

**OUT OF BOUNDS:
SAN FRANCISCO'S HOMELESS POLICIES**

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Abstract

Homelessness, both a legal and public policy issue, has dominated the City of San Francisco government agenda for over fifteen years. Despite the front-and-center nature of homelessness, the policies enacted have done little to reduce the count. This paper, first, presents San Francisco's new approach to the issue; namely, the creation of a new and far more limited class of "chronically homeless" persons. This first section includes an examination of the causes of homelessness, the physical alienation of homeless persons through "quality of life" laws, and recent policy initiatives used to social exclude the bulk of homeless persons by limiting the definition to a narrow few. In the second section, the paper examines alienation scholarship, exploring how and why certain groups are excluded. With roots in law and economic scholarship and critical race theory, the conclusion reached is that the City of San Francisco has used law and policy to exclude homeless persons based on their inability to participate in the market economy.

I. Introduction

“Homelessness has replaced the Golden Gate Bridge and the cable car as one of the city's most defining symbols.”¹

Homelessness has dominated the city government agenda in San Francisco for over fifteen years. Mayors are elected, in part, based on their vision for how the city's homeless policies can be reformulated to get rid of the problem. From appealing homeless advocates by promising more housing to assuaging local businesses by restricting the street presence of homeless people, the policies enacted have done little to reduce the count of those on the streets.

There are many ways to assess the effectiveness of city policies addressing homelessness. They may be based on methodology (for example, who is included in the homeless count), basic economic questions (the increase or decrease in homeless spending), or political assessments (reduction in the visibility of homelessness or the sentiments of city taxpayers). Taking the first factor as an example, homelessness may look entirely different depending on how many homeless people the city counts. If city officials include only those in shelters and sleeping on downtown streets, the homeless population residing in tent cities on the edges of the city, those crashing on the couches of friends and family, and those living in cars will not be included. As such, a city is motivated to construct its view of what the “homelessness problem” is and to match its policies accordingly.

The purpose of this paper is to demonstrate that San Francisco has framed its homeless population as those falling into the category of “chronic homelessness” and that its policies are constructed to physically and socially alienate homeless persons generally. With roots in law and economic scholarship and critical race theory, my central thesis is that certain law and policy is used to exclude homeless persons based on their inability to participate in the market economy.

¹ Rachel Gordon, *Mayor: Homeless are city's new symbol -- Newsom outlines progress on issue in State of the City address*, S.F. CHRONICLE, Friday, October 22, 2004, at B1.

The first section examines laws and policies addressing homelessness in San Francisco. The factors that have led to a sharp rise in homelessness across the United States are described. Next, the paper demonstrates that substantial sections of the downtown core has been made inaccessible or deeply inconvenient for homeless people, resulting in physical alienation, generally through the use of “quality of life” laws, or ordinances that prohibit the solicitation of funds, sleeping in parks, and loitering. In part three, one of San Francisco’s recent policies, the *San Francisco Plan to Abolish Chronic Homelessness*, will be examined, exploring the re-taloring of homelessness to mean those “chronically” on the street.

The second section of the paper examines the alienation scholarship, exploring how and why certain groups are excluded, and applying this scholarship to San Francisco’s homeless policies.

II. Homelessness: Who is In, Who is Out?

The sharp rise in homelessness over the past twenty years is not a phenomenon unique to San Francisco; many urban centers are experiencing major homelessness crises.² This section first explains the main factors contributing to the rise of homelessness and, second, analyzes San Francisco's alienation of homeless people through physical and social exclusion.

1. Down and Out: The Rise of Homelessness

The rise of homelessness in the United States over the last two decades has numerous causes, but its recent severity can fairly be attributed to reductions in the affordability of housing³ and the decline of real wages.⁴ While the typical face of a homeless person is a single, mentally ill man with a substance abuse problem,⁵ in reality single men comprise 41% of the homeless population, families with children 40%, single women 14%, and unaccompanied youth 5%.⁶ Sixty-six percent of the homeless families in the survey cities are headed by a single parent. Race is another important factor: approximately 49% of the population is African-American, 35% is white, 13% is Hispanic, 2% is Native American, and 1% is Asian. It is estimated that those with mental illnesses account for 23% of the homeless population and substance abusers account

² Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 646 (1992). See also Maya Nordberg, *Jails Not Homes: Quality of Life on the Streets of San Francisco*, 13 HASTINGS WOMEN'S L.J. 261 (2002) (noting that up to 2 million people in the United States are currently homeless).

³ THE UNITED STATES CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICAN CITIES, 54, 74-75 (2001).

⁴ Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 608 (2004).

⁵ Melanie B. Abbott, *Homelessness and Substance Abuse: Is Mandatory Treatment the Solution?* 22 FORDHAM URB. L.J. 1, 66 (1994).

⁶ See the Stewart B. McKinney Act, 42 U.S.C. § 11301, et seq. (1994) ("McKinney"), which states that a person is considered homeless who "lacks a fixed, regular, and adequate night-time residence and; and... has a primary night time residency that is: (A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations... (B) an institution that provides a temporary residence for individuals intended to be institutionalized, or (C) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings." 42 U.S.C. § 11302(a). HUD interprets the McKinney definition to include only those persons who are on the streets or in shelters and persons who face imminent eviction (within a week) from a private dwelling or institution and who have no subsequent residence or resources to obtain housing.

for 30%. Seventeen percent of the homeless in the survey cities are employed in full-or part-time jobs. Ten percent are veterans.⁷

In its 2003 Status Report on Hunger and Homelessness in U.S. city,⁸ the Conference of Mayors found that a lack of affordable housing is the primary cause of homelessness.⁹ Between 1997 and 2001, the number of lower-middle and middle income households spending more than half their incomes on housing rose by more than 700,000. The Joint Center for Housing at Harvard University found that housing problems fall most heavily on those in the bottom fifth of the income distribution, who can “barely afford to pay enough to cover the cost of utilities, property taxes, and maintenance on even modest units in less desirable communities.”¹⁰

Once housing is lost, shelters have often served as emergency assistance while new lodging is found. Over the last few years, there has been a decline in the availability of shelters. Between 2001 and 2003, requests increased by an average of 13%. In 84% of the cities surveyed, emergency shelters have turned away homeless families due to lack of resources; in 60% of the cities families may have to break up in order to be sheltered; and in 72% they have turned away homeless people generally.¹¹ People remain homeless for an average of 5 months.¹²

Another important factor is the decline in wealth, income, and job rates of the poor. While households in the top fifth of the income distribution held 60% of aggregate income in 2001, households in the top fifth of the wealth distribution held 83% of aggregate wealth. Indeed, the top five percent of wealth holders held

⁷ THE UNITED STATES CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICAN CITIES 56 (December 2003) [hereinafter Conference of Mayors].

⁸ *Id.* at ii.

⁹ Listed in order of frequency, the following causes were identified as the cause of homelessness: (a) lack of affordable housing; (b) mental illness and the lack of needed services; (c) low-paying jobs; (d) substance abuse and the lack of needed services; (e) unemployment; (f) domestic violence; (g) poverty; and (h) prison release. Many of these factors are interrelated (*Id.* at 71).

¹⁰ JOINT CENTER FOR HOUSING STUDIES AT HARVARD UNIVERSITY, STATE OF THE NATION'S HOUSING 2003 (June 2003), at 6.

¹¹ Ann M. Burkhardt, *The Constitutional Underpinnings of Homelessness*, 40 HOUS. L. REV. 211, 267-277 (2003).

¹² Note that this time period does not meet the definition of chronic homelessness (considered the major homelessness problem) provided by the federal government or the City of San Francisco. See Definition of Chronic Homelessness, *infra* note 52.

