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A Tale of 2 Cities: Legal Strategies and Solutions for Handling Homelessness

Constitutional Considerations in Developing Regulations and Strategies Impacting the Homeless

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The tale of the City of West Palm Beach, Florida and of Portland, Oregon is not so different. Homeless individuals require services from police, fire, library, parks, housing and code enforcement. While homelessness generally is not considered a protected class, regulations affecting the homeless have given rise to constitutional issues that must be considered. Some regulations which have been called into question include panhandling, food distribution and permitting, sleeping on public property, and abandoned property. Homeless individuals and advocacy groups have brought First, Fourth, and Eighth Amendments challenges to various government regulations. In this paper, I will discuss the each type of constitutional challenge and then provide a summary of applicable case law.

I. FIRST AMENDMENT

A majority of the First Amendment challenges involve homeless individuals challenging anti-solicitation and begging ordinances. There are also several cases where individuals serving homeless have challenged permitting regulations related to food distribution.

A. FIRST AMENDMENT ANALYSIS

The First Amendment guarantees all people the right to engage not only in 'pure speech,' but 'expressive conduct' as well. *Hollman ex rel. Hollman v. Harland*, 370 F. 3d 1252, 1270 (11th Cir. 2004)(citing *United States v. O'Brien*, 391 U.S. 367,376-77 (1968)). When speech is communicated through expressive conduct, Courts apply the *O'Brein* standard.

In the cases reviewed relating to panhandling, numerous Courts have asked a series of questions to guide their analysis, namely:

What is the character of the place targeted for regulation?

Where such a place is public ways, sidewalks, parks and places that have been traditionally open for speech activities, the government's ability to regulate speech is very limited. *McCullen v. Coakley*, 134 S.Ct. 2518 (2014)(citations omitted).

Is the regulation content based or content neutral on its face? This analysis requires one to answer two additional questions:

1. Does the law apply to speech because of the topic discussed or the idea or message expressed, either by defining regulated speech by its function or purpose? If yes, then the regulation is content based.

2. If the answer to the first question is no, the regulation is content neutral, and the next question one must ask is: can the law be justified without reference to the content of the regulated speech?

When the regulation is content based, it is subject to strict scrutiny which means it must be the least restrictive means of advancing a compelling governmental interests.

When the regulation is content neutral, it is subject to intermediate scrutiny which requires the regulation serve a significant governmental interest narrowly tailored to achieve that interest while leaving open alternative means of communication.

B. ANTI-SOLICITATION REGULATIONS AFTER 2015

While the Supreme Court has not directly resolved the constitutional limitations on panhandling laws applicable to individual beggars, it has clearly recognized protections for speech related to organized charities, not-for-profits, and political groups. *See Gresham*, 225 F. 3d at 903 (citing *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Several jurisdictions have found panhandling to be analogous to charitable solicitation and deserving of First Amendment protection. *Speet v. Schuette*, 726 F.3d 867, 875 (6th Cir. 2013); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 551 (4th Cir.2013); *Loper v. New York City Police Department*, 999 F.2d 699, 706 (2d Cir.1993); *Smith v. City of Fort Lauderdale, Fla.*, 177 F.3d 954, 955 (11th Cir.1999). In addition, one can easily infer from the Supreme Court's decision in *Thayer v. City of Worchester*, 135 S. Ct. 2887 (2015), that it does, in fact, view panhandling as protected activity, (vacating final judgment for City and remanding to First Circuit for further consideration in light of *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

Like many cities, Worcester was facing challenges relating to panhandling and sought to reduce panhandling. In a one-year period, the City police were dispatched to 181 incidents of aggressive behavior of individuals who may have been panhandling which resulted in five arrests. Additionally, the City engaged social workers to work with panhandlers to educate them about resources and services available, including housing, financial, mental health and addiction services. The City also found that walking in and out of traffic is inherently dangerous and needed regulation. To address these challenges, the City adopted two ordinances: one prohibited aggressive panhandling and solicitation and the other prohibited standing or walking on a traffic island or roadway except for the purposes of crossing an intersection or crosswalk, to enter or exit a vehicle, or for some lawful purpose.

Worchester enforced its regulations and was sued. The United States District Court, Massachusetts, found that soliciting contributions is expressive activity that is protected by the First Amendment and that political speech such as holding up signs and waving to passing motorists and pedestrians is the type of speech which is afforded the strongest protection under the First Amendment.

The district court also found the ordinances in question were content neutral because they were applied equally without regard to message. Reviewing the preamble to the challenged ordinances, the court held that the City had a

legitimate government interest in promoting the safety and convenience of citizens on public sidewalks and streets and that the ordinances were narrowly tailored to achieve the intended purpose as the panhandling ordinance only applied to aggressive panhandling and the median ordinance only restricted loitering on traffic islands, medians and other similar public ways when the conduct could prove distracting to drivers and pedestrians.

