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STATE LAW AND LOCAL ORDINANCES IN CALIFORNIA BARRING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

James W. Meeker, John Dombrink** & Gilbert Geis****

I. INTRODUCTION

Legal protection against discrimination for persons whose "affectional preference" or "sexual orientation" is directed toward their own gender is, at best, uneven rather than comprehensive. At the federal level, the civil service is obligated to demonstrate that personnel actions directed against homosexuals bear a "rational nexus" to security or efficiency.[1] Such showings generally have to meet more stringent standards than those regarding military duty and work dealing with sensitive intelligence materials.[2] In these realms, a generic assumption that homosexuality threatens the integrity of the armed forces and the spy establishment is apt to prevail.[3]

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1. *See, e.g.*, Gayer v. Schlesinger, 490 F.2d 740 (D.C. Cir. 1973); Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969). A former counsel for the U.S. Civil Service Commision summarized the conditions aptly: " 'The courts have told us, "You fellows aren't annointed and shouldn't be making moral judgments." And . . . that's a reasonable position for the government to be in.' " Wall St. J., July 1, 1974, at 1, col. 1.

2. *See generally* C. WILLIAMS & M. WEINBERG, HOMOSEXUALS AND THE MILITARY (1971); Snyder & Nyberg, *Gays and the Military: An Emerging Policy Issue*, 8 J. POL. & MIL. SOC. 71 (1980); Note, *Employment Discrimination in the Armed Services—An Analysis of Recent Decisions Affecting Sexual Preference Discrimination*, 27 VILL. L. REV. 351 (1982).

3. Saal v. Middendorf, 427 F. Supp. 192 (N.D. Cal. 1977), *rev'd*, Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); Doe v. Chafee, 355 F. Supp. 112 (N.D. Cal. 1973); *see also* Matlovich v. Secretary of Air Force, 591 F.2d 852 (D.C. Cir. 1978); Ingalls v. Brown, 377 F.2d 151 (D.C. Cir. 1967). Participants in the debate differ in their conclusions. A former assistant deputy director of the Central Intelligence Agency has argued that " 'The Soviets specialize in homosexual cases. They assign KBG agents who are homosexuals themselves to entrap our agents.' " TIME, Jan. 12, 1981, at 22. On the other hand, an author of a treatise in praise of homosexuality wrote that the work of homosexual intelligence agents during World War II "made the exploits of Mata Hari look like child's play." C. TRIPP, THE HOMOSEXUAL MATRIX 217 (1975). The same author also argues, rather unpersuasively, that homosexuals make better diplomats because they can more easily than heterosexuals stand prolonged male

At the state level, safeguards vary throughout the nation. In Wisconsin, for example, the state civil rights act specifically embraces sexual orientation as a protected category in a number of specified areas.[4] Illinois and Michigan prohibit discrimination against homosexuals in public housing, while California, New York, Ohio, and Pennsylvania have executive orders that ban some forms of discrimination against homosexuals.[5] In most states, however, courts have held that the state civil rights statute offers protection only to those categories of persons explicitly set forth in the enactments, and none of these civil rights statutes, except Wisconsin's statute, specifically identify sexual orientation as a protected category.[6]

In the private sector, protections for homosexuals remain largely as one commentator found them nine years ago: "Individuals employed in the private sector are still without significant legal recourse against discriminatory practices."[7] Some exceptions to this statement have arisen, however. Most notable has been the gradual emergence in various municipalities throughout the nation of local ordinances which prohibit discrimination on the basis of affectional preference or sexual orientation, and which specify that such protection is guaranteed both in the public and the private realm.

At this moment, approximately fifty such ordinances exist.[8] They have to date escaped systematic examination by legal scholars, in part because they tend to fall beyond the usual purview of such analyses unless they give rise to important appellate decisions. In part, also, their neglect reflects the fact that the ordinances are widely scattered and that they usually apply to only a relatively small constituency. Nonetheless, the local ordinances forbidding discrimination against persons on the basis of sexual preference constitute a grass roots movement of considerable importance, both in actual legal terms and in terms of symbolic meaning. The promulgation of these local ordinances demonstrates, among other things, a frustration on the part of their advocates with the most common paths towards civil rights protections, such as federal enactments, state laws, and court rulings. They also reflect the ability of organized partisan groups to be effective when

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companionship. *Id.* at 218.

4. WIS. STAT. ANN. §§ 111.31–.32 (West Supp. 1984).

5. N.Y. Times, Sept. 2, 1984, § 1, at 26, col. 1.

6. *See, e.g.*, Macauley v. Massachusetts Comm'n against Discrimination, 379 Mass. 279, 397 N.E.2d 670 (1979). The court noted that "[i]f the scope of the statute is to be extended, it must be done by legislation." *Id.* at 282, 397 N.E.2d at 671.

7. Siniscalco, *Homosexual Discrimination in Employment*, 16 SANTA CLARA L. REV. 495, 512 (1976).

8. *See* NATIONAL GAY TASK FORCE, GAY RIGHTS PROTECTIONS IN THE UNITED STATES AND CANADA (1984).

they operate in limited geographic areas, where opposition forces may not be as readily mobilized or as potentially powerful as in a wider and perhaps more heterogeneous setting.

This article, in the broader context of the movement for civil rights within the state, will examine ordinances prohibiting discrimination on the basis of sexual orientation which have been enacted in California. These ordinances range in coverage from merely stating a municipal policy against discrimination rooted in a person's sexual preference to the outright prohibition of such discrimination in the areas of public and private employment, public accommodations, education, and housing. The variation in the scope of these ordinances reflects the nature of such enactments nationwide. In addition, California has developed a substantial body of case law that extends the protection of its state civil rights statute into the area of sexual preference. The simultaneous development of such case law and the passage of local ordinances makes California uniquely informative as a case study of discrimination against homosexuals.

II. STATE PROTECTIONS

A. *California's Civil Rights Act*

As noted earlier, only Wisconsin explicitly affords protection to homosexuals as a denominated group in realms such as private employment and housing.[9] Absent express statutory specification, the issue often becomes, as it has in California, the manner in which the courts interpret the general intent of their antidiscrimination laws. The fundamental issue, then, is whether the statute's enumeration of protected categories of persons will be construed as an exclusive listing or as merely illustrative of the breadth of the law's reach. California courts have given their civil rights statute the latter interpretation.