57% of the total, with the entire bottom half holding 3%.¹³ The wealthiest 10% of the population owns 81.8% of the country's privately-held real estate, 81.2% of the stocks, and 88% of the bonds.¹⁴

In 2000, the U.S. Census Bureau reported that the bottom quintile of had 3.6% of the income. By contrast, the top quintile of households had 49.7% of the income, with the top two quintiles having almost three-quarters.¹⁵ From the late 1970s to the mid-1990s, the income for the poorest families with children decreased by more than 20% and increased by almost 30% for the wealthiest families.¹⁶

Government assistance can help sustain income levels to assist the poor in obtaining (and retaining) housing. The continued pressure on the stock of affordable units, the ongoing rise in home prices, and the likelihood of a rise in interest rates point to continued problems in affordable housing.¹⁷ Currently, about 34% of renters in the lowest quintile receive housing assistance.¹⁸

In summary, the rise in homelessness is almost certainly due to a reduction in the affordability of housing and a decline in income. The cause is structural. While individual policies or programs may help stem the impact of these changes, a true remedy would require political and community support. Support could range from a paradigm shift in acceptance for subsidized housing¹⁹ to a paradigm shift in overhauling public benefits. The following section examines the impact of San Francisco's policies on community support.

2. Out of Town: Using Ordinances to Cast Out the Homeless

¹³ JOINT CENTER FOR HOUSING STUDIES AT HARVARD UNIVERSITY, *supra* note 10, at 15

¹⁴ Burkhart, *supra* note 11, at 277.

¹⁵ *Id.* at 267-277.

¹⁶ *Id.* at 278.

¹⁷ JOINT CENTER FOR HOUSING STUDIES AT HARVARD UNIVERSITY, *supra* note 10, at 6 (Noting that regulatory constraints on land drive up land costs in and around many of the nation's metropolitan areas, restricting development of affordable housing).

¹⁸ Given recent pronouncements that there will be a decrease in HUD grants, this number is likely to go down. See THE CENTER ON BUDGET AND POLICY PRIORITIES, MANY LOW-INCOME FAMILIES WOULD LOSE FEDERAL HOUSING ASSISTANCE UNDER PROPOSED FUNDING CUTS, March 17, 2004, at http://www.cbpp.org/3-17_04hou-pr.htm.

¹⁹ JOINT CENTER FOR HOUSING STUDIES AT HARVARD UNIVERSITY, *supra* note 10, at 31

San Francisco was voted the second meanest city by the National Coalition on Homelessness by having introduced “quality of life” laws and by exuding a general negative political climate towards homeless people.²⁰ Using campaigns centered on the notion that homeless persons are dangers to the public,²¹ public nuisances, and a risk to the city’s ability to attract tourists and business²², San Francisco has adopted a number of quality of life laws.²³

²⁰ NATIONAL COALITION ON HOMELESSNESS, *ILLEGAL TO BE HOMELESS: THE CRIMINALIZATION OF HOMELESSNESS IN THE UNITED STATES*, 27 (August 2003) [hereinafter NCH], at <http://www.nationalhomeless.org/crimreport>. Additional criteria used to determine meanest cities are: (1) enforcement and severity of penalties for anti-homeless laws; (2) local activists and organizations supporting the “meanest” designation; (3) the city having been surveyed or study in the report; and (4) the presence of criminalizing legislation pending or enacted in the city.

²¹ Ilene Lelchuk, *One of S.F.'s toughest neighborhoods to see police crackdown and new social workers*, S.F. CHRONICLE, Wednesday, May 5, 2004, at A-1 (where the city linked strategies to address drug crimes and prostitution with homelessness).

²² *Id.* See also the Hotel Council of San Francisco’s advertising campaign “We Want Change,” noting the negative economic effects caused by giving money to panhandlers. The campaign urged the city council to introduce laws restricting panhandling, and suggested that tourists and citizens should not give handouts.

²³ See the use by the San Francisco Police of California Penal Code, Section 647 (see Appendix I).

Ordinance	Section	Brief Description
Aggressive solicitation	SF Police Code, Art. 2, Sec. 120-2	Penalizes aggressive solicitation, including offenses as: (a) soliciting near automated teller machines and (b) soliciting on median strips. The penalty prescribed is “diversion,” meaning social service assistance from the Department of Public Health.
Confiscation of unattended shopping carts	SF Public Works Code, Art. 24, Sec. 1402	Unattended empty shopping carts located on either public property or on private property without the owner's consent are hereby declared a nuisance (and, under section 1403, may be impounded).
Consuming Alcoholic Beverages in Public	SF Police Code, Art. 1, Sec. 21	Alcoholic beverages may not be consumed on any public street, avenue, sidewalk, stairway, alley, or thoroughfare within the City and County of San Francisco.
Loitering on Sidewalks in business district	SF Traffic Code, Art. 4, Sec. 76	In any business district it is unlawful for any person to stand on the sidewalk, except as near as is practicable to the building line or the curblin.
Obstructing public streets, etc.	SF Police Code, Art. 1, Sec. 22	Person are prohibited from obstructing the free passage of any person or persons on any street, passageway or other public place.
Sleeping or camping in parks	SF Park Code, Art. 3, Secs. 3.12 and 3.13	Persons are prohibited from constructing a tent or other structure for the purposes of sleeping; sleeping in a park is prohibited between 10 p.m. and 6 a.m.
Sleeping in cars	SF Police Code, Art. 1.1, Sec. 97	Prohibits the use or occupy of any house car, camper or trailer coach for human habitation, including sleeping, eating or resting on any San Francisco street, park, beach, square, avenue, alley or public way, between the hours of 10:00 p.m. and 6:00 a.m.
Urinating and defecating in public	SF Police Code, Art. 2, Sec. 153	Prohibits the deposit human urine or feces on any public or private highway or road, including rights-of-way.

These offenses are examples of “quality of life” violations. They bring to mind vagrancy statutes from the United Kingdom and other countries that penalize individuals for visible indigence, the appearance of poverty, and inability to demonstrate financial sustainability.²⁴ Homelessness *per se* is not directly criminalized, largely due to the U.S. Supreme Court ruling that criminalizing an involuntary status is contrary to the Eighth Amendment of the Constitution.²⁵ Although quality of life laws seem, in their face, to be content neutral, homeless people are far more vulnerable to them than other groups.²⁶ For example,

²⁴ Norberg, *supra* note 2, at 266. For a discussion of the discounting of Elizabethan legal approaches to pauperism, see *Edwards v. California* 314 U.S. 162, 177 (1941) (“[w]hatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a ‘moral pestilence.’ Poverty and immorality are not synonymous”).

²⁵ *Robinson v. California*, 370 U.S. 660 (1962). See also *People v. Kellogg*, 119 Cal. App. 4th 593 (2004) (held that California statute did not punish the mere condition of being a homeless, chronic alcoholic, but rather punished conduct posing a public safety risk).

²⁶ Nordberg, *supra* note 2, at 271.

the consumption of alcohol on public streets or on public property open to public view but excludes those consuming alcohol within the “interior portion of any private dwelling, habitat, or building.”²⁷

Quality of life ordinances are one of the tools used by police and city officials to move homeless people from San Francisco’s streets. In addition to citations being issued, officials may give warnings or may adopt other techniques, such as random sidewalk of the areas that homeless people regularly sleep in.²⁸ A recent newspaper account states:

[T]his month, teams of police and outreach workers increased their patrols along Market -- deliberately walking its full downtown length three times a day, with street cleaners on motorized sweeps following along. The main job of the street cleaners is to spray down the sidewalks to clear away urine and other filth left by the homeless. But a byproduct of the patrols is to force anyone sleeping or sitting on the sidewalk to get out of the way. Homeless advocates have complained since the spring that spraying down streets is harassing sidewalk sleepers.²⁹

Brief explanations of the techniques, including specific ordinances, employed by city officials for removing homeless people from San Francisco’s streets are noted below.³⁰

(a) *Downtown San Francisco*: This area encompasses the Tenderloin, the downtown core, the South of Market (SOMA) area, and Van Ness (a major thoroughfare). Different techniques have been used by city officials to clear streets: the downtown area has a specific ordinance that prohibits “any person to stand on the sidewalk, except as near as is practicable to the building line or the curbline;”³¹ other ordinances include state and city laws prohibiting obstructing sidewalks and traffic,³² and loitering;³³ city officials may give warnings or wash down streets as opposed to giving formal ordinances;³⁴ prohibitions against actions

²⁷ San Francisco Police Code, Art. 1, Sec. 21.

²⁸ Interview with LS Wilson, Civil Rights Project, Coalition on Homelessness (Oct. 25, 2004).

²⁹ Kevin Fagan, Panhandlers curbed on Market, Van Ness Outreach workers, police mobilized under Prop. M, S.F. CHRONICLE, Saturday, October 16, 2004, at B-1.

³⁰ The information is drawn mainly based on an interview with LS Wilson of San Francisco’s Coalition on Homelessness, who oversees three to five weekly outreaches. These outreaches involve speaking directly with homeless persons in different areas of the city and collecting ordinances so that they may be challenged in court. City ordinances also directly prohibit certain conduct and are noted where appropriate.

³¹ San Francisco Traffic Code, Art. 4, Sec. 76 (where the “downtown core” is “that area of San Francisco encompassed by and including Washington Street on the north, Stockton Street and 4th Street on the west, King Street on the south and The Embarcadero on the east”).

³² San Francisco Police Code, Art. 1, Sec. 22.

³³ California Law 647(e) and (h).

³⁴ Fagan, *supra* note 29.

that may occur by virtue of being on the street, such as urinating on streets or public intoxication;³⁵ and the newly-implemented aggressive panhandling ordinance may be used if homeless people solicit funds near automated teller machines or on median strips.³⁶

(b) *Bayview-Hunter's Point*: This is one of San Francisco's poorest, most crime-ridden neighborhoods, and one of the few where gentrification has not occurred. It is the site of the former Hunters Point Naval Shipyard, which is still being cleaned up by the United States Navy due to toxic and radioactive waste issues. The neighborhood has among the worst performing schools in San Francisco.³⁷ It has recently been targeted by San Francisco Mayor Gavin Newsom for clean-up,³⁸ which may explain the rise of enforcement of city ordinances, including prohibitions against sleeping in cars³⁹ and breaking up encampments.⁴⁰ A recent newspaper article noted that: "Last week, members of the Coalition on Homelessness said, city staff swept through an encampment of homeless people in the Bayview near the waterfront, confiscating cars [...]."⁴¹

(c) *City Parks*: There are two specific ordinances that prohibit sleeping in parks: one banning the use of tents and other structures for lodging, the second prohibiting sleeping between 10 p.m. and 6 a.m.⁴² Other ordinances used include those listed in (a) above relating to consumption of alcohol and urinating in public, and issuing warnings.

(d) *Roadways and Underpasses*: The following laws may be used to prohibit the establishment of "tent cities," or informal dwelling places, on roadways and underpasses: obstructing traffic;⁴³ loitering on

³⁵ San Francisco Police Code, Art. 2, Sec. 153 and SF Police Code, Art. 1, Sec. 21.

³⁶ San Francisco Police Code, Section 120-2(D)(2) and (3). Note that, according to the SCDC, *infra* note 117, this ordinance has been minimally enforced, likely because the diversion program that forms part of the statute has not been implemented. The diversion program requires that city officials offer services in place of fines.

³⁷ Wikipedia, Hunters Point (San Francisco), at [http://en.wikipedia.org/wiki/Hunters_Point_\(San_Francisco\)](http://en.wikipedia.org/wiki/Hunters_Point_(San_Francisco)).

³⁸ Gordon, *supra* note 1.

³⁹ SF Police Code, Art. 1.1, Sec. 97.

⁴⁰ California Penal Code 647(e) and (h).

⁴¹ Ilene Lelchuk, *Mayor Newsom takes a walk on needy side of Tenderloin*, S.F. CHRONICLE, Thursday, October 14, 2004, at B-1.

⁴² San Francisco Park Code, Art. 3, Secs. 3.12 and 3.13.

⁴³ San Francisco Police Code, Art. 1, Sec. 22.

public streets;⁴⁴ obstructing streets, lanes, alleys, places, or courts;⁴⁵ obeying street signs;⁴⁶ and compliance with traffic laws generally.⁴⁷ According to the Coalition on Homelessness, there has been an increase in the sweeps made “near any entrance or exit to the city.”⁴⁸

The sum total of these practices is the removal of homeless people from the sections of the city they use, in particular, services such as shelters, government housing offices, legal assistance providers, and health care centers.⁴⁹ A map illustrating some of the city spaces that have been affected is provided on the next page.⁵⁰

[Map will be supplied]

⁴⁴ California Penal Code 647(e).

⁴⁵ San Francisco Public Works Code, Art. 15, Sec. 723.

⁴⁶ California Vehicle Code 21451(c) and (d), 21452(b), 21543(d), 21456, 21456.5

⁴⁷ California Vehicle Code 2800.

⁴⁸ LS Wilson, *supra* note 28.

⁴⁹ 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, 383 (1998).

⁵⁰ Based on information gathered during an interview with LS Wilson, *supra* note 28. While not marked on the map, it is worth noting that the urban spaces in question are where the majority of homeless-related services are located. City spaces not described in this paper, such as the Haight-Ashbury and Mission neighborhoods, have been also been noted.

3. Out of Mind: A Definitional Paradigm Shift

This part examines a recent policy of the City of San Francisco, the *San Francisco Plan to Abolish Chronic Homelessness*,⁵¹ raising concerns regarding its ability to address homelessness generally.

(a) *Plan's Basic Tenets*

According to the Plan, Mayor Gavin Newsom accepted as his mandate the responsibility to address homelessness and, as such, commissioned a report to end chronic homelessness from what has become the Ten Year Council to End Chronic Homelessness in San Francisco (the "Ten Year Council").⁵² The Plan found that:⁵³

- An estimated 20% (or 3,000) of San Francisco's homeless population meets the definition of "chronically homeless";⁵⁴
- The chronically homeless consume 63% of the annual homeless budget (which includes local, state, and federal funding);

⁵¹ CITY AND COUNTY OF SAN FRANCISCO, THE SAN FRANCISCO PLAN TO ABOLISH CHRONIC HOMELESSNESS, June 30, 2004 [hereinafter, the Plan].

⁵² The definition of chronic homelessness given by the U.S. Department of Housing and Urban Development ("HUD") is: An unaccompanied homeless individual with a disabling condition who has either been continuously homeless for a year or more OR has had at least four (4) episodes of homelessness in the past three (3) years. To be considered chronically homeless, persons must have been sleeping in a place not meant for human habitation (e.g., living on the streets) and/or in emergency shelter during that time (taken from U.S. Department of Housing and Urban Development, Guide to Counting Unsheltered Homeless People, Chapter 2, at 5, at <http://www.hud.gov/offices/cpd/homeless/library/countinghomeless/index.cfm>) [hereinafter Definition of Chronic Homelessness].

⁵³ Plan, *supra* note 51, at 13-19.

