The Great Urban Race: The Homeless Dilemma

Speakers:
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TAKE NOTES & EMAIL THEM
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Introduction

- On a single night in 2017, **553,742 people** in the United States were experiencing homelessness in the United States
  - 65% were staying in emergency shelters or transitional housing
  - 35% were staying in unsheltered locations
- **Homelessness increased for the first time in seven years nationwide**
- **Homelessness in California has been increasing.**
  - 21% of all homeless people were children (under the age of 18)
  - 10% were between the ages of 18 and 24
  - 70% were 25 years or older
- **25% of the homeless population in the United States were in California**
  - California accounted for **49%** of unsheltered people in the country

The Cost of Addressing Homelessness

- In fiscal year 2016-2017, San Francisco spent $275 million on homelessness and supporting housing. Annual spending for 2017-2018 is projected to hit $305 million.
  - Source: San Francisco Chronicle, Despite money and effort, homelessness in SF as bad as ever, June 26, 2017 (updated September 7, 2017)
- In May 2017, the Los Angeles City Council approved $176 million for homelessness programs.
  - Source: Los Angeles Times, L.A. lawmakers sign off on $9.2-billion budget, May 18, 2017
- In October 2017, the Mayor of Sacramento asked for $53 million to provide homeless services.
  - Source: The Sacramento Bee, Sacramento mayor asks county to divert $53 million toward homeless services, October 18, 2017 (updated October 28, 2017)
- Assembly Bill 3171 would pay for homeless shelters, rental assistance, permanent housing and other efforts
  - Mayors of California’s 11 largest cities are seeking a total of $1.5 billion
  - Source: Los Angeles Times, Garcetti pushes for state bill to fund homeless housing, February 26, 2018
Current Litigation

The following jurisdictions are currently involved in litigation arising out of clearing homeless encampments:

• City of Eureka
• City of Berkeley
• City of Santa Ana & Orange County
  • Santa Ana voted to sue Orange County, Irvine, Laguna Niguel, and Huntington Beach
Federal Definition of Homeless

42 U.S.C. § 11302

• (1) an individual who lacks a fixed, regular, and adequate nighttime residence;
• (2) an individual with a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, abandoned building, bus or train station, airport, or camping ground;
• (3) an individual or family living in a supervised publicly or privately operated shelter designated to provide temporary living arrangements (including hotels and motels paid for by Federal, State, or local government programs for low-income individuals or by charitable organizations, congregate shelters, and transitional housing);
• (4) an individual who resided in a shelter or place not meant for human habitation and who is exiting an institution where he or she temporarily resided; and
• (5) an individual who will imminently lose their housing, including housing they own, rent, or live in without paying rent, are sharing with others, and rooms in hotels or motels not paid for by Federal, State, or local government programs for low-income individuals or by charitable organizations.
Glossary of Legal Terms

• Facial challenge – Allegation that the text of an ordinance violates a protected right (“on its face”)
• As applied – Allegation that the way an ordinance is enforced on an individual violates a protected right
Public Entity Actions that May Impact Homeless Individuals

• Enforcing Panhandling Ordinances
• Enforcing Sleeping/Camping Ordinances
• Enforcing Ordinances Prohibiting Living in Cars
• Seizing Property on Public Property
  • Enforcing Storage of Personal Property Ordinances
  • Confiscating Unattended Property
  • Cleaning or Clearing Homeless Encampments
Potential Constitutional Violations for Public Entity Actions

• Claims under 42 U.S.C. § 1983
  • Violation of Eighth Amendment – Cruel and Unusual Punishment
  • Violation of Fourteenth Amendment – Equal Protection and Due Process
    • Vagueness
    • Selective Enforcement
  • Violation of the First Amendment – Free Speech
  • Violation of Fourth Amendment – Unlawful Search and Seizure
• Corresponding State Claims
Panhandling Ordinance

• Generally prohibits “aggressive solicitation”, regulates activity on public property or private property that is open to the public, and prohibits solicitation in specific locations

• Example: Berkeley Municipal Code Section 13.37.020
  A. It is unlawful for any person to solicit another in any public place at the times, locations and in the manner specified below:
     1. In any manner which coerces, threatens, hounds, or intimidates the person solicited;
     2. Within ten feet of any automatic teller machine in the City.

