

MEMORANDUM OF LAW

DATE: June 15, 1992

TO: Christiann Klein, Executive Director, Human
Relations Commission

FROM: City Attorney

SUBJECT: Misdemeanor Arrests for Hate Crimes

The Human Relations Commission ("HRC") is interested in enacting an ordinance that would require the immediate arrest and incarceration of individuals suspected of having been involved in a hate crime. As a result, you have asked what, if any, constitutional, legal, or policy limitations would preclude enactment of a municipal ordinance which would require that individuals who are charged with misdemeanor hate crimes be booked, jailed for twenty-four hours, and required to post bail.

SHORT ANSWER

State law preempts local regulation of the criminal aspects of hate crimes as well as the procedures to be followed upon arrest for a misdemeanor. Thus, the City of San Diego is precluded from enacting a separate municipal ordinance mandating that individuals charged with hate crimes be booked, jailed for twenty-four hours, and required to post bail. Individuals charged with such crimes may, however, be arrested and incarcerated for misdemeanor hate crimes if their actions fit within the already existing parameters for misdemeanor arrest. Additionally, the City of San Diego, like other California communities, could adopt special enforcement and investigative policies for addressing hate crimes which occur in the community.

DISCUSSION

A. State Law Preempts Local Regulation of the Criminal Aspects of Hate Crimes

It is well settled that a municipal ordinance is invalid if it attempts to impose additional requirements in a field that is preempted by the general law and any local legislation in conflict with the general law is void. *Lancaster v. Municipal Court*, 6 Cal. 3d 806, 807 (1972). Conflicts exist if the ordinance duplicates, contradicts, or enters an area fully occupied by general law. *Id.* at 808 (citations omitted). If the area of legislation has been fully occupied by the state, "there

is no room for supplementary or complementary local legislation, even if the subject were otherwise one properly characterized as a 'municipal affair.'" *Id.* at 808. However, when the purpose of the state legislative scheme is to protect against a specific harm, preemptive language should be construed so as to permit local protections which cover areas not covered by the statute. *Soderling v. City of Santa Monica*, 142 Cal. App. 3d 501 (1983).

To determine whether an ordinance imposes additional or supplementary requirements, one must look to the entire statutory scheme. The California legislature in Penal Code section 422.6 et seq., has adopted statutes which extensively regulate the criminal aspects of hate crimes. The statutes specifically deal with the criminal prosecution of bias-motivated crimes. Section 422.6 defines the specific conduct which is prohibited and sets out punishment for such conduct upon conviction. For example, Section 422.95 provides that a defendant who is granted probation on a hate crime conviction may be ordered by the court to complete a program on racial or ethnic sensitivity, or other similar training in the area of civil rights, as a condition of probation. Section 422.8 provides that hate crime statutes do not prevent nor limit prosecution of an arrested person pursuant to other provisions of law, such as battery or vandalism. The legislature did not, however, make any specific exceptions allowing additional local regulation of hate crimes. As the California hate crime statutes are currently written, they manifest a legislative intent to adopt a uniform scheme of criminal liability for hate crimes and to occupy the field to the exclusion of local regulation.

B. State Law Preempts Local Regulation of the Procedures to be Followed Upon Arrest for a Misdemeanor Offense

Presently, the warrantless arrest of a person for the commission of a misdemeanor is legally permissible in California providing certain conditions exist.

Those conditions are:

1. When a police officer has reasonable cause to believe that the person to be arrested has committed a public offense in his presence (Penal Code section 836(1)); or
2. When a public offense is committed or attempted in the presence of a private person (Penal Code section 837(1)).

The procedures to be followed upon an arrest for an offense declared to be a misdemeanor are set forth in California Penal Code sections 853.5 et seq. Penal Code section 853.6 deals with release after a misdemeanor arrest and provides in pertinent part:

(a) In any case in which a person is arrested for an offense declared to be a misdemeanor, including a violation of any city or county ordinance, and does not demand to be taken before a magistrate, that person shall, instead of being taken before a magistrate, be released according to the procedures set forth by this chapter. (Emphasis added.)

The Legislature amended the statute in 1984 to change the wording from "may . . . be released" to "shall . . . be released." Rules of statutory construction indicate the may is permissive while shall is mandatory. "Statutory requirements are mandatory, rather than directory, and exact strict compliance when such an intent is expressed or implicit in the statute." *People v. Wilson*, 191 Cal. App. 3d 161, 166 (1987). The present statutory scheme does not, in most circumstances, grant an arresting officer the discretion to arrest a misdemeanor. There are, however, specific statutory conditions which permit an arresting police officer to physically arrest and book a person who has committed a misdemeanor. Those conditions are stated in Penal Code section 853.6(i) and are as follows:

1. The person arrested was so intoxicated that he or she could have been a danger to himself or herself or to others.
2. The person arrested required medical examination or medical care or was otherwise unable to care for his or her own safety.
3. The person was arrested under one or more of the circumstances listed in Sections 40302 and 40303 of the Vehicle Code.
4. There were one or more outstanding arrest warrants for the person.
5. The person could not provide satisfactory evidence of personal identification.
6. The prosecution of the offense or offenses for which the person was arrested, or the prosecution of any other offense or offenses, would be jeopardized by immediate release of the person arrested.
7. There was a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested.
8. The person arrested demanded to be taken before a

- magistrate or refused to sign the notice to appear.
9. There is reason to believe that the person would not appear at the time and place specified in the notice. The basis for this determination shall be specifically stated.

Penal Code section 853.6(a) was amended in 1991 to provide that a person must be taken before a magistrate instead of being released if the person is arrested for a misdemeanor violation of a protective court order involving domestic violence, as defined in Penal Code section 13700(b), unless the arresting officer determines there is not a reasonable likelihood that the offense will continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested. This amendment indicates a legislative intent to strengthen existing remedies for misdemeanor violations of protective court orders involving domestic violence.

Similarly, the California Legislature has demonstrated its concern about the increasing number of hate crimes by taking action to toughen laws dealing with such offenses. However, unlike the amendment to section 853.6(a) regarding domestic violence protective court orders, the legislature did not enact a similar provision for misdemeanor violations of the hate crime statutes. Such inaction on the part of the legislature implies that the general procedures to be followed upon arrest for a misdemeanor offense, set forth in sections 853.5 et seq., apply to arrests for misdemeanor hate crime offenses.

Further, these sections do not provide for local regulation of the procedures to be followed when an arrest for a misdemeanor offense is made. Therefore, the arrest and nonrelease of a person charged with a misdemeanor hate crime is governed by these sections. The preemption by state law of the procedural aspects of an arrest for a misdemeanor hate crime indicates that any municipal ordinance which requires the mandatory nonrelease and twenty-four detention of an arrestee, unless the arrestee actions are governed by Penal Code section 856(i), would be invalid.

CONCLUSION

State law preempts local regulation of the criminal aspects of hate crimes. Similarly, state law preempts the procedural regulations for arrests after the perpetration of a misdemeanor hate crime. The City may, however, seek increased enforcement of arrests for misdemeanor hate crimes by educating law enforcement personnel to work more effectively within the parameters of Penal Code section 853.6(i).

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By

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