⁵⁴ The Plan would not include: children (with disabilities and without disabilities) who are homeless with their parents; parents (with disabilities and without disabilities) who are homeless and who have children with them; youth on their own with disabilities who have not been homeless long enough to fit the federal definition; youth on their own without disabilities; unaccompanied individuals with disabilities who have not been homeless long enough to fit the federal definition; unaccompanied individuals without disabilities; and unaccompanied individuals who are unwilling to be declared disabled (NATIONAL COALITION ON HOMELESSNESS, QUESTIONS AND ANSWERS ABOUT THE CHRONIC HOMELESSNESS INITIATIVE, at <http://www.nationalhomeless.org/chronic/chronicqanda.html>).

- The Ten-Year Council targeted the chronically homeless to the exclusion of other homelessness people because “[they] are the most in need, they consume the lion’s share of dedicated resources and, if their needs are met, the city will save money”;
- The main strategy in addressing chronic homelessness will be the creation of “permanent supportive housing,” housing that includes on-site case managers, roving behavioral health teams, medical care, and information on mental and substance abuse treatment;
- City shelters and transitional housing programs will be phased down and replaced with 24-hour crisis clinics and sobering centers; and
- The Plan will take priority over traditionally funded housing and service programs until the chronic homeless issue is solved.

(b) *The Plan’s Rationales*

The basic premise of the Plan seems correct; that is, that the provision of housing is necessary to address homelessness. It is also laudable that the Plan aims to move homeless people into one housing unit, rather than shuffling them from shelter to transitional housing to permanent housing. Further, providing on-site services is an essential model of program delivery, reducing the difficulty homeless people face in tracking down services, arranging for appointments, and traveling throughout the city.

That said, there are some highly questionable features of the Plan. First, it is not clear how the Plan concluded the number of chronically homeless and the amount of resources they consume. The meaning of “chronic homelessness” is, in and of itself, disputed.⁵⁵ The federal government’s chronic homelessness data

⁵⁵ TESTIMONY OF NATIONAL LOW INCOME HOUSING COALITION, U.S. HOUSE OF REPRESENTATIVES FINANCIAL SERVICES COMMITTEE SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY, July 13, 2004, at <http://www.nlihc.org/press/pr071304.htm>.

is based on a study done of New York and Philadelphia shelters,⁵⁶ which has been criticized as unscientific as it does not count those living outside of shelters, nor does it consider those in other urban jurisdictions or in rural areas.⁵⁷

Second, the Plan seeks to create 3,000 units of housing for the chronically homeless by 2010, or in six years, which, theoretically, would address the units needed for the chronically homeless population that exists today.⁵⁸ However, with a clear statement that the Plan will take precedence over other homeless services and programs (which presumably includes those preventing the slip *to* chronic homelessness) the number of units necessary would be far more than those estimated.⁵⁹ In conjunction with another San Francisco policy, Care Not Cash, which slashes the welfare checks of single men from approximately \$410 per month to \$59, the first county to “use welfare dollars to finance supportive housing,” appears to be “hurting one homeless population as it helps another.”⁶⁰ All in all, there appears to be little concern regarding the needs of the general homeless populations and the care that those slipping into chronic homelessness will require.⁶¹

Third, there appear to be two inconsistencies with the decision to phase down shelters over the next four to six years.⁶² The Plan suggests that shelters will be adequately replaced by permanent supportive housing and crisis clinics (the clinics are mainly for those with alcohol and substance abuse problems). Data from HUD suggests that chronically homeless people comprise a high proportion of non-shelter users, regularly

⁵⁶ D.P. Culhane, D.P. and R. Kuhn, Patterns and determinants of shelter utilization among single homeless adults in New York City and Philadelphia: A longitudinal analysis of homelessness, 17 (1) J. OF POL. ANAL. AND MGMT 23-43 (1997).

⁵⁷ NCH, *supra* note 2.

⁵⁸ Plan, *supra* note 51, at 33.

⁵⁹ The Plan itself acknowledges that San Francisco has experienced a 76% increase in the number of homeless people since 2000, with the street population increasing by 123% and the shelter population by 28% (Plan, *supra* note 51, at 30).

⁶⁰ Lee Romney, *Care Not Cash program progresses*, LA TIMES, Sunday, October 10, 2004, at <http://www.contracostatimes.com/mld/cctimes/news/state/9883795.htm?1c>.

⁶¹ Note also the possible intention of the City to reduce the number of people receiving cash assistance. Since April 2004 (when Care Not Cash was introduced), the San Francisco homeless CAAP caseload decreased by 1,354 persons (54%). In April, there were 2,497 homeless CAAP clients. In October there were 1,143 homeless CAAP clients (Care Not Cash Monthly Update, October 2004, at <http://sfgov.org/dhs>).

⁶² Plan, *supra* note 51, at 15.

sleeping outdoors, in abandoned buildings, in tent cities or shanty-type constructions, or in vehicles.⁶³

Thus, if the chronically homeless population is not the group frequently using shelters, what connection is there to the Plan and what will happen to the homeless persons currently using them?

In addition, shelters will be one of the entryways into the Plan, meaning that, through outreach, chronic shelter users will be given the option to enter supportive housing. In addition, Mayor Newsom has suggested that the enforcement of quality of life ordinances will serve as a means to move those from the street to permanent support housing. If shelters are closed, how can they serve as an entryway? And, there appears to be some doubt that outreach outside of shelters has occurred. For example, when a Bayview-Hunters Point encampment was recently torn down and vehicles that people were residing in confiscated, it appears that no social service or health workers came by with offers to help, nor were housing units offered.⁶⁴

This leads to a fourth, and overarching concern, namely that of addressing homeless for the 80% not included in the Plan and for homelessness generally. As stated earlier in this section, the causes of homelessness are largely related to a decline in the affordability of housing and income-related difficulties for this in poverty. The Plan has no strategies for addressing prevention or causes of homelessness. It is puzzling that the Plan would suggest a focus on chronic homelessness, given the federal government's reduction in programs such as subsidized housing. The projected \$1.6 billion dollars in cuts to Section 8 housing vouchers in the 2005 Budget, with the cut rising to \$4.6 billion or 30 percent by 2009, will shrink the program by about 250,000, rising to 600,000.⁶⁵ Those currently benefiting from programs will almost certainly have trouble finding replacement income or housing. One would think that it would make more sense for San Francisco to focus on strategies for homeless groups that will be adversely affected by policies like them.

⁶³ HUD, *supra* note 52, at 4

⁶⁴ Ilene Lelchuk, *Mayor Newsom takes a walk on needy side of Tenderloin*, S.F. CHRONICLE, Thursday, October 14, 2004, at B-1. According to this article, city lawyers were present, presumably to confirm that they were entitled to tear down the encampment and confiscate cars.

⁶⁵ CENTER ON BUDGET AND POLICY PRIORITIES, *supra* note 18. The Section 8 program provides low-income families with vouchers to help cover the cost of rental housing in the private market.

All in all, it seems evident that the Plan's strategy is to redefine homelessness to mean "chronic homelessness" and to deal exclusively with this small segment of the overall population. There are significant concerns with the way that the problem was defined, that both the chronically and "regular" homeless populations will grow, and that the causes of homelessness will remain unaddressed.

III. City Policies and the "Otherization" of the Homeless

This section first explores existing scholarship on how the "other" is manifested and, second, applies this scholarship to San Francisco's homeless policies.

