OCTOBER 2006 LAW REVIEW

CARDBOARD HOMELESS SHELTER IN PARK

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As described by the U.S. Supreme Court, the Due Process Clause of the Fourteenth Amendment requires that laws be crafted with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for police enforcement. In the absence of "sufficient clarity," a federal court may strike down a law as unconstitutionally vague.

In the case of *City of Chicago v. Morales* (No. 97-1121, U.S. 6/10/1999) the U.S. Supreme Court struck down an ordinance which prohibited "criminal street gang members" from "loitering" with one another or with other persons in any public place. In the opinion of the Supreme Court, this ordinance was unconstitutional because it did not provide "sufficiently specific limits on the enforcement discretion of the police to meet constitutional standards for definiteness and clarity." Specifically, the definition of "loitering" in the ordinance prohibited "remaining in any one place with no apparent purpose" in the presence of criminal gang members in a public place. Under such circumstances, the Court found "[f]riends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member." As a result, the Court held this particular ordinance was unconstitutionally vague because it failed to "give the ordinary citizen adequate notice of what is forbidden and what is permitted."

In contrast, in the case of *Betancourt v. Bloomberg*, No. 04-0926-cv (Fed. 2nd Cir. 5/18/2006), the majority opinion found the plain language in a challenged ordinance was sufficient to alert the public of what conduct was prohibited. Moreover, the language in the ordinance provided adequate guidance to effectively limit the discretion of police in effecting an arrest for such proscribed conduct by a homeless man sleeping in a public park.

FACTS OF THE CASE

In 1994, the City of New York undertook a "Quality of Life" initiative designed to reduce a wide range of street crimes including prostitution, panhandling, and drug sales. Plaintiff Betancourt alleged that the City later expanded this initiative to reduce the number of homeless persons residing in public spaces. Specifically, the City's Police Department issued a guide for law enforcement officers listing laws that prohibited conduct targeted by the initiative, including City Administrative Code § 16-122, subsection (b) of which provided as follows:

> [i]t shall be unlawful for any person, such person's agent or employee to leave, or to suffer or permit to be left, any box, barrel, bale of merchandise or other movable property whether or not owned by such person, upon any marginal or

> public street or any public place, or to erect or cause to be erected thereon any shed, building or other obstruction. N.Y., N.Y., Admin. Code ("NYC Admin. Code") § 16-122(b).

In the early morning hours of February 28, 1997, in and around certain parks in lower Manhattan, police officers arrested 25 individuals, including Betancourt. Betancourt had come to the park at approximately 10:30 p.m. on February 27 with some personal possessions, three folded cardboard boxes, and a loose piece of cardboard. Betancourt used the three boxes to construct a "tube" large enough to accommodate most of his body. He placed the tube on the park bench, climbed into the tube, covered the exposed part of his body with the loose piece of cardboard, and went to sleep.

At approximately 1:00 a.m. on February 28, 1997, City police roused Betancourt from his sleep on a park bench and arrested him. Betancourt was charged with violating § 16-122 and later released. The City prosecutor decided the charge lacked merit and declined to prosecute the case.

In September 1997, with the assistance of a public interest law firm, Betancourt brought a federal civil rights claim under 42 U.S.C. § 1983 alleging § 16-122(b) was unconstitutionally vague as applied to him. The federal district court granted summary judgment in favor of the City. In addressing Betancourt's vagueness challenge, the district court stated that "a statute is not unconstitutionally vague if it (1) gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited, and (2) provides explicit standards for those who apply it."

In so doing, the district court found the plain language of § 16-122(b) sufficiently clear to alert Betancourt that his conduct was prohibited. The court stated that the language that "makes it unlawful to erect or cause to be erected any shed, building or other obstruction" was reasonably understood to apply to Betancourt's conduct."

> [Betancourt] had erected a human-sized cardboard structure, housing a human inside, in a public space. He was not simply occupying a park bench with a few personal items. Rather, he had erected an obstruction in a public space.

As a result, the federal district court found Betancourt had sufficient notice that his conduct was prohibited by Section 16-122(b). Moreover, the district court found § 16-122(b) did not give law enforcement agents unfettered discretion to make arrests. On the contrary, the district court found the ordinance provided adequate guidelines to permit police to determine whether a person was engaging in conduct that violated the ordinance. Specifically, the district court found the ordinance offered law enforcement personnel "guidance in the form of a list of specific objects, including boxes, that should not be left in public spaces." According to the district court, the ordinance was not unconstitutionally vague simply because the police had to exercise "some discretion in the application" of Section 16-122(b). Rather, the district court found "[t]he text of

Section 16-122(b) provides sufficient guidelines to limit police discretion in its application, and therefore it is not void in its application to Plaintiff's conduct." Accordingly, the federal district court rejected Betancourt's constitutional challenge to Section 16-122(b). Betancourt appealed.

VAGUENESS TEST

On appeal, Betancourt reasserted his claim that § 16-122(b) was unconstitutionally vague as applied to him. As described by the federal appeals court, "the due process doctrine of vagueness incorporates notions of fair notice or warning and requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact [i.e., juries or judges] in order to prevent arbitrary and discriminatory enforcement."

> [T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement….
>
> Where the legislature fails to provide such minimal guidelines [to govern law enforcement], a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.

