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“Consensus Mayor’s” Sour Grapes

by Patrick Monette-Shaw

A legal theory holds that any law that “forbids an act in terms so vague that men of common intelligence and understanding must guess as to its meaning and differ as to its application violates the first essential of due process of law.” Mayor Lee was mistakenly advised he could go after his political foe, Sheriff Ross Mirkarimi, by invoking San Francisco’s overly-vague definition of official misconduct.

Although former Mayor Willie Brown has advised Mayor Ed Lee to get over and move beyond the Supervisors’ reinstatement of Sheriff Mirkarimi (“Mayor Lee, bury hatchet over sheriff case,” *San Francisco Chronicle*, Oct. 27), Lee continues to pout sour grapes. “Slick Willie” should have advised Lee that continuing to harass Mirkarimi may well result in Lee being a one-term mayor.

After all, San Franciscans have not ceded our democracy to the vagaries of mayoral case-by-case “discretion,” nor have voters granted Lee the authority to replace our rule of laws with either his own rules of “decency” or his so-called “sound judgment.”

As www.citireport.com editor Larry Bush noted in a recent post (“Big Mouths, Little Brains”) regarding the Supervisors’ vote to reinstate Sheriff Mirkarimi, “There has been so much stupidity to choose from that it’s hard to know where to start.” Bush was referring to the botched Ethics Commission and Board of Supervisors hearings “consensus” Mayor Ed Lee launched.

The lack of ethical reasoning and hypocrisy — when not sheer stupidity — emanating from San Francisco’s City Hall with its cadre of Deputy City Attorneys, is shocking to San Franciscans.

Stupidity of Mayor Lee’s Lawyers

There’s no sympathy to be found for Ed Lee’s reliance on the stupid legal strategy developed by Deputy City Attorneys Sherri Kaiser and Peter Keith, most probably with the concurrence of their boss, City Attorney Dennis Herrera.

Forget for a moment that the Ethics Commission threw out the official misconduct charges Lee initially filed, and that the Ethics Commission then rejected all six of the amended charges the Mayor substituted. Forget that in order to move the charges to the Board of Supervisors, the Ethics Commission hastily incorporated portions of the Mayor’s amended counts four and five into a new hybrid charge just minutes before voting on August 19, depriving Mirkarimi’s lawyers of an opportunity to prepare a defense against an eleventh-hour new charge.

Look to the testimony of Ms. Kaiser during the Board’s hearing.

Throughout the Ethics trial, Kaiser convinced the Ethics Commissioners that there had to be a “relationship test” between official duties and an official’s behavior. But at the Board’s hearing on October 9, Kaiser changed her tune, first saying that the decision to remove an elected official should be made on a case-by-case basis by relying only on the “sound judgment” of the Mayor, Ethics Commission, and Supervisors. Then, Kaiser changed her tune again, saying that it is entirely a discretionary — not a “sound judgment” — decision and that it is not up to the Board of Supervisor’s to use their personal views of what the standards of conduct should be for the Sheriff.



Mayor Ed Lee dreams of sharing a special Thanksgiving dinner with Sheriff Ross Mirkarimi, carved hatchet-style and served on cooked-up Sour Grapes substrate.

Cartoon: courtesy of Doug Comstock / Westside Observer Newspaper

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Kaiser repeatedly said on October 9 that it would be “really wrong” to leave the removal of the Sheriff to a recall election. She claimed that voters had given the Mayor and Ethics Commission a clear definition of official misconduct, that voters “have determined for themselves how they wish to be governed,” and that they “would like to be governed” by asking their “Mayor, their Ethics Commission, their Board of Supervisors, to take action to protect them” via the official misconduct process, rather than a recall.

Kaiser went so far as to compare Mirkarimi to a hypothetical Animal Control Officer who might be running a dog fight ring on his private time. When Kaiser said, “No one wants Michael Vic in control of the Animal Control Department,” she was booed by the audience for blurting out such a stupid analogy, but she charged ahead, anyway.

Kaiser stated that the Mayor “certainly does not agree with Commissioner Hur’s decision to emphasize the need for a bright-line rule” that would clearly, and narrowly, define official misconduct. Kaiser claimed that voters had intended to infer broader, not narrower, interpretation of official misconduct. She went so far as to say that a so-called bright line rule seeking “clarity simply for the sake of clarity, predictability simply for the sake of predictability, is not a reason to ... narrowly constrict ethical duties of officers.”