1. One and Other: Wedding Alienation to the Creation of an Other

Alienation is the use of social, economic, and political exclusion to reinforce social values. It is connected, in part, to rationality, or the view that if people are too "coddled" or are given special treatment or assistance, they won't seek self-betterment. Alienation reinforces the notion that those who don't play by the rules ought to be excluded from social life. Unless it is determined that those asking for assistance are truly unable to provide it for themselves, both economic protection and public approval will be denied to those who ask for it.⁶⁶ This rests on the public norm that people have a responsibility to participate economically in society and not doing so is an anti-social act.⁶⁷ Citizens have the moral obligation to become competent, meaning taught to discharge their obligations through the use of social control.⁶⁸ Essentially, a person's moral worth is premised on their ability to function in the market.⁶⁹

⁶⁶ Paul Krugman, *For Richer*, N.Y. TIMES, Oct. 20, 2002, at 62(1).

⁶⁷ Joel F. Handler, *The Legacy of Goldberg v. Kelly: A Twenty Year Perspective: "Constructing the Political Spectacle": Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History* 56 BROOKLYN L. REV. 899, 903 (1990). See also M. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 157-65 (1989).

⁶⁸ See, e.g., CALIFORNIA'S WELFARE TO WORK PROGRAM, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, at http://www.dss.cahwnet.gov/cdssweb/Welfare-to_172.htm, which states as a first sentence, "Current welfare rules ensure that individuals who work are better off financially than if they do not work," reinforcing the view that generous welfare contributions serve as an economic disincentive to working.

⁶⁹ Handler, *supra* note 67, at 903.

This conception of social norms reflects a shift in values to overt individualism and disconnection among social classes.⁷⁰ Alienation emerges as the result of this shift. Alienation lies in opposition to the concept of “belonging,” articulated as: “...social connection or affiliation, including bonds of love, friendship and shared purpose, as well as the basic ability to communicate and relate to others. ... The second aspect is social acceptance, which enables a person to be with and among others with a sense of comfort and entitlement, or in short, a sense that she belongs and that she has a rightful place in the world.”⁷¹ Alienation has dramatic human effects, ranging from the ability to flourish to outright survival. Aristotelian philosopher Alasdair MacIntyre suggests that liberal philosophers have emphasized reason and self-sufficiency over our universal and inevitable dependence on each other. He believes that, without a “set of ongoing institutionalized relationships, relationships of family and household, of school or apprenticeship ... of local community, and of the larger society,” human beings cannot survive, learn to reason independently, form realistic aspirations, attain self-knowledge, or have confidence in our judgments about ourselves and our world.⁷² Indeed, Putnam’s observations regarding “social capital” would reinforce the economic truth behind the importance of relationships.⁷³

Alienation makes blatant who is worthy of participating in social life. An illuminating article written by Joel Handler demonstrates that the changes made to welfare were linked to the view that poor, African-American women would have incentives to continue having babies, never marry, and not pursue work if benefits were sufficient to live on.⁷⁴ Thus, the program would need to provide de-incentives by restricting

⁷⁰ See e.g., Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?* 98 HARV. L. REV. 592 (1985) (Arguing that cost-benefit comparisons are created to serve, intentionally or not, a specific agenda. The intellectual and social heritage of these ideas lies in the classical eighteenth and nineteenth century economics of unfettered contract, consumer sovereignty, social Darwinism, and perfect markets. This brings these ideas within a paradigm focused on individualism, “efficient” resource allocation, and maximum productivity, as against respect for distributive justice, procedural fairness, personal rights and public goods).

⁷¹ A. Hubbard, *The Major Life Activity of Belonging*, 39 WAKE FOREST L. REV. 217, 219 (2004).

⁷² *Id.* at 239.

⁷³ See Robert D. Putnam, *Tuning In, Tuning Out: The Strange Disappearance of Social Capital in America*, 128 POL. SCI. AND POL. 664.

⁷⁴ Handler, *supra* note 67, at 926 and DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997) (noting that courts have ignored the connection between race and welfare policies). While space does not permit the issue to be pursued in this paper, it is worth examining the degree to which racial discrimination is a factor in government approaches taken towards poverty, in particular that the public implicitly denies benefits to those who are seen as the primary

the time period in which they could remain on assistance, reducing the amount of benefits received, and capping the number of children covered. The view is that benefits create laziness, lack of incentives, and unearned benefits:

The current Darwinist approach towards welfare, which is clothed in market terminology, creates a hostile and brutal environment for the poor. The idea of earning one's citizenship by being a productive member and not being a "transaction cost" reinforces the notion that the poor have failed themselves and society, thus deserving the minimal amount of aid. Combined with the pop-psychology idea of "enabling" creeping into the rhetoric of judging the poor, an unforgiving attitude towards the poor arises.⁷⁵

As Handler states, "We have invented the underclass as the Other."⁷⁶ "Otherness" may take the form of denial of citizenship rights, such as civil and political,⁷⁷ but may also be economic and social. Either way, there is an undermining of that person's ability to participate in social life or to maintain a sense of cultural citizenship.⁷⁸ One of the strengths of otherizing is its ability to normalize the experiences of the dominant society, applying their values to a class of persons it deems unacceptable.⁷⁹ Groups marked as Other "are both marked out by stereotypes and at the same time rendered invisible. The stereotypes confine them to a nature which is often attached in some way to their bodies, and which thus cannot easily be denied. These stereotypes so permeate the society that they are not noticed as contestable."⁸⁰

An extreme example of alienation is the political, economic and social disenfranchisement of convicted felons, including the practice of excluding them from voting (even subsequent to release from prison) and policies aimed at making it difficult for them to gain meaningful employment. A subtler example of

recipients, namely Hispanic and African American persons. This issue was raised in our "Law, Markets & Society" class, October 28, 2004.

⁷⁵ Frank Munger, *How Can We Save the Safety Net?* 69 BROOKLYN L. REV. 543, 551 (2004). See also the Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (which refuses to extend the child tax credit to the poor because they do not earn enough to qualify).

⁷⁶ Handler, *supra* note 67, at 967.

⁷⁷ U.S. CONST. amend. XV, § 1 ("the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude").

⁷⁸ Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN'S L.J. 138, 195 (2004). See also Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991).

⁷⁹ IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 59 (1990).

⁸⁰ *Id.*

alienation is those living in poverty. Since the ability to support oneself through gainful employment is the entryway to social membership, the lack of ability to work at a non-poverty wage is becoming the barrier.⁸¹ The 1980's and 1990's saw the rise of arguments about how the sins of "welfare queens"⁸² and their propensity to abuse "handouts"⁸³ resulted in the "decline of the Protestant Work Ethic."⁸⁴ This main concern about this abuse was the effect on the market system, where resources were drained away from those who had legitimately worked for them.⁸⁵ While the market rhetoric may be new, it draws on the thread linking the history of poverty policies, namely that benefits should only be given to those who would not thereby be encouraged to become permanently dependent.⁸⁶ This rhetoric reinforces the painting of the poor as the Other as a group that undermines social values by not participating in a meaningful way in society.⁸⁷ They are challenging social norms and violating the dominant group's notion of the social contract.

Courts have reinforced this view of welfare and other income compensation policies. In the 1970 case, Goldberg v. Kelly⁸⁸, the Supreme Court held that before welfare benefits could be terminated, the state must provide recipients with the opportunity to submit a written statement as to why their benefits should not be terminated and that a pre-termination evidentiary hearing was necessary. Denying the argument that fiscal and administrative costs justified the lack of a hearing, the Court acknowledged the importance of dignity, opportunity, and community belonging, stating:

From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. ... Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of

⁸¹ Handler, *supra* note 67, at 967.

⁸² Munger, *supra* note 75, at 560 (Noting the myth of the poor, black, teenage welfare mother with many children who remains on welfare for many years. In reality, fewer than one in ten recipients are teenagers; a typical welfare family has fewer than two children; and most recipients receive welfare for relatively short periods of time.)

