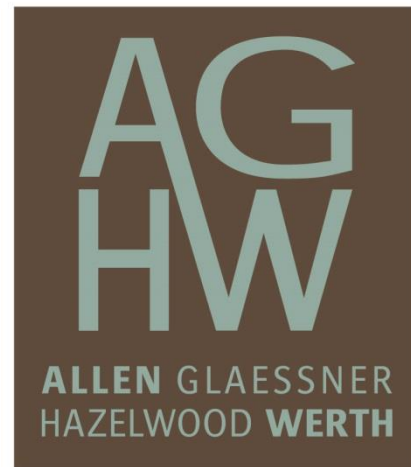


**Fulton El Camino Recreation & Park District  
Rio Linda Elverta Recreation & Park District  
September 24, 2021**

# Gimme Shelter: The Homeless Dilemma for Public Entities

**Presented By:  
Kimberly Y. Chin, Esq.**



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# Introduction

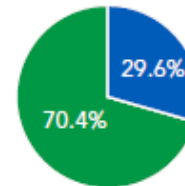
- On a single night in 2020, **580,466 people** in the United States were experiencing homelessness in the United States
  - 61% were staying in sheltered locations
  - 39% were staying in unsheltered locations
- **Homelessness increased for the fourth consecutive year in a row nationwide.**
- **Homelessness in California increased by 6.8% in between 2019 to 2020.**
- **28%** of the homeless population in the United States were in California
- California accounted for **51%** of unsheltered people in the country

## CALIFORNIA



Total Homeless, 2020  
**161,548**

**40.9** in every **10,000** people were experiencing homelessness



■ Unsheltered (113,660)  
■ Sheltered (47,888)

## Estimates of Homelessness

**135,771** Individuals

**25,777** people in families with children

**12,172** unaccompanied homeless youth

**11,401** veterans

**48,812** chronically homeless individuals

Source: U.S. Department of Housing and Urban Development, The 2020 Annual Homeless Assessment Report (AHAR) to Congress

# The Cost of Addressing and Preventing Homelessness

- **San Francisco:** Mayor Breed proposed over \$1 billion in new funding to address homelessness over the next two years
  - Source: San Francisco Chronicle, *Mayor Breed wants to add more than \$1 billion to fighting homelessness in San Francisco over next two years*, June 2, 2021
- **Los Angeles:** \$1 billion budget for homelessness
  - Source: Spectrum News1, *Garcetti signs \$11 billion budget, with nearly \$1 billion for homeless crisis*, June 2, 2021
- **State:** Governor Newsom proposes to spend \$12 billion on affordable units and prevention services to help solve homelessness
  - Source: The Sacramento Bee, *Gavin Newsom wants to spend billions to fight homelessness in California. Here's the plan*, May 11, 2021

# Current Litigation

The following jurisdictions are or were recently involved in litigation brought by homeless individuals:

- City of Berkeley
- City of Oakland
- City of Emeryville
- City of Santa Cruz
- City of Sausalito
- City of Santa Ana & Orange County
  - Santa Ana voted to sue Orange County, Irvine, Laguna Niguel, and Huntington Beach
- City of Eureka
- City and County of Los Angeles
  - Ordered to offer housing to all individuals in Skid Row
- City of San Diego
- Caltrans

# 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
- **Temporary Restraining Order (“TRO”)** - an order by the court immediately prohibiting a threatened action
- **Motion for Preliminary Injunction** – a request to stop someone from doing something
  - Goal: Preserve the status quo before final judgment
  - Party asking for a preliminary injunction must show:
    - Likelihood of success on the merits
    - Irreparable harm without the injunctions
    - Balance of equities and hardships are in the party’s favor
    - Injunction is in the public’s interest

# Public Entity Actions that May Impact Homeless Individuals

- Enforcing Sleeping/Camping Ordinances
- Enforcing Ordinances Prohibiting Living in Cars/Parking Cars Overnight
- 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
    - State-created Danger Doctrine
  - Violation of the **First Amendment** – Free Speech
  - Violation of **Fourth Amendment** – Unlawful Search and Seizure
- Corresponding State Claims



# 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

- 2018/2019: *Martin v. City of Boise*, 920 F.3d 584 (9<sup>th</sup> 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.’”

# State of the Law Cont'd

- 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

- 1998: *In re Eichorn*, 69 Cal.App.4<sup>th</sup> 382 (Cal. App. Ct.)
  - 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

- 2018/2019: *Martin v. City of Boise*, 920 F.3d 584 (9<sup>th</sup> Cir.)
  - 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
      - An ordinance barring the obstruction of public rights of way or the erection of certain structures may be constitutionally permissible [added 4/1/2019 in amended opinion]
      - 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.
  - December 2019: U.S. Supreme Court has declined to review.

