

CAMPING ORDINANCE CRIMINALIZED HOMELESS STATUS

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On May 7, 2019, Denver voters overwhelmingly rejected a "Right to Survive" referendum which would have effectively repealed the city's existing anti-camping ordinance in public parks and spaces. This vote came in the wake of the federal appeals court "City of Boise" opinion described herein. In this case, federal appeals court for the Ninth Circuit held unconstitutional any such camping ordinance which effectively criminalizes the mere status of being homeless. In an apparent response to this federal court opinion, a number of cities in the West have reportedly ceased enforcing their anti-camping laws.

Search terms: Denver, homeless, camping SEE:

<https://www.governing.com/topics/health-human-services/gov-denver-homeless-camping-ban-voters-ballot.html>

<https://www.denverpost.com/2019/04/12/denver-initiative-300-camping-ban-homeless/>

The growing concern among public park administrators is that any such legislated "Right to Survive" or "Right to Shelter" policy would override existing urban camping ordinances and could also effectively nullify existing park curfew regulations. Without directly addressing the lack of available shelters and affordable housing for the homeless, public parks could become low cost de facto open air homeless shelters with increased trash and sanitation burdens threatening the environmental integrity of park resources.

While rejecting a camping ordinance which could effectively criminalize the mere status of being homeless, the federal appeals court in the "City of Boise" opinion described below did not issue an absolute ban on such local laws. On the contrary, the federal appeals court found "an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations" as well as "an ordinance barring the obstruction of public rights of way or the erection of certain structures...might well be constitutionally permissible."

In determining the constitutionality of an existing or proposed anti-camping ordinance, the issue, however, would be whether a law or regulations "punishes a person for lacking the means to live out the universal and unavoidable consequences of being human." Accordingly, in considering the constitutionality of an "anti-camping" ordinance, a federal court would necessarily examine what viable alternatives existed, if any, to satisfy the basic human need for shelter by homeless individuals who might otherwise have no other option but to resort to "camping" in public parks and places.

SLEEPING BAN IN PUBLIC PLACES

In the case of *Martin v. City of Boise*, 902 F.3d 1031, 2018 U.S. App. LEXIS 25032 (9th Cir. 4/1/2019), the issue before the United States Court of Appeals for the Ninth Circuit was "whether the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no

home or other shelter to go to."

The plaintiffs were six current or former residents of the City of Boise ("the City") who are homeless or have recently been homeless. These homeless individuals had lived in or around Boise since 2007. Between 2007 and 2009, each plaintiff alleged he or she was cited by Boise police for violating one or both of two city ordinances, the "Camping Ordinance" and the "Disorderly Conduct Ordinance." With one exception, all plaintiffs were sentenced to time served for all convictions; on two occasions, one plaintiff was sentenced to one additional day in jail.

The Camping Ordinance, Boise City Code § 9-10-02, made it a misdemeanor to use "any of the streets, sidewalks, parks, or public places as a camping place at any time." The Camping Ordinance defined "camping" as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence."

The Disorderly Conduct Ordinance, Boise City Code § 6-01-05, prohibited "occupying, lodging, or sleeping in any building, structure, or public place, whether public or private without the permission of the owner or person entitled to possession or in control thereof."

HOMELESS POPULATION SHELTER

Boise has had a significant and increasing homeless population. According to a January 2014 count taken by the Idaho Housing and Finance Association, there were 753 homeless individuals in Ada County where Boise is the county seat; 46 of the reported homeless were "unsheltered," or living in places unsuited to human habitation such as parks or sidewalks. In 2016, reported data indicated there were 867 homeless individuals counted in Ada County, 125 of whom were unsheltered. This reported data likely underestimated the number of homeless since the count reflected a one-night point in time. Moreover, many homeless individuals may have access to temporary housing on a given night. In addition, weather conditions may affect the number of available volunteers and the number of homeless people staying at shelters or accessing services on the night of the count.

In the City of Boise, three homeless shelters run by private, nonprofit organizations were the only shelters in Ada County offering emergency shelter services. One shelter ("Sanctuary") operated by a religious organization did not impose any religious requirements on its residents and was open to men, women, and children of all faiths. Because of its limited capacity, Sanctuary frequently has to turn away homeless people seeking shelter.

In 2010, Sanctuary reached full capacity in the men's area "at least half of every month," and the women's area reached capacity "almost every night of the week." In 2014, the shelter reported that it was full for men, women, or both on 38% of nights. Sanctuary provides beds first to people who spent the previous night at Sanctuary. At 9:00 pm each night, it allots any remaining beds to those who added their names to the shelter's waiting list.