⁸³ Handler, *supra* note 67, at 908.

⁸⁴ Michaels, *supra* note 4.

⁸⁵ *Id.* at 585.

⁸⁶ Handler, *supra* note 67, at 928.

⁸⁷ YOUNG, *supra* note 79, at 59.

⁸⁸ 397 U.S. 254 (1970) [hereinafter Goldberg].

unjustified frustration and insecurity.⁸⁹

The Court has limited the application of the case by finding that it does not apply to veteran's benefits⁹⁰; social security disability benefits⁹¹; or worker's compensation⁹²; and, in terms of state support, that welfare benefits are not a right and states have no obligation to provide minimum levels of support,⁹³ and that states may determine whether welfare applicants have a "legitimate claim of entitlement" for due process purposes.⁹⁴ Subsequent state court decisions have held that it is not unconstitutional to create an irrebuttable presumption that recipients of state aid are not needy and not eligible for town welfare⁹⁵ and that a social security disability claimant who could not stand or walk for more than two hours without pain could perform "light work" jobs and was therefore ineligible for benefits.⁹⁶ Courts have backtracked substantially from their protection of at least limited economic rights.

Homeless people serve as the most overt example of poverty. Their marginalization requires legitimization as to why they should not be helped, raising the issue of classification of those "deserving" and "undeserving" of public sympathy.⁹⁷ At the moment, this classification rests on a moral distinction based on who has a work ethic, whether a disability forgives responsibility, what behaviors homeless people should exhibit (including what rational actions they should undertake), and the extent to which they respect social norms.⁹⁸ The disenfranchisement of criminals has been justified in that certain people have "broken the rules."⁹⁹ As described earlier, welfare programs have been cut on the rationale that some will take advantage of public generosity. Likewise, where homeless people are concerned, there is an increasing

⁸⁹ Goldberg, *supra* note 88, at 265.

⁹⁰ Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985).

⁹¹ Mathews v. Eldridge, 424 U.S. 319 (1976).

⁹² Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

⁹³ Lavine v. Milne, 424 US 577 (1976).

⁹⁴ Griffeth v. Detrich (1979, CA9, Cal).

⁹⁵ Baker v. Concord (1990, CA1, NH).

⁹⁶ Fenton v. Apfel (1998, CA8 Mo).

⁹⁷ Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?* 27 U.C. DAVIS L. REV. 255 (1994) (arguing that empathy has transitioned to intolerance, in part because Americans view homeless policies as ineffective and the amount of money spent a waste).

⁹⁸ Handler, *supra* note 67, at 906.

⁹⁹ Mary Beth Pfeiffer, *A Death in the Box*, NEW YORK TIMES MAGAZINE, October 31, 2004 (stating that 250,000 Americans with mental illnesses live in prisons and that people with untreated mental illness are often poor and homeless. Many commit petty crimes, creating arrest records that often lead to harsh sentences).

trend to locate people along a spectrum of the deserving and undeserving based on who seems to be making an effort to rise out of negative circumstances.

Alienation speaks both the language of morality and of economics¹⁰⁰ and is wielded by neo-conservatives and neo-liberals.¹⁰¹ These features are what make it powerful when used to justify particular programs.¹⁰² For example, economic analysis may equally be used to demonstrate that the market is not self-regulating, that poor people's loss of purchasing power is enormously harmful to the system, or that the impact of class segregation are both socially and economically suspect.¹⁰³ Alienation is less likely to succeed where there is a perceived injustice in the exclusion of certain people. This may be considered the "charitable impulse": "At various times, the charitable impulse seems to become overwhelmed by other forces, but it is never completely silent. During periods when social control policies are regulated most harshly, the full rigor of the state is often blunted by the desire of local people to help their unfortunate neighbors."¹⁰⁴ Identifying who is deserving and who isn't helps lawmakers justify certain policies over others.

2. In and Out: Reframing and Removing Homelessness

Two main connections between San Francisco's homeless policies and alienation may be drawn from the foregoing scholarship. First, there is a clear move to redefine the homeless population as meaning those falling under the umbrella of "chronically homeless." The Plan's redefinition serves as a confirmation of who is "deserving" of support and who isn't. Basically, those with mental illnesses should have help and

¹⁰⁰ See Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State* 78 IND. L.J. 783 (2003). See also Steve P. Calandrillo, *Responsible Regulation: A Sensible Cost-Benefit, Risk Versus Risk Approach to Federal Health and Safety Regulation*, 81 B.U. L. REV. 957, 984 (2001) (stating that Kaldor-Hicks efficiency -- meaning resource allocations in which aggregate gains outweigh aggregate costs, even if some individuals experience greater losses -- seeks the greatest good for the greatest number of people).

¹⁰¹ Michaels, *supra* note 4, at 586. See also the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PUBLIC LAW 104-193) (signed by President Bill Clinton, this legislation sets a five-year time limit for receiving welfare payments and requires that recipients work while after two years of receiving assistance) and ANTHONY GIDDENS, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* 13 (1998) (arguing that neoliberalism includes the belief that the welfare state is "the source of all evils").

¹⁰² See Munger, *supra* note 75, at 551 (suggesting that economic analysis with respect to the poor is used to justify the moral belief that they are personally at fault for their condition).

¹⁰³ Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View From Century's End*, 49 AM. U.L. REV. 1, 51 (1999).

¹⁰⁴ Handler, *supra* note 67, at 938.

housing, but the needs of everyone else will have to wait.¹⁰⁵ The public's sympathies may now be legitimately focused on the poor sick people, while the vast percentage of homeless people are viewed as being able to wait for assistance and less worthy of immediate help.

Given its inability to address the larger economic and structural issues that contribute to homelessness and the financial demands that services impose, the motivations of the city may be to use neo-liberal values to address at least one part of the homeless problem.¹⁰⁶ This would be consistent with its attempts to appear residents and businesses as though it is addressing the problem,¹⁰⁷ while gathering whatever funding it can from the federal government.¹⁰⁸ The City is also able to scale back existing programs assisting the general homeless population. One example explicitly described in the Plan is the reduction in shelters. A second example is the introduction of *Care Not Cash* in April 2004 which provided that General Assistance rates drop from approximately \$410 to \$59 in exchange for housing (mainly shelters) and other in-kind services.¹⁰⁹ While city officials state, "Under *Care Not Cash*, homeless ... clients are offered housing/shelter and associated amenities as a portion of their benefit package. Funding that would have otherwise been used for cash aid is being used to expand permanent housing and services for this population," the priority for housing is the chronically homeless population.¹¹⁰

¹⁰⁵ I attended a discussion in my "Homelessness in America" class, where a public official described the chronically homeless as "bleeding and dying" and the rest of the homeless population as "suffering from a broken arm." Unfortunately, we had to promise not to reveal names or quote the public official, but this kind of language reinforces the views of San Francisco lawmakers.

¹⁰⁶ Major Gavin Newsom recently acknowledged that, "Cities like San Francisco have become America's first responders in almost every category, forced to create the solutions to the seemingly intractable problems facing Americans today" (Gordon, *supra* note 1).

¹⁰⁷ Chronic homelessness is now seen by hotel operators, for example, as the "major issue" as it "tarnishes the city's allure and is so difficult to fix" (George Raine, *S.F. tourism springing back, but not to glory of 2000*, S.F. CHRONICLE, Monday, September 27, 2004, at A-1).

