EMERGING ISSUES REGARDING HOMELESSNESS

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Agenda

- Introduction—where is the law going with respect to issues involving homelessness?
- Anti-camping regulations and *Martin v. City of Boise*—how is it being applied in the Ninth Circuit?
- Soliciting donations and aid—what is the status of "anti-panhandling" regulations?
- Use of vehicles for habitation—understanding homestead and the rules for ticketing and impoundment.
- The Eighth Amendment and excessive fines—breathing new life into an old concept

Legal Trends in Homelessness

- We have all noticed the dramatic increase in the number of unsheltered people in recent years. So have the courts.
- Traditional views of how laws may be enforced are undergoing change.
- We will focus on recent changes in the law and explore what the future may hold.
- There are many factors contributing to the situation and solutions are complex and complicated.

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Camping Ordinances--Martin v. Boise

- *Martin v. Boise* (April 1, 2019) is a Federal Ninth Circuit decision brought by unsheltered individuals against the City of Boise seeking to enjoin enforcement of anti-camping ordinances.
- The claim: enforcing anti-camping ordinances violates the 8th Amendment if no alternative space is available. Doing so criminalizes homelessness.
- Boise was actively enforcing its public camping ordinances—over 175 citations in Q1 2015.
- The 8th Amendment is not just about punishment; it places limits on what may be criminalized (e.g., drug addiction, alcoholism).

Martin—a "Narrow" Ruling

"[A]s long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter."

Martin provides guidance on what the ruling *does not* cover:

- A city is not required to provide sufficient shelter for those who are unsheltered;
- A city need not allow individuals to sit, lie or sleep on the streets at any time or at any place.

Martin—Limitations on the Holding

Martin elaborated further on the limits of its holding in footnote 8:

- It 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 certain times and in certain locations may be permissible *even when shelter is otherwise unavailable*.
- An ordinance may prohibit right of way obstruction or the erection of certain types of structures for shelter.
- The key is whether a city's ordinances punishes a person for lacking the means to live out the "universal and unavoidable consequences of being human."

Martin—Shelter Space

- Cities have the option of establishing a system for tracking shelter space availability.
- In theory, such a system would assist a city in determining when it may enforce a city-wide public camping ordinance.
- In practice, such a system is logistically difficult. It requires coordination with area agencies and non-profits that provide shelter services.

Martin—Shelter Space

Boise's attempt to track shelter space is a cautionary tale:

- There are three shelters in Boise—two of which are church-run.
- There was evidence that the church shelters required participation in religious activity or instruction in order to receive shelter.
- "A city cannot, via the threat of prosecution, coerce an individual to attend religion-based treatment programs consistently with the Establishment Clause of the First Amendment."
- All three shelters had duration restrictions for its residents.
- Point in time counts and arrest numbers also demonstrated a lack of available shelter.

Martin v. City of Boise--What's Next?

- The Ninth Circuit denied rehearing and the US Supreme Court denied Boise's petition for review.
- Question: Should cities and counties revise their camping or sit/lie ordinances in response to *Martin*?
- Answer: It should be considered. Martin is primarily about enforcement, but ordinance revisions may help from a legal standpoint.
- Many camping ordinances predate the rise of the homeless population in our state. Cities may want to consider whether their ordinances are in keeping with current legislative priorities.

Post-*Martin* Case Law

Blake v. City of Grants Pass, (July 22, 2020, unpublished, Oregon Federal District Court):

- City adopted city-wide anti-camping ordinance in response to its "vagrancy problems."
- In response to *Martin*, it removed "sleeping" from its ordinance, but kept its broad definition of "camping."
- Point in time counts showed conclusively that there were many more unsheltered individuals than shelter beds.
- Court ruled that Martin applies to both criminal *and* civil citations.
- *Blake* confirms that an approach that emphasizes enforcement is problematic.

Post-*Martin* Case Law

Aitken v. City of Aberdeen, 393 F. Supp. 3d 1075 (W.D. Wash. 2019):

- Individuals sought to enjoin their eviction by the City from "River Camp," a thin strip of land between a rail yard and a river.
- The site posed health and safety issues and was hard to access for first-responders.
- Court: Eviction from public property is not "punishment" for the purposes of *Martin*.
- The Court did issue "a brief stay" of enforcement of the City's anti-camping and sit-lie regulations during the time of the eviction.

Post-*Martin* Case Law

Gomes v. County of Kauai, 481 F. Supp. 3d 1104 (D. Haw. 2020):

- Plaintiffs were cited for illegal camping in a public park and sued, claiming 8th Amendment violation.
- The county regulation applied to camping parks and not other public places.
- Court: *Martin* is a "narrow" case and does not prohibit regulations that prohibit camping at certain times and locations.
- Is there an obligation to specify where an individual *can* camp, or is it enough to say where it is prohibited?

