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California Adds a New Remedy for the Ever-Changing Face of Hate

Sarah J. Farhat

Code Sections Affected

Civil Code §§ 52, 52.1 (amended).

AB 587 (Firebaugh & Wesson); 2001 STAT. Ch. 261.

The spectacle of orange blazes, partially obscured by trees, became clearer with each step through the heavy brush. Flames wrapped around the limbs of each cross. An odor like gasoline, but a bit sweeter, pervaded the air. Intense heat replaced the chill. Long orange and yellow flames reached ten feet from the tops of the crosses, like devilish hands grabbing at the floor of heaven.¹

I. INTRODUCTION

People hidden beneath white robes and hoods gathered around a burning cross strategically placed in a minority neighborhood is the classic example of a hate crime. Such imagery conjures up echoes of an archaic mentality long rejected by the United States Constitution as well as the California Government: inequality. What can be defined as a hate crime is no longer limited to force, intimidation, or threats toward the free exercise of a constitutionally protected right based on race;² hate crimes are also comprised of similar conduct based on a person's "religion, ancestry, national origin, disability, gender, or sexual orientation."³

This article addresses amendments⁴ made to two existing sections of the California Civil Code. The first amendment affects a section that metes out one possible remedy for a violation of the Unruh Civil Rights Act (Unruh Act),⁴

1. JOHN W. PHILLIPS, SIGN OF THE CROSS 27-28 (2000) (telling the true story about a city attorney who prosecutes one of the first successful cases involving the Ku Klux Klan and other white supremacist groups for burning a cross in a minority neighborhood).

2. See CAL. PENAL CODE § 422.6 (West 1999) (defining the types of acts that constitute a hate crime).

3. *Id.*

4. CAL. CIV. CODE § 51 (West Supp. 2002).

California Civil Rights Amendments of 1999,⁵ or the Gender Tax Repeal Act.⁶ The second amendment deals with a section of the Tom Bane Civil Rights Act (Bane Act)⁷ California's principle hate crime act. Additionally, this article provides a brief background of California's hate crime history and discusses pertinent past legislation involving the sections affected by Chapter 261.⁸ This article also details the provisions of Chapter 261,⁹ explores the impacts of such changes on existing law and policy, and discusses whether the objectives of Chapter 261 are likely to be achieved.¹⁰

II. BACKGROUND

The term "hate crime" can be traced back to a 1985 bill authored by former United States Congressional House Representatives John Conyers, Barbara Kennelly, and Mario Biaggi, entitled "Hate Crime Statistics Act."¹¹ The Hate Crime Statistics Act¹² requires the Department of Justice to collect statistical data on the nature of crimes racially, religiously, and ethnically motivated.¹³ California has a similar statute that requires the collection and reporting of hate crime information within the state.¹⁴ In 2000, the California Department of Justice reported that in California 1,957 hate crime events occurred against 2,352 victims by 2,107 known suspects.¹⁵ Of those events, 63.1 percent were racially motivated, 20.7 percent were motivated by the sexual orientation of the victims, and 66.1 percent were considered violent crimes.¹⁶

A hate crime is not always a substantive crime in and of itself. It can be described as criminal conduct motivated by prejudice, that focuses on the criminal's mentality rather than on his conduct.¹⁷ The existing hate crime statutes today are divided into four categories: "(1) sentence enhancements, (2)

5. *Id.* § 51.5.

6. *Id.* § 51.6.

7. *Id.* § 52.1 (as amended by Chapter 261).

8. *Infra* Parts II, III.

9. *Infra* Part IV.

10. *Infra* Part V.

11. JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 4 (1998).

12. Hate Crime Statistics Act of 1990, Pub. L. No. 101-275, 104 Stat. 1990 (codified at 28 U.S.C.A. § 534).

13. *Id.*

14. CAL. PENAL CODE § 13023 (West Supp. 2001).

15. ATTORNEY GENERAL BILL LOCKYER, CALIFORNIA DEPARTMENT OF JUSTICE, DIVISION OF CRIMINAL JUSTICE INFORMATION SERVICES, *Hate Crime in California, 2000*, BUREAU OF CRIMINAL INFORMATION AND ANALYSIS, CRIMINAL JUSTICE STATISTICS CENTER (Aug. 10, 2001) available at <http://www.ag.ca.gov/> (last visited Jan. 10, 2002) (copy on file with the *McGeorge Law Review*).

16. *Id.*

17. JACOBS & POTTER, *supra* note 11, at 27.

substantive crimes, (3) civil rights statutes, and (4) reporting statutes.”¹⁸ Sentence-enhancing statutes increase the penalty for a crime when the offender’s motivation for committing the crime is designated by the particular statute as prejudice.¹⁹ Some hate crime statutes create new substantive crimes by redefining conduct that has already been criminalized, or by upgrading the crime to an aggravated form.²⁰ Others are modeled on federal civil rights acts which tend to be broadly written, making all conduct falling within the parameters of the statute a possible hate crime if prejudice played some causal role.²¹ Finally, reporting statutes, like the Hate Crimes Statistics Act adopted by the U.S. Congress,²² call for the collection and compilation of hate crime statistics throughout a certain area.²³

III. EXISTING LAW

A. California’s Hate Crime Statutes

In California, hate crimes have been divided into crimes of violence and interference with a civil right.²⁴ The Ralph Civil Rights Act of 1976 (Ralph Act)²⁵ declares that all people within California have the right to be free from violent crimes based on their “race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability . . .” The remedy for a Ralph Act violation includes actual damages, exemplary damages, a twenty-five thousand dollar civil penalty, and reasonable attorney’s fees to the person subjected to violence or intimidation motivated by prejudice.²⁶ Under section 52 of the California Civil Code, an action may be brought by the Attorney General, district attorney, city attorney, or the injured individual.²⁷

The Bane Act²⁸ establishes that all people should be able to exercise their constitutionally protected rights free from “threats, intimidation, coercion, or attempts to interfere by threats, intimidation or coercion” by other persons, regardless of whether such persons act under the color of the law.²⁹ The penalties an individual may seek for a Bane Act violation include actual damages, treble³⁰

18. *Id.* at 29.

19. *Id.*

20. *Id.* at 33.

21. *Id.* at 39.

22. 28 U.S.C.A. § 534.

23. JACOBS & POTTER, *supra* note 11, at 39-40.

24. See SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 587, at 2-3 (July 3, 2001).

25. CAL. CIV. CODE § 51.7 (West Supp. 2001).

26. *Id.* § 52; SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 587, at 2 (July 3, 2001).

27. CAL. CIV. CODE § 52.

28. *Id.* § 52.1.

29. *Id.*

30. BLACK’S LAW DICTIONARY 397 (7th ed. 1999) (defining treble damages as, “[d]amages that by

exemplary damages totaling at least one thousand dollars, injunctive relief, and attorney's fees as determined by the court.³¹ If a government attorney seeks recovery under this section, however, the recovery is limited to equitable relief.³²

B. California Civil Rights Statutes

The Unruh Act,³³ first adopted in 1905, presently provides that all persons within California's jurisdiction shall be free from discrimination in business establishments based on their "sex, race, color, religion, ancestry, national origin, disability, or medical condition."³⁴ It entitles all persons to equal "accommodations, advantages, facilities, privileges, or services" from any business within the State.³⁵ The code sections following the Unruh Act narrow its broad scope by using more specific language to describe the different types of discrimination the Unruh Act prohibits.³⁶

The California Civil Rights Amendments of 1999, also known as the Prudence Kay Poppink Act,³⁷ prohibit business establishments from discriminating, boycotting, blacklisting, or refusing to contract with an individual or company based on the real or perceived aspects of that person's "race, creed, religion, color, national origin, sex, disability, or medical condition" or such attributes of anyone associated with that person.³⁸ The Gender Tax Repeal Act of 1995 (GTRA)³⁹ prohibits business establishments from discriminating in the prices they charge for services based on the patron's gender.⁴⁰ However, the GTRA is careful to distinguish the difference in the price of services based on gender, which is prohibited, and the difference in the price of services based on job-related items, such as the amount of time spent on the task or the difficulty of the task, which is lawful.⁴¹

Section 52 of the Civil Code provides a remedy for violation of the Unruh Act, the California Civil Rights Amendments of 1999, and the Ralph Act.⁴² Section 52 provides for actual damages, treble damages not less than one

statute, are three times the amount that the fact finder determines is owed.").

31. CAL. CIV. CODE §§ 52- 52.1; SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 587, at 2 (July 3, 2001).

32. CAL. CIV. CODE § 52.1.

33. *Id.* § 51.

34. *Id.*

35. *Id.*

36. *Id.* §§ 51.2-.8. For example, section 51.2 addresses age discrimination; section 51.5 specifically addresses business establishments and prohibits blacklisting and boycotting on the basis of race, creed, or religion; and section 51.6 deals with gender discrimination. *Id.*

37. CAL. CIV. CODE § 51.5.

38. *Id.*

39. *Id.* § 51.6.

40. *Id.*

41. *Id.*

42. CAL. CIV. CODE § 52.

thousand dollars, and attorney's fees for any violation of the Unruh Act or the California Civil Rights Amendments of 1999.⁴³ Section 52 also provides a remedy⁴⁴ for a violation of the Ralph Act, as discussed above.⁴⁵

IV. CHAPTER 261

Chapter 261 amends the Civil Code to permit the Attorney General, district attorney, or city attorney to pursue a twenty-five thousand dollar civil penalty under the Bane Act.⁴⁶ This measure mandates that such civil penalty will be awarded to each victim for every offense committed by each violator of the statute.⁴⁷ Chapter 261 also increases the minimum penalty allowed for violations of the Unruh Act, the Civil Rights Amendments of 1999, and the GTRA from one thousand dollars to four thousand dollars.⁴⁸ Finally, Chapter 261 adds a cross-reference to GTRA to provide a remedy for violations of the GTRA.⁴⁹ This remedy corrects a technical mistake made in 1995 when the GTRA was adopted.⁵⁰

V. ANALYSIS OF CHAPTER 261

A. Section 52 of the Civil Code

Chapter 261 increases the minimum penalty allowed for violations of the Unruh Act, the Civil Rights Amendments of 1999, and the GTRA from one thousand dollars to four thousand dollars.⁵¹ California's Attorney General, Bill Lockyer, believes that increasing the minimum penalty will help deter the discrimination prohibited by these Acts.⁵² Usually, violations of these sections

43. *Id.* § 52(a).

44. *Id.* §§ 52(b).

45. *Supra* Part III.A.

46. *Id.* § 52.1(a).

47. *See id.* (stating that "[i]f this civil penalty is requested, it shall be assessed individually against each person who is determined to have violated this section and the penalty shall be awarded to each individual whose rights under this section are determined to have been violated.").

48. *Id.* § 52(a) (amended by Chapter 261).

49. *Id.*

50. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 587, at 1 (July 18, 2001).

51. *See* CAL. CIV. CODE § 52 (amended by Chapter 261) (providing that any person whose conduct is "contrary to Section 51, 51.5 or 51.6 is liable for each and every offense for the actual damages and any amount that may be determined by a jury . . . up to a maximum of three times the amount of actual damages but in no case less than four thousand dollars (\$4,000).").

52. Office of Assemblymember Marco Firebaugh, QUESTIONS AND ANSWERS AB 587—CIVIL RIGHTS ACTIONS (on file with the *McGeorge Law Review*) [hereinafter QUESTIONS AND ANSWERS]; SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 587, at 5-6 (July 3, 2001); Telephone Interview with Henry Contreras, Legislative Analyst, Office of Assemblymember Marco Firebaugh (July 20, 2001) [hereinafter Contreras Interview] (notes on file with the *McGeorge Law Review*); Letter from Janet Gaard, Director, Legislative Affairs, Office of the Attorney General, to Marco Firebaugh, Assemblymember (June 21,

result in actual damages of less than one thousand dollars.⁵³ Consequently, many individuals choose not to pursue claims under these sections, or may not even know they have a cause of action under these sections.⁵⁴ For business owners who violate these sections, paying an occasional one thousand dollars in damages to an aggrieved patron becomes an “absorbable cost of doing business” because the probability of such a patron coming forward is slight.⁵⁵ Increasing the statutory minimum to four thousand dollars may draw more public attention to the availability of such remedies, and make violations of these statutes less of an absorbable cost of doing business and more of a deterrence without causing small businesses to file bankruptcy.⁵⁶ Setting the statutory minimum at four thousand dollars, while taking a bigger bite out of the business owner’s pocket, still allows an individual to bring his or her own claim in small claims court without having to hire an attorney.⁵⁷

Chapter 261 also provides a cross-section reference to the GTRA, from which a remedy was omitted when it was adopted.⁵⁸ In subsection (d) of the GTRA, the Legislature explicitly provides that the remedy for any violation of GTRA is to be the remedy stated in section 52(a).⁵⁹ However, section 52 of the Civil Code did not reflect this.⁶⁰ Chapter 261 adds the GTRA section to section 52 of the Civil Code to correct this oversight.⁶¹

2001) [hereinafter Gaard Letter] (on file with the *McGeorge Law Review*).

53. See QUESTIONS AND ANSWERS, *supra* note 52, at 2 (stating that “the Attorney General has reported that violations of these civil rights provisions often result in damages to individual victims in amounts less than one thousand dollars); see also *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 27, 219 Cal. Rptr. 133, 134 (1985) (addressing an instance where the male plaintiff was refused car wash and nightclub cover discounts that were given to females); *Reese v. Wal-Mart Stores, Inc.*, 73 Cal. App. 4th 1225, 1230, 87 Cal. Rptr. 2d 346, 350 (Cal. Ct. App. 1999) (addressing an instance where a male plaintiff claimed discrimination under the GTRA for being overcharged on an oil change).

54. QUESTIONS AND ANSWERS, *supra* note 52, at 2; Contreras Interview, *supra* note 52.

55. QUESTIONS AND ANSWERS, *supra* note 52, at 2; Contreras Interview, *supra* note 52.

56. QUESTIONS AND ANSWERS, *supra* note 52, at 2; Contreras Interview, *supra* note 52.

57. QUESTIONS AND ANSWERS, *supra* note 52, at 2; Contreras Interview, *supra* note 52; see SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 587, at 4 (July 3, 2001) (explaining that the maximum an individual can seek in small claims court is five thousand dollars; by setting the statutory minimum at four thousand dollars, the Legislature allows individuals who want to bring a claim but who do not wish to hire an attorney to sue in small claims court).

58. Compare CAL. CIV. CODE § 52(a) (amended by Chapter 261) (stating that “[w]hoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to section 51, 51.5, or 51.6, is liable”), with *id.* § 52(a) (West Supp. 2001) (admonishing that “[w]hoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to section 51 or 51.5, is liable”).

59. CAL. CIV. CODE § 51.6 (West Supp. 2002).

60. *Supra* note 58.

61. CAL. CIV. CODE § 52(a) (amended by Chapter 261).

B. Section 52.1 of the Civil Code

Prior to adopting Chapter 261, California only allowed a government attorney to seek injunctive and equitable relief for a violation of the Bane Act.⁶² Chapter 261 creates the opportunity for the Attorney General, district attorney, or city attorney to pursue a civil penalty of twenty-five thousand dollars.⁶³ Unlike an earlier amendment creating the same opportunity for those wishing to bring an action under the Ralph Act,⁶⁴ Chapter 261 allows for a much broader application of the remedy. The Bane Act does not restrict its application to a particular class of individuals. Rather, it gives any person the option of seeking a civil penalty.⁶⁵ The purpose of expanding remedy options under this section is to provide victims with attorneys that may otherwise be difficult to hire given the type of case.⁶⁶ Private attorneys are often reluctant to take cases dealing with a hate crime statute because such cases are usually taken on a contingency fee basis, are costly, and are often difficult to prove.⁶⁷ By expanding the remedies available to government attorneys, victims of hate crimes are more likely to seek redress which, in turn, will likely lead to more prosecutions of hate crimes and relief to a greater number of victims.⁶⁸

Chapter 261 also mandates that such civil penalty will be awarded to each victim for every offense committed by each violator of the statute.⁶⁹ This provision furthers Chapter 261's overarching objectives of deterrence and reporting.⁷⁰ By requiring that each person who violates the statute pay the victim for each incident, business owners will be deterred from engaging in such illegal acts over extended periods of time.⁷¹ Similarly, people will be encouraged to report such violations because they may be able to recover from multiple persons who violate the statute on multiple occasions.⁷² This provision supplements Chapter 261's other amendments by offering yet another reason for business

62. *Id.* § 52.1.

63. *Id.*

64. JACOBS & POTTER, *supra* note 11, at 39.

65. CAL. CIV. CODE § 52.1.

66. QUESTIONS AND ANSWERS, *supra* note 52, at 1.

67. *Id.*

68. *See id.* (stating that "allowing these attorneys to prosecute these cases makes it more likely that hate crimes will be reported and that the perpetrators will be dissuaded from future violations.").

69. CAL. CIV. CODE § 52.1 (amended by Chapter 261).

70. *See* QUESTIONS AND ANSWERS, *supra* note 52, at 1 (stating that "allowing these attorneys to prosecute these cases makes it more likely that hate crimes will be reported and that the perpetrators will be dissuaded from future violation"); Gaard Letter, *supra* note 52 (asserting that "the imposition of a significant civil penalty will serve as an effective deterrent against the violation of our state civil rights statutes. Furthermore, victims of these types of violations may be more likely to seek redress through the Attorney General's Office if monetary relief is available.").

71. Contreras Interview, *supra* note 52.

72. *Id.*

owners to refrain from engaging in acts that violate this statute and for private citizens to report such incidents when they occur.

VI. CONCLUSION

Deterrence and reporting are the main objectives to be accomplished by Chapter 261's amendments to California's Civil Code.⁷³ By increasing the statutory minimum for violations of various civil rights laws and broadening the scope of remedies which can be sought by government attorneys for violations of California's hate crime statute, would-be violators of these statutes are more likely to be deterred from violating the statute, and victims are more likely to report the violations that occur. However, the true test of Chapter 261 will appear in the coming years when its effects will become more apparent.

73. QUESTIONS AND ANSWERS, *supra* note 52, at 1.