¹⁰⁸ Federal funding has been received based on San Francisco's decision to focus on chronic homelessness. The city recently received \$4.6 million to help the hard-core homeless, which "were awarded largely on the basis of the city having enacted, last summer, a 10-year plan to end chronic homelessness, Mayor Gavin Newsom and Philip Mangano, head of the U.S. Interagency Council on Homelessness, said at a joint press conference in City Hall." Similar grants of approximately \$24.2 million were made to San Francisco based largely on the city's having committed to enacting a 10-year plan (Kevin Fagan, *\$4.6 million awarded to homeless programs*, S.F. CHRONICLE, Tuesday, October 5, 2004, at B-4).

¹⁰⁹ City and County of San Francisco, *Care Not Cash Monthly Update* (September 2004), at <http://www.sfgov.org/dhs> [hereinafter *Monthly Update*].

¹¹⁰ *Id.*

Indeed, the city may view the narrowing of “homelessness” to “chronic homelessness” as solving two problems: it can get federal funding to help offset some of the costs and, in addition, can legitimately introduce harsh quality of life ordinances to appease businesses and help draw in tourists. This allows for the emphasis on a combination of economic motivations, market realism, and equality (or the dominant neo-liberal political views), permitting San Francisco to use market language to justify its programs while simultaneously claiming to be doing the right thing.¹¹¹ This is the essential element of creating an Other: using morality and economics to distinguish who falls into the “deserving” and “undeserving” categories.

Second, Otherness can be observed by the separation between institutions addressing homelessness and homeless people themselves. Where quality of life laws are concerned, there is an attempt by the City to move those who use particular services away from the locations where the services are found.¹¹² In the Plan, homeless people are now required to be institutionalized in order to receive assistance, both by having to enter supportive housing and by having the General Assistance they receive reduced under *Care Not Cash*. There is a group that creates the services and those that consume them, the latter entirely dependent on the former for all of their needs. This is consistent with Young’s notion of Otherness as both marking people by stereotypes and rendering them as invisible.¹¹³ Homeless people are those that consume services without ever becoming participants in social or economic life, and can be rendered invisible by their placement in particular forms of housing and removed from city streets.

Third, the removal of homeless people from city streets, particularly those where services are typically located, permits a redefinition of the city. It is a city deemed cleansed of a homeless problem, where people are either cached in supportive housing under the Plan or removed by ordinances for having used public space for living purposes. Gone is the characterization that: “The homeless are allowed to *be* -- provided they are on the streets, in the parks, or under the bridges. ... [I]n the daytime and, for many of them, all through the night, wandering in public places is their only option. When all else is privately

¹¹¹ Handler, *supra* note 67; YOUNG, *supra* note [X]; Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923 (2000).

¹¹² LS Wilson, *supra* note 28.

¹¹³ YOUNG, *supra* note 79, at 59.

owned, the sidewalks are their salvation.”¹¹⁴ Homeless people are, in a literal sense, cast out by their physical removal.

IV. Conclusion

This paper has used San Francisco’s quality of life ordinances and homeless policies as a backdrop to understanding how homeless people have been physically and socially marginalized. It has identified their increasing role as the Other, as being alienated from general society as a result of their lack of participation in market society. If, indeed, this is correct, what can be done to reverse the trend?

As seen earlier, homelessness is largely due to structural issues, with cities facing great challenges in dealing with it. Hoping for a national shift in thinking to address it is nice, but insufficient (although it should be tried!). In the meantime, using strategies that de-emphasize homeless people as Others may make a difference.

One strategy in addressing alienation broadly and quality of life ordinances specifically has been the creation of a mass defense legal organization. The major objection to this strategy is that any kind of social transformation requires a “bottom up” approach; that is, debating change in the political arena.¹¹⁵ By contrast, others would argue that legal rights are necessary for empowerment.¹¹⁶ The organization, called the Status Crimes Defense Collaborative (“SCDC”), is comprised of staff and members of the American Civil Liberties Union, the Lawyer’s Committee for Civil Rights, Bay Area Legal Aid, the Coalition on Homelessness, and other legal advocacy groups. SCDC organizes mass defenses for persons charged with quality of life offenses: “Through outreach, organizing, education, advocacy, and legal representation the [SCDC] defends homeless and marginally housed people in San Francisco charged with crimes that punish them because of their homelessness.”¹¹⁷ Defenses do not normally concern constitutional arguments but,

¹¹⁴ Waldron, *supra* note 78 at 301.

¹¹⁵ Munger, *supra* note 75, at 546.

¹¹⁶ Handler, *supra* note 67, at 971.

¹¹⁷ Status Crimes Defense Collaborative, Memorandum of Understanding (on file with author).

instead, lawyers and legal advocates argue over issues such as whether homeless persons charged with sleeping in parks were actually sleeping.

In addition to ensuring that homeless persons are given a proper defense,¹¹⁸ work like the SCDC's challenges the "us-them" mentality of the quality of life laws. There is little doubt that homeless people lining city streets have a profound impact on residents, business owners, tourists, and even the homeless themselves. As stated earlier, the tendency of people to feel a "charitable impulse" for the homeless can materialize into supportive public action or may be lead to feelings of outrage.¹¹⁹ It depends in part on how causes of and strategies related to homelessness are rationalized to the public.

Another strategy has been for those in the Other category working with city officials directly to change the types of laws enacted. For example, Paul Boden, head of the Coalition on Homelessness, and several other community activists, were recently appointed to serve on the committee to oversee the implementation of San Francisco's 10-year plan to end chronic homelessness.¹²⁰ This is pragmatic method implies working within the system to change it, bringing both the homeless and homeless advocates within governmental structures to work for change. It is consistent with a movement in Europe known as the "Fourth Way," which emphasizes that the interplay between the poor, poverty advocates, and academics is essential to address poverty generally.¹²¹

Understanding the role that alienation plays in policies is useful for looking at homelessness strategies through a new lens. Moreover, understanding the moral and economic language assists academics, lawyers, advocates, and homeless persons themselves in arriving at effective strategies for their own work, in particular, by using the language of morality and economics themselves.

¹¹⁸ *Duro v. Reina*, 495 U.S. 676 (1990).

¹¹⁹ Handler, *supra* note 67, at 938.

¹²⁰ Kevin Fagan, *Newsom, Alioto name homelessness panel*, S.F. CHRONICLE, Friday, October 22, 2004, at B-4.

¹²¹ See "ATD Fourth World," at <http://www.atd-quartmonde.org/accueil-uk.html>. See also Waldron, *supra* note 78 at 314 where he discusses law-making: "[L]egislation is called for and promoted by people who are secure in the knowledge that they themselves have some place where they are permitted to sleep. Because *they* have some place to sleep which is not the subway, they infer that the subway is not a place for sleeping."

BIBLIOGRAPHY

I. Case Law

Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

Baker v. Concord (1990, CA1, NH).

Bruckman v. Guiliani, 94 N.Y.2d 387 (2000).

Duro v. Reina, 495 U.S. 676 (1990).

Edwards v. California 314 U.S. 162, 177 (1941).

Fenton v. Apfel (1998, CA8 Mo).

Goldberg v. Kelly, 397 U.S. 254 (1970).

Griffeth v. Detrich (1979, CA9, Cal).

Lavine v. Milne, 424 US 577 (1976).

Mathews v. Eldridge, 424 U.S. 319 (1976).

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

Robinson v. California, 370 U.S. 660 (1962).

Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985).

II. Statutes and Government Proceedings

California Penal Code 647.

California Vehicle Code 21451.

California Vehicle Code 21452(b).

California Vehicle Code 21543(d).

California Vehicle Code 21456.

California Vehicle Code 21456.5.

California Vehicle Code 2800.

CITY AND COUNTY OF SAN FRANCISCO, CARE NOT CASH MONTHLY UPDATE (September 2004), *at* <http://www.sfgov.org/dhs>.

CITY AND COUNTY OF SAN FRANCISCO, THE SAN FRANCISCO PLAN TO ABOLISH CHRONIC HOMELESSNESS, June 30, 2004.

Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752.

Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PUBLIC LAW 104-193).

San Francisco Park Code, Art. 3, Sec. 3.12.

San Francisco Park Code, Art. 3, 3.13.

San Francisco Police Code, Art. 1, Sec. 21.

San Francisco Police Code, Art. 1, Sec. 22.

San Francisco Police Code, Art. 1.1, Sec. 97.

San Francisco Police Code, Art. 2, Sec. 153.

San Francisco Police Code, Section 120-2(D)(2) and (3).

San Francisco Public Works Code, Art. 15, Sec. 723.

San Francisco Traffic Code, Art. 4, Sec. 76.

Stewart B. McKinney Act, 42 U.S.C. § 11301, et seq. (1994).

TESTIMONY OF NATIONAL LOW INCOME HOUSING COALITION, U.S. HOUSE OF REPRESENTATIVES FINANCIAL SERVICES COMMITTEE SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY, July 13, 2004.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, GUIDE TO COUNTING UNSHELTERED HOMELESS PEOPLE, CHAPTER 2, at <http://www.hud.gov/offices/cpd/homeless/library/countinghomeless/index.cfm>).

U.S. CONST. amend. XV, § 1.

WELFARE TO WORK PROGRAM, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, at http://www.dss.cahwnet.gov/cdssweb/Welfare-to_172.htm.

III. Secondary Sources

ATD Fourth World, at <http://www.atd-quartmonde.org/accueil-uk.html>.

Melanie B. Abbott, *Homelessness and Substance Abuse: Is Mandatory Treatment the Solution?* 22 FORDHAM URB. L.J. 1, 66 (1994).

Ann M. Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 HOUS. L. REV. 211 (2003).

Steve P. Calandrillo, *Responsible Regulation: A Sensible Cost-Benefit, Risk Versus Risk Approach to Federal Health and Safety Regulation*, 81 B.U. L. REV. 957 (2001)

THE CENTER ON BUDGET AND POLICY PRIORITIES, MANY LOW-INCOME FAMILIES WOULD LOSE FEDERAL HOUSING ASSISTANCE UNDER PROPOSED FUNDING CUTS, March 17, 2004, at <http://www.cbpp.org/3-17-04hous-pr.htm>.

D.P. Culhane, D.P. and R. Kuhn, Patterns and determinants of shelter utilization among single homeless adults in New York City and Philadelphia: A longitudinal analysis of homelessness, 17 (1) J. OF POL. ANAL. AND MGMT 23 (1997).

Kevin Fagan, *\$4.6 million awarded to homeless programs*, S.F. CHRONICLE, Tuesday, October 5, 2004, at B-4.

Kevin Fagan, *Newsom, Alioto name homelessness panel*, S.F. CHRONICLE,

Friday, October 22, 2004, at B-4.

Kevin Fagan, Panhandlers curbed on Market, Van Ness Outreach workers, police mobilized under Prop. M, S.F. CHRONICLE, Saturday, October 16, 2004, at B-1.

ANTHONY GIDDENS, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* 13 (1998).

Rachel Gordon, *Mayor: Homeless are city's new symbol -- Newsom outlines progress on issue in State of the City address*, S.F. CHRONICLE, Friday, October 22, 2004, at B1.

Joel F. Handler, *The Legacy of Goldberg v. Kelly: A Twenty Year Perspective: "Constructing the Political Spectacle": Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOKLYN L. REV. 899 (1990).

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 (1998).

Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923 (2000).

A. Hubbard, *The Major Life Activity of Belonging*, 39 WAKE FOREST L. REV. 217 (2004).

JOINT CENTER FOR HOUSING STUDIES AT HARVARD UNIVERSITY, *STATE OF THE NATION'S HOUSING 2003* (June 2003).

M. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 157 (1989).

Paul Krugman, *For Richer*, N.Y. TIMES, Oct. 20, 2002, at 62(1).

Ilene Lelchuk, *Mayor Newsom takes a walk on needy side of Tenderloin*, S.F. CHRONICLE, Thursday, October 14, 2004, at B-1.

Ilene Lelchuk, *One of S.F.'s toughest neighborhoods to see police crackdown and new social workers*, S.F. CHRONICLE, Wednesday, May 5, 2004, at A-1.

Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State* 78 IND. L.J. 783 (2003).

Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN'S L.J. 138 (2004).

Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573 (2004).

Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?* 27 U.C. DAVIS L. REV. 255 (1994).

Frank Munger, *How Can We Save the Safety Net?* 69 BROOKLYN L. REV. 543 (2004).

NATIONAL COALITION ON HOMELESSNESS, *QUESTIONS AND ANSWERS ABOUT THE CHRONIC HOMELESSNESS INITIATIVE*, at <http://www.nationalhomeless.org/chronic/chronicqanda.html>.

NATIONAL COALITION ON HOMELESSNESS, *ILLEGAL TO BE HOMELESS: THE CRIMINALIZATION OF HOMELESSNESS IN THE UNITED STATES*, 27 (August 2003), at <http://www.nationalhomeless.org/crimreport>.

Maya Nordberg, *Jails Not Homes: Quality of Life on the Streets of San Francisco*, 13 HASTINGS WOMEN'S L.J. 261 (2002).

Mary Beth Pfeiffer, *A Death in the Box*, NEW YORK TIMES MAGAZINE, October 31, 2004.

Robert D. Putnam, *Tuning In, Tuning Out: The Strange Disappearance of Social Capital in America*, 128 POL. SCI. AND POL. 664 (1995).

George Raine, *S.F. tourism springing back, but not to glory of 2000*, S.F. CHRONICLE, Monday, September 27, 2004, at A-1.

DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997).

Lee Romney, *Care Not Cash program progresses*, LA TIMES, Sunday, October 10, 2004, at <http://www.contracostatimes.com/mld/cctimes/news/state/9883795.htm?1c>.

Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631 (1992).

Status Crimes Defense Collaborative, Memorandum of Understanding (on file with author).

Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?* 98 HARV. L. REV. 592 (1985).

THE UNITED STATES CONFERENCE OF MAYORS, *A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICAN CITIES* (2001).

THE UNITED STATES CONFERENCE OF MAYORS, *A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICAN CITIES* (December 2003).

Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991).

Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View From Century's End*, 49 AM. U.L. REV. 1 (1999).

Wikipedia, *Hunters Point (San Francisco)*, at [http://en.wikipedia.org/wiki/Hunters_Point_\(San_Francisco\)](http://en.wikipedia.org/wiki/Hunters_Point_(San_Francisco)).

Interview with LS Wilson, Civil Rights Project, Coalition on Homelessness (Oct. 25, 2004).

IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 59 (1990).

APPENDIX I: CALIFORNIA PENAL CODE

§ 647. Disorderly conduct; Restrictions on probation

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

[...]

(c) Who accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms.

[...]

(e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself or herself and to account for his or her presence when requested by any peace officer so to do, if the surrounding circumstances would indicate to a reasonable person that the public safety demands this identification.

(f) Who is found in any public place under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, controlled substance, or toluene, in such a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, or toluene, interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.

[...]

(h) Who loiters, prowls, or wanders upon the private property of another, at any time, without visible or lawful business with the owner or occupant. As used in this subdivision, "loiter" means to delay or linger without a lawful purpose for being on the property and for the purpose of committing a crime as opportunity may be discovered.

[...]

(j) Who lodges in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control of it.