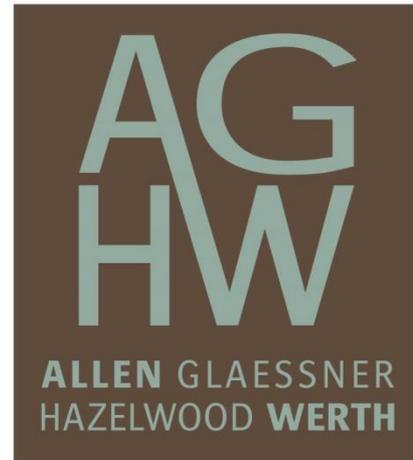


PARSAC ACADEMY
December 4, 2019

Gimme Shelter: The Homeless Dilemma for Cities

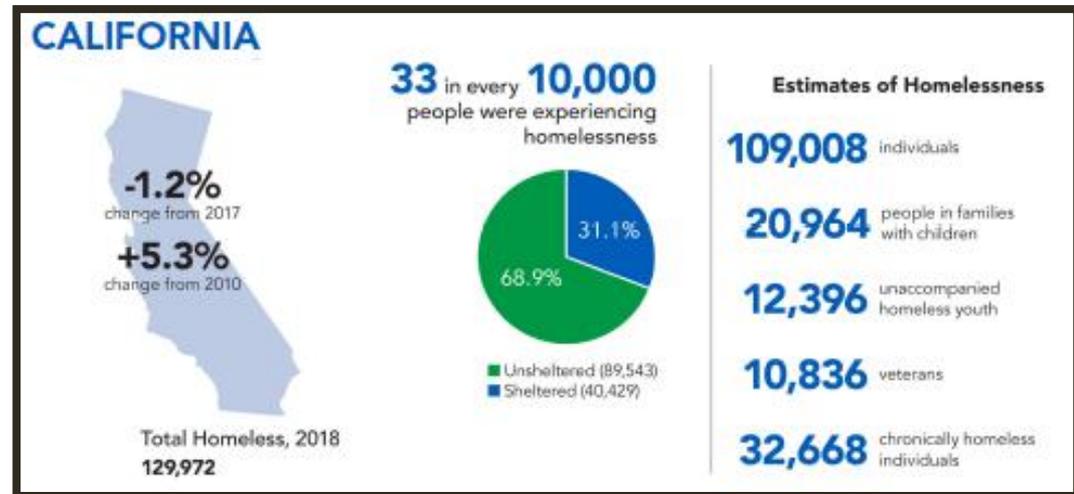
Presented By:
Kimberly Y. Chin, Esq.



TRUSTED IN TRIAL

Introduction

- On a single night in 2018, **553,000 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 second year in a row nationwide.**
- **Homelessness in California has been increasing, but decreased by 1.1% in 2018.**
- **24%** of the homeless population in the United States were in California
- California accounted for **47%** of unsheltered people in the country



Source: U.S. Department of Housing and Urban Development, The 2018 Annual Homeless Assessment Report (AHAR) to Congress

The Cost of Addressing and Preventing Homelessness

- **San Francisco:** \$284.5 million budget in the 2018-19 fiscal year
 - Source: San Francisco Chronicle, *SF's record budget focuses on saving lives, cleaning streets, improving MUNI*, August 11, 2018
- **Los Angeles:** \$430 million budget in the 2018-19 fiscal year
 - Source: Los Angeles Times, *L.A. budgets \$430 million to help homeless, most of it long-term debt*, April 30, 2018
- **Sacramento:** \$15.7 million budget in the 2018-29 fiscal year
 - Source: The Sacramento Bee, *Sacramento mayor asks county to divert \$53 million toward homeless services*, February 5, 2019
- **State:** Governor Newsom's budget includes \$500 million in grant funding to address homelessness
 - Source: The Sacramento Bee, *'This is a crisis.' Help for housing costs, homeless in Gavin Newsom's first budget*, January 10, 2019

Current Litigation

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

- City of Eureka
- City of Berkeley
- City of Oakland
- City of Santa Ana & Orange County
 - Santa Ana voted to sue Orange County, Irvine, Laguna Niguel, and Huntington Beach
- City of San Diego

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
- 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 Panhandling Ordinances
- 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
 - 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 (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.'"

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.4th 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 (9th 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.
 - The City of Boise has asked the U.S. Supreme Court 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

- **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

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

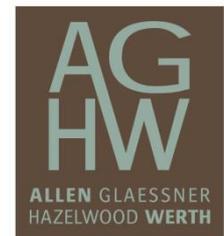
- 2012: *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir.)
 - Federal class action brought against the city, alleging that its police department and bureau of street services confiscated and destroyed homeless individuals' unattended but unabandoned personal possessions in violation of the Fourth 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

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

- 2000: *Los Angeles Alliance For Survival v. City of Los Angeles*, 22 Cal. 4th 352 (Cal. Sup. Ct. 2000) / 224 F.3d 1076 (9th Cir.)
 - 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

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)

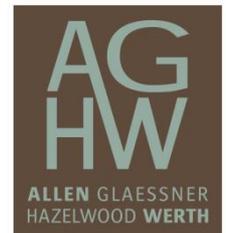
State of the Law

- 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



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
- **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**

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

QUESTIONS?

KIMBERLY Y. CHIN, ESQ.

kchin@aghwlaw.com