The district court stated there were ample alternative channels because the regulations applied to vocal requests and only restricted soliciting in circumstances where it is considered especially unwanted or bothersome at night, around banks, in lines for theatre, etc. and that political signs were allowed on sidewalks and in parks.

An appeal was taken, and the First Circuit agreed with the district court finding that the regulation was content neutral and applied intermediate scrutiny. The First Circuit did not review the district court's intermediate scrutiny analysis but instead held that appellants failed to make the prima facie showing necessary to trigger the government's burden of proving that the ordinance survived intermediate scrutiny when bringing an overbreadth challenge.

On June 29, 2015, in one paragraph, the United States Supreme Court granted a petition for writ of certiorari, vacated the judgment and remanded the case for further consideration in light of *Reed v. Town of Gilbert*.

In *Reed*, Gilbert's sign code prohibited signs without a permit but exempted 23 categories of signs including Ideological, Political and Temporary Directional signs. The City's regulations were challenged. The Ninth Circuit held that the sign code provisions did not regulate based on content and were content neutral. On appeal, the United States Supreme Court granted certiorari and reversed the Ninth Circuit.

The court explained that the government 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' The Government regulations are content based if "***a law applies to a particular speech because of the topic discussed or the idea or message expressed.***"

Gilbert argued that the sign code was content neutral because the code did not regulate content of speech and was not adopted because of disagreement with a particularized message sought to be conveyed. The Court clarified that applying that analysis skips the crucial first step which is to determine whether the law is content neutral on its face. Gilbert also argued that the regulation was content neutral because the code does not mention any ideas or viewpoints nor does it single one out for differential treatment. The court acknowledged that discrimination among viewpoints is content discrimination but emphasized that a content-based regulation is not restricted to particular viewpoints, but also to prohibition of public discourse on an entire topic. The Court explained "speech

regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."

The Court found that Gilbert's sign code was content based on its face, because the restrictions' application depended entirely on the communicative content of the sign.

On remand, the district court found that the panhandling regulation was content based and noted that all courts reviewing similar anti-solicitation ordinances post *Reed* have found regulations content based and that *Reed* mandates a finding that the ordinance is content based because it targets anyone seeking to engage in a specific type of speech, i.e. solicitation of donations. Conversely, the Court found that the regulation relating to the medians was content neutral as it only regulated conduct and the conduct was regulated equally consistent with concerns raised by *Reed*.

While the Court found that the City's primary interest in enacting the ordinance was a compelling state interest, it found the panhandling regulation did not survive strict scrutiny because it was not the least restrictive means of promoting that interests.

The factors found insufficient included:

- The provision prohibiting solicitation "after dark" which is defined as commencing ½ hour before sunset to ½ hour after sunrise was not narrowly tailored as there was no evidence that limitation was necessary to advance public safety concerns.
- Even though the City had evidence to support its public safety concerns, the number of instances of aggressive panhandling cited and the possibility that an individual known to aggressively panhandle being fatally struck by a motor vehicle while engaging in activity prohibited by the ordinance are insufficient for the Court to find that Ordinance 9-16 withstands strict scrutiny.

The district court provided the following direction:

> "Post *Reed*, municipalities must go back to the drafting board and craft solutions which recognize an individual's [right] to continue to solicit in accordance with their right under the First Amendment, while at the same time, ensuring that their conduct does not threaten their own safety, or that of those being solicited. In doing so, they must define with particularity the threat to public safety they seek to address, and then enact laws that precisely and narrowly restrict *only* that conduct which would constitute such a threat." (Emphasis included).

As to the median ordinance, the district court found that the ordinance was not narrowly tailored to achieve a compelling government interest where the City had not established the need for the sweeping ban and had not seriously undertook to address the problem with less intrusive tools readily available to it.

After approximately three years of litigation, the plaintiffs sought attorneys' fees of $1,016,439.90 and costs of $9,783.59 and $16,888.00 for preparing the fee petition. After reducing the number of hours spent and the hourly rate of the lawyers, the district court awarded fees of $509,705.38, approved costs of $9,783.59 and denied the cost to prepare the petition.

Like the First Circuit, the Seventh Circuit, on rehearing, found a municipal ordinance that prohibited oral requests for immediate payment of money but permitted signs requesting money and requests for money later to be content based under *Reed*. *Norton v. City of Springfield*, 806 F. 3d 411 (7th Cir. 2015).

