

United

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In the past three decades, lesbians in the United States have gained recognition for their rights in a number of areas. Nevertheless, the human rights of lesbians continue to be violated on a daily basis.

HATE VIOLENCE AGAINST LESBIANS

Hate violence against lesbians is pervasive throughout the United States. In recent years, numerous studies have documented a dramatic increase in the number of reported incidents of anti-lesbian and anti-gay violence. In the five major U.S. cities with agencies that monitor hate crimes against lesbians and gay men, reports of anti-gay and anti-lesbian incidents increased by 172% between 1988 and 1992.¹ In Colorado, reports of anti-lesbian and anti-gay violence tripled in November and December of 1992 after vot-

ers approved a state ballot initiative prohibiting enactment of laws to protect lesbians and gay men from discrimination.² According to the U.S. Department of Justice, lesbians and gay men "are probably the most frequent victims" of hate violence in the U.S.³

At least two studies have shown that lesbians and gay men of color are at greater risk for violent attack because of their sexual orientation.⁴ Youth are also at greater risk. For example, of the 500 lesbian, gay, and bisexual youths who used the services of the Hetrick-Martin Institute of New York City in 1988, 40% had experienced violent attacks.⁵

Thirty-five states have enacted hate crimes statutes that mandate enhanced penalties for and/or the collection of official statistics on bias-motivated crimes. Only 21 of these statutes, however, include crimes motivated by bias against lesbians and gay men. Even in states with hate crime statutes that include sexual orientation, police routinely refuse to investigate or act on violent crimes against lesbians and gay men and are themselves the third most common perpetrators of violence against lesbians and gay men, which includes rape and sexual assault.⁶ Similarly, district attorneys frequently refuse to prosecute violence against lesbians and gay men as hate crimes, even when the perpetrators acknowledge a homophobic motivation, and courts often view lesbians and gay men as undeserving of protection. In 1989, Dallas judge Jack Hampton stated that "I put prostitutes and queers at the same level...and I'd be hard-put to give somebody life for killing a prostitute."⁷

Not surprisingly, most lesbians and gay men who are victimized by hate crimes never report the assault, for fear of being disregarded or victimized further by the police or criminal justice system. A recent study found that 72% of white lesbian and gay victims of assault and 82% of lesbian and gay people of color victimized by assault did not report such incidents.⁸ Although comprehensive studies have not yet been done, lesbians appear to be particularly unlikely to report hate crimes. Because assaults on lesbians are usually

based on gender as well as sexual orientation, reports by lesbians are especially liable to be minimized or dismissed as incidents of "routine" male hostility toward women.

According to Women, Inc., a California organization serving battered women, domestic violence occurs in one in four lesbian relationships—roughly the same percentage as in heterosexual relationships. However, few domestic violence agencies have created services for battered lesbians.

FAMILY RIGHTS

Child Custody and Visitation

As a group, lesbians and their children are systematically denied the basic rights and protections guaranteed to other American families. Although the U.S. Supreme Court has recognized that "the rights attached to parenthood are among the 'basic civil rights,'" state courts routinely view lesbian and gay parents as undeserving of the rights afforded to other parents. As a result, the estimated six to 14 million children with a lesbian or gay parent¹⁰ have little protection against judicial decisions that arbitrarily dissolve or disrupt their families.

State courts generally discriminate against lesbians in custody and visitation determinations. A minority of states consider a parent's sexual orientation to have bearing on a custody determination only if there is some evidence of harm to the child. Most state courts, however, either deem lesbian and gay parents per se unfit to raise children or deny normal custody and visitation rights based on unfounded bias and stereotypes about lesbian parents.¹¹ In states with statutes that criminalize private consensual sexual acts between adults, some courts subject lesbian and gay parents to invasive questioning about their private sexual practices or deprive lesbian parents of custody or normal visitation on the supposition that they have violated the state

sodomy statute. In a highly publicized case in 1994, a Virginia trial court removed Sharon Bottoms' two-year-old son from her custody based solely on the judge's belief that Sharon Bottoms' lesbianism was "immoral" and "illegal." In April 1995, the Virginia state supreme court upheld this ruling.¹² Every year, hundreds of lesbian mothers across the nation lose custody of their children on similar grounds.

