

## Repealable Rights: Municipal Civil Rights Protection for Lesbians and Gays

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### I. Introduction

Twenty million people in the United States are gay or lesbian.<sup>1</sup> Most municipalities, all but one state<sup>2</sup> and the federal government do not extend to these individuals the rights or protections that ensure the necessities of human dignity and survival: housing,<sup>3</sup> employment,<sup>4</sup> education,<sup>5</sup> the right to legally sanction their relationships,<sup>6</sup> custody of their children,<sup>7</sup> and police

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1. *Civil Rights Act Amendments of 1981 to Prohibit Discrimination on the Basis of Affectional or Sexual Orientation. Hearing on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Education & Labor*, 97th Cong., 2d Sess. 2 (1982) [hereinafter *Civil Rights*] (statement of Rep. Weiss).

Throughout this article the term gay, when alone, includes both gay men and lesbians.

2. Wis. Stat. Ann. § 111.31-.325, .36 (West 1988).

3. A gay person or couple denied housing has no recourse without legislation. St. Paul, Minnesota voters repealed a gay rights ordinance in 1978. One month after the vote, a gay attorney received an eviction notice. He explains,

I had lived there for four years and I'd never had any trouble with my landlord. . . . But it was fairly well-known to my neighbors what my sexual preference was. I was quite active in the campaign [against repeal]. Well, I went quietly. I didn't want to move but the notice was all very legal and I knew if I fought it, I would lose.

Lori Sturdevant, *Calm in St. Paul After Antigay Vote May Not Last*, Minneapolis Tribune, July 30, 1978, at 1A, col. 1, 6A, col. 1.

4. "[O]ver 26 percent of all gay people in this country have employment problems and over 9 percent lose their jobs solely because of their sexual orientation." 127 Cong. Rec. 23,300 (1981) (statement of Sen. Tsongas referring to a study by the National Institute of Mental Health).

5. See Richard Mohr, *Gays/Justice: A Study of Ethics, Society, and Law* 146 n.17 (1988).

6. [B]y refusing to recognize same-sex loving commitments, the State denies equal benefits to those whose sexual feelings compel them to form lifetime partnerships with others of the same sex. State enforcement and encouragement of stereotypical sexual roles contradicts modern progress in understanding human sexuality, and stigmatizes persons on the basis of their gender.

Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 Women's Rts. L. Rep. 143, 164 (1988).

7. See, e.g., *G.A. v. D.A.*, 745 S.W.2d 726 (Mo. Ct. App. 1987) (upholding trial court's denial of custody to lesbian mother because of her sexual orientation); see

protection.<sup>8</sup> Furthermore, recent surveys indicate that in addition to widespread discrimination in these areas,<sup>9</sup> incidents of physical violence directed at gays and lesbians because of their perceived sexual orientation have been increasing.<sup>10</sup> Living amidst this discrimination and hatred is psychologically as well as physically

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also Sexual Orientation and the Law § 1.03[5][c] (Roberta Achtenberg ed. 1987) ("[C]ourts in custody disputes involving lesbian mothers have repeatedly employed the presumption that lesbian mothers are unfit *per se*, thereby rendering the hearing given to mothers meaningless.").

8. Historically the police have harassed gays. This harassment led to what is considered the birth of the modern gay rights movement: uncontrollable rioting followed a routine police raid on the Stonewall Inn, a gay bar on New York City's Christopher Street. Brooks Egerton, *Gay Politics: A Time to Take Stock*, *The Progressive*, May 1985, at 25, 27. Widespread violence against gays is currently a major problem and gays still do not feel they can turn to police for protection. In a study conducted by the Wisconsin Governor's Council on Lesbian and Gay Issues, twenty-five percent of the respondents said police had assaulted them. *Id.* at 26.

9. See generally City of New York Commission on Human Rights, Gay and Lesbian Discrimination Documentation Project: A Two Year Report on Complaints of Sexual Orientation Discrimination (1985) [hereinafter Discrimination Project] (chronicling incidents of anti-gay discrimination and bias from November 1983 to October 1985).

10. The National Gay & Lesbian Task Force reported that incidents of violence against gays and lesbians in the United States rose from 2,042 to 4,946 between 1985 and 1986. Richard Blow, *Those Were the Gays*, *The New Republic*, Nov. 2, 1987, at 14, 15.

Lesbians and gay men are probably the most frequent victims of hate violence. Peter Finn & Taylor McNeil, *The Response of the Criminal Justice System to Bias Crime: An Exploratory Review 2* (Oct. 7, 1987) (report submitted to the National Institute of Justice and the U.S. Department of Justice). A survey of two-thousand seventy-four (2,074) lesbians and gay men in eight cities indicated that 86% had been verbally harassed; 44% threatened with physical violence; 9% had been assaulted with a weapon; 19% had been punched, kicked or beaten; 19% were victimized by vandalism; and 20% were harassed by the police. National Gay & Lesbian Task Force, *Anti-Gay Violence, Victimization & Defamation in 1988* (1989) (Appendix A) (1984 study of Gay/Lesbian victimization in Atlanta, Boston, Dallas, Los Angeles, New York, St. Louis, and Seattle).

The statistics only suggest the viciousness of the crimes and their effects. A young gay man was hurled to his death on his way home from church by youths yelling, "Hey, let's kick the shit out of this fag." This crime led to renewed interest in protection for gays and lesbians in the state of Maine. Joan Cort & Edmund Carlevale, *Legacy of 'Gentle Charlie': Murder in Maine Renewes Interest in Rights Bill*, *The Advocate*, Sept. 4, 1984, at 12. In Rochester, New York, the vituperative attitude of those testifying against a gay rights ordinance convinced city council members that protection was necessary. Peter Freiberg, *Fundamentalist Opposition Backfires*, *The Advocate*, Feb. 7, 1984, at 9.

"[One] in [five] gay men and [one] in [ten] lesbians [have] been physically assaulted because of their sexual orientation." *Anti-Gay Violence: Hearing Before the Subcomm. on Criminal Justice of the House Committee on the Judiciary*, 99th Cong., 2d Sess. 1 (1986) [hereinafter *Violence*] (statement of Rep. Conyers citing a National Gay & Lesbian Task Force Study). The victims of these attacks are not always gay men or lesbians but also those whom their assailants assume to be gay. *Id.* at 5 (testimony of Diana Chrsitensen, executive director of Community United Against Violence).

destructive.<sup>11</sup>

Even so, people who are otherwise concerned about the destructiveness of discrimination do not fully perceive the personal pain and societal damage that homophobia wreaks.<sup>12</sup> Some people misperceive discrimination on the basis of sexual orientation as a frivolous issue.<sup>13</sup> These people either assume that one makes a concerted choice to be gay and thus an object of discrimination, or conversely, that gays and lesbians are not discriminated against because they are not visibly different.<sup>14</sup>

Some individuals insist that outlawing discrimination against the stigmatized group is tantamount to legislating personal taste.<sup>15</sup> When the rights at issue, however, are equal access to essentials such as employment, housing and health care, civil rights must take precedence over any right to discriminate. The exacerbation of the Acquired Immune Deficiency Syndrome (AIDS) tragedy, caused by homophobia and a delayed governmental response,<sup>16</sup> demonstrates the suffering that results from discrimination founded on personal distaste. The response to the AIDS crisis

11. "[G]ays manifest many of the same self-destructive, self-deluding, self-oppressing patterns of behavior shared by other historically oppressed minorities." Mohr, *supra* note 5, at 148.

12. As a group, gays and lesbians have few natural allies and continue to occupy a low priority on the left's agenda. Most liberal intellectuals probably still agree with Jeff Greenfield's statement in 1978 that homosexuals who wanted the right to be open about their sexuality were taking the left away from 'the business. . . of social justice.'

Vito Russo, *Maurice*, 245 *The Nation* 498, 500 (1987) (review of the film by James Ivory).

13. "America holds a stereotype of gays as wealthy, frivolous, selfish, conspicuous consumers, and based on this stereotype some people claim that gays are not in need of civil rights protections." Mohr, *supra* note 5, at 154.

14. The myth persists that there is no discrimination against gay men and lesbians. There are good reasons for this myth. First, the invisibility of the group does not lend itself to easy survey or polling. And, second, most gay men and lesbians who suffer from such discrimination do not protest the injustice publicly. There are two reasons many follow this course - because in most parts of this nation there is no legal recourse, and because these individuals must pick up the pieces of their lives and find new jobs.

*Civil Rights*, *supra* note 1, at 8, 9 (testimony of Jean O'Leary, director of the National Association of Business Councils).

A writer dismissing the need for New York City's gay rights ordinance argued, "[Y]ou need not know that a person is gay unless he, or she, tells you so, or indulges in bizarre behavior that calls attention to gayness." *Gay Rage*, *Nat'l Rev.*, Apr. 25, 1986, at 18.

15. A writer comments on the imminent passage of New York City's municipal ordinance prohibiting discrimination against gay men and lesbians, "Under the new bill, homosexuality would become one of the things citizens aren't allowed to dislike." *Ministry of Love*, *Nat'l Rev.*, Mar. 28, 1986, at 23.

16. For a complete description of how homophobia directly contributed to the magnitude of the AIDS epidemic, see Randy Shilts, *And the Band Played On* (1987).

tragically illuminates that societal stigmatization promotes an attitude of neglect towards a group that should receive massive support.

At the federal level, the gay and lesbian equal rights movement has had little success in Congress or the courts.<sup>17</sup> Congress has been unresponsive,<sup>18</sup> thus perpetuating the problems gays and lesbians encounter.<sup>19</sup> Even the Supreme Court, in *Bowers v. Hardwick*,<sup>20</sup> exacerbated the discrimination faced by gays and lesbians.<sup>21</sup>

State court decisions range from those that are enlightened

17. See *infra* notes 32-40 and accompanying text.

18. A bill to include prohibitions against discrimination on the basis of sexual orientation has been introduced in Congress in each session since 1975. Seventy members of the House and ten senators co-sponsored the 1988 bill. Arthur Leonard, Gay & Lesbian Rights Protections in the U.S. (1989) (pamphlet published by the National Gay & Lesbian Task Force).

Congress has failed to pass the following bills that would have prohibited discrimination on the basis of sexual orientation in areas such as housing and employment: H.R. 166, 94th Cong., 1st Sess. (1975); H.R. 5452, 94th Cong., 1st Sess. (1975); H.R. 10389, 94th Cong., 1st Sess. (1975); H.R. 13019, 94th Cong., 2d Sess. (1976); H.R. 13928, 94th Cong., 2d Sess. (1976); H.R. 451, 95th Cong., 1st Sess. (1977); H.R. 2998, 95th Cong., 1st Sess. (1977); H.R. 4794, 95th Cong., 1st Sess. (1977); H.R. 5239, 95th Cong., 1st Sess. (1977); H.R. 7775, 95th Cong., 1st Sess. (1977); H.R. 10575, 95th Cong., 2d Sess. (1978); H.R. 12149, 95th Cong., 2d Sess. (1978); H.R. 2074, 96th Cong., 1st Sess. (1979); S. 2081, 96th Cong., 1st Sess. (1979); H.R. 1454, 97th Cong., 1st Sess. (1981); H.R. 3371, 97th Cong., 1st Sess. (1981); S. 1708, 97th Cong., 1st Sess. (1981); H.R. 2624, 98th Cong., 1st Sess. (1983); S. 430 98th Cong., 1st Sess. (1983); H.R. 230, 99th Cong., 1st Sess. (1985); S. 1432, 99th Cong., 1st Sess. (1985); S. 464, 100th Cong., 1st Sess. (1987); H.R. 709, 100th Cong., 1st Sess. (1987); S. 2109, 100th Cong., 2d Sess. (1988); S. 47, 101st Cong., 1st Sess. (1989); H.R. 655, 101st Cong., 1st Sess. (1989) (information obtained from Rep. Barney Frank).

19. "By permitting discrimination, the Federal Government actually facilitates violence against gay people by inhibiting them from reporting to the police and seeking legal redress." *Violence*, *supra* note 10, at 5 (testimony of Kevin Berrill, director of the Violence Project of the National Gay & Lesbian Task Force). The government perpetuates discrimination against gays in its hiring policy while even government sponsored reports indicate that the reasons given for the discriminatory treatment are untenable. See Joel William Friedman, *Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation*, 64 Iowa L. Rev. 527, 541-42 (1979).

20. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that there is no constitutional right to engage in homosexual sodomy). The Court did not simply leave the decision to the individual states but made clear its opposition to homosexuality by comparing homosexual sex to adultery and incest, *id.* at 196, and by characterizing homosexual sex as worse than rape. *Id.* at 197 (Burger, C.J., concurring).

21. Messages that are coming right now from the Federal level...are overtly hostile to lesbians and gay men. When the Chief Justice of the Supreme Court states an opinion and discusses extensively the way in which homosexuality used to be a capital crime, it is something some Americans will interpret as license to go out and hurt us, attack us.

*Violence*, *supra* note 10, at 18 (testimony of David Wertheimer of the New York City Gay and Lesbian Anti-Violence Project) (referring to *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

and supportive of gay rights to those that reveal inveterate prejudice and insensitivity born of unexamined homophobia and ignorance.<sup>22</sup> Wisconsin is the only state to bar discrimination against gays in both private and public employment, housing, education, and accommodations.<sup>23</sup> In addition, eight states have executive orders forbidding discrimination by state agencies.<sup>24</sup>

Gay men and lesbians have more political influence on the municipal level. Sixty-one cities have enacted laws that provide varying degrees of protection from discrimination on the basis of sexual orientation.<sup>25</sup> This article examines the impact of these ordinances.

First, this article surveys current federal and state protection for gays. Then this article lists the cities that have gay rights ordinances and examines some specific incidents regarding their passage and repeal. Finally, this article considers the effectiveness of municipal ordinances in providing protection and enforcement, as well as the negative effects of municipal ordinances. Municipal ordinances that prohibit discrimination on the basis of sexual orientation have extremely limited utility. This article recommends that the ordinances' administrators should actively inform and educate the public about the ordinances in order to improve the otherwise limited impact they currently offer gays and lesbians.

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22. In the case of two men charged with a homophobic murder, a Fort Lauderdale, Florida trial judge, Daniel Futch, asked whether the deceased was gay and whether it was a crime to "beat up a homosexual." After receiving an affirmative answer the judge replied, "Times really have changed." *Antigay Violence Spurs New Legislative Efforts*, 1988 Lesbian/Gay Law Notes 32.

Texas State District Court Judge Jack Hampton said that the homosexuality of two murder victims influenced his decision to give their killer a thirty-year sentence rather than the maximum life sentence. *Star Tribune*, Dec. 17, 1988, at 3A, col. 5.

23. Leonard, *supra* note 18; Wis. Stat. Ann. § 111.31-32 (West 1988).

24. The states with executive orders are California, Minnesota, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, and Washington. Leonard, *supra* note 18.

25. The following municipalities have ordinances that mention discrimination on the basis of sexual orientation: Alexandria, VA; Alfred, NY; Amherst, MA; Ann Arbor, MI; Aspen, CO; Atlanta, GA; Austin, TX; Baltimore, MD; Berkeley, CA; Boston, MA; Boulder, CO; Buffalo, NY; Burlington, VT; Cambridge, MA; Champaign, IL; Chapel Hill, NC; Chicago, IL; Columbus, OH; Cupertino, CA; Davis, CA; Dayton, OH; Denver, CO; Detroit, MI; East Hampton, NY; East Lansing, MI; Evanston, IL; Gaithersburg, MD; Harrisburg, PA; Hartford, CT; Houston, TX; Iowa City, IA; Ithaca, NY; Laguna Beach, CA; Los Angeles, CA; Madison, WI; Malden, MA; Marshall, MN; Milwaukee, WI; Minneapolis, MN; Mountain View, CA; New York, NY; Oakland, CA; Olympia, WA; Palo Alto, CA; Philadelphia, PA; Portland, OR; Pullman, WA; Raleigh, NC; Rochester, NY; Sacramento, CA; Saginaw, MI; San Francisco, CA; Santa Barbara, CA; Santa Cruz, CA; Seattle, WA; Troy, NY; Tucson, AZ; Urbana, IL; Washington, DC; West Hollywood, CA; and Yellow Springs, OH. *Id.*

## II. Present Coverage at the Federal and State Levels

### A. Federal Protection

The federal government is the largest employer in the United States<sup>26</sup> and, until recently, had a closed-door policy regarding gays.<sup>27</sup> Positions ranging from janitor to naval officer regardless of the need for security clearance, fell under this blanket discrimination.<sup>28</sup> Although this policy has been somewhat mitigated, the federal government is still responsible for massive discrimination against this group.<sup>29</sup> Equally disturbing, the government selectively applies this policy. If the exclusion were stringently enforced, the dismissal rate and the cost would be enormous.<sup>30</sup>

Although Supreme Court Justice William J. Brennan states that gays and lesbians would meet the standards set out for a suspect class,<sup>31</sup> the majority of the Court does not afford them this

26. The federal government employed 3,021,000 people in 1985. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988*, at 282 (1987). In comparison, General Motors, the largest company in the U.S. based on sales, employs 813,400 people. *Fortune*, The 1988 Directory of U.S. Corporations 6, 7, 34 (1988).

27. Friedman, *supra* note 19, at 536.

28. See *Vigil v. Post Office Dep't of United States*, 406 F.2d 921 (10th Cir. 1969) (Post Office discharged janitor for engaging in homosexual conduct); *Saal v. Midendorf*, 427 F. Supp. 192 (N.D. Cal. 1977) (Navy air traffic controller discharged after admitting she had engaged in homosexual activity).

29. In *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969), the court reversed the Civil Service Commission's dismissal of a NASA employee for "homosexual conduct." *Id.* at 1162. The court declared that "the unparticularized and unsubstantiated conclusion that . . . possible embarrassment [from an employee's homosexual conduct] threatens the quality of the agency's performance is an arbitrary ground for dismissal." *Id.* at 1167. The *Norton* court, however, stated that homosexual conduct in some cases could be cause for dismissal of a federal employee. *Id.* at 1168. A series of lower federal and state courts interpreted *Norton* as allowing discrimination on the basis of sexual orientation. Friedman, *supra* note 19, at 540. The federal government continues to discriminate on the basis of sexual orientation.

See also sources cited *infra* note 30.

30. "[T]he Pentagon spent [an estimated] \$336 million dollars on its homosexuality probes in 1983 alone. Jim Lynch, *Witch Hunt at Paris Island*, *The Progressive*, Mar. 1989, at 24, 25. In 1987 the Navy discharged 773 people for homosexuality; the Army 335, the Air Force 282. *Id.* The Marine Corps seems to currently be engaged in a witch hunt for lesbians in its ranks. Female marines are eight times as likely as men to be discharged for homosexuality. *Id.* The interrogation process would shock civilians, but even more shocking is the substantial amount of time military personnel spend in jail for being gay. *Id.* at 25-27. After only ten minutes of deliberation, two military boards ended the military career of a U.S. Naval Academy student, Joseph Steffan, two months before his graduation date solely because he was gay. Steffan was in the top ten percent of his class and a top officer of the senior class. *Star Tribune*, Dec. 30, 1988, at 1A, col. 1.

During the McCarthy era "fag hunts" purged thousands of gay people from government employment. John D'Emilio, *Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970*, at 40-53 (1983).

31. Justice Brennan stated that

homosexuals constitute a significant and insular minority of this coun-

protection. Instead, the Court refers protection of gays back to Congress and state legislatures.<sup>32</sup>

In the private sector, federal action is strikingly absent—legislative protection that specifically includes gays is limited to municipal ordinances and the Wisconsin state statute.<sup>33</sup> Although discrimination against gays needs redress,<sup>34</sup> courts have not interpreted the federal statutes that guarantee equal access to the necessities of life as applying to gays and lesbians.<sup>35</sup>

Year after year, legislators introduce gay rights bills at the federal level without success.<sup>36</sup> While gay lobby groups are active in Washington,<sup>37</sup> a comprehensive gay rights bill probably will not make it out of committee anytime soon.<sup>38</sup> Even though gays and lesbians constitute the seventh largest voting block in the country,<sup>39</sup> and voter participation from the gay community is greater than that from other groups,<sup>40</sup> legislators still neglect these issues.

A major problem for gay activists is that although they represent a large and potentially powerful voting block, many of their

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try's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.'

Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) (citation omitted), *denying cert.* to 730 F.2d 444 (6th Cir. 1984).

32. Bowers v. Hardwick, 478 U.S. 186, 189 (1986). During the oral arguments for *Bowers*, Justice Rehnquist asked why those affected by state sodomy laws could not resort to the legislatures for relief. *Supreme Court Hears Sodomy Challenge in Restrained Mood*, 1986 Lesbian/Gay Law Notes 21, 22. Ironically, the *Bowers* ruling may predispose legislators to reject overturning state sodomy laws because of the Supreme Court's expressed moral condemnation of homosexuals. The Court did not simply return the issue to the states for decision, but emphasized its opposition to equal rights for gays. See *supra* note 20.

33. See *supra* notes 17-25 and accompanying text.

34. See *supra* notes 3-8 and accompanying text regarding discrimination against gays.

35. Peggy Katzer, *Civil Rights—Title VII and Section 1983(3)—Discrimination Against Homosexuals*, 26 Wayne L. Rev. 1611 (1980) (discussing *DeSantis v. Pacific Telephone & Telegraph*, 608 F.2d 327 (9th Cir. 1979)).

36. See *supra* note 18.

37. Blow, *supra* note 10, at 15.

38. The Center for Public Choice at George Mason University predicted the odds that the following gay rights bills will pass various legislative stages in the 101st Congress: H.R. 655—24% chance to pass House Education & Labor Committee, 18% chance to pass Senate Committee, 20% chance to pass House floor and 16% chance to pass Senate floor; S. 47—9% chance to pass Senate Judiciary Committee, 5% chance to pass House committee, 7% chance to pass Senate floor and 4% chance to pass House floor. Westlaw (Billcast database 1989).

39. Egerton, *supra* note 8, at 27.

40. *Id.*

constituents choose to remain closeted.<sup>41</sup> The problem is circular: until protections exist and societal attitudes change many gays rightfully fear coming out, but unless gays let politicians know they exist their strength as a group remains hidden, making it difficult to gain legislative support. Society, however, imposes a high cost on coming out, including the loss of employment, child custody, and familial and social acceptance.<sup>42</sup> The threat of physical violence and other psychological pressures compound these costs.<sup>43</sup>

State and federal legislators considering support of gay rights legislation may view attempts to pass municipal ordinances as a litmus test of the viability of gay rights legislation.<sup>44</sup> If politicians believe they can advocate issues for this group without alienating significant numbers of other voters, they will gain new constituents. Defeats and repeals of gay rights ordinances, however, indicate a lack of public support or the failure of gay activists to deliver their constituency. The defeat of a repeal referendum or the passage of a new ordinance indicates the converse.

### B. State Efforts

Legislators in many states have introduced gay rights bills,<sup>45</sup> and at least two of these states came extremely close to passing comprehensive laws that would prohibit discrimination on the basis of sexual orientation.<sup>46</sup> Only Wisconsin has a statute that prohibits this discrimination.<sup>47</sup>

Gay activists in Wisconsin point out that besides offering re-

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41. "Of the [ten percent] of the population estimated to be gay or lesbian, only a tiny fraction has contact with any gay institutions, be they social, cultural, religious, or political." *Id.* at 25.

42. *Id.* at 26.

43. *Id.*

44. See *infra* note 76 and accompanying text.

45. See Peter Freiberg, *Gay Rights: Tough Fight in State Legislatures*, The Advocate, May 14, 1985, at 14, 15 (Legislators have introduced gay rights bills in Connecticut, Illinois, Maine, Massachusetts, Michigan, New Jersey, New York, Rhode Island and Washington.); Peter Freiberg, Chris Heim, Stephen Kulieke & Mark Potter, *Gay Bills Falter in Maine, Minnesota and Illinois*, The Advocate, July 7, 1983, at 10, 11 (Legislators have also introduced gay rights bills in California and Minnesota.).

46. On May 12th, 1987, the Connecticut House of Representatives defeated a gay rights bill in a tie vote after six representatives who had originally voted for the bill switched their votes apparently in response to heavy lobbying from the Catholic Church. Peter Freiberg, *Connecticut Legislature Defeats Gay Right Bill in a Tie Vote*, The Advocate, June 23, 1987, at 14.

The defeat of a gay rights bill in the Massachusetts House of Representatives on September 23, 1985 was attributed to opposition from Catholic leaders as well as to fear of AIDS. Peter Freiberg, *Mass. House Defeats Gay Rights Bill*, The Advocate, Oct. 29, 1985, at 13.

47. Wis. Stat. Ann. § 111.31-.32 (West 1988).



course from discrimination in private and public employment, housing, and public accommodations, the law has a symbolic effect and increases the morale of lesbians and gay men.<sup>48</sup> The law's chief sponsor, Representative David Clarenbach, explains,

The message is clear that Wisconsin is a 'free state,' and lesbians and gay men are to be accepted in our state on an equal legal footing. The message is equally directed at the straight community, that we are a diverse society...and we have to protect subgroups in our society from mistreatment.<sup>49</sup>

The silence and negative messages from the federal government<sup>50</sup> and other states undermine the Wisconsin legislature's condemnation of discrimination on the basis of sexual orientation. Another apparent problem is that many gays are not aware of the protective legislation.<sup>51</sup> Finally, many still do not feel comfortable reporting incidents of discrimination because doing so means coming out.<sup>52</sup>

Executive orders issued by governors offer another form of protection on the state level. These orders, now in place in eight states, ban discrimination by state agencies on the basis of sexual orientation in employment practices and provision of services.<sup>53</sup> These orders, which have no force of law,<sup>54</sup> could have symbolic effect. Governors, however, tend to keep their issuance quiet,<sup>55</sup> thereby stifling any potential positive impact.

Although gay and lesbian lobbyists continue to work on the state and federal level, the limited progress thus far indicates that legislatures will not pass comprehensive gay rights legislation in the near future.<sup>56</sup> Gay and lesbian activists seek victories on the municipal level because success is possible. Municipal ordinances, however, do not provide the greatest advantages to the gay and lesbian community. In fact, activists probably prefer the uniform

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48. Peter Freiberg, *Wisconsin: Evaluating the First State Gay Rights Law Three Years Later*, *The Advocate*, Sept. 3, 1985, at 12.

49. *Id.*

50. *See supra* notes 17-21 and accompanying text.

51. Freiberg, *supra* note 48, at 12.

52. *Id.*; *see also supra* note 14.

53. *See supra* note 18.

54. *See* Arthur Leonard, *The Legal Position of Lesbians and Gay Men in the United States*, in Second ILGA Pink Book 105 (1988).

55. In Minnesota, Governor Rudy Perpich signed an executive order with absolutely no publicity. Senator Allan Spear, an openly gay senator who worked for the order's issuance, did not learn of it until two weeks after its signing. Peter Freiberg, *Minnesota Governor Signs Progay Executive Order; Court Strikes Down Sodomy Law*, *The Advocate*, Jan. 6, 1987, at 15. Similarly, Rhode Island Governor Edward DiPrete issued such an order but avoided any publicity surrounding its issuance. Peter Freiberg, *Rhode Island Governor Orders End to Bias in State Jobs*, *The Advocate*, Sept. 17, 1985, at 14.

56. *See supra* notes 23, 36-38 and accompanying text.

protections provided by state and federal law. Although the limited protection of municipal ordinances might be better than no protection, the campaigns to enact local ordinances and to keep them in place require financial and volunteer resources. Instead, gay and lesbian activists could apply these resources to campaigns in state and federal legislatures and to educational efforts to combat anti-gay stereotypes.

### III. Municipal Ordinances

#### A. Passage

Currently sixty-one cities<sup>57</sup> have enacted municipal ordinances protecting people from discrimination on the basis of their real or perceived<sup>58</sup> sexual orientation. The breadth and strength of these ordinances vary. Coverage ranges from protection in only public employment to protection in housing, education, credit, union practices, public employment, and private employment. The financial support dedicated to enforcement also varies: some cities create distinct agencies to enforce the gay rights ordinance and others leave enforcement to an already established human rights commission or the city attorney.<sup>59</sup>

Some cities have quietly added "affectional preference" or "sexual orientation" language to existing human rights ordinances without much opposition, and these additions have remained unopposed.<sup>60</sup> Often, however, the addition of such language ignites a battle between gay rights activists and various conservative religious groups.<sup>61</sup>

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57. See *supra* note 25.

58. Discrimination on the basis of perceived sexual orientation harms not only gays. A heterosexual woman filed a complaint with the New York City Human Rights Commission alleging that she was harassed by co-workers and management after her supervisor "'spread the rumor that [she] was a dyke.'" Discrimination Project, *supra* note 9, at 22. Similarly, a heterosexual male police officer said that he had been fired after admitting he had a gay male friend because he was then perceived as gay. *Id.* at 46.

59. See James Meeker, John Combrink & Gilbert Geis, *State Law and Local Ordinances in California Barring Discrimination on the Basis of Sexual Orientation*, 10 U. Dayton L. Rev. 745, 760, 762 (1985) (For instance, in Santa Barbara and Santa Clara counties in California, the affirmative action officer has authority to enforce the ordinances, whereas in Laguna Beach, the city attorney has enforcement responsibility.).

60. See, e.g., Rick Harding, *Gays Win Protection in Raleigh, N.C.*, The Advocate, Mar. 1, 1988, at 10, 11 (Raleigh); Ray O'Laughlin, *Gays in Two Calif. Cities Get Xmas Gift: Civil Rights*, The Advocate, Jan. 24, 1984, at 10 (Oakland); The Advocate, Aug. 7, 1984, at 13 (Saginaw, Michigan).

61. See, e.g., The Advocate, Mar. 31, 1987, at 24 (Concord, CA); The Washington Post, Mar. 12, 1988, at A3, col. 1 (New York, NY); *Rights Reaction*, 240 The Nation 100 (1985) (Houston, TX).

In some cities gay and lesbian activists waged protracted battles for the ordinances. For instance, in both Chicago and New York, activists waged fifteen-year campaigns for passage of their gay rights ordinances.<sup>62</sup> As with any political campaign the financial and emotional costs may be high. In addition, the consequences for gays and lesbians who decide to undertake such a campaign may include facing the emotional decision to "come out" with its concomitant problems.

These fights for municipal protection serve as a rallying point for the gay movement and help to counter the demoralization inflicted by numerous unsuccessful requests for redress in Congress and state legislatures. Working at the municipal level is a way to maintain a visible role in the democratic process.<sup>63</sup> A further benefit of these campaigns, even when they are not successful, is the opportunity to dispel societal myths and fears about gays and lesbians through education and media exposure. Education and exposure are especially important to the gay rights movement because studies indicate that those who know a gay person have more positive attitudes towards lesbians and gays.<sup>64</sup> Unfortunately, once in place, the ordinances no longer serve this educational function because the agencies responsible for their enforcement do not wage campaigns to educate the general public or to remind gays that the ordinances exist. Perhaps politicians and bureaucrats are comfortable placating this controversial group with low-profile and low-power legislation.

### B. Repeal

A minority group seeking any government protection also might face the risk of that protection's repeal. Many of the same municipalities that have the power to pass civil rights legislation also allow referendum measures on the general election ballot to repeal ordinances.<sup>65</sup> Opponents of civil rights ordinances need only gather signatures from a small percentage of eligible voters to obtain a referendum. At least five communities have had public referendums that repealed their gay rights ordinances.<sup>66</sup> The same

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62. N.Y. Times, Mar. 21, 1986, at A1, col. 1; Equal Time News, Jan. 18, 1989, at 2.

63. "People are seeing a need for more grass-roots activity if we are to be a part of the democratic process." Blow, *supra* note 10, at 15 (quoting lesbian activist Carmen Vasquez).

64. See Gregory Herek, *Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men*, in Bashers, Baiters & Bigots: Homophobia in American Society 8 (John DeCecco ed. 1985).

65. See generally Eugene McQuillin, *The Law of Municipal Corporations* § 16.48-70 (3d ed. 1989) (a treatise on initiatives and referendums).

66. The Gay Rights Writer's Group, *It Could Happen to You* 7 (1983) [hereinaf-

coalition of political and religious conservatives that opposes the passage of ordinances organizes the repeal campaigns.<sup>67</sup> In Eugene, Oregon, anti-gay activists who successfully led a campaign to repeal the city's gay rights ordinance obtained enough signatures to put a repeal referendum on the ballot before the ordinance was even formally on the books.<sup>68</sup>

Like the cost of passage, the cost of fighting a repeal referendum is high. The gay rights activists that tried to prevent the repeal in Eugene spent over \$50,000.<sup>69</sup> An unsuccessful attempt to prevent repeal in St. Paul, Minnesota cost pro-gay forces \$113,000.<sup>70</sup> More recently, the gay community spent \$350,000 on an unsuccessful attempt to prevent repeal of an Oregon executive order barring discrimination against gays by government agencies.<sup>71</sup> Even after repeal attempts fail, opponents may continually place the referendum on subsequent ballots as long as the referendum has the requisite number of signatures.

The cost of these campaigns is more than monetary. Whether the campaign is for passage or against repeal, its educational effect is valuable. The campaigns, unfortunately, also give anti-gay activists a forum to reinforce common negative misperceptions about gays.<sup>72</sup> Homophobia comes out of the closet during ordinance fights. For example, in Houston, Texas, voters rejected an ordinance passed by the city council that extended employment discrimination protection to public employees. Opposition tactics included a newspaper advertisement saying the ordinance would "encourage *more* homosexuals to settle here, increasing the threat to *your* health."<sup>73</sup> A pamphlet showed a child cringing in fear and read, "Murder, Violence and Homosexuality."<sup>74</sup> The Ku Klux Klan marched down Main Street chanting, "Death to Homosexuals,"<sup>75</sup> making it clear whose health was at risk.

While referendum battles might be seen positively as rallying

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ter Writer's Group] (Dade County, FL; Eugene, OR; St. Paul, MN; and Wichita, KS). In Boulder, Colorado, voters repealed a gay rights ordinance in 1974 and then added gay rights protections in 1987. *Boulder Ordinance Prohibits Bias*, Guardian, Dec. 30, 1987, at 4.

67. See sources cited *supra* note 61.

68. Writer's Group, *supra* note 66, at 13.

69. *Id.* at 21.

70. Peter Freiberg, *St. Paul Activists Ponder Whether to Push Rights Bill*, The Advocate, Mar. 20, 1988, at 15, 17.

71. Conversation with member of Oregonians for Fairness, the group that fought the repeal, (March 21, 1989) (on file with *Law & Inequality*).

72. See, e.g., Writer's Group, *supra* note 66, at 56-58.

73. Egerton, *supra* note 8, at 27 (emphasis in original).

74. *Id.*

75. *Id.*

points that enable gay activists to organize and educate, they are also extremely costly. The protection gained with all the money, organization and effort is tenuous and fragile. At any time another referendum challenge might eliminate the protection. A referendum repeal might also hurt gays' chances of obtaining federal legislation. For instance, Representative Barney Frank (D-Mass.) predicted that the repeal of the Oregon Executive Order would have a disastrous effect on the federal effort for gay rights.<sup>76</sup>

### C. Coverage, Enforcement and Utilization

Sixty-one cities provide protection from discrimination to gays and lesbians in some or all of these areas: public employment, public accommodations, private employment, education, real estate, credit, and union practices.<sup>77</sup> Almost every city with an ordinance offers protection in public employment. Slightly over half of the cities offer coverage in private employment, bank credit, and public accommodations. Employment is probably the most crucial area for protection because lack of income makes people vulnerable in the other areas of coverage.

Typically, the ordinance's coverage extends to the city's geographic boundaries, with some exceptions. For instance, in Minneapolis, Minnesota, a private employer whose personnel office is in Minneapolis will be held accountable to the city's human rights ordinance even when hiring for a job located outside of the city.<sup>78</sup> In some instances, however, the city's control does not even extend to situations within its boundaries. For example, a state appeals court held that the University of Minnesota, located in part in Minneapolis, Minnesota, is exempt from coverage under the Minneapolis ordinance.<sup>79</sup> The same court issued an order stating that

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76. Representative Barney Frank (D-Mass.) said,

We've been making progress here in Washington on federal gay rights legislation because we have been able to convince members of Congress that prejudice against gays has diminished among the electorate. Passage of Measure 8 in a state like Oregon would be disastrous because of the message it would send to Congress.

Equal Time News, Oct. 12, 1988, at 2, col. 1.

77. See *supra* note 25.

78. Conversation with Minneapolis Department of Civil Rights Enforcement Manager, William R. Prock (Sept. 20, 1988).

79. City of Minneapolis Comm'n on Civil Rights v. University of Minnesota, 356 N.W.2d 841 (Minn. Ct. App. 1984). The court held that the Minneapolis Commission on Human Rights does not have jurisdiction over the University of Minnesota as a state institution. *Id.* at 842-43. The enabling legislation permitting Minneapolis to establish a Human Rights Commission does not mention power over the state or the university. *Id.* at 843. The court stated that the plaintiff has a right to be heard at the State Department of Human Rights. *Id.* The state human rights legislation, however, does not protect gays.

the Minneapolis Commission on Human Rights has no power to pursue complaints against Hennepin County, the county in which Minneapolis sits.<sup>80</sup> State and federal government agencies are immune from the ordinances<sup>81</sup> and, in at least one city, religious institutions are exempt from coverage.<sup>82</sup>

The ordinances are usually enforced by the city's human rights or civil rights commission, if the city is large enough to support one, and if not, then by the city attorney.<sup>83</sup> For example, in Minneapolis, which has a typical ordinance, any person may file a complaint with the director of the city department of civil rights.<sup>84</sup> The Minneapolis ordinance sets forth a procedure for investigating complaints including the following: "The director may attempt to conciliate the matter complained of prior to the signing of a verified complaint or prior to making a determination of probable cause."<sup>85</sup> After investigating complaints, the director decides whether probable cause exists to believe that a violation has occurred.<sup>86</sup> If the director does not find probable cause, the complainant is notified in writing and has fifteen days to appeal.<sup>87</sup> Upon appeal, a three-person review committee examines the director's decision. The complainant may make a presentation to the committee as well.<sup>88</sup> The committee may reverse or confirm the director's decision, or remand the complaint to the director for further investigation.<sup>89</sup>

If the director or the review committee makes a finding of probable cause upon appeal, the director must attempt to eliminate the offending acts or practices by conciliation.<sup>90</sup> If conciliation attempts are unsuccessful, then "the director shall refer the complaint to the commission."<sup>91</sup> The commission's chairperson

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80. *Hennepin County Personnel Dep't v. Minneapolis Comm'n on Civil Rights*, No. C2-87-1027 (Minn. Ct. App. filed June 16, 1987), *appeal denied* (Minn. filed Aug. 19, 1987).

81. See Minn. Stat. § 645.27 (1988) ("The state is not bound by the passage of a law unless named therein, or unless the words of the act . . . leave no doubt as to the intention of the legislature."); *Minnesota v. United States*, 305 U.S. 382, 387 (1939) (a state may not sue the United States without its consent).

82. New York, N.Y., Administrative Code ch. 1, § 8-108.1(2)(c) (1986).

83. See *supra* note 59.

84. See Minneapolis, Minn., Civil Rights Code tit. 7, § 141.50(a) (1988). For other representative ordinances see *e.g.*, Boston, Mass., Ordinances tit. 12, ch. 16, § 411 (1984); Boulder, Colo., Code § 12-1-8(a) (1984).

85. Minneapolis, Minn., Civil Rights Code tit. 7, § 141.50(b) (1988).

86. *Id.* § 141.50(c).

87. *Id.* § 141.50(d).

88. *Id.*

89. *Id.*

90. *Id.* § 141.50(e).

91. *Id.*

appoints three members of the commission who were not part of the review committee to serve as a hearing committee.<sup>92</sup> The hearing committee has authority to apply to the state district court to subpoena witnesses to appear at the hearing and to bring with them any necessary materials.<sup>93</sup> The hearing committee makes a final decision as to whether the respondent has discriminated, orders the respondent to cease and desist if discriminatory practices are found, and may order a civil penalty, compensatory and limited punitive damages.<sup>94</sup>

In Minneapolis, a party dissatisfied with the panel's final decision may seek judicial review based on the commission's findings of fact.<sup>95</sup> The scope of judicial review, however, is limited.<sup>96</sup>

Despite the extent of discrimination that gays and lesbians face,<sup>97</sup> these ordinances receive surprisingly little use. The Minneapolis City Council added "affectional preference" language to the existing civil rights ordinance in 1974. From 1974 until 1987, the Minneapolis Department of Civil Rights received one hundred forty-two discrimination complaints on the basis of sexual orientation.<sup>98</sup> The Seattle Human Rights Department received twenty-five cases in 1986, nine cases in 1987 and ten cases in 1988.<sup>99</sup> In New York City, forty-two individuals filed sexual orientation dis-

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92. *Id.* § 141.50(d), (h).

93. *Id.* § 141.50(k) (1987).

94. *Id.* § 141.50(l).

95. *Id.* § 141.60(b) (1988) (providing for judicial review in accordance with the Minnesota Procedure Act).

96. Under The Minnesota Procedure Act, a reviewing court

may reverse or modify [the commission's] decision if the substantial rights of the petitioners may have been prejudiced because administrative finding, inferences, conclusion, or decisions are:

- (a) In violation of constitutional provisions; or
- (b) In excess of the statutory authority or jurisdiction of the agency; or
- (c) Made upon unlawful procedure; or
- (d) Affected by other error of law; or
- (e) Unsupported by substantial evidence in view of the entire record as submitted; or
- (f) Arbitrary or capricious.

Minn. Stat. § 14.69 (1988).

97. See *supra* notes 3-8 and accompanying text.

98. The complaints break down into the following categories: employment, 77; housing, 25; public accommodations, 31; education, 2; other, 7. The sexual orientation cases have represented between 1% and 7.5% of the entire caseload. The department received the most cases in the first few years after the ordinance's passage and then in recent years. After the number of complaints dropped off in the late 1970s and the early 1980s, the department reached the highest level of sexual orientation complaints in the years 1985 to 1987. Information from City of Minneapolis Department of Civil Rights on file with *Law & Inequality*.

99. Information provided by Seattle Human Rights Department on file with *Law & Inequality*.

crimination complaints over a two year period.<sup>100</sup>

These figures do not represent the number of people who call the commissions with complaints about discrimination on the basis of sexual orientation.<sup>101</sup> People often abandon the complaint process.<sup>102</sup> Further, the figures do not include complaints for which the commission does not find probable cause.<sup>103</sup> A major barrier to accurate statistics is the necessity for the complainant to come out to some degree in order to file the complaint. A person may come out while living in a city where protection exists, only to move to a city with no protection where she or he may be fired or experience other repercussions from having filed suit. "[T]he gay victim of discrimination has few resources, finds it difficult to prove discrimination, and stands to lose more through publicity than would be gained by a settlement."<sup>104</sup>

Gay and lesbian activists have spent large amounts of time and money to enact these ordinances, which apparently have little effect. The ordinances could serve a symbolic and educational purpose by informing the public that discrimination on the basis of sexual orientation is misguided as well as illegal. Yet, none of these cities advertises or conducts outreach programs to inform the gay community that the ordinances are in place, or to inform the straight community that discrimination on the basis of sexual orientation is illegal.<sup>105</sup> Some cities provide pamphlets specifically geared towards those with sexual orientation complaints. The cities, however, only send these pamphlets to individuals who call the commission with a complaint.

Perhaps the gay community should use its own resources to inform others of the ordinances' existence, while educating the heterosexual community at the same time. Furthermore, the public must make the agencies that administer these ordinances accountable for carrying out their directive to utilize all powers at

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100. Information provided by Keith O'Connor, enforcement agent with the New York City Department of Human Rights, on file with *Law & Inequality*. New York does not keep statistics on the number of sexual orientation discrimination cases it handles. Conversation with Keith O'Connor, enforcement officer with New York City's Department of Civil Rights (September 1988).

101. Telephone conversations with Keith O'Connor, enforcement agent with the New York City Department of Human Rights (Dec. 2, 1988); with William Prock, enforcement manager with the Minneapolis Department of Civil Rights (Sept. 20, 1988); and with Bob Matz, enforcement agent with the Seattle Department of Civil Rights (Sept. 30, 1988).

102. *Id.*

103. *Id.*

104. Egerton, *supra* note 8, at 27.

105. See sources cited *supra* note 60.



their disposal to end discrimination against gays and lesbians.<sup>106</sup> In addition to advertising the law's existence, the agencies should keep comprehensive and accessible records about the complaints they receive, those complaints dismissed and the reasons complaints are not pursued. This information could further demonstrate the need for statewide protection.

#### IV. Conclusion: The Limitations of Municipal Ordinances

Municipal ordinances which prohibit discrimination on the basis of sexual orientation are one of the few means by which gays and lesbians have gained any legislative legal protection. These ordinances, however, are too limited to effectively address the problems faced by this minority. The ordinances cover only a small geographic area and have no application in some major areas of concern such as federal and state government employment, child custody, marriage, military service, and some private employment discrimination. The small numbers of grievances processed in major metropolitan areas such as New York, Minneapolis, and Seattle indicate the limited impact of these ordinances.

The fights to pass local ordinances may help organize the gay community for other political action, but one might also speculate that enactment of the ordinances lulls gays, who might otherwise be politically active, into a false sense of security. Further, referendums on the ordinances that result in repeal send a negative message to local and national politicians.

The effectiveness of the ordinances depends largely on the financial backing provided by the municipal government. The ordinance is the city's symbolic statement that its citizens do not tolerate discrimination against gays. Yet, the publicity and enforcement given to these laws is limited either by budgetary constraints or by the desire of politicians to give the ordinances a low profile. Therefore, the symbolic effect of the ordinances is minimal because people, both gay and straight, are not made aware of their existence. The agencies charged with the ordinances' enforcement or the gay community itself could remedy this problem by advertising the existence of the ordinances.

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106. See Minneapolis, Minn., Civil Rights Code tit. 7, § 141.40(1)(1985).