The other two shelters in Boise were both operated by the Boise Rescue Mission ("BRM"), a Christian nonprofit organization. One of those shelters, the River of Life Rescue Mission ("River

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of Life"), is open exclusively to men; the other, the City Light Home for Women and Children ("City Light"), shelters women and children only.

BRM's facilities provide two primary "programs" for the homeless, the Emergency Services Program and the New Life Discipleship Program. The Emergency Services Program provides temporary shelter, food, and clothing to anyone in need. Christian religious services are offered to those seeking shelter through the Emergency Services Program. The shelters display messages and iconography on the walls, and the intake form for emergency shelter guests includes a religious message. The Discipleship Program is an "intensive, Christ-based residential recovery program" of which "religious study is the very essence."

POLICE SHELTER PROTOCOL

The plaintiffs filed suit in the United States District Court for the District of Idaho in October of 2009, alleging their previous citations under the Camping Ordinance and the Disorderly Conduct Ordinance violated the U.S. Constitution Cruel and Unusual Punishment Clause of the Eighth Amendment. Under federal civil rights law, the plaintiffs sought damages for those alleged violations and a court order precluding any future enforcement of the ordinances by the City of Boise.

After the litigation began, the Boise Police Department promulgated a new "Special Order," effective as of January 1, 2010. The Special Order prohibited enforcement of either the Camping Ordinance or the Disorderly Conduct Ordinance against any homeless person on public property on any night when no shelter had "an available overnight space." City police implemented the Special Order through a two-step procedure known as the "Shelter Protocol."

Under the Shelter Protocol, if any shelter in Boise reaches capacity on a given night, that shelter will so notify the police at roughly 11:00 pm. Each shelter has discretion to determine whether it is full, and Boise police have no other mechanism or criteria for gauging whether a shelter is full.

The Camping Ordinance and the Disorderly Conduct Ordinance were both amended in 2014 to codify the Special Order's mandate that "[l]aw enforcement officers shall not enforce [the ordinances] when the individual is on public property and there is no available overnight shelter." Boise City Code §§ 6-01-05, 9-10-02.

Since the Shelter Protocol was adopted, one of the shelters ("Sanctuary") has reported that it was full on almost 40% of nights. Although BRM agreed to the Shelter Protocol, its internal policy is never to turn any person away because of a lack of space, and neither BRM shelter has ever reported that it was full. If all shelters are full on the same night, police are to refrain from enforcing either ordinance. Presumably because the BRM shelters have not reported full, Boise police continue to issue citations regularly under both ordinances.

CREDIBLE ENFORCEMENT THREAT

In July 2011, the federal district court granted summary judgment to the City, holding the Special Order and Shelter Protocol referenced in the amendment ordinances effectively

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"permitted camping or sleeping in a public place when no shelter space was available." As a result, the federal district court found plaintiffs' claims were "mooted" because there was no longer a "credible threat" of future prosecution under the challenged ordinances:

If the Ordinances are not to be enforced when the shelters are full, those Ordinances do not inflict a constitutional injury upon these particular plaintiffs... [T]here is no known citation of a homeless individual under the Ordinances for camping or sleeping on public property on any night or morning when he or she was unable to secure shelter due to a lack of shelter capacity... [T]here has not been a single night when all three shelters in Boise called in to report they were simultaneously full for men, women or families.

On appeal, the federal appeals court held the district court had erred in finding plaintiffs' claims were moot because "the Special Order was a statement of administrative policy and so could be amended or reversed at any time by the Boise Chief of Police." Accordingly, the federal appeals court found: "The City had not met its 'heavy burden' of demonstrating that the challenged conduct — enforcement of the two ordinances against homeless individuals with no access to shelter — could not reasonably be expected to recur."

In addition, the appeals court found plaintiffs had presented evidence of a "credible threat of prosecution under one or both ordinances in the future at a time when they are unable to stay at any Boise homeless shelter." In so doing, the court further noted "the City is wholly reliant on the shelters to self-report when they are full."

In particular, the court found undisputed evidence that the Sanctuary shelter was "full as to men on a substantial percentage of nights, perhaps as high as 50%." While the BRM facility claimed it would "never turn people away due to lack of space," the court found the BRM would, however, "refuse to shelter homeless people who exhaust the number of days allotted by the facilities." Further, the court found homeless could be denied access to shelter facilities based on the time of their arrival:

BRM's facilities may deny shelter to any individual who arrives after 5:30 pm, and generally will deny shelter to anyone arriving after 8:00 pm. Sanctuary, however, does not assign beds to persons on its waiting list until 9:00 pm. Thus, by the time a homeless individual on the Sanctuary waiting list discovers that the shelter has no room available, it may be too late to seek shelter at either BRM facility.