Adoption

Lesbians confront numerous legal and administrative barriers to adoption, both as single parents and as couples. In Florida and New Hampshire, legislation absolutely prohibits lesbians and gay men from becoming adoptive parents. Even in the absence of a statutory prohibition, courts have denied adoption petitions by lesbians and gay men solely because of the petitioner's sexual orientation.¹³ Many state and private adoption agencies engage in a more subtle form of discrimination by refusing to initiate adoption proceedings on behalf of a prospective lesbian or gay parent.¹⁴

Lesbian couples who wish to adopt a child as a couple face even more formidable obstacles. Because the overwhelming majority of states prohibit joint adoptions by unmarried couples, and because same-gender couples cannot marry, lesbian and gay couples are effectively barred from bringing a joint adoption petition. To date, only Massachusetts has granted a joint adoption petition on behalf of a lesbian couple. Finally, many lesbian couples have formed families in which both partners raise and care for a child who is the biological or adoptive child of one of the partners, but who has no legal relationship to the other parent. In a small but growing number of states, courts have allowed the non-legal or "second parent" to adopt the couple's child without terminating the parental rights of the first parent.¹⁵ In most states, however, there are virtually no legal means of protecting the relationship between the non-biological or non-adoptive parent and the child. If the legal parent dies or

becomes incapacitated, the child does not automatically remain with her or his other parent and may be left without a legal parent. Even if the legal parent has drafted a nomination of guardianship or conservatorship, it is up to the discretion of the court whether the child will be allowed to stay with her or his nonlegally recognized parent. The children of such couples are also deprived of numerous other legal rights and protections afforded by having two legal parents, such as the right to inherit property from both parents, and to receive family-related benefits such as health insurance and Social Security.¹⁶

Foster Parenting

Lesbians also face extreme discrimination in their efforts to serve as foster parents. In New Hampshire, a state statute prohibits placement of foster children in homes with lesbians or gay men.¹⁷ In 1994, the Nebraska Department of Social Services also adopted a formal policy prohibiting placement of children in lesbian or gay foster homes.¹⁸ While most states do not have explicit policies regarding lesbian and gay foster parents, states that discriminate against lesbians and gay men in custody and adoption proceedings are extremely unlikely to certify lesbians as foster parents.¹⁹

The pervasive discrimination against lesbians and gay men in the foster system has a particularly devastating impact on lesbian and gay youth in the child welfare system, for whom finding a supportive foster placement is frequently difficult or impossible. The tragedy of denying lesbians and gay men the opportunity to provide supportive foster homes for lesbian- and gay-identified youth was brutally illustrated by the immediate aftermath of the Nebraska policy described above. The day following the announcement of Nebraska's policy prohibiting placement of children with gay and lesbian foster parents, E.J. Byington, a 17-year-old openly gay foster child recently placed with a gay couple, committed suicide after expressing fear that he

would be removed from his foster parents' home.²⁰

Access to Donor Insemination

Because most state laws governing donor insemination are designed to protect married women and their husbands, lesbians who conceive children through a known sperm donor are vulnerable to paternity suits by donors. As a result, access to anonymous or confidential donor insemination services is the only way for most lesbians to protect the integrity of their chosen families against interference by donors and courts.²¹ Currently, no state prohibits lesbians from using insemination services, although such legislation was proposed in Oregon in 1995. In practice, however, lesbians seeking insemination services face significant discrimination, including widespread denial of services by doctors, sperm banks, and other health care providers,²² and the refusal of insurance companies to reimburse lesbian couples for insemination and other fertility-related expenses.

Domestic Partnership and Same-Sex Marriage

Currently, there is no jurisdiction in the U.S. in which lesbian or gay couples can legalize their relationships through marriage. The landmark case currently underway in Hawaii, however, may open the door to a state-by-state consideration of whether the "different-sex" restriction on marital choice amounts to unconstitutional sex discrimination.²³ If Hawaii permits same-gender marriage in that state, many lesbians and gay men will marry in Hawaii and return to their home states expecting full legal recognition of their marriages. Utah has already passed state legislation refusing to recognize same-gender marriages from other states, and opponents of same-gender marriage are organizing to pass similar "gay exceptions" to equal marriage rights in other states.