If you have not reviewed your anti-solicitation ordinance post *Reed*, now is a good time to do it. If you need some suggestions for drafting an ordinance likely to withstand potential judicial challenge Judith Wegner and Burton Craige, Professor of Law Emerita, and Dean Emerita, University of North Carolina School of Law, Chapel Hill, North Carolina outlines such a Model Ordinance and answer questions relative to burden of proof, evidence and structure in their article titled "An Annotated Model Panhandling Ordinance: Preventing Harassment While Protecting Free Speech" published in Municipal Lawyer, September/October 2017 Vo. 57, No. 5.

C. PERMIT REQUIREMENTS FOR FOOD DISTRIBUTION

Another not so common issue arises when those serving the homeless population provide large group feedings in public parks and other public spaces. As you can imagine, large groups of homeless result in complaints from other park users, residents and surrounding business owners. Common complaints include garbage, crime, insufficient services, economic impact to businesses and residential property values, and unequal access to public space. In response, local governments have attempted to pass permit regulations relating to large group food distribution. The Ninth and Eleventh Circuits have both faced First Amendment challenges relating to their ordinances.

In 2006, Santa Monica was challenged for several ordinances including its food distribution ordinance, SMMC § 5.06.010 (Oct. 22, 2002), which concerned public parks and stated:

Any person who serves or distributes food to the public in City parks or on the City Hall lawn must:

> (a) comply with applicable state health and safety standards regulating food service and distribution, including, but not limited to, the requirements of obtaining and displaying a valid permit from the Los Angeles County Department of Health which includes City approval as to location; and
>
> (b) comply with all applicable requirements of the City of Santa Monica's **Community Events Law**. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1029 (9th Cir. 2006).

The **Community Events Law** required that permits be obtained for three categories of community events. The provision applicable to the food distribution ordinance and discussed in the opinion was subsection (b) which read:

> Any activity or event involving one hundred fifty or more persons on City owned, controlled, or maintained property not subject to the requirements of subsection (a) of this Section.

The opinion addressed numerous challenges relative to the permit requirements that are not discussed in this paper but should be reviewed should you consider adopting any permitting scheme that could result in a First Amendment challenge. The Ninth Circuit, without addressing the food distribution portion of the ordinance, held that, standing alone, subsection (b) of the permit requirement, applicable only to groups of 150 or more, was narrowly tailored to Santa Monica's governmental interest in allocating use of Santa Monica's public open space among competing groups of citizens.

In 2007, the City of West Palm Beach passed an Ordinance prohibiting food distribution in two downtown parks. The next year, Food Not Bombs and Art and Compassion filed a complaint for injunctive relief with the Southern District of Florida. Plaintiff, Art and Compassion, claimed that it had been meeting at one of the parks on Wednesday evening for two years for the purpose of sharing prayer, testimonies of divine intervention and sharing messages of hope and healing through food with every person in attendance. Plaintiff, Food Not Bombs, claimed it held meetings at the park on Saturday mornings for the purpose of sharing and conveying messages of caring and compassion, through food, with every person in attendance. Plaintiffs alleged the ordinance was adopted to target their messages being conveyed and to move the homeless out of public view. Plaintiffs further alleged a violation of the First Amendment Free Exercise of Religion, Speech and Peaceable Assembly. Plaintiffs claimed that food sharing was expressive and symbolic conduct that constituted speech protected under the First Amendment and that City's regulation which was content-based was unconstitutional on its face because it prohibited expressive and symbolic conduct at two City parks.

During the pendency of this litigation, in an unrelated matter, the district court in Florida's middle district entered a final judgment in favor of the First Vagabonds Church of God finding in favor of a church under the Free Exercise Clause and in favor of Orlando Food Not Bombs on its as-applied challenge under the Free Speech Clause upholding a food distribution permitting ordinance in Orlando.

Based on this decision, the City settled the pending litigation. The main terms of the settlement agreement were 1) parties agreed to find a safe, suitable alternative location that would not impact business owners and local residents but will also accomplish the groups' mission; 2) City agreed to repeal the ordinance and 3) to pay attorney's fees of $100,000.

As is apparent, West Palm Beach was not the only City in Florida attempting to address impacts of large group feedings. In 2010, the Eleventh Circuit found a similar ordinance requiring sponsors of large groups (25 or more people) within the Greater Downtown Park District of Orlando to obtain a permit was not protected by the First Amendment because the Ordinance regulated no protected expressive conduct.

In 2011, the Eleventh Circuit reconsidered its decision *en banc*. The court assumed without deciding whether food distribution is expressive conduct and held that the ordinance did not violate Free Speech Clause of the First Amendment.

Relying on *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the court applied two tests. Under the reasonable time, place, and manner test, the court found that the ordinance narrowly furthered the substantial interest of the City in managing its parks and being fair to individual neighborhoods by spreading the burