

# Position Paper on a Proposed Sit/Lie Ordinance for the City of San Francisco

Coalition on Homelessness

The first recent public discussion of a sit/lie ordinance in San Francisco seems to stem from a December 17 hit-piece by the *San Francisco Chronicle's* East Bay columnist, C.W. Nevius.<sup>1</sup> Since that time, Nevius has written in favor of a sit/lie law four more times in his column<sup>2</sup>, the *Chronicle* has run a similar supportive column by Andrew S. Ross<sup>3</sup>, and new Police Chief George Gascón has voiced very strong support for such an ordinance<sup>4</sup> and worked with the City Attorney's Office to draft a sit/lie ordinance. Misinformation—largely spurred by media coverage of unsubstantiated hearsay (e.g., the *Chronicle's* coverage of a non-existent group of wandering rogues straight out of *Mad Max*), and partially by Park Station (e.g., in the January Park Station Community Meeting, the Station's captain told the audience that police were unable to address the issues that concerned residents and merchants without citizens' arrests)—has spurred understandable concern among a small subset of Haight Street's merchants. Meanwhile, the majority of residents of the neighborhood have been left out of the discussion, and there has been next to *no* discussion of the implications of an ordinance born of the troubles of almost 0.1 square miles of the city for the residents of the other 46.6 square miles. Furthermore, there is no empirical data to support any of the claims of increased violent crime in the Haight. Resident complaints indicate that there are serious and valid concerns on the ground in the vicinity of Haight Street, which may well require changes in policing in the neighborhood. The proposal for a sit/lie ordinance, however, takes advantage of these valid concerns as well as media-driven hysteria, and pushes a tragic response which we believe will result in a policy mess, an unconstitutional and potentially costly legal fiasco, and a grave failure of our social ethics.

## Executive Summary

We oppose *any* sit/lie ordinance for social, legal, and ethical reasons.

### Social:

- We believe that a sit/lie will blur criminality, effectively penalizing homeless people, day-laborers, and other vulnerable groups for activities irrationally associated with other activities which are already illegal, and breaking any connection between criminal activities and penalties. (pp. 4–5)
- We believe that a sit/lie law will create a situation where police targeting further alienates vulnerable people already alienated through personal and social abuses that may have caused their homelessness. (p. 5)

### Legal:

- A sit/lie ordinance, if interpreted in accordance with state law and court precedent, would be duplicative of existing state and local laws. (pp. 5–7)
- A sit/lie ordinance as applied would almost inevitably violate California constitutional free speech

---

1 "Sit/lie' law needed to stop bullies on Haight," *San Francisco Chronicle*, December 17, 2009, p. C-1

2 "Time to get tough on toughs in the Haight," *San Francisco Chronicle*, December 19, 2009, p. C-1; "Looks like the Haight's getting cleaned up," *San Francisco Chronicle*, December 24, 2009, p. C-1; "Police chief won't take criticism lying down," *San Francisco Chronicle*, January 5, 2010, p. C-2; "Haight's up in arms over street thugs," *San Francisco Chronicle*, January 16, 2010, p. C-1.

3 "Getting S.F. leaders to pay attention," *San Francisco Chronicle*, December 18, 2009, p. DC-1.

4 "Message From The Office of the Chief Of Police," posted December 31, 2009, <http://www.sf-police.org/index.aspx?page=3278>.

rights, *and, indeed, on exactly such grounds, San Franciscans challenged a prior municipal sit/lie law.* (pp. 7–8)

- A sit/lie ordinance would violate the Eighth Amendment's provisions concerning criminality. (p. 8)
- A sit/lie ordinance as applied would violate homeless people's equal protection and Fourteenth Amendment due process rights. (pp. 8–9)
- A sit/lie ordinance would incur absurd costs to several City departments: SFPD, the Sheriff's Department, the District Attorney's Office, the Public Defender's Office, and the Superior Court. (pp. 9–10)

**Ethical:**

- A sit/lie ordinance will increase social divisions in our society, particularly those based on class, and statuses related to abuse, such as sexuality and youth. (p. 10)
- A sit/lie ordinance will of necessity incur discretion-based policing, which will define legality and criminality on the fly based on social prejudice, rather than the rule of law. (pp. 10–11)

We believe that solutions to the problems on the ground in the Haight *do* exist, and that our community must seek out these solutions. However, we cannot accept that these solutions come at the expense of the basic rights of our citizenry, and through the harassment and criminalization of our society's most vulnerable members.

## What the Law May Say

At the time of writing, no concrete proposal has yet been put forward for the actual form and content of a sit/lie ordinance. One draft, produced by the City Attorney's Office, has made its way to the public. The draft justifies a new ordinance based on the finding that:

A business area becomes dangerous to pedestrian safety and economic vitality when individuals block the public sidewalks. This behavior causes a cycle of decline as residents and tourists go elsewhere [*sic*] to meet, shop and dine.

The draft then goes on to prohibit three activities:

1. sitting or lying down on a sidewalk or on any object placed on the sidewalk;
2. placing or leaving any object on the sidewalk further away than two feet from one's nearest foot; and
3. allowing a pet to be more than two feet away from oneself.

Much of the language is borrowed directly from Seattle's sit/lie ordinance. The draft indicates reference also to the laws of Portland, Los Angeles, and Houston.<sup>5</sup>

The draft indicates that the law would apply in “[t]he Haight Street area,” and certain other locales that are not specified in the draft. A memo from Captain Theresa Barrett (Park Station) to Commander James Dudley (Metro) dated January 21 is likely helpful in this regard. The San Francisco Police Department has denied our request for a copy of this memo. At the January 12 Park Station Community Forum, Captain Barrett said that the areas in which the sit/lie ordinance would apply would be determined by the various station captains for their stations' jurisdictions.

The draft also includes eleven exceptions:

1. medical emergencies

---

<sup>5</sup>Seattle Municipal Code 15.48.040; Portland City Code 14A.50.030; Los Angeles Municipal Code 41.18; City Code Section 40-351.

2. physical or mental “incapacitation”
3. use of a wheelchair, walker, or similar device
4. sidewalk-based business with an appropriate permit
5. observation of a parade, festival, rally, etc.
6. First Amendment-protected expressive assembly for eight hours or less
7. sitting on a chair or bench supplied by the City government or an abutting business
8. waiting for a bus
9. setting of an object on the sidewalk in conformance with a permit
10. conduct in violation of the above prohibitions, but allowed through some other sort of permit
11. temporary placement of delivered merchandise on the sidewalk

A first conviction of the proposed law would be an infraction, punishable by a fine of \$50–100. Subsequent convictions would be misdemeanors, with a maximum sentence of six months in County Jail and a \$500 fine.

## What Other Laws (Would) Have Said

The proposal is not without antecedents. In 1968, San Francisco's Board of Supervisors actually passed a sit/lie ordinance. Section 20 of the Municipal Police Code prohibited sitting, lying, or sleeping on the city's sidewalks. Merchant groups pushed for the law, while opponents saw it as “anti-hippie”—probably correctly: The Haight-Ashbury Merchants and Improvement Association spoke of the law as an answer to a problem which the organization had “been putting up with... for two years,” i.e., since the hippies came to town. The law was approved unanimously by the Board of Supervisors, but even its supporters recognized its cosmetic nature: “[I]t does not treat with root causes of our alienated elements in society,” admitted Supervisor Robert Mendelsohn.<sup>6</sup>

Hippies were not the only targets of MPC 20. In the 1970s, the San Francisco Police Department began using the law as a regular tool for the targeting of LGBT people—especially gay men—in the Castro—at that time still known as Eureka Valley. The most infamous case came on September 7, 1974, when police officers beat a young man outside of a gay bar, arrested him and thirteen others, and charged all with MPC 20. Harvey Milk—not yet a supervisor—dubbed the men the “Castro 14,” and turned their abuse into a local *cause célèbre*.

Ultimately, MPC 20 did not stand the test of time: In May of 1979, the ACLU—backed by LGBT rights groups—filed suit against the Chief of Police and the Sheriff, arguing that the law was enforced “based not upon [suspects'] conduct, but because of status or appearance.”<sup>7</sup> Later that year, Sharon Jennings moved to suppress the evidence used to charge her in a case that developed out of an MPC 20 arrest. The courts ultimately found with Jennings.<sup>8</sup> In August, as a partial settlement for the ACLU case the Board of Supervisors repealed MPC 20, and replaced it with the sidewalk obstruction laws that we retain today: MPC

6 “Board Unit's OK: Sidewalk, Street Law Called Anti-Hippie.” *San Francisco Chronicle*. Friday, November 15, 1968. p. 4. HAMIA was a Haight-Ashbury neighborhood association founded in 1906 which excluded renters from its exclusive membership.

7 *San Francisco Chronicle*. Wednesday, May 2, 1979. p. 3.

8 In addition to the two 1979 cases—*Ramey v. Gain* and *Jennings v. Superior Court*—we have found an August 7, 1979 letter from then-Deputy City Attorney Philip Moscone referring to a prior case in which MPC 20 was found unconstitutional in application:

Recently, Sections 20A and 20B of the Municipal Police Code... were declared unconstitutional as applied to members of religious sects who were soliciting donations and impeding the progress of pedestrians on Fisherman's Wharf.

We have not been able to find the ruling or formal citation for the case.

22–24. MPC 22–24 replace a sweeping ban that allows police to enforce the social prejudice *du jour* with a law that focuses on the *willful obstruction* of the city's sidewalks. (It is worth noting that MPC 22 continued to be used for the police harassment of queer people on Polk Street, as found by the Mayor's Criminal Justice Commission in 1981. Such laws, whenever they exist, are used by the powerful to make those whose presence they disdain “criminals.”)

This ought to have been the last that San Francisco ever heard of sit/lie laws. It was not. In 1994, then-Mayor Frank Jordan placed Proposition M on the November ballot. In the realm of homeless policy, Mayor Jordan was best known for his documentably ineffective Matrix program, which brought heavy police pressure to bear against homeless people in a manner quite similar to the “Safer City Initiative” in Los Angeles' Skid Row (successfully challenged in the Ninth Circuit in *Jones v. Los Angeles*, discussed below). Jordan's proposition called for a legislative equivalent of the heavy-handed policing that already existed: a sit/lie law which would apply to 15% of the geographical area of the city, and whose supporters were expressly targeting homeless people. That law would have effectively barred homeless people from Fisherman's Wharf, North Beach, the entirety of the Embarcadero, the entirety of Market Street, the entirety of the Tenderloin, the Mission, the Castro, the Haight, and sundry areas in the Richmond, the Sunset, Ingleside, and the Bayview. The measure was opposed by the San Francisco Democratic Party (“Harassing your fellow human beings is easy, immoral and unjust... Our police should be fighting violent crime not sitting persons.”), the Green Party (“It's much easier to punish poor people than to alleviate poverty.”), and a council of eleven churches and synagogues (“Proposition M legally applies to all people in certain neighborhoods—from coffee drinking cafe goers, to those who are on the street because they have no home. But in reality, the proposition is a shameful attempt to move 'unsightly' poor and homeless people out of some parts of the City.”), among others.<sup>9</sup> Mayor Jordan ultimately failed to convince the electorate of a sit/lie ordinance's necessity.

## Sit/Lie as Social Policy

“A criminal justice system works when there is a clear link between actions and consequences.”  
—Chief George Gascón

The complaints which the public has heard from the Haight have been of two varieties:

1. those about activities which are *already* criminal, such as assault and mugging, which will be discussed further in the section on **Legal Considerations** around the proposed ordinance (and which, it should be noted, are entirely undocumented).<sup>10</sup>
2. those that deal not with any particular activities, but rather with the complainant's discomfort at the mere presence of homeless people in public places.

For the former cases, justice is ill-served when there are no direct consequences of assault, battery, and robbery. Justice is done a further disservice when the response to reasonable public outrage around violence and theft is to shift the perception of culpability to those who are accused in court of no crime but

---

9 *San Francisco Voter Information Pamphlet and Sample Ballot; November 8, 1994 Consolidated General Election*. pp. 193–194.

10 We have been trying doggedly to find documentation of any real incidents in the Haight. The only two cases we have found were: 1) an alleged battery, in which case the District Attorney's Office dropped charges, as video of the incident showed it to be a case of mutual combat; and 2) a case in which a woman claims that her baby was spit upon—a very clear case of assault. According to a representative of Sup. Mirkarimi's office in the February 11, 2010 Haight-Ashbury Neighborhood Council meeting, the Supervisor's office spoke directly with this woman, who had not reported the assault to the police. No doubt, in the Haight, as in every neighborhood, other similar cases exist. But it is to be emphasized that assault and battery *should be charged as assault and battery*: Their relationship to sitting on the sidewalk is non-existent.

resting on the sidewalk. (This is, further, probably illegal; more on this argument in the section on **Legal Considerations** below.) When people break laws, we don't pass new laws that make it illegal to look like a criminal: When we're worried about white serial killers, we don't criminalize whiteness just to be able to prosecute actual killers. When we're worried about adult heterosexual males abusing their children, we don't criminalize heterosexuality. We use the laws that we already have against murder and child abuse.

Playing fast and loose with justice is directly harmful to our communities. On the one hand, this is a public safety issue: Under a sit/lie law, violent criminals experience no direct consequences for their actions, and thus have no criminal justice disincentive for their commission. If they receive any criminal justice penalty, it is a fine or community service for an infraction, rather than incarceration or probation for a misdemeanor or felony, and furthermore, that infraction is unrelated to the real crime, and the penalty would be received with or without commission of that crime. At the same time, our communities are left with violent criminals on the streets.

On the other hand, it substitutes profiling for investigation and caricature for true culpability: Homeless people who are guilty of no crime save (newly criminalized) sitting on sidewalks are associated with violent criminals and are penalized with the same unaffordable fines as the real criminals whom the law is purportedly meant to target. Homelessness, at its core, is an economic issue: People are homeless because they cannot afford rent. But certain groups of people are especially likely to be economically disadvantaged: This includes people with mental illnesses, people of color, immigrants, queer people (especially transgender people), and, especially on Haight Street, young people for whom home life with their parents was untenable because of various kinds of abuse, including homophobia. The criminalization of the economic status of such people can only further their sense of alienation.

Aside from the psychological barriers to engagement with the City's social services system created through further alienation and the stigma of criminalization, the creation of a criminal record—even when comprised primarily of infractions (and the law as proposed would force most homeless people into the commission of misdemeanors)—can create bureaucratic barriers to housing. There is no shortage of cases in which homeless people—after waiting for months or years on a wait-list—have been offered housing, but have been unable to actually enter the housing because of the existence of bench warrants for infraction citations. If our goal is to end homelessness—and it should be—we must create as few barriers to housing as possible. Criminalizing homeless people for their economic and housing status creates barriers.

So much for the addressing of real crimes. It is clear that a great many sit/lie proponents—perhaps the majority of the most vocal proponents—are bothered not by real crimes, but by the very presence of homeless people in public view in San Francisco.

We don't wish to waste too much time on addressing this concern: In a democracy, we cannot purge our society of those we find distasteful as totalitarian and ethnic nationalist regimes have seen fit to do. Any of us should be ashamed to consider the idea in public.

## Legal Considerations

A sit/lie ordinance would be not just bad social policy, but would be junk legislation, and almost certainly unconstitutional.

### A Sit/Lie Ordinance Would Be Duplicative of Existing State and Municipal Law

A sit/lie ordinance anywhere in California *cannot* create an offense that is not present in existing law. The draft version of the ordinance claims that the purpose of a sit/lie ordinance would be to prevent danger to pedestrians and economic decline by the blockage of sidewalks. However, it is already illegal to block sidewalks: Section 22 of the Municipal Police Code provides that:

┆ No person shall wilfully [*sic*] and substantially obstruct the free passage of any person or persons on any street, sidewalk, passageway or other public place.

(Sections 23 and 24 of the Municipal Police Code detail misdemeanor penalties for repetitions of the behavior proscribed in Section 22.)

It may be contended that the purpose of resuscitating a sit/lie law in San Francisco would be to penalize those cases in which the obstruction of passage is either involuntary or incomplete. This is a California legal impossibility, rejected by the courts for San Francisco in 1980. In California,

Every person who willfully and maliciously obstructs the free movement of any person on any street, sidewalk, or other public place or on or in any place open to the public is guilty of a misdemeanor.

per California Penal Code Section 647c. In *Jennings v. Superior Court* (104 Cal. App. 3d 50), the court notes that subsection A of MPC 20 takes its authority from PC 647c. *But...*

There is a critical difference between the two sections. Penal Code section 647c requires that the obstructing be done “willfully and maliciously,” whereas section 20A omits the term “maliciously.” Penal Code section 7 defines “willfully” as follows: “The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage; ...” The same section defines “maliciously”: “The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law; ...” Thus, the requirement of “maliciousness” in section 647c supplies the necessary criminal intent.

Section 20A, requiring only willfulness and prohibiting the mere hindrance or delay of free passage or use of sidewalks in the “customary manner” sweeps in all variety of harmless activities. Certainly the welfare of San Francisco, if jeopardized at all by obstructors of the sidewalk, is jeopardized only by those who act with malice—that is, with a “wish to vex, annoy, or injure another person, or an intent to do a wrongful act.” (Pen. Code, § 7, subd. 4.) Section 20A, as it stands, permits in San Francisco the same kind of situation the *Shuttlesworth* court warned against in Birmingham. It provides that “a person may stand on a public sidewalk in [San Francisco] only at the whim of any police officer of that city... Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state.” (*Shuttlesworth v. Birmingham, supra*, 382 U.S. at pp. 90-91 [15 L.Ed.2d at p. 179].)

We conclude that section 20A must be read as requiring maliciousness.

Note: Were MPC 20(a) not read in that light, it could not have been a crime, as it would have lacked the constituent intent necessary for criminal activity. Thus, the Court of Appeal of California *could only read a new sit/lie ordinance as being identical to MPC 22(a)*, save that (in the current draft form) it would set the maximum penalty for a first violation at \$100, rather than \$500, and identical to PC 647c, save that it would set first violation as an infraction, rather than as a misdemeanor, and would severely limit San Francisco judges' sentencing options to the lenient end.

A sit/lie law could only be duplicative of existing law. As we state above, given current Police Department bombast around the need for and suggested efficacy of a sit/lie law, we imagine that initial enforcement might be otherwise, but it takes little legal literacy to see, in keeping with *Jennings v. Superior Court*, that these enforcement practices would quickly be found illegal.

Strangely, the Police Department and other supporters hold that a sit/lie law would be used to

address anti-social behaviors other than the (willful and malicious) obstruction of sidewalks. This is a strange proposal: Instead of using the more serious laws on hand to address allegations of assault or battery (PC 240–243), mugging (PC 211–212), or even “aggressive” solicitation (MPC 120-2(d)1), sit/lie proponents claim to seek to simply keep alleged criminals away from particular sidewalks. It should not need to be mentioned that this is dishonest legislating, and in practice potentially unconstitutional on due process grounds.

We strongly disagree with the “carrot-and-stick” approach to poverty—the notion that poor people need the threat of legal penalties (the “stick”) in order to be persuaded to access services (the “carrot”)—but it's worth pointing out to that approach's advocates that the stick-wielders have a fine array of cudgels ranging from MPC 22 (“obstructing the sidewalk”—an infraction used hundreds of times a year illegally, yet effectively, by the police to penalize homeless people for sleeping on the sidewalk), through PK 3.12–13 (local park “camping” and “sleeping”—infraction/misdemeanor “wobblers”), to PC 647(e) (“lodging”—a misdemeanor used quite regularly in the Tenderloin against homeless people guilty of nothing but sleeping on the sidewalk). Meanwhile, there is a radical dearth of “carrots”—we have fewer than 1,100 shelter beds for a City-recognized 6,500 homeless people and wait lists for *every* City-funded behavioral health service. There are *no* walk-in services for homeless adults in the area of Haight Street and Golden Gate Park aside from the Free Clinic. The two drop-in locations for youth on Haight Street have limited capacity, and are not designed to be daytime cages for young people. So much for carrots. A further club—a non-regulation club (as we'll discuss below)—*cannot* drive homeless people toward non-existent or maxed-out services, but can only further punish them for their poverty.

### **A Sit/Lie Ordinance Would Be Challenged on State and Federal Constitutional Grounds, and Would Deservingly Lose**

But it is not only on due process grounds that a sit/lie ordinance would likely be found unconstitutional.

The proposed ordinance, in the available draft version, takes its fundamental prohibition, its warning section, and six of its eleven exceptions from Seattle's SMC 15.48.040. Presumably, this is intended to ensure the proposal against constitutional challenges, as the Seattle law withstood a constitutional challenge at the Ninth Circuit US Court of Appeals in *Megan S. Roulette v. City of Seattle* (1996 78 F.3d 1425). Indeed, *Roulette v. Seattle* is very important for understanding constitutional issues surrounding sit/lie laws, but the notion that Xeroxing Seattle's law and dropping it into San Francisco's books can avoid unconstitutionality betrays a rather careless reading of *Roulette*: *Roulette* finds simply that Seattle's law is not *facially* in violation of the First and Fourteenth amendments. *This does not mean that SMC 15.48.040 is constitutional*. In fact, Judge (now Chief Judge) Alex Kozinski's opinion in *Roulette* serves as a textbook on how *not* to challenge the constitutionality of a sit/lie ordinance, and clarifies the conditions under which a sit/lie ordinance could be demonstrated to be unconstitutional. Based on application, it seems almost inevitable that a local sit/lie ordinance would be successfully challenged for violation of California Constitutional free speech and US Constitutional Fourteenth Amendment rights, and would likely also be successfully challenged on US Constitutional Eighth Amendment grounds.

#### *Free Speech*

Alms-begging is state constitutionally protected activity in California, as found in *Jack Carreras et al. v. City of Anaheim* (1985 768 F.2d 1039). It is practically inevitable that a new sit/lie law would have a disproportionate impact on panhandlers, given: 1) the fact that panhandlers frequently sit as part of their expression of supplication; and, 2) that San Francisco police already target panhandlers in numerous commercial corridors, and will no doubt continue to receive requests from wealthier business and property owners that they do so. It is beyond likely to the point of near certainty that a sit/lie law in San Francisco would create the conditions for its own successful challenging.

Indeed, the plaintiffs in *Berkeley Community Health Project v. City of Berkeley* (902 F.Supp. 1084)

were able to persuade the US District Court, N.D. California on exactly such grounds in 1995.<sup>11</sup> In the same year, Cincinnati's sit/lie law was struck down by the US District Court, Southern Ohio (Clark v. City of Cincinnati, No. 1-95-448, S.D. Ohio Oct. 25, 1995). Three years later, Salida, Colorado, similarly lost its sit/lie law on First Amendment grounds (Case No. 97CR62, Colo. Dist. Ct. 1998). Portland—in its long line of failed sit/lie laws (the city has tried *numerous* times to pass sit/lie laws, but each attempt has been struck down by the courts)—lost one of these on First Amendment grounds in Oregon v. Kurylowicz (No. 03-07-50223, Or. Cir. Ct. 2004). The reasoning and the case law on this point are so strong that New Orleans (Henry v. City of New Orleans, No. 03-2493, E.D. La. 2005) and Elkton, Maryland (Archer v. Town of Elkton, Case No. 1:2007-CV-01991, Md. Dist. Ct. July 27, 2007) knew that they were beat when challenged on First Amendment grounds, and settled, both changing policing practices (in the former case) or rescinding legislation (in the latter), and paying plaintiffs financial damages (in both).

As noted above, Seattle's SMC 15.48.040 has withstood not one but *two* Constitutional challenges: *Roulette v. Seattle* (1996, mentioned above) and *City of Seattle v. McConahy* (937 P. 2d 1133, Wash. Ct. App. 1997). In neither case was SMC 14.48.404 challenged on its application against panhandlers: *Roulette v. Seattle* was a facial challenge, while the court's decision against *McConahy* and *Hoff* in *Seattle v. McConahy* was in large part based on the fact that *McConahy* was not engaged in panhandling. The only other case of which we are aware in which a sit/lie law sustained a First Amendment challenge was *Amster v. Tempe* (248 F.3d 1198). Like *Roulette v. Seattle*, *Amster v. Tempe* was a facial challenge. It is unlikely that these mistakes will be made in San Francisco, should the City decide to pass such a law.

As mentioned in an above footnote, San Francisco's prior sit/lie law, Municipal Police Code Section 20, was found unconstitutional on what appear to have been First Amendment grounds. (See **What Other Laws (Would) Have Said**, above.)

#### *Cruel and Unusual Punishment*

With extraordinarily rare exceptions, people do not sit on sidewalks with malicious intent. Those of us so inclined are generally quite capable of imagining far more effective methods than sitting to, “vex, annoy, or injure our neighbors.” Florida's Second District Court of Appeal agreed in *State of Florida v. Earl L. Penley* (276 So.2d 180):

We find that there is marked similarity between this ordinance and most vagrancy legislation in that both provide for punishment of unoffending behavior. This court, therefore, ...*[holds]* that the ordinance here under scrutiny draws no distinction between conduct that is calculated to harm and that which is essentially innocent.

*State v. Penley* refers specifically to a St. Petersburg anti-sleeping law, but the reasoning holds equally well for waking resting behaviors, and calls to mind the above-cited quote from *Jennings v. Superior Court*: “the welfare of San Francisco, if jeopardized at all by obstructors of the sidewalk, is jeopardized only by those who act with malice.” Sitting, qua sitting, is an innocent activity.

The Ninth Circuit has agreed quite recently in the 2006 case *Edward Jones et al. v. City of Los Angeles* (444 F.3d 1118): “Whether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human.” While *Jones v. Los Angeles* has been depublished, it is important to note that the legal argument comes from a court in whose jurisdiction we are (and whose composition has not changed since 2006), and was depublished not for any flaws in the argument, but because of a settlement during appeals between the plaintiffs and the City of Los Angeles.

#### *Fourteenth Amendment: Equal Protection and Due Process*

As explained by almost every proponent of a sit/lie ordinance in mass media and in community meetings, the overt purpose of such a law involves targeted enforcement and the removal of particular people

<sup>11</sup> Ultimately, *BCHP v. Berkeley* was settled before adjudication, but part of the settlement required

*Berkeley* to repeal its sit/lie ordinance. Over a decade later, *Berkeley* did enact another sit/lie ordinance, which has not yet been challenged in court.

from public spaces based on economic and housing status, or on perceived “thuggishness” independent of other criminal wrongdoing. This is well documented. This is also entirely unconstitutional. When Atlanta's “urban camping” ordinance (which was effectively a sit/lie law without a “sit” component) was challenged on equal protection grounds by Charles Richardson et al., the City wisely opted to settle (N.D. Ga. Aug. 28, 1997). New Orleans, too, chose to settle when its sit/lie law was challenged on equal protection grounds by five homeless people (Henry v. New Orleans, E.D. La. 2005).

In *City of Chicago v. Jesús Morales et al.* (199 527 U.S. 41), Justice John Paul Stevens wrote for the Court that the freedom to remain stationary in public,

...for innocent purposes is part of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this “right to remove from one place to another according to inclination” as “an attribute of personal liberty” protected by the Constitution... *Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is “part of our heritage”* *Kent v. Dulles*, 357 U.S. 116, 126 (1958), or the right to move “to whatsoever place one's own inclination may direct” identified in Blackstone's Commentaries. 1 W. Blackstone, *Commentaries on the Laws of England* 130 (1765). (*emphasis added*)

While *Chicago v. Morales* addressed a loitering ordinance, it seems unlikely that the Court's ruling on “remain[ing] in a public place of [one's] choice” would apply differently to sitting and standing.

### **A Sit/Lie Ordinance Would Incur Inexcusable Costs**

You will note, above, that when sit/lie laws have been challenged, municipalities have very frequently been forced to pay settlements to homeless plaintiffs. The factors involved in a lawsuit (attorneys' fees, settlement, etc.) are only one facet of the expenditures that the City is likely to incur if it chooses to enact a sit/lie law.

Captain Teresa Barrett of Park Station has claimed that the purpose of a sit/lie law is to issue so many citations to homeless people that Superior Court judges will be willing to issue stay-away orders from Haight Street (and, presumably, as we can expect the ordinance to apply citywide, from other commercial corridors). Ignoring, for the moment, the unconstitutionality of the proposal and its legal ludicrousness, it would be outrageously expensive to implement.

Stay-away orders are available to the court as a term of probation. That is, they are options *only in sentencing*, and only for cases that would allow incarceration—i.e., misdemeanors and felonies. Thus, an officer issuing a citation for the sit/lie ordinance currently proposed would have to know that the accused had already received a citation for the law within the past thirty days, and cite as a misdemeanor. One of two things would then need to happen: Either the accused would need to voluntarily show up to court (which is, frankly, unlikely, given the appearance rates for similar laws such as MPC 22 and PC 647(e)), or the citing officer would need to take the accused into custody for booking at County Jail.

As County Jail is already full, this leaves the Sheriff's Department in the position of either choosing to “cite out” the accused (who, again, will likely never appear at court), selecting misdemeanor and commuted-felony Barabbases in order to make room for sidewalk sitters, or seeking more funds in order to accommodate all.

In either of the latter two cases, the Sheriff's Department will then need to hold the accused at substantial cost until a trial date. The courts, in this recession, are currently so backed up that trial dates are usually scheduled many months out. The District Attorney's Office, which last year laid off both misdemeanor and felony prosecutors, would then need to move at least one attorney to prosecute these new cases. The Public Defender's Office would be required to provide counsel. That latter office is already “conflicting out” some of its cases because of its budget shortfall, and would no doubt need to conflict out further in order to provide adequate counsel. This means an additional cost for the courts, which bear the burden for the private sector attorneys who contract as conflicts counsel.

The combined costs for the Sheriff's Department, the District Attorney's Office, and the Superior

Court would be substantial for every individual charged, and the outcome is far from sure: It is, frankly, just as likely that a judge would be outraged at the aforementioned ludicrousness of the request as cooperative with Captain Barrett's plan.

It is conceivable that the District Attorney's Office, at the Police Department's request, could seek a preliminary injunction against homeless people who do not appear at court for their restraining order hearings, but it is highly unlikely that any attorney in this country could make a good case for the "irreparable harm" that is caused by sitting on the sidewalk. In fact, as mentioned above in *Jennings v. Superior Court*, judges in San Francisco have already determined that sitting without malice *does not* harm San Francisco.

Given this, it is difficult to justify these substantial costs on any but the most cynical political grounds.

## Ethical Considerations

### Social Division

A local sit/lie law will not decrease homelessness, and will not even honestly attempt to address the issues that residents of the Upper Haight are concerned about. It will be in violation of both the US and California Constitutions. It will be bad social policy, and bad law. But more important than either of these concerns, a sit/lie ordinance would be ethically wrong.

The purpose of a sit/lie law, as explained by both Captain Barrett and Chief Gascón, is to drive certain people away from the Haight—*people who have not been found guilty of committing any crime against person or property*. The mechanisms explained by the two officers differ—Captain Barrett proposes that stay-away orders will be employed, while Chief Gascón has a slightly less legalistic take on how police officers can be used for the end of "displacement" (his term)—but the end is the same. One purpose of our criminal justice system—and part of the reason that we have jails, prisons, and stay-away orders—is to isolate criminals from members of society whom they may harm. But the people who would receive tickets under a sit/lie law would most likely *not* have any other criminality in common: the only crime of which they would be legally charged is sitting. It is obvious that their *non*-criminal commonality will be homelessness. The result is that a sit/lie law will create a divided society, in which certain neighborhoods are only accessible to people of certain income brackets, while those too poor to afford rent will be confined to parts of town where they will most likely have less access to income opportunities and social services, and will be further alienated from and by our society.