# State of the Law Cont'd

- 2018: *Miralle v. City of Oakland*, 2018 WL 6199929 (N.D. Cal.)
  - Motion for preliminary injunction brought by six homeless individuals seeking to prevent the City of Oakland from removing them from their encampment
    - Plaintiffs alleged that the City's attempt to remove them from their current location violated their Eighth Amendment rights, among others.
    - Facts showed that the City had procedures for removing the encampment, including certain notice requirements, offer of shelter beds, and assistance with moving belongings.
    - The City committed at the hearing to temporary indoor bed space for each member of the encampment.
  - Holding: Motion denied – Plaintiffs did not show a likelihood of success on the merits
    - “Plaintiffs not faced with punishment for acts inherent to their unhoused status that they cannot control.”
    - Plaintiffs are not unable to obtain shelter outside of the encampment based on the City's representations
    - “*Martin* does not establish a constitutional right to occupy public property indefinitely at Plaintiffs' option.”



# The Takeaways

- There may be an Eighth Amendment violation if there is an attempt to cite or arrest an unsheltered person when there is no available shelter space.
- An Eighth Amendment violation has not been recognized against a non-City/County public entity, but that does not stop a lawsuit from being filed.
- Courts have recognized that non-City/County public entities are not equipped to provide for a homeless encampment.
  - *Veterans for Peace Greater Seattle, et al. v. City of Seattle, et al.*, No. C09-1032 RSM, 2009 WL 2243796 (W.D. Wash. Jul. 24, 2009)
  - *Sullivan v. City of Berkeley, et al.*, No. C17-06051 WHA, 2017 WL 4922614 (N.D. Cal. Oct. 31, 2017)

# State-Created Danger Doctrine

- Generally prohibits placing a person in a situation of known danger with deliberate indifference to their personal or physical safety
- Example: Clearing a homeless encampment
- Potential Constitutional Challenges:
  - Violation of **Fourteenth Amendment** (Due Process)

# State of the Law

- 1989: *Wood v. Ostrander*, 879 F.2d 583 (9<sup>th</sup> Cir.)
  - Federal lawsuit brought by a woman alleging due process violations under the Fourteenth Amendment when a police officer left her by the side of the road
  - Findings:
    - Plaintiff raised a genuine issue of fact showing the police officer acted with deliberate indifference to her personal security
    - Plaintiff raised a genuine issue of fact as to whether the police officer “affirmatively placed the plaintiff in a position of danger”
  - Holding: Plaintiff can claim liability under 42 U.S.C. § 1983 if can demonstrate that the state acted with deliberate indifference in placing an individual in a position of danger

# Examples of State-Created Danger Doctrine Applied to Homelessness

- Clearing homeless encampments during COVID-19 pandemic when CDC guidelines advised against dispersing homeless individuals into the community
- ***Santa Cruz Homeless Union v. Bernal (N.D. Cal.)***
  - Federal lawsuit arising out of the City of Santa Cruz's attempt to clear encampments from San Lorenzo Park and the Benchlands during the COVID-19 pandemic
  - No alternative shelters or individual housing options
  - Court granted preliminary injunction because clearing the encampment during the COVID-19 pandemic would place the individuals in a "more vulnerable situation and in greater danger without access to shelter and services"
- ***Sausalito/Marin County Chapter of the California Homeless Union v. City of Sausalito (N.D. Cal.)***
  - Federal lawsuit arising out of City of Sausalito attempt to enforce a day camping prohibition and closing and/or clearing an encampment at Dunphy Park and moving it to Marinship Park
  - Court questioned the City's alleged concern for the health and safety of the residents
  - Court granted preliminary injunction because of health and safety risk to encampment residents, City provided no good reason to justify the ban of day camping, and City had taken no steps to ensure that Marinship Park is safe.
- Both preliminary injunctions have now been modified to allow the encampments to be relocated.

# Takeaways

- Can relocate/clear a homeless encampment as long as the residents are not being placed in a more dangerous situation
- Act with good, fact-based reasons
- Highly dependent on the situation – as situation/circumstances change, the danger can change

# 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
- 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



# 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

**UNCLEAR: WHETHER NECESSITY DEFENSE APPLIES**

# 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

- **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
- **Safe Parking Programs**
  - Provide those living in their cars a safe place to park overnight
  - Partner with religious and non-profit organizations
  - Participants register and receive a placard
  - Parking lots are open for a certain set period of time at night
  - May include services, such as access to restrooms, showers, clothes and food pantry, food service, free wi-fi/computer use, or laundry service
- **Revisit RV/Parking ordinances/regulations**

# QUESTIONS?

KIMBERLY Y. CHIN, ESQ.

[kchin@aghwlaw.com](mailto:kchin@aghwlaw.com)

