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Embracing “Choice” and Abandoning the Ballot: Lessons from Berkeley’s Popular Defeat of Sit-Lie

*Courtney Oxsen**

In November 2012, Berkeley voters defeated Measure S, an ordinance that would have made it illegal to sit down in Berkeley’s commercial districts during most of the day, a so-called “sit-lie” law.¹ Sit-lie laws have become increasingly prevalent nationwide as a means to combat the presence of homeless individuals in downtown areas,² ever since Seattle’s sit-lie regulation was upheld by the Ninth Circuit in 1996.³ The defeated ordinance would have been Berkeley’s second sit-lie law on the books, and the third nationally to be passed by the general voting populace.⁴ Debate over the efficacy and constitutionality of sit-lie laws has been fierce nationally and in individual localities. Proponents of the measure say sit-lie laws are a necessary tool for law enforcement to maintain order in public spaces, protect local economies and community members, and usher homeless people into public services.⁵ Opponents counter that the laws are

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1. Dylan Tokar, *Sharply-Divided Electorate Rejects Berkeley’s Most Controversial Measures*, SAN JOSE MERCURY NEWS, Nov. 19, 2012, http://www.mercurynews.com/top-stories/ci_22028527.

2. Kathryn Hansel, *Constitutional Othring: Citizenship and the Insufficiency of Negative Rights-Based Challenges to Anti-Homeless Systems*, 6 NW. J. L. & SOC. POL’Y 445, 447 (2011); NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 7 (2011), available at <http://www.nlchp.org/content/pubs/11.14.11%20Criminalization%20Report%20&%20Advocacy%20Manual,%20FINAL1.pdf> [hereinafter CRIMINALIZING CRISIS].

3. *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996).

4. Bob Offer-Westort, *Berkeley Rejects Sitting Prohibition and the San Francisco Model*, POOR MAGAZINE, Nov. 27, 2012, <http://www.poormagazine.org/node/4620>.

5. “While putting the homeless in jail for sleeping on the streets is certainly not the answer, using shoddy constitutional reasoning to block an ordinance that gives law enforcement officers tools to work with is not the answer either.” Emily N. McMorris, Jones v. City of Los Angeles: *A Dangerous Expansion of Eighth Amendment Protections Stifles Efforts to Clean Up Skid Row*, 40 LOY. L.A. L. REV. 1149, 1166 (2007) (internal citation omitted); Telephone Interview with John Caner, Executive Director, Downtown Berkeley Association (Nov. 27, 2012) (notes on file with author); Interview with Dr. Davida Coady, Executive Director, Options Recovery Services, in Berkeley, Cal. (Oct. 24, 2012) (recording on file with author); JESSICA CASSELLA ET AL., CITY HALL FELLOWS,

inhumane towards homeless individuals, ineffective as a solution to the crisis of homelessness in the United States or the economic woes of local businesses, and meant only to hide the homeless from view and preserve the comfort of the financially privileged.⁶

As viewed through a series of interviews⁷ with campaign organizers for and against Measure S, this paper will contextualize Measure S within the larger framework of the sit-lie movement nationwide. Section I will review the general debate and rhetoric around anti-homelessness laws nationally, as well as catalog the development of judicial responses to challenges of the laws. Section II will explore the specific debate around sit-lie, and the current state of in-effect sit-lie laws, in particular those which were cited by the Yes on S campaign as success stories and models. Section III presents the development of Measure S and its journey to the ballot, and the major leaders, financiers, and positions of both the Yes on S and No on S campaigns. Section IV examines the outcome of Berkeley's sit-lie vote largely *vis-à-vis* the perspectives of campaign organizers, both independently and in comparison with that of the only other city which has put a sit-lie law on the ballot, San Francisco. As the paper explicates, the failure of Berkeley's Measure S following the success of San Francisco's Measure L can be explained through an analysis of the political alliances at the local level, as well as campaigning techniques. Finally, Section V will propose applicable lessons from Berkeley's experience for municipalities, sit-lie proponents, and homelessness advocates facing the potentiality of a sit-lie measure and continued community discussion in their locality.

IMPLEMENTATION, ENFORCEMENT, AND IMPACT: SAN FRANCISCO'S SIT/LIE ORDINANCE ONE YEAR LATER 11 (2012), available at <http://wraphome.org/downloads/sitLieCHFReport.pdf>.

6. Malia Wollan, *Free Speech Is One Thing, Vagrants Another*, N.Y. TIMES, Oct. 19, 2012, <http://www.nytimes.com/2012/10/20/us/berkeley-targeting-homeless-proposes-ban-on-sidewalk-sitting.html>; Donald Saelinger, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL'Y 545, 546 (2006); Telephone Interview with Elisa Della Pianna, Director, East Bay Community Law Center Neighborhood Justice Clinic (Dec. 14, 2012) (notes on file with author); Interview with Bob Offer-Westort, Coordinator, Stand Up for the Right to Sit Down Campaign, in Berkeley, Cal. (Oct. 5, 2012) (recording on file with author).

7. Six interviews lasting from half an hour to two hours were conducted with organizers on both sides of Measure S. Interviews in person were recorded, interviews over the phone were not but detailed notes were transcribed. The interviews were a semi-structured dialogue, guided by open-ended questions.

I. THE NATIONAL CRISIS OF HOMELESSNESS AND THE CRIMES OF MISERY RESPONSE

The crisis of homelessness remains a major issue in current American society, on a national and local level.⁸ Cities across the nation have seen continued increases in homeless populations; meanwhile local government services such as affordable housing and shelters have stagnated or decreased.⁹ An increasingly common response to clashes between the homeless and the business community at the local level over the past two decades has been to enact or enforce already existing laws criminalizing certain acts that are especially prevalent or necessary to the homeless lifestyle.¹⁰ The rise in these conflicts increased sharply following the economic recession of the 1980s and the Reagan Administration’s policy of dramatically decreasing funding for poverty services.¹¹ The activities targeted by such laws include sleeping in public, camping in public, public urination or defecation, loitering, begging, “aggressive” panhandling, and most recently, sitting or lying down on public sidewalks. Laws regulating these activities are often referred to as “civility” laws or “public order” laws. Proponents argue that this suite of laws is merely a continuation of the longstanding Western legal tradition of regulating vagrancy and public nuisances.¹² Critics characterize them as “crimes of misery,” arguing that despite their universal applicability, these laws are passed only in response to the visible presence of homeless people in public spaces.¹³ Many cite the “broken windows” theory of community policing, pioneered in the early 1980s as the origin of civility laws.¹⁴ Under this theory, a proliferation of “minor” crimes is thought to lead to an increase in major crimes in a given community.¹⁵ Under Mayor Rudolph Giuliani, New York was the first city to experiment with a series of laws meant to address “quality of life crimes” such as loitering, littering, vandalism, public intoxication, prostitution, public urination, and panhandling.¹⁶

8. Casey Garth Jarvis, *Homelessness: Critical Solutions to a Dire Problem; Escaping Punitive Approaches by Using a Human Rights Foundation in the Construction and Enactment of Comprehensive Legislation*, 35 W. ST. U. L. REV. 407, 409 (2008); Hansel, *supra* note 2, at 446.

9. CRIMINALIZING CRISIS, *supra* note 2, at 14.

10. Jarvis, *supra* note 8, at 419; CRIMINALIZING CRISIS, *supra* note 2, at 17.

11. Jarvis, *supra* note 8, at 418.

12. John B. Mitchell, *Crimes of Misery and Theories of Punishment*, 15 NEW CRIM. L. REV. 465, 469 (2012).

13. *Id.* at 473.

14. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 301–02 (1998).

15. *Id.*

16. *Id.*

A. PHILOSOPHICAL AND SOCIOLOGICAL ORIGINS OF THE
CRIMINALIZATION OF HOMELESSNESS

The evolution of jurisprudence regarding sit-lie and other laws and regulations criminalizing homelessness has revolved around the root cause and nature of homelessness.¹⁷ In determining eligibility for relief in challenges to these laws, courts have grappled with the question of whether or not homelessness is “voluntary” or caused by personal deficiency, as both a sociological phenomenon and an individual fact-based inquiry. The “involuntary” image of homelessness as a status characterizes the homeless individual as a helpless victim impacted by larger structural forces.¹⁸ The converse of the blameless victim image is the homeless individual who somehow causes or perpetuates their own homelessness.¹⁹ In other words, this individual “chooses” homelessness in lieu of options society deems more appropriate, such as maintaining employment and a place of residence.²⁰ The implication then is that those who “choose” homelessness are lazy and looking for handouts. The former image proved more convincing to judges, and was therefore embraced by lawyers and advocates fighting laws criminalizing homelessness.²¹

B. LEGAL ORIGINS OF SIT-LIE AND OTHER “CRIMES OF MISERY”

The strain of legal thought which led to the current public policy trend of criminalizing acts related to homelessness can be traced back to the 1962 landmark Supreme Court case *Robinson v. California*.²² The case involved a California statute that made it a crime to “be addicted to the use of narcotics.”²³ Analogizing the condition of being addicted to the use of narcotics to being mentally ill or “afflicted with a venereal disease,”²⁴ the Court found the statute to constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. The exact result of the decision is still debated. Some theorists interpreted the decision to hold unconstitutional the criminalization of status.²⁵ Others read the decision to

17. See generally Wes Daniels, “Derelicts,” *Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687 (1997).

18. This perspective emerges from symbolic interactionism, the sociological doctrine that emphasizes the construction of the self through the larger society. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Robinson v. California*, 370 U.S. 660, 666–67 (1962); Benno Weisberg, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual “Crimes,”* 96 J. CRIM. L. & CRIMINOLOGY 329 (2005).

23. *Robinson*, 370 U.S. at 660.

24. *Id.* at 666.

25. *Powell v. Texas*, 392 U.S. 514 (1968); Jarvis, *supra* note 8, at 417; Weisberg, *supra* note 22 at 334.

mark the beginning of a constitutional requirement of volition for criminal liability, and that “involuntary” acts or those prompted by an uncontrollable compulsion are not criminally culpable.²⁶ The Eighth Amendment remains the primary channel used to challenge civility laws in court.

The Court revisited the issue in *Powell v. Texas* and, in a plurality opinion, held that the *Robinson* doctrine applied only to the criminalization of status, and not to acts related to status.²⁷ Powell was convicted for public intoxication and argued that the sanction punished his status as an alcoholic in violation of *Robinson*. The Court rejected this logic and limited the *Robinson* holding, noting that a broader reading would negate criminal liability if a showing of “compulsion” were met.²⁸ In his concurring opinion, Justice White noted that the ruling would necessarily change if the facts were such that the law was applied to a homeless alcoholic.²⁹ The *Robinson* doctrine has subsequently been applied by courts in cases regarding alcoholism, mental illness, sexual disorder, and homelessness, with widely varying results.³⁰

The significance of the *Robinson* and *Powell* approaches specifically to other crimes of misery is that they triggered the core framework for current debate over sit-lie laws.³¹ Courts that have applied the *Robinson/Powell* doctrine to cases of homelessness have struggled to come to a definitive conclusion over its scope. However, the debate has tended to hinge on two elements that pervade sit-lie rhetoric: whether acts derivative of status are protected under the Eighth Amendment, and the issue of choice, or volition, in the status of homelessness and its attendant conduct.