• Possible Constitutional Challenges
  • Violation of the First Amendment (Free Speech)
  • Violation of the Fourteenth Amendment (Due Process)
State of the Law

  - Federal challenge to Los Angeles’ “aggressive solicitation” ordinance, alleging that it violated First and Fourteenth Amendments and corresponding state claims
  - Findings:
    - California Supreme Court ruled that public solicitation for the immediate donation or payment of funds are content neutral
    - Ordinances that regulate such public solicitation should be evaluated under intermediate scrutiny
  - Holding: Ordinance will be found constitutional as a reasonable time, place, and manner regulation so long as it is (1) narrowly tailored, (2) serves a significant government interest, and (3) leaves open ample alternative avenues of communication
The Takeaways

- **CONSTITUTIONAL**, if can pass intermediate scrutiny

- Have a government interest based on facts to justify the restriction
  - Safety hazard
  - Preventing harassment and intimidation
  - Traffic flow alone may not be enough

- Tailor the restriction to address the government interest
  - Roadways
  - ATMs
  - Bus stops
  - Outdoor dining areas

- Leave open other ample channels of communication
  - Other opportunities/places for solicitation that are not subject to regulation
Sleeping/Camping Ordinances

• Generally prohibit sitting, lying, sleeping, and camping on public property

• Example: Sacramento City Code 12.52.030

  “It is unlawful and a public nuisance for any person to camp, occupy camp facilities, or use camp paraphernalia in the following areas:
  A. Any public property; or
  B. Any private property. . . .”

• Potential Constitutional Challenges:
  • Violation of First Amendment (Free Speech)
  • Violation of Eighth Amendment (Cruel and Unusual Punishment)
  • Violation of Fourteenth Amendment (Equal Protection & Due Process)
State of the Law

• 1995: *Tobe v. City of Santa Ana*, 9 Cal.4th 1069 (Cal. Sup. Ct.)
  • State constitutional facial challenge to a Santa Ana ordinance that banned camping and storage of personal property in designated public areas
  • Findings:
    • No fundamental right to camp on public property
    • Ordinance rationally related to clean streets and maintenance
    • Homelessness was not a suspect class
  • Holding:
    • Ordinance did not violate homeless individuals’ constitutional rights, including the right to inter/intra state travel and the right against cruel and unusual punishment
    • Ordinance was not vague, overbroad, or discriminatory
State of the Law Cont’d

  • State petition for writ of habeas corpus challenging a homeless man’s conviction for violating the same Santa Ana ordinance
  • Considered whether the “necessity” defense applied to violations of the ordinance
    • Necessity defense: Act cannot be punished if it is, in some sense, involuntary; rooted in Eighth Amendment
  • Holding: If a homeless individual truly had nowhere else to go, enforcing the ordinance would violate that individual’s constitutional rights because it would punish the homeless individual’s attempt to sleep, eat, and survive
    • Defendant had sufficient evidence to present the necessity defense at trial
State of the Law Cont’d

• 2006: *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir.)
  - Federal as-applied constitutional challenge to Los Angeles’ ordinances regulating sitting, lying, or sleeping on streets, sidewalk, or other public way, alleging violation of the Eighth Amendment
  - Holding: Necessity defense applied – cannot enforce ordinance when homeless individual had no where to go
    - “Appellants are entitled at a minimum to a narrowly tailored injunction against the City’s enforcement . . . at certain times and/or places.”
  - **BUT**: Decision vacated when case settled

• 2009: *Lehr v. City of Sacramento*, 624 F.Supp.2d 1218 (E.D. Cal.)
  - Federal as-applied constitutional challenge to Sacramento’s camping ordinance, alleging violations of the Eighth Amendment
  - Holding: Declined to extend *Jones*
    - “A decision in Plaintiffs’ favor would set precedent for an onslaught of challenges to criminal convictions by those who seek to rely on the involuntariness of their actions. It would potentially provide constitutional recourse to anyone convicted on the basis of conduct derivative of a condition he is allegedly ‘powerless to change.’ While this Court is sympathetic to the plight of Plaintiffs in this case, as well as to that of all individuals who are without shelter, a decision in favor of Plaintiffs today would be dangerous bordering on irresponsible.”
State of the Law Cont’d

• 2013: *Bell v. City of Boise*, 709 F.3d 890 (9th Cir.)
  • Federal as-applied challenge to the City of Boise’s camping ordinances, alleging that they violated Plaintiffs’ Eighth Amendment rights
  • Holding: Plaintiffs had standing to sue for violation of their Eighth Amendment right against cruel and unusual punishment when municipality did not have sufficient available shelter space
    • Did not determine whether the enforcement of the ordinances actually violated Plaintiffs’ rights
  • **BUT**: United States filed a Statement of Interest
    • Encouraged the court to adopt the analysis in *Jones* when evaluating Boise’s ordinances
State of the Law Cont’d

• 2018: *Martin v. City of Boise*, 2018 WL 4201159 (9th Cir.)