A small number of cities and counties permit lesbian and

gay couples to register as "domestic partners" and in some cases to become eligible to receive some of the benefits afforded to legal spouses. Because of the inability to marry and given the very limited scope of domestic partner benefits, lesbian couples and their children are still effectively denied numerous significant rights afforded to married couples, including the right to inherit property, the right to obtain family-related employment benefits such as health insurance and family leave, the right to visit one's partner in prison or in the hospital, the right to tax exemptions, the right to make medical decisions on behalf of an incapacitated partner, and the right to bring one's non-U.S. citizen spouse into the U.S. on a permanent basis. In a well known case, for example, Karen Thompson was forced to fight a seven-year legal battle to gain guardianship of her partner, Sharon Kowalski, after Kowalski was severely disabled in a 1983 car accident.²⁴ Although the Kowalski case garnered national attention, lesbian and gay couples continue regularly to confront similar circumstances.

DISCRIMINATION IN EMPLOYMENT

Employers in the United States must comply with numerous state and federal statutes that prohibit discrimination in employment on the basis of race, sex, religion, national origin, or disability. In the overwhelming majority of jurisdictions, however, sexual orientation is not a protected category. Employers in these jurisdictions are free to fire or otherwise discriminate against lesbian and gay employees solely on the basis of their sexual orientation. In practice, moreover, discrimination against lesbians and gay men is extremely widespread. As many as two-thirds of gay corporate employees have witnessed some sort of hostility toward gay people on the job.²⁵ The impact of this discrimination falls hardest on lesbians, and particularly on lesbians of color, who are also subject to discrimination on the basis of gender and race.

Gains for lesbians in the private employment sector have been slow. In 1993, the National Gay and Lesbian Task Force sent surveys to the 1,000 largest companies in the country. Of the 98 companies that returned the survey, only five offer domestic partner benefits to same-sex partners. However, half of those companies do include sexual orientation issues in diversity training; more than two-thirds offer some type of support for people with HIV, and in February 1992, Levi-Strauss & Co., with 23,000 workers, became the largest U.S. employer to offer health insurance to partners of lesbians and gay men.

Lesbians have slightly greater protection from discrimination in public employment than in the private arena, since government employers must comply with civil service regulations and with state and federal constitutions that often provide some protection against arbitrary termination or other penalties. Nonetheless, traditional civil rights litigation

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strategies in federal and state courts have not been very successful in establishing protection against discrimination. The impact of discrimination in the public employment arena is especially egregious in public education, where lesbian teachers are extremely vulnerable to the loss of their jobs on the basis of their sexual orientation.

In 1994, Congress failed to enact the Employment Nondiscrimination Act, a proposed national law that would have banned job discrimination on the basis of sexual orientation. Prospects for enactment of any such bill in the near future are dim. In addition, voters in nine states proposed

statewide anti-gay ballot initiatives that would repeal all existing anti-discrimination protections for lesbians and gay men. Seven of these initiatives never reached the ballot, and the remaining two were defeated, in Oregon and Idaho. Organized anti-gay movements throughout the country continue to confront state and local governments with similar attempts to deny equal protection to lesbians and gay men.

As the largest employer in the nation, the U.S. military's policy of discriminating against lesbians and gay men has caused profound economic and personal injury to thousands of lesbian service members. It is also a devastating symbol of the U.S. government's refusal to afford lesbians and gay men equal treatment under the law. The official policy of the U.S. military is that "homosexuality is incompatible with military service." Despite the widely publicized "Don't Ask, Don't Tell" compromise enacted into law following a great deal of media attention and political debate,²⁶ lesbian military personnel remain routinely subject to harassment and discharge. The Code of Military Justice still prohibits same gender sexual conduct, and lesbians continue to be court-martialed and discharged for violating the code. Under the new policy, lesbians may also be discharged merely for disclosing their sexual orientation to others, even to personal friends or family members.²⁷