California's Unruh Civil Rights Act[10] grew out of the common-law doctrine that provided protection for consumers dealing with businesses and agencies defined as "affected with a public interest."[11] Dispute primarily centered on the determination of what kinds of affairs and business establishments fell into the classification. When California, in 1897, codified this common-law doctrine,[12] its concern was to spell out

9. WIS. STAT. ANN. §§ 111.31–.32 (West Supp. 1984).

10. CAL. CIV. CODE §§ 51–52 (West 1981).

11. *See generally* Hamilton, *Affectation with Public Interest*, 39 YALE L.J. 1089 (1930); McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759 (1930).

12. For an admirable background exposition of the common-law doctrine in California, see Tobriner & Grodin, *The Individual and Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247 (1967).

the kinds of facilities covered: It listed "inns, restaurants, hotels, eating houses, barber shops, bathhouses, theaters, skating rinks, and other places of public accommodation or amusement."[13] Entitlement to service at such places was granted to "all citizens within the jurisdiction of the state."[14] Later amendments to the law merely included new facilities within the statute's ambit—public conveyances in 1919[15] and ice cream and soft drink parlors in 1923.[16]

In 1951, the California Supreme Court in *Orloff v. Los Angeles Turf Club*,[17] made its first significant clarification of precisely who might or might not be embraced within the meaning of "all citizens." Morris Orloff had twice been ejected and was finally barred from entering the Santa Anita race track in southern California on the ground that he was a person of "immoral character." The court ruled that the race course was a site of "public entertainment" and that it thereby was compelled to admit Orloff onto its premises. Orloff's character, the court held, both in terms of demonstrated acts and general repute, was not to be at issue. The only thing that mattered was "a person's conduct when entering and attending a public place."[18] Later in the same year, the court, in *Stoumen v. Reilly*,[19] ruled that the State Board of Equalization could not close the Black Cat Restaurant on the ground that it was a place at which homosexuals congregated. The court declared that there was "no evidence of any illegal or immoral conduct on the premises" nor was there any evidence "that the patrons resorted to the restaurant for purposes injurious to public morals."[20] At the same time, the *Stoumen* decision stressed that businesses retained the right to exclude persons for good cause, and that access to services was dependent upon "acting properly" and "not committing illegal and immoral acts."[21]

The decisions in *Orloff* and *Stoumen* clearly had taken literally the statutory stipulation that "all citizens" were protected against arbitrary discrimination in public accommodations. Nonetheless, the California legislature, because of a concern that courts were unduly limiting the kinds of places that could be regarded as "public

13. Ch. 108, 1897 Cal. Stat. 137.

14. *Id. See also* Klein, *The California Equal Rights Statutes in Practice*, 10 STAN. L. REV. 253 (1958).

15. Ch. 210, 1919 Cal. Stat. 309.

16. Ch. 235, 1922 Cal. Stat. 485.

17. 36 Cal. 2d 734, 227 P.2d 449 (1951).

18. *Id.* at 740–41, 227 P.2d at 454.

19. 37 Cal. 2d 713, 234 P.2d 969 (1951).

20. *Id.* at 716, 234 P.2d at 970–71.

21. *Id.*, 234 P.2d at 971.

accommodations,"[22] in 1959 enacted the Unruh Civil Rights Act.[23] The first and key section of the Unruh Act reads: "All citizens within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry or national origin are entitled to full and equal accommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever."[24]

The list of protected categories of persons set forth in the Unruh Civil Rights Act was an expansion of the code's previous penalty provision, which had stated that only legally justifiable reasons, "applicable alike to every race or color," would excuse a failure to provide services in public accommodations.[25] In carrying out this revision, however, the legislature opened up the question of whether only the groups it had named were to be protected or whether, indeed, "all citizens" continued to be embraced under the new statute. Careful reading of the language of the act would appear to indicate that the added designations, such as "sex" and "ancestry," were only meant to flesh out the skeletal term "all citizens." At the same time, it might also be argued that even an expansive interpretation of the statute would broaden the listed groups at most only to include categories that are descriptively cognate to those specified in the act, such as "age," rather than to characteristics presumptively tied somewhat more closely to behavior, such as sexual orientation.

The California Supreme Court's first major adjudication of the issue was in *In re Cox*.[26] Justice Tobriner, writing for the majority, insisted that the legislature could be presumed to have been aware of the court's earlier stand in *Orloff* and *Stoumen*, and stated that it would be unreasonable to infer that the legislature meant to deprive citizens other than those in the specifically denominated groups of the rights enunciated by the statute.[27] The court declared that "not one shred of legislative history" had been presented to suggest such a legislative intent.[28] The court also maintained that a 1961 legislative change[29] which substituted "all persons" for "all citizens" in the statute offered further evidence of the ecumenical nature of the intended coverage. That amendment, it was noted, aimed to secure protection for aliens as well as citizens.[30]

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22. *In re* Cox, 3 Cal. 3d 205, 214, 474 P.2d 992, 997, 90 Cal. Rptr. 24, 29 (1970).
23. Ch. 1866, 1959 Cal. Stat. 4424 (codified at CAL. CIV. CODE §§ 51–52 (West 1981)).
24. CAL. CIV. CODE § 51 (West 1981).
25. Ch. 235, 1923 Cal. Stat. 485.
26. 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24.
27. *Id.* at 215, 474 P.2d at 998, 90 Cal. Rptr. at 30.
28. *Id.* at 216, 474 P.2d at 998, 90 Cal. Rptr. at 30.
29. Ch. 1187, 1961 Cal. Stat. 2920.
30. *Cox*, 3 Cal. 3d at 216, 474 P.2d at 999, 90 Cal. Rptr. at 31.

In *Cox*, the court found that the managers of a shopping center could not legally eject customers whose only offense appeared to be that one drove a motorcycle and the other "wore long hair and dressed in an unconventional manner."[31] However, the court emphasized, as it had in earlier cases, that it did not mean to preclude businesses from establishing "reasonable deportment regulations that are rationally related to the services performed and the facilities provided."[32] The essence of the *Cox* ruling was that though the Unruh Act had primarily been implemented to prohibit racial discrimination, "both its history and its language disclose a clear and large design to interdict all arbitrary discrimination by a business enterprise."[33]

In 1982 this doctrine was tested anew in *Marina Point, Ltd. v. Wolfson*,[34] in which a southern California landlord tried to exclude all families with minor children from his apartment complex. The California Supreme Court ruled against the landlord and decreed that families with children came under the umbrella of statutorily protected groups.[35] The court turned aside the claim that the legislature's addition in 1974 of "sex" to the roster[36] indicated a desire to delimit the protected categories. The court supported its conclusion by noting that the legislator who forwarded the measure adding "sex" to the Unruh Act specifically stated that "[t]he listing of possible bases of discrimination has no legal effect, but is merely illustrative."[37] At the same time, the court found unpersuasive the fact that nine bills designed to curtail age discrimination in housing had been introduced in the legislature since 1974 and none had passed.[38] In this regard, the California Supreme Court took a course contrary to that of federal courts that have found the repeated defeat of measures aimed at including sexual orientation under Title VII of the Civil Rights Act[39] persuasive evidence that homosexuals enjoyed no protections under that act.[40]