More so than Supervisor Christina Olague, Supervisor Jane Kim peppered Kaiser with astute questions. Kim noted that Kaiser testified to the Board that the “relationship test” was not enough (which was odd, since Kaiser had focused heavily on the relationship test during the Ethics hearings). Kim asked Kaiser: “So it would be a relationship test, plus what the Mayor and the Ethics Commission [determined], [plus] what we [the Board of Supervisors] deem as falling below the standard of decency, and that is [on] a case-by-case basis?” At first, Kaiser responded, “Yes, that’s correct.” Then she corrected herself, saying “I think it is a discretionary decision ... I think that it is, at bottom, a judgment call.”

Kaiser’s waffling startled Kim, who then asked “Does that open us up to the vagueness issue, which may make that clause then unconstitutional, because then a person may not reasonably be able to predict when their behavior is official misconduct or not?” Honing in on the “standard of decency” clause added to the Charter in 1995, Kim noted that any standard of decency may change over time, depending on who is appointed to the Ethics Commission, who has been elected to the Board of Supervisors, and who is the elected Mayor, opening the question of whether the definition is too vague for anyone to determine what is or isn’t official misconduct.

That’s when Kaiser blurted it is not up to the Supervisor’s personal views, and the standards of decency and conduct are “position-specific” that should be discerned with the help of people in a given profession, not by the Board. If that’s the case, why were the Supervisors even involved?

Kaiser Falsely Claims “No Legislative History”

Kaiser repeated that the people of San Francisco had put the official misconduct tool in the Mayor’s and Board’s hands to serve the people’s will to remove officials without the trouble of a recall election. She claimed that there was “no legislative history, no ballot history, that sheds light” on the intent of the authors of the Charter’s official misconduct provision.

In a contrary opinion, Mr. Bush notes that he covered every session of the Charter Revision Committee in ’94 and ’95 that wrote the official misconduct language, and the drafter’s intent had *not* been to update the Charter language to address the Superior Court ruling in Airport Commissioner Larry Mazzola’s case. Bush asserts the intent of the Charter Revision Committee was to address “concerns that a ‘moral character’ provision was a left-over of the language used to bar people from professions based on sexual orientation.” Bush notes that neither the Ethics Commission nor the City Attorney bothered going to the Main Public Library where the Charter Revision Committee’s minutes are archived to see the legislative and ballot history.

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Other observers have noted that the 1995 voter guide pamphlet contained a digest by then City Attorney Louise Renne that explicitly described the changes in our ethics law as insignificant. Clearly, voters weren't told in '95 that they would be giving new powers to the Mayor, or that they would be ceding to the Mayor authority to make discretionary decisions to remove elected officials without a recall election. Had voters been told that the Mayor would gain such authority, the amendments would not have passed and we'd still have the "moral character" provisions.

Vague Is as Vague Does

Ms. Kaiser testified that the people — the voters — put the official misconduct language into the City Charter. She asserted that the language isn't "vague," the language makes it more "nimble" when determining official misconduct.

Kaiser was completely misguided during her Board testimony. Voters *never* get to choose the actual legal text of ballot language put before them, unless it involves a citizen-initiative measure. Voters have no say over the language chosen for measures placed on the ballot by the Mayor or Board of Supervisors.

Ms. Kaiser now claims that if the official misconduct language is too vague, it's because the voters chose to approve the vagueness put before them written by someone else, over preciseness. Kaiser's blame-the-voters tactic on behalf of the Mayor is appalling.

Seven Stupid Supervisors

October 9 was a very dark day for San Franciscans, because only four of our eleven Board of Supervisors voted to reinstate Sheriff Ross Mirkarimi. Supervisors Christina Olague, Jane Kim, David Campos, and John Avalos reached the correct conclusion: That Mirkarimi's behavior — deplorable as it may have been — did not rise to the definition of official misconduct.

In stark contrast, the remaining seven District Supervisors — including Mark Farrell, Sean Elsbernd, Malia Cohen, Carmen Chu, Scott Wiener, Board President David Chiu, and Eric Mar — knowingly voted to hand the Mayor unlimited precedent-setting power to bring official misconduct charges against political foes, a process ripe for political shenanigans and mayoral abuse. All seven also knowingly voted to accept the Ethics Commission's constitutionally vague interpretation of official misconduct. Had these seven Supervisors prevailed, they would have knowingly handed to some future court proceeding — as Mr. Bush reports — clear evidence that the official misconduct charges against Mirkarimi were unconstitutionally vague, since the Mayor and the Ethics Commission never adequately defined official misconduct (and can't, unless they ask voters to change the Charter again).