On the other hand, the appeals court acknowledged that "[r]egulations need not… achieve meticulous specificity, which would come at the cost of flexibility and reasonable breadth." According to the court, "[t]he degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment."

> [E]conomic regulation is subject to a less strict vagueness test than is legislation regulating noncommercial conduct. On the other hand, a greater degree of precision is required for enactments that provide for criminal penalties because the consequences of imprecision are qualitatively more severe.
>
> Perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If it does pose such a threat, a more stringent vagueness test should apply.

In this particular instance, the appeals court found the ordinance regulated mere conduct, in contrast to protected free speech activities. As a result, the court found the challenged ordinance "does not impinge on constitutionally protected rights."

> Betancourt does not contend 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. Nor does § 16-122(b) impinge on Betancourt's other constitutionally protected rights, for, despite his contention to the contrary, it does not impair his right to travel, given that it does not restrict interstate or intrastate "freedom of movement."

On the other hand, since § 16-122(b) was a criminal statute, the appeals court found the ordinance was "subject to more than a minimal level of scrutiny" in determining "whether § 16-122(b) was impermissibly vague as applied to Betancourt."

In the opinion of the appeals court, the district court had properly applied the required "moderately stringent vagueness test" in finding the plain language in the ordinance was "sufficient to alert Betancourt, and to provide adequate guidance to law enforcement agents, that Betancourt's conduct was prohibited." In so doing, the appeals court found the § 16-122(b) prohibition "forbids a person to erect in any public place any shed, building or other obstruction, and those words have plain dictionary meanings that applied to the conduct of Betancourt."

> Webster's Third New International Dictionary (1976) ("Webster's Third") gives one definition of the verb to "erect" as to "put up (as a building or machine) by the fitting together of materials or parts." An ordinary person planning to fashion three boxes into a structure that was sufficiently large for a man to crawl into, and that was designed to give him shelter against the cold, would recognize that he was planning to "put up" something "by the fitting together of materials or parts."
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> Webster's Third defines "obstruction" as "something that obstructs or impedes," and defines "obstruct" as to "block up." An ordinary person would understand that an agglomeration of boxes large enough for a man to fit into would be "something that obstructs or impedes."

On appeal, Betancourt had argued that the interpretation and applicability of the ordinance should be "limited to structures of permanence" based upon the language prohibiting the erection of "any shed, building or other obstruction." In so doing, Betancourt pointed out that "sheds and buildings are structures that would normally be of some permanence." In contrast, Betancourt contended that the prohibition against leaving "any box, barrel, bale of merchandise or other movable property" only "concerns movable objects" which created a permanent obstruction in a public place. The appeals court rejected this argument.

> An object plainly may "obstruct or impede" without doing so permanently. Had the lawmakers intended "obstruction" to mean a permanent edifice, they could have simply added that adjective before "obstruction." We think it clear that § 16-122(b) was meant to forbid any obstruction, whether permanent or temporary.
>
> In sum, as § 16-122(b) forbids a person to "erect" an "obstruction" in a public place, we conclude that the district court properly ruled that that language was

> sufficient to alert Betancourt, and to provide adequate guidance to law enforcement agents, that Betancourt's conduct was prohibited.

As a result, the appeals court concluded "§ 16-122(b) is not unconstitutionally vague as applied to Betancourt."

On appeal, Betancourt had also argued that § 16-122(b) was "unconstitutionally over-reaching because it prohibits innocent, unoffending conduct that is beyond the state's police power to regulate", i.e., "sitting, lying, or sleeping" by homeless persons "in parks and other public places, where they are not impinging on the rights of others." Once again, the appeals court disagreed. As interpreted by the court, the ordinance "does not appear to prohibit the conduct—'sitting, lying, or sleeping'--described by Betancourt." Rather, according to the court, "§ 16-122(b) by its terms prohibits leaving or constructing in public spaces inanimate objects that are, *inter alia* [i.e., among other things], obstructions." The appeals court, therefore, affirmed the judgment of the district court which had rejected Betancourt's constitutional challenge to the ordinance.

POSTSCRIPT

On May 29, 2006, the *New York Times* published an article entitled "Ex-Homeless Man, Loser In Court, Feels Victorious" in which Augustine Betancourt is described as "serene," despite having "just lost a nearly nine-year legal battle with the City of New York." The article describes how Betancourt, after years of prodding by his public interest lawyer, had "achieved a measure of victory… in other areas of his life" having "ended a 14-year bout of homelessness" in 2002 when he moved into "a single-room-occupancy hotel… that houses 416 adults, all of them poor, disabled or formerly homeless."

The article goes on to note that "Mayor Michael R. Bloomberg has largely halted the aggressive enforcement tactics of his predecessor against the homeless" wherein Mayor Rudolph W. Giuliani, after taking office in 1994, "directed the police to enforce a 1969 Sanitation Department regulation that forbids people from erecting 'any shed, building or other obstruction'' in public space." While pleased with the "legal victory," the piece quoted counsel for the City in which she stated that "the Bloomberg administration was committed to reaching out to the homeless":

> We are pleased that the court recognized that the city must balance its need to keep public order with the needs of homeless individuals, for whom the city provides round-the-clock shelter and other social services.

While Betancourt and his public interest attorney were "disappointed" in the majority opinion of the federal appeals court, the article noted that there were no plans to appeal this decision to the U.S. Supreme Court.