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Police Interaction with Homeless Persons – Part I – Sleeping and Possessions

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Introduction

In recent years, a number of federal civil rights lawsuits against police departments and their personnel, as well as against municipalities generally have involved issues arising from the presence of a large number of homeless persons in major urban areas. These lawsuits have covered a variety of topics, including homeless persons sleeping, loitering, or erecting temporary shelters in public places such as parks or sidewalks, issues arising out of the operation of homeless shelters, and the seizure or disposal of the possessions of homeless persons.

The old saying is that a “man’s home is his castle,” and, of course, it is protected under the Fourth Amendment against unreasonable searches and seizures. But is it still a castle with such protection when the “castle” is a cardboard box, a space over a sidewalk heating grate, or no fixed location at all?

Police have been sued by both individuals and by advocacy organizations which champion the rights and interests of the homeless, and in a number of instances, courts have been concerned with seeing that constitutional rights of such persons are not ignored because of their economic status and lack of a fixed abode.

On the other side of the equation, persons residing in cities, and individuals and corporations operating businesses of all kinds are concerned about adverse secondary effects that they see from the presence of homeless persons in their communities, including harassment by aggressive panhandlers, crime, sanitary problems, litter, impediments to the flow of traffic, and disincentives for

customers or tenants to patronize particular businesses, hotels, or apartment complexes.

The first part of this two-part article discusses some recent cases involving homeless people's sleeping accommodations in public places and homeless shelters. A second article will discuss issues concerning aggressive panhandling and vending, as well as use of force against homeless persons. On the last page of this article, there is a brief section with some on-line resources.

Sleeping in public places and homeless shelters

Homeless persons, like everyone, must sleep somewhere. While some are accommodated at shelters, or temporarily at the homes of friends, family, or neighbors, inevitably many sleep outdoors in public places such as parks, streets, or sidewalks. Some cities have attempted to criminalize such activities.

In [Jones v. City of Los Angeles](#), No. 04-55324, 444 F.3d 1118 (9th Cir. 2006), a federal appeals court, by a vote of 2-1, ruled that a City of Los Angeles ordinance that criminalized homeless people sitting, lying, or sleeping on streets and sidewalks at all times violates the Eighth Amendment prohibition on cruel and unusual punishment.

In this case, six homeless persons, who claimed that they were unable to obtain shelter on the night that each of them was cited or arrested for violation of a Los Angeles city ordinance prohibiting sitting, lying, or sleeping on public streets and sidewalks sued the city. The Complaint sought an injunction against the enforcement of the ordinance during nighttime hours (9 p.m. to 6:30 a.m.), or at any time against the temporarily infirm or permanently disabled.

In ruling that the ordinance did, in fact, violate the Eighth Amendment, a 2-1 majority of a federal appeals court panel stated that there was a "severely large" gap between the size of the homeless population needing a shelter bed and the number of such beds available in public shelters, private shelters, or inexpensive "Single Room Occupancy" hotels (SROs) in the "Skid Row" area of town. Evidence in the case, the court found, showed that for many of the homeless persons in the city without the "resources or luck to obtain shelter," sidewalks "are the only place to be."

The court also cited studies showing that homelessness often results not from "informed choice," but rather from mental illness, substance abuse, domestic violence, low-paying jobs, and the "chronic lack of affordable housing."

The appeals court found that the Los Angeles ordinance was one of the most restrictive municipal laws on the subject in the country, since the city could secure

a conviction under the ordinance against any person who sits, lies, or sleeps in a public way at any time of day. In many other cities, ordinances directed at homeless people provide "ways to avoid criminalizing the status of homelessness," the court commented, by making an element of the crime some conduct in combination with sitting, lying, or sleeping in a state of homelessness, such as only prohibiting doing so if it intentionally obstructs pedestrian or vehicular traffic, or limiting enforcement to certain hours, or certain areas.

Because of the broad reach of the Los Angeles ordinance, the court stated, thousands of homeless people in the city violate the ordinance every day and every night, and many are arrested, often losing, in the process, the few possessions they may have.

The appeals court ruled that the city could not "expressly criminalize" the status of homelessness by making it a crime to be homeless without violating the Eighth Amendment. It reasoned that it therefore also could not criminalize acts that are an "integral aspect of that status." Because there is insufficient shelter in the city to provide beds for all homeless persons at all times, including on the nights of their arrest or citation, the court found, the city: "has encroached upon Appellants' Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless."

Whether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human. It is undisputed that, for homeless individuals in Skid Row who have no access to private spaces, these acts can only be done in public.

The appeals court's majority rejected the argument that the ordinance was aimed at "criminal conduct" rather than the status of being homeless. Unlike criminal conduct such as drug dealing, the opinion states, "the conduct at issue here is involuntary and inseparable from status--they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping." To rule otherwise, the court continued, would be to believe that homeless persons could avoid sitting, lying, and sleeping for "days, weeks, or months at a time" to comply with the ordinance "as if human beings could remain in perpetual motion."

The panel's majority emphasized that its ruling was a narrow one, and did not prevent the criminalizing of conduct that is not an "unavoidable consequence of being homeless," such as panhandling or obstructing traffic. It also did not strike down the ordinance on its face or in its entirety.

We hold only that, just as the Eighth Amendment prohibits the infliction of criminal punishment on an individual for being a drug addict, or for involuntary public drunkenness that is an unavoidable consequence of

being a chronic alcoholic without a home, the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles.

The panel majority ruled that the plaintiffs were entitled to an injunction against the city's enforcement of the ordinance at certain times and/or places, so long as there are a greater number of homeless individuals in the city than the number of available beds.

A strong dissent by one judge on the three-judge panel acknowledged that "homelessness is a serious problem," but characterized the ordinance as punishing the conduct of sitting, lying or sleeping on city sidewalks, rather than the status of homelessness, noting that the conduct involved could be committed by persons with homes as well as by homeless people.

Following the panel's decision, the parties reached a settlement of the lawsuit, and jointly filed a motion asking the appeals court to dismiss the appeal and withdraw its opinion, which the court did. [Jones v. City of Los Angeles](#), No. 04-55324, 505 F.3d 1006 (9th Cir. 2007). As a result, the panel's decision is no longer binding precedent, but it remains very instructive as to how a major court addressed this problem in a major U.S. city. The settlement included the city barring the police from arresting homeless people from sleeping on the sidewalk from 9 p.m. to 6 a.m., so long as sleepers are ten feet away from businesses, and until the city builds 1250 units of housing designed to meet the needs of the homeless.

Homeless persons who sleep in parks, sidewalks, alleys, or other public places often erect temporary "shelters," constructed of boxes or other materials. A number of municipalities have sought to outlaw such behavior.

In [Betancourt v. Bloomberg](#), No. 04-0926, 448 F.3d 547 (2nd Cir. 2006), cert. denied, 127 S. Ct. 587 (2006), a federal appeals court, by a 2-1 vote, ruled that a New York law under which a homeless man was arrested for erecting cardboard structures in which he slept on a park bench did not violate his constitutional rights, as well as ruling that there was probable cause for his arrest.

In this case, a homeless man in New York City was arrested along with other homeless persons under a city program designed to improve the quality of life in the city's public spaces. He was charged with violation of a provision of the city's administrative code that prohibits leaving boxes and erecting obstructions in public spaces. He sued the city, the mayor, and the police commissioner for alleged violations of his civil rights, claiming that the code section was unconstitutionally overbroad and also unconstitutionally vague as applied to him, failing to provide clear notice of what conduct was prohibited. He further claimed

that his arrest was without probable cause and violated his constitutional right to travel.

A federal appeals court panel, by 2-1, upheld the trial court's determination that the code section was sufficiently clear to give notice both to the homeless man and to law enforcement officials as to what conduct was prohibited, and further found that the section plainly applied to his observed conduct, providing probable cause for his arrest.

The city's "quality of life" initiative was designed to reduce a wide range of street crimes, including prostitution, panhandling, and drug sales. The plaintiff claimed that the initiative, in enforcing provisions like the code section involved in his arrest, had been expanded to reduce the number of homeless persons living in public spaces. On the night of his arrest, police arrested 25 persons, including the plaintiff, in a city park. The plaintiff had come to the park at approximately 10:30 p.m. with some personal possessions, three folded cardboard boxes, and a loose piece of cardboard. He used the boxes to construct a "tube" big enough to cover most of his body, placed the tube on a park bench, climbed into the tube, covered the exposed part of his body with the loose piece of cardboard, and went to sleep.

The officers woke him from his sleep and arrested him. He was later given a ticket and released, and the district attorney later declined to prosecute him, stating that the prosecution of the case "lacked prosecutorial merit."

Upholding these actions, the appeals court found that they did not impinge on the plaintiff's constitutional rights. The plaintiff did not argue that his construction of a cardboard enclosure in which he could sleep, with some protection from the cold, was intended to be "expressive activity" protected by the First Amendment. Additionally, the court found, the code section did not restrict his right to travel, because it did not prevent his "freedom of movement" either in interstate travel or within the state.

The appeals court found that the code section clearly prohibited erecting any obstruction in a public place, and that this clearly applied to the cardboard tube. The court noted in passing that the plaintiff had technically not violated the provisions concerning "leaving" boxes in a public place, since he did not leave the cardboard tube, but rather placed himself inside it. The appeals court rejected the argument that the tube was not an obstruction because it was not permanent.

The appeals court also rejected the argument that the code section was "unconstitutionally over-reaching because it prohibits innocent, unoffending conduct that is beyond the state's power to regulate," such as sitting, lying or sleeping by homeless people in parks and other public places, "where they are not impinging on the rights of others." The appeals court found that the code section by its language only prohibited "leaving or constructing in public spaces

inanimate objects" that are obstructions, and did not appear to prohibit the conduct of "sitting, lying, or sleeping" described by the plaintiff.

The officers, having observed the plaintiff in a cardboard structure large enough to house him, which he had erected in a public space, the appeals panel majority concluded, "had probable cause to arrest him."

A strong dissent by one judge on the panel argued that the arrest of the plaintiff "presents a textbook illustration of why vague criminal laws are repugnant to the Due Process Clause of the [Fourteenth Amendment](#)," and stated the belief that the law in question, as applied to the plaintiff, was unconstitutionally vague. This judge argued that the plaintiff's cardboard tube, placed on the park bench, was "no more of an obstruction than his prone body alone." Further, he argued, the plaintiff would not have been regarded as having erected an obstruction if he had covered his body on the bench with blankets, jackets, or a warm fur coat.

Some persons who are homeless seek refuge in homeless shelters operated by municipalities, charity organizations, churches, or other private entities. In [Thomas v. Cohen](#), No. 05-5072, 453 F.3d 657 (6th Cir. 2006), a federal appeals court found that three homeless women, evicted from homeless shelter by Louisville, Kentucky police without legal process at the request of the shelter's director were not "tenants" under Kentucky law, had no property interest in the premises, and, therefore, the officers' actions did not violate their due process rights.

The officers removed the women from a transitional homeless shelter in which they were residing, acting at the request of the shelter's director, and without providing the women with legal process of any kind. The shelter's director had earlier asked the women to leave the shelter for various violations of the house rules, but they refused to leave. All residents of the shelter were homeless women.

The women protested that they were tenants who paid rent, and the officers allegedly ignored these protests, and rejected their attempts to show the officers documents from their legal aid attorney expressing an opinion as to their tenancy.

The state law concerning tenants, the appeals court found expressly provides that it does not apply to residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational counseling, religious, or similar service. The court rejected the argument that the shelter was not an "institution" because it is located in a residential building and neighborhood. Despite its location, the court noted, residing at the shelter was incidental to the provision of educational counseling, religious, or similar services, and was designed to prepare homeless women to get back on their feet. The court rejected the plaintiffs' attempt to characterize the shelter as simply "low-income" housing, and their status as tenants.

