

Sexual Orientation Rights in the Workplace: A Proposal for Revising and Reconsidering California's Assembly Bill 101

INTRODUCTION

California law prohibits employment discrimination based on race, creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, and age.¹ The first California statute to provide protection from discrimination was the Fair Employment Practices Act (FEPA), enacted in 1959.² At that time, only race, creed, color, national origin, and ancestry were included as classifications upon which employers were not allowed to discriminate.³ In subsequent years, the legislature recognized that other classifications needed protection from employment discrimination.⁴ Thus, the legislature amended FEPA to bar employment decisions based on sex,⁵ age,⁶ physical handicap,⁷ medical condition,⁸ marital status,⁹ and pregnancy.¹⁰ In 1980, the legislature also changed the name of FEPA to the Fair Employment and Housing Act (FEHA).¹¹ More recently, the California legislature has recognized that sexual orientation minorities¹² need the same type of protection extended to the other

¹ CAL. GOV'T CODE §§ 12900-12996 (West 1992).

² Fair Employment Practices Act, ch. 121, § 1, 1959 Cal. Stat. 1999, 1999-2005 (repealed 1980).

³ *Id.* (establishing CAL. LAB. CODE § 1412).

⁴ *See infra* notes 5-10 and accompanying text.

⁵ Act of Sept. 19, 1970, ch. 1508, 1970 Cal. Stat. 2993.

⁶ Act of Nov. 24, 1972, ch. 1144, § 1, 1972 Cal. Stat. 2211.

⁷ Act of Oct. 2, 1973, ch. 1189, 1973 Cal. Stat. 2498.

⁸ Act of Aug. 28, 1975, ch. 431, 1975 Cal. Stat. 923.

⁹ Act of Sept. 21, 1976, ch. 1195, 1976 Cal. Stat. 5458.

¹⁰ Act of Sept. 28, 1978, ch. 1321, § 1, 1978 Cal. Stat. 4319.

¹¹ Fair Employment and Housing Act, ch. 992, § 4, 1980 Cal. Stat. 3138, 3140-65 (codified as amended at CAL. GOV'T CODE §§ 12900-12996 (West 1992)).

¹² Sexual orientation minorities include lesbians, gay men, and bisexuals.

classifications included in FEHA.¹³ Recognizing this need, the legislature has twice approved legislation to provide such protection, the more recent effort being Assembly Bill 101, passed in 1991.¹⁴

Although the legislature favors protecting sexual orientation minorities from employment discrimination,¹⁵ California's governors have been less willing to provide this protection. Governor Deukmejian vetoed the legislature's 1984 employment discrimination measure.¹⁶ Governor Wilson vetoed A.B. 101 in 1991.¹⁷ Wilson defended his veto on the ground that California already has laws to protect sexual orientation minorities from employment discrimination.¹⁸ He also stated that A.B. 101 would increase lawsuits by providing more statutory grounds for

¹³ See *infra* note 14 and accompanying text.

¹⁴ The State legislature first approved a statute to protect sexual orientation minorities from employment discrimination in 1984. A.B. 1, 1983-4 Regular Session (1984). The State legislature passed A.B. 101 in 1991. A.B. 101, 1991-2 Regular Session (1991). For a partial text of A.B. 101, see *infra* note 335.

¹⁵ See *supra* note 14 and accompanying text.

¹⁶ Letter from George Deukmejian, Governor of California, to the Members of the California Assembly (Mar. 13, 1984) (on file with the State of California Legislative Bill Room).

¹⁷ Letter from Pete Wilson, Governor of California, to the Members of the California Assembly (Sept. 30, 1991) [hereafter *Governor Wilson Letter*] (on file with the State of California Legislative Bill Room).

¹⁸ *Id.* Governor Wilson cited several forms of protection. First, he cited the state constitution's equal protection clause, which prohibits discrimination by any governmental entity against any class of individuals in employment decisions. *Id.* (citing CAL. CONST. art. I, § 7(a)). Second, Governor Wilson cited Government Code § 18500, which requires equal treatment of all civil service applicants and employees without regard to sexual orientation. *Id.* Third, the Governor cited Executive Order B-54-79, which prohibits discrimination on the basis of sexual orientation in state employment. *Id.* Fourth, he noted that under current case law, Labor Code §§ 1101 and 1102 protect manifest homosexuals from employment discrimination based on their gay or lesbian political activities or affiliations. *Id.* (citing *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d 458 (1979)). The Governor also cited an Attorney General's opinion, which concluded that these Labor Code provisions prohibit private employers from discriminating on the basis of homosexual orientation or affiliation, private as well as manifest. *Id.* (citing 69 Op. Cal. Att'y Gen. 80 (1986)). Moreover, Governor Wilson noted that courts have been increasingly vigorous in protecting homosexual employees from wrongful termination. *Id.* (citing *Collins v. Shell Oil Co.*, (1990 (sic)) 56 Fair Empl. Prac. Cas. 440).

employment discrimination claims.¹⁹ According to Wilson, additional claims would put an excessive burden on the Department of Fair Employment and Housing (DFEH),²⁰ oppress innocent employers, and increase the cost of doing business in California.²¹

The Governor's defense of his veto has failed to resolve the matter. In fact, neither the supporters nor the opponents of A.B. 101 are satisfied with the veto. A.B. 101's supporters believe the Governor bowed to pressure from political and religious conserv-

¹⁹ *Id.* In his letter to the California Assembly, the Governor stated:

The remedy proposed by AB 101 for those who believe themselves to be victims of employer discrimination based on their sexual orientation is to pursue procedures now available to those who believe themselves the victims of job discrimination because of race, gender, age, physical disability or membership in some other protected class.

Over 10,000 such complaints are filed each year with the Department of Fair Employment and Housing! Up to one-quarter may wind up in court, adding substantially to the flood-tide of litigation which increasingly and importantly threatens California's competitiveness as a place to do business.

Id.

²⁰ The Department of Fair Employment and Housing (DFEH) is responsible for preliminary investigation of all employment discrimination claims arising under the Fair Employment and Housing Act (FEHA). For a discussion of current DFEH responsibilities, see *infra* notes 306-07, 316-31 and accompanying text.

²¹ *Governor Wilson Letter*, *supra* note 17. For relevant portions of Governor Wilson's written comments to the California Assembly, see *supra* note 19. Governor Wilson further stated:

The cost to employers of defending against these lawsuits is not readily quantifiable, but it is real and substantial, especially to small employers. Litigation in any form is expensive. The potential cost, however, is more than going to court. It includes a myriad of unknowns, such as the potential increase in business insurance. It also includes the cost of *avoiding* litigation. As has happened in other cases, businesses may find themselves implementing costly programs to avoid the protracted negative publicity that even groundless lawsuits sometimes cause.

In short, AB 101 is not a simple resolution declaring an acknowledged right. It is a statute imposing, in addition to present protections, a specific remedy which does indeed create burdens upon employers, both guilty and innocent.

AB 101 has been routinely labeled by the news media as a "gay rights bill." Proponents of the legislation have rejected this characterization, protesting that they are seeking no special

atives.²² A.B. 101's opponents credit the veto to their intense pressure rather than to the Governor's political or moral philosophy.²³ Governor Wilson's veto also touched off a wave of protests and riots.²⁴ To make matters worse, subsequent legal disputes have undermined the Governor's assertion that sufficient protection already exists to prevent employment discrimination based on sexual orientation.²⁵

This Comment examines employment discrimination against California's sexual orientation minorities and proposes a revision of A.B. 101 that could win even greater support for the measure. Part I of this Comment analyzes employment discrimination against sexual orientation minorities in California. This material addresses discrimination in both the private and public sectors. Part II examines the current federal and state laws that apply to sexual orientation minorities seeking protection from discrimination in the workplace. Part III describes why the current laws are insufficient. This Part also reviews A.B. 101, California's most recent legislative effort to provide effective protection from sexual orientation employment discrimination. The review of A.B. 101 analyzes both the changes the measure would have made to existing law and the controversy A.B. 101 generated before and after the Governor vetoed the measure.

Having found that current laws are inadequate to protect sexual orientation minorities from employment discrimination, Part IV proposes that the California legislature reconsider legislation that would provide explicit protection. Part IV first recommends that the legislature reconsider A.B. 101 in its entirety. As Part IV will show, many of the concerns that led Governor Wilson to veto

rights unavailable to others, but only freedom from discrimination. They ask, they say, only fairness.

Well, fair enough.

But they should understand, then, the need for fairness to innocent employers and their other employees.

.....
Fairness demands that where other protections exist in the law, anecdotal evidence of even invidious discrimination—if it has not been shown to be pervasive—does not warrant imposing that burden.

Id.

²² See *infra* notes 379-88 and accompanying text.

²³ See *infra* notes 389-91 and accompanying text.

²⁴ See *infra* notes 394-98 and accompanying text.

²⁵ See *infra* notes 161-222, 228-34 and accompanying text.

A.B. 101 were not well-founded. This analysis, however, may not be enough to persuade Governor Wilson to change his position. Thus, the legislature may need to make compromises that will address his concerns and broaden support for a measure that will protect sexual orientation minorities from workplace discrimination. Therefore, Part IV also proposes a legislative compromise that could create the broad support required to enact this much needed protection.

I. BACKGROUND

In California and across the nation, employment discrimination based on sexual orientation is pervasive. Studies reveal that as many as 30% of gay workers experience discrimination at work; up to 17% have been fired because of their lifestyle.²⁶ Employers discriminate against sexual orientation minorities by rejecting

²⁶ See Martin P. Levine, *Employment Discrimination Against Gay Men*, in *HOMOSEXUALITY IN INTERNATIONAL PERSPECTIVE* 18, 27 (Joseph Harry & Man Sing Das eds., 1980) (reporting that almost 30% of gay men report job discrimination and 17% have lost or were denied employment based on their sexual orientation); Martin P. Levine & Robin Leonard, *Discrimination Against Lesbians in the Work Force*, 9 *SIGNS* 700, 706 (1984) (reporting that nearly 25% of all lesbians have experienced employment discrimination based on sexual orientation); Maria Goodavage, *Gay Rights Bill Corners Governor*, *USA TODAY*, Sept. 25, 1991, at 3A (reporting on more recent survey finding that 16% of homosexual workers are harassed at work and 9% are fired because of their lifestyle); Martha Groves, *Frequent Job Bias Leaves Little Recourse, Gays Say*, *L.A. TIMES*, Oct. 5, 1991, at A1 (reporting that 15% of 6,500 gays interviewed believe they have experienced job discrimination based on their sexual orientation).

These statistics are conservative because many sexual orientation minorities do not admit to being gay, lesbian, or bisexual. Levine & Leonard, *supra*, at 708-10. Therefore, they may have been the victims of discrimination but are not included in the statistical surveys. *Id.*; see also Thomas A. Stewart & Mark D. Fefer, *Gay in Corporate America*, *FORTUNE*, Dec. 16, 1991, at 43. Stewart & Fefer report that sexual orientation minorities defy common stereotypes regarding the kinds of occupations they choose. *Id.* The common stereotypes are that sexual orientation minorities tend to choose careers in social services, entertainment, the arts, and fashion. *Id.* In a survey of 4,000 gays and lesbians, however, one research organization found that "more homosexuals work in science and engineering than in social services, 40% more are employed in finance and insurance than in entertainment and the arts; and 10 times as many work in computers as in fashion." *Id.* These statistics are significant because they show that employment discrimination against sexual orientation minorities harms employees in a broad range of occupations.

their applications for employment or by firing employees thought or known to be attracted to members of the same gender.²⁷ Employers similarly discriminate against sexual orientation minorities by failing to promote them²⁸ and refusing to extend employment benefits to their domestic partners.²⁹ Finally, co-workers may harass sexual orientation minorities, creating yet

²⁷ See *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (denying federal relief for plaintiffs who claimed their employer fired them because they were gay or appeared to be gay). For a discussion of this case, see *infra* notes 147-48. See also Levine, *supra* note 26, at 20-26 (describing discriminatory practices toward sexual orientation minorities); Hugh Dellios, *Firings Fuel Push for Gay Rights Bill*, CHI. TRIB. (North Sports ed.), Apr. 5, 1991, at C3. A Tennessee corporation, Cracker Barrel Old Country Store, Inc., fired up to six employees because they were gay. *Id.* The company distributed a written policy against employing individuals "whose sexual preferences fail to demonstrate normal heterosexual values which have been the foundation of families in our society." *Id.*; cf. CAL. GOV'T CODE § 12940(a) (West 1992) ("It shall be an unlawful employment practice . . . [f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person . . . or to bar or to discharge the person from employment . . .").

²⁸ See Levine, *supra* note 26, at 20-26 (describing systematic efforts that employers use to ensure that they do not promote sexual orientation minorities); cf. CAL. GOV'T CODE § 12940(a) (West 1992) ("It shall be an unlawful employment practice . . . to discriminate against the person [protected by the statute] in compensation or in terms, conditions or privileges of employment.").

²⁹ A "domestic partner" is a partner of an employee who is like a spouse, even though the couple is not legally married. See Robert Eblin, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067, 1068-70 (1990). Domestic partners include heterosexual as well as homosexual couples. *Id.* at 1069. Because marriage between people of the same sex is not permitted in any state, domestic partner benefits are especially important to sexual orientation minorities. *Id.* at 1068-70 ("Simply defined, domestic partner provisions extend [employment] benefits to an individual's spousal equivalent, without regard to sex, as though the two persons were legally married. . . . Domestic partnership status is especially important to gay couples . . . because they do not have the option of securing benefits through marriage."). One recent California case that examines domestic partnership benefits is *Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410, 415 (Ct. App. 1985) (holding that California's constitutional guarantee of equal protection does not apply to state agency's refusal to extend employment benefits to homosexual partners of agency employees).

another form of employment discrimination.³⁰ Sometimes the harassment becomes so intense that known or suspected gay and lesbian employees must seek employment elsewhere.³¹ When the employer fails to take decisive measures to prevent harassment, the employer implicitly participates in the discrimination.³²

One indication that employment discrimination against sexual orientation minorities is a problem is found in American attitudes. A Gallup poll conducted in 1989 found that 18% of Americans did not believe homosexuals should have equal rights in terms of job opportunities and 11% were undecided.³³ Additionally, 32% of those surveyed believed that sexual orientation minorities should not be allowed to become doctors³⁴ and less than 50% of the survey respondents believed that sexual orientation minorities should be allowed to serve as elementary or high school teachers.³⁵ A 1987 poll of executive officers from Fortune

³⁰ See Levine & Leonard, *supra* note 26, at 706 (referring to harassment of lesbians in the workplace); cf. CAL. GOV'T CODE § 12940(h) (West 1992):

It shall be an unlawful employment practice . . . [f]or an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age, to harass an employee or applicant.

Id.

³¹ See, e.g., Scott Harris, *City's Gay Rights Ordinance Faces Test in Court Case*, L.A. TIMES, Dec. 6, 1991, at B1 (reporting on one Los Angeles employee who was fired from his job following harassment from fellow workers about his sexual orientation).

³² Cf. CAL. GOV'T CODE § 12940(h) (West 1992):

Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring.

Id.

³³ Diane Colasanto, *Gay Rights Support Has Grown Since 1982, Gallup Poll Finds*, S.F. CHRON., Oct. 25, 1989, at A21. The results were based on telephone interviews with 1,227 adults with a 3% margin of error. *Id.* However, in 1977, 33% believed that homosexuals should not have equal rights to job opportunities while 11% were undecided. *Id.* Therefore, the new survey indicates that people are becoming more tolerant of sexual orientation minorities. *Id.*

³⁴ *Id.* 12% were undecided. *Id.*

³⁵ *Id.*

500 companies found that 66% of the executives said they would hesitate to promote a gay or lesbian employee to management.³⁶

These biases are reflected in the workplace. In both the private and public sectors, recent examples of discrimination against sexual orientation minorities demonstrate that they have good reason to fear employment discrimination. In the private sector, Jeffery C. had consistently scored well in job performance reviews as an executive with a subsidiary of Shell Oil Co.³⁷ Jeffery lost his job, however, shortly after his secretary found a memo he wrote pertaining to a party for gays.³⁸ Shell Oil fabricated a new, negative job evaluation to support its decision to fire Jeffery.³⁹ The new evaluation contained false information about his personal background, education, performance, leadership ability, and judgment.⁴⁰

Another example from the private sector is Michael T.'s experience with the Bank of America.⁴¹ Although his superior job performance as a senior legal secretary earned him a raise, he claims that he was fired because of his sexual orientation and because he moonlighted as a dancer in a local gay theater.⁴² His termination came two weeks after his supervisors made a surprise visit to the theater where Michael performed.⁴³

Sexual orientation discrimination is also a problem in the public sector. One of the greatest perpetrators of employment discrimination against sexual orientation minorities is the federal government.⁴⁴ Under federal regulations, the military must dis-

³⁶ Goodavage, *supra* note 26 (referring to *Wall Street Journal* poll).

³⁷ *Collins v. Shell Oil Co.*, No. 610983-5, 1991 WL 147364, at *2 (Cal. Super. Ct. June 13, 1991).

³⁸ *Id.* at *2-*3.

³⁹ *Id.* at *1-*4.

⁴⁰ *Id.* at *4. The employer even shared confidential information about the plaintiff's sexual orientation with other potential employers and then criticized him for not working hard enough to find another job. *Id.* at *5. The superior court judge awarded the plaintiff \$5.3 million. *Id.* at *1. The judge based the award on contract remedies (\$2,523,229 for loss of income) and tort remedies (\$800,000 for non-economic harm and \$2,000,000 for punitive damages based on intentional infliction of emotional distress). *Id.*

⁴¹ Michael McCabe, *Gay Dancer Sues B of A Over Firing*, S.F. CHRON., Jan. 7, 1992, at D3.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See *infra* notes 45-54 and accompanying text; see also RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 30 (1988) (discussing federal government discrimination against sexual orientation minorities).

charge individuals who engage or have engaged in homosexual acts or who state they are homosexual or bisexual.⁴⁵ The govern-

⁴⁵ 32 C.F.R. pt. 41, app. A, pt. 1 H (1991). The beginning of the regulation reads:

H. *Homosexuality*. 1. *Basis*. a. Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among service members; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

b. As used in this section:

(1) Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts;

...

c. The basis for separation may include preservice, prior service, or current service conduct or statements. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

(a) Such conduct is a departure from the member's usual and customary behavior;

(b) Such conduct under all the circumstances is unlikely to recur;

....

Id.

The government's defense of its policies in federal court cases has echoed the language of these regulations. *See Beller v. Middendorf*, 632 F.2d 788, 811 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). The following are examples of some of the government's rationales. First, sexual orientation minorities increase anti-gay feelings among other military personnel and decrease military discipline and morale. *Id.* Second, sexual orientation minorities are less likely to perform their duties effectively. *Id.* Third, parents of potential military personnel may be reluctant to allow their children to join the military, knowing their children have to associate with others who are incapable of maintaining high moral standards. *Id.* Fourth, sexual orientation minorities may disrupt the military by forcing their desires on

ment continues this practice even though a majority of Americans believe that sexual orientation minorities should be able to serve in the military.⁴⁶ Although sexual orientation minorities fare better in the federal government's civil service,⁴⁷ they still experience discrimination when working in jobs that require security clearances.⁴⁸ For example, the Central Intelligence Agency and Federal Bureau of Investigation continue to actively discriminate against sexual orientation minorities.⁴⁹

The government also compels certain private sector employers to discriminate against sexual orientation minorities if they will have access to classified information.⁵⁰ The government defends its policy on the grounds that sexual orientation minorities are a greater security risk than heterosexual employees.⁵¹ In Califor-

others. *Id.* Finally, society may mistake governmental toleration of sexual orientation minorities as tacit approval. *Id.*

⁴⁶ See Gerald Cohen, *Poll Finds Support for Gays in Military; Pentagon Policy of Discharging Homosexuals Opposed by 81%*, S.F. CHRON., Apr. 19, 1991, at A15. Penn & Schoen Associates of New York conducted a poll of 800 people and found that 65% supported admitting homosexuals to the military. *Id.* Eighty-one percent of the respondents said that they oppose the Pentagon's policy of discharging gays and lesbians from the military solely because of their sexual orientation. *Id.* Nevertheless, a Pentagon representative reasserted Pentagon policy that "[h]omosexuality is incompatible with military service." *Id.*

⁴⁷ See *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (holding that male federal civil service employee's alleged "feminine conduct" or advances towards member of same sex is not a ground for dismissal).

⁴⁸ See MOHR, *supra* note 44, at 30 (discussing federal governmental discrimination against sexual orientation minorities).

⁴⁹ *Id.*

⁵⁰ The federal government is able to perpetuate discrimination throughout the private defense industry by denying sexual orientation minority employees access to classified information needed to fulfill their job responsibilities. See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 568 (9th Cir. 1990) ("[I]t is undisputed that for both Secret and Top Secret clearances, [the Defense Industrial Security Clearance Office] refers all homosexual applicants to [the Defense Industrial Security Clearance Review] for an expanded investigation and adjudication."). For further discussion of this case, see *infra* notes 134-37 and accompanying text.