Both historically and under the new policy, the military's ban on lesbian and gay service members has a dramatically disproportionate effect on lesbians. Between 1980 and 1990, women accounted for 6% of all personnel serving in the armed forces and for 20% of all discharged for homosexuality.²⁸ The primary explanation for this disproportionate impact is the pervasive sexual harassment faced by women in all levels of military service. Regardless of their actual sexual orientation, female service members who reject sexual overtures from male soldiers are vulnerable to the accusation of lesbianism and to being singled out for investigation and discharge.

LESBIAN YOUTH

As a group, lesbian youth confront systematic isolation, rejection, hostility, and violence. Parents and other family members frequently reject or abuse their lesbian and gay children. A recent study found that 46% of teenagers reporting violent physical assault said that the assault was related to their sexual orientation; of these, 61% reported that the violence came from within their own families.²⁹ Nationally, studies show that as many as 25% percent of homeless urban youth are lesbian, gay, bisexual, or transgender runaways or "throwaways," pushed out of their families of origin because of parental homophobia.³⁰ Lesbian youth also confront an extremely high level of harassment and abuse in the school system, both from other students and from teachers and other school staff. A 1984 study by the National Gay and Lesbian Task Force, for example, found that 20% of lesbians reported being verbally or physically assaulted in high school.³¹ No federal statute protects lesbian and gay youth against discrimination in public schools; only one state (Massachusetts) has such a statute.

Lesbian youth face profound discrimination in the child welfare and juvenile justice systems, due to the nearly complete lack of social services and safe placements (e.g., foster homes or group homes) and to open hostility and prejudice on the part of many attorneys, judges, probation officers, and social service providers. Lesbian youth are also extremely vulnerable to forced psychiatric confinement by parents, school officials, social welfare personnel, and juvenile courts, many of whom perceive lesbian youth as "confused" or "deviant" and in need of psychiatric treatment. Within the mental health system, lesbian youth are frequently labeled and "treated" for their sexual orientation. In particular, lesbian youth are vulnerable to being labeled with so-called "gender identity disorder," a psychiatric diagnosis that pathologizes girls and young women who "display intense negative reactions to parental expectations or attempts to have them wear dresses or other feminine

attire," who "prefer boy's clothing and short hair," who "prefer boys as playmates, with whom they share an interest in contact sports, rough-and-tumble play, and traditional boyhood games," and who "show little interest in dolls or any form of feminine dress up or role-play activity."³² Lesbian youth diagnosed with this homophobic and misogynist "disorder" are frequently subjected to invasive behavior modification treatments that attempt to force them to conform to gender stereotypes and to adopt a heterosexual orientation.

HEALTH CARE

The major problem facing lesbians seeking access to health care is lack of information on the part of providers, which in turn causes many lesbians to avoid the health care system altogether. Homophobia is widespread; in a recent national survey of physician attitudes towards lesbian and gay patients conducted by the American Physicians for Human Rights, nine out of 10 physicians reported observing anti-gay bias and more than two-thirds knew of lesbian and gay patients who had received poor care or were denied care because of their sexual orientation. While nearly all agreed that a physician's knowledge of a patient's sexual orientation was important to ensure that specific medical needs were met, two-thirds believed that patients who revealed their sexual orientation would receive inferior care as a result. Finally, cost and lack of health insurance are major barriers to care; more than one out of three lesbians in a large 50-state study reported having no health insurance.³³

Many lesbians avoid seeking or cannot afford gynecological care. In a large national study, 35-45% of lesbians received no gynecological care, and in a 1988 study of lesbians' relationships with their health-care providers, 72% recounted negative experiences.³⁴ Doctors often presume that lesbians are not at risk for sexually transmitted dis-

eases, and they often fail to provide routine screening. Research is limited, but has shown that syphilis, herpes, and chlamydia can be passed between women.³⁵ Most research on HIV transmission has neglected to study woman-to-woman transmission.