Post-*Martin* Takeaways

- Enforcement remains a tool, but only on a limited basis as part of a holistic response to issues involving homelessness.
- Anti-camping regulations that address specific areas or types of conduct are easier to defend than city-wide prohibitions.
- Some cities have established authorized encampments (for example, Olympia Downtown Mitigation Site) which provides enforcement flexibility.
- A Thurston County "scattered site" pilot program will provide case management, hygiene services, and garbage collection at certain existing (but unauthorized) encampments.

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Panhandling Regulations

Traditionally, courts have ruled that “charitable appeals for funds is protected speech, but that government may impose “time, place and manner” restrictions on such speech. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 100 S. Ct. 826 (1980).

Reed v. Town of Gilbert

Reed v. Town of Gilbert called into question local codes that regulate based on sign content.

City of Lakewood v. Willis

Not long after *Reed*, in 2016, the Washington Supreme Court struck down an ordinance restricting where "begging" could take place in *City of Lakewood v. Willis*.

The ordinance prohibited begging at freeway onramps, offramps and major intersections in the City.

City of Lakewood v. Willis

- Steven Willis was issued a criminal citation for “begging” at a freeway onramp.
- Begging was defined as “asking for money or goods as a charity, whether by words, bodily gestures, signs or other means.”
- He had a sign stating that he was disabled and needed help. He was not cited for blocking the onramp or disrupting traffic.
- The court emphasized that an officer would need to read the sign to know if the ordinance was violated.

City of Lakewood v. Willis

Under the ordinance, soliciting votes or customers would not have been a violation:

City of Lakewood v. Willis--Lessons

- Many cities have ordinances on panhandling that have not been updated in light of *Willis*.
- Beware of ordinances that regulate the content of expressive activity instead of legitimate public safety issues.
- Although *Reed* is a sign case, the results in *Willis* are not limited to signs—the reasoning applies to any expressive activity.
- Also beware of ordinances that create broad zones of restriction on soliciting aid or donations within a certain distance of bus stops, parking lots, ATMs, etc. Such ordinances may be vulnerable to challenge, although this issue was not directly addressed in *Willis*.

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Living in Vehicles

- The 2018 Seattle/King County Point-in-Time Count of Persons Experiencing Homelessness found 3,372 people were living in cars, vans and RVs. That number dropped to 2,147 in 2019 but went up to 2,748 in 2020. A lot of people are living in vehicles.
- Traditional view—municipalities may regulate parking and prohibit living in vehicles on private property. Duration restrictions may be imposed on parking in the right of way.
- In many cities, vehicles are subject to impoundment after 72 hours.
- If a vehicle used as a residence becomes inoperable, it is likely to be impounded if it is parked in the right of way.

Desertrain v. City of Los Angeles

- In *Desertrain v. City of Los Angeles* (Ninth Circuit, 2014), criminal defendants challenged a vehicle habitation ordinance as void for vagueness.
- The ordinance: “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 … as living quarters either overnight, day-by-day, or otherwise.”
- Case facts show enforcement is broad and arbitrary. Was the City is using this ordinance as a pretext to drive homeless people out of Venice Beach?

Desertrain Takeaways

- Vague ordinance + arbitrary enforcement makes for an easy case result.
- Most cities in Washington prohibit any vehicle from remaining in the same spot for a certain period of time (e.g., 24 or 72 hours). Most cities do not have a separate vehicle habitation ordinance.
- Tacoma's vehicle habitation ordinance is much more detailed and requires that the vehicle be in the same spot for 72 hours before there is a violation. See TMC 11.05.231.
- But there is another legal issue associated with vehicles used for habitation…

City of Seattle v. Long—Part 1

- In *City of Seattle v. Long* (Washington Court of Appeals, July 29, 2020), the City towed Steven Long's truck from an unused gravel lot owned by the City.
- The truck was inoperable, had been in the same spot for three months and had been tagged for remaining on City property for more than 72 hours.
- Mr. Long lived in his truck, and he contested impoundment on that basis.
- A City magistrate found the vehicle was parked in violation of City ordinances, but waived the ticket fee, reduced the impound fee from $946 to $547, and offered a payment plan to Mr. Long who accepted get his truck back and to avoid sale of the vehicle at auction. He then appealed.
- The trial court reversed, finding that the Washington Homestead Act (RCW Chapter 6.13) applies to vehicles used as residence and that the impound charges amount to a lien on Mr. Long's residence.

City of Seattle v. Long—Part 1

- Both sides agreed a vehicle may be subject to homestead protection. The dispute was whether homestead protection attached automatically to Mr. Long's vehicle, or whether he needed to file a "declaration of homestead."
- The Court of Appeals found that the statute was ambiguous but interpreted it to provide automatic protection since homestead rights are favored under Washington law.
- The Wa. Const. protects homesteads from "forced sale." The court interpreted that to apply to the process by which unclaimed impound vehicles are sold at auction.
- The Court threw out the payment plan since it was based on a threat of forced sale.