  • Federal as applied challenge to City of Boise’s camping and disorderly conduct ordinances, alleging that they violated Plaintiffs’ Eighth Amendment rights

  • Holding: “‘So long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],’ the jurisdiction cannot prosecute homeless individuals for ‘involuntarily sitting, lying, and sleeping in public.’”

  • BUT: “We in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . At any time and at any place.”

  • FOOTNOTE 8:

    • Holding does not cover individuals who do have access to shelter but choose not to use it

    • An ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible

    • Whether an ordinance is consistent with the Eighth Amendment will depend on whether it punishes a person for lacking the means to live out the ‘universal and unavoidable consequences of being human’ in the way the ordinance prescribes.
The Takeaways

- **CONSTITUTIONAL** under certain circumstances
  - Whether there are shelter services available
  - If no or limited shelter services available, amend ordinance to ensure constitutional enforcement

1. **Time Limit on Enforcement**
   - Example: Seattle Municipal Code Section 15.48.040
     “A. Prohibition. A person shall not sit or lie down upon a public sidewalk, or upon a blanket, chair, stool, or any other object placed upon a public sidewalk, during the hours between 7 a.m. and 9 p.m. in the following zones . . .”

2. **Location Limit on Enforcement**
   - Example: Reno Municipal Code Section 8.12.015
     “. . . no person shall sit or lie down upon a public sidewalk, or upon a blanket, chair, stool, or any other object placed upon a public sidewalk in the Downtown Reno Regional Center, which shall be defined as the area within the exterior boundary bounded by the following named streets . . .”

3. **Conditional Enforcement**
   - Example: Richmond Municipal Code Section 11.96.030
     “It shall be unlawful for any person to camp, sleep in or occupy camp facilities or use camp paraphernalia in the following areas, except as otherwise provided: (1) Any street; (2) Any parking lot, public area or open spaces, improved or unimproved; provided, however, that no person shall be in violation of this section unless (A) The person is informed of the whereabouts of homeless shelters in the City of Richmond; (B) Such shelter is actually available to such person; and (C) Such person willingly refuses to stay in such shelter.”

4. **Or combination of the above**
Ordinances Prohibiting Living in Cars

• Generally prohibits using a vehicle as a living quarter

• Example: Los Angeles Municipal Code § 85.02
  No person shall use a vehicle parked or standing upon any City street, or upon any parking lot owned by the City of Los Angeles and under the control of the City of Los Angeles or under control of the Los Angeles County Department of Beaches and Harbors, as living quarters either overnight, day-by-day, or otherwise.

• Possible Constitutional Challenges
  • Violation of the Fourteenth Amendment (Equal Protection and Due Process)
  • Violation of the Eighth Amendment (Cruel and Unusual Punishment)
State of the Law

• 2015: *Desertrain v. City of Los Angeles*, 754 F.3d 1147 (9th Cir. 2014)
  • Federal facial challenge to Los Angeles’ ordinance prohibiting using vehicles as living quarters
  • Findings:
    • Ordinance does not define “living quarters” or “otherwise”
    • Police officers not provided with limiting instructions
  • Holding: Ordinance vague as written
    • Provides insufficient notice of the conduct it penalizes
    • Promotes arbitrary and discriminatory enforcement
The Takeaways

• **CONSTITUTIONAL** if clearly written and/or limiting instructions provided to and followed by enforcing agency

• Clearly define the conduct or activities prohibited

• If including a time period, be clear on the time period

• If any part of the ordinance could be considered vague, provide enforcing agency with clear instructions for enforcement and ensure those instructions are followed
  • Written policy or memo
  • Training

**UNCLEAR: WHETHER NECESSITY DEFENSE APPLIES**
Seizing Property on Public Property

• Generally arises in three scenarios:
  • Enforcing a storage of personal property ordinance
  • Confiscating unattended property
  • Clearing or cleaning homeless encampments

• Example: Sacramento City Code 12.52.040
  It is unlawful and a public nuisance for any person to store personal property, including camp paraphernalia, in the following areas, except as otherwise provided by resolution of the city council:
    A. Any public property; or
    B. Any private property without the written consent of the owner.
    A violation of this section is a misdemeanor. In addition to the remedies set forth in Penal Code Section 370 the city attorney may institute civil actions to abate a public nuisance under this chapter.