In addition, the federal appeals court found evidence that some BRM programs required the homeless to participate in certain religious activities. According to the court, the City would violate the Establishment Clause of the First Amendment to effectively coerce a homeless individual to attend religious-based "treatment programs" to avoid prosecution under the ordinances. In this particular instance, several of the plaintiffs objected to the "overall religious atmosphere" in an available homeless shelter, including "the Christian messaging on the shelter's intake form and the Christian iconography on the shelter walls."

Under these circumstances, the federal appeals court found homeless individuals "may be forced to choose between sleeping outside on nights when Sanctuary is full (and risking arrest under the ordinances), or enrolling in BRM programming that is antithetical to his or her religious beliefs."

EIGHTH AMENDMENT VIOLATION?

Under the circumstances, the issue before the federal appeals court was, therefore, whether "the Cruel and Unusual Punishments Clause of the Eighth Amendment" in the U.S. Constitution precluded "the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter."

As cited by the court, the Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. Further, the court noted the Cruel and Unusual Punishment Clause "circumscribes the criminal process in three ways":

First, it limits the type of punishment the government may impose; second, it proscribes punishment "grossly disproportionate" to the severity of the crime; and third, it places substantive limits on what the government may criminalize.

In this particular instance, the court found the third limitation was pertinent, i.e., substantive limits on what the government may criminalize:

The entire thrust of the Cruel and Unusual Punishment is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus* [guilty act]. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, involuntary...[C]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.

Accordingly, the federal appeals court acknowledged, "the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." In particular, the appeals court found: "This principle compels the conclusion that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter."

Whether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human. Moreover, any 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. As a result, just as the state may not criminalize the state of being "homeless in public places," the state may not criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets.

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While the City could not criminalize the state of being homeless in public places, the federal appeals court cautioned: "Our holding is a narrow one." Specifically, the federal appeals court would "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."

We hold only that 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.

That is, as 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.

As applied to the homeless plaintiffs in this particular case, the appeals court found the challenged ordinances "effectively punish them for something for which they may not be convicted under the Eighth Amendment — sleeping, eating and other innocent conduct." As noted by the court, "the two ordinances criminalize the simple act of sleeping outside on public property, whether bare or with a blanket or other basic bedding."

As characterized by the federal appeals court, the Disorderly Conduct Ordinance, on its face, criminalized "[o]ccupying, lodging, or sleeping in *any* building, structure or place, whether public or private" without permission. Boise City Code § 6-01-05. Similarly, the court found the Camping Ordinance criminalized using "any of the streets, sidewalks, parks or public places as a camping place at any time." Boise City Code § 9-10-02. Moreover, court noted the ordinance defined "camping" broadly:

The term "camp" or "camping" shall mean the use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation at anytime between sunset and sunrise, or as a sojourn.

Indicia of camping may include, but are not limited to, storage of personal belongings, using tents or other temporary structures for sleeping or storage of personal belongings, carrying on cooking activities or making any fire in an unauthorized area, or any of these activities in combination with one another or in combination with either sleeping or making preparations to sleep (including the laying down of bedding for the purpose of sleeping).

Further, the federal appeals court noted the Camping Ordinance was "frequently enforced against homeless individuals with some elementary bedding, whether or not any of the other listed indicia of 'camping' were present," i.e., "the erection of temporary structures, the activity of cooking or making fire, or the storage of personal property."

For example, a Boise police officer testified that he cited plaintiff Pamela Hawkes under the Camping Ordinance for sleeping outside "wrapped in a blanket with her sandals off and next to her," for sleeping in a public restroom "with blankets," and

for sleeping in a park "on a blanket, wrapped in blankets on the ground."

Based upon this evidence, the federal appeals court found the Camping Ordinance "can be, and allegedly is, enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements."

Accordingly, as applied to the facts of this case, the federal appeals court held: "a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter." In making this determination, however, the federal appeals court noted the following limitations on its holding:

Naturally, our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible.

So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures [might be constitutional]. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, 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 appeals court, therefore, reversed the judgment of the federal district court granting summary judgment to the City and remanded the case for further proceedings. On remand, the district court would consider whether the City's amended ordinances would effectively preclude any future "criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them."

SEE ALSO:

Camp "Cleanup" Makes Homeless Status Criminal

James C. Kozlowski. *Parks & Recreation*. Mar. 2011 Vol. 46, Iss. 3

<http://cehdclass.gmu.edu/jkozlows/lawarts/03MAR11.pdf>

Cardboard Homeless Shelter in Park

James C. Kozlowski. *Parks & Recreation*. Oct 2006. Vol. 41, Iss.10.

<http://cehdclass.gmu.edu/jkozlows/lawarts/10OCT06.pdf>

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