City of Seattle v. Long—Part 1

- The Washington Supreme Court reversed. It agreed that the automatic homestead protection applies to vehicles used for habitation.
- But once Mr. Long got his truck back, there was not a lien or judgment being enforced against the truck.
- Homestead protections are a “shield” with respect to enforcement of judgments against homesteads, not a “sword” by which vehicle owners may prevent impoundment.
- This result does not provide much benefit to local governments—most homestead claims will arise when the towing company has possession of the vehicle and is preparing to sell it at auction.

City of Seattle v. Long—Part 1

- The Court: “We note that our decision on the homestead act does not call into question the city's independent authority to impound a vehicle. The Seattle Municipal Code provides this mechanism to enforce parking infractions... A vehicle owner can object to the impoundment and payment of fees, but the homestead act is not a sword to prevent impoundment… Homestead protections are resolved upon enforcement, not issuance, of a parking ticket or impoundment of a vehicle.”
- Question: If a municipality can impound homestead vehicles but may not sell unclaimed vehicles, what should be done with those vehicles?
- In the meantime, municipalities must take care when impounding vehicles that may be used for habitation and document their condition and appearance.
- For more, please see my blog articles about the Court of Appeals and the Washington Supreme Court decision.

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City of Seattle v. Long—Part 2

The Court's ruling on homestead allowed it to reach Mr. Long's Eighth Amendment excessive fines claim.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The key issue: Should an individual's ability to pay be part of the excessive fines analysis?

Historically, the answer has been "no." The US Supreme Court "largely ignored" the excessive fines clause for two centuries.

The Wash. Sup. Ct. reviewed foundational texts (e.g., the Magna Carta) and recent case law and concluded that ability to pay should be part of the excessive fines analysis.

City of Seattle v. Long—Part 2

The excessive fines analysis has two-parts:

(1) are the costs imposed at least partially punitive? and

(2) Are they "excessive"—i.e., disproportional to the gravity of the offense.

Parking regulations and impounds are partly remedial and partly punitive. Impound has a deterrence function, which is a component of punishment.

Long—Excessive Fines

Excessive fines—proportionality is key, but there are a "patchwork" of tests in the federal circuits.

While the US Supreme Court has not yet decided if ability to pay is a component, "the history of the Eighth Amendment suggests it is."

"We pay more than "lip service" to the excessive fines clause and instead hew to its history. We conclude…that courts considering whether a fine is constitutionally excessive should also consider a person's ability to pay."

Long—"Gross Disproportionality" Test

The test considers:

(1) the nature and extent of the infraction or crime,

(2) whether the violation was related to other illegal activities,

(3) the other penalties that may be imposed for the violation,

(4) the extent of the harm caused, and

(?) The person's ability to pay the fine.*

*Unclear whether this should be treated as a fifth test element or a separate inquiry.

Long—"Gross Disproportionality" Test

Payment of the $547.12 impound fee was grossly disproportional as to Mr. Long:

- The infraction was minor. His truck was inoperable, so he couldn't move it. He was in an underused gravel parking lot and was not blocking traffic.
- There was no evidence of other infractions or crimes, or nuisance or public health issues.
- His tools and bedding were in the back of the truck and he caught influenza from sleeping outside.
- His total monthly income at the time was $400-$700.
- All the test factors were in his favor. But how would different facts change the analysis? What if all the factors except for ability to pay worked against the individual? Would a court reach a different result?

Jacobo Hernandez v. City of Kent

Mr. Jacobo Hernandez was arrested and subsequently pled guilty in federal court to possession of meth with intent to distribute, a felony.

He had used his vehicle to deliver eight pounds of meth (hidden in the gas tank) and admitted to making two other deliveries, for which he was not charged.

The City of Kent sought forfeiture of the vehicle, which was worth $3,000 to $4,000. Mr. Hernandez had $50 in his jail account and no other assets.

All the other proportionality factors favored forfeiture given the serious nature of the crime and the vehicle's role in it.

Jacobo Hernandez v. City of Kent

Forfeiture of the vehicle should be upheld because it was an instrumentality in the commission of a felony, right?

Wrong. The Court of Appeals found that ability to pay could outweigh all the other factors, especially when the fine amounts to the entirety of a person's assets.

Even though the crime was serious, Mr. Hernandez was, in the court's view, simply a courier, not a drug boss.

"[f]or the forfeiture of an entirety of a person's estate to be proportional … it would have to be far more heinous than Mr. Jacobo[ ]Hernandez's role as a courier on this one (or even three) occasions."

Excessive Fines—the Need for Clarity

The Supreme Court in *Long* provided detailed analysis of the basis for adding an ability to pay factor to the excessive fines test.

The facts in *Long* were "easy," so it did not provide much guidance on how ability to pay relates to the other factors.

"The excessive fines clause prohibits the extraction of payment as a punishment for *some offenses* that would deprive a person of his or her livelihood."

At this point, it is unclear whether ability to pay is: (1) part of a balancing test with the other "grossly disproportionate" factors; or (2) a separate or parallel analysis that would apply when a fine is especially burdensome to an individual.

The City of Kent filed a petition for review, so hopefully the Court will grant review and provide additional guidance soon!

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