A strong dissent by one judge on the three-judge panel noted that the plaintiffs each paid \$140 per month in exchange for his or her room, which no other resident had the right to enter, and that no supervisory staff resided on the premises, so that the plaintiffs lived there as "independent adults." Further, the dissenting judge pointed to the plaintiffs' argument that they were evicted from the shelter in retaliation for filing a complaint with the Board of Health, and would have held that the plaintiffs were tenants under Kentucky law and their oral agreement with the shelter, entitled to due process before eviction.

In Johnson v. Board of Police Commissioners, No. 4:04 CV 01266, 351 F. Supp. 2d 929 (E.D. Mo. 2004), a federal court found that homeless persons were entitled to preliminary injunction against alleged police "harassment" aimed at allegedly removing them from the downtown area of St. Louis, Missouri. Activities enjoined include directing or allowing the removal of homeless persons or homeless-appearing persons from public areas "where such citizens have a lawful right to be" without probable cause to believe that a crime has been or is being committed, or a need to clear such public areas for reasons of "security or public safety."

Possessions

Given that homeless people lack a place to sleep, it goes without saying that the issue of how to safeguard their few possessions is a constant quandary. And to much of the surrounding community, those few possessions may appear to be nothing more than so much trash, often placed on the ground, and in need of being cleaned up and disposed of. Yet one man's trash may be another man's treasure. In Cash v. Hamilton County Dept. of Adult Prob., No. 03-3916, 388 F.3d 539 (6th Cir. 2004), a federal appeals court overturned summary judgment for a city and county in a lawsuit by homeless persons claiming that they have an unconstitutional policy or custom of seizing and destroying their property without proper notice and hearing.

Homeless persons in Cincinnati, Ohio filed a federal civil rights lawsuit against the city and Hamilton County, claiming that the defendants had violated their Fifth and Fourteenth Amendment rights to due process of law by destroying their personal property without notice and without any right to reclaim the items taken. The city paid the county to provide clean-up services, with crews of persons sentenced to community service and assigned to the county probation department, led by a field supervisor, providing litter collections and ground maintenance of city-owned lots. Some of those lots had homeless persons living on or near them.

The trial court granted summary judgment for the defendants, but a federal appeals court reversed, reinstating the lawsuit.

The evidence in the case showed that a homeless man and his wife were living under a viaduct in Cincinnati, and that when the couple returned to their living space they found a crew from the county taking away their property. When they asked for the return of their property, the work crew supervisor allegedly told him that "I'm not allowed to; we have been given orders to clear out under all the bridges." They made an effort, subsequently, to locate their property. Although the city's sanitation division told them that their property would be "held for 30 days," they were not told where it was located, and a worker with a homeless assistance organization was told by the sheriff's office that "the stuff from the homeless sites is thrown away."

Five homeless individuals initially filed the suit, but three subsequently died. The lawsuit did not contest the city's authority to remove personal property from municipally-owned areas, but contended that the practice of doing so without notice and a hearing, and destroying the property after confiscation violated due process of law.

The appeals court noted that the trial judge relied exclusively on "undisputed testimony" from supervising police officers who said that the work crews are told to separate personal belongings from trash, and that personal belongings are then inventoried in the police property room where they are held, according to one officer, for a year before they are thrown away. From this, the trial court concluded that any destruction of the plaintiffs' property that occurred at the homeless site would be "unauthorized."

Under [Parratt v. Taylor](#), #79-1734, 451 U.S. 527 (1981) and [Hudson v. Palmer](#), #82-1630, 468 U.S. 517 (1984), unauthorized deprivations of property by government are not violations of due process so long as post-deprivation remedies are available, so the court concluded that no due process violation occurred. The plaintiffs were free to sue the city and county after the fact either for damages or to get their property back.

The appeals court, however, rejected the finding that the supervising officers' testimony was "undisputed." It found instead that the plaintiffs presented "substantial evidence" suggesting that the city and county had a custom and practice of hauling to the dump all unattended property found at the sites in question, including testimony by a field supervisor for the county probation department. He testified that he and his work crews followed police directions, and that the "standard cleanup" procedure was that officers directed the probationers to put "all items in bags" and then put the bags into a sanitation truck. He said that he had "never" observed a police officer segregating any of the items and saying that some should be saved, and that the items are all "hailed off to the trash, to the dump."