The thrust of the *Marina Point* decision was that a whole class could not be discriminated against because certain class members

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31. *Id.* at 210, 474 P.2d at 994, 90 Cal. Rptr. at 26.
32. *Id.* at 217, 474 P.2d at 999, 90 Cal. Rptr. at 31.
33. *Id.* at 212, 474 P.2d at 995, 90 Cal. Rptr. at 27.
34. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982).
35. *Id.* at 725, 640 P.2d at 117, 180 Cal. Rptr. at 498.
36. Ch. 1193, 1974 Cal. Stat. 2568.
37. *Marina Point*, 30 Cal. 3d at 734, 640 P.2d at 123, 180 Cal. Rptr. at 504. The court also noted that several lower court decisions and attorney general opinions had concluded that the protection provided by the Unruh Act is not limited to the statute's listed categories. *Id.* at 736, 640 P.2d at 124, 180 Cal. Rptr. at 505.
38. *Id.* at 735 n.7, 640 P.2d at 123 n.7, 180 Cal. Rptr. at 505 n.7.
39. 42 U.S.C. §§ 2000e-2–2000e-17 (1982).
40. *See, e.g.*, Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456, 457 (N.D. Cal. 1975).

might misbehave and annoy others. The landlord had claimed that children are "rowdier, noisier, more mischievous and more boisterous than adults."[41] It is important to observe that one author, arguing against the court's conclusion,[42] believed that reasonable public policy grounds exist for excluding children from certain housing facilities, just as projects exclusively for the elderly have been justified.[43] She advocated that the legislature abrogate *Marina Point* and let local governments deal with the problem as they see fit.[44]

Specific extension of the coverage of the Unruh Act to homosexuals first occurred in 1982 in *Hubert v. Williams*.[45] William Hubert, a quadriplegic, stipulated that he associated with persons of homosexual orientation; in addition, the fulltime attendant who cared for him was a lesbian. On these grounds, his landlord had sought to terminate his tenancy. The California Court of Appeals found the *Marina Point* ruling to be fully dispositive, declaring: "[W]e hold homosexuals to be a class protected by the Unruh Act. Based on the record before us and the nature of the facilities involved, we find no compelling societal interest which could justify an exclusion based upon class status as a homosexual."[46]

Given this judicial view, the only truly arguable issue in the subsequent case of *Curran v. Mount Diablo Council of the Boy Scouts*[47] was whether the Boy Scouts constituted a "business establishment" within the reach of the Unruh Act. Timothy Curran, an eighteen-year-old Eagle Scout, had applied for "Scouter" status, which routinely had been granted to those with his scouting credentials. His application was turned down on the ground that, as a homosexual, he was not a good moral example for younger scouts. The court, in addition to finding for Curran on an Unruh Act basis, also found common-law grounds for ruling that expulsion from an association on the basis of homosexuality was both "capricious and offensive to public policy."[48] Homosexuality

41. *Marina Point*, 30 Cal. 3d at 723, 640 P.2d at 116, 180 Cal. Rptr. at 498. *See generally* O'Brian & Fitzgerald, *Apartment for Rent—Children Not Allowed*, 25 DE PAUL L. REV. 64 (1975); Travalio, *Suffer the Little Children—But Not in My Neighborhood: A Constitutional View of Age-Restrictive Housing*, 40 OHIO ST. L.J. 295 (1979); Note, *Landlord Discrimination against Children*, 11 LOY. L.A.L. REV. 609 (1978).

42. Miles, Marina Point, Ltd. v. Wolfson: *Discrimination in Rental Housing against Families with Children*, 71 CALIF. L. REV. 1324 (1983).

43. Taxpayers Ass'n v. Weymouth Township, 80 N.J. 6, 364 A.2d 1016 (1976), *cert. denied*, 430 U.S. 977 (1977).

44. Miles, *supra* note 42, at 1340.

45. 133 Cal. App. 3d Supp. 1, 184 Cal. Rptr. 161 (Cal. App. Dep't Super. Ct. 1982).

46. *Id.* at 3, 184 Cal. Rptr. at 163.

47. 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983).

48. *Id.* at 723, 195 Cal. Rptr. at 331.

per se, it noted, "does not connote immorality."[49] Indeed, in a brief rhetorical excursion the court noted that "the genius of American pluralistic society lies in its ability to accept diversity and differences."[50] In terms of the Unruh Act, the court, relying on *Burks v. Poppy Construction Co.*,[51] ruled that "business establishments" includes "all commercial and noncommercial entities open to and serving the public."[52]

The most far-reaching application to date of the Unruh Civil Rights Act to the protection of homosexuals from discrimination in privately owned facilities occurred in *Rolon v. Kulwitzky*.[53] In *Rolon*, a California Court of Appeals reversed a Los Angeles Superior Court decision, and ruled in favor of two self-declared lesbians who had been denied service in the "romantic booth" area of an upscale Los Angeles restaurant. The women had sought injunctive relief under the Unruh Act and under the Los Angeles antidiscrimination ordinance,[54] charging that they had been discriminated against as a result of their sexual preference.

The facts pleaded were as follows: The women had sought to be seated in one of the six special booths in Papa Choux, a restaurant that prided itself on its "old world" atmosphere. The special booths, which were visible to most diners, were equipped with sheer curtains, call buttons, gilded sculptures of classic lovers, and phone jacks, and were visited by a strolling violinist. The function of these booths, according to restaurant management, was to provide a uniquely romantic setting for mixed couples—not for pairs of women or men or for couples with children. The restaurant, which had a strict dress code, sought to regulate any conduct which might detract from what it regarded as an especially dignified atmosphere.[55]

The lesbian plaintiff who had arrived at the restaurant first had been seated in a "romantic booth." When the second woman arrived,

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49. *Id.* The *Curran* ruling has been cited by a New York court in a defamation case as a testament to a gradually emerging public regard of homosexuality as acceptable, or at least tolerable, human behavior. Matherson v. Marchello, 100 A.D.2d 233, 473 N.Y.S.2d 998 (1984).

50. *Curran*, 147 Cal. App. 3d at 723, 195 Cal. Rptr. at 332.

51. 57 Cal. 2d 463, 370 P.2d 313, 20 Cal. Rptr. 609 (1962).

52. *Curran*, 147 Cal. App. 3d at 732–33, 195 Cal. Rptr. at 338. A few months earlier, however, another division of the state court of appeals had found a youth club which excluded girls not to be a business establishment because, among other things, it was charitably funded and nonprofit, it charged a nominal fee for services, and it relied largely upon volunteers to carry out its work. Isbister v. Boys' Club, 144 Cal. App. 3d 338, 192 Cal. Rptr. 560 (1983).

53. 153 Cal. App. 3d 288, 200 Cal. Rptr. 217 (1984).

54. Los Angeles, Cal., Ordinance 152,458 (July 8, 1979).

55. Affidavit of Walter Kulwitzky at 2, Rolon v. Kulwitzky, No. C-456-144 (Los Angeles County Super. Ct. July 13, 1983) (on file with University of Dayton Law Review); Defendant's Memorandum of Points and Authorities and Declarations, Rolon v. Kulwitzky, No. C-456-144 (Los Angeles County Super. Ct. July 13, 1983) (on file with University of Dayton Law Review).

the maitre d' reluctantly allowed her to join her lover, but subsequently requested that the pair leave the booth and take a table elsewhere in the restaurant. No evidence was provided at the superior court hearing that the restaurant managers knew the women were lesbians.[56]

The restaurateurs argued in superior court that the Unruh Act protects only against discrimination based on gender. Since neither pairs of males nor pairs of females could occupy the special booths, Papa Choux's owners argued that their regulation was evenhanded and therefore legal.[57] Attorneys for the restaurant also maintained that its regulations represented reasonable conditions designed to create a unique atmosphere for the enhancement of business.[58] The restriction was conceived, the restaurateurs claimed, solely to initiate and cultivate a valuable and unique property right.[59]

At trial, the superior court judge declared that "sexual preference is not in the statute and is not inferentially in the statute. . . . There is no law that prohibits discrimination by reason of sexual preference."[60] The judge commented that "[t]he courts really can't be too far out ahead of what society accepts as acceptable conduct when we are dealing with one's right to conduct a business and try to be successful at it."[61] In differentiating the possible rights of homosexuals from those of other groups protected under the federal civil rights act, the judge added in dictum: "Homosexuals choose their lifestyle; they are not born with it, at least so far as this court is advised."[62] The Los Angeles local ordinance forbidding discrimination on grounds of sexual orientation was ruled to be inapplicable because its definition of sexual orientation was unclear, and perhaps unconstitutional, and because the city ordinance was preempted by state law.[63]

The California Court of Appeals reversed the lower court's ruling and granted the plaintiffs a preliminary injunction. The court declared that the Unruh Act's listing of classes of persons protected against discrimination was not exclusive and that homosexuals came within the act's embrace.[64] The court in so ruling emphasized that the kind of conduct that would be exhibited in a restaurant would not be the kind

56. Record at 4–5, *Rolon*.

57. Defendants' Memorandum of Points and Authorities and Declarations of Walter Kulwitzky and Emmanuel Caralli at 10, *Rolon* (on file with University of Dayton Law Review).

58. *Id.* at 13.

59. *Id.* at 12.

60. Record at 7, *Rolon*.

61. *Id.* at 10.

62. *Id.* at 40.

63. *Id.* at 46.

64. *Rolon*, 153 Cal. App. at 291, 200 Cal. Rptr. at 218.

of "intimate" conduct likely to offend patrons.[65] Later, the owners of Papa Choux held a "funeral" and closed their special seating section, rather than comply with the court's order.[66]

B. Gay Law Students Association v. Pacific Telephone & Telegraph Co.

The decision in *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*[67] is a distinct development in the creation of antidiscrimination protections for homosexuals in California. The case, which came in the midst of other important court interpretations of the Unruh Act, is particularly notable for the high caliber of its legal reasoning and its compelling arguments opposing discrimination against homosexuals. Nonetheless, given the factual situation involved, it does not appear likely that the decision will play a particularly important role in providing protection for large numbers of homosexuals.

At least since 1974, Pacific Telephone, an affiliate of American Telephone and Telegraph, had maintained a written policy against hiring homosexuals.[68] The plaintiffs filed a class action suit against the company and against the Fair Employment Practice Commission, alleging that the company was in violation of its statutory mandate, and that the commission was acting improperly in refusing to take action to remedy employment discrimination against homosexuals by Pacific Telephone and other companies with similar policies. The commission's argument that its governing statute[69] did not authorize it to act against employment discrimination based on sexual orientation was sustained at all court levels.[70] The California Supreme Court ruled that while the Unruh Act was essentially a restatement of common-law doctrine, the Fair Employment Practices Act was a new legislative creation whose protective embrace could not be widened by reference to inclusive phrases such as the "all citizens" found in the Unruh Act's predecessors.[71] The court thus concluded that the commission has no jurisdiction over charges of employment discrimination based on sexual

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65. *Id.* at 292, 200 Cal. Rptr. at 219.

66. L.A. Times, May 25, 1984, § 2, at 1, col. 3.

67. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

68. An official of the company was quoted that year as saying, "If someone came in for a job and was militantly gay, we'd reject them—not because they're militantly gay, but because their apparent mode of life would hardly be consistent with job performance." Wall St. J., July 1, 1974, at 1, col. 1.

69. CAL. LAB. CODE § 1420(a) (West 1981).

70. *Gay Law Students*, 24 Cal. 3d at 466, 492, 595 P.2d at 596–97, 613, 156 Cal. Rptr. at 19, 35.

71. *Id.* at 490, 595 P.2d at 612, 156 Cal. Rptr. at 34.

orientation.[72]

The court also ruled, however, that the state's equal protection clause[73]—which the court stated protected any class of individuals from arbitrary discrimination in employment by the state or any governmental entity[74]—applied to Pacific Telephone.[75] In essence, the court concluded that the constitutional protections against discrimination applied to a privately owned public utility company which enjoyed a state-protected monopoly or quasi-monopoly.[76] In addition, the court held that arbitrary discrimination was explicitly prohibited in the Public Utilities Code.[77]

For persons concerned with extending and solidifying the rights of homosexuals, probably the most attractive segment of the ruling was that which relied upon the Labor Code's mandate that "No employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics . . . . [or] (b) Controlling or directing or tending to control or direct the political activities or affiliations of employees."[78] The court held that the plaintiffs had stated a cause of action under this provision.[79] Justice Tobriner, writing for the court, placed the struggle of homosexuals for civil rights squarely into the political arena, thereby demanding special protection:

> [T]he struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity. Indeed the subject of the rights of homosexuals incites heated political debate today, and the "gay liberation movement" encourages its homosexual members to attempt to convince other members of society that homosexuals should be accorded the same fundamental rights as heterosexuals. The aim of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.[80]

The reasoning in *Gay Law Students*, particularly the Labor Code

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72. *Id.* at 492, 595 P.2d at 613, 156 Cal. Rptr. at 35.

73. CAL. CONST. art. I, § 7, para. a.

74. *Gay Law Students*, 24 Cal. 3d at 467, 595 P.2d at 597, 156 Cal. Rptr. at 19.

75. *Id.* at 472, 595 P.2d at 600, 156 Cal. Rptr. at 22.

76. The court noted that exclusion from work in a monopolistic industry is potentially more damaging than in the case of a private employer because in the latter case the employee or applicant can seek work with the employer's competitors. *Id.* at 470–71, 595 P.2d at 599–600, 156 Cal. Rptr. at 21–22.

77. *Id.* at 475, 595 P.2d at 602–03, 156 Cal. Rptr. at 25 (citing CAL. PUB. UTIL. CODE § 453(a) (West 1981)).

78. CAL. LAB. CODE § 1101 (West 1981).

79. *Gay Law Students*, 24 Cal. 3d at 489, 595 P.2d at 611, 156 Cal. Rptr. at 33.

80. *Id.* at 488, 595 P.2d at 610, 156 Cal. Rptr. at 32.

rationale, was said by one commentator to hold the prospect for "far reaching beneficial effects on the rights of gay employees."[81] But the same writer stressed that the decision probably should be regarded as "idiosyncratic to California."[82] Even within California, however, the decision appears to have only limited applicability.

III. LOCAL ORDINANCES

A. *General Considerations*

Passage of local ordinances to prevent discrimination on the basis of sexual orientation is largely a consequence of frustration with efforts to achieve this goal in federal and state legislatures and courts.[83] The first local move of this kind is generally considered to be the ordinance passed by the city of Ann Arbor, Michigan, in 1972, prohibiting discrimination on the basis of sexual orientation.[84] Since then, approximately fifty municipalities, a dozen counties, and half a dozen states have passed new laws or interpreted old ones to provide some measure of protection for homosexuals.[85] The forms of protection vary greatly, from strictly delimited areas of protection through local resolutions to more comprehensive laws, such as the state-wide measure enacted in

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81. Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311, 316 (1980–81).

82. *Id.* Similarly, other writers have found the decision "heartening" and resplendent with "some stirring language," but peculiar to California, with its unique case law on state-protected monopolies. E. BOGGAN, M. HAFT, C. LISTER, J. RUPP & T. STODDARD, AN ACLU HANDBOOK: THE RIGHTS OF GAY PEOPLE 17 (rev. ed. 1983). Nonetheless, that discrimination against homosexuals represents a deprivation of their constitutionally guaranteed freedoms is one of the most promising doctrines in this area. A glimmer of hope based on first amendment concerns is presented by National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 105 S. Ct. 1858 (1985).

83. *See generally* Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, CIV. LIB. REV., Jan.-Feb. 1979, at 19. In a recent decision, Judge Robert H. Bork of the U.S. Court of Appeals for the District of Columbia, in upholding the Navy's discharge of a petty officer on the ground that he had had sexual relations with another man, noted that he could "find no constitutional right to engage in homosexual conduct" and that legal change on the matter would have to come "through the moral choices of the people and their elected representatives" and not through judicial command. Dronenberg v. Zech, 741 F.2d 1388, 1397 (1984). Given the unwillingness of Congress to amend the 1964 Civil Rights Act to protect homosexuals, rulings such as *Dronenberg* are likely, as the executive director of the National Gay Task Force noted, to result in increased pressure on state and local governments to enact protections for homosexuals. N.Y. Times, Sept. 2, 1984, at 26, col. 1.

84. ANN ARBOR, MICH., CODE ch. 112 (1982). The National Gay Task Force contends that the first local move to protect homosexuals was the Atlanta Civil Service Board's interpretation of its charter in 1971 as protecting civil service workers from discrimination on the basis of sexual orientation. NATIONAL GAY TASK FORCE, *supra* note 8. However, the Atlanta city clerk's office, the Atlanty city attorney's office, and the city's affirmative action department have no record of such action.

85. NATIONAL GAY TASK FORCE, *supra* note 8.

Wisconsin in 1982.[86]

On several occasions, ordinances decreed by local governing bodies have been overturned in referendum votes. The most notable occasion was in 1977, when the Dade County, Florida, ordinance was voted down by a margin of 208,000 to 92,000.[87] Eleven of the fifty-one local ordinances now in effect and four of the thirteen county measures are found in California jurisdictions. In all, then, about twenty-three percent of the country's municipal and county ordinances operate in California.[88]

B. Profile of the Ordinances

The accompanying chart provides a tabular representation of the coverage of the municipal and county ordinances in California[89] and California's 1979 state executive order.[90] In terms of their coverage and enforcement the ordinances vary greatly in their scope and effectiveness.

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86. WIS. STAT. ANN. § 111.32 (West Supp. 1984).

87. N.Y. Times, Dec. 28, 1977, at A14, col. 5. The involvement of entertainer Anita Bryant in the attack on the ordinance guaranteed widespread publicity. Bryant headed a group called "Save Our Children" and was widely quoted as arguing "If homosexuality were the normal way, God would have made Adam and Bruce." *Id.*, May 10, 1977, at 18, col. 1. Local ordinances were also defeated in St. Paul, Minnesota; Boulder, Colorado; and Eugene, Oregon, by margins of approximately two to one, and in Wichita, Kansas, by a margin of four to one. *Id.*, May 13, 1974, at 17, col. 1; *id.*, May 28, 1978, at 36, col. 3.

88. NATIONAL GAY TASK FORCE, *supra* note 8.

89. BERKELEY, CAL., CODE ch. 13.28 (1982), Cupertino, Cal., Resolution 3833 (Feb. 18, 1975); Laguna Beach, Cal., Ordinance 1061 (Mar. 1, 1984); Los Angeles, Cal., Ordinance 152,458 (June 1, 1979); Mountain View, Cal., Resolution 10,435 (Mar. 31, 1975); Oakland, Cal., Ordinance 10,427 (Jan. 10, 1984); Sacramento, Cal., Resolution 83-1012 (1983); San Francisco, Cal., Ordinance 119-78 (Apr. 11, 1978); Santa Barbara, Cal., Resolution 79-085 (Aug. 21, 1979); Santa Barbara County, Cal., Resolution 82-536 (Oct. 11, 1982); Santa Cruz, Cal., Resolution NS-15,246 (Apr. 1983); Santa Cruz County, Cal., Resolution 320-75 (1975) (as amended by Resolution 79-81 (Oct. 27, 1981)). The city of Palo Alto's nondiscrimination policy is embodied in the city manager's report on affirmative action. City Manager's Report No. 532.4 (Sept. 23, 1974). The National Gay Task Force claims that San Mateo County has, since 1975, prohibited discrimination against homosexuals in employment and housing. NATIONAL GAY TASK FORCE, *supra* note 8. However, the county clerk's office and personnel department in San Mateo have no record of the existence of such an ordinance.

90. California Exec. Order No. B-54-79 (Apr. 4, 1979).

Coverage of California's Ordinances Prohibiting Discrimination Based on Sexual Orientation

	Public Employment	Business Establishments	Private Employment	Housing & Real Estate	Education	Affirmative Action	City Facilities & Services
Berkeley	X	X	X	X	X		X
Cupertino	X					X	
Laguna Beach	X	X	X	X	X		X
Los Angeles	X	X	X	X	X		X
Mountain View	X					X	
Oakland	X	X	X	X			
Palo Alto	X				X		
Sacramento	X						
San Francisco	X	X	X	X			
Santa Barbara	X				X		
Santa Barbara County	X					X	
Santa Cruz	X					X	
Santa Cruz County	X					X	
San Mateo County	X		X	X			
State Executive Order	X						

1. Coverage

Coverage refers to the reach of the statute, including whether it embraces employment, housing and real estate, business establishments and practices, public accommodations, city facilities and services, and educational institutions.

The Berkeley ordinance, enacted in 1978, has served as the prototype for a number of similar measures. Berkeley's ordinance specifically prohibits discrimination in hiring, discharging, or otherwise discriminating with respect to terms, conditions, or privileges of employment on the basis of an individual's sexual orientation.[91] This prohibition extends to the segregation of employees on the basis of sexual orientation and to discrimination in job training.[92] The ordinance is applicable to employment agencies and labor organizations as well as employers.[93] Advertisements which indicate unlawful discriminatory

91. BERKELEY, CAL., CODE ch. 13.28, § .030(A) (1982).
92. *Id.* § .030(A)(2) & (5).
93. *Id.* § .030(A).

practices are specifically prohibited as well.[94] The ordinance does, however, allow for the affirmative defense that heterosexuality is a "bona fide occupational qualification."[95] San Francisco, Laguna Beach, and Los Angeles share all these provisions with Berkeley,[96] but the remaining California ordinances and resolutions generally do not provide for such widespread protections. In all California ordinances and resolutions, however, as well as in the state executive order, public employment discrimination against homosexuals is barred.

The four particularly comprehensive ordinances—Berkeley, San Francisco, Laguna Beach, and Los Angeles—also specifically prohibit discrimination in housing and other real estate dealings. The ordinances make it unlawful for any person to "interrupt, terminate, or fail or refuse to initiate or conduct any transaction in real property" on the basis of sexual orientation.[97] This protection extends to advertisements, representations of property as available, loans, guarantees, insurance, and a range of tenant services. The Oakland ordinance, although worded differently, provides similar protections.[98] All these ordinances, however, exempt from their coverage landlords of owner-occupied structures with bathrooms or kitchens used in common with tenants, while Berkeley, San Francisco, Laguna Beach, and Los Angeles also exempt any structures with less than three dwelling units.[99]

The Berkeley, Los Angeles, and Laguna Beach ordinances also prohibit discrimination against homosexuals by business establishments, city services and facilities, and educational institutions. Homosexuals may not be denied "the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any business establishment."[100] Homosexuals must also be granted equal enjoyment of city and city-supported facilities and services, and it is unlawful to place different terms and conditions on the availability of city facilities or services on the basis of a person's sexual orientation.[101]

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94. *Id.* § .030(A)(6).

95. *Id.* § .030(C).

96. Laguna Beach, Cal., Ordinance 1061 (May 1, 1984); Los Angeles, Cal., Ordinance 152,458 (June 1, 1979); San Francisco, Cal., Ordinance 119-78 (Apr. 11, 1978).

97. BERKELEY, CAL., CODE ch. 13.28, § .040(A); Laguna Beach, Cal., Ordinance 1061 (May 1, 1984); Los Angeles, Cal., Ordinance 152,458 (June 1, 1979); San Francisco, Cal., Ordinance 119-78 (Apr. 11, 1978).

98. Oakland, Cal., Ordinance 10,427 (Jan. 10, 1984).

99. BERKELEY, CAL., CODE ch. 13.28, § .040(C); Laguna Beach, Cal., Ordinance 1061 (May 1, 1984); Los Angeles, Cal., Ordinance 152,458 (June 1, 1979); Oakland, Cal., Ordinance 10,427 (Jan. 10, 1984); San Francisco, Cal., Ordinance 119-78 (Apr. 11, 1978).

100. BERKELEY, CAL., CODE ch. 13.28, § .050; Laguna Beach, Cal., Ordinance 1061 (May 1, 1984); Los Angeles, Cal., Ordinance 152,458 (June 1, 1979).

101. BERKELEY, CAL., CODE ch. 13.28, § .060; Laguna Beach, Cal., Ordinance 1061 (May 1, 1984); Los Angeles, Cal., Ordinance 152,458 (June 1, 1979).

Likewise, the three ordinances prohibit discrimination in admission to educational institutions, in the granting of educational services, and in the use of educational facilities.[102] The Oakland ordinance also prohibits discrimination by business establishments and by city and city-supported services and facilities,[103] while the San Francisco ordinance only prohibits discrimination with respect to public accommodations.[104]

2. Enforcement

In Berkeley, San Francisco, Laguna Beach, and Los Angeles any aggrieved person, a representative of the protected class, or the district attorney can petition for injunctive relief.[105] These cities also allow for the award of actual damages, costs, and reasonable attorney's fees[106] and, with the exception of San Francisco, also allow the court to award punitive damages.[107] The Oakland ordinance is alone in not only providing for civil damages and injunctive relief, but in also imposing a criminal penalty of misdemeanor upon violators.[108]

In contrast, the remaining California ordinances and resolutions not only are less comprehensive than those discussed above, but they also lack any enforcement teeth. For example, the ordinance or resolution may merely direct the city manager to communicate the antidiscriminatory policy to all city employees, recruitment services, and the wider community.[109] Other cities at least set up a complaint procedure to deal with alleged violations. In Santa Barbara County and Santa Cruz County, the county affirmative action officer is charged with disseminating information, providing guidance and training, and investigating and making findings and recommendations in the realm of discrimination against homosexuals.[110]

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102. BERKELEY, CAL., CODE ch. 13.28, § .070; Laguna Beach, Cal., Ordinance 1061 (May 1, 1984); Los Angeles, Cal., Ordinance 152,458 (June 1, 1979).

103. Oakland, Cal., Ordinance 10,427 (Jan. 10, 1984).

104. San Francisco, Cal., Ordinance 119-78 (Apr. 11, 1978).

105. BERKELEY, CAL., CODE ch. 13.28, § .090 (1982); Laguna Beach, Cal., Ordinance 1061 (May 1, 1984); Los Angeles, Cal., Ordinance 152,458 (June 1, 1979); San Francisco, Cal., Ordinance 119-78 (Apr. 11, 1978).

106. BERKELEY, CAL., CODE ch. 13.28, § .080 (1982); Laguna Beach, Cal., Ordinance 1061 (May 1, 1984); Los Angeles, Cal., Ordinance 152,458 (June 1, 1979); San Francisco, Cal., Ordinance 119-78 (Apr. 11, 1978).

107. BERKELEY, CAL., CODE ch. 13.28, § .080 (1982); Laguna Beach, Cal., Ordinance 1061 (May 1, 1984); Los Angeles, Cal., Ordinance 152,458 (June 1, 1979).

108. Oakland, Cal., Ordinance 10,427 (Jan. 10, 1984).

109. *See, e.g.*, Cupertino, Cal., Resolution 3833 (Feb. 18, 1975).

110. Santa Barbara County, Cal., Resolution 82-536 (Oct. 11, 1982); Santa Cruz County, Cal., Resolution 320-75 (1975) (as amended by Resolution 79-91 (Oct. 27, 1981)).

C. *Laguna Beach*

A case study of the process of enactment, in 1984, of the ordinance in the California city of Laguna Beach provides a sense of the elements of the campaign waged on both sides of the issue before a local ordinance comes into force.

The Laguna Beach effort was a direct outgrowth of California Governor Deukmejian's veto in 1984 of Assembly Bill 1, which would have added sexual orientation to the list of conditions in the Government Code[111] that were outlawed as a basis for discrimination in employment.[112] The bill was vetoed even though its sponsors noted that it would not "permit advocacy of a homosexual lifestyle" or allow violations of "an employer's dress code or standards of behavior on the job" and that it also would exempt from protection "persons convicted of crimes involving sex with a minor who might be applying for work involving children."[113]

Laguna Beach, a city of 19,000 persons founded in 1927, is a "quiet seaside resort, known for decades as an art colony."[114] The city has a comparatively sizeable population of homosexuals. At the time of the governor's veto of Assembly Bill 1, the mayor of Laguna Beach, Robert Gentry, had only recently declared his homosexuality. The mayor believed that the legislature's approval of Assembly Bill 1 had "provided gays with a new sense of freedom and human dignity, and a sense of belonging."[115] The homosexual community of Laguna Beach viewed the governor's veto as a stinging setback. Gentry reported that, following the veto, friends told him stories of harassment and of fear for their jobs.[116]

Gentry obtained approval from the city council to have the city attorney draft an ordinance providing employment and housing protection for homosexuals. The city attorney, after studying a sample of

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111. Assembly Bill 1 would have amended Government Code §§ 12,920, 12,921, 12,926, 12,931, 12,940, 12,944, and 12,933, and added § 12,940.5.

112. In his veto message, Governor Deukmejian said, "A person's sexual orientation should not be the basis for the establishment of a specially protected class of individuals, especially in the absence of a compelling showing of need." He believed that such a need had not been demonstrated. N.Y. Times, Sept. 2, 1984, § 1, at 26, col. 1. However, a National Institute of Mental Health study reports that 16% of homosexuals have employment difficulties and 9% lose their jobs because they are homosexual. P. Gebhard, Incidence of Overt Homosexuality in the United States and Western Europe (unpublished manuscript) *noted in* NATIONAL INST. OF MENTAL HEALTH, TASK FORCE ON HOMOSEXUALITY, FINAL REPORT 7, 22 (1969).

113. CALIFORNIA ASSEMBLY BILL 1: INFORMATION PACKET 6 (1983).

114. N.Y. Times, Nov. 4, 1984, at 16, col. 3.

115. Interview with Robert F. Gentry, mayor of Laguna Beach, California, in Irvine, California (July 2, 1984) [hereinafter cited as Gentry interview].

other measures in force throughout the state, "cut and pasted" together a draft proposal in line with his instructions to make the ordinance as broad as possible. However, the city attorney had been told by the council that it did not want to "clutter" the measure with a new agency for enforcement, nor did it desire criminal penalties: civil fines would be sufficient. Enforcement was to be carried out through complaints to the city attorney. In order to avoid having a complainant be forced to prove his or her homosexuality, the term "actual or supposed" homosexuality was incorporated into the ordinance.[117]

Gentry had specifically requested that housing be included as a protected area within the Laguna Beach ordinance. Living near homosexuals and renting to them, he believed, is a much touchier issue for many nonhomosexuals than working with them.[118] Otherwise, the mayor wanted to make the ordinance much like others in the state, rather than a "striking advance," so that the city council members would more readily support it.[119]

The bill attracted considerable public opposition. Opponents charged that the mayor was using the issue to advance his own political fortunes, and that the enactment would not make "one bit of difference." About 350 signatures were gathered on a petition opposing the measure, largely through the efforts of members of a conservative religious group in the city.[120] It was argued that the antidiscriminatory

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117. In an interview with city attorney Philip D. Kohn, Kohn stressed that, while his office had had no previous complaints by homosexuals of discrimination, the absence of such complaints could well have been a function of the fact that there had been no means by which they could have been made. Kohn believes that there is a "genuine likelihood that the ordinance might be of use." He pointed out that the absence of complaints following the ordinance's enactment should not be taken as an indication of its irrelevance, since its passage could have reduced discrimination. Kohn refuted opponents' claims that the large influx of homosexuals into the community demonstrated the absence of discrimination and instead viewed the large number of homosexuals in Laguna Beach as increasing the opportunities for discrimination. Kohn also stressed that ordinances such as the one he drafted are not truly "gay rights" measures, but rather protect a much wider range of interests. For example, under the new ordinance heterosexuals in a gay bar could not be discriminated against. Interview with Philip Kohn, city attorney for Laguna Beach, California, in Costa Mesa, California (Aug. 15, 1984).

118. The classic study demonstrating this point is E. BOGARDUS, IMMIGRATION AND RACE ATTITUDES (1928).

119. Gentry interview, *supra* note 115.

120. Religious groups—most notably the Roman Catholic Archdiocese of New York and Agudah Israel—were also in the forefront of the movement against New York City's Executive Order 50, which would have required religious organizations to abide by the city policy barring job discrimination based on sexual orientation. The religious groups argued that abiding by the provision would condone immoral behavior. N.Y. Times, Aug. 15, 1984, § 2, at 3, col. 5. In September, 1984, the New York State Supreme Court struck down the portion of the executive order barring discrimination against homosexuals, noting that federal, state, and city codes banning discrimination do not include the sexual preference category. *Id.*, Nov. 27, 1984, at B3, col. 1. In November, 1984, however, the New York State Supreme Court upheld a Board of Estimate

measure was being "ramrodded" through the council without an adequate determination of what discrimination, if any, existed against homosexuals in the city. The opposition also maintained that some of the worst employment discrimination in the city was practiced by businesses operated by homosexuals which hired only persons who shared the manager's predilections.[121] Unpersuaded by the opponents of the measure, the city council endorsed the ordinance by a unanimous vote.

IV. CONCLUSION

With few exceptions, there has been an extreme reluctance by either the United States Congress or the federal judiciary to provide protection against discrimination based on sexual preference.[122] Specific protection in this area has been left almost entirely to state and local development. As the case study of California demonstrates, this usually occurs by way of judicial expansion of the state civil rights coverage and the sporadic enactment of local ordinances.

In terms of uniformity and enforceability there are many advantages to a comprehensive state law, such as that in Wisconsin.[123] Given the recent veto of Assembly Bill 1, however, enactment of such a law in California appears unlikely in the near future. Though the courts have been liberal in their interpretations of the classifications covered by the Unruh Act, there are limits to the protections afforded by this statute, particularly in the realm of private employment.

The California Supreme Court in *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*[124] held that employment discrimination on the basis of sexual preference was clearly illegal for the state as well as for state-protected utilities. In other cases, the California Supreme Court has ruled that the common law prohibits discriminatory labor union policies which arbitrarily exclude persons from employment opportunities,[125] and that professional and business associations also are prohibited from arbitrary exclusion of individuals

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resolution that bans discrimination against homosexuals in hiring by social service agencies that do business with the city. *Id.*, Nov. 16, 1984, at B3, col. 1. The Appellate Division later overturned the lower court decision. *Id.*, May 8, 1985, at A1, col. 5. Both the executive order and the resolution had been the subject of suits brought by the Roman Catholic Archdiocese of New York and other charitable organizations. *Id.*

121. Interview with Jeff Jahraus, in Laguna Beach, California (Aug. 3, 1984).

122. Two bills which would have included sexual orientation or preference as one of the protected categories under the 1964 Civil Rights Act have recently been considered in Congress. Senate Bill 2568 never came to a floor vote in the 98th Congress, although a companion measure passed the House of Representatives by an overwhelming majority. Telephone interview with Senator Alan Cranston's office, Washington, D.C. (Mar. 12, 1985).

123. WIS. STAT. ANN. § 111.32 (West Supp. 1984).

124. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

125. James v. Marinship Corp., 25 Cal. 2d 721, 740–41, 155 P.2d 329, 339–40 (1944).

from employment opportunities.[126] However, in *Gay Law Students* the court just as clearly held that sexual preference discrimination was not covered by the state's Fair Employment Practices Act.[127] Furthermore, California common law has not yet been extended to bar employment discrimination based on sexual preference in the private sector, unless there is a state-protected monopoly or quasi-monopoly.

Local ordinances are most effective in filling the void that is left currently by state statutes and the common law in the realm of private employment. It remains questionable, however, whether the protection afforded is of any substance or is primarily a symbolic gesture. No appellate tests have yet been made of the employment provisions of the local ordinances, and it is possible that such a test might result in the overturn of such ordinances, at least with respect to the private employment provisions, because of the preemption issues associated with the Fair Employment Practices Act. Given the *Gay Law Students* ruling, it may be that only a change in state law can secure protection for homosexuals in private employment.

This is not to suggest that the ordinances, even if they prove vulnerable to challenge, serve no function. They are assuredly important in states that have neither an expansive civil rights statute nor a common-law doctrine that extends discrimination protection to homosexuals. A recent example of the effectiveness of local ordinances occurred in Austin, Texas, where a municipal court upheld the constitutionality of the city's sexual preference ordinance in its application against a bar that had prohibited same-sex dancing.[128] In jurisdictions where the legal impact of such ordinances may prove less significant, such as in California,[129] they can nonetheless play an important symbolic role. They allow a community to go on record that its authorities will no longer tolerate discrimination against homosexuals. This provides both publicity as well as some measure of protection. Besides, these ordinances may offer more substantial legal protection than the Unruh Act, which allows defendants to demonstrate exculpating reasonable grounds for what would otherwise be unlawful discrimination.

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126. See cases cited in *Gay Law Students*, 24 Cal. 3d at 483, 595 P.2d at 607, 156 Cal. Rptr. at 29.

127. *Id.* at 489, 595 P.2d at 611, 156 Cal. Rptr. at 33.

128. State v. Driskill Bar & Grill, Inc., Nos. 739,130 & 739,131 (Austin, Tex. Mun. Ct. Apr. 16, 1980).

129. *See* Exler v. Disneyland, No. 342,021 (Super. Ct. Cal. May 14, 1984). The plaintiffs in *Exler* had challenged Disneyland's ban on same-sex dancing. There were no applicable local ordinances and the case was decided against Disneyland under the Unruh Act. When asked how he felt about the likely impact of local ordinances in such cases, the plaintiff's attorney responded that he believed the Unruh Act provided adequate protection and that a local ordinance would have been duplicative. Interview with Ronald V. Talmo, in Tustin, California (Oct. 16, 1984).

Oftentimes too, the enforcement of the rights of members of a minority group will depend upon the willingness of attorneys to take such cases. That willingness is likely to be based to some extent on an estimate of the probability of success. Homosexual discrimination cases are more apt to arise if there exist clearly drafted statutes or ordinances barring such discrimination, so that attorneys do not have to rely on more tenuous legal arguments. In this regard, the ordinances, although still quite limited in number and piecemeal in coverage, represent an important development in the area of preventing discrimination based upon sexual preference.