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In a clear example of irony, four of the seven Supervisors who voted to oust Mirkarimi were referred by the Sunshine Ordinance Task Force to the Ethics Commission over probable official misconduct themselves. The four — the Board's then Land Use and Economic Development Committee composed of Supervisors Mar, Cohen, and Wiener — along with Board President Chiu, appear to prefer handing the Mayor unlimited power to bring official misconduct charges on a case-by-case, unconstitutionally-vague basis, without any clear standard of the definition of official misconduct that would apply to all City employees.

Ed Lee's Unequal "Discretion"

Mr. Bush notes: "None of this can obscure the reality that it was Ed Lee who is responsible for the defeat of his Official Misconduct charge by the Board." Bush reported that Lee testified under oath at the Ethics Commission that he had not given any attention to the City Charter's requirements for official misconduct charges, admitted he had no written policy regarding official misconduct, and then insisted that even if an individual case involved a criminal conviction, he would still use his "discretion" on whether to pursue official misconduct charges on a case-by-case basis. Bush notes this may end up being a text book example of the description of "vague" as one can find, which judges all too often find objectionable.

Bush has documented Mayor Lee's and the Board of Supervisor's unequal application of "discretion." For instance, although the Ethics Commission referred a case of official misconduct against Library Commission president Jewelle Gomez to the Mayor, requesting that the Mayor remove her from an appointed position, the Mayor has ignored the Ethics Commissions recommendation for over a year, and has not taken any action against Gomez.

Worse, on June 14, 2011, ten of our current Supervisors (excluding Olague) confirmed by a unanimous 11-to-zero vote the appointment of Julius Turman to the Police Commission, despite the fact that the Board of Supervisors knew (or had to have known), that Turman had been arrested over domestic violence charges. Turman's former boyfriend, Philip Horne, had accused Turman of beating him up on January 2, 2006, giving Horne a bloody nose, scratches, and a loosened tooth. Horne alleged that then-District Attorney Kamala Harris didn't prosecute because of Turman's political connections. Despite the fact that the felony domestic charges were dropped by prosecutors, Turman settled out of court with Horne for an undisclosed amount. Is there no "nexus" between Horne's domestic violence history and his duties as a Police Commissioner?

While Supervisor Jane Kim dissented in the Rules Committee regarding Turman's appointment, indicating she had concerns about appointing people to a police oversight body if there were questions about an applicant's past and experience that might weaken their oversight "capacity," Kim nonetheless voted along with the full Board to appoint Turman, despite his domestic violence history.

Not only did the Board unanimously appoint Turman to the Police Commission, apparently no domestic violence prevention agency publicly opposed Turman's confirmation. Neither Andrea Shorter, a political consultant who chairs the City's Justice and Courage Oversight Panel, nor Kathy Black, director of La Casa de las Madres, a shelter for domestic violence victims, spoke up to object to Mr. Turman's appointment, despite the initial felony domestic violence charges against him. Are Shorter and Black, and the rest of the domestic violence prevention community, selectively holding Mirkarimi to a different standard than they apply to Turman, on a case-by-case basis?

Then there's the problem of unequal treatment of Fire Chief Joanne Hayes-White. Mr. Bush notes that "over the past several years, cases involving high profile or politically connected individuals have been dropped. This includes a police report on Fire Chief Joanne Hayes White, accused by her husband of hitting him repeatedly in front of their children." Seems that neither the Mayor, the Board of Supervisors, nor the domestic violence prevention community wants to hold Chief Hayes-White to the new "standard" they invented to hang the Sheriff. More hypocrisy and selectively unequal treatment for favored politicians and City officials.

Supervisor Wiener Requested a "Do-Over"

Just thirty seconds before the Board of Supervisors were to cast their votes determining Mirkarimi's fate, misguided Supervisor Scott Wiener asked whether the Board could have a "do-over," asking "Are we able to sustain any charge alleged by the Mayor, whether or not the Ethics Commission recommended sustaining of that charge?"

Scott Emblidge, the special attorney advising both the Board and the Ethics Commission — as if there was *no* conflict of interest between a single lawyer advising both bodies — responded that the Board "[is] able to sustain any charge," but that the Board needed to be voting on the same thing.

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This shocked observers, who believed that the Board could only consider charges brought by the Mayor that the Ethics Commission had actually sustained. Wiener — and everyone else — knew at that point in the proceeding that the Board was about to hand Mr. Mayor an embarrassing loss on a 7-to-4 vote, when the Mayor needed at least nine votes to prevail.

But Wiener wanted to turn the clock back to reconsider charges that the Ethics Commission had clearly already rejected. Despite being advised that the Board could reconsider what Ethics had rejected, Wiener curiously decided not to pursue a do-over and let the issue go, even though he appeared eager to resurrect the Mayor's flawed charges against Mirkarimi.

Misguided Media

On October 10, the day after the Board of Supervisors voted 4 to 7 to reject the Ethics Commission's recommendation against Mirkarimi, the *San Francisco Chronicle* published an editorial ("Shame on four supervisors"), alleging that the four "rationalized" their votes by raising "the question of whether a man elected to be sheriff could commit official misconduct before actually taking office." The *Chronicle* was disingenuous: The Board of Supervisors had not raised that question; indeed, that whole question had been raised by the Mayor and an all-too-eager-to-please Ethics Commission that did everything it could to avoid answering that question. The question Ed Lee posed to the Ethics Commission, and the question the Board of Supervisors were asked to answer (but avoided), was whether there has to be a "nexus" between any official duties, and actual behavior.

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For her part, Melissa Griffin over at the *San Francisco Examiner*, opined on October 18 that since the sexual battery charges against District 5 supervisorial candidate Julian Davis is a misdemeanor, the four Supervisors (who did not find a nexus between Mirkarimi's official duties and his wife's bruised arm) had somehow concluded that Mirkarimi's behavior had been acceptable for a public official to commit. Like Deputy City Attorney Sherri Kaiser before her, Griffin attempted to draw parallels between Mirkarimi's wife's bruised arm, and child abuse, elder abuse, assault, battery, and hit-and-run cases that occurred after-hours, or before assuming office.

Griffin then lamented that an "unsuspecting public" has been "burdened" by the task of mounting a recall effort against Mirkarimi, making "it easier for abusers to remain in office." Griffin asserts the four supervisors are "cowards" for foisting an expensive, time-consuming, recall process against Mirkarimi onto voters. But Griffin mentions nothing about the expensive \$1.14 million in City Attorney costs the Mayor has racked up mounting a failed effort to oust Mirkarimi during the Ethics Commission's probe. Worse, Griffin studiously ignored Deputy City Attorney Kaiser's assertion that a recall election is the wrong approach.

Notably, Griffin mentions not one word about abuser Turman remaining in office as a Police Commissioner. Perhaps that's because Turman and Jewelle Gomez are both African Americans; both are appointees, not elected officials; and both are reportedly gay or lesbian, as opposed to Mr. Mirkarimi, who appears to be straight. Indeed, Griffin wails about violence against women, but mentions nothing about the domestic violence against men inflicted by Turman and Hayes-White.

For its part, the *Examiner* editorialized on October 14 ("People deserve a say in the Mirkarimi case"), that if voters are unhappy with the way the four Supervisors interpreted the City Charter in Mirkarimi's official misconduct case, voters should mount the very recall process Griffin believes is "burdensome," and which recall process the Mayor's own attorney, Ms. Kaiser, believes is "wrong."

Never mind that the four Supervisors correctly interpreted the City Charter, the *Examiner* wails. What's important, the *Examiner* asserts, is that "**any** incident of domestic violence is inexcusable." The *Examiner* appears to have turned a blind eye to the domestic violence allegations against both Turman and Hayes-White. By its lack of logic, the *Examiner* appears to believe that Turman's and Hayes-White's behavior was excusable, but that Mirkarimi's was not.

In addition, while Mirkarimi has now been thoroughly “investigated” by the Mayor, the Ethics Commission, and the Board of Supervisors, the *Examiner* now asserts that although Mirkarimi appears to have been absolved of the official misconduct charges by the official processes put in place to protect voters, Mirkarimi now deserves to be handed double-jeopardy by being “tried” all over again via a recall election. How many times is the guy going to get tried for a single “crime”? If our elected leaders can’t, and haven’t, agreed on whether “official misconduct” occurred, how can the Mayor, Ms. Kaiser, and the *Examiner* believe that voters — the vast majority of whom are neither lawyers, nor have likely been trained in ethical issues — should now be expected to discern definitively what legal scholars and ethicists were unable to discern?

Consensus Mayor’s Sour Grapes

On October 10, the day after Mirkarimi was reinstated by the Board of Supervisors, District Attorney George Gascón released a statement demanding that Mirkarimi recuse himself from the supervision of domestic violence activities in his department. Gascón reportedly threatened Mirkarimi with “legal action” if he didn’t recuse himself.

Larry Bush notes that Gascón’s demand appears to have little meaningful impact, as there is nothing in the Charter that permits the District Attorney to demand an elected Sheriff — or any other elected official — abandon duties set in the Charter.

Bush notes that a www.CitiReport.com investigation revealed that Police Department records show 3,515 police reports of domestic violence were filed, but that Gascón’s District Attorney staff filed only 245 misdemeanor cases and 240 felony cases — totaling just 14 percent — of the 3,515 police reports. Bush also reports that a *San Francisco Public Press* investigation revealed Gascón’s District Attorney Domestic Violence Team reviewed about 8,600 criminal cases but dropped about 6,200 — 72.1% — of them without going to court, and that the incidence of dropped cases has actually increased under Gascón’s tenure.

Given Gascón’s domestic violence track record, he’s displaying pure hubris demanding anything from Mirkarimi. And where are Ms. Black and Ms. Shorter in this? Why aren’t they screaming their heads off over Gascón’s pathetic domestic violence record, selectively focusing only on Mirkarimi? How can Mayor Sour Grapes look anyone straight in the face — or himself in the mirror — refusing to bury the hatchet and actually work with Mirkarimi, while throwing his mayoral arms around hypocrite Gascón? And why has Melissa Griffin all but ignored Gascón’s lousy record, while she foams at the mouth over Mirkarimi?

Not to be outdone, on October 26 Mayor Lee wrote to Mirkarimi, now alleging that certification of batterers’ intervention programs “may be in jeopardy.” [Note Lee’s use of “may be,” not “are,” and that Lee appears to have raised this issue only *after* the Supervisors reinstated Mirkarimi.] Turning the screw, Lee now asks Mirkarimi why he’s qualified to oversee the Sheriff Department’s domestic violence programs. It appears that the sour grapes Mayor just can’t let go of his loss at the Board of Supervisors.

On Monday, October 29, news broke that Mayor Lee’s prominent ally — Silicon Valley billionaire Ron Conway and his wife Gayle — formed an independent expenditure committee to oppose Supervisor Olague in next week’s District 5 election. Previously, the Conway’s contributed \$500 each to Olague’s election campaign, but their new independent



Mayor Ed Lee puffs up during his Ethics Commission testimony, just before the so-called “Bomb Threat” gave him an opportunity to flee the hearing room.

“ Mayor Lee’s prominent ally — Silicon Valley billionaire Ron Conway and his wife Gayle — formed an independent expenditure committee to oppose Supervisor Olague in next week’s District 5 election. Can anyone say, “Citizen’s United”? How much meddling will the out-of-towner billionaire Conway’s do on behalf of their friend, Ed “Sour Grapes” Lee? How much money-equals-speech will the Conway’s throw against Olague? ”

expenditure committee — which can raise an unlimited amount of money — has quickly amassed, at minimum, \$120,000 to go after Olague in retaliation for her vote to reinstate the Sheriff.

Can anyone say, “Citizen’s United”? How much meddling will the out-of-towner billionaire Conway’s do on behalf of their friend, Ed “Sour Grapes” Lee? How much money-equals-speech will the Conway’s throw against Olague to unseat her by buying an election? The Mayor is misjudging San Franciscans’ tolerance for sour grapes.

Will the Conway’s also target Supervisor Jane Kim’s re-election campaign in 2014?

On a personal note, I am offended that the Mayor continues to equate the mere bruise Mirkarimi’s wife sustained to the sexual molestation my three sisters endured from our father (leaving one of them with life-long mental illness), and my father’s intermittent psychological abuse of my mother for 22 years. The Mayor’s insistence that a bruise is somehow equal to what they endured is a slap in the face to my sisters and mother — and by extension, a slap in mine — denigrating their collective trauma.

When the Mayor and District Attorney Dennis Herrera run for re-election, voters should toss them both out of office — Herrera for allowing his subordinates to mount this ridiculous case against Mirkarimi, and Lee for pouting like a child after losing a blatant, politically motivated witch-hunt.

“Where are Ms. Black and Ms. Shorter in this? Why aren’t they screaming their heads off over District Attorney George Gascón’s pathetic domestic violence record, selectively focusing only on Mirkarimi?”

If voters don’t rout both men from office, they’ll be handing our democracy over to demagogues, and billionaires buying City Hall influence.

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For more on Ms. Shorter’s pending troubles, see Larry Bush’s article “The Domestic Violence Challenge,” at: www.citireport.com/2012/11/the-domestic-violence-challenge/. She seems to have missed reporting legally-required data.

She also appears not to understand that one of the key reason’s many people opposed Mirkarimi’s removal is that to fire breadwinners from their jobs for a misdemeanor domestic violence conviction is not only excessive, but would also scare victims and perpetrators away from reaching out for counseling, due to the fact that their family might lose all income if law enforcement overreacts.

Cartoon of Mayor Ed Lee courtesy of Doug Comstock / www.westsideobserver.com/comstockCartoon.
Photo of Mayor Ed Lee courtesy of Luke Thomas / www.FogCityJournal.com.

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