This is especially tragic when we bear in mind that the people targeted by the currently proposed legislation are young people, most of whom have left their homes because they are not safe at home: whether because of the parental abuse that is far too widespread in our society, or the homophobia that characterizes far too much of the United States. That these young people—many of them minors—would leave abusive environments elsewhere and come to San Francisco, only to be further alienated by this "wide open city" is unconscionable.

### Discretion and Discrimination

In Park Station Community Meetings on January 12 and February 23, Captain Barrett assured the public that a sit/lie ordinance would not apply to homeowners, merchants, or "nice" homeless people. Obviously, police discretion is a very real concern. A realistic view of modern US policing must recognize that police will *always* be required to use a modicum of discretion: This is not under debate. *But our core objection is that legality and criminality should never be determined by discretion alone.* This is when, in the words of the Shuttlesworth Court, discretion "bears the hallmark of a police state." The notion, one supposes, is that we ought to have a police state for the poor and democracy for the wealthy. Examples of such societies fill Western history, from the Roman Republic of Spartacus' time to Jim Crow. These "democratic" exemplars are far from inspiring.

Discretion-based criminality creates too much room for the very human failing of discrimination.

When discrimination is effectively legislated, doors are opened for extraordinary cruelty. The most glaring recent and local example of the dangers of discriminatory policing is perhaps from December 1 of last year: Officer Trevor Kelly of Park Station shot and killed a dog tied up near a children's playground in the Panhandle while its owners were present, and while it was not threatening any human beings, simply because the dog's owners were homeless. There's clear reason to believe that Officer Kelly may have a grudge against homeless people: In November of the prior year, Officer Kelly was accused of beating up a young man, and throughout late 2008 and 2009, young homeless women in the Haight and in Golden Gate Park have accused Officer Kelly of stalking them. Clearly, this is a matter for the Office of Citizen Complaints and the Police Commission, but it's important to understand that our city's and our state's anti-homeless laws create an environment in which the police abuse of homeless people is not only acceptable, but is borderline legislatively guaranteed.

## Solutions

The typical conservative critique of liberals and progressives is that they are big on concern, but weak on solutions. Let us be the first to admit that we are not policing policy experts, and we believe that the San Francisco Police Department *must* be at the table in determining how to address policing concerns. But we cannot accept that this solution must come at the expense of the rule of law, and the civil rights of our society's most vulnerable citizens.

We *are* experts in matters of homelessness, and we would like to bring to your awareness the dearth of homeless services available in the Haight—especially for adults. By a similar token, we need to recognize that the Tenderloin is a neighborhood—not a prison colony—and that it is inappropriate to expect all poor people in San Francisco to be satisfied with SRO hotel rooms in this one neighborhood. If the City and County of San Francisco wants to help people in Golden Gate Park and on Haight Street access housing, it needs to recognize the need for affordable housing accessible to homeless people located near their existing communities in the neighborhood.

Finally, a word on policing: The current heavy-handed tactics in the Haight and in Golden Gate Park *do not work*. Conservatives in this city are enamored with the analogy of coupled social services and criminalization as a “carrot and stick.” The assumption that homeless people require coercion in order to access services is both ignorant of facts and insulting. The fact of the matter is that there is a waitlist for *every* City-funded service in San Francisco, and that there is a very high rate of turn-aways from the shelter system—a system which has only one shelter bed for every six officially recognized homeless people. When homeless people are coerced by the Community Justice Center or the San Francisco Police Department (usually coupled with the HOT Team) into social or behavioral health services, the particular services are frequently inappropriate for the mandated client.

Since the late 1980s, the City's most tired and ineffective response to homelessness has been police harassment. Every year, police issue literally tens of thousands of tickets to homeless people. This has not somehow dissuaded mythical Devil-may-care vagabonds from being willfully and defiantly homeless; homelessness has only increased. This approach is not only ineffective in addressing homelessness, but it is a tremendous waste of police officers' time. Every half hour that a police officer spends issuing a citation for sleeping on the sidewalk (“lodging”) or jay-walking is a half hour that she or he is *not* spending addressing real crimes for which a sit/lie ordinance has been falsely advertised as a solution. Certainly, a partial *real* solution might be the reallocation of SFPD's time toward crimes against person and property, and away from the harassment of vulnerable peoples for the commission of victimless crimes.

**Coalition on Homelessness**  
468 Turk Street  
San Francisco, CA 94102  
415.346.3740

On sit/lie and other civil rights issues, contact:  
Bob Offer-Westort, Civil Rights Organizer  
civilrights@cohsf.org