
3. Bisexual people who live within a gay or lesbian family can be equally affected by the lack of protection afforded gay, lesbian and transgender families.
4. Minter, Shannon, "Transgendered Persons and Marriage: The Importance of Legal Planning," National Center for Lesbian Rights, 2001, and "Representing Transsexual Clients: An Overview of Selected Legal Issues," National Center for Lesbian Rights, 2000.
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7. The Florida law, which prohibits both individuals and couples from adopting, was upheld in a 2001 challenge.
8. Based on the Human Rights Campaign's review of court records with respect to adoption, custody or visitation.
9. Shannon Minter, in answer to a question posted on HRC FamilyNet, <http://www.hrc.org/familynet/chapter.asp?article=312>.
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11. "Defense of Marriage Act: OGC-97-16," *op. cit.*
12. The Texas bill addressed "sexual preference" although this term is considered misleading. The preferred term is "sexual orientation."
13. "Md. Rights Law To Take Effect," *The Washington Blade*, Nov. 23, 2001.
14. "Christian Civic League Says It Lacks Signatures for Referendum Question," The Associated Press, Jan. 8, 2002.
15. "Group Proposes Constitutional Amendment To Block Same-Sex Marriages," The Associated Press, July 24, 2001; "Gay and Lesbian Group Sues to Block Massachusetts Ballot Question on Marriage," The Associated Press, Oct. 4, 2001; "GLAD Will Challenge Anti-Gay Ballot Initiatives in the Supreme Judicial Court," Gay & Lesbian Advocates & Defenders news release, Sept. 5, 2001.
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18. "Gay Rights Advocates Win Victory for Tolerance," *Kalamazoo Gazette*, Nov. 7, 2001.
19. *Ibid.*
20. "Miami Beach Voters Approve Domestic Partnership Initiative," *Miami Herald*, Nov. 7, 2001.
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22. For more information, visit HRC FamilyNet's "Legal Center," <http://www.hrc.org/familynet/chapter.asp?chapter=75>.
23. "Court: Civil Unions Aren't 'Marriage,'" The Associated Press, Jan. 25, 2002.
24. "State Senate OKs Milestone Domestic Partners Bill," *San Francisco Chronicle*, Sept. 11, 2001.
25. The Netherlands became the first country to permit same-sex couples to marry in 2001. It appears likely that Belgium will follow suit in 2002.
26. "Is DOMA Doomed? The Federal 'Defense of Marriage Act' and State Anti-Gay, Anti-Marriage Laws," Gay & Lesbian Advocates & Defenders, 2001.