Pottinger v. City of Miami was the first case to apply the *Robinson/Powell* doctrine specifically to the criminalization of the homeless or crimes of misery.³² Plaintiffs challenged Miami’s laws against eating, congregating, and sleeping in public places as applied to homeless people, arguing that their homeless status was involuntary and beyond their ability to alter. The Court found that homeless people rarely become so as a result of their own choice. It also focused on the huge population of homeless individuals in Miami compared with its limited shelter offerings. These two findings led the Court to conclude that Miami’s homeless population had nowhere to conduct the prohibited involuntary, life-

26. Weisberg, *supra* note 22, at 334.

27. *Powell*, 392 U.S. at 544; Jarvis, *supra* note 8, at 423.

28. *Powell*, 392 U.S. at 546.

29. *Id.* at 551.

30. Kathryn Kizer, *Behind the Guise of Gang Membership: Ending the Unjust Criminalization*, 5 DEPAUL J. FOR SOC. JUST. 333, 336 (2012).

31. See generally Weisberg, *supra* note 22.

32. *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1563 (S.D. Fla. 1992); Elizabeth M. M. O’Connor, *The Cruel and Unusual Criminalization of Homelessness: Factoring Individual Accountability into the Proportionality Principle*, 12 TEX. J. C.L. & C.R. 233, 256 (2007).

sustaining activities other than in public, thus risking arrest and criminal sanction. Miami was enjoined from enforcing the ordinances.

Pottinger's approach, linking a given municipality's offerings of shelter with the voluntariness of homeless individuals' public conduct, was rejected by the court in *Joyce v. City and County of San Francisco*.³³ The judge in *Joyce* reasoned that the availability of sufficient shelter beds for the population was not definitive of homeless "status" because status cannot be correlated to "the discretionary acts of others."³⁴ The court in *Joyce* found homelessness to be better classified as a condition instead of a status, emphasizing that homelessness, unlike race, national origin, gender, or illness, is largely predicated on voluntary choices.³⁵ The court read *Robinson* to apply only to status explicitly, and not to acts derivative of a status, in line with *Powell*.³⁶ Finally, foreshadowing some of the major themes in Berkeley's Measure S campaign, the *Joyce* court also explored in great detail whether the plaintiffs were "actually homeless."³⁷

A California Appeals Court recently had the opportunity to analyze the *Robinson/Powell* dichotomy in the case of a homeless alcoholic in *People v. Kellogg*,³⁸ as portended by Justice White's concurring opinion in *Powell*. The court rejected Justice White's position, holding that the plaintiff was arrested for his particular disorderly conduct while being intoxicated in public, not his status as a homeless alcoholic, despite the argument that *Kellogg* suffered from severe mental illness and had been unable to find stability in a shelter.³⁹

Beyond the voluntariness of the sanctioned conduct, the "legitimacy" of a plaintiff's homelessness, and the availability of shelter, courts have also focused on the availability of the necessity defense to strike down *Robinson* challenges.⁴⁰ In *Tobe v. City of Santa Ana*, the California Supreme Court rejected a challenge to the city's laws against camping and storing personal belongings in public places, a typical law in the "crimes of misery" suite.⁴¹ The opinion was careful to note that for the "truly homeless," there may be the possibility of the defense of necessity.⁴² In

33. *Joyce v. City & Cnty. of San Francisco*, 846 F. Supp. 843, 849 (N.D. Cal. 1994).

34. *Id.* at 857.

35. *Id.*

36. *Id.*

37. *Id.* at 849. On appeal at the Ninth Circuit, the case was dismissed on standing grounds, as a new mayor had abandoned the program in question. *Joyce v. City & Cnty. of San Francisco*, 87 F.3d 1320 (9th Cir. 1996).

38. *People v. Kellogg*, 119 Cal. App. 4th 593 (Cal. Ct. App. 2004).

39. *Id.* at 602, 605.

40. See generally Antonia K. Fasanelli, *In Re Eichorn: The Long Awaited Implementation of the Necessity Defense in A Case of the Criminalization of Homelessness*, 50 AM. U. L. REV. 323 (2000).

41. *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069 (1995).

42. *Id.* at 1118. "Assuming arguendo the accuracy of the declarants' descriptions of the circumstances in which they were cited under the ordinance, it is far from clear that none

another challenge to an anti-camping ordinance in Florida, the Eleventh Circuit rejected the Eighth Amendment claim because the law punished conduct, not status.⁴³

II. WHY SIT-LIE? THE NATIONAL DEBATE

The debate over laws prohibiting sitting and lying down on sidewalks has remained largely the same in the two decades since the first laws were passed. Those in favor of restricting sitting and lying down on sidewalks feel that the presence of homeless people in commercial districts, or even in the entire city, detracts from other community members' enjoyment of the public space. Another frequently cited issue is the impact that the presence of large groups of homeless people or panhandlers on the street has on local business, tourism, and the economic health of the municipality.⁴⁴ Proponents point to the need for civility in public spaces, and adopting model behavior laws for busy city districts.⁴⁵ Ushering homeless people into much-needed services, and preventing tangential criminal behavior such as assault, public intoxication, drug sales, and harassment, are motives and projected outcomes of the ordinances. A pervasive sentiment is also that the community or municipality contributes significantly to public services that go underutilized, and therefore more tactics are necessary to combat the issues of homelessness and public disorder, such as sit-lie laws and related measures. The criticism of the opposition's stance is rooted in the notion that living on the streets is inhumane, and that the opponents of sit-lie fetishize and enable those inhumane living conditions. The supporting parties are thematic as well in most of the cities with sit-lie ordinances. Typically measures are supported by city officials such as the mayor, police chief, or city attorney, as will be discussed later in this section. Commercial district business associations, chambers of commerce, and local business owners also tend to support sit-lie measures.

Groups in opposition to sit-lie measures have also echoed the same concerns since their inception. First, they state that sitting is a normal activity and criminalizing it is irrational or absurd. Critics of sit-lie laws claim that the law is subject to selective and discriminatory enforcement against homeless people in violation of constitutional rights.⁴⁶ Sit-lie laws in conjunction with other measures criminalizing homelessness, they argue, punish a person for their homeless status.⁴⁷ Cities do not provide sufficient

had alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations." *Id.* at 1105.

43. *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000).

44. O'Connor, *supra* note 32, at 241; Saelinger, *supra* note 6, at 545, 552 (cities tend to enforce laws most severely in anticipation of tourist season or when attempting to revitalize downtown areas).

45. Wollan, *supra* note 6.

46. CRIMINALIZING CRISIS, *supra* note 2, at 7.

47. Hansel, *supra* note 2, at 447.

services, including shelter beds, affordable housing, and health care for their homeless populations.⁴⁸ Citation fines are prohibitive for the indigent, and outstanding criminal records only create barriers to access services such as housing, employment, and health care, instead of facilitating access to those services.⁴⁹ Their sentiment is that the true motive of sit-lie laws is to remove homeless people from sight, or from the municipality as a whole, rather than truly address the core causes of homelessness.⁵⁰ Finally, the cost of enforcing sit-lie laws on the streets and in the courts would be better used expanding services for the populations at which the laws are disproportionately directed.⁵¹ Opponents of sit-lie laws tend to be service providers, legal services and civil liberties organizations, and homeless people.⁵²

Both proponents and critics of sit-lie laws agree on core issues about homelessness and municipal wellbeing. Each side of the debate acknowledges that sit-lie laws are primarily targeted at homeless people. They also agree wholeheartedly that homelessness is a pervasive issue that deserves the policy attention of local lawmakers and residents.⁵³ Both support some degree of local services for homeless populations. What they cannot reconcile is the root cause of the issue of homelessness, or the appropriate response. Proponents of sit-lie measures conceive of homelessness as an issue of individual choice and behavior, and a perceived common definition of order and decency in the public sphere. Opponents see the issue in terms of human rights, government responsibility, and economic disparity.

A. SIT-LIE JURISDICTIONS: THE DEVELOPMENT OF THE SIT-LIE MOVEMENT

Over 30 cities have passed some version of a sit-lie ordinance into law. It is important to note that sit-lie measures differ from sidewalk obstruction measures, which simply limit the obstruction of the sidewalk, whether with one's person or one's belongings, so that persons or wheelchairs are unable

48. O'Connor, *supra* note 32, at 235.

49. Wollan, *supra* note 6.

50. Saelinger, *supra* note 6, at 545.

51. CRIMINALIZING CRISIS, *supra* note 2, at 9; Ariel Messman-Rucker, *Berkeley Chooses Compassion: Measure S Rejected by Voters*, STREET SPIRIT, Dec. 5, 2012, <http://www.thestreetspirit.org/berkeley-chooses-compassion-measure-s-rejected-by-voters>.

52. Examples include the National Lawyers Guild and the ACLU. See Dan Kwak, *National Lawyers Guild Joins Opposition to Berkeley Sidewalk Measure*, DAILY CALIFORNIAN (Sept. 25, 2012), <http://www.dailycal.org/2012/09/25/national-lawyers-guild-joins-opposition-to-berkeley-sidewalk-measure/>; CRIMINALIZING CRISIS, *supra* note 2, at 16 (noting that the report's advocacy manual is intended to help "advocates, service providers, attorneys, and homeless people combat such counterproductive laws and policies").

53. Laila Kearney, *Voters on Both Sides of Measure S See Berkeley Homelessness as Problem, Says Campaigner*, BERKELEY PATCH (Nov. 12, 2012, 3:21 AM), <http://berkeley.patch.com/articles/voters-on-both-sides-of-measure-s-see-berkeley-homelessness-as-problem-says-campaigner>; McMorris, *supra* note 5, at 1166.

to pass. The Berkeley sit-lie debate was influenced by some major cities, whose ordinances were cited by the Measure S campaign as models.

1. Seattle, Washington: The Test Case

Seattle, Washington is often cited as the birthplace of the sit-lie law.⁵⁴ On October 4, 1993, the Seattle city council enacted an ordinance prohibiting sitting or lying down on the sidewalk downtown or in “neighborhood commercial zones” during business hours. The sit-lie ordinance was part of a package of “civility laws” proposed by then-city attorney Mark Sidran to respond to blight and resulting vagrancy in downtown Seattle.⁵⁵ Many of the laws in the package were already in existence, but were under-enforced, and the package reemphasized their enforcement.⁵⁶ In 1994, the ACLU joined with local legal service providers to represent homeless Seattle residents, as well as a diverse group of other plaintiffs who used the streets for business, political, and social reasons,⁵⁷ in challenging the first sit-lie law. The plaintiffs in *Roulette v. Seattle* brought causes of action on procedural and substantive due process grounds, the Equal Protection Clause of the Fourteenth Amendment, the right to travel, and free speech.⁵⁸ Plaintiffs’ motion for summary judgment was denied by the district court, which instead granted the city’s cross-motion for summary judgment ruling the ordinance facially constitutional.⁵⁹ On appeal at the Ninth Circuit in 1996, the petitioners narrowed the focus of their claims to First Amendment and substantive due process grounds.⁶⁰ The circuit court’s ruling was affirmed, thus sparking a wave of sit-lie laws across the West Coast, employing Seattle’s ordinance as a model.⁶¹

The circuit court’s reasoning for rejecting plaintiffs’ claims is instructive for the logic behind subsequent sit-lie movements and the design of the resulting ordinances. The circuit court judge found it relevant that Seattle’s law was not meant to completely expel homeless people from commercial districts, and that they could still enter to access needed services. Because of the ordinance’s limitations to commercial districts, the ordinance left open sufficient alternative areas of the city in which homeless people would be able to sit and lie down. Perhaps most

54. Heather Knight, *San Francisco Looks to Seattle: Did Sidewalk Siting Ban Help?*, SEATTLEPI.COM (Mar. 29, 2010, 10:00 PM), <http://www.seattlepi.com/local/article/San-Francisco-looks-to-Seattle-Did-sidewalk-888774.php>.

55. *Id.*

56. *Id.*

57. William M. Berg, Note, *Roulette v. City of Seattle: A City Lives With Its Homeless*, 18 SEATTLE U. L. REV. 147, 171 (1994).

58. *Roulette v. City of Seattle*, 78 F.3d 1425, 1426 (9th Cir. 1996).

59. *Id.* at 1426–27.

60. *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996).

61. Elizabeth Traugott, *Palo Alto’s Not Alone in Dealing with Sit-Lie Law*, PALO ALTO ONLINE (May 21, 1997), http://www.paloaltoonline.com/news_features/homeless/homeless.story2.php.

significantly, the court was compelled by the fact that the ordinance was only in effect from 7:00 A.M. to 9:00 P.M.

2. Santa Cruz, California: The “Ambassadors” Model

Santa Cruz is widely regarded as the premiere example of a successful sit-lie ordinance in California, including by the Measure S campaign.⁶² Both San Francisco and Berkeley looked to Santa Cruz as a model as they designed their sit-lie ordinances to put on the ballot. Santa Cruz passed its sit-lie law through the city council in 1994. Similarly to Berkeley, Santa Cruz is known as a progressive city with a thriving arts community and alternative scene, and is therefore an attractive city to travelers and homeless youth.⁶³ Like Berkeley, a downtown business association employs and funds a team of “City Hosts” to enforce the sit-lie ordinance and other laws aimed at “quality of life” offenses.⁶⁴ As a result, Santa Cruz has successfully reduced the behavioral issues associated with “sitters” congregating in its downtown commercial district, with few citations issued in the process.⁶⁵

3. Los Angeles, California: The *Robinson* Pioneer

The most significant legal battle regarding a sit-lie law other than *Roulette* revolved around Los Angeles’ notorious Skid Row in 2002. In response to efforts to revitalize downtown and pressure from the business community, Los Angeles’ new police chief, William J. Bratton, began enforcing a long-ignored sit-lie ordinance from 1968.⁶⁶ Data from 2006 indicates that Skid Row was home to approximately 12,000 of the city’s 80,000 homeless population, although the neighborhood’s shelter bed capacity was limited to approximately 10,000.⁶⁷

62. Lisa Aliferis, *Debating Berkeley’s Sit-Lie Ballot Measure*, KQED NEWS (Oct. 8, 2012), <http://blogs.kqed.org/election2012/2012/10/08/debating-berkeleys-sit-lie-ballot-measure/>; Wollan, *supra* note 6; Scott James, *Santa Cruz Reduces Street Crime, but Its Model Is Not Cheap*, N.Y. TIMES, Sept. 2, 2010, http://www.nytimes.com/2010/09/03/us/03bcjames.html?_r=0; Emilie Raguso, *Measure S: Will it Help or Hurt the Homeless*, BERKELEYSIDE (Oct. 31, 2012, 11:00 AM), <http://www.berkeleyside.com/2012/10/31/measure-s-will-it-help-or-hurt-the-homeless>.

63. Mike Rotkin, *Santa Cruz Is a Model for Berkeley Civil Sidewalks*, BERKELEYSIDE (Oct. 31, 2012, 5:00 AM), <http://www.berkeleyside.com/2012/10/31/santa-cruz-is-a-model-for-berkeley-civil-sidewalks/>.

64. Harcourt, *supra* note 14, at 301–02; Rotkin, *supra* note 63; James, *supra* note 62.

65. Rotkin, *supra* note 63; James, *supra* note 62.

66. Sarah Gerry, *Jones v. City of Los Angeles: A Moral Response to One City’s Attempt to Criminalize, Rather than Confront, Its Homelessness Crisis*, 42 HARV. C.R.-C.L. L. REV. 239, 241 (2007). Bratton was also the police chief in New York City at the time it pioneered the “Broken Windows” model of crime control. Samantha Masunaga & Ashley Griffin, *Meet William Bratton, Former Top Cop in LA and New York, Now Oakland’s Security Advisor*, OAKLAND NORTH (Feb. 20, 2013, 4:08 PM), <https://oaklandnorth.net/2013/02/20/meet-william-bratton-former-top-cop-in-la-and-new-york-now-oaklands-security-advisor/>.

67. Gerry, *supra* note 66, at 241.

The ACLU filed suit on behalf of six homeless individuals living in Skid Row who had been found in violation of the statute. In finding the statute an unconstitutional criminalization of status, the Ninth Circuit extended the *Robinson* doctrine to include acts that are an “integral aspect of [a given] status,” akin to the *Pottinger* analysis.⁶⁸ This is the only example of a court invalidating a sit-lie law. However, the unconstitutionality was rooted in that the ordinance applied to the entire city, at all times of day, leaving open less universal restrictions on sitting and lying down. The court also characterized the unconstitutionality as pertaining to those who were “involuntarily homeless” due to the lack of available shelter housing in Los Angeles. The effect of *Jones v. Los Angeles* was to open the floodgates to other cities in the Ninth Circuit’s jurisdiction to adopt their own variations of the sit-lie ordinance within the limits of *Jones*. As part of the settlement reached by the plaintiffs and the city, the opinion was ultimately depublished.⁶⁹ The Ninth Circuit remains the only circuit to have found that conduct derivative of a status violates the Eighth Amendment under the *Robinson* doctrine.⁷⁰

4. San Francisco, California: Election Success

San Francisco’s history with sit-lie laws dates back to the origin of the overturned law in *Jones*. Although Seattle is often cited as the birthplace of sit-lie, the San Francisco Board of Supervisors actually passed one of the first sit-lie laws of its kind in 1968.⁷¹ The law made it a misdemeanor to “willfully sit, lie or sleep in or upon any street, sidewalk or other public place in such a manner as to obstruct the free passage or use in the customary manner of such street, sidewalk, or public place.”⁷² A violation could carry up to a \$500 fine and up to a six-month jail sentence.⁷³ Mayor Joseph L. Alioto passed the law in reaction to the Haight-Ashbury Merchants and Improvement Association’s complaints about the impact of congregators on the commercial district.⁷⁴ He was careful to assert, however, that the measure should not be used to discriminate against groups or chill speech and dissent. Ultimately, the ACLU challenged the

68. Hansel, *supra* note 2, at 458.

69. *Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2007) (withdrawing the opinion in *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006)).

70. Gerry, *supra* note 66, at 246.

71. *The Mayor Signs Law on Sidewalks*, S.F. BAY GUARDIAN ARCHIVES, at <http://www.sfbg.com/PDFs/sidewalks.pdf> as in Heather Mac Donald, *The Sidewalks of San Francisco*, CITY JOURNAL, (2010), http://www.city-journal.org/2010/20_4_san-francisco-homeless.html.

72. *Id.*

73. *Id.*

74. Heather Mac Donald, *The Sidewalks of San Francisco*, CITY JOURNAL (2010), http://www.city-journal.org/2010/20_4_san-francisco-homeless.html; COALITION ON HOMELESSNESS, POSITION PAPER FOR A PROPOSED SIT/LIE ORDINANCE IN SAN FRANCISCO 3 (2012), available at <http://www.cohsf.org/reports/2010/sitLie.pdf>.

ordinance from a number of angles and the law was repealed by the Board of Supervisors in 1979.⁷⁵ Opponents alleged that it was enforced in a discriminatory manner by law enforcement against hippies, and later, homosexuals.

At approximately the same time that Seattle's sit-lie law was upheld in district court, San Francisco resurrected the sit-lie law discussion. Mayor Frank Jordan put Measure M on the ballot in November 1994, which would have created a misdemeanor offense for sitting or lying down on sidewalks in commercial districts between the hours of 7:00 A.M. and 10:00 P.M.⁷⁶ The measure was narrowly defeated by a "No" vote of 50.6% to 49.3%.⁷⁷ This was the first instance of a sit-lie ordinance being put to a vote by the residents of a municipality. Other cities had implemented sit-lie measures via the mayors and city councilmembers.

November 2010 brought another effort in San Francisco to effectuate a sit-lie ordinance by popular election. Then-Mayor Gavin Newsom presented a citywide ban to the Board of Supervisors in June, who declined to adopt it in an 8-3 vote.⁷⁸ In a controversial move, Mayor Newsom introduced Proposition L on the November 2010 ballot after the Board of Supervisor's voted against it.⁷⁹ The ordinance was explicitly modeled after Seattle's 1994 law.⁸⁰ The mayor found support for the measure in Police Chief George Gascon and Santa Cruz Mayor Mike Rotkin, who demonstrated solidarity by attending the initial Board of Supervisors discussion of the issue.⁸¹ Sixteen years after Measure M, Proposition L found major support in the merchants of the Haight-Ashbury district.⁸² Proponents argued that it was a necessary tool to regain civility in the sidewalks and for the police to respond to the sidewalk culture that was

75. *Jennings v. Superior Court*, 104 Cal. App. 3d 50 (Cal. Ct. App. 1980); Asaf Shalev, *Ghosts of Sit-Lie Past*, S.F. BAY GUARDIAN ONLINE (May 11, 2011, 1:08 PM), <http://www.sfbg.com/politics/2011/05/11/ghosts-sit-lie-past>.

76. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, NO HOMELESS PEOPLE ALLOWED: A REPORT ON ANTI-HOMELESS LAWS, LITIGATION AND ALTERNATIVES IN 49 UNITED STATES CITIES 31 (1994), available at <http://www.nlchp.org/content/pubs/NoHomelessPeopleAllowed19941.pdf>.

77. *Id.* (citing Mike Bruner, *Sidewalk Sitting Ban Is Defeated*, S.F. EXAMINER, Nov. 16, 1994, at B1).

78. *San Francisco's Prop L: Sit-Lie*, KQED NEWS (Oct. 27, 2010, 6:33 AM), <http://www.kqed.org/a/kqednews/RN201010270633/c>.

79. Joshua Sabatini, *City Hall Watch: SF Mayor's Sit-Lie Law Faces Setback*, S.F. BAY GUARDIAN (June 9, 2010), <http://www.sfexaminer.com/sanfrancisco/city-hall-watch-sf-mayors-sit-lie-law-faces-setback/Content?oid=2129897#ixzz1M6djwx00>.

80. Bay City News, *Santa Cruz Mayor Tells Supes He Supports Sit/Lie Law*, S.F. APPEAL (Mar. 1, 2010, 5:44 PM), <http://sfappeal.com/alley/2010/03/santa-cruz-mayor-tells-supes-he-supports-sit-lie-law.php>.

81. *Id.*

82. CITY HALL FELLOWS, *supra* note 5, at 10.

negatively impacting merchants.⁸³ Opponents countered that it was a violation of human rights and a criminalization of homelessness.⁸⁴

Proposition L was passed by voters, garnering 54.3% of the vote.⁸⁵ It is codified in Section 168 of the San Francisco Police Code.⁸⁶ The first violation of the ordinance is punishable by a fine between \$50 and \$100 and/or community service.⁸⁷ Fines for each subsequent violation can range from \$300 to \$500 and accrue over time.⁸⁸

5. Berkeley, California

Berkeley voters first passed a sit-lie measure in 1994: Measure O.⁸⁹ The measure also included an ordinance against aggressive panhandling. Coupled with the measure, the voters were offered an opportunity to increase social services funding for homeless and low-income residents of Berkeley, and they approved it. Service providers in Berkeley were divided on the “carrot-stick” measure. Most were opposed to the ordinances but conflicted about refusing the funds for services.⁹⁰ The ACLU and Berkeley Community Health filed suit quickly after its passage.⁹¹ After initially granting a preliminary injunction against its enforcement, the U.S. District Court for the Ninth Circuit dismissed following the decision in *Roulette v. Seattle*.⁹² Regardless of the victory, Berkeley’s newly elected city council opted to repeal the ordinance,⁹³ leaving intact a portion of the aggressive panhandling clause that prohibited aggressive panhandling near ATMs.

In 1998, Berkeley city council passed a law prohibiting lying down on sidewalks, which remains in effect.⁹⁴ Mayor Tom Bates attempted to resurrect the original scope of Measure O, but could not garner significant support to effectuate the law.

B. ARE SIT-LIE ORDINANCES EFFECTIVE?

Local leaders of cities that have implemented and maintained sit-lie laws praise their effectiveness in addressing issues revolving around congregating homeless youths in business districts and downtown areas. Mike Rotkin, former mayor of Santa Cruz, says that their ordinance was

83. CITY HALL FELLOWS, *supra* note 5, at 10.

84. CITY HALL FELLOWS, *supra* note 5, at 11.

85. CITY HALL FELLOWS, *supra* note 5, at 11.

86. CITY HALL FELLOWS, *supra* note 5, at 9.

87. CITY HALL FELLOWS, *supra* note 5, at 9.

88. CITY HALL FELLOWS, *supra* note 5, at 9.

89. Offer-Westort, *supra* note 4.

90. Interview with Carol Denney, Activist, in Berkeley, Cal. (Nov. 20, 2012) (recording on file with author).

91. Traugott, *supra* note 61.

92. Berkeley Cmty. Health Project v. City of Berkeley, 119 F.3d 794 (9th Cir. 1997).

93. Raguso, *supra* note 62.

94. BERKELEY, CAL., MUNICIPAL CODE § 13.36.015 (1998).

especially effective when coupled with the “city hosts” program, and ultimately resulted in “a dramatic reduction in problematic behaviors with few citations ever issued in the process.”⁹⁵ He reports, however, that an initial period of strictness ultimately required a number of stay-away orders to be issued to certain repeat offenders.⁹⁶ Kathleen Rawson, CEO of Downtown Santa Monica, Inc., is similarly satisfied with the success of its sit-lie law ordinance in conjunction with a street ambassador program.⁹⁷ As many as 75 cities across the country have similar sit-lie laws in effect.⁹⁸ However, little empirical data exists to measure the success of sit-lie laws in obtaining their presented goals.

In March 2012, San Francisco commissioned a report from the non-partisan City Hall Fellows on the impacts of the sit-lie ordinance, one year after enforcement began.⁹⁹ The report found that the law has been enforced with wide variance in San Francisco’s ten precincts. Park Station, with jurisdiction over the Haight-Ashbury district, reported issuing the most citations at 152 total for the nine-month period tracked by the report. Four other precincts issued between 15 and 59 citations. Five precincts issued between zero and three citations, including the Tenderloin, a district that was an anticipated hot spot for enforcement. Officers from the precincts with the lowest reported citations indicated that they primarily employed the ordinance’s verbal warning provision, or considered the ordinance a low priority for enforcement. In the Park Station precinct, over 90 percent of the 152 citations were issued to 19 repeat violators, with over 50 percent going to four offenders. Those offenders have accrued in some instances over \$20,000 in fines that are extremely unlikely to be paid. Most of the repeat offenders are older homeless individuals with substance abuse and mental health issues living in Golden Gate Park or the Haight street corridor, and over 85 percent of offenders were over the age of 30. This data and Park Station officers indicate that the younger homeless population responds to verbal warnings. Therefore, the sit-lie law in San Francisco is successfully deterring younger populations from occupying the Haight corridor sidewalk, but the most severely punished are the persistently homeless, most vulnerable individuals. As for the provision of the sit-lie ordinance that requires the city to “maintain a neighborhood outreach plan to provide the social services needed by those who chronically sit or lie down on a public sidewalk,” little evidence is available as to what referrals have been issued and whether or not individuals have been successfully connected to services because tracking referrals has not

95. Rotkin, *supra* note 63.

96. Rachel Swan, *Unfounded Fears*, EAST BAY EXPRESS, Oct. 3, 2012, <http://www.eastbayexpress.com/ebx/unfound-fears/Content?oid=3353227&showFullText=true>.

97. *Id.*

98. CRIMINALIZING CRISIS, *supra* note 2, at 7.

99. CITY HALL FELLOWS, *supra* note 5.

occurred. If any referral to services is offered by a law enforcement officer, it is typically a half-sheet of paper that indicates what services can be accessed by calling 311. Finally, the City Hall Fellows conducted a survey of over 50 merchants in the Haight district regarding Proposition L. Fifty-eight percent of merchants indicated that the occurrence of individuals sitting in front of their establishments has stayed the same or increased since the sit-lie ordinance was passed.

During the Measure S campaign season, opponents of Measure S commissioned a report on the efficacy of sit-lie laws nationally from the Berkeley Law Policy Advocacy Clinic.¹⁰⁰ The report sought to respond to the claims of Measure S and other sit-lie proponents regarding the purported goals of enacting the ordinances. Focusing on California jurisdictions that had passed sit-lie laws, the report found no meaningful evidence of increased economic activity.¹⁰¹ The report also found that the Berkeley business districts claiming to have suffered the most from the presence of homeless congregators, Telegraph and Shattuck Avenues, have actually fared best of all of Berkeley’s nine business districts since the economic downturn in 2008.¹⁰² Measure S campaign organizers criticized the study for only examining economic data from 2008 to the present, alleging that data from years earlier shows a considerable decline in economic activity in those neighborhoods compared with the rest of Berkeley.¹⁰³

Organizers of the Yes on S campaign expressed that both the City Hall Fellows and Berkeley Policy Advocacy studies were biased against sit-lie. John Caner asserted that the timing of the Berkeley Policy Advocacy’s report release did not allow them to respond in time with independent research.¹⁰⁴ He characterized San Francisco’s sit-lie measure as moderately successful despite the City Hall Fellows report’s condemnation.¹⁰⁵ Mr. Caner’s colleagues in Seattle testified to him that, following that city’s ordinance, the troublesome population was absent from the downtown commercial areas the ordinance impacted.¹⁰⁶ He reiterated Mayor Rotkin and Mayor Rawson’s successful implementation of the verbal warning

100. JOSEPH COOTER, ERICKA MEANOR & EMILY SOLI, DOES SIT-LIE WORK? WILL “MEASURE S” INCREASE ECONOMIC ACTIVITY AND IMPROVE SERVICES TO HOMELESS PEOPLE? (2012), available at <http://www.law.berkeley.edu/files/1023sit-lie2.pdf>.

101. *Id.* at 4.

102. *Id.* at 5.

103. Roland Peterson, *Letter to the Editor: Measure S Will Create More “Welcoming and Friendly” Commercial Districts*, BERKELEY PATCH (Nov. 5, 2012, 9:01 PM), <http://berkeley.patch.com/articles/letter-to-the-editor-measure-s-will-create-more-welcoming-and-friendly-commercial-districts>.

104. Telephone Interview with John Caner, Executive Director, Downtown Berkeley Association (Nov. 27, 2012) (notes on file with author).

105. *Id.*

106. *Id.*

provisions of their ordinances without ever issuing citations under the sit-lie law.

III. MEASURE S: RESURRECTED BY THE ELECTION AVENUE

Berkeley Mayor Tom Bates first introduced the “Civil Sidewalks” ballot initiative in June of 2012 by putting it on the June 12th city council meeting agenda.¹⁰⁷ Measure S was Mayor Bates’ second effort to put sit-lie on the ballot in as many years. He first introduced the measure in spring of 2011, but the city council declined to consider it after UC Berkeley students and local residents expressed opposition to and protested against the measure.¹⁰⁸ Mayor Bates’ second sit-lie proposal in 2012 was similarly controversial. At the June 12th city council meeting, a large protest of over seventy demonstrators formed on the steps of City Hall, where they held a news conference.¹⁰⁹ Protestors carried signs that read, “Stand Up for the Right to Sit Down.”¹¹⁰ Over 100 community members on both sides of the issue participated in a heated public comment debate that went far into the night.¹¹¹ At the apex of the meeting, opponents of the measure were singing “We Shall Not Be Moved,” prompting Mayor Bates to call for a vote.¹¹² The measure passed 6-1, with councilmembers Jesse Arreguin and Kriss Worthington (both having already expressed opposition to the measure) declining to vote because they alleged that many community members had not yet had a chance to speak.¹¹³ The ACLU of Northern California wrote a letter to the city council, dated August 13th, alleging violations of the council’s own procedure and the Brown Act in how the

107. Alyssa Neumann, *Measure That Would Restrict Sitting on City Sidewalks Aimed for November Ballot*, DAILY CALIFORNIAN, June 1, 2012, <http://www.dailycal.org/2012/06/01/measure-that-would-restrict-sitting-on-city-sidewalks-aimed-for-november-ballot/>;

Interview with Dr. Davida Coady, Executive Director, Options Recovery Services, in Berkeley, Cal. (Oct. 24, 2012) (recording on file with author).

108. Alyssa Neumann, *supra* note 107; Adelyn Baxter, *Sit-Lie Ordinance Protestors March to Council Meeting*, DAILY CALIFORNIAN, Apr. 27, 2011, http://archive.dailycal.org/article/112972/sit-lie_ordinance_protesters_march_to_council_meet.

109. *Berkeley City Council Considers Strict Sit-Lie Ordinance, Inspires Protests*, KTVU.COM (June 12, 2012, 6:45 PM), <http://www.ktvu.com/news/news/local-govt-politics/berkeley-city-council-considers-strict-sitlie-ordi/nPSx3/>.

110. This later became the slogan of the opposition to Measure S. Alan Wang, *Berkeley City Council Passes Sit-Lie Ordinance*, ABC7 NEWS (June 12, 2012), http://abclocal.go.com/kgostory?section=news/local/east_bay&id=8699031.

111. *Id.*; Oksana Yurovsky, *Despite Public Outcry, Civil Sidewalks Passes for November Ballot*, DAILY CALIFORNIAN, June 13, 2012, <http://www.dailycal.org/2012/06/13/despite-public-outcry-civil-sidewalks-measure-passes-for-november-ballot>.

112. Adelyn Baxter, *ACLU Sends Letter to Berkeley City Council Alleging Brown Act Violation*, DAILY CALIFORNIAN, Sept. 9, 2012, <http://www.dailycal.org/2012/09/09/aclu-sends-letter-to-berkeley-city-council-alleging-brown-act-violation/>.

113. *Id.*

measure was brought to a vote.¹¹⁴ Specifically, it alleged that Mayor Bates and the council members supportive of putting Measure S on the ballot met and discussed the measure privately during recess. A writ was later filed by David Waggoner, Managing Attorney of the Homeless Action Center, claiming the same violations.¹¹⁵ The writ was denied by the court.¹¹⁶

A. MEASURE S: THE NUTS AND BOLTS

Measure S as written prohibited sitting or lying down on a “Commercial Sidewalk” from the hours of 7:00 A.M. to 10:00 P.M.¹¹⁷ The language of the statute included a number of exceptions for circumstances including medical emergencies, individuals using wheelchairs, sitting on public benches or bus stops, and events for which permits have been obtained.¹¹⁸ The measure also included a provision that declared it would not be enforced in violation of the United States or California constitutions.¹¹⁹ An offender’s first violation of the ordinance would be charged with an infraction, subject to community service or a \$75 fine.¹²⁰ “Subsequent violations may be charged as either an infraction or misdemeanor.”¹²¹ The text of the measure also provided that a warning by law enforcement would be necessary prior to issuing an infraction.¹²² The ordinance was modeled largely off of the Seattle and San Francisco examples. Proponents of the measure suggest that Berkeley is “committed” to expunging citations for those offenders who enter social services, although the text of the measure is silent on this issue, and spokespeople indicated forgiveness would be left to the discretion of the judge.¹²³

B. YES ON S: BERKELEY CIVIL SIDEWALKS

Mayor Bates found a significant amount of support from Berkeley constituents for Measure S. Initial proponents included Roland Peterson,

114. Letter from Michael T. Risher, Staff Attorney, ACLU of Northern California, to Tom Bates, Mayor, Berkeley, Cal. & Berkeley City Councilmembers (Aug. 13, 2012), *available at* <http://www.dailycal.org/2012/09/09/aclu-sends-letter-to-berkeley-city-council-alleging-brown-act-violation>.

115. Interview with Patricia Wall, Executive Director, Homeless Action Center, in Berkeley, Cal. (Oct. 5, 2012) (recording on file with author).

116. Interview with Patricia Wall, Executive Director, Homeless Action Center, in Berkeley, Cal. (Oct. 5, 2012) (recording on file with author).

117. Ballot Question and Full Text, Measure S, *available at* <http://www.ci.berkeley.ca.us/uploadedFiles/Clerk/Elections/Sidewalks%20-%20Question%20and%20Text%20ONLY.pdf>.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*; COOTER, ET AL., *supra* note 100; *Forum: Measure S: Berkeley’s Proposed Sit-Lie Ban*, KQED (Oct. 5, 2012, 9:00 AM), *available at* <http://www.kqed.org/a/forum/R201210050900>.

Executive Director of the Telegraph Business Association,¹²⁴ and Councilmember Gordon Wozniak (who has been called “the most pro-development member of the council”).¹²⁵ Ultimately, Yes on S supporters included Davida Coady, MD, MPH, Executive Director of Options Recovery Services in Berkeley;¹²⁶ as well as numerous Telegraph and Shattuck district business owners;¹²⁷ and John Caner, CEO of the Downtown Berkeley Association for over 20 years.¹²⁸ Once the measure was officially on the ballot, Mr. Caner reduced his CEO position to half-time and assumed a leadership position in the Yes on S campaign as a citizen. The measure was also supported by Livable Berkeley,¹²⁹ a nonprofit coalition of local “citizens, environmental leaders, social equity advocates, design professionals, city planners and progressive builders” who support local policies and organize events that improve Berkeley’s quality of life.¹³⁰ The coalition was formed easily as the many supporters were longtime colleagues and friends as fellow residents of Berkeley.¹³¹ Also, the coalition had begun to take shape in the wake of the previous year’s abandoned ballot measure.¹³²

The Coalition for Berkeley Civil Sidewalks/Yes on S campaign was funded primarily by local commercial landowners, trusts, limited liability corporations, and local businesses.¹³³ Donors also included the Berkeley Alliance for Progress, a coalition working to provide opportunities for

124. Alyssa Neumann, *supra* note 107.

125. Judith Scherr, *Preservationists Double-Team Gordon Wozniak*, EAST BAY EXPRESS, Aug. 25, 2010, <http://www.eastbayexpress.com/ebx/preservationists-double-team-gordon-wozniak/Content?oid=2018235>.

126. Roland Peterson, *Challenges Still Remain for the City*, DAILY CALIFORNIAN, Nov. 16, 2012, <http://www.dailycal.org/2012/11/16/challenges-still-remain-for-the-city>.

127. Craig Becker, *We Can Do Better with Civil Sidewalks*, BERKELEYSIDE, <http://www.berkeleyside.com/2012/09/19/measure-s-we-can-do-better-with-civil-sidewalks>, (last visited Oct. 18, 2013).

128. Telephone Interview with John Caner, Executive Director, Downtown Berkeley Association (Nov. 27, 2012) (on file with author).

129. Argument in favor of Measure S, *available at* <http://www.ci.berkeley.ca.us/uploadedfiles/clerk/elections/argument%20in%20favor%20of%20measure%20s.pdf>.

130. LIVABLE BERKELEY, <http://www.livableberkeley.org/about> (last visited Oct. 17, 2013).

131. Telephone Interview with John Caner, Executive Director, Downtown Berkeley Association (Nov. 27, 2012) (notes on file with author).

132. Telephone Interview with John Caner, Executive Director, Downtown Berkeley Association (Nov. 27, 2012) (notes on file with author).

133. Berkeley Election Reform Act (BERA) 2012 Contribution List (Dec. 12, 2012, 6:14 PM), <http://www.ci.berkeley.ca.us/uploadedFiles/Clerk/Elections/2012%20Contribution%20List.pdf>; Berkeley Sit-Lie Ordinance, Measure S (Nov. 2012); BALLOTPEdia, *Berkeley Sit-Lie Ordinance, November 2012*, [http://ballotpedia.org/wiki/index.php/Berkeley_Sit-Lie_Ordinance_Measure_S_\(November_2012\)](http://ballotpedia.org/wiki/index.php/Berkeley_Sit-Lie_Ordinance_Measure_S_(November_2012)) (last visited Sept. 28, 2013); Voters Edge, *Measure S: Sitting on Sidewalks*, BERKELEYSIDE, <http://votersedge.org/berkeley/ballot-measures/2012/november/measure-s/funding> (last visited Sept. 29, 2013); Becky O’Malley, *Following the Money Behind Berkeley Ballot Measures*, BERKELEY DAILY PLANET (Oct. 12, 2012, 9:58 AM), <http://www.berkeleydailyplanet.com/issue/2012-10-12/article/40324?headline=Following-the-Money-Behind-Berkeley-Ballot-Measures--By-Becky-O-Malley>.

Berkeley's youth.¹³⁴ A handful of individual donors were also represented, such as Richard Beahrs, environmental entrepreneur and board member of the San Jose Giants baseball franchise; Aileen Dolby, Senior Vice President of Colliers International, a commercial real estate company;¹³⁵ and Margit Roos-Collins, a Berkeley High volunteer and author of "The Flavors of Home: A Guide to Wild Edible Plants of the Bay Area."¹³⁶ As of October 21, 2012, the Yes on S campaign had raised \$90,850 according to Berkeley disclosures.¹³⁷

C. NO ON S: STAND UP FOR THE RIGHT TO SIT DOWN

The Stand Up for the Right to Sit Down/No on S campaign was formed out of two legal services nonprofits in Berkeley, the Alameda County Homeless Action Center (HAC) and the East Bay Community Law Center Neighborhood Justice Clinic (EBCLC). It included previously homeless individuals, local artists, and organizers. A number of political clubs endorsed No on S, including eighty percent of local Democratic Clubs and every active local party except the Republicans.¹³⁸ The UC Berkeley ASUC Senate passed a resolution to officially oppose Measure S.¹³⁹ The No on S coalition was born out of the leadership of EBCLC and HAC, two neighboring legal advocacy organizations who work with Alameda County's homeless and low-income populations to provide direct services. Similarly to No on S, the organizers, including Patricia (Pattie) Wall, Executive Director of HAC, Osha Neumann, Consulting Attorney at EBCLC and a well-known local homeless rights lawyer, and Elisa Della-Pianna, Director of the EBCLC Neighborhood Justice Clinic, were close colleagues prior to the introduction of Measure S to the ballot.

The campaign was funded primarily by individual donations ranging from \$50 (the minimum amount required to be reported by Berkeley law) to \$5,018, from Patricia E. Wall. Many of the larger donations came from service providers and liberal legal services organizations. The ACLU of Northern California donated \$1,500. The East Bay Community Law Center donated \$999. Boona Cheema, former Executive Director of Building Opportunities for Self-Sufficiency (BOSS), a nonprofit providing

134. BERA 2012 Contribution List, *supra* note 133, at 17; BERKELEY ALLIANCE, <http://berkeleyalliance.org/about/> (last visited Sept. 25, 2013, 11:43 PM).

135. BERA 2012 Contribution List, *supra* note 133, at 17; Resume, Aileen Dolby, <http://www.colliersparrish.com/PDFprofiles/oak/adolby.pdf> (last visited Nov. 12, 2012, 9:13 PM).

136. Elle Holland, *Margit Roos-Collins, Volunteer Extraordinaire*, BERKELEY HIGH JACKET, Dec. 14, 2012, http://www.bhsjacket.com/features/margit_roos_collinsvolunteer_extraordinaire.

137. BERA 2012 Contribution List, *supra* note 133, at 17.

138. Messman-Rucker, *supra* note 51.

139. Noah Ickowitz, *Measure B.S.*, DAILY CALIFORNIAN, Oct. 12, 2012, <http://www.dailycal.org/2012/10/12/measure-b-s/>.

services to homeless families with barriers to self-sufficiency,¹⁴⁰ donated \$500. As of October 21, 2012, the No on S campaign had raised approximately \$15,277.

D. THE DISPUTE: ERADICATING ECCENTRISM IN A LIBERAL TREASURE OF THE UNITED STATES

The debate in Berkeley over Measure S in many regards mirrored the core arguments of the national sit-lie debate outlined in the second section of this paper. The official goals of the Measure S campaign were to “help people into services and prevent sidewalk encampments that keep shoppers away from our neighborhood businesses.”¹⁴¹ The campaign emphasized that Berkeley funds social services for homeless people to the tune of \$2.8 million annually.¹⁴² Measure S campaign leaders argued that the measure was intended to change behavior and stop “unfettered harassment of the public by street sitters.”¹⁴³ Mr. Caner asserted the value of establishing “boundaries” with the homeless individuals regularly sitting on sidewalks in the commercial districts of Berkeley. Campaign leaders claimed that Telegraph and Shattuck Avenues suffered economically in excess of other districts because of the challenges presented by homeless people sitting on the street,¹⁴⁴ and that some small businesses closed explicitly for that reason.¹⁴⁵

The No on S campaign’s claims against the measure revolved primarily around the absurdity and inefficacy of criminalizing the act of sitting down, and that it discriminates against poor people as a class.¹⁴⁶ They argue that Measure S is not a real solution to homelessness, and that the cost of the measure diverts valuable police resources from solving real crimes.¹⁴⁷ Beyond police resources, Berkeley’s current shelter beds are severely inadequate to serve its homeless population, and the \$2.8 million figure put forth by Yes on S includes health and wellness services available to the entire city’s population. They point out that, as noted in a previous section,

140. About Us, Executive Director Boona Cheema, BUILDING OPPORTUNITIES FOR SELF SUFFICIENCY, <http://www.self-sufficiency.org/index.php/leadership/executive-director> (last visited Nov. 13, 2012, 7:14 AM).

141. Argument in favor of Measure S, *supra* note 129.

142. Argument in favor of Measure S, *supra* note 129; Natalie Orenstein, *Downtown Berkeley Ambassadors Help Monitor Homeless*, BERKELEYSIDE (July 2, 2012, 8:02 AM), <http://www.berkeleyside.com/2012/07/02/downtown-berkeley-ambassadors-help-monitor-homeless/>.

143. Peterson, *supra* note 103.

144. Soumya Karlamangla, *Fire Accelerated Telegraph Avenue Spiral*, SFGATE.COM (Nov. 17, 2012), <http://www.sfgate.com/bayarea/article/Fire-accelerated-Telegraph-Avenue-spiral-4046882.php>; Wollan, *supra* note 6.

145. Wollan, *supra* note 6.

146. No on S and Yes on Real Solutions to Homelessness, STAND UP FOR THE RIGHT TO SIT DOWN (Nov. 9, 2012, 7:59 PM), <http://www.noonsberkeley.com/no-on-s-and-yes-on-real-solutions-to-homelessness/>.

147. *Id.*

it is already a crime in Berkeley to lie down on sidewalks.¹⁴⁸ Berkeley law and California penal code each have provisions against obstructing sidewalks.¹⁴⁹ It is also a crime to block passage with one’s person or belongings.¹⁵⁰ Berkeley has laws regulating dogs on leashes in public spaces, and stationary dogs on commercial sidewalks.¹⁵¹ Proponents of Measure S argued that these laws alone were not enough to obtain the desired “civil sidewalks” Berkeley merchants and residents deserve. Opponents counter that all the above listed behavior, cited by Measure S as comprising the hostile sidewalk climate justifying sit-lie, is already illegal, and therefore criminalization of sitting down will not remedy the issue or address its root causes.¹⁵²

IV. BERKELEY’S HOMELESS POPULATION AND AVAILABLE SERVICES: THE *POTTINGER/JONES* ANALYSIS

The National Law Center on Homelessness and Poverty defines criminalizing homelessness as the “[e]nactment and enforcement of laws that make it illegal to sleep, sit, or store personal belongings in the public spaces of cities without sufficient shelter or affordable housing.”¹⁵³ Measure S supporters denied that the ordinance was criminalizing homelessness, emphasizing that homelessness is unhealthy and the measure is intended to encourage homeless people into services.¹⁵⁴

Measure S campaign spokesperson Davida Coady, Executive Director of Options Recovery Services (“Options”), attests that social services are always available, even for walk-ins, at Options.¹⁵⁵ Services at Options are focused around drug and alcohol addiction treatment, and are primarily outpatient day or evening programs.¹⁵⁶ Options also offers transitional and permanent “clean and sober” housing programs, which have a prerequisite of sobriety to qualify and maintain residence, for some including abstaining from smoking cigarettes.¹⁵⁷ Meanwhile, the City of Berkeley’s affordable

148. BERKELEY, CAL., MUNICIPAL CODE § 13.36.015 (1998).

149. CAL. PENAL CODE § 647c (1968); BERKELEY, CAL., MUNICIPAL CODE § 14.48.020 (1952).

150. BERKELEY, CAL., MUNICIPAL CODE § 13.36.015 (1998); BERKELEY, CAL., MUNICIPAL CODE § 14.48.020 (1952).

151. BERKELEY, CAL., MUNICIPAL CODE § 13.36.015 (1998); BERKELEY, CAL., MUNICIPAL CODE § 13.36.015 (1998).

152. Osha Neumann, *Public Comment: Anti-Homeless Groundhog Day*, BERKELEY DAILY PLANET (June 7, 2012, 4:52 PM), <http://www.berkeleydailyplanet.com/issue/2012-06-08/article/39810?headline=Anti-Homeless-Groundhog-Day--By-Osha-Neumann>.

153. CRIMINALIZING CRISIS, *supra* note 2, at 6.

154. *See* Becker, *supra* note 127.

155. *Forum*, *supra* note 123.

156. OPTIONS RECOVERY SERVICES, <http://optionsrecovery.org/services.htm> (last visited Oct. 29, 2012, 4:55 PM).

157. Interview with Dr. Davida Coady, Executive Director, Options Recovery Services, in Berkeley, Cal. (Oct. 24, 2012) (recording on file with author).

housing units are currently at full capacity.¹⁵⁸ The available shelter beds, including permanent, seasonal, and transitional housing units, are far exceeded by the number of homeless people in Berkeley.¹⁵⁹ The city of Berkeley provides 132 year-round shelter beds, 82 of which are long term (30-day to six-month stays).¹⁶⁰ The Youth Engagement, Advocacy, Homes Program (YEAH) operates an emergency shelter for homeless youth six months out of the year, and is funded by Alameda County and private donations.¹⁶¹ According to a 2009 survey, Berkeley's homeless population included 680 individuals.¹⁶² The city operates five drop-in centers for homeless residents whose hours are primarily limited to weekday business hours, save for a women's center open for six hours on Sundays.¹⁶³

Given the above figures, the City of Berkeley's current service offerings and shelter beds are not sufficient to house or serve their current homeless population. This dynamic places them within the *Pottinger* framework of volition analysis, and raises the question whether the law would have survived judicial inquiry under Ninth Circuit precedent. Dr. Coady's assertion that Options Recovery Service has never turned away a willing program participant challenges that notion.¹⁶⁴ Although Options is not city-funded beyond contracts with the court system, Yes on S organizers consistently pointed to Options as proof that services in Berkeley were not exhausted by the constituents Measure S would target. The disconnect as asserted by No on S leaders lies in Options' policy of admitting only program participants who are detoxed and committed to sobriety, which can be a barrier for many homeless individuals who use substances as self-medication.¹⁶⁵ There is a growing consensus that access to permanent housing is a key prerequisite to homeless individuals successfully utilizing other social services and obtaining any meaningful stability.¹⁶⁶

158. COOTER, ET AL., *supra* note 100, at 7.

159. COOTER, ET AL., *supra* note 100, at 7.

160. *City of Berkeley Homeless Services – Emergency Services*, HOUSING AND COMMUNITY SERVICES DEPARTMENT <http://www.ci.berkeley.ca.us/contentdisplay.aspx?id=5554> (last visited Dec. 12, 2012).

161. YOUTH ENGAGEMENT, ADVOCACY, AND HOUSING, www.yeah-berkeley.org (last visited Sept. 28, 2013); Marine Chalons, *The Young and the Homeless*, BERKELEY POLITICAL REVIEW (May 7, 2010), <http://bpr.berkeley.edu/2010/05/the-young-and-homeless/>; Lance Knobel, *Berkeley City Council Passes Budgets for 2012, 2013*, BERKELEYSIDE (June 29, 2011, 12:39 PM), <http://www.berkeleyside.com/2011/06/29/council-passes-budgets-for-2012-2013/> (noting that YEAH! relinquished its city contract for \$45,000 annually).

162. COOTER, ET AL., *supra* note 100, at 7.

163. *City of Berkeley Homeless Services – Emergency Services*, *supra* note 160.

164. Interview with Dr. Davida Coady, Executive Director, Options Recovery Services, in Berkeley, Cal. (Oct. 24, 2012) (recording on file with author).

165. ADVOCACY MANUAL *in* CRIMINALIZING CRISIS, *supra* note 2, at 23–24.

166. MANUEL MORENO ET AL., PROJECT 50: THE COST EFFECTIVENESS OF THE PERMANENT SUPPORTIVE HOUSING MODEL IN THE SKID ROW SECTION OF L.A. COUNTY i (2012), *available*

Berkeley’s “Ambassador” program is another means through which Yes on S organizers assured sit-lie offenders would be directed into services. The “ambassador” or “host” programs are unique fixtures of a few West Coast sit-lie jurisdictions, typically funded by downtown property owner and merchant groups.¹⁶⁷ In Berkeley, the program was originally funded by the Telegraph Business Improvement District and the Downtown Berkeley Association, with support from the City, although financial support was cut in half in 2012 because the program was not having enough impact on the downtown climate.¹⁶⁸ They are now primarily funded by the TBID and DBA, in conjunction with Block by Block, a company that provides ambassador services to similar downtown associations in 46 cities nationwide. The Ambassadors’ duties include “cleaning the streets, reporting graffiti to authorities, providing information to tourists, and referring homeless and low-income people to services.”¹⁶⁹ In particular, Hospitality Ambassadors’ responsibilities related to street populations are to “provide outreach for social services to homeless and other populations in concert with Berkeley Health Department’s Mental Health Division;” “address nuisance activity through education, outreach, and reminders to street and other populations of ordinances regarding smoking, noise, open containers, aggressive panhandling, sleeping during prohibited times, trespassing, etc.,” and “discourage problematic street behavior by education on the law and on expectations for appropriate behavior, by acting on behalf of merchants or stakeholders who complain, and/or by requesting the person to change their location.”¹⁷⁰ Some of the sixteen ambassadors are graduates of Options Recovery Services.¹⁷¹ Campaign leaders repeatedly asserted that the ambassadors were well-positioned to facilitate a compassionate implementation of the sit-lie law if enacted, although the ambassadors were not explicitly referenced in the text of the ordinance nor was their continued funding guaranteed in any capacity by the ordinance.

Local homeless advocates and Measure S opponents object to the program in its current manifestation on a number of grounds. First, they contend that the ambassadors are not adequately trained as social workers, case workers, or outreach workers. Another concern is that they are

at <http://zev.lacounty.gov/wp-content/uploads/Project-50-Cost-Effectiveness-report-FINAL-6-6-12.pdf>.

167. Swan, *supra* note 96.

168. COOTER, ET AL., *supra* note 100.

169. COOTER, ET AL., *supra* note 100.

170. DOWNTOWN BERKELEY ASSOCIATION, *Hospitality Ambassadors*, <http://www.downtownberkeley.com/dba-programs-hospitality-ambassadors> (last visited Oct. 18, 2013).

171. Interview with Dr. Davida Coady, Executive Director, Options Recovery Services, in Berkeley, Cal. (Oct. 24, 2012) (recording on file with author); Telephone Interview with John Caner, Executive Director, Downtown Berkeley Association (Nov. 27, 2012) (notes on file with author).

underpaid and thus they are under-motivated. Therefore their deployment as the frontline of the city's interactions with their homeless population is ill-advised, if not irresponsible. Second, the ambassadors' best intentions to usher street sitters into services will not be effective without adequate services in the city of Berkeley to send them to. Finally, the Yes on S organizers' enthusiasm for the ambassador program hiring graduates of Options Recovery represents a serious disconnect about the needs of the population Measure S is targeted against. It also has the potential to create a hierarchy among poor people and those with substance abuse issues, by predicating the marginal employment of low-income, recently recovered addicts on their paternalizing or removing from view the still-homeless.

V. WHY DID SAN FRANCISCO SUCCEED, AND BERKELEY FAIL? ORGANIZERS' ANALYSIS

A. SAN FRANCISCO VERSUS BERKELEY

San Francisco and Berkeley share a historic cultural relationship to their homeless populations in commercial districts. The Haight-Ashbury corridor and Telegraph Avenue are each tourist attractions for their history of dissidence, the 1960s hippie movement, and a colorful mass of street people (often constituted of homeless travelers, performers, and artists). On top of their geographic proximity and liberal reputations,¹⁷² San Francisco and Berkeley's approaches to sit-lie were similar in many ways. The parties of interest on each side of the campaign were overwhelmingly identical. San Francisco and Berkeley are thus far the only two cities in the nation to have presented a sit-lie law as a question for voters. Proposition L and Measure S were each city's second ballot proposal of a sit-lie law. Proposition L and Measure S each came over fifteen years after their respective city's original propositions, Measure O and Measure M. Interestingly, Berkeley's electorate passed their sit-lie measure in the 1990s but defeated it in 2012. Meanwhile, San Francisco defeated Measure O in the 1990s but approved it in 2010. The analysis of each law's success or failure therefore necessarily hinges on local issues, and the tactics of the individual campaigns for and against sit-lie.

Bob Offer-Westort was lead organizer for the campaigns opposing both San Francisco's Proposition L and Berkeley's Measure S. Mr. Offer-Westort was recruited by the Stand Up for the Right to Sit Down campaign specifically for his work on Proposition L.¹⁷³ After his surprise at San Francisco's passage of sit-lie, he anticipated a similar defeat in Berkeley.¹⁷⁴

172. Wollan, *supra* note 6.

173. Interview with Patricia Wall, Executive Director, Homeless Action Center, in Berkeley, Cal. (Oct. 5, 2012) (recording on file with author).

174. Interview with Bob Offer-Westort, Coordinator, Stand Up for the Right to Sit Down Campaign in Berkeley, Cal. (Nov. 20, 2012) (recording on file with author).

Notable differences between San Francisco and Berkeley are population density and the average wealth of its residents. The Proposition L campaign spent approximately \$412,000 compared to the Yes on S campaign’s \$120,000. (Measure S, however, raised and spent more than any other campaign in the Berkeley election, or in any election in the previous decade.) While San Francisco’s sit-lie law included a provision for review and enhancement of available social services, the Measure S campaign made promises of access to services that were not supported in the text of the measure. Mr. Offer-Westort proposes that the major difference in the two campaigns was that Stand Up for the Right to Sit Down was able to learn from No on L’s mistakes.¹⁷⁵

Stand up for the Right to Sit Down employed a number of tactics it considers fundamental in the defeat of the measure. In contrast with San Francisco’s sit-lie opposition, No on S focused a majority of their energy on door-to-door volunteer outreach. Mr. Offer-Westort estimates that through those efforts the campaign was able to reach ten percent of the Berkeley electorate. A key element that had been successful in San Francisco that was replicated in Berkeley was creative campaign events. No on S supporters hosted a black-tie sidewalk chess competition, an Olympic Sitting competition, and sidewalk chalk artists at major BART stations, many of which were modeled after similar events that garnered significant media attention in the Proposition L campaign. According to Mr. Offer-Westort, the media likely played a key role in each campaign. The *San Francisco Chronicle*, in particular columnist C. W. Nevius, came out in strong support of Proposition L and reported on it often during the election season. Alternately, in Berkeley, Measure S was officially opposed by *The Daily Californian* (arguably the paper of record in Berkeley), *Berkeley Daily Planet*, and the *San Francisco Bay Guardian*.¹⁷⁶ The *New York Times* also came out with an article contrasting Berkeley’s history as a civil rights hub with the contemporary effort to criminalize sitting, focusing on the impact it would have on Berkeley’s homeless.¹⁷⁷ Mr. Offer-Westort’s idea is not without support. Despite claims that newspapers are less relevant than television or social networking at influencing voters, researchers have found that newspapers still have an impact on election outcomes.¹⁷⁸

Perhaps the most impactful element of the No on S campaign, beyond attaining their goal of defeating the measure, was their success at coalition-building. The Yes on S campaign was quite successful in aligning property

175. Interview with Bob Offer-Westort, Coordinator, Stand Up for the Right to Sit Down Campaign in Berkeley, Cal. (Nov. 20, 2012) (recording on file with author).

176. *BALLOTPEDIA*, *supra* note 133.

177. Wollan, *supra* note 6.

178. Christopher Elmendorf, *Districting for a Low-Information Electorate*, 121 *YALE L.J.* 1846, 1869 (2012).

owners, merchants, and city officials behind the law in a similar pattern to other cities, with dramatic fundraising impacts. By their estimation, Stand Up for the Right to Sit Down was very effective, alternately, at innovative community organizing. The campaign was able to court traditional backers, such as city officials, political parties and clubs, service providers, and civil rights and liberties organizations. But its most unique and likely impactful endorsers came in other forms, such as the UC Berkeley student body, an undeniably influential voting bloc in local Berkeley elections. Through creative outreach, a vast majority of local clergy members also rallied behind the No on S campaign, publicly displaying their opposition at key press moments with floor-to-ceiling puppets meant to represent saints and other biblical figures.¹⁷⁹

Yes on S organizers agree with many of the No on S campaign's assessment of the successes and failures of the campaign. Mr. Caner expressed regret that the text of the ordinance did not explicitly provide for any additional access to services, or forgiveness for sit-lie offenders who enter services subsequent to citation. They also felt that more outreach to the UC Berkeley student population would have been beneficial, and that this was a particularly potent missed opportunity considering the 2011 survey indicating the majority of students would frequent Telegraph Avenue more often if there were less homeless people.

B. WHY MEASURE S MATTERS FOR THE CONTINUING CONVERSATION ABOUT HOMELESSNESS

Despite its conformity to the common narratives among the various cities that have proposed and passed sit-lie laws, Berkeley's campaign for Measure S was unique in a few significant ways. The public debate over Measure S was distinct in that one of the measure's main spokespersons, Davida Coady, is a prominent local service provider. Social service providers who work with homeless populations almost exclusively oppose sit-lie measures. Dr. Coady's presence at the forefront of the conversation about Measure S had important implications for the nature of the discussion. Namely, it shifted the humanitarian focus of the sit-lie issue, from whether the criminalization of sitting down was a violation of the human rights of the homeless, to whether it is cruel to allow the substance-addicted and mentally ill to remain sitting on the sidewalk, even if the proposed solution means criminalizing life-sustaining conduct.¹⁸⁰

The primary distinction between Dr. Coady and the service providers at the forefront of the No on S campaign is their stance on harm reduction philosophy.¹⁸¹ Harm reduction is a public health strategy that aims to

179. Raguso, *supra* note 62.

180. *Forum*, *supra* note 123.

181. Interview with Stand Up for the Right to Sit Down organizing committee, in Berkeley, Cal. (Nov. 13, 2012); Interview with Dr. Davida Coady, Executive Director,

reduce the harms associated with certain behaviors, such as substance abuse.¹⁸² It was initially introduced as an alternative method to abstinence-only approaches to intervention for adults.¹⁸³ A major focus of Dr. Coady’s in her public appearances for Measure S was the prevalence of substance abuse and addiction issues in the East Bay’s homeless population, and her years of experience treating substance abuse through Options Recovery Services.¹⁸⁴ Options Recovery Services embraces abstinence-only treatment for adults with substance abuse issues.¹⁸⁵ The program has capacity for all of Berkeley’s homeless population; in fact, according to Dr. Coady, Options has never turned a willing participant away.¹⁸⁶ A willing participant must endure detoxification prior to entering the program, and maintain sobriety for the duration of outpatient treatment at Options Recovery Services.¹⁸⁷ This is where Dr. Coady and other service providers tend to split. Patricia E. Wall, Executive Director of the Homeless Action Center, employs harm reduction strategy in her practice, with the goal of providing “barrier-free access” to legal services.¹⁸⁸ While these approaches are sometimes incompatible, and in the specific instance of the Measure S campaign their practitioners found themselves on opposite sides of the issue, Yes on S organizers see the split as a coalition-building deficit. Elisa Della Pianna, Director of the EBCLC Neighborhood Justice Clinic, acknowledges that abstinence-only substance abuse treatment works for a substantial minority of the population, and will and should continue to exist alongside harm-reduction strategies.¹⁸⁹ However, it is not as clear that the local abstinence-only community is similarly inclusive of harm reduction philosophy.

The Yes on S campaign and the media focused particularly on the issue of whether the troublesome “sitters” Measure S would target were legitimately homeless, and if so, whether they were homeless by choice.

Options Recovery Services, in Berkeley, Cal. (Oct. 24, 2012) (recording on file with author).

182. Dr. Karen Mary Leslie, *Harm Reduction: An Approach to Reducing Risky Behaviors in Adolescents*, 13(1) PAEDIATRICS & CHILD HEALTH 53 (2008), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2528824>.

183. *Id.*

184. *Forum, supra* note 123; Osha Neumann & Dr. Davida Coady, Debate: Berkeley Measure S - Sit-Lie Ordinance, (Oct. 23, 2012), available at <http://www.kpfa.org/archive/id/85446>.

185. OPTIONS RECOVERY SERVICES, <http://optionsrecovery.org/services.htm> (last visited Oct. 29, 2012, 4:55 PM).

186. Interview with Dr. Davida Coady, Executive Director, Options Recovery Services, in Berkeley, Cal. (Oct. 24, 2012) (recording on file with author).

187. Interview with Dr. Davida Coady, Executive Director, Options Recovery Services, in Berkeley, Cal. (Oct. 24, 2012) (recording on file with author).

188. ALAMEDA COUNTY HOMELESS ACTION CENTER, www.homelessactioncenter.org (last visited Nov. 12, 10:03 PM); Interview with Patricia Wall, Executive Director, Homeless Action Center, in Berkeley, Cal. (Oct. 5, 2012) (recording on file with author).

189. Telephone Interview with Elisa Della Pianna, Director, East Bay Community Law Center Neighborhood Justice Clinic (Dec. 13, 2012) (notes on file with author).

Roland Peterson, Director of the Telegraph Property and Business Improvement District, asserts that “the majority of ‘street sitters’ are not homeless, and from time to time, they are not locals either.”¹⁹⁰ Media outlets conducted countless interviews with homeless youths who say they chose to live on the streets and travel.¹⁹¹ In a column titled “Homeless by Choice,” *Daily Californian* reporter Jason Willick reported on a series of interviews he conducted on Telegraph Avenue that indicated, “many homeless people in the Telegraph area . . . are not victims of poverty and misfortune but practitioners of a bizarre subculture that glorifies homelessness. . . . To them, homelessness is an alternative culture—a way to rebel against ‘the system.’”¹⁹² Rachel Swan of the *East Bay Express* reported that, “[m]any of Berkeley’s homeless have chosen living on the street as a lifestyle, and they approach panhandling with the same diligence that someone might devote to an office job.”¹⁹³ A number of editorials indicated that, even if the ordinance did provide for more services, the Telegraph Avenue homeless population would not accept them. Mr. Offer-Westort stated that the vast majority of homeless people would like to be in housing or shelters, however, many of the available housing has strict rules prohibiting any substance use, including cigarettes or alcohol; “Saying that certain services are inappropriate is different than being across-the-board service-resistant.”¹⁹⁴ Thomas Kinzer, a UC Berkeley senior who experienced homelessness prior to entering university, said about his experience at a city council meeting, “It’s not illegal to not be very good at life.”¹⁹⁵

VI. NEW APPROACHES TO SIT-LIE AND HOMELESSNESS: LESSONS FROM BERKELEY

A. OVERARCHING GOALS FOR FEDERAL AND LOCAL POLICYMAKERS

In 2008, the U.S. Conference of Mayors released a Status Report on Hunger and Homelessness in America’s Cities.¹⁹⁶ The report surveyed 25 cities on the availability of shelter beds, affordable subsidized permanent housing, and requests for emergency food assistance.¹⁹⁷ Cities were also asked to identify the three main causes of homelessness for persons in families and for single adults and unaccompanied minors. The three most

190. Peterson, *supra* note 103.

191. Raguso, *supra* note 62.

192. Jason Willick, *Homeless by Choice*, DAILY CALIFORNIAN, Oct. 22, 2012, <http://www.dailycal.org/2012/10/22/homeless-by-choice/>.