A police officer present during the three days of cleanup in mid-October, 2001 when the plaintiffs' property was taken supported this testimony. He distinguished the cleanup of homeless property from the department's general policy for dealing with personal property found at other locations around the city, stating that any unattended property found elsewhere is taken back to the station, logged, and held as found property, so that if someone can prove that the property is theirs, it is returned to them. For purposes of summary judgment, therefore, there was a genuine issue of material fact created by this testimony contradicting the evidence presented by the city and county. Summary judgment was therefore inappropriate.

The appeals court further found that there was a genuine issue of material fact as to whether adequate notice was provided to homeless persons like the plaintiffs. "The established precedent is that individuals whose property interests are at stake are entitled to a 'notice and opportunity to be heard.'" The city argued that it published a notice in the local newspaper, but the plaintiffs argued that such a notice is insufficient "particularly when the educational and financial restraints of the homeless community are considered."

Some other cases on this issue include:

* [Stone v. Pamoja House](#), No. 03-9174, 111 Fed. Appx. 624 (2nd Cir. 2004), cert. denied, 546 U.S. 902 (2005), ruling that a homeless person had no constitutional due process claim against city and the operator of a homeless shelter for the disposal of his bags of property. He abandoned his property interest in the bags and their contents by failing to retrieve them for almost a month after the stated storage period expired. The court also rejected the plaintiff's argument that he had a constitutionally protected due process property interest in residing in the shelter of his choice.

* [Bonner v. City of Santa Ana](#), #6012674, 45 Cal.App.4th 1465 (1996), finding that a homeless person who sued city officials after his property was thrown into a trash can could not recover for a violation of California Constitution, Art. I Sec. 7. The plaintiff obtained a judgment for damages in the trial court. Violations of the state's equal protection and due process clauses are not self-executing and do not support an award of damages.

* [Kincaid v. City of Fresno](#), No. CV-F-06-1445, 2008 U.S. Dist. Lexis 38532 (E.D. Cal.), a lawsuit filed on behalf of a class of homeless persons whose property had been taken and destroyed in a sweep of public property by the city, its police, or its sanitation division, in which the trial court certified a class. The plaintiffs claimed that these actions violated their Fourth and Fourteenth Amendment rights. The court ruled that if the homeless class established that their personal property was destroyed immediately after seizure while property

belonging to others was not destroyed in this manner, this would show a violation of the right of equal protection of law under the Fourteenth Amendment.

Resources

- [Cincinnati Ohio Police Department Guidance on Police Interaction with Homeless Encampments](#)
- [Fort Lauderdale, Florida Police Department Policy on Homeless Persons](#)
- [West Palm Beach Florida Police Department SOP Manual, Sec. III-7 Homeless Persons](#)
- [Homeless People's Trust and Interactions with Police and Paramedics](#), by Tanya L. Zakrison, Paul A. Hamel, and Stephen W. Hwang, Journal of Urban Health: Bulletin of the New York Academy of Medicine, Vol. 81, No. 4 (2004).
- [Ombudsman's Special Report: Policy Review and Recommendations: Interactions Between the Boise \(Idaho\) Police Department and the Homeless](#), by Pierce Murphy, December 20, 2006.
- [Interagency Council on Homelessness](#).
- [42 U.S.C. Sec. 11301](#), federal statute concerning homeless persons.
- [National Coalition for the Homeless](#).
- [A Dream Denied: The Criminalization of Homelessness in U.S. Cities](#). A Report by The National Coalition for the Homeless and The National Law Center on Homelessness & Poverty. (161 pages, January 2006).
- [Hate Violence, and Death on Main Street USA: A Report on Hate Crimes and Violence Against People Experiencing Homelessness 2007](#). (112 pages, April 2008).
- [2008 Directory of National, Statewide, and Local Homeless Advocacy Coalitions](#). A list of over 200 such coalitions.
- [Homelessness, litigation and law reform strategies: A United States perspective](#) by Maria Foscarinis, Executive Director, National Law Center on Homelessness & Poverty, Australian Journal of Human Rights (2004).
- [National Law Center on Homelessness & Poverty](#).

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