Lack of preventive care often fails to identify treatable conditions, including hypertension, diabetes, substance abuse, and early stage cancers. Undetected gynecological cancers in lesbians, which could be identified through routine screening, ultimately become life threatening. According to the latest national study of lesbian health concerns, one out of 20 lesbians over age 55 has never had a pap smear, and one out of six has never given herself a breast self-examination.

NOTES

- 1 National Gay and Lesbian Task Force Policy Institute, *Anti-Gay/Lesbian Violence, Victimization and Defamation in 1992*, Washington, D.C., 1993.
- 2 *Id.*
- 3 National Institute of Justice, U.S. Department of Justice, "The Response of the Criminal Justice System to Bias Crime: An Exploratory Review," 1987.
- 4 Gregory M. Herek and Kevin T. Berrill, eds., *Hate Crimes: Confronting Violence Against Lesbians and Gay Men*, 1992.
- 5 *Id.*
- 6 Gary David Comstock, *Violence against Lesbians and Gay Men*, 1991.
- 7 Pamela Reynolds, "Judge creates uproar in Texas," *Boston Globe*, 26 February 1989.
- 8 *Id.*
- 9 See *Stanley v. Illinois*, 405 U.S. 645 (1972).
- 10 Charlotte J. Patterson, "Children of the Lesbian Baby Boom: Behavior Adjustment, Self Concept, and Sex-Role Identity," in *Contemporary Perspectives on Gay and Lesbian Psychology: Theory, Research, and Applications* 156, 164 (Beverly Greene & Gregory Herek, eds., 1994).

- 11 David K. Flaks, "Lesbian Families: Judicial Assumptions, Scientific Realities," 3 Wm. & Mary Bill of Rts. J. 345 (1994).
- 12 Bottoms v. Bottoms, 18 VA App. 481; 444 S.E.2d 276.
- 13 In a 1986 Arizona case, for example, an appellate court denied an adoption petition from a bisexual man on the grounds that "It would be anomalous for the state on the one hand to declare homosexual conduct unlawful and on the other create a parent after that proscribed model, in effect approving that standard, inimical to the natural family, as head of a state-created family." In re Pima County Juvenile Matter, 727 P.2d 830, 835 (Ariz. Ct. App. 1986).
- 14 Ricketts and Achtenberg, "The Adoptive and Foster Gay and Lesbian Parent," in F. Bozett, ed., Gay and Lesbian Parents, 1987.
- 15 "Second parent" adoptions have been granted in Alaska, California, D.C., Illinois, Massachusetts, Michigan, Minnesota, New York, New Jersey, Oregon, Pennsylvania, Texas, Vermont and Washington. Only two states, however, have upheld the validity of second parent adoptions at the state supreme court level (Massachusetts and Vermont). In the other states listed here, second parent adoptions are still vulnerable to legal challenges.
- 16 National Center for Lesbian Rights, Lesbians Choosing Motherhood: Legal Implications of Donor Insemination and Co-Parenting, 1991.
- 17 N.H.Rev. Stat. Ann. @ 161:2 (IV)(Supp. 1988). In upholding the policy, the court noted: "as a matter of public policy, the provision of a healthy environment, and role models for our children, the New Hampshire policy should exclude homosexuals." Opinion of the Justices, No. 87-080, Supreme Court of New Hampshire, 129 N.H. 290; 525 A.2d 1095.
- 18 See The New York Times 29 January, 1995 p.17, col. 1. "Nebraska Moves to Bar Homosexuals from being Foster Parents," noting that "Foster children in Nebraska can no longer be placed in the homes of people who identify themselves as homosexual or in homes where unrelated, unmarried adults live together."
- 19 Wendell Ricketts, Lesbians and Gay Men as Foster Parents (National Child Welfare Resource Center, 1991).
- 20 Elise Harris, OUT, May 1995.
- 21 National Center for Lesbian Rights, Lesbians Choosing Motherhood: Legal Implications of Donor Insemination and Co-Parenting, 1991.
- 22 A 1988 federal government study found that homosexuality was among the top four reasons given by doctors and clinics for