• Potential Constitutional Challenges
  • Violation of the Fourth Amendment (Search and Seizure)
  • Violation of the Fourteenth Amendment (Due Process)
State of the Law

- 2012: *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir.)
  - Federal class action brought against the city, alleging that its police department and bureau of street services confiscated and destroyed homeless individuals’ unattended but unabandoned personal possessions in violation of the Fourth and Fourteenth Amendments
  - Findings:
    - City seized and destroyed homeless individuals’ unattended property while they were attending to “necessary tasks” (showering, eating, using restrooms, attending court)
    - Homeless individuals have possessory interests in their unattended but unabandoned property on public property
  - Holding: Must provide notice and opportunity to be heard (due process) before seizing and destroying homeless individuals’ unabandoned personal possessions left unattended on public property
The Takeaways

- **CONSTITUTIONAL**, if notice and opportunity to be heard are provided prior to confiscation and destruction of property
- Review police procedures relating to seizing, confiscating, or destroying homeless individuals’ property
- Amend the ordinance to clearly reflect the police procedures
- **Suggested Procedures**
  - Provide written notice that the property is going to be seized/confiscated (example: 24-72 hours)
    - Public entity can elect to follow California Civil Code section 2080 et seq.
    - A shorter notice period may be permissible if the unattended/abandoned property poses a health or safety hazard
  - Document the property seized/confiscated
  - Provide opportunity to reclaim seized/confiscated property (this information can be included on the notice)
    - Provide the time period for how long property will be held
    - Provide a telephone number or address where property can be claimed
  - Consider a policy of not destroying government-issued IDs and papers
Don’t Forget About Existing Laws

- Regulating Traffic Flow in Roadways and Sidewalks
  - Vehicle Code Section 21950(b)
  - Penal Code Section 647c
- Disorderly Conduct (begging, lodges in property without permission of the owner, intoxication, etc.)
  - Penal Code Section 647
- Disturbing the Peace
  - Penal Code Section 415
- Trespass
  - Penal Code Section 602
- Public Nuisance
  - Penal Code Section 372
- Park Regulations
Enforcement Reminders

• Attempt to provide assistance/resources with enforcement
• Document each encounter
• Utilize progressive enforcement
• Consider whether ADA accommodations should/need to be provided
Other Possible Solutions

• Declare a homeless shelter crisis pursuant to Government Code section 8698
  • Allows a political subdivision to declare a shelter crisis so that persons unable to
    obtain housing can occupy designated public facilities during the state of
    emergency
  • Immunes the political subdivision from ordinary negligence in the provision of
    emergency housing
  • Suspends state and local statutes, regulations, and ordinances proscribing
    standards of housing, health, or safety to the extent that strict compliance would
    prevent, hinder, or delay the mitigation of the effects of a shelter crisis
  • Allows political subdivisions to enact municipal health and safety standards to be
    operative during the housing emergency consistent with ensuring minimal public
    health and safety
  • Special provisions for the Cities of San Jose, Berkeley, Emeryville, Los Angeles,
    Oakland, and San Diego, the County of Santa Clara, and the City and County of
    San Francisco
Other Possible Solutions

• Allow Encampments (Seattle model)
  • Permit encampments on city or private land through modification to land use code
  • Partner with private groups to operate the encampment with City funding
  • Restrict number of persons
  • Restrict length of permitted use
  • Create a code of conduct
  • Create advisory committees that meet regularly to review camp operations
  • Indemnity provision
Litigation Strategies

- Understand the legal landscape
  - Know the ordinances your City has and their history
  - Know how those ordinances are enforced
- Develop good working relations
  - Between City departments
  - With the community
  - With opposing counsel
- Be prepared for quick response
  - Lawsuits may start with motions for temporary restraining orders and/or preliminary injunctions which call for shortened briefing schedule
- Preview defense strategy early
  - Stay of enforcement
  - Gather information/documents
  - Amendment or repeal of ordinances
- Think outside to “legal” box to resolve cases
- Recognize there is not a legal solution to homelessness
  - Consistently engage your police department, City council, community groups, religious organizations, and citizens in an ongoing dialogue to share information, concerns, and resources even after the litigation is over
PLEASE RATE THIS SESSION

Android

Apple iOS
QUESTIONS?

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