193. Swan, *supra* note 96.

194. Raguso, *supra* note 62.

195. Yurovsky, *supra* note 111.

196. UNITED STATES CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA’S CITIES (2008), available at http://usmayors.org/pressreleases/documents/hungerhomelessnessreport_121208.pdf.

197. *Id.* at 1.

commonly cited causes of homelessness for persons in families were lack of affordable housing, poverty, and unemployment.¹⁹⁸ For single persons, the three most commonly cited causes of homelessness were substance abuse, lack of affordable housing, and mental illness. This highlights the changing landscape of the conversation around homelessness as sit-lie precedent develops. In contrast to the reporting on Measure S and Berkeley’s homeless, mayors are not citing “preference” as the underlying issue causing homelessness, although that does not exclude it from the realm of possibility.

The Obama Administration has cautioned cities against enacting laws criminalizing homelessness.¹⁹⁹ In its 2010 Federal Strategic Plan, the U.S. Interagency Council on Homelessness (USICH) strongly advised local governments to refrain from enacting laws that criminalize homelessness. The USICH plan asserts that such criminalization fails to increase access to services and tends to create additional barriers between homeless people and access to housing, income, and employment. The National Law Center on Homelessness and Poverty recommends that cities and local governments stop enacting laws criminalizing homelessness and life-sustaining activities conducted out of doors.²⁰⁰

After over two decades, the only sit-lie laws that have been “successful” are in those jurisdictions that have invested significant funds in the implementation of those laws, such as Santa Cruz and Santa Monica. There is no empirical evidence to date of the success of a sit-lie law in addressing root causes of homelessness. The U.S. Conference of Mayors, USICH, the National Law Center on Homeless and Poverty, the City Hall Fellows, and the Berkeley Policy Clinic all recommend the best response to the issue of homelessness is the allocation of funds to develop and expand transitional and permanent supported housing for the extremely low-income and homeless. Sit-lie laws are the most recent in a long line of criminalization efforts that have proven ineffective and costly, and should be abandoned in favor of the unanimous recommendation of national, local, government, academic, and nonprofit policymakers—to house the homeless.

B. LESSONS FOR LOCAL GOVERNMENTS, MERCHANTS, AND SIT-LIE PROPONENTS

After comparing San Francisco and Berkeley’s disparate experiences in efforts to pass a sit-lie law on the ballot, some definitive conclusions emerge. First, approaching crimes of misery regulations of any kind via ballot measures is not recommendable. Berkeley’s experience is instructive in this regard for potential future proponents of sit-lie laws.

198. UNITED STATES CONFERENCE OF MAYORS, *supra* note 196, at 19.

199. Wollan, *supra* note 6.

200. CRIMINALIZING CRISIS, *supra* note 2, at 12.

Despite the copious resources the Yes on S campaign fundraised and their special spokesperson in the form of a prominent local service provider and homeless advocate, their sit-lie measure was defeated. Given the fact that San Francisco was successful in the same political climate of relative liberalism in the national scope, it implies there is arbitrariness and a gamble to the ballot endeavor that is simply not worth the financial investment.

Both campaigns agreed that engaging the sit-lie issue via a ballot measure was detrimental to their positions.²⁰¹ First, the adversarial nature of an election can produce negative or uninformed rhetoric. Because the Measure S language was decided before the campaigns began, Berkeley Civil Sidewalks had to promote and defend provisions of the law, such as the forgiveness provision for entering services and the ambassadors' reliability, that were not actually present in the text. The election forced the No on S campaign to fundraise frantically in the face of Berkeley Civil Sidewalks' significant resource advantage. Stand Up for the Right to Sit Down organizers cited the focus on fundraising as a major impediment to meaningful coalition building. Both sides also agreed that if the measure was approached in a good-faith, collaborative manner, important provisions would likely have been negotiated that could fairly address the root causes of homelessness as well as encourage civil sidewalks.

Furthermore, a moral reason emerges for abandoning the election process in proposing crimes of misery regulations. While the constitutionality of crimes of misery laws is still undecided, some courts (including the Ninth Circuit) have been inclined to strike down sit-lie laws, in particular in those municipalities without sufficient services to serve their homeless population.²⁰² On a moral level, while such ambiguity as to the constitutionality of these laws remains, it is irresponsible and cruel to put the question of human rights of the homeless in the hands of the voting public. If the criminalization of homelessness is not abandoned, then it should at least be a matter for legislators. Meanwhile, should proponents of sit-lie laws find themselves in possession of a dearth of resources in the public or private sector, this paper has presented a number of approaches to negotiating clashes between homeless and traveling individuals occupying commercial sidewalks and local businesses and commercial real property owners. The success of the sit-lie programs in Santa Monica and Santa Cruz are decidedly not predicated on the law, but the amount of resources designated to their respective City Hosts/Ambassador programs. If properly trained in outreach and supported by sufficient city-provided

201. Interview with John Caner (Nov. 27, 2012) (notes on file with author); Interview with Elisa Della Pianna (Dec. 14, 2012) (notes on file with author); Interview with Bob Offer-Westort (Nov. 20, 2012) (notes on file with author).

202. O'Connor, *supra* note 32, at 235.

services to direct sitters to, those “carrot” programs could be implemented in many cities without the “stick” of a sit-lie law.

Ideally, in seeking a solution, local governments should embrace the suggestions of the most reputable policy analysts and service providers, and re-invest in the low-income housing that was obliterated in the 1980s. If in harsh fiscal climates, cities find the costs of redeveloping low-income housing too prohibitive, Opponents of Measure S have suggested a community-oriented, humane solution that none of the organizers of Yes on S raised in our interviews or in the media. The notion is simple: City officials and local business owners should make a concerted effort to legitimately engage with the populations they are seeking to move along through sit-lie. Rather than hire a team of graduates of local substance abuse programs to provide a buffer and mediate disputes between travelers, homeless people, business owners, and shoppers, local governments should facilitate direct conflict resolution between those groups. Ultimately, proponents of sit-lie and crimes of misery laws seem to want to avoid any form of direct interaction with the indigent, marginalized, or alternative. Despite their reticence, encouraging a meaningful interaction among these divided classes may be the most successful approach to achieving sit-lie proponents’ goals: boosting commerce, promoting tourism, ensuring public safety, and encouraging those who need services to access them.

C. STRATEGIES FOR HOMELESS ADVOCATES AND OPPONENTS OF CRIMES OF MISERY

The Measure S campaign introduced a novel issue that will likely continue to be central in the fight against crimes of misery. Berkeley faced a unique circumstance, in which the No on S campaign, comprised mainly of local service providers and advocates, lost an important advocate and ally to the Yes on S campaign. This divide is indicative of a larger issue that has and will continue to affect the dialogue around homelessness: harm reduction versus abstinence-only substance abuse treatment. Dr. Coady’s support of Measure S resonated with a significant contingent of Berkeley’s voting populace. Those who were fearful but still inclined to express their discomfort with the growing presence of homeless people and travelers in Berkeley’s commercial districts found a voice in Dr. Coady’s compassionate position. Her “service-resistant” rhetoric directly invoked the “homeless by choice” model of volition/voluntariness. Embracing the theory that those who would be sanctioned or targeted by Measure S make conscious choices to be vulnerable under the measure aligns the campaign with general attitudes towards criminal justice and our country’s political discourse.

Dr. Coady’s endorsement of Measure S also speaks to the No on S campaign’s central victory, and the second major lesson for advocates: Coalition building is essential to success. The numerous formulations of “choice” homeless populations face, as delineated in our Eighth

Amendment judicial precedent, become further nuanced in the public discourse around sit-lie and other crimes of misery. Dr. Coady's position seems to align with the "personal deficiency" model, where bad choices such as substance abuse, laziness, and criminality are the cause of homelessness.²⁰³ Her abstinence-only approach also rejects the *Robinson* notion that addiction is involuntary and not a choice. Therefore, any homeless or marginalized low-income resident of Berkeley who does not participate in Options Recovery remains homeless and/or addicted by their own fault. The media and commercial Yes on S organizers focused significantly on the youths who purportedly "chose" homelessness as a glamorous lifestyle. This mindset oversimplifies the many issues homeless youth face that impact their homelessness, instead attempting to "other" these otherwise harmless youths into a category society is more comfortable sanctioning.

Because of the dominance of the "choice" rhetoric in issues affecting the homeless, homeless advocates and opponents of sit-lie have been forced onto the defensive. Much of their efforts both in the courts and in the court of public opinion have been geared toward fighting the notion that there is any possibility of uncoerced, pure "choice" in a homeless person's life, thereby adopting the "blameless victim" model. Advocates emphasize how mental health, abuse, economic, and institutional factors impact each and every homeless individual, even those who testify to reporters²⁰⁴ that they are homeless only because they want to be, thereby undermining homeless individuals' agency. Measure S lost by a narrow margin, and therefore suggests that, even in the most liberal of cities, the characterization of homelessness as "involuntary" is no longer persuasive to the voting public.

Sit-lie and other crimes of misery opponents can count a major, if close, victory in the defeat of Measure S. Perhaps it is a prudent time for those fighting against the proliferation of crimes of misery to engage in a new tactic, retiring the defensive position and adopting an offensive one. Advocates should begin to fight the notion that homelessness is an unqualified evil, and embrace homelessness as a meaningful choice for some individuals that should not be criminalized. Rather than focusing campaign and community education efforts on dismantling the personal deficiency presumptions inherent in crimes of misery campaigns, advocates should instead directly engage sit-lie supporters in a dialogue about choice. What if the group of traveling youths who sit for long periods in a commercial district did in fact choose traveling and homelessness in lieu of an employed, financially, and physically comfortable lifestyle? Why should their sitting be criminalized? This dialogue would reveal that the sitting itself is not the offense, but rather that proponents harbor a bias,

203. See generally Tanene Allison, *Confronting the Myth of Choice: Homelessness and Jones v. City of Los Angeles*, 42 HARV. C.R.-C.L. L. REV. 253 (2007).

204. In the case of Jason Willick, a successful student and a stranger.

bewilderment, and discomfort with those who choose a humbler or less conventional life than the majority, in addition to the mentally ill, substance users, and the extremely poor. Pushing typically ardent supporters, like merchants and local government officials, and casual supporters such as local concerned citizens, to adamantly defend their position may not influence public sentiment immediately, or change the outcome of an election. But it could have the effect of shifting the policy discourse that has developed over the last thirty years from, “Why help or tolerate the homeless?” back to “Why criminalize them?”—a dramatic step in the right direction.