27. The Full Faith and Credit Clause of the U.S. Constitution states in part: “Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state.”
28. “Kansas Widow Can Argue That Earlier Sex Change Does Not Invalidate Her Marriage,” Lambda Legal Defense and Education Fund news release, May 11, 2001.
29. Minter, “Transgender Persons and Marriage,” *op. cit.*
30. Such severe limitations were first seen in Nebraska in November 2000.
31. The Washington State Public Employees Benefits board also approved a motion in May 2001 to provide domestic partners of state employees with health insurance coverage.
32. Stacey, Judith, and Biblarz, Tim, “How Does the Sexual Orientation of Parents Matter?” *American Sociological Review*, April 2001. While there are no ironclad studies on the number of gay and lesbian parents of children under the age of 18, estimates range from 700,000 to 6 million.
33. The Child Welfare League of America’s Standards for Adoption Service of 1988 states, in part, “Applicants should be fairly assessed on their abilities to successfully parent a child needing family membership and not on their appearance, differing lifestyle, or sexual preference.”
34. The North American Council on Adoptable Children policy of 1998 states, in part, “Everyone with the potential to successfully parent a child in foster care and adoption is entitled to fair and equal consideration regardless of sexual orientation or differing life style or physical appearance.” North American Council on Adoptable Children website. (http://www.nacac.org/about_policystatements.html#gay)
35. Conger, J.J., “Proceedings of the American Psychological Association, Incorporated, for the year 1976: Minutes of the Annual Meeting of the Council of Representatives,” *American Psychologist*, 32 (1977), pp. 408-438. The American Psychological Association policy states, in part, “The sex, gender identity, or sexual orientation of natural, or prospective adoptive or foster parents should not be the sole or primary variable considered in custody or placement cases.”
36. Fla. Stat. Ch. 63.042(3) (1999).
37. A Mississippi appellate court found in 2001 that the adoption statute, combined with the state’s anti-adoption law, indicate the Legislature’s intent to restrict the rights of gays and lesbians.; *S.B. v. L.W.*, 793 So. 2d 656 (Miss. App. 2001).
38. Utah Code Ann., 78-30-1 (2000); 62A-4a-6-2 (2000).
39. Based on court records with respect to adoption, custody or visitation.
40. The New Jersey Supreme Court has ruled that sexual orientation is an impermissible basis for discrimination in adoption, custody and visitation. Illinois’ state adoption act explicitly permits gay and lesbian parents to adopt.
41. Minter on HRC FamilyNet, *op. cit.*
42. Gay and lesbian parents are not permitted to become foster parents in Arkansas since an October 2000 decision by the state’s Child Welfare Agency Review Board.
43. “All Couples Included in Adoption Bill,” *Concord Monitor*, Jan. 31, 2001.
44. *In re Adoption of R.B.F.*, 2000 WL 1673363 at ¶ 14 (Pa. Super. 2000). This ruling did not appear to be motivated by an effort to discriminate against same-sex families, but, rather, by a technicality, as the court said the state’s Adoption Act makes second-parent adoption available to married couples only. Nonetheless, the withdrawal of a form of protection previously granted underscores the vulnerability of gay and lesbian parents and their children.
45. “Court Agrees to Hear Case Overturning Gay Adoptions,” *The Associated Press*, Jan. 29, 2002.
46. “Million-Dollar Court Case Sends a Clear Message to Schools: Protect Gay Students Equally or Pay,” *The Detroit News*, Nov. 29, 1996.
47. “Hostile Hallways: Bullying, Teasing, and Sexual Harassment in School,” 2001, <http://www.aauw.org/2000/hostile.html>
48. “Million-Dollar Court Case Sends a Clear Message to Schools: Protect Gay Students Equally or Pay.” *op. cit.*

49. “Youth Bring Gay Rights Movement to School,” Oct. 1, 1999, <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=494>.

50. President Clinton signed Executive Order 13087 in 1998 prohibiting discrimination based on sexual orientation in the federal civilian work force. President Bush has allowed it to stand.

51. “Documenting Discrimination: A Special Report from the Human Rights Campaign Featuring Cases of Discrimination Based on Sexual Orientation in America’s Workplace,” Human Rights Campaign Foundation, 2001.

52. “Ruling Allows Transsexuals to Sue Under Disability Discrimination Laws,” *The Associated Press*, Oct. 16, 2001.

53. Testimony before U.S. Senate Judiciary Committee hearing on hate crimes in May 1999.

54. “Uniform Crime Reports: Hate Crime Statistics 2000,” U.S. Department of Justice, Federal Bureau of Investigation, 2000.

55. The Hawaii statute covers bias based on “actual or perceived” sexual orientation.

56. “Hull Signs Repeal of Sex Laws,” *Arizona Republic*, May 9, 2001.

57. The state’s high court overturned the law notoriously upheld by the U.S. Supreme Court in the 1986 case, *Bowers v. Hardwick* (U.S. Supr. Ct. 1986).

58. Eskridge Jr., William N. *Gaylaw* (Cambridge, Mass.: Harvard University Press, 1999).

59. *Ibid.*

60. Based on monitoring by HRC WorkNet.

61. Ten states have Family Medical Leave or similar laws that either specifically allow, or could be interpreted to allow, an employee to take leave to care for his or her unmarried or same-sex partner. They are: Alabama, California, Colorado, Delaware, Georgia, Hawaii, Iowa, Missouri, Oregon and Vermont.

APPENDIX

OTHER HELPFUL RESOURCES ON GAY, LESBIAN, BISEXUAL AND TRANSGENDER FAMILIES

HRC FamilyNet (www.hrc.org/familynet)

The Human Rights Campaign Foundation's FamilyNet is the most comprehensive and up-to-date resource for and about gay, lesbian, bisexual and transgender families. HRC FamilyNet provides information and resources about adoption, civil unions, coming out, custody and visitation, donor insemination, family law, families of origin, marriage, money, parenting, religion, schools, senior health and housing, state laws and legislation, straight spouses and transgender issues. More than 20 national gay, lesbian, bisexual and transgender organizations are partner organizations in HRC FamilyNet, including most of those listed below:

Alternative Family Institute

www.altfamily.org
425 Divisadero St., Ste. # 203-B
San Francisco, CA 94117
Phone: 415/436-9000
E-mail: info@altfamily.org

American Civil Liberties Union Lesbian and Gay Rights Project

www.aclu.org
125 Broad St.
New York, NY 10004
Phone: 212/549-2627
E-mail: lgbthiv@aclu.org

Association of Gay and Lesbian Psychiatrists

www.aglp.org
4514 Chester Ave.
Philadelphia, PA 19143-3707
Phone: 215/222-2800

Children of Lesbians and Gays Everywhere

www.colage.org
3543 18th St., Ste. #1
San Francisco, CA 94110
Phone: 415/861-KIDS (5437)
E-mail: colage@colage.org

Family Pride Coalition

www.familypride.org
P.O. Box 65327
Washington, DC 20035-5327
Phone: 202/331-5015
E-mail: pride@familypride.org

Fenway Community Health

www.fenwayhealth.org
7 Haviland St.
Boston, MA 02115
Phone: 617/267-0900

Gay & Lesbian Advocates & Defenders

www.glad.org
294 Washington St., Ste. 740
Boston, MA 02108
Phone: 617/426-1350
E-mail: gladlaw@glad.org

Gay and Lesbian Medical Association

www.glma.org
459 Fulton St., Ste. 107
San Francisco, CA 94102
Phone: 415/255-4547
E-mail: info@glma.org

Gay Financial Network

www.gfn.com
111 Broadway, 12th Floor
New York, NY 10006
Phone: 800/848-6010

Gay, Lesbian and Straight Education Network

www.glsen.org
121 West 27th St., Ste. 804
New York, NY 10001-6207
Phone: 212/727-0135
E-mail: glsen@glsen.org

International Gay and Lesbian Human Rights Commission

www.iglhrc.org
1360 Mission St., Ste. 200
San Francisco, CA 94103
Phone: 415/255-8680
E-mail: iglhrc@iglhrc.org

Lambda Legal Defense and Education Fund

www.lambdalegal.org
120 Wall St., Ste. 1500
New York, NY 10005
Phone: 212/809-8585
E-mail: lambdalegal@lambdalegal.org

Lesbian and Gay Immigration Rights Task Force

www.lgirtf.org
230 Park Ave., Ste. 904
New York, NY 10169
Phone: 212/818-9639
E-mail: info@lgirtf.org

National Center for Lesbian Rights

www.nclrights.org
870 Market St., Ste. 570
San Francisco, CA 94102
Phone: 415/392-6257
E-mail: info@nclrights.org

National Gay and Lesbian Task Force

www.nglhf.org
1700 Kalorama Road, N.W.
Washington, DC 20009-2624
Phone: 202/332-6483
E-mail: nglhf@nglhf.org

National Latina/o Lesbian, Gay, Bisexual & Transgender Organization

www.llego.org
1420 K St., N.W., Ste. 200
Washington, DC 20005
Phone: 202/408/5380

Old Lesbians Organizing for Change

www.oloc.org
P. O. Box 980422
Houston, TX 77098
E-mail: chardenea@worldnet.att.net

Parents, Families and Friends of Lesbians and Gays

www.pflag.org
1726 M St., N.W., Ste. 400
Washington, DC 20036
Phone: 202/467-8180
E-mail: info@pflag.org

Partners Task Force for Gay & Lesbian Couples

www.buddybuddy.com
P. O. Box 9685
Seattle, WA 98109-0685
Phone: 206/935-1206
E-mail: demian@buddybuddy.com

Pride Senior Network

www.pridesenior.org
356 W 18th St.
New York, NY 10011
Phone: 212/271-7288
E-mail: pridesr@erols.com

Senior Action in a Gay Environment

www.sageusa.org
305 Seventh Ave.
New York, NY 10001
Phone: 212/741-2247

Servicemembers Legal Defense Network

www.sldn.org
P.O. Box 65301
Washington, DC 20035-5301
Phone: 202/328-3244
E-mail: sldn@sldn.org

Straight Spouse Network

www.ssnetwk.org
8215 Terrace Dr.
El Cerrito, CA 94530-3058
Phone: 510/525-0200
E-mail: dir@ssnetwk.org

Note: For more information about HRC FamilyNet, e-mail familynet@hrc.org or call 202/628-4160.

ABOUT THE AUTHOR

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