⁵¹ See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375 (9th Cir. 1990). The court refused to grant a rehearing in a case where the court upheld the right of the government to discriminate against sexual orientation minorities in its hiring practices. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990). Justice Canby's dissenting opinion cites three reasons offered by the government

nia, the government's policy could have a significant impact due to the large amount of private defense work that takes place in the state.⁵² Governmental discrimination is harmful because it reinforces the belief that sexual orientation minorities are inferior.⁵³ The government's practices may also encourage California's private sector employers to imitate the government's discrimination against sexual orientation minorities.⁵⁴

Although California provides greater protection for its public employees than the federal government,⁵⁵ many California public sector employees still suffer from sexual orientation discrimination. For example, in 1991, Mitchell G. testified before the California Assembly that he was forced to resign his position with the Los Angeles Police Department because of open and continual harassment against him based on his sexual orientation.⁵⁶ He stated that his fellow officers routinely glued his locker shut and refused to come to his aid during life-threatening situations, and that his superior officer singled him out for abuse.⁵⁷ Mitchell also testified that if an officer befriended or assisted him, the other officers would harass that person as well.⁵⁸ In addition to police officers, public school teachers and school board members who are open about their minority sexual orientation are also especially vulnerable to discrimination and harassment.⁵⁹

for its policy. "(1) [H]omosexuals may be less willing than others to abide by the law; (2) they may be especially subject to coercion or blackmail; and (3) they may be emotionally or mentally unstable." 909 F.2d at 381 (Canby, J., dissenting).

⁵² *The Impact of the Aerospace Industry on California*, BUS. DATELINE, Dec. 1991, § 1 at 1 (stating that aerospace/defense constitutes eight percent of California's employment base).

⁵³ Cf. *High Tech Gays*, 909 F.2d at 382 (Canby, J., dissenting) ("Homosexuals are hated, quite irrationally, for what they are, what they did not choose to be, and what they cannot easily change. Mainstream society has mistreated them for centuries.").

⁵⁴ Cf. MOHR, *supra* note 44, at 30 (discussing federal governmental discrimination against sexual orientation minorities).

⁵⁵ Compare *infra* notes 85-151 and accompanying text with *infra* notes 155-227 and accompanying text (discussing protection granted by federal and California law, respectively).

⁵⁶ See David Tuller, *Drive for New Laws; Broader Support for Gay Rights*, S.F. CHRON., Apr. 12, 1991, at A1.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Kathleen Hendrix, *A Difficult Test*, L.A. TIMES, Nov. 1, 1991, at E1 (reporting on bias against one Los Angeles Board of Education member

Although the accounts of Jeffery, Michael, and Mitchell are examples of blatant discrimination, many sexual orientation minority employees experience discrimination in more subtle ways.⁶⁰ They find their career paths blocked by a "glass ceiling."⁶¹ Employers use subjective criteria to weed out sexual orientation minorities from career advancement.⁶² Not only do sexual orientation minorities fear that they will be denied further promotions, they also fear they will have to endure harassment in order to keep their jobs.⁶³ Many sexual orientation minority employees respond by pretending that they are heterosexual.⁶⁴ Many choose not to share their personal lives with co-workers and some even lie about their personal lives to avoid discrimination.⁶⁵

The reports from sexual orientation minorities who experience employment discrimination,⁶⁶ confirmed by surveys that report American prejudice against them,⁶⁷ indicate that sexual orientation minorities need legal protection from employment discrimination. While all states should consider how to protect sexual orientation minorities within their borders, California should be a leader in offering such protection because, as the most populous state in the nation,⁶⁸ California may have the largest population

after he publicly acknowledged his homosexuality); James Quinn, *Activists Vow to Continue Protests for Gay Teachers*, L.A. TIMES (Valley ed.), June 14, 1991, at B3 (reporting on two teachers forced to resign because of their sexual orientation). Although Americans are becoming more tolerant of sexual orientation minorities in the workplace, *supra* note 33, many Americans continue to believe that employment in public education should be off limits to sexual orientation minorities. *See supra* text accompanying note 35.

⁶⁰ *See infra* notes 61-65 and accompanying text; *see also* Susan Orenstein, *Gays Still Struggling for Acceptance at S.F. Firms*, THE RECORDER, July 9, 1991, at 1 (reporting on sexual orientation discrimination in San Francisco law firms).

⁶¹ Stewart & Fefer, *supra* note 26, at 45 ("Gay executives also fear a 'glass ceiling' beyond which known or suspected homosexuals cannot rise.").

⁶² *Id.*

⁶³ *Id.* at 44. Even when companies have programs to promote work force sensitivity to diversity, sexual orientation minorities still experience harassment from other employees. *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See supra* notes 26, 37-65 and accompanying text.

⁶⁷ *See supra* notes 33-36 and accompanying text.

⁶⁸ THE WORLD ALMANAC AND BOOK OF FACTS 1992, 74-75 (1991) (quoting from U.S. Bureau of the Census, U.S. Dep't of Commerce, 1990 Census). The 1990 census found that the United States has a population of

of sexual orientation minorities.⁶⁹ Recently, a majority of California's population expressed their concern that sexual orientation minorities need more protection from employment discrimination.⁷⁰ In a poll taken during 1991, approximately two-thirds of California voters favored legislation that would provide more protection.⁷¹ Yet, FEHA does not protect sexual orientation minorities.⁷² Instead, FEHA applies only to race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, and age.⁷³

Precluding sexual orientation minorities from FEHA protection may adversely affect the economic welfare of California in addition to harming the individual victims of sexual orientation discrimination.⁷⁴ Sexual orientation employment discrimination harms the California economy because it deprives the state of the full utilization of its human resources.⁷⁵ However, if FEHA protection included sexual orientation, California's sexual orienta-

248,709,873. *Id.* The same census recorded California's population at 29,760,021. *Id.* Therefore, California's population is over 10% of the nation's population.

⁶⁹ A common figure used to estimate the sexual orientation minority population is 10% of the larger population. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375, 378 (9th Cir. 1990); see ALFRED KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 650-51 (1948) (finding that 8% of those surveyed considered themselves exclusively homosexual for at least three years, 18% had at least as many homosexual experiences or reactions as heterosexual ones); ALFRED KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 473-74 (1953) (finding that between 1% and 3% of unmarried women surveyed were exclusively lesbian and 8% were more attracted to members of their own sex than to members of opposite sex). If California's population is 29,760,021, *supra* note 68, then there may be 2,976,002 people of minority sexual orientation residing within the state. See also Beverly Beyette, *Tallying New Family Ties*, L.A. TIMES, Mar. 23, 1990, at E1 (reporting 1980 U.S. census estimate that between 152,000 and 233,792 people of minority sexual orientation live in Los Angeles).

⁷⁰ See Catherine Gewertz & George Frank, *Wilson Criticized by Both Sides After Gay-Rights Bill Veto; Reaction: Homosexual-Rights Activists Call Him a Spineless Politician; Opponents of the Bill Attack the Governor's Overall Record*, L.A. TIMES, Oct. 1, 1991, at B1 (referring to one poll indicating that California voters favored legislation that would prohibit employment discrimination based on sexual orientation).

⁷¹ *Id.*

⁷² See CAL. GOV'T CODE §§ 12900-12996 (West 1992).

⁷³ *Id.* § 12920.

⁷⁴ See *infra* notes 75-77 and accompanying text.

⁷⁵ See *infra* note 295 and accompanying text.

tion minorities could count on having access to jobs that would allow them to realize their fullest potential.⁷⁶ Furthermore, if FEHA prohibited sexual orientation employment discrimination, this would also protect qualified workers from the psychological and economic harm caused by unemployment or by employment in demeaning, unchallenging jobs.⁷⁷

II. EXISTING LAW

Although overt and subtle employment discrimination against sexual orientation minorities remains pervasive,⁷⁸ neither the federal government nor the State of California offers widespread protection from such discrimination.⁷⁹ This Part reviews the limited protection available to prevent sexual orientation employment discrimination.⁸⁰ This review discusses laws and policies on the federal,⁸¹ state,⁸² local,⁸³ and individual employer⁸⁴ levels.

A. Protection Granted by the Federal Constitution and Statutes

Neither the United States Supreme Court nor Congress has provided explicit protection against sexual orientation employment discrimination.⁸⁵ The Supreme Court's shift towards a more conservative jurisprudence appears to foreclose the possibility that the Constitution will help gays, lesbians, and bisexuals in protecting their rights.⁸⁶ Although some federal judges in lower courts are willing to extend protection under the Constitution, they are often overruled by their peers or limited by

⁷⁶ See *infra* note 295 and accompanying text; see also Stewart & Fefer, *supra* note 26 (describing fear and isolation of sexual orientation minority employees and how discrimination causes some to set lower career goals).

⁷⁷ See Stewart & Fefer, *supra* note 26, at 44 (reporting that sexual orientation minorities lower their ambitions and quit excelling when they perceive that their sexual orientation will preclude them from promotions).

⁷⁸ See *supra* notes 26-65 and accompanying text.

⁷⁹ See *infra* notes 80-227 and accompanying text.

⁸⁰ See *infra* notes 85-240 and accompanying text.

⁸¹ See *infra* notes 85-151 and accompanying text.

⁸² See *infra* notes 155-227 and accompanying text.

⁸³ See *infra* notes 228-34 and accompanying text.

⁸⁴ See *infra* notes 235-40 and accompanying text.

⁸⁵ See *infra* notes 90-151 and accompanying text.

⁸⁶ *Justice Marshall's Retirement Tilts Supreme Court Further from Gay Rights*, LESBIAN/GAY NOTES, Summer 1991, at 47 (reporting that Justice Marshall's retirement means that sexual orientation minorities can expect even less protection from Supreme Court).

Supreme Court precedent.⁸⁷ In addition, federal statutes are silent regarding sexual orientation rights in the workplace.⁸⁸ Even when laws could theoretically help prevent discrimination, federal courts have been reluctant to interpret them to afford such protection.⁸⁹

1. Federal Protection Granted by the Constitution

The Federal Constitution could prevent federal and local governments from discriminating against sexual orientation minorities. Two constitutional doctrines that are pertinent to this discussion are the doctrines of due process⁹⁰ and equal protection.⁹¹ In *Bowers v. Hardwick*,⁹² however, the Supreme Court ruled that sexual conduct associated with minority sexual orientation is not a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.⁹³ The Court has not ruled whether equal protection prohibits governmental discrimination against sexual orientation minorities.⁹⁴ Lower federal courts, however, are wrestling with the issue, with mixed results.⁹⁵

According to the Constitution, the government may not interfere with certain fundamental rights without providing due process.⁹⁶ Two fundamental rights relevant to sexual orientation

⁸⁷ See *infra* notes 134-43 and accompanying text.

⁸⁸ See *infra* notes 144-51 and accompanying text.

⁸⁹ See *infra* notes 146-48 and accompanying text.

⁹⁰ See *infra* note 96 (providing text of Due Process Clause); see also *infra* notes 96-102 and accompanying text (discussing notion of due process).

⁹¹ See *infra* note 120 (providing text of Equal Protection Clause); see also *infra* notes 120-28 and accompanying text (discussing notion of equal protection).

⁹² 478 U.S. 186 (1986).

⁹³ *Id.* at 191 (“[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.”). For a more comprehensive analysis of *Bowers*, see *infra* notes 103-19, 243-45 and accompanying text.

⁹⁴ Justice Blackmun, in his dissenting opinion in *Bowers*, argued that the Court should have considered an Equal Protection Clause analysis even though neither party had raised the issue. See *Bowers*, 478 U.S. at 202 (Blackmun, J., dissenting).

⁹⁵ See *infra* notes 131-43 and accompanying text.

⁹⁶ U.S. CONST. amend. V, § 1 (“No person shall be . . . deprived of life, liberty, or property, without due process of law”); U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .”); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (“The makers of our Constitution undertook to

minorities include the rights to privacy and personal autonomy.⁹⁷ The Supreme Court has affirmed these rights in cases in which government regulations interfered with decisions affecting marriage,⁹⁸ child-bearing,⁹⁹ and child-rearing.¹⁰⁰ The Supreme Court applies a strict scrutiny test to laws that interfere with fun-

secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”) (Brandeis, J., dissenting); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-2 at 1307 (2d ed. 1988) (“[A] court must decide, in this society and at this time, whether a person’s choice to act or think in a certain way should be fundamentally protected against coercion by law. . . .”).

⁹⁷ *Cf.* *Whalen v. Roe*, 429 U.S. 589, 603-04 (1977). In this case, the Court held that a state may collect and store information regarding its citizens’ use of prescription drugs. *Id.* The plaintiffs asserted that the record-keeping infringed upon their right to privacy. *Id.* at 598. In discussing the fundamental right to privacy, the Court held that “[t]he cases sometimes characterized as protecting ‘privacy’ have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.” *Id.* at 598-600 (citations omitted).

⁹⁸ *See Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (striking statute requiring court approval for marriages involving individuals already obligated to pay child support payments and ruling that marriage rights are fundamental rights); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (reversing conviction of one couple who violated Virginia’s statute proscribing interracial marriages).

⁹⁹ *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640 (1974) (striking arbitrary mandatory leave rule because it unconstitutionally interfered with decisions regarding child-bearing and child-rearing); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that personal autonomy rights include maternal decisions to terminate pregnancies and that state interest in protecting potential fetal life is not compelling enough to ban abortions until third trimester of pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (striking law restricting use of contraceptives to married people because it unlawfully interfered with unmarried person’s right to choose whether to have children); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding unconstitutional Connecticut statute criminalizing use of contraceptives).

¹⁰⁰ *See Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that parents may choose between public or private schooling for their children based on constitutional guarantee of liberty); *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923) (comparing philosophical utopias, where parents have no authority over their children, to constitutional guarantee of liberty which guarantees that parents are free to make important decisions regarding their children’s education).

damental rights.¹⁰¹ Laws that interfere with non-fundamental rights receive minimum rationality review.¹⁰²

The leading case applying the Due Process Clause to sexual orientation rights is *Bowers v. Hardwick*.¹⁰³ Hardwick was arrested for violating a Georgia state law prohibiting sodomy, even though he committed the violation in the privacy of his home.¹⁰⁴ The Eleventh Circuit Court of Appeals ruled that the right to enter into private and intimate associations, even with the same gender, is a fundamental right.¹⁰⁵ Therefore, the circuit court ruled that the

¹⁰¹ The strict scrutiny test includes two factors. First, the government must demonstrate a compelling (rather than simply legitimate) interest in the result achieved by the law. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Second, the government must demonstrate that the means chosen are necessary to achieve its compelling interest. *Id.* The fit between the means and the ends must be close, with no less burdensome alternative means available. *See, e.g., Roe v. Wade*, 410 U.S. 113, 155 (1973) (“Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”) (citations omitted).

¹⁰² The regulation must have some rational relationship to a legitimate state interest. *United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 (1937). One of the first Supreme Court cases that addressed this issue is *Lochner v. New York*, 198 U.S. 45 (1905). The *Lochner* Court held that when, pursuant to its police power, a state enacts legislation that interferes with personal liberties, the legislation must be “fair, reasonable, and appropriate.” *See id.* at 56. However, the Supreme Court later distinguished between the type of legislation to which *Lochner* applies and legislation that interferes with fundamental rights. *See Griswold v. Connecticut*, 381 U.S. at 481-82. The *Griswold* Court held that the “fair, reasonable and appropriate” requirement applies to legislation pertaining to economics, business affairs, or social conditions. *See id.* Yet laws that interfere with intimate relationships, such as the relationship between husband and wife, must meet a higher standard of review. *Id.*; *see also Roe v. Wade*, 410 U.S. at 173 (Rehnquist, J., dissenting). In describing the appropriate standard of review for non-fundamental rights, Justice Rehnquist stated that “[t]he test . . . is whether or not a law such as that challenged has a rational relation to a valid state objective.” *Id.*

¹⁰³ 478 U.S. 186 (1986).

¹⁰⁴ *Id.* at 187-88. After defining sodomy as “any sexual act involving the sex organs of one person and the mouth or anus of another,” the statute provides that “[a] person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.” *Id.* at 188 n.1 (quoting GA. CODE ANN. § 16-6-2 (1984)).

¹⁰⁵ *See Hardwick v. Bowers*, 760 F.2d 1202, 1212 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).

Georgia law was unconstitutional unless it could pass the strict scrutiny test.¹⁰⁶

On appeal, a majority of the Supreme Court narrowed the issue to whether the Constitution confers a fundamental right upon homosexuals to engage in sodomy.¹⁰⁷ In upholding the Georgia law, the majority concluded there is no such fundamental right under the Constitution.¹⁰⁸ The majority stated that fundamental rights are those that are “implicit in the concept of ordered liberty”¹⁰⁹ or “deeply rooted in this Nation’s history and tradition.”¹¹⁰ The Court then reviewed the history of laws that prohibit sodomy and homosexuality.¹¹¹ The Court concluded that it would be facetious to suggest that homosexual conduct is implicit in the ordered concept of liberty or deeply rooted in the nation’s tradition.¹¹²

Having ruled that the government may regulate sexual conduct, the Court also held that such governmental regulations may reach into the privacy of the home.¹¹³ To reach this conclusion, the Court had to distinguish *Bowers* from a previous case, *Stanley v. Georgia*.¹¹⁴ In *Stanley*, the Court had reversed the conviction of a man unlawfully possessing obscene materials in the privacy of his home.¹¹⁵ The *Stanley* Court held that the government had the authority to regulate obscene materials, but the government’s authority did not reach into the privacy of the home.¹¹⁶ The *Bowers* Court, however, limited *Stanley* to First Amendment issues¹¹⁷ and concluded that the issue of privacy within the home was irrelevant.¹¹⁸ Having distinguished *Bowers* from previous cases involving the fundamental right to privacy, the *Bowers* Court applied minimum rationality review and upheld the Georgia law prohibit-

¹⁰⁶ See *id.* at 1213.

¹⁰⁷ See *Bowers*, 478 U.S. at 190.

¹⁰⁸ See *id.* at 191.

¹⁰⁹ *Id.* at 191-92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

¹¹⁰ *Id.* at 192 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

¹¹¹ *Id.* at 192-93 nn.5-6.

¹¹² *Id.* at 192-94.

¹¹³ See *id.* at 195.

¹¹⁴ 394 U.S. 557 (1969).

¹¹⁵ *Id.* at 568.

¹¹⁶ *Id.*

¹¹⁷ See *Bowers*, 478 U.S. at 195.

¹¹⁸ *Id.*

ing sodomy.¹¹⁹

Although the Supreme Court has ruled out due process protection for sexual orientation minorities, the Equal Protection Clause could still offer some protection.¹²⁰ The doctrine of equal protection requires the government to treat similarly situated people in a similar manner.¹²¹ Laws that require differential treatment among similarly situated people must be at least rationally related to a legitimate state purpose.¹²² Furthermore, the Supreme Court has been suspicious of laws that impose special burdens upon certain discrete and insular minorities with a

¹¹⁹ See *id.* at 196. However, in his dissent, Justice Blackmun insisted that *Bowers*' major issue was privacy, not sodomy. *Id.* at 199 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)) ("[T]his case is about 'the most comprehensive of rights . . . ' namely, 'the right to be let alone.'"). Blackmun argued that the right to privacy has both a decisional and a spatial component. *Bowers*, 478 U.S. at 204.

The decisional component concerns an individual's liberty to choose the nature of expressing intensely personal bonds.

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.

Id. at 204. According to Blackmun, the spatial component includes the right to privacy in certain places such as one's home. *Id.* Government regulations interfering with intimate, consensual behavior in the privacy of the bedroom violate both the decisional and spatial dimensions of privacy. *Id.* Justice Stevens also filed a dissent questioning the broad nature of the sodomy law. See *id.* at 214-20 (Stevens, J., dissenting). He took exception to the way the law applied to people of all sexual orientations and to married as well as unmarried people. *Id.* at 214. Therefore, Stevens claimed, the state must show why such a broad group is prohibited from engaging in this conduct or why the law is selectively enforced against those of minority sexual orientation. *Id.* at 216.

¹²⁰ U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

¹²¹ See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.").

¹²² *Id.* at 440 ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

history of being oppressed by the majority.¹²³ The Court therefore uses strict scrutiny¹²⁴ when examining laws that burden classifications based on race, alienage, or national origin.¹²⁵ When examining laws that burden classifications such as gender¹²⁶ or non-marital children,¹²⁷ the Court uses heightened scrutiny.¹²⁸

Within the context of sexual orientation rights, the equal protection issue is whether the Court will use heightened scrutiny for

¹²³ See, e.g., *United States v. Carolene Products*, 304 U.S. 144, 153 (1938) (suggesting that legislation burdening majority is best changed through political process, but that Court may need to more thoroughly scrutinize legislation that disadvantages discrete and insular minorities); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988) (arguing that function of Equal Protection Clause is to protect disadvantaged groups).

¹²⁴ See *supra* note 101 and accompanying text.

¹²⁵ See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985):

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. . . .

The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy — a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

Id.

¹²⁶ *Id.* at 440-41 (“Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment A gender classification fails unless it is substantially related to a sufficiently important governmental interest.”) (citations omitted).

¹²⁷ *Id.* at 441.

Because illegitimacy is beyond the individual’s control and bears “no relation to the individual’s ability to participate in and contribute to society” official discriminations resting on that characteristic are also subject to somewhat heightened review. Those restrictions “will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.”

Id. (citations omitted).

¹²⁸ See *supra* notes 126-27 and accompanying text.

laws or regulations that place a special burden upon sexual orientation minorities.¹²⁹ If the Court holds that sexual orientation minorities are sufficiently discrete and insular with a history of political oppression, then laws or regulations that burden sexual orientation minorities should receive heightened scrutiny.¹³⁰ This in turn would protect sexual orientation minorities from governmental practices that discriminate against them based on their sexual orientation.

Although the Supreme Court has not ruled whether sexual orientation minorities are entitled to heightened scrutiny under the Equal Protection Clause, other federal courts have.¹³¹ For example, two recent cases from the Ninth Circuit considered whether courts should apply a heightened form of scrutiny when the government discriminates against sexual orientation minorities. One case involved civilians working in the private defense industry;¹³² the other case involved a military serviceman.¹³³

In *High Tech Gays v. Defense Industrial Security Clearance Office*,¹³⁴ a district court held that gays and lesbians are a quasi-suspect class, entitled to heightened scrutiny under the Equal Protection Clause.¹³⁵ Therefore, the court held that the federal government could not subject sexual orientation minorities to more intensive security checks based on the suspicion that sexual orientation

¹²⁹ See *Watkins v. United States Army*, 875 F.2d 699, 724 (9th Cir. 1989) (Norris, J., concurring), *cert. denied*, 111 S. Ct. 384 (1990). Although he concurred with the result, Judge Norris dissented from the majority's legal rationale, stating, "[N]o federal appellate court has decided . . . whether persons of homosexual *orientation* constitute a suspect class under equal protection doctrine." *Id.* (emphasis added).

¹³⁰ For a description of tests that the Court could apply, see *supra* notes 100-01, 126-27 and accompanying text.

¹³¹ See *infra* notes 134-43 and accompanying text; see also *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991) (holding that no rational basis exists for considering one's sexual orientation for public school teacher positions and that classifying teachers according to sexual orientation is inherently suspect).

¹³² See *infra* notes 134-37 and accompanying text.

¹³³ See *infra* notes 138-43 and accompanying text.

¹³⁴ 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd*, 895 F.2d 563 (9th Cir. 1990), *reh'g denied*, 909 F.2d 375 (9th Cir. 1990).

¹³⁵ *Id.* at 1368. The plaintiffs in this case needed security clearances to perform government-related work. *Id.* at 1366. In 1987, they brought a class action suit alleging that the government subjected minority sexual orientation workers to a more thorough and sensitive scrutiny regarding their private sexual activity. *Id.* at 1362-64.

minorities are greater security risks.¹³⁶ The ruling, however, was short-lived. In 1990, a Ninth Circuit panel reversed the lower court's finding regarding the quasi-suspect status.¹³⁷

In *Watkins v. United States Army*,¹³⁸ a Ninth Circuit Court of Appeals panel ruled that the Army violated the Equal Protection Clause by refusing to re-enlist a soldier based on his sexual orientation.¹³⁹ The full Ninth Circuit decided to review the deci-

¹³⁶ *Id.* at 1377. However, the court held that the government's discrimination did not even meet the rational basis standard of review. *Id.*

¹³⁷ *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 565 (9th Cir. 1990). Relying on *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Ninth Circuit panel said, "[I]f there is no fundamental right to engage in homosexual sodomy under the Due Process Clause . . . it would be incongruous to expand the reach of equal protection to find a fundamental right of homosexual conduct under the equal protection component of the Due Process Clause of the Fifth Amendment." *Id.* at 571 (citations omitted). The panel acknowledged that the *Bowers* Court did not consider an equal protection claim. *Id.* Nevertheless, the mere fact that homosexual conduct can be criminalized persuaded the panel that sexual orientation should not be construed as a suspect or quasi-suspect classification. *Id.* The full Ninth Circuit later rejected the plaintiff's petition for a rehearing. 909 F.2d 375 (1990). However, Judge William Canby, in a dissent joined by Judge William Norris, disputed the assertion that *Bowers* precluded an equal protection analysis. *Id.* at 378-79 (Canby, J. dissenting).

¹³⁸ 847 F.2d 1329 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989).

¹³⁹ *Id.* at 1352. The procedural aspect of this case is complicated. *Watkins* sued the Army for discharging him because of his sexual orientation. 551 F. Supp. 212 (W.D. Wash. 1982). *Watkins* had served the Army with distinction for 14 years. *Id.* at 215-16. During this period, he was candid about his sexual orientation. *Id.* Nevertheless, the Army allowed him to re-enlist several times. *Id.* Suddenly, after 14 years of service, the Army refused to allow *Watkins* to re-enlist because of his sexual orientation. *Id.* The district court upheld *Watkins*' claim against the Army on a theory of equitable estoppel. *Id.* at 223. The court of appeals, however, reversed on the grounds that federal courts have no equity powers to order military officials to violate their own regulations unless such regulations are held to be repugnant to the Constitution or the military's statutory authority. *See Watkins v. United States Army*, 721 F.2d 687, 690 (9th Cir. 1983). The court then remanded the case to examine whether the Army acted within its legal authority. *Id.* at 688.

Upon remand, the judges decided the legal issues differently. *See* 847 F.2d 1329 (9th Cir. 1988). This time, the court ruled that the Army's re-enlistment regulations violate the constitutional guarantee of equal protection by discriminating against homosexuals without a compelling interest in doing so. *Id.* at 1352-53.

sion.¹⁴⁰ The court continued to rule in favor of the plaintiff, but rejected the equal protection analysis and granted relief on equitable estoppel grounds.¹⁴¹ Thus, while some Ninth Circuit judges have used higher standards of scrutiny when examining laws and regulations that discriminate against sexual orientation minori-

¹⁴⁰ *Watkins*, 875 F.2d 699 (9th Cir. 1989).

¹⁴¹ *Id.* at 707. In determining whether equitable estoppel was appropriate to assert against the government, the court applied what it called "traditional estoppel." *Id.* The court held that *Watkins* must first establish affirmative misconduct on the part of the government, going beyond mere negligence. *Id.* It also held that the Army's failure to abide by its own regulations constituted the requisite misconduct. *Id.* The Army's regulations required that *Watkins* be discharged because of his sexual orientation. *Id.* However, the Army re-enlisted *Watkins* even though he was candid about his sexual orientation. *Id.* Second, *Watkins* had to establish that the government's wrongful act would cause a serious injustice to *Watkins* and that the government's liability would not damage the public's interest. *Id.* The court held that the government's termination of *Watkin's* military career, thereby denying him retirement benefits, despite his candidness about his sexual orientation, constituted a serious injustice. *Id.* at 708. The court further held that the public's interest would not be harmed by preventing *Watkins'* discharge because he had served the Army and his country with distinction. *Id.* at 709.

After satisfying the requirements for asserting estoppel against the government, *Watkins* still had to prove his case of estoppel. *Id.* *Watkins* prevailed in his estoppel claim by proving the following: (1) the Army knew that it failed to follow its regulations by re-enlisting *Watkins* despite knowing that he was gay; (2) *Watkins* was justified in relying upon the government's failure to discharge him, especially because the Army allowed him to serve for 14 years; (3) *Watkins* did not know that the Army could not re-enlist him, in fact, the Army's decision to re-enlist him proved the opposite; and (4) *Watkins* relied on the Army's conduct to his own detriment. *Id.* at 709-11.

Judge Norris filed a concurring opinion reaffirming the equal protection analysis and the need to grant suspect classification status to sexual orientation minorities. *Id.* at 711-31 (Norris, J., concurring). In distinguishing *Watkins* from *Bowers*, Norris distinguished the Due Process Clause considerations used in *Bowers* from his Equal Protection Clause analysis. *Id.* at 718. "The due process clause [sic] . . . protects practices which are 'deeply rooted in this Nation's history and tradition.'" *Id.* In contrast, the Equal Protection Clause "protects minorities from discriminatory treatment at the hands of the majority. Its purpose is not to protect traditional values and practices, but to *call into question* such values and practices when they operate to burden disadvantaged minorities." *Id.*; see also Sunstein, *supra* note 123, at 1163 ("The Due Process Clause often looks backward. . . . By contrast, the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure.").

ties, their decisions have been overruled by higher courts¹⁴² or by their peers.¹⁴³

2. Protection Granted by Federal Statutes

In the absence of constitutional protection from employment discrimination, federal laws could provide the protection instead. Currently, however, federal law provides no explicit protection.¹⁴⁴ Although some federal laws may be construed as granting protection for sexual orientation minorities, the judiciary has interpreted the laws narrowly. For example, Title VII of the Civil Rights Act prohibits employment discrimination based on "race, color, religion, sex, or national origin."¹⁴⁵ Theoretically, this statute could prohibit discrimination against a woman who does not engage in typically "female" sexual conduct.¹⁴⁶ However, in *DeSantis v. Pacific Telephone & Telegraph Co.*,¹⁴⁷ the Ninth Circuit Court of Appeals held that employment discrimination based on sexual orientation is not actionable under Title VII.¹⁴⁸ Thus, if employment protection is to be extended under federal law, Con-

¹⁴² See *supra* notes 134-37 and accompanying text.

¹⁴³ See *supra* notes 138-41 and accompanying text.

¹⁴⁴ The only federal law that mentions sexual orientation is the Hate Crimes Statistics Act. See *infra* note 149 (discussing the Hate Crimes Statistics Act in detail); see also Deborah Ellis, *Gays and Lesbians: A Matter of Civil Rights*, N.J. L.J., July 25, 1991, at 18 (asserting that more federal protection is needed for sexual orientation minorities).

¹⁴⁵ 42 U.S.C. §§ 2000e to 2000e-17 (1988).

¹⁴⁶ See I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1168-70 (1991) (reporting on federal judges refusing to interpret Title VII to include sexual orientation rights).

¹⁴⁷ 608 F.2d 327 (9th Cir. 1979).

¹⁴⁸ *Id.* The plaintiffs raised several arguments in their favor. First, they contended that employment discrimination based on sexual orientation has a disproportionate impact on males because of the greater incidence of homosexuality in the male population and because employers are more likely to discover that their male employees are gay. *Id.* at 329-30. The court ruled that although males may experience a disproportionate impact, Title VII does not apply because the legislation was not intended to remedy sexual orientation employment discrimination. *Id.* at 330. Next, the plaintiffs argued that men who prefer male sex partners will be treated differently than women who prefer male sex partners. *Id.* at 331. The court rejected this argument, claiming that the distinction is not the male partner of the employee in both cases but that one situation involves a partner of the same sex. *Id.* The plaintiffs further argued that because an employer could not discriminate based on the race of an employee's friends, an employer could not discriminate based on the gender of an employee's sexual partner.

gress will have to take the lead by enacting explicit legislation to protect sexual orientation rights in the workplace.¹⁴⁹ Although

Id. Once again, the court rejected their argument, claiming that sexual relationship, not friendship, was the real issue. *Id.*

Another gay employee claimed that he was discharged because of his effeminate appearance. *Id.* at 331. Again, the court held that effeminacy and gender are two separate issues; Title VII does not protect against discrimination based on effeminate behavior. *Id.* at 331-32. *But see* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (holding that gender stereotyping is unlawful under Title VII). In *Price Waterhouse*, the Court ruled that employers engage in gender discrimination when they base employment decisions on whether employees conform to gender norms. *Id.* at 250-51. Theoretically, gender stereotyping includes gender attraction. *See* Capers, *supra* note 146, at 1170-87 (discussing gender and sex stereotyping and tying it in with sexual orientation and the *Price Waterhouse* case). However, given the increasingly conservative nature of the federal courts, the gender stereotyping approach may not work. *See, e.g.,* Sean P. Murphy, *Rights Cases Shift to State Courts*, BOSTON GLOBE, June 18, 1991, at 17 (reporting on new trend of taking civil rights cases to state courts because federal courts are making it almost impossible to prevail, even though such rights originated under federal law).

Another inhibiting factor in federal court is Rule 11. *See* 28 U.S.C.A. Rule 11 (West Supp. 1992). Rule 11 allows federal judges to sanction attorneys for litigating claims that are not well grounded in fact or are not warranted by either existing law or a good faith argument that the existing law should be extended, modified, or reversed. *Id.; see also* Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988). In a statistical analysis of Rule 11 sanctions, Vairo reported that 28% of all motions for Rule 11 sanctions were filed in civil rights and employment discrimination cases and that 86% of these motions were directed at plaintiff's counsel. *Id.* at 200. The court sanctioned the plaintiff in 72% of these cases. *Id.* This figure is 17% higher than the average of sanctions awarded against plaintiffs in other types of litigation. *Id.* at 200-01. This may discourage attorneys from seeking judicial remedies for sexual orientation employment discrimination.

¹⁴⁹ One positive step towards creating greater protection under federal law is the Hate Crimes Statistics Act. Hate Crime Statistics Act of 1990, Pub. L. No. 101-275, 104 Stat. 140 (1990). The Act requires law enforcement agencies to collect information on hateful actions against groups or individuals because of their sexual orientation. *Id.* ("[T]he Attorney General shall acquire data . . . about crimes that manifest evidence of prejudice based on race, religion, sexual orientation . . ."). The Attorney General is then supposed to compile this data and report the results annually. *Id.* While this law does not protect sexual orientation minorities in any way, the statistics gathered pursuant to the law may provide an incentive to enact protective laws in the future. *Cf.* Joseph M. Fernandez, Recent Development, *Bringing Hate Crime into Focus: The Hate Crime Statistics Act of 1990*, Pub. L. No. 101-275, 26 HARV. C.R.-C.L. L. REV. 261, 263 (1990) (reporting that one purpose of Hate Crime Statistics Act of

Congress continues to consider legislation that would explicitly prohibit discrimination based on sexual orientation,¹⁵⁰ Congress

1990 is to provide empirical data necessary to develop effective policies to fight problem of hate-motivated violence).

¹⁵⁰ See, e.g., H.R. 1430, 102d Cong., 1st Sess. (1991). The relevant portions of the proposed statute now pending in Congress are as follows:

SEC. 2. AMENDMENTS TO CIVIL RIGHTS ACT OF 1964.

(d) EQUAL EMPLOYMENT OPPORTUNITIES.-

(1) Sections 703(a), 703(b), 703(c), 703(d), 703(e), 703(h), 703(j), 704(b), 706(g), and 717(a) of such Act (42 U.S.C. 2000e-2(a), 2000e-2(b), 2000e-2(c), 2000e-2(d), 2000e-2(e), 2000e-2(h), 2000e-2(j), 2000e-3(b), 2000e-5(g), and 2000e-16(a)) are amended by striking "sex," each place it appears and inserting "sex, affectional or sexual orientation."

(2) Section 717(c) of such Act (42 U.S.C. 2000e-16(c)) is amended by striking "sex" and inserting "sex, affectional or sexual orientation."

(3) Section 703(h) of such Act (42 U.S.C. 2000e-2(h)) is amended by striking "sex" the first place it appears and inserting "sex, affectional or sexual orientation."

(4) The heading of section 703 of such Act is amended by striking "SEX," and inserting "SEX, AFFECTIONAL OR SEXUAL ORIENTATION."

(e) INTERVENTION BY ATTORNEY GENERAL IN CIVIL RIGHTS CASES.-Section 902 of such Act (42 U.S.C. 2000h-2) is amended by striking "sex" and inserting "sex, affectional or sexual orientation."

(f) DEFINITION; RULES OF INTERPRETATION.-Title XI of such Act (42 U.S.C. 2000h et seq.) is amended by adding at the end the following new section:

"AFFECTIONAL OR SEXUAL ORIENTATION
"SEC. 1107.

"(a) DEFINITION.-For purposes of titles II, III, VI, VII, and IX of this Act, the term "affectional or sexual orientation" means male or female homosexuality, heterosexuality, and bisexuality by orientation or practice, by and between consenting adults.

"(b) RULES OF INTERPRETATION.-(1) Nothing in this Act shall be construed to permit or require-

"(A) that a finding of discrimination on the basis of affectional or sexual orientation be based on any statistical differences in the incidence of persons of a particular affectional or sexual orientation in the general population as opposed to the incidence of such persons in the activity concerned; or

"(B) the use of any quota as a remedy for discrimination on the basis of affectional or sexual orientation.

"(2) Nothing in this Act shall be construed to require any person to disclose a personal affectional or sexual orientation."

is unlikely to pass such legislation in the near future.¹⁵¹

In the absence of federal protection of sexual orientation rights in the private workplace, sexual orientation minorities have turned to their own states for protection.¹⁵² While many states have debated whether to enact such legislation,¹⁵³ only four states and the District of Columbia currently have statutes that explicitly protect sexual orientation rights in the private workplace.¹⁵⁴ The

Id. Representative Weiss (D-NY) introduced this legislation to the House of Representatives. 137 CONG. REC. H1727 (daily ed. Mar. 13, 1991) (statement of Rep. Weiss).

¹⁵¹ Groves, *supra* note 26 (reporting that passage of federal civil rights bill for sexual orientation is unlikely to happen for years).

¹⁵² See Jorge Casuso, *Gays, Lesbians Shift Focus to Civil Rights—and Win*, CHI. TRIB., Apr. 30, 1991, at C1.

¹⁵³ *Id.* (citing consideration by Illinois, California, and Oregon); Kay Longcope, *Rally Renewed for National Gay Rights Bill*, BOSTON GLOBE, June 2, 1990, Living Sec. at 8 (citing consideration by Maine, Rhode Island, South Dakota, and Washington).

¹⁵⁴ The four states are Wisconsin, Massachusetts, Hawaii, and Connecticut. Pertinent portions of the statutes appear below.

Wisconsin law provides:

(2) It is the intent of the legislature to protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination because of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record or membership in the national guard, state defense force or any other reserve component of the military forces of the United States or this state, and to encourage the full, nondiscriminatory utilization of the productive resources of the state to the benefit of the state, the family and all the people of the state.

WIS. STAT. ANN. § 111.31 (West 1988).

Further, the Wisconsin "Bill of Human Rights" provides:

It is the intent of this section to promote fair and friendly relations among all the people in this state, and to that end race, creed, sexual orientation or color ought not to be made tests in the matter of the right of any person to sell, lease, occupy or use real estate or to earn a livelihood or to enjoy the equal use of public accommodations and facilities.

WIS. STAT. ANN. § 66.433(9) (West 1990).

Massachusetts law provides that it is unlawful:

For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, or ancestry of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such indi-

next Part reviews California's response to sexual orientation employment discrimination.

vidual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

MASS. GEN. LAWS ANN. ch. 151B, § 4(1) (West 1992); *see also* MASS. GEN. LAWS ANN. ch. 151B, § 3(6) (West 1992) (authorizing Commission to "receive, investigate and pass upon complaints . . . alleging discrimination because of the race, color, religious creed, national origin, sex, sexual orientation"); Virginia N. Lee, *Legislative Responses to Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 25 HARV. C.R.-C.L. L. REV. 287 (1990) (discussing protection of sexual orientation rights under Massachusetts law); Anthony P. Sayer, *Rights Protected by the Massachusetts Civil Rights Act Against Interference on Account of Race or Color*, 17 SUFFOLK U. L. REV. 53 (1983) (discussing organization and procedural course of prosecution under Massachusetts law).

Hawaii law provides:

Discriminatory practices made unlawful; offenses defined. It shall be an unlawful discriminatory practice: (1) Because of race, sex, sexual orientation, age, religion, color, ancestry, handicapped status, marital status, or arrest and court record: For any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment.

HAW. REV. STAT. § 378-2 (Supp. 1991).

Connecticut law provides:

It shall be a discriminatory practice in violation of this section: (1) For an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual's sexual orientation, (2) for any employment agency, except in the case of a bona fide occupational qualification or need, to fail or refuse to classify properly or refer for employment or otherwise to discriminate against any individual because of the individual's sexual orientation, (3) for a labor organization, because of the sexual orientation of any individual to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer, unless such action is based on a bona fide occupational qualification; or (4) for any person, employer, employment agency or labor organization, except in the case of a bona fide occupational qualification or need, to advertise employment opportunities in such a manner as to restrict such

B. Protection Granted by the California Constitution and Statutes

California's constitution and statutes provide greater protection than their federal counterparts for sexual orientation minorities in the workplace.¹⁵⁵ California courts have also been more willing to interpret California's constitution and laws as providing such protection.¹⁵⁶ Further, the court decisions have been supplemented by other state government actions.¹⁵⁷ For example, former Governor Jerry Brown issued an executive order barring discrimination against sexual orientation minorities in state jobs.¹⁵⁸ In addition, the legislature and Governor, working together, enacted legislation to bar sexual orientation discrimination in the state civil service.¹⁵⁹ The state Attorney General has also issued opinions that favor expanded protection for sexual orientation rights in the workplace.¹⁶⁰ This Part reviews current legal protection of sexual orientation rights in the workplace under California's constitution and laws.¹⁶¹

1. Protection Granted by the California Constitution

The California constitutional guarantees of equal protection¹⁶² and privacy¹⁶³ may provide limited protection for sexual orientation rights in the workplace. In *Gay Law Students Ass'n v. Pacific*

employment so as to discriminate against individuals because of their sexual orientation.

Act of May 1, 1991, No. 4, § 3, Conn. Acts 91-58 (Reg. Sess.); *see also* D.C. Code Ann. § 1-2512 (1987) (prohibiting employment decisions based upon "the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, or political affiliation . . ." of any individual).

¹⁵⁵ *See infra* notes 162-240 and accompanying text.

¹⁵⁶ *See infra* notes 170-222 and accompanying text.

¹⁵⁷ *See infra* notes 213-19, 223-27 and accompanying text.

¹⁵⁸ *See infra* notes 223-24 and accompanying text.

¹⁵⁹ *See infra* note 225 and accompanying text.

¹⁶⁰ *See infra* notes 213-19, 224-29 and accompanying text.

¹⁶¹ *See infra* notes 162-234 and accompanying text.

¹⁶² CAL. CONST. art. I, § 7(a) ("A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . .").

¹⁶³ CAL. CONST. art. 1, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and privacy."). In 1972, California voters amended the constitution to include the right to privacy. *See Final Election Results Statewide and From L.A. County*, L.A. TIMES, Nov. 9, 1972, Part 1, at 22.

Telephone & Telegraph Co.,¹⁶⁴ the California Supreme Court ruled that the state constitution's Equal Protection Clause applies to sexual orientation rights.¹⁶⁵ More recently, in *Soroka v. Dayton Hudson Corp.*,¹⁶⁶ the First District Court of Appeal held that the Privacy Clause¹⁶⁷ prohibits all employers from collecting unnecessary information that could later be used to discriminate against sexual orientation minorities.¹⁶⁸ However, the California Supreme Court recently set the *Soroka* decision aside, ruling that *Soroka* is to have no binding authority between now and the time that the supreme court issues its own ruling in the case.¹⁶⁹

In *Gay Law Students Ass'n*,¹⁷⁰ the California Supreme Court held that the Equal Protection Clause of the state constitution protects homosexuals from arbitrary state action against them.¹⁷¹ The court then extended this protection to employees of a privately owned public utility.¹⁷² The *Gay Law Students Ass'n* plaintiffs sued both the employer, Pacific Telephone & Telegraph Co. (PT&T), and the Fair Employment Practices Commission (FEPC).¹⁷³ They charged PT&T with unlawful discrimination based on sexual orientation in hiring, firing, and promoting employees.¹⁷⁴ The plaintiffs included the FEPC in the suit because they believed the FEPC had, contrary to FEPA's mandate, improperly refused to take any action on their behalf.¹⁷⁵ The court ruled that the FEPC could only act on complaints of discrimination against classifications protected by FEPA.¹⁷⁶ Because "sexual orientation" was not included in FEPA, the FEPC had no jurisdiction in the matter.¹⁷⁷ Thus, the greater part of the court's opinion examined the

¹⁶⁴ 595 P.2d 592 (Cal. 1979).

¹⁶⁵ *Id.* at 597.

¹⁶⁶ 1 Cal. Rptr. 2d 77 (Ct. App. 1991), *review granted and opinion superseded*, 822 P.2d 1327 (Cal. 1992).

¹⁶⁷ CAL. CONST. art. 1, § 1. For the text pertaining to privacy, see *supra* note 163.

¹⁶⁸ *Soroka*, 1 Cal. Rptr. 2d at 85.

¹⁶⁹ *Soroka v. Dayton Hudson Corp.*, 822 P.2d 1327 (Cal. 1992).

¹⁷⁰ 595 P.2d 592 (Cal. 1979).

¹⁷¹ *Id.* at 597.

¹⁷² *Id.* at 602-03.

¹⁷³ *Id.* at 595.

¹⁷⁴ *Id.* In one case, the employer would not even allow an applicant to apply for employment upon learning about his sexual orientation. *Id.* at 596.

¹⁷⁵ *Id.* at 595.

¹⁷⁶ *Id.* at 611-13.

¹⁷⁷ *Id.* at 613.

constitutional and statutory claims against PT&T.¹⁷⁸

The constitutional issue before the court was whether the California Constitution¹⁷⁹ bars a state-protected, but privately owned, public utility from engaging in arbitrary employment discrimination.¹⁸⁰ PT&T claimed that it should only be subject to the legal restrictions imposed upon private employers.¹⁸¹ The court, however, held that the equal protection guarantee "places special obligations on a state-protected public utility, such as PT&T, to refrain from all forms of arbitrary employment discrimination."¹⁸² The court made two rulings to support its holding. First, equal protection requires the state to demonstrate that an employee's sexual orientation renders the employee unfit for a job before using sexual orientation as a basis for discrimination.¹⁸³ Second, a privately owned utility must abide by the same restraints that the constitution imposes upon the state.¹⁸⁴

¹⁷⁸ *Id.* at 595-611; see also *infra* notes 179-84 and accompanying text.

¹⁷⁹ Specifically, CAL. CONST. art. I, § 7(a). For the text of § 7(a), see *supra* note 162.

¹⁸⁰ *Gay Law Students Ass'n*, 595 P.2d at 597-99.

¹⁸¹ *Id.* at 597.

¹⁸² *Id.*

¹⁸³ *Id.* In establishing that the California Constitution prevents arbitrary employment discrimination based on sexual orientation, the court adopted the premise that "both the state and federal equal protection clauses clearly prohibit the state or any governmental entity from arbitrarily discriminating against any class of individuals in employment decisions." *Id.* The court then cited state and federal precedents to support its holding. *Id.* Precedents cited included: *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (holding that male federal civil service employee's alleged feminine conduct or advances towards member of same sex is not grounds for dismissal); *Saal v. Middendorf*, 427 F. Supp. 192, 199-203 (N.D. Cal. 1977) (denying Navy's right to arbitrarily and capriciously process discharges for its personnel because of their homosexual conduct); *Society for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399 (N.D. Cal. 1973) (holding that federal government's fear that homosexual employees bring government service into public contempt is insufficient to support decisions to terminate homosexual employees), *aff'd in part*, 528 F.2d 905 (1975); and *Morrison v. Board of Education*, 461 P.2d 375 (Cal. 1969) (holding that teachers who maintain private, homosexual relationships should not be subject to disciplinary action at work unless their conduct indicates inability to teach). *Gay Law Students Ass'n*, 595 P.2d at 597.

¹⁸⁴ *Gay Law Students Ass'n*, 595 P.2d. at 597, 599-600. The court devoted greater attention to this part of its holding. Article I, § 7 of the California Constitution does not contain the explicit "state-action" requirement of its federal constitutional counterpart. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due

With the exception of certain monopolies such as PT&T, *Gay*

process of law”) (emphasis added). Yet, a previous California Supreme Court decision implied that the California guarantee of equal protection applied only to the state’s actions. *See Kruger v. Wells Fargo Bank*, 521 P.2d 441 (Cal. 1974) (denying plaintiff’s request for judicial application of California’s Equal Protection Clause when state action is not involved). Nevertheless, the court asserted that the scope of the California Constitution is broader than that of the United States Constitution. *See Gay Law Students Ass’n*, 595 P.2d at 598. The court cited a more recent California Supreme Court decision on point. *Id.* (citing *Garfinkle v. Superior Court*, 578 P.2d 925, 934 (Cal. 1978), *cert. denied and appeal dismissed*, 439 U.S. 949 (1978)). The *Gay Law Students Ass’n* court declared that “in interpreting the scope of the due process clause under the state Constitution, we are not bound by federal decisions analyzing the state action requirement under the Fifth or Fourteenth Amendments” *Id.* The *Gay Law Students Ass’n* court concluded:

In like fashion, although our court will carefully consider federal state action decisions with respect to the federal equal protection clause insofar as they are persuasive, we do not consider ourselves bound by such decisions in interpreting the reach of the safeguards or [sic] our state equal protection clause. As article 1, section 24 of the California Constitution explicitly declares: “Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.”

Id.

The court then explained the factors that appeared to make PT&T more akin to a government entity than a private employer. *Id.* at 599. These factors included the extensive state regulation of PT&T, public perception of PT&T as a state entity, and state powers granted to PT&T such as eminent domain. *Id.*

The court also suggested three other reasons for its decision that PT&T should be considered a state entity. *Id.* at 599-600. First, PT&T had less incentive than private employers to avoid arbitrary discrimination. *Id.* at 600. The court reasoned that private employers, not receiving the same state protection as PT&T, were less likely to engage in arbitrary discrimination because they needed to hire the best workers possible to remain competitive. *Id.* at 599. Second, because PT&T is a monopoly, allowing PT&T to discriminate arbitrarily puts many members of the public in the pernicious position of having no choice but to indirectly support its practices. *Id.* at 599-600. Third, PT&T is a state-franchised monopoly, holding over 80% of the telephone service market in California, amounting to more than “tens of thousands of jobs.” *Id.* at 600.

Finally, the court stated that PT&T must comply with California’s constitutional guarantee of equal protection because the state granted PT&T’s monopoly status over telephone service within the state. *Id.* Moreover, United States Supreme Court precedent regarding legislated monopolies requires that they abide by constitutional constraints. *See Steele v. Louisville*

Law Students Ass'n did not extend constitutional protection to the private sector.¹⁸⁵ However, another provision of the California Constitution may impede private employers from arbitrary employment discrimination based on sexual orientation. In *Soroka v. Dayton Hudson Corp.*,¹⁸⁶ the First District Court of Appeal held that the Privacy Clause¹⁸⁷ limits information that employers may request from job applicants.¹⁸⁸ More specifically, applicants and employees do not have to disclose potentially harmful information about themselves unless the employer has a compelling interest and the information is job-related.¹⁸⁹

The constitutional issue before the *Soroka* court was whether Dayton Hudson Corp., owner of Target Stores, could ask applicants intrusive questions about their private lives.¹⁹⁰ Target used a test, called the Psychscreen,¹⁹¹ to prepare a psychological profile of applicants for the position of store security officer.¹⁹² The test included intrusive questions about the applicant's religious beliefs and sexual orientation.¹⁹³ Target did not receive answers

& Nashville R.R. Co., 323 U.S. 192, 202 (1944) (holding that union governed by Railway Labor Act cannot enter into agreements that discriminate among union members along racial classifications). Therefore, when state action grants monopoly status over employment opportunities, the monopoly's employment practices must comport with federal and state constitutional constraints. See *Gay Law Students Ass'n*, 595 P.2d at 600.

¹⁸⁵ See *supra* notes 179-82 and accompanying text.

¹⁸⁶ 1 Cal. Rptr. 2d 77 (Ct. App. 1991), review granted and opinion superseded, 822 P.2d 1327 (Cal. 1992).

¹⁸⁷ CAL. CONST. art. I, § 1; see *supra* note 163 for the text.

¹⁸⁸ *Soroka*, 1 Cal. Rptr. 2d at 84-86.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 82.

¹⁹¹ *Id.* at 79. The Psychscreen is a combination of the Minnesota Multiphasic Personality Inventory and the California Psychological Inventory. *Id.*

¹⁹² A security officer's responsibilities include observation, apprehension, and arrest of suspected shoplifters. *Id.* The officer is unarmed, but carries handcuffs and may use force against a suspect in self-defense. *Id.*

¹⁹³ *Id.* at 79-80. The test included questions about an applicant's religious attitudes, such as:

67. I feel sure that there is only one true religion. . . . 201.
I have no patience with people who believe there is only one true religion. . . . 477. My soul sometimes leaves my body. . . . 483. A minister can cure disease by praying and putting his hand on your head. . . . 486. Everything is turning out just like the prophets of the Bible said it would. . . . 505. I go to church

to specific questions.¹⁹⁴ Instead, a private firm used the answers to prepare a general profile, which was then sent to Target.¹⁹⁵ The profile assessed the applicant's emotional stability, interpersonal style, dependability, reliability, and potential for addiction.¹⁹⁶

Target defended its use of the Psychscreen on two grounds. First, Target claimed that job applicants receive less protection under the Privacy Clause than employees.¹⁹⁷ Second, even if the Privacy Clause protects job applicants, Target claimed the Psychscreen was job-related in that it helped the store to hire applicants with good judgment and emotional stability.¹⁹⁸

The *Soroka* court rejected Target's first argument and ruled that the state constitution's Privacy Clause applies equally to job applicants and employees.¹⁹⁹ The court also held that Target did not demonstrate a compelling interest in asking the questions used in the Psychscreen.²⁰⁰ The court further held that the Psychscreen

almost every week. 506. I believe in the second coming of Christ. . . . 516. I believe in a life hereafter. . . . 578. I am very religious (more than most people). . . . 580. I believe my sins are unpardonable. . . . 606. I believe there is a God. . . . 688. I believe there is a Devil and a Hell in afterlife.

Id. at 80.

The test included questions about an applicant's sexual orientation, such as:

137. I wish I were not bothered by thoughts about sex. . . .
 290. I have never been in trouble because of my sex behavior. . . .
 339. I have been in trouble one or more times because of my sex behavior. . . .
 466. My sex life is satisfactory. . . .
 492. I am very strongly attracted by members of my own sex. . . .
 496. I have often wished I were a [a member of the opposite sex]. . . .
 525. I have never indulged in any unusual sex practices. . . .
 558. I am worried about sex matters. . . .
 592. I like to talk about sex. . . .
 640. Many of my dreams are about sex matters.

Id.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 82.

¹⁹⁸ *Id.* at 81, 86.

¹⁹⁹ *Id.* at 84-85.

²⁰⁰ *Id.* at 85-86. Target claimed it did not have to comply with the compelling interest standard of review because applicants lose some of their privacy rights when applying for a job. *See id.* at 83. Target supported its claim by citing *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194 (Ct.

questions were not sufficiently job-related.²⁰¹

App. 1989). *Soroka*, 1 Cal. Rptr. 2d at 82. The *Wilkinson* court held that employees and applicants have different privacy rights regarding mandatory drug testing. *Wilkinson*, 264 Cal. Rptr. at 204 (“[A]pplicants for jobs . . . have a choice; they may consent to the limited invasion of their privacy resulting from the testing, or may decline both the test and the conditional offer of employment.”).

The *Soroka* court chose not to follow *Wilkinson*. *Soroka*, 1 Cal. Rptr. 2d at 84. The *Soroka* court began its analysis by examining the right to privacy in California. *Id.* at 82. Guided by precedent and legislative history, the court concluded that privacy is such a fundamental right that only a compelling interest can supplant it. *Id.* at 82-85. The court cited the traditional judicial protection of privacy, which existed even before California’s voters amended the constitution in 1972 to include the right to privacy. *Id.* at 82. Thus, when voters amended the constitution to include the guarantee of privacy, the amendment expanded privacy rights even further. *Id.*

The court relied on the argument in favor of the amendment, sent to all of California’s voters, to prove the intent of the voters who approved the measure. *Id.* at 83. The ballot argument specifically used the term, “compelling interest.” *Id.* at 84 (“[T]he ballot argument that California voters endorsed when they adopted the privacy amendment . . . states that a violation of the constitutional right to privacy can only be overcome by a compelling interest.”). *Id.*

Following its analysis of the expanded right to privacy, the *Soroka* court considered whether job applicants should receive a lower standard of protection than employees. *Id.* at 82-83. The court used precedent and the ballot argument favoring the privacy amendment to hold that applicants and employees have the same right to privacy. *Id.* at 83. The ballot argument specifically mentioned an applicant’s need for additional privacy rights. *Id.* (“[We] are required to report some information, regardless of our wishes for privacy Each time we . . . interview for a job . . . a dossier is opened and an informational profile is sketched.”) (quoting CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 27 (Nov. 7, 1972)).

²⁰¹ *Id.* at 86. The *Soroka* court did not specify what criteria Target would have to meet to satisfy California requirements for job-relatedness. *Id.* Instead, the court asserted that the California standard is broader than the federal standard. *Id.* at 85. The federal standard is that a clear, direct nexus must exist between the nature of the employee’s duty and the nature of the privacy intrusion. *Id.* The *Soroka* court concluded that Target’s use of the Psychscreen did not even meet the federal standards. *Id.* at 86.

Furthermore, the *Soroka* court again relied on the ballot argument in favor of the privacy clause amendment. *Id.* at 85. The ballot argument specified that the right to privacy would prevent businesses from collecting unnecessary information. *Id.* Therefore, Target could not defend its use of the Psychscreen for store security officers. *Id.* Nevertheless, the *Soroka* court implied that some other jobs may warrant the use of the Psychscreen, including the intrusive questions. *See id.* at 79 n.4 (“We view the duties and responsibilities of . . . public safety personnel to be substantially different from those of store security officers.”).

In sum, *Soroka* established a constitutional right to privacy that constrains California employers from requesting unnecessary information about job applicants as well as employees. By preventing employers from collecting information that might serve as a basis for discrimination, *Soroka* protected employees from discrimination. However, the California Supreme Court has set the *Soroka* decision aside.²⁰² The appellate court decision will have no authority unless the supreme court reviews and agrees with it.

2. Protection Granted by Statutes, Executive Orders, and Attorney General Opinions

The *Gay Law Students Ass'n* and *Soroka* cases are examples of judicial interpretations of the state constitution that created new rights for sexual orientation minorities.²⁰³ These two cases also demonstrate liberal judicial interpretation of state statutes to protect sexual orientation minorities from employment discrimination.²⁰⁴ For example, both the *Gay Law Students Ass'n* and *Soroka* courts held that sections 1101 and 1102 of the California Labor Code provide this protection.²⁰⁵

Section 1101 of the California Labor Code prohibits employers from interfering with an employee's right to engage in politics.²⁰⁶ Section 1102 protects an employee's free choice regarding participation in political activities.²⁰⁷ The *Gay Law Students Ass'n* court

²⁰² *Soroka v. Dayton Hudson Corp.*, 822 P.2d 1327 (Cal. 1992).

²⁰³ See *supra* notes 164-202 and accompanying text.

²⁰⁴ See *infra* notes 206-22 and accompanying text.

²⁰⁵ *Gay Law Students Ass'n*, 595 P.2d at 609-11; *Soroka*, 1 Cal. Rptr. 2d at 88. Apparently, the *Gay Law Students Ass'n* court, rather than the attorneys, introduced this interpretation of the California Labor Code. *Gay Law Students Ass'n*, 595 P.2d at 618 (Richardson, J., dissenting). In his dissenting opinion, Justice Richardson wrote: "The majority holds that the present complaint states a cause of action . . . for abridging plaintiffs' political freedom The majority's reliance on [California Labor Code §§ 1101 & 1102] is invalid The 'political' argument has never been advanced nor apparently even thought of by either lawyers or litigants." *Id.*

²⁰⁶ CAL. LAB. CODE § 1101 (West 1989) ("No employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office. (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.").

²⁰⁷ CAL. LAB. CODE § 1102 (West 1989) ("No employer shall coerce or influence or attempt to coerce or influence his employees through or by

held that sexual orientation minorities engage in political activity when they strive for equal rights, especially in the field of employment.²⁰⁸ The court further held that sexual orientation minorities must be encouraged to publicly acknowledge their orientation and associate with others to work for equal rights.²⁰⁹ Therefore sections 1101 and 1102 prohibit employers from penalizing their sexual orientation minority workers for being open about their sexuality and striving for equal rights.²¹⁰ These laws are especially significant because they apply to private as well as public employers.²¹¹

means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.”).

²⁰⁸ *Gay Law Students Ass'n*, 595 P.2d at 610. The court drew an analogy between gay rights and civil rights and pointed out that one barrier to liberation is societal pressure to conceal one's sexual orientation if it is anything other than heterosexual. *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 611. The court held that the plaintiffs had a valid claim against PT&T for refusing to hire “manifest” homosexuals. *Id.* The plaintiffs could include the charge that PT&T would not consider applicants sent by an organization that actively promoted equal employment opportunity rights for homosexuals. *Id.* Previous California Supreme Court decisions limited sections 1101 and 1102 of the California Labor Code to partisan politics. *See, e.g., Lockheed Aircraft Corp. v. Superior Court*, 28 Cal. 2d 481, 485 (1946) (holding that Labor Code §§ 1101 and 1102 protect partisan activities related to or connected with orderly conduct of government and peaceful organization, regulation, and administration of government).

The *Gay Law Students Ass'n* court also found grounds for a sexual orientation discrimination suit against PT&T in the California Public Utilities Code §§ 453(a) and 2106. *Gay Law Students Ass'n*, 595 P.2d at 602-09. Section 453 prohibits public utilities from showing favoritism or prejudice among individuals or corporations. CAL. PUB. UTIL. CODE § 453(a) (West 1975 & Supp. 1992). The dissent argued that this statute applies only to services that a utility offers to customers. *Gay Law Students Ass'n*, 595 P.2d at 615 (Richardson, J., dissenting). But the majority applied this statute to employment decisions as well. *Id.* at 609. Section 2106 allows individuals who are injured by an illegal public utility practice to institute court action to recover monetary damages. CAL. PUB. UTIL. CODE § 2106 (West 1975 & Supp. 1992). Thus, the court held that plaintiffs' complaints were sufficient to state a cause of action under § 2106. *Gay Law Students Ass'n*, 595 P.2d at 604. Furthermore, the court allowed plaintiffs' request for injunctive relief to be maintained as ancillary to their damage action. *Id.* at 609.

²¹¹ CAL. LAB. CODE §§ 1101-1102 (West 1992). Both sections start with “[n]o employer shall” *Id.*

The *Gay Law Students Ass'n* decision did not indicate whether sections 1101 and 1102 of the California Labor Code protect employees who choose not to disclose their sexual orientation.²¹² However, a subsequent Opinion from the California Attorney General stated that the California Labor Code sections protect even those employees who keep their orientation private.²¹³ The Attorney General drew an analogy between partisan political activities and the political consequences associated with sexual orientation.²¹⁴ The Attorney General reasoned that an employer may construe an employee's silence regarding political affiliation as an indication that the employee supports a political party opposed to the employer's political party.²¹⁵ If the law allows employers to fire those employees who remain silent, then all employees will be compelled to vocally assert a political affiliation in order to preserve their jobs.²¹⁶ Therefore, the employer would be coercing the employees to engage in political activities, a violation of California Labor Code section 1102.²¹⁷ Likewise, an employer may suspect that an employee who remains silent about matters of sexual orientation is actually a sexual orientation

²¹² See *Gay Law Students Ass'n*, 595 P.2d at 611 ("These allegations can reasonably be construed as charging that PT&T discriminates in particular against persons *who identify themselves* as homosexual, *who defend homosexuality*, or who are *identified with* activist homosexual organizations. So construed, the allegations charge that PT&T [is violating the Labor Code].") (emphasis added).

²¹³ 69 Op. Cal. Att'y Gen. 80, 82 (1986). Addressing the ambiguity in the wake of the *Gay Law Students Ass'n* opinion, the Attorney General stated:

We are now asked the question left unanswered by the Supreme Court in *Gay Law Students Assn.*: Are employees with a homosexual orientation or affiliation protected in the same manner as those who identify themselves as homosexual, who defend homosexuality or who are identified with activist homosexual organizations? While the issue is not entirely free from doubt, we believe that if the California Supreme Court were directly confronted with the issue, it would rule that Labor Code sections 1101 and 1102 protect employees from discrimination on the basis of undisclosed or suspected homosexual orientation in the same manner as they protect employees from discrimination on the basis of open homosexual identification.

Id.

²¹⁴ *Id.*

²¹⁵ *Id.* at 83.

²¹⁶ *Id.*

²¹⁷ *Id.*

minority.²¹⁸ Therefore, the law must protect employees who desire not to talk about their sexual orientation with employers.²¹⁹

The State Attorney General's Opinion, however, is not binding upon state courts.²²⁰ It will only become binding if state courts apply the Attorney General's reasoning to actual cases. The *Soroka* court is the only appellate court that has referred to the Opinion.²²¹ Although the *Soroka* decision appears to agree with the Attorney General, the California Supreme Court may rule otherwise. When the supreme court reconsiders *Soroka*, the court may decide to limit or abolish the use of the California Labor Code to protect sexual orientation minorities.²²²

In addition to the statutes and opinions already discussed, California has other legal provisions that specifically protect sexual orientation minorities from employment discrimination. In 1979, Governor Jerry Brown issued an executive order directing state government employers to refrain from engaging in employment discrimination based on sexual orientation.²²³ When the Attor-

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See, e.g., Moore v. Panish*, 652 P.2d 32 (Cal. 1982). Describing the authority of a California Attorney General opinion, the court stated that "Attorney General opinions are generally accorded great weight." *Id.* at 37 (citation omitted). However, in *Moore*, the court declared the opinion to be unpersuasive. *Id.*

²²¹ *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 88 (Ct. App. 1991), *review granted and opinion superseded*, 822 P.2d 1327 (Cal. 1992). The court used the opinion to support its assertion that Labor Code §§ 1101 and 1102 "prohibit a private employer from discriminating against an employee on the basis of his or her sexual orientation." *Id.*

²²² *See, e.g., supra* note 205 (asserting that court, rather than counsel, provided new interpretation of California Labor Code). At this time, the court may look back and decide that its previous interpretation was wrong.

²²³ Exec. Order No. B-54-79 (1979) (on file with the California State Archives). Governor Brown's executive order declares:

WHEREAS, Article I of the California Constitution guarantees the inalienable right of privacy for all people which must be vigorously enforced; and

WHEREAS, government must not single out sexual minorities for harassment or recognize sexual orientation as a basis for discrimination; and

WHEREAS, California must expand its investment in human capital by enlisting the talent of all members of society;

NOW, THEREFORE, I, Edmund G. Brown Jr., Governor of the State of California, by virtue of the power and authority

ney General was asked to write an opinion on whether the Governor exceeded his authority in issuing the order, the Attorney General concluded that the Governor had acted within his authority.²²⁴ Furthermore, section 18500 of the California Government Code puts Governor Brown's executive order into statutory form for California's civil service.²²⁵ Finally, a 1983 Attorney General Opinion supports sexual orientation rights in the workplace by stating that public agencies cannot use sexual orientation as a basis for employment discrimination.²²⁶ The 1983 Opinion is significant because it relied on the California constitutional guarantees of privacy and equal protection.²²⁷

vested in me by the Constitution and statutes of the State of California, do hereby issue this order to become effective immediately:

The agencies, departments, boards and commissions within the Executive Branch of state government under the jurisdiction of the Governor shall not discriminate in state employment against any individual based solely upon the individual's sexual preference. Any alleged acts of discrimination in violation of this directive shall be reported to the State Personnel Board for resolution.

Id.

²²⁴ 63 Op. Cal. Att'y Gen. 583, 583-84 (1980).

²²⁵ Section 18500 provides in relevant part:

It is the purpose of this part: To provide a comprehensive personnel system for the state civil service, in which: . . .
(5) Applicants and employees are treated in an equitable manner without regard to political affiliation, race, color, sex, religious creed, national origin, ancestry, marital status, age, sexual orientation, disability, political or religious opinions or non-job-related factors.

CAL. GOV'T CODE § 18500(c) (West 1992).

²²⁶ 66 Op. Cal. Att'y Gen. 486 (1983).

²²⁷ *Id.* The opinion construed the equal protection guarantees in accordance with the *Gay Law Students Ass'n* precedent. See *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979). See *supra* notes 179-84 for the discussion about the *Gay Law Students Ass'n* approach to equal protection. The Attorney General's privacy analysis followed the reasoning of *Griswold v. Connecticut*, 381 U.S. 479 (1965) (establishing existence of non-enumerated zones of privacy). 66 Op. Cal. Att'y Gen. 486, 487 (1983). Because privacy is an inalienable right in California, sexual orientation, although not explicitly enumerated, is implied. See *id.* Therefore, the government may not restrict or interfere with such private affairs unless it has a compelling reason to do so. *Id.* at 487-88.

C. Protection Granted Through Local Ordinances

The most explicit protection against sexual orientation employment discrimination exists on the local level. Many cities across the country have enacted their own protective ordinances.²²⁸ Most of California's largest cities, including San Francisco, Los Angeles, San Diego, and Sacramento, have enacted ordinances that explicitly prohibit sexual orientation employment discrimination.²²⁹

²²⁸ See Maria Goodavage & Debbie Howlett, *Gays in Battle for Rights*, USA TODAY, Oct. 2, 1991, at 1A (citing National Gay and Lesbian Task Force study finding that more than 80 cities have adopted ordinances to prohibit discrimination based on sexual orientation).

²²⁹ See, e.g., SACRAMENTO, CAL., CITY CODE ch. 14, §§ 14.101-.112 (1990). Section 14.101 provides that:

(a) Unlawful Employment Practices. It shall be an unlawful employment practice for any person to do any of the following acts wholly or partially based on sexual orientation of an employee or applicant for employment, unless based on a bona fide occupational qualification:

(1) No employer shall fail or refuse to hire, or discharge any individual, discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his or her status as an employee.

Id.

Subsequent subdivisions apply the law to employment agencies, labor organizations, training programs, and advertising practices. *Id.* Subheading (b)(2) exempts businesses with five or fewer employees. *Id.* Subheading (c)(1) requires employers and labor organizations with 15 or more employees to post a notice of this ordinance in an area where other employment notices are posted. *Id.* Section 14.108 allows plaintiffs to sue in civil courts. *Id.* Plaintiffs may sue for actual damages and costs, injunctive relief, and attorney's fees. *Id.* § 14.108; see also Anne Stroock, *SF Gay-Rights Law Upheld Again*, S.F. CHRON., Apr. 6, 1990, at A26 (reporting on superior court judge upholding San Francisco's protective ordinance for fifth time). *But see* Reynolds Holding, *State Laws Unclear on Gay Job Bias; Controversy Expected to End Up in Supreme Court*, S.F. CHRON., Dec. 30, 1991, at A13 (reporting that one Los Angeles superior court judge ruled that Los Angeles' protective ordinance is preempted by state legislation); Kevin Mims, *Gay-Rights Activists Push for Increased Protection*, BUS. J. SACRAMENTO 8, Apr. 15, 1991, § 1, at 22. Sacramento's Human Rights and Fair Housing Commission is charged with investigating claims of sexual orientation discrimination. *Id.* But Maria Necoachea, a senior associate with the Commission's human rights division, points out that the Commission has no legal power to enforce the law. *Id.*

While the local ordinances offer the most explicit protection, they may also be the weakest form of protection. Religious and political conservatives often target these ordinances for repeal.²³⁰ Furthermore, these ordinances have only been tested on the superior court level, with mixed results. In the San Francisco area, at least one judge has allowed the local ordinances to provide a cause of action against an employer.²³¹ In Los Angeles, however, a superior court judge ruled that FEHA preempts employment discrimination laws on the local level.²³² The plaintiff in the Los Angeles case claims he will appeal the superior court's ruling.²³³ If so, an appellate court will finally have an opportunity to rule on the validity of local ordinances.²³⁴

D. Protection Granted Through Employment Policies

Meanwhile, sexual orientation rights activists have taken their cause directly to the source of the problem: the employers.²³⁵ In response, some of America's largest corporations have developed policies that prohibit sexual orientation employment discrimination.²³⁶ While these policies are in effect, they may provide grounds for a breach of contract claim against an employer that violates its own policy.²³⁷ Corporate management has also responded to the needs of sexual orientation minorities by offering special programs to promote employee tolerance of diversity, encouraging gay worker associations, and considering the extension of employment benefits to domestic partners.²³⁸ Levi

²³⁰ Holding, *supra* note 229.

²³¹ Stroock, *supra* note 229.

²³² *Delaney v. Superior Fast Freight*, C-750189 (Cal. Super. Ct. 1991); Holding, *supra* note 229. For the specific language in FEHA which may preempt local ordinances prohibiting employment discrimination, see *supra* note 229.

²³³ Harris, *supra* note 31.

²³⁴ *Id.*

²³⁵ Stewart & Fefer, *supra* note 26, at 43 (reporting that sexual orientation rights activists have taken their cause to employers and have even increased their efforts following Governor Wilson's veto of A.B. 101).

²³⁶ *Id.*

²³⁷ *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917 (Ct. App. 1981). The *Pugh* court held that an employer's express or implied agreement to terminate an employee only for cause is legally binding. *Id.* at 925. Such agreements may be contained in the form of the employer's personnel policies or practices. *Id.* at 926.

²³⁸ Stewart & Fefer, *supra* note 26, at 50.

Strauss, AT&T, and Xerox are among the most progressive corporations in this regard.²³⁹ These policies, however, exist at the pleasure of management and may be unilaterally revoked at any time.²⁴⁰

III. ANALYSIS

The previous Part reviewed laws, statutes, and policies that apply to sexual orientation employment discrimination on the federal, state, local, and individual employer levels.²⁴¹ This Part argues that the current legal protection from such discrimination is inadequate and that, at the least, sexual orientation minorities need explicit statutory protection at the state level. As in the preceding Part, this analysis begins with federal laws and concludes with employment policies. Having concluded that new statutory protection is needed, this Part then reviews A.B. 101, California's most recent attempt to provide explicit protection from sexual orientation employment discrimination. The review of A.B. 101 begins with a discussion of FEHA and then explains how A.B. 101 would have amended FEHA to extend adequate protection to sexual orientation minority workers. This Part concludes with a discussion of public reaction to both A.B. 101 and the Governor's veto of the measure.

A. Why Existing Law Is Not Enough

1. Federal Law

Federal law currently offers no explicit protection from employment discrimination based on sexual orientation.²⁴² In *Bowers v. Hardwick*,²⁴³ the Supreme Court ruled that the Constitution does not protect the right of consenting sexual orientation minorities to engage in sodomy in the privacy of the home.²⁴⁴ Even though *Bowers* is not an employment discrimination case, it poses formidable obstacles for sexual orientation rights in the workplace.

²³⁹ *Id.*

²⁴⁰ Richard J. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-At-Will Doctrine*, 139 U. PA. L. REV. 197, 207-08 (1990).

²⁴¹ See *supra* notes 78-240 and accompanying text.

²⁴² See *supra* notes 85-154 and accompanying text.

²⁴³ 478 U.S. 1039 (1986).

²⁴⁴ For a discussion of *Bowers*, see *supra* notes 103-19 and accompanying text.

The majority and concurring opinions suggest that sexual relationships between members of the same sex violate traditional norms of morality.²⁴⁵ The Court is unlikely to protect a class of people from employment discrimination based on their desire to engage in “immoral behavior.”

Furthermore, the Court reasoned that traditional values limit present and future rights under the Constitution.²⁴⁶ Such a view may prevent sexual orientation minorities from ever receiving constitutional protection, even if the majority of society clearly rejects the “immorality” argument. Even worse, when the Court espouses “traditional” values against homosexuality, some people may interpret this as permission to inflict traditional forms of prejudice upon those suspected to be sexually attracted to members of the same sex.²⁴⁷ As already noted, such hostility is often inflicted in the workplace.²⁴⁸

Some federal appellate courts have followed the Supreme Court’s lead, using the *Bowers* decision to deny heightened scrutiny under the Equal Protection Clause.²⁴⁹ These courts, however, generally limit their analysis to cases involving sexual orientation minorities who desire to serve in the military or in jobs that require a government security clearance.²⁵⁰ The federal courts are less tolerant of governmental discrimination against sexual orientation minorities in lower level, civil service posi-

²⁴⁵ *Bowers*, 478 U.S. at 192-93, 196-97.

²⁴⁶ *Id.*

²⁴⁷ *Cf. MOHR, supra* note 44, at 30 (discussing federal governmental discrimination against sexual orientation minorities).

²⁴⁸ *See supra* notes 26-77 and accompanying text.

²⁴⁹ For a discussion of some district and appellate federal court decisions, see *supra* notes 134-41.

²⁵⁰ The Constitution’s guarantee of due process and equal protection applies only to state action. For the relevant text, see *supra* note 120. Therefore, federal court jurisdiction is limited to considering whether government regulations or policies place an undue burden on sexual orientation minorities. Many courts have ruled that sexual orientation is not even rationally related to a legitimate government interest in lower level, civil service positions. *See, e.g., infra* note 251. However, courts are more likely to defer to the government in areas of national defense and security. *See, e.g., Korematsu v. United States*, 323 U.S. 214, 223 (1944) (deferring to military judgment and national security interests in upholding conviction of one who violated military order denying West Coast access to all individuals of Japanese ancestry). Therefore, sexual orientation minorities must convince the courts to apply heightened scrutiny in order to prevail against the government in cases involving national defense and security.

tions.²⁵¹ Nevertheless, because the federal courts deny constitutional protection to sexual orientation minorities, the federal government is able to continue its record as the worst perpetrator of employment discrimination against sexual orientation minorities.²⁵²

Although Congress has the authority to require public and private sector employers to refrain from sexual orientation employment discrimination, Congress has failed to enact such legislation.²⁵³ Furthermore, federal courts have refused to interpret current federal laws against employment discrimination as applying to sexual orientation minorities.²⁵⁴ Thus, sexual orientation minorities need specific legislation to protect their rights in the workplace. Although Congress is considering such legislation,²⁵⁵ there is currently little hope that it will pass.²⁵⁶ In sum, neither the Constitution nor federal statutes protect California's sexual orientation minorities from employment discrimination.

2. California Law

Compared with their federal counterparts, California's constitution and laws provide more explicit protection from sexual orientation employment discrimination.²⁵⁷ This protection, however, is insufficient. California's constitutional protection is both limited and unclear.²⁵⁸ California's statutory laws tend to be limited in scope; or they may offer broad but ineffective protection because they lack specificity.²⁵⁹ California's employers and

²⁵¹ See *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (holding that government cannot use sexual orientation alone to deny or terminate employment). *But see* *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976) (holding that openly flaunting one's sexual orientation may bring discredit upon government and, therefore, may justify governmental decisions to deny or terminate employment).

²⁵² See *supra* notes 44-51 and accompanying text.

²⁵³ The constitutional guarantee of equal protection only applies to governmental laws and regulations. See *supra* text accompanying note 96.

²⁵⁴ See *supra* notes 145-48 and accompanying text.

²⁵⁵ See *supra* note 150 and accompanying text.

²⁵⁶ See *supra* note 151 and accompanying text.

²⁵⁷ See *supra* notes 155-60 and accompanying text; *infra* notes 258-79 and accompanying text.

²⁵⁸ See *supra* notes 170-202 and accompanying text; *infra* notes 260-64 and accompanying text.

²⁵⁹ See *infra* notes 265-71 and accompanying text.

employees need clearer guidelines regarding their responsibilities and rights.

The Equal Protection Clause of the California Constitution protects sexual orientation minorities from arbitrary employment discrimination.²⁶⁰ But this protection is limited in that it only applies to public employers and certain monopolies.²⁶¹ The Privacy Clause may prevent all California employers from prying into the private lives of their workers,²⁶² but when an appellate court used the Privacy Clause to preclude such intrusion, the California Supreme Court set the decision aside.²⁶³ Until the supreme court issues its own opinion, the protection offered through the Privacy Clause will remain unclear.²⁶⁴

The one California state statute that explicitly prohibits sexual orientation employment discrimination applies only to the California civil service.²⁶⁵ Other California public positions may fall under Governor Brown's Executive Order B-54-79,²⁶⁶ but the executive order does not include any enforcement provisions.²⁶⁷ The result is that current state statutes and executive orders that explicitly refer to sexual orientation are inadequate because they are either too limited or too weak.

On the other hand, sections 1101 and 1102 of the California Labor Code may offer broader protection by requiring all California employers to comply with their provisions,²⁶⁸ but they may not be explicit enough to provide sufficient protection. Because these sections of the California Labor Code do not explicitly refer to sexual orientation, the California Supreme Court could decide to overrule the *Gay Law Students Ass'n* decision and limit sections 1101 and 1102 to purely partisan political activities.²⁶⁹ Even if

²⁶⁰ See *supra* notes 170-84 and accompanying text.

²⁶¹ See *supra* notes 184-85 and accompanying text.

²⁶² See *supra* notes 186-201 and accompanying text.

²⁶³ See *supra* notes 186-202 and accompanying text.

²⁶⁴ See Philip Hager, *State Justices Set Aside Ruling on Gay Job Bias*, L.A. TIMES, Feb. 1, 1992, at A1.

²⁶⁵ CAL. GOV'T CODE § 18500(c)(5) (West Supp. 1992).

²⁶⁶ Exec. Order No. B-54-79 (1979). For the text of the executive order, see *supra* note 223.

²⁶⁷ *California Legislature Will Not Try to Override Wilson's Veto of Gay Rights Bill*, DAILY LAB. REP., Oct. 1, 1991, at A11 (reporting that Governor Wilson's Personnel Board concluded that it had no authority to provide any remedies if supervisors violate Governor Brown's executive order).

²⁶⁸ See *supra* note 213 and accompanying text.

²⁶⁹ Previous California Supreme Court decisions have limited §§ 1101

the supreme court abides by its *Gay Law Students Ass'n* decision, allowing the California Labor Code to protect "manifest homosexuals" in their struggle for equal job opportunities, the court may decide that closeted sexual orientation minorities are not protected.²⁷⁰ The court may choose either of these alternatives when it issues its opinion in the *Soroka* case.²⁷¹ Given this uncertainty, sexual orientation minorities cannot rely on the California Labor Code to protect them from employment discrimination.

Even if sexual orientation minorities enjoyed explicit protection under California law, they still might not be able to enforce the law unless they receive help in expediting their claims. Many workers may find the costs of litigation to be too expensive to justify seeking a legal remedy in court.²⁷² Although a few cases may yield substantial punitive damages,²⁷³ most cases would

and 1102 of the California Labor Code to partisan politics. *See, e.g., Lockheed Aircraft Corp. v. Superior Court*, 28 Cal. 2d 481, 485 (1946), discussed *supra* note 210; Holding, *supra* note 229 (reporting on California's more conservative supreme court, making it less likely that court will follow its previous interpretation of California's Labor Code).

²⁷⁰ *See, e.g., Susan Christian, Q & A: Joel J. Loquvam, Civil Rights Attorney, Duran & Loquvam*, L.A. TIMES (Orange County ed.), Oct. 14, 1991, at D4 (interviewing one attorney who claims that it was difficult to get one superior court judge to believe that California Labor Code protects sexual orientation minorities who choose not to make political issues out of their sexual orientation).

²⁷¹ *Soroka v. Dayton Hudson Corp.*, 822 P.2d 1327 (Cal. 1992); *see supra* notes 201-02, 221 and accompanying text.

²⁷² *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301, 1319 (9th Cir. 1981) (discussing problem of plaintiffs being unable to find counsel in employment discrimination cases); Warren E. Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377, 381-82 (1980) (reporting on 1978 survey concluding that over 60% of Americans could not afford access to legal services); Kathleen E. Justice, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179, 208 n.189 (1991) (reporting on 1987 survey finding that 94% of those turned away from Legal Aid Society in Orange County, California could not afford to hire their own private attorney); Cathleen Decker, *Women Tell of Frustration in Combatting Sexual Harassment Rights: The Law Provides Little Redress to Those Who Cannot Afford the Expense of Filing Lawsuits, the Legislature's Women's Caucus is Told at a Hearing*, L.A. TIMES, Nov. 15, 1991, at A3.

²⁷³ For example, in *Collins v. Shell Oil Co.*, No. 610983-5, 1991 WL 147364 (Cal. Super. Ct. June 13, 1991), a judge awarded \$5.3 million to an executive who was terminated based on his sexual orientation. *Id.* The award included \$2 million for punitive damages. *Id.*

likely yield considerably lower awards.²⁷⁴ These awards may not be substantial enough to support the costs of litigation.

Under FEHA, California already has an administrative structure designed to assist workers with their discrimination claims.²⁷⁵ The DFEH and the Fair Employment and Housing Commission (FEHC) are already equipped to handle the types of discrimination that sexual orientation minorities experience in the workplace.²⁷⁶ However, DFEH and FEHC jurisdiction is limited to the classifications protected by FEHA.²⁷⁷ FEHA does not presently cover sexual orientation minorities.²⁷⁸ To remedy this situation, sexual orientation minorities need legislation that will allow the DFEH and FEHC to help settle the discrimination claims.²⁷⁹

²⁷⁴ See Decker, *supra* note 272.

²⁷⁵ See *infra* notes 305-33 and accompanying text.

²⁷⁶ See *infra* notes 293-333 and accompanying text.

²⁷⁷ CAL. GOV'T CODE §§ 12900-12996 (West 1992).

²⁷⁸ See *id.* § 12920.

²⁷⁹ Governor Wilson has allowed the Department of Labor to handle some employee grievances following the appellate court decision in *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77 (Ct. App. 1991), *review granted and opinion superseded*, 822 P.2d 1327 (Cal. 1992). See Harris, *supra* note 31. Arguably, the Labor Department is not as well suited to handle employment discrimination claims as DFEH. In particular, the Labor Department lacks experience handling typical complaints alleging employment discrimination. For a discussion of *Soroka*, see *supra* notes 186-202 and accompanying text.

For a discussion of non-statutory remedies available under California law, see David B. Oppenheimer & Margaret M. Baumgartner, *Employment Discrimination and Wrongful Discharge: Does the California Fair Employment and Housing Act Displace Common Law Remedies?*, 23 U.S.F. L. REV. 145, 147-48 (1989). Describing employment actions at common law the authors state:

California law generally provides that unless the parties agree otherwise, the term of a person's employment is 'at will,' and therefore that employment may be terminated by either party without cause. An employer's right to terminate employees at will is not, however, totally unfettered. In addition to various statutory restrictions, California common law provides that an employee may not legally be fired when the termination violates: (1) public policy; (2) an express or implied in fact contractual promise, such as a promise to fire only for good cause; or (3) the covenant of good faith and fair dealing, which is implied by law in all California contracts.

Id. (footnotes omitted). Violations of public policy may result in tort damages, while contract violations may result in contract remedies. *Id.*

3. Local Ordinances

The local ordinances adopted by many of California's largest cities are explicit and broad enough to satisfy the needs of sexual orientation minorities. These ordinances, however, may not have any authority.²⁸⁰ California's superior courts are split on whether FEHA preempts employment discrimination laws on the local level.²⁸¹ Until appellate courts resolve this conflict, sexual orientation minorities cannot rely on local ordinances to provide effective relief in court. Although the First District Court of Appeal should soon have the opportunity to decide if the local ordinances are valid,²⁸² clear legislation would have an obvious advantage. By providing explicit protection against sexual orientation employment discrimination, the legislature would create a uniform state-wide law and obviate the need for appellate review regarding the legal validity of the local ordinances.²⁸³

A uniform state-wide law would have another advantage for sexual orientation minorities. Even if an appellate court allows plaintiffs to advance employment discrimination claims under the local ordinances, the ordinances may not survive repeal initiatives from conservative political and religious groups.²⁸⁴ Once again, clear state-wide legislation would provide stability and durability.

Finally, even if the local ordinances stand up in court and survive all attempts at repeal, the ordinances may still prove ineffective. First of all, they may not provide sufficient remedies.²⁸⁵ Secondly, cities may lack the administrative equivalent of a DFEH to help expedite the complaints.²⁸⁶ Finally, the local ordinances cannot provide the uniform state-wide protection on which workers and employers alike can rely. Because of these shortcomings, sexual orientation minorities need uniform protection on the state level to protect them from employment discrimination.

4. Employment Policies

Individual employment policies against sexual orientation dis-

²⁸⁰ See *supra* notes 231-34 and accompanying text.

²⁸¹ See *supra* notes 231-34 and accompanying text.

²⁸² See *supra* note 234 and accompanying text.

²⁸³ Holding, *supra* note 229.

²⁸⁴ See *supra* note 230 and accompanying text.

²⁸⁵ Each city must determine what its remedy will be. For the partial text of Sacramento's anti-discrimination ordinance, including remedies, see *supra* note 229.

²⁸⁶ Mims, *supra* note 229.

crimination are too narrow and too weak to provide the protection needed by sexual orientation minorities. The policies are too narrow in that they are only helpful to employees covered by the policy. Many other sexual orientation minorities, working for employers without such policies, would still need protection. Furthermore, these policies are a weak form of protection because an employer can withdraw them at any time.²⁸⁷ Although these policies provide some protection, they should only be considered to be a short-term solution until sufficient state-wide protection becomes available through new state laws.

B. California's Attempt to Enact Legislation-A.B. 101

A simple and efficient method for providing sexual orientation minorities with protection from employment discrimination would be to amend FEHA. This method is simple because it only requires that the words "sexual orientation" be added to an already existing law.²⁸⁸ This method is efficient because FEHA has been around long enough so that employers, the DFEH, the FEHC, and the courts are already familiar with the statute's requirements.²⁸⁹ This Part begins with a discussion of FEHA, California's statutory protection from employment discrimination.²⁹⁰ Following the discussion of FEHA, this Part explains how A.B. 101 would have amended FEHA to include protection from discrimination based on sexual orientation.²⁹¹ This Part concludes with an examination of the public reaction to A.B. 101 and to Governor Wilson's subsequent veto of the measure.²⁹²

²⁸⁷ Pratt, *supra* note 240.

²⁸⁸ For an example of how legislators can simply add "sexual orientation" to the text of preexisting legislation to prohibit employment discrimination, see *infra* note 335.

²⁸⁹ See *supra* notes 1-10. California has been legislating against employment discrimination since 1959. See *supra* note 1 and accompanying text. During this period lawmakers extended the legislation so that it now prohibits discrimination based on race, creed, color, national origin, ancestry, sex, age, physical handicap, medical condition, marital status, and pregnancy. See *supra* notes 2-10. Many California cases describe the provisions of California's FEHA. See, e.g., *Rojo v. Kliger*, 801 P.2d 373 (Cal. 1990).

²⁹⁰ See *infra* notes 293-333 and accompanying text.

²⁹¹ See *infra* notes 334-44 and accompanying text.

²⁹² See *infra* notes 345-98 and accompanying text.

1. California's Fair Employment and Housing Act

FEHA declares that employment discrimination against certain classifications is contrary to state policy.²⁹³ These classifications include race, creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, and age.²⁹⁴ The rationale behind FEHA is that discrimination based on these classifications "foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general."²⁹⁵ FEHA also establishes that the opportunity to seek, obtain, and hold employment without discrimination is a civil right for those protected by the statute.²⁹⁶

Section 12940 specifies that employers of five or more persons, labor organizations, and employment agencies must comply with FEHA.²⁹⁷ Unlawful employment practices include employment decisions that discriminate against the classifications protected by the Act.²⁹⁸ Discriminatory practices include more than hiring and firing employees, but extend to compensation, terms, conditions, and privileges of employment.²⁹⁹ Employers must also refrain from retaliating against employees who oppose unlawful employment discrimination practices or who participate in proceedings provided for in the Act.³⁰⁰

Section 12940 also safeguards employees who are members of

²⁹³ CAL. GOV'T CODE § 12920 (West 1992).

²⁹⁴ *Id.* However, this prohibition does not include family members employing other immediate family members, nor does the prohibition apply to individuals employed under a special license in a nonprofit sheltered workshop or rehabilitation facility. *Id.* § 12926(b).

²⁹⁵ *Id.* § 12920.

²⁹⁶ *Id.* § 12921.

²⁹⁷ "Employers" includes any person regularly employing five or more persons but excludes non-profit religious organizations. *Id.* § 12926(c). "Labor organizations" are organizations that participate in collective bargaining or deal with employers concerning grievances, terms, or conditions of employment. *Id.* § 12926(e). "Employment agency" means any person who undertakes for compensation the procurement of employees or opportunities to work. *Id.* § 12926(d). The statute allows for an exception for a bona fide occupational qualification or when in compliance with California or United States security regulations. *Id.* § 12940.

²⁹⁸ *Id.* § 12940(a).

²⁹⁹ *Id.*

³⁰⁰ *Id.* § 12940(f).

the protected classifications from harassment based on their protected status.³⁰¹ For the purposes of harassment, an employer is defined as any person regularly employing one or more persons.³⁰² Furthermore, employers and supervisors are liable for their failure to intervene in situations when they know or should have known that prohibited harassment is taking place.³⁰³ Finally, section 12940 makes it illegal for any person to aid, abet, incite, compel, or coerce another person to engage in conduct that the Act proscribes.³⁰⁴

Sections 12930 through 12935 provide enforcement power for the provisions of FEHA.³⁰⁵ Section 12930 establishes the DFEH.³⁰⁶ The DFEH has the power and duty to receive, investigate, and attempt conciliation for complaints alleging unlawful employment and housing practices.³⁰⁷ Section 12935 establishes the Fair Employment and Housing Commission (FEHC), authorizing it to adopt, amend, and rescind regulations and standards for interpreting, implementing, and applying all provisions of FEHA.³⁰⁸ The FEHC also conducts hearings, with the DFEH representing the complainant.³⁰⁹

Two other important provisions of FEHA are sections 12944 and 12993. Section 12944 regulates licensing boards.³¹⁰ Licensing boards are limited in their ability to require examinations or establish any qualifications for licensing that have an adverse impact on those protected by FEHA.³¹¹ If the requirements have a disparate impact, they may be maintained only if they are job-related.³¹² Finally, section 12993 calls for liberal interpretation of FEHA to accomplish its purposes.³¹³ Although FEHA preempts

³⁰¹ *Id.* § 12940(h).

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* § 12940(g).

³⁰⁵ *Id.* §§ 12930-12935.

³⁰⁶ *Id.* § 12930.

³⁰⁷ *Id.* § 12930(f)(1).

³⁰⁸ *Id.* § 12935.

³⁰⁹ *Id.* §§ 12967-12969.

³¹⁰ *Id.* § 12944. A "licensing board" is any state board, agency, or authority in the State and the Consumer Services Agency which has the authority to grant licenses or certificates which are prerequisites to employment eligibility or professional status. *Id.* § 12944(e).

³¹¹ *Id.* § 12944(a).

³¹² *Id.*

³¹³ *Id.* § 12993(a).

similar legislation drafted by cities and counties within California,³¹⁴ it does not preempt other state legislation that applies to the protected classifications.³¹⁵

Having identified FEHA's basic provisions regarding unlawful employment discrimination, this discussion now considers the procedural provisions for aggrieved parties. Those who believe they are the victims of unlawful employment discrimination under FEHA must file their complaint with the local DFEH.³¹⁶ The DFEH then investigates the complaint and determines its merit.³¹⁷ If the DFEH investigates the complaint and determines that it is valid, then the DFEH seeks to remedy the situation through conference, conciliation, and persuasion.³¹⁸ If the DFEH is able to effect an agreement between the parties, the agreement is reduced to writing and signed by all parties.³¹⁹ Within one year of the agreement, the DFEH conducts a compliance review to determine if the agreement is being obeyed.³²⁰

If the DFEH is not able to effect an agreement, the Department then issues a written accusation,³²¹ leading to a hearing before the FEHC.³²² The DFEH presents the case on behalf of the complainant.³²³ If the FEHC finds for the plaintiff, the Commission may issue an injunction and take other actions including hiring, reinstatement, or upgrading the employee, with or without back pay.³²⁴ If the DFEH finds that a preliminary injunction is neces-

³¹⁴ *Id.* § 12993(c) (“[I]t is the intention of the Legislature to occupy the field of regulation of discrimination in employment . . . exclusive of all other laws banning discrimination in employment . . . by any city, city and county, county, or other political subdivision of the state . . .”).

³¹⁵ *Id.*

³¹⁶ *Id.* § 12960.

³¹⁷ *Id.* § 12963 (“[T]he department shall make [a] prompt investigation”); *see id.* § 12963.1 (authorizing DFEH to issue subpoenas for witnesses and production of books, to issue written interrogatories, and take depositions).

³¹⁸ *Id.* § 12963.7.

³¹⁹ *Id.* § 12964.

³²⁰ *Id.*

³²¹ *Id.* § 12965(a).

³²² *Id.* § 12967.

³²³ *Id.* § 12969.

³²⁴ *Id.* § 12970. However, the Commission cannot award punitive damages. *Dyna-Med, Inc. v. Fair Employment and Hous. Comm'n*, 743 P.2d 1323, 1339 (Cal. 1987) (holding that FEHA does not authorize Fair Employment and Housing Commission (FEHC) awards of punitive damages against employers who engage in unlawful employment practices); *cf.*

sary to protect the interests of the plaintiff, the Department may bring a civil action for preliminary relief pending final disposition of the complaint.³²⁵ The DFEH may also decide not to proceed with the complaint.³²⁶ If so, the Department issues a "right to sue letter" allowing the complainant to proceed with a claim in a trial court.³²⁷

In sum, FEHA provides complainants with several options regarding how to proceed with a complaint based on the Act. In all cases, the complainant must file with the DFEH and allow the Department a limited amount of time to investigate the claim.³²⁸ Following the DFEH's investigation, the complainant may choose one of the following courses of action: (1) the complainant may rely on the DFEH and the FEHC to resolve the entire issue;³²⁹ (2) the complainant may exhaust all FEHA remedies and then file a claim in civil court, using evidence obtained from the DFEH investigation;³³⁰ or (3) the complainant may decide not to use any of the DFEH's findings and file a civil suit immediately after receiving the right to sue letter.³³¹ The civil suit may be the most attractive option because civil courts can award punitive and compensatory damages in addition to all the equitable remedies that the FEHC may award.³³² The following section discusses how A.B. 101 would have provided these options for those who

Peralta Community College Dist. v. Fair Employment and Hous. Comm'n, 801 P.2d 357, 370 (Cal. 1990) (holding that FEHA does not authorize FEHC awards of compensatory damages against employers who engage in unlawful employment practices).

³²⁵ CAL. GOV'T CODE § 12974 (West 1992).

³²⁶ *Id.* § 12965(b).

³²⁷ *Id.*

³²⁸ *Id.* §§ 12960, 12963. However, a complainant need not file with the DFEH for a claim based on common law or upon a right granted by another statute. *Rojo v. Kliger*, 801 P.2d 373 (Cal. 1990). The complainant may even file simultaneous claims. *Id.* When filing simultaneous claims, the civil claim would include only those claims not asserted under FEHA. *Id.* The DFEH claim, in turn, would include only a FEHA-based complaint. *Id.*

³²⁹ CAL. GOV'T CODE §§ 12962-12974 (West 1992).

³³⁰ *Rojo*, 801 P.2d at 373.

³³¹ *Dyna-Med, Inc. v. Fair Employment and Hous. Comm'n*, 743 P.2d 1323, 1324 (Cal. 1987) (referring to DFEH policy of permitting any claimant who so wishes to bring private court action).

³³² *Peralta Community College Dist. v. Fair Employment and Hous. Comm'n*, 801 P.2d 357 (Cal. 1990) (allowing only civil courts to award compensatory and punitive damages for FEHA claims in addition to non-FEHA remedies based on tort, contract, and public policy theories).

believe that an employer has discriminated against them because of their sexual orientation.³³³

2. Assembly Bill 101

The California Legislature drafted A.B. 101 to amend FEHA so that it would also protect sexual orientation rights in the workplace.³³⁴ In its final version, A.B. 101 would have amended sections 12920, 12921, 12926, 12930, 12931, 12935, 12940, 12944, and 12993 of FEHA.³³⁵ The major change in these sections would have been the addition of sexual orientation to the classifi-

³³³ See *infra* notes 334-44 and accompanying text.

³³⁴ A.B. 101, 1991-2 Regular Session (1991). California Governor Pete Wilson vetoed the legislation on September 30, 1991. *Governor Wilson Letter*, *supra* note 17. During Governor Wilson's campaign, he actively recruited support from the gay and lesbian community, who interpreted his actions as supportive of sexual orientation rights. Victor F. Zonana, *The Gay Vote Is Hotly Pursued in Governor's Race*, L.A. TIMES, May 20, 1990, at A3 (reporting that Governor Wilson, ignoring barbs from other Republican party members who labelled him as "pro-gay," solicited votes from gay and lesbian political groups).

³³⁵ A.B. 101, 1991-2 Regular Session (1991). For this discussion, the relevant changes that A.B. 101 would have made to FEHA include the following additions (represented by italicized print):

§ 12920. Public policy; employment rights and opportunities; housing; purpose; police power

It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, age, or *sexual orientation*.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance (sic), and substantially and adversely affects the interest of employees, employers, and the public in general.

Further, the practice of discrimination because of race, color, religion, sex, marital status, national origin, or ancestry in housing accommodations is declared to be against public policy.

It is the purpose of this part to provide effective remedies which will eliminate such discriminatory practices.

The Legislature finds and declares that religious associations and religious corporations not organized for private profit, whether incorporated as religious or public benefit corporations, are currently exempt from the prohibitions against employment discrimination contained in this part. It

is the intent of the Legislature that the act adding this paragraph make no change in that exemption.

This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.

§ 12921. Civil right; employment without discrimination

The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, age, or *sexual orientation* is hereby recognized as and declared to be a civil right.

§ 12926. Additional definitions

As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(k) *“Sexual orientation” means heterosexuality, homosexuality, and bisexuality.*

§ 12930. Functions, powers and duties

The [DFEH] shall have the following functions, powers and duties:

(i) To issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination in employment on the bases enumerated in this part and discrimination in housing because of race, religious creed, color, sex, marital status, national origin, ancestry, or *sexual orientation*.

§ 12931. Assistance to communities and persons; resolutions of disputes, disagreements and difficulties relating to discriminatory practices; requests

The department may also provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, age, or *sexual orientation* which impair the rights of persons in such communities under the Constitution or laws of the United States or of this state. The services of the department may be made available in cases of such disputes, disagreements, or difficulties only when, in its judgment, peaceful relations among the citizens of the community involved are threatened thereby. The department's services are to be made available only upon the request of an appropriate state or local public body, or upon the request of any person directly affected by any such dispute, disagreement, or difficulty.

The assistance of the department pursuant to this section shall

be limited to endeavors at investigation, conference, conciliation, and persuasion.

§ 12935. Functions, powers and duties

The commission shall have the following functions, powers and duties:

.....
(g) To create or provide financial or technical assistance to such advisory agencies and conciliation councils, local or otherwise, as in its judgment will aid in effectuating the purposes of this part, and to empower them to study the problems of discrimination in all or specific fields of human relationships or in particular instances of employment discrimination on the bases enumerated in this part or in specific instances of housing discrimination because of race, religious creed, color, national origin, ancestry, marital status, sex, or *sexual orientation*, and to foster, through community effort or otherwise, good will, cooperation, and conciliation among the groups and elements of the population of the state and to make recommendations to the commission for the development of policies and procedures in general. Such advisory agencies and conciliation councils shall be composed of representative citizens, serving without pay.

.....
(i) To issue publications and results of inquiries and research which in its judgment will tend to promote good will and minimize or eliminate unlawful discrimination. Such publications shall include an annual report to the Governor and the Legislature of its activities and recommendations.

§ 12940. Employers, labor organizations, employment agencies and other persons; unlawful employment practice; exceptions

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or *sexual orientation* of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

.....
(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or *sexual orientation* of any person, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated

membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or *sexual orientation* of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or *sexual orientation* of the person discriminated against.

(d) For any employer or employment agency, unless specifically acting in accordance with federal equal employment opportunity guidelines and regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or *sexual orientation*, or any intent to make any such limitation, specification or discrimination. Nothing in this subdivision shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.

(e) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code which prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(f) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(g) For any person to aid, abet, incite, compel, or coerce the

doing of any of the acts forbidden under this part, or to attempt to do so.

(h) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, age, or *sexual orientation*, to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment. The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment. For purposes of this subdivision only, "employer" means any person regularly employing one or more persons, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision thereof, and cities. However, "employer" does not include a religious association or corporation not organized for private profit. For other types of discrimination as enumerated in subdivision (a), an employer remains as defined in subdivision (c) of Section 12926. Nothing contained in this subdivision shall be construed to apply the definition of employer found in this subdivision to subdivision (a).

(i) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

§ 12940.5

Nothing in this part relating to discrimination on account of sexual orientation is intended, nor shall be construed, to permit the imposition of quotas, or other such affirmative actions as relief for discrimination based on, or because of, sexual orientation.

§ 12944. Licensing boards; unlawful acts based on examinations and qualifications; determination of unlawfulness; inquiries; records

(a) It shall be unlawful for a licensing board to require any examination or establish any other qualification for licensing which has an adverse impact on any class by virtue of its race, creed, color, national origin or ancestry, sex, age, medical condition, physical handicap, or *sexual orientation*, unless such practice can be demonstrated to be job related.

Where the commission, after hearing, determines that an

examination is unlawful under this subdivision, the licensing board may continue to use and rely on such examination until such time as judicial review by the superior court of the determination is exhausted. If an examination or other qualification for licensing is determined to be unlawful under this section, that determination shall not void, limit, repeal, or otherwise affect any right, privilege, status, or responsibility previously conferred upon any person by such examination or by a license issued in reliance on such examination or qualification.

(b) It shall be unlawful for any licensing board, unless specifically acting in accordance with federal equal employment opportunity guidelines or regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical handicap, medical condition, sex, age, or *sexual orientation*, or any intent to make any such limitation, specification, or discrimination. Nothing in this subdivision shall prohibit any licensing board from making, in connection with prospective licensure or certification, an inquiry as to, or a request for information regarding, the physical fitness of applicants if that inquiry or request for information is directly related and pertinent to the license or the licensed position the applicant is applying for.

(c) It is unlawful for a licensing board to discriminate against any person because such person has filed a complaint, testified, or assisted in any proceeding under this part.

(d) It is unlawful for any licensing board to fail to keep records of applications for licensing or certification for a period of two years following the date of receipt of such applications.

(e) As used in this section, "licensing board" means any state board, agency, or authority in the State and Consumer Services Agency which has the authority to grant licenses or certificates which are prerequisites to employment eligibility or professional status.

§ 12993. Construction of part; continuation of Civil Rights Law and other laws relating to discrimination; effect on retirement, pension and other plans; Unruh Civil Rights Act

(a) The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, age, or *sexual orientation*.

A.B. 101, 1991-2 Regular Session (1991).

cations already protected by the Act.³³⁶ Additionally, A.B. 101 would have added section 12940.5 to preclude quotas and affirmative action based on sexual orientation.³³⁷

By adding sexual orientation to current FEHA provisions, A.B. 101 would have created uniform, state-wide protection from employment discrimination based on sexual orientation.³³⁸ A.B. 101 proposed that employment discrimination based on sexual orientation be declared against the public policy of the state.³³⁹ Furthermore, the measure would have made the opportunity to seek, obtain, and hold employment a civil right for people of all sexual orientations.³⁴⁰ Both the DFEH as well as the FEHC would have had jurisdiction over claims alleging job-related sexual orientation discrimination.³⁴¹ Employer decisions to hire or discharge individuals based on their sexual orientation would have become unlawful.³⁴² A.B. 101 would also have made supervisor harassment of employees unlawful if based on sexual orientation, and would have required that supervisors intervene when they become aware of such harassment taking place among employees.³⁴³ Furthermore, employees would have received protection from retaliation when they oppose unlawful employment practices or participate in proceedings authorized by FEHA.³⁴⁴

³³⁶ See *supra* note 335.

³³⁷ See *supra* note 335.

³³⁸ Cf. *supra* notes 313-15 and accompanying text (discussing FEHA provisions for preempting other laws regarding employment discrimination).

³³⁹ Cf. *supra* notes 293-96 and accompanying text (discussing FEHA declaration that employment discrimination against certain classifications is contrary to state policy).

³⁴⁰ Cf. *supra* note 296 and accompanying text (discussing FEHA provision establishing that opportunity to seek, obtain, and hold employment without discrimination is civil right for those protected by FEHA).

³⁴¹ Cf. *supra* notes 305-09 and accompanying text (discussing powers and duties FEHA establishes for DFEH and FEHC).

³⁴² Cf. *supra* notes 298-300 and accompanying text (discussing discriminatory practices that FEHA makes unlawful). Exceptions would be permitted for bona fide occupational qualifications, compliance with security regulations, and religious organizations; cf. *supra* note 335 (setting forth exceptions).

³⁴³ Cf. *supra* notes 301-04 and accompanying text (discussing FEHA provision that safeguards employees from harassment).

³⁴⁴ Cf. *supra* note 300 and accompanying text (discussing FEHA provision making it unlawful for employers to retaliate against employees who use FEHA to oppose employment discrimination practices).

3. Reactions to A.B. 101

A.B. 101 generated tremendous controversy. Sexual orientation rights activists considered A.B. 101 to be a milestone in their quest for civil rights as well as employment rights.³⁴⁵ Business representatives, however, believed that more rights for gays and lesbians meant fewer rights for employers.³⁴⁶ Yet, the strongest reaction came from conservative religious and political groups.³⁴⁷ In the end, they were probably most influential in the defeat of A.B. 101.³⁴⁸ This section reviews the reactions of business groups, religious bodies, and political parties to A.B. 101 before and after the Governor vetoed the measure.

Although initially hostile toward A.B. 101, business community leaders claimed neutrality towards the measure following negotiations with its sponsor.³⁴⁹ Business leaders feared that A.B. 101 would increase business costs due to increased litigation.³⁵⁰ They also feared that A.B. 101 might require job quotas and compel

³⁴⁵ See Nancy Gibbs, *Test Case for a Gay Cause*, TIME, Oct. 14, 1991, at 30 (“Wilson’s veto sent a chill through civil rights activists across the country Gays had viewed California, as the country’s most populous state and a leader in civil rights legislation, as a critical test case.”); Susan Yoachum, *Anti-Bias Laws in Other States; Those with Hiring Protection for Gays Report No Major Problems*, S.F. CHRON., Sept. 24, 1991, at A13 (quoting East Coast gay rights activist’s comments on A.B. 101’s national importance).

³⁴⁶ Bills that are “pro” one group are often seen as “anti” another. Therefore, some representatives of the business community labelled the bill as “anti-employer.” See, e.g., Robert B. Gunnison & Vlae Kershner, *Wilson Produced Some Surprises*, S.F. CHRON., Oct. 16, 1991, at A15 (“Frankly, with Governor Deukmejian, if it was an anti-employer bill, it was pretty hard to imagine that bill being signed With Governor Wilson, we had to make the argument on the merits.” (quoting Fred Main, general counsel of California Chamber of Commerce)).

³⁴⁷ See *infra* notes 355-66, 389-93 and accompanying text.

³⁴⁸ See *infra* notes 355-66, 389-93 and accompanying text.

³⁴⁹ See Bradley Inman, *Look for Bold Proposals on How to Manage Growth in California*, L.A. TIMES, Sept. 29, 1991, at D2. The article reports that the California Manufacturers Association took a neutral stance toward A.B. 101. *Id.* It also notes that the California Chamber of Commerce withdrew its opposition to A.B. 101 after Assemblyman Terry Friedman accepted the Chamber’s proposals to change A.B. 101. *Id.* The changes ensured that employers could legally withhold employment benefits from domestic partners. *Id.*

³⁵⁰ See Mims, *supra* note 229 (reporting on one business leader’s fear that if A.B. 101 becomes law, 100 to 200 additional employment discrimination claims may be reported within one year).

employers to extend employee benefits to domestic partners.³⁵¹ In order to gain support from the business community, A.B. 101 was amended to prohibit quotas and protect employers from having to extend benefits to domestic partners of employees.³⁵² Following the revisions, the business community became more favorable towards the bill.³⁵³ Some labor organizations also supported A.B. 101.³⁵⁴

The strongest opposition to A.B. 101 came from conservative Christians. Many fundamentalist Christians consider minority sexual orientation to be a threat to families,³⁵⁵ a threat to health,³⁵⁶ and a threat to the moral integrity of society.³⁵⁷ The Reverend Lou Sheldon, head of the Traditional Values Coalition, was particularly upset that sexual orientation rights could be equated with civil rights.³⁵⁸ He responded by attempting to have the California Constitution amended to require a minimum two-thirds majority approval from California voters before enforcing existing sexual orientation rights measures or passing new ones.³⁵⁹ Sheldon's measure would have affected state and local

³⁵¹ See, e.g., Inman, *supra* note 349.

³⁵² Carl Ingram, *Senate OKs Gay Rights, RU-486 Bills*, L.A. TIMES, Sept. 12, 1991, at A3 (reporting that A.B. 101 was amended to prohibit quotas); Inman, *supra* note 349 (reporting that A.B. 101 would not require employers to extend employment benefits to live-in partners).

³⁵³ Inman, *supra* note 349.

³⁵⁴ See, e.g., Tuller, *supra* note 56 (reporting that Assemblyman Terry Friedman (D-West Hollywood) received enthusiastic applause from members attending state-wide convention of machinists' union while speaking about A.B. 101's importance).

³⁵⁵ See, e.g., Goodavage & Howlett, *supra* note 228 (quoting Beverly LaHaye, president of concerned Women for America. "It's a threat to the families of America . . . They are looking for government endorsement that in turn would undermine families.").

³⁵⁶ See, e.g., Vicki Torres, *Despite Protests, Pasadena Oks Plan to Fight AIDS*, L.A. TIMES, June 19, 1991, at B3 (reporting on conservative Christian opposition to AIDS education programs).

³⁵⁷ See, e.g., Robert Boczkiewicz, *Court Refuses Christ as Legal Counsel*, S.F. CHRON., Apr. 19, 1991, at B7 (reporting on Colorado minister supporting Biblical doctrine of killing homosexuals); Kevin Brass, *Gay Activists Upset over Panel of "Third Thursday,"* L.A. TIMES (San Diego County ed.), Oct. 14, 1991, at F2 (reporting that Reverend Lou Sheldon was declaring "open warfare" on homosexuality, calling homosexuality "an immoral but chosen and curable" illness).

³⁵⁸ Tuller, *supra* note 56 ("Homosexuals have hijacked the freedom train to Selma . . . That train never stopped at Sodom.").

³⁵⁹ Ralph Frammolino, *Sheldon Backs Initiative for Two-thirds Vote on Gay*

laws.³⁶⁰ Meanwhile, other religious groups were more favorable. The California Council of Churches supported the measure and many religious leaders spoke in favor of A.B. 101.³⁶¹

Political groups also had different reactions to A.B. 101. Democrats generally supported the measure while many Republicans fought against it.³⁶² Although Governor Wilson initially supported A.B. 101, he soon faced opposition from his own party.³⁶³ The opposition increased as the bill came before the Senate.³⁶⁴ Throughout the debate over A.B. 101, politics and religious sentiments overlapped. For example, in the Assembly, Assemblyman Knowles' speech included remarks more akin to religious rhetoric than reasoned political analysis.³⁶⁵ And, before the Senate, Sen-

Issues, L.A. TIMES (Orange County ed.), June 18, 1991, at A3 (discussing Sheldon's efforts to bring initiative before California voters that would repeal sexual orientation rights at local and state levels).

³⁶⁰ *Id.*

³⁶¹ For an interesting account of negotiations between sexual orientation rights activists and a denomination with a history of opposing them, see Tuller, *supra* note 56. In Connecticut, sexual orientation rights activists negotiated with Roman Catholic Archbishop John Whelan. *Id.* Previously, the Roman Catholics helped defeat sexual orientation rights legislation. *Id.* Following the negotiations, however, the Church remained neutral and the measure passed. *Id.* The Roman Catholics did not oppose the new bill because it contained elements important to the hierarchy. *Id.* It had a narrow scope, confining itself to employment, housing, and public accommodations. *Id.* The bill prohibited discrimination without legitimizing lifestyle. *Id.* The measure also allowed the state to consider sexual orientation in adoption proceedings. *Id.*

Not all Christians are hostile to minority sexual orientations. For a theological treatise that refutes Christianity's reliance on the Bible to support homophobia and argues for the blessing of same-sex unions, see JOHN S. SPONG, *LIVING IN SIN? A BISHOP RETHINKS HUMAN SEXUALITY* (1988).

³⁶² Ingram, *supra* note 352.

³⁶³ See Tuller, *supra* note 56 (reporting that 28 Assembly Republicans encouraged Governor Wilson to veto A.B. 101 if it reached his desk); Vlade Kershner, *Governor Ponders Fate of 4 Key Bills*, S.F. CHRON., Sept. 16, 1991, at A16 (reporting on pressure that Republicans exerted on Governor Wilson to veto A.B. 101).

³⁶⁴ See *supra* note 363.

³⁶⁵ Lou Cannon, *Wilson Pressured to Veto Gay Job-Bias Legislation; Governor Will Do 'the Right Thing,' Aides Say*, WASH. POST, Sept. 19, 1991, at A3 (reporting on Republican Assemblyman Knowles' speech opposing A.B. 101, including remarks so disgusting that other conservative Assembly members publicly disassociated themselves from Knowles' statements).

ate Leader David Roberti (D-Los Angeles) chafed at religious opposition to the bill.³⁶⁶

Despite the controversy surrounding A.B. 101, both the Assembly and the Senate approved the measure and sent it to the Governor.³⁶⁷ Many supporters of A.B. 101 predicted that Governor Wilson would sign the bill.³⁶⁸ In fact, the Governor had expressed his support of the legislation earlier in the year.³⁶⁹ But Wilson equivocated as conservative members from his own party denounced the measure and Wilson's support for it.³⁷⁰ On September 29, just before the release of a public opinion poll indicating majority support for A.B. 101, Wilson vetoed the measure.³⁷¹

In his veto message, the Governor acknowledged the harm caused by a "tiny minority of mean-spirited, gay-bashing bigots."³⁷² Nevertheless, he claimed the problem was not serious enough to warrant new legislation.³⁷³ Furthermore, Wilson claimed that sufficient protection already exists to combat sexual orientation discrimination in the workplace.³⁷⁴ The Governor also expressed his concern for the adverse impact that A.B. 101 could have on California businesses and the DFEH.³⁷⁵ He claimed that new lawsuits could harm California businesses and be unfair to innocent employers.³⁷⁶ In addition, Wilson implied that the DFEH handles too many cases already, and that too many

³⁶⁶ Ingram, *supra* note 352 ("[M]aybe the pressures from some of those organizations that call themselves churches is going to preclude you from casting the vote you would like to cast." (quoting Roberti's remarks before Senate)).

³⁶⁷ Jerry Gillam & Carl Ingram, *Legislation to Hold Early Presidential Primary Dies*, L.A. TIMES, Sept. 14, 1991, at A22.

³⁶⁸ Cannon, *supra* note 365.

³⁶⁹ George Skelton & Jerry Gillam, *Governor Vetoes Gay Job Bias Bill*, L.A. TIMES, Sept. 30, 1991, at A1.

³⁷⁰ See *supra* note 363 and accompanying text.

³⁷¹ See Gewertz & Frank, *supra* note 70 (reporting on poll finding that Californians approved of A.B. 101 by two to one margin).

³⁷² *Governor Wilson Letter*, *supra* note 17 ("[T]here is no question that bigots exist and engage in abhorrent, utterly repugnant gay-bashing . . .").

³⁷³ *Id.* For the pertinent text of Governor Wilson's letter, see *supra* note 21.

³⁷⁴ *Governor Wilson Letter*, *supra* note 17. For the pertinent text of Governor Wilson's letter, see *supra* note 18.

³⁷⁵ See *infra* text accompanying notes 408-10.

³⁷⁶ See *Governor Wilson Letter*, *supra* note 17. For the pertinent text of Governor Wilson's letter, see *supra* note 21.

of these cases wind up in court.³⁷⁷ Finally, the Governor implied he might have signed the measure had it encouraged, rather than required, employers not to discriminate against sexual orientation minorities.³⁷⁸

Reaction to the veto was even stronger than reaction to the bill itself. Both supporters and opponents of A.B. 101 criticized the Governor.³⁷⁹ Supporters of A.B. 101 criticized the veto because they perceived that Wilson had succumbed to pressure from religious and political conservatives.³⁸⁰ Furthermore, they rejected his claim that sufficient protection against sexual orientation employment discrimination already exists.³⁸¹ One former California Supreme Court Justice scoffed at Wilson's claim.³⁸² An attorney responded to the veto by filing a suit on behalf of his client claiming sexual orientation discrimination.³⁸³ Politicians,³⁸⁴ political bodies,³⁸⁵ and clergy³⁸⁶ also registered their disappointment. While many supporters of A.B. 101 despaired,³⁸⁷ others committed themselves to continue their efforts for legislative change.³⁸⁸

³⁷⁷ *Governor Wilson Letter*, *supra* note 17. For the pertinent text of Governor Wilson's letter, see *supra* note 19.

³⁷⁸ *Governor Wilson Letter*, *supra* note 17, at 1 ("Proponents argue that . . . simple fairness demands the elimination of discrimination in employment on the basis of sexual orientation. Were AB 101 . . . a simple resolution declaring that simple proposition, it could be easily accepted.").

³⁷⁹ Gewertz & Frank, *supra* note 70.

³⁸⁰ *Id.* ("Wilson absolutely caved in to the far right of his own party and to the fundamentalists on gay rights." (quoting a supporter of A.B. 101)).

³⁸¹ See *infra* notes 382-86 and accompanying text.

³⁸² Stephen G. Hirsch, *Gay Rights Advocates Attack Wilson's Logic*, *THE RECORDER*, Oct. 1, 1991, at 1 (quoting former state Supreme Court Justice Joseph Grodin as saying, "To say there is ample protection under the existing law is to engage in wishful thinking. . . . What would we have said to someone who said we shouldn't have passed the Civil Rights Act of 1964 because it would have given rise to excessive litigation?").

³⁸³ Reynolds Holding, *Gay Hiring Suit Names Health Club*, *S.F. CHRON.*, Oct. 1, 1991, at A15.

³⁸⁴ Jerry Roberts & Susan Yoachum, *Wilson Veto of Gay Bill Denounced by Both Sides*, *S.F. CHRON.*, Oct. 1, 1991, at A1.

³⁸⁵ Elaine Herscher & Dan Levy, *Gay Rights Protest Turns Violent*, *S.F. CHRON.*, Oct. 1, 1991, at A15 (citing resolution passed by San Francisco's Board of Supervisors and Mayor Art Agnos condemning Wilson's veto of A.B. 101).

³⁸⁶ Gewertz & Frank, *supra* note 70.

³⁸⁷ Goodavage & Howlett, *supra* note 228.

³⁸⁸ *Id.*; Herscher & Levy, *supra* note 385.

But those who had worked hardest to pressure the Governor to veto the bill were not satisfied either.³⁸⁹ They saw the veto as their own victory over a liberal governor and were particularly offended by the Governor's remarks in his veto message.³⁹⁰ They accused Wilson of doing what was politically expedient rather than what was morally right.³⁹¹ Religious and political conservatives embraced the veto as an opportunity to continue their efforts at circumscribing gay rights across the nation.³⁹² Thus, the Governor was without support by those on both sides of the issue.³⁹³

In addition to the verbal rhetoric, demonstrators protested and in some cases rioted.³⁹⁴ Angry citizens immediately took to the streets in Los Angeles and San Francisco.³⁹⁵ Approximately 4,000 protesters from all over the state marched on the Capitol.³⁹⁶ Similar protests were held in smaller communities as well.³⁹⁷ Opponents of the bill also held rallies, although on a

³⁸⁹ See Gewertz & Frank, *supra* note 70 ("Surprisingly, however, fundamentalists who had passionately opposed the measure had only the faintest praise for the Governor. They thanked him for his veto but attacked his overall record on tax and family issues.").

³⁹⁰ *Id.*; see also Roberts & Yoachum, *supra* note 384 ("Sheldon said it was the heavy pressure applied by his group . . . that forced the governor to back off his earlier support for the . . . bill.").

³⁹¹ Roberts & Yoachum, *supra* note 384.

³⁹² Lou Cannon & Maralee Schwartz, *Voters in St. Paul Considering Repeal of Gay-Rights Law*, WASH. POST, Oct. 20, 1991, at A18.

³⁹³ See Roberts & Yoachum, *supra* note 384 ("The moderates, who supported A.B. 101, will remember Wilson as the governor who vetoed the bill. The conservatives will remember him as the governor who almost signed the bill.").

³⁹⁴ Eric Lichtblau, *Seventeen Arrested in Gay Rights Protest in Garden Grove*, L.A. TIMES, Oct. 6, 1991, at B1.

³⁹⁵ Hersher & Levy, *supra* note 385 (reporting that 2,000 demonstrators attended one rally held in Los Angeles and that San Francisco's violent rally drew 7,000 protestors); Bill Workman & Vlae Kershner, *Noisy Attack Over Veto of Gay-Rights Bill*, S.F. CHRON., Oct. 2, 1991, at A1 (reporting on demonstrators disrupting Governor Wilson's speech at Stanford University).

³⁹⁶ See Robert B. Gunnison, *Gay Rights Protest at Capitol*, S.F. CHRON., Oct. 12, 1991, at A1 (describing Sacramento's rally as "the most turbulent Capitol demonstration since the Vietnam War").

³⁹⁷ See Lichtblau, *supra* note 394 (reporting on one protest held in Garden Grove).

much smaller scale.³⁹⁸ The strong and violent reaction generated by the veto of A.B. 101 indicates that the struggle for, and against, sexual orientation rights in California is far from over.

IV. PROPOSAL

Governor Wilson defended his veto of A.B. 101 on the ground that sufficient legal protection from sexual orientation employment discrimination already exists.³⁹⁹ Yet, legal developments subsequent to his veto undermine his assertion.⁴⁰⁰ One appellate court decision apparently agreed with the Governor's understanding of the constitutional guarantee of privacy as well as the protection provided by the California Labor Code.⁴⁰¹ But the state supreme court set the appellate court's decision aside,⁴⁰² indicating that the court may disagree with both the Governor and the appellate court. The supreme court's action raises serious questions about how much protection California's Constitution and statutes currently provide to prohibit sexual orientation discrimination in the workplace. Furthermore, a Los Angeles superior court judge recently ruled that FEHA preempts local ordinances prohibiting sexual orientation employment discrimination.⁴⁰³ These rulings show that sexual orientation minorities need clear, state-wide legislation to protect them from discrimination. Employers would also benefit from such legislation as it would guide them in making employment decisions. Finally, judges would benefit from clear legislation so that they could be confident that they are making the correct rulings under California law.

Governor Wilson also defended his veto on the grounds that it would place an inordinate burden upon innocent employers who do not discriminate.⁴⁰⁴ According to Wilson, simply trying to obey a new law would be expensive.⁴⁰⁵ In addition, employers might have to spend extra money to defend themselves against

³⁹⁸ Hersher & Levy, *supra* note 385 (reporting on small gathering in Concord in support of Wilson's veto).

³⁹⁹ See *supra* note 18 and accompanying text.

⁴⁰⁰ See *supra* notes 161-222, 228-34 and accompanying text.

⁴⁰¹ See *supra* notes 161-222 and accompanying text.

⁴⁰² See *supra* notes 202, 222 and accompanying text.

⁴⁰³ See *supra* note 232 and accompanying text.

⁴⁰⁴ See *supra* notes 19-21 and accompanying text.

⁴⁰⁵ See *supra* note 21 and accompanying text.

more lawsuits or pay more money for their insurance.⁴⁰⁶

The reaction to A.B. 101 by many business leaders contradicts the Governor's assertions. Most of the business community maintained a neutral stance towards the measure once business leaders achieved compromises on key aspects of the legislation.⁴⁰⁷ One compromise made quotas and affirmative action unlawful, thereby reducing chances of litigation and increased expenses.⁴⁰⁸ The business community won another significant concession in obviating any need to extend employment benefits to domestic partners.⁴⁰⁹ The resulting legislation provided the business community with a uniform law regarding sexual orientation rights in the workplace.⁴¹⁰ Uniform, state-wide legislation would preempt local ordinances and relieve employers of responsibility for monitoring disparate local laws.⁴¹¹

Although Governor Wilson feared the effects that a measure such as A.B. 101 might have on businesses, the experience of other states with similar legislation suggests that his fears are unfounded. Both Wisconsin and Massachusetts have had similar laws on their books long enough to indicate whether a new California law would create a flood-tide of litigation.⁴¹² Neither state has reported increased litigation.⁴¹³ In fact, two weeks before

⁴⁰⁶ See *supra* note 21 and accompanying text.

⁴⁰⁷ See *supra* notes 349-54 and accompanying text.

⁴⁰⁸ See *supra* note 352 and accompanying text.

⁴⁰⁹ See *supra* note 352 and accompanying text.

⁴¹⁰ See *supra* note 314 and accompanying text (discussing how FEHA preempts similar legislation passed at state and local levels, thereby creating uniform, state-wide legislation).

⁴¹¹ Cf. *supra* note 314 and accompanying text (discussing how FEHA preempts similar legislation passed at state and local levels, thereby creating uniform, state-wide legislation).

⁴¹² Act of March 2, 1981, ch. 112, § 14, 1981 Wis. Laws 901, 905 (codified as amended at Wis. STAT. ANN. § 111.31 (1988)). Wisconsin enacted its law in 1981. Act of Nov. 15, 1989, ch. 516, §§ 1-14, 1989 Mass. Acts 843 (codified as amended at MASS. GEN. LAWS ANN. ch. 151B, § 4 (West Supp. 1992)). Massachusetts enacted its law in 1989.

⁴¹³ See Scott Hildebrand, *Wisconsin Law Has Had 'Positive Impact'*, USA TODAY, Nov. 15, 1989, at A3 (reporting that Wisconsin statute prohibiting sexual orientation discrimination has had positive impact). Approximately 60 discrimination complaints are filed each year, although many more cases apparently exist. *Id.* Some of the claims are based on housing discrimination. *Id.* Most cases settle out of court with remedies ranging from apologies to monetary settlements. *Id.* Even though laws protect sexual orientation minorities, social stigma continues to inhibit many employees from admitting their orientation or pursuing remedies for

Governor Wilson vetoed A.B. 101, Massachusetts Governor William Weld, a fellow Republican, sent a letter to Wilson urging him to sign the measure.⁴¹⁴ The positive experiences in other states contradict Wilson's fear of new lawsuits, unless Wilson believes that California's sexual orientation minorities are more litigious or that discrimination against sexual orientation minorities is more pervasive in California.⁴¹⁵

Even if Governor Wilson is justifiably concerned for California business competitiveness, his concern is an insufficient basis for determining whether to provide protection for basic human rights. Responsibility for protecting the innocent should be balanced between employers and employees. Adding sexual orientation to the Fair Employment and Housing Act would not upset the balance. The difficulty of proving discrimination discourages frivolous lawsuits.⁴¹⁶ Attorney and court fees are high enough so that few employees can afford to maintain private claims.⁴¹⁷ Even

discrimination. *Id.*; see also Roberts & Yoachum, *supra* note 384 (reporting that Massachusetts has also had few law suits arising under its new sexual orientation discrimination laws). The agency responsible for handling discrimination claims reported receiving only 41 claims based on sexual orientation discrimination during 1990, the first year after Massachusetts passed protective legislation. *Id.*

⁴¹⁴ See Roberts & Yoachum, *supra* note 384. Governor Weld noted a lack of problems in states passing laws even more strict than A.B. 101. *Id.*

⁴¹⁵ Given the concerns Governor Wilson expressed, passing legislation protecting sexual orientation minorities from employment discrimination likely presents a "catch 22" situation. To get legislation, there must be a need for it. If proponents of legislation are too successful in proving such need, however, they risk losing the legislation. *Cf.* Groves, *supra* note 26 (reporting on research study which found that 15% of 6,500 gays interviewed believed they had experienced job discrimination based on their sexual orientation). In San Francisco, where an ordinance outlaws such discrimination, the Human Rights Commission handled only about 70 formal complaints during 1990. *Id.* Although its jurisdiction is limited to San Francisco, the Human Rights Commission receives an average of more than 20 inquiries per week from callers in other parts of the state. *Id.* This could suggest that formal laws would reduce the discrimination, thus reducing employers' liability for lawsuits. See generally *id.*

⁴¹⁶ See Christian, *supra* note 270 ("California is an at-will employment state, so no employer has to give an employee a reason for termination. It makes discrimination cases very tough to prove." (quoting employment discrimination attorney Joel Loquvam)).

⁴¹⁷ See *supra* note 272 and accompanying text (discussing high costs of bringing employment discrimination claims).

if an attorney is willing to work on a contingency fee scale, the case must have enough merit to make it worth the risk of losing.

On the other hand, if the case is handled by the DFEH, the Department will refuse to proceed with frivolous claims.⁴¹⁸ If the DFEH decides the claim has merit, the Department will first attempt to conciliate rather than litigate.⁴¹⁹ If effective conciliation reduces the frequency of court litigation, then allowing the DFEH to handle the claims would actually improve California's business competitiveness.

For the reasons stated above, A.B. 101 should be reconsidered. California law regarding employment discrimination based on sexual orientation is limited and unclear.⁴²⁰ Businesses could benefit from uniform laws that also allow the DFEH to attempt to diffuse disputes before they escalate into high-cost legal battles for large remedies.⁴²¹ Employees would also benefit from clear laws that protect them from discrimination.⁴²² Additionally, access to the DFEH would help employees resolve workplace disputes.⁴²³ On a broader scale, sexual orientation minorities would further benefit from a clear law that teaches society that it is wrong to discriminate based on sexual orientation.⁴²⁴

Although reconsidering A.B. 101 may be laudable, it is probably impractical. In spite of public approval for the measure and lack of strong business opposition, the Governor is unlikely to reverse his stand on A.B. 101.⁴²⁵ At the time of his veto, he suggested he would sign a bill that encouraged nondiscrimination against sexual orientation minorities if it provided no reme-

⁴¹⁸ CAL. GOV'T CODE § 12963.7 (West 1992).

⁴¹⁹ See *supra* note 318 and accompanying text (describing process by which DFEH investigates complaints and noting that DFEH's first priority is to communicate and conciliate).

⁴²⁰ See *supra* notes 288-398 and accompanying text.

⁴²¹ See *supra* notes 418-19 and accompanying text.

⁴²² See *supra* notes 288-398 and accompanying text.

⁴²³ See *supra* notes 316-32 and accompanying text.

⁴²⁴ See Robert Roden, *Educating Through the Law: The Los Angeles AIDS Discrimination Ordinance*, 33 UCLA L. REV. 1410 (1986) (describing teaching function of law, and applying analysis to laws prohibiting discrimination against persons with AIDS).

⁴²⁵ See *supra* notes 363-66 and accompanying text (noting that California Republicans applied intense pressure on Governor Wilson to veto A.B. 101). Wilson is likely to experience even greater pressure if the legislature sends A.B. 101 to the Governor's office again. Signing the exact same bill after vetoing it could jeopardize his career as the Republican Governor of California.

dies.⁴²⁶ Nevertheless, the legal developments subsequent to his veto may allow the Governor a graceful explanation for endorsing tougher legislation to provide sexual orientation rights in the workplace.⁴²⁷ If the legislature presented the Governor with a bill similar to A.B. 101, but with additional compromises, the Governor may be more likely to sign it.

One compromise would be to continue to include sexual orientation in the policy and enforcement provisions of FEHA, but add a new section to the Act that would dictate the substantive law for sexual orientation rights in the workplace. Thus, sections 12920 and 12921 would be amended to include sexual orientation among the protected classifications. Section 12940, on the other hand, would remain unchanged. Instead, a new section containing the substantive law concerning sexual orientation employment discrimination would be added to FEHA.

The compromise proposal is similar to A.B. 101 in that employment discrimination based on sexual orientation would be declared contrary to public policy.⁴²⁸ Likewise, the opportunity to seek, obtain, and hold employment without discrimination based on sexual orientation would be declared a civil right.⁴²⁹ These two provisions would serve the function of teaching that employment discrimination based on sexual orientation is just as wrong as discrimination against any of the other classifications protected by FEHA.⁴³⁰

Furthermore, both the DFEH and the FEHC would have jurisdiction to work with claims based on sexual orientation employment discrimination.⁴³¹ This would provide both claimants and businesses with a resource to help diffuse and resolve conflicts.⁴³² If conciliation efforts fail, claimants with apparently valid claims would still be able to count on the DFEH to help them resolve their claims through legal remedies.⁴³³

The compromise proposal would also add a new section to

⁴²⁶ See *supra* note 378 and accompanying text.

⁴²⁷ See *supra* notes 161-234 and accompanying text.

⁴²⁸ See *supra* notes 240, 293-96 and accompanying text; see also *supra* note 339.

⁴²⁹ See *supra* notes 296, 340 and accompanying text; see also *supra* note 339.

⁴³⁰ See *infra* note 434 and accompanying text.

⁴³¹ See *supra* notes 305-09, 341 and accompanying text.

⁴³² See *supra* notes 316-20, 421-23 and accompanying text.

⁴³³ See *supra* notes 321-33 and accompanying text.

FEHA. This section would pertain exclusively to sexual orientation employment discrimination issues. The new section would make it unlawful for employers, labor organizations, employment agencies, and apprenticeship programs to discriminate based on sexual orientation.⁴³⁴ Discrimination would include employment decisions as well as harassment, retaliation, and aiding and abetting any of the unlawful practices.⁴³⁵

The new section would also define the remedies for sexual orientation employment discrimination. Under A.B. 101, a complainant would have been able to proceed to civil court without allowing the DFEH to do all in its power to settle the claim without litigation.⁴³⁶ Additionally, the complainant would be able to seek unlimited damages in the civil court proceeding.⁴³⁷ Under the compromise proposal, the FEHA provisions would become the exclusive remedy for employment claims based on sexual orientation discrimination.⁴³⁸ This would mean that a claimant would have to allow the DFEH and the FEHC to do all in their power to resolve the dispute before the claimant could proceed with a suit in a civil court.⁴³⁹

The new section would also put a cap on the punitive and compensatory damages that a civil court could award.⁴⁴⁰ This would protect businesses in two ways. First, less lucrative awards would remove the incentive to take the dispute to court, thereby encouraging complainants to rely on DFEH efforts to resolve the dispute.⁴⁴¹ Second, even if the dispute is eventually resolved in a civil court, employers will be protected from extravagant punitive and compensatory damages awards.⁴⁴²

Therefore, the new proposal would be identical to A.B. 101 regarding sections 12920, 12921, 12926, 12930, 12931, 12935,

⁴³⁴ See *infra* note 444 and accompanying text.

⁴³⁵ See *infra* note 444 and accompanying text.

⁴³⁶ See *supra* notes 316-27, 329-31 and accompanying text.

⁴³⁷ See *supra* notes 332-36 and accompanying text.

⁴³⁸ See *infra* note 444 and accompanying text.

⁴³⁹ *Cf. Rojo v. Kliger*, 801 P.2d 373, 383-84 (Cal. 1990) (holding that plaintiffs whose claims are based exclusively on FEHA must exhaust all administrative remedies under FEHA before filing their claims in civil court).

⁴⁴⁰ See *infra* note 444.

⁴⁴¹ *Cf. supra* note 318 and accompanying text (referring to DFEH's conciliatory, rather than adversary, role).

⁴⁴² See *infra* note 444 and accompanying text.

12944, and 12993.⁴⁴³ FEHA would also be amended to include the following new section:

Unlawful Employment Discrimination Based on Sexual Orientation⁴⁴⁴

(a) It is an unlawful employment practice for employers, employment agencies, labor organizations, or apprenticeship programs to discriminate against applicants and employees based on sexual orientation. Unlawful discriminatory practices include:

(1) Refusing to hire, employ, or promote a qualified applicant or employee based on sexual orientation; or deciding to lay off, terminate, discharge, or demote an employee based on sexual orientation.

(2) Refusing to increase compensation or benefits from employment based on sexual orientation; or deciding to reduce the compensation or benefits from employment based on sexual orientation.

(3) Refusing to select an individual for a training program leading to employment or promotion based on sexual orientation; or expelling an individual from a training program leading to employment or promotion based on sexual orientation.

(4) Refusing to allow an individual to become a member in a labor organization based on the individual's sexual orientation; or expelling an individual from membership based on sexual orientation.

(b) Nothing in this section shall prevent an employer, labor organization, or employment agency from engaging in any of the employment practices in subsection (a):

(1) When such practices are based upon a bona fide occupational qualification. A bona fide occupational qualification is one that is reasonably necessary to the normal operation of the particular business or enterprise. In such cases the burden of proof is upon the party claiming the bona fide occupational qualification; or

(2) When made in accordance with applicable security regulations established by the United States or the State of California. In such cases the burden of proof is upon the party claiming the bona fide occupational qualification.

(c) It is an unlawful employment practice for an employer, labor organization, employment agency, or apprenticeship training program to harass an employee, applicant, or trainee based on sexual orientation. Harassment includes actions by agents

⁴⁴³ A.B. 101, 1991-2 Regular Session (1991). For relevant portions of the bill, see *supra* note 335.

⁴⁴⁴ This section would amend FEHA to prohibit sexual orientation employment discrimination.

and supervisors and failure of agents and supervisors to take reasonable and appropriate steps to prevent harassment. Agents and supervisors are liable for failure to act when they know or should have known of the harassment taking place. Loss of tangible job benefits shall not be necessary in order to establish harassment. The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment. For purposes of this subdivision only, "employer" means any person regularly employing one or more persons, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision thereof, and cities.

(d) It is an unlawful employment practice for an employer, labor organization, employment agency, or apprenticeship training program to retaliate against any applicant or employee for opposing any practices forbidden under this part. It shall also be an unfair employment practice to retaliate against applicants or employees who participate in filing complaints or participating in any proceeding provided for in the Fair Employment and Housing Act. For the purposes of this section, retaliation means any employment practice having an adverse impact on the applicant or employee who opposes the employer's actions or participates in proceedings under this Act.

(e) It is an unlawful employment practice for any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(f) An applicant or employee who files a sexual orientation discrimination complaint against an employer, labor organization, or employment agency is limited to the remedies provided for in this Act. However, an applicant or employee may have other legal rights and remedies not contained in this act. Furthermore, the Fair Employment and Housing Commission may award a complainant compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. All awards are subject to judicial review. Furthermore, this relief is limited to:

- (1) \$50,000 in cases where the respondent has one to one hundred employees.
- (2) \$100,000 in cases where the respondent has 101 to 200 employees.
- (3) \$200,000 in cases where the respondent has 201 to 500 employees.
- (4) \$300,000 in cases where the respondent has more than 500 employees.

(g) Religious associations and religious corporations not organized for private profit, whether incorporated as religious or public benefit corporations, are exempt from the prohibitions against employment discrimination contained in this part.

CONCLUSION

Invidious employment discrimination harms employees, businesses, and the state. To prevent this harm from occurring, the California legislature has passed laws to prevent employers from discriminating against certain classes of people who are especially vulnerable to employment discrimination. Over the last decade, the legislature has recognized and responded to another vulnerable group—sexual orientation minorities. On two occasions both the Assembly and Senate have agreed upon a legislative solution and sent it to the Governor. In each case, however, the Governor vetoed the legislation. In the meantime, there is no clear consensus regarding how much protection sexual orientation minorities can count on under California law. This Comment proposes that the legislature's most recent bill be reconsidered. Because the Governor is unlikely to sign a measure identical to one he has recently vetoed, this Comment also proposes a compromise that would still provide clear and effective protection for California's workers while limiting the risk of harm to California's employers. Legislation that protects the interests of both employees and employers will enhance individual fulfillment, business productivity, and state prosperity.

ADDENDUM

In the year following Governor Wilson's veto of A.B. 101, the California Legislature approved two more measures to provide protection from sexual orientation employment discrimination. On September 25, 1992 the Governor signed one of these measures into law.⁴⁴⁵ The new legislation essentially codifies the Gay Law Students Ass'n v. Pacific Telephone

⁴⁴⁵ A.B. 2601, 1992-3 Regular Session (1992). The text reads:

(a) Sections 1101 and 1102 prohibit discrimination or different treatment in any aspect of employment or opportunity for employment based on actual or perceived sexual orientation.

(b) For purposes of this section:

(1) "Employer" as used in this chapter includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, including the state or any political subdivision of the state.

(2) "Employer" as used in this chapter does not include a religious association or corporation not organized for private profit, whether incorporated as a religious or private benefit corporation.

(c) Nothing in this section shall invalidate any marital status classification that is otherwise valid.

and Telegraph Co.⁴⁴⁶ decision into law. Under the new law, Californians will have explicit, state-wide protection from sexual orientation employment discrimination.

The new measure, however, is quite different from A.B. 101 or the revised proposal at the end of this Comment. The new measure offers different remedies, relies on different enforcement mechanisms, and will look to different case precedents when resolving disputes. While the new measure is a step in the right direction, it will require both employers and employees to become familiar with separate statutes, diverse state enforcement agencies, and different cases to resolve comparable civil rights claims.

In sum, one of the new measure's greatest weaknesses is that it separates sexual orientation rights from other civil rights without providing a sound policy basis. The result is that sexual orientation minorities will still need to pursue civil rights protection. Furthermore, California's employers and employees will shoulder the burden of becoming familiar with dissimilar mechanisms for resolving similar employment discrimination complaints.

Alan W. Richardson

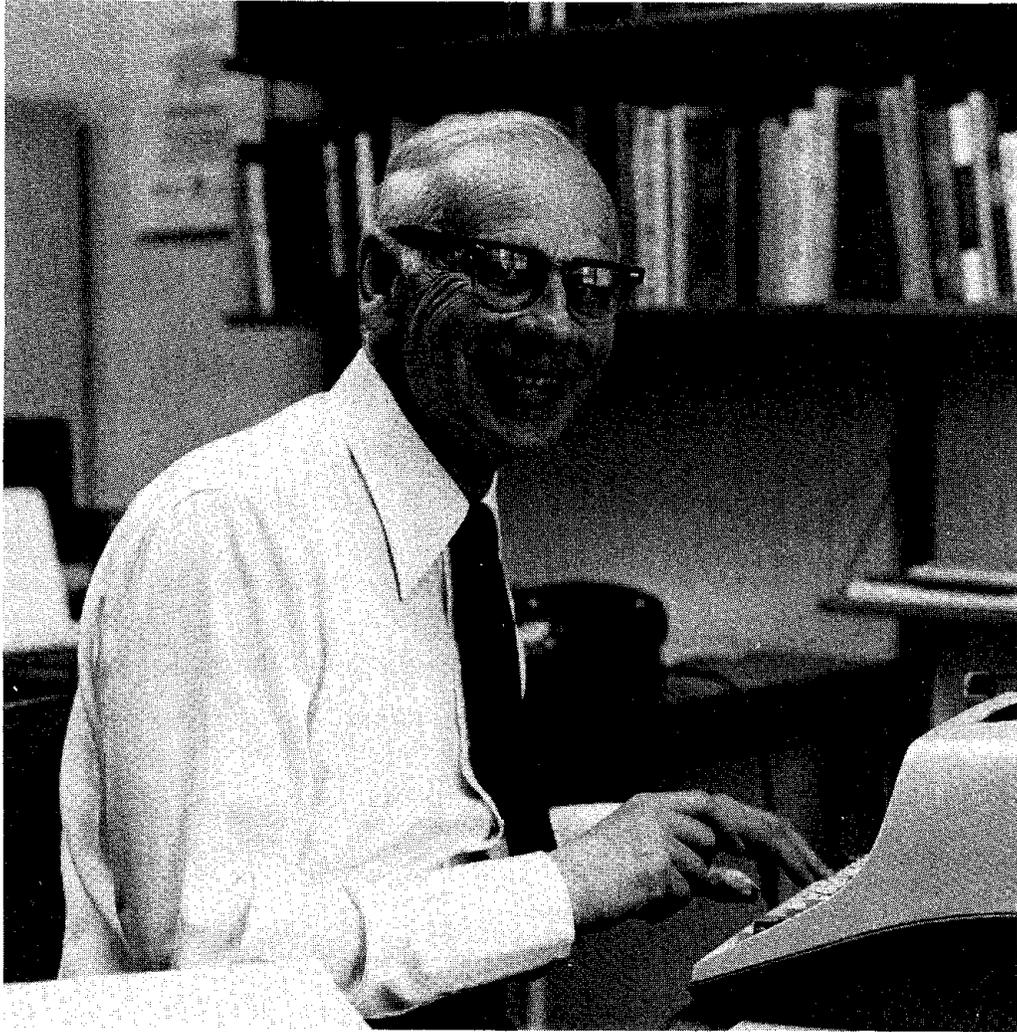
(d) Nothing in this section shall require or permit the use of quotas or other affirmative action.

(e) Nothing in this section shall interfere with whatever existing rights an employer has to base employment action on the commission of conduct illegal in California.

(f) Section 1103 on criminal penalties shall not apply to a violation of this section.

Id.

⁴⁴⁶ 595 P.2d 592 (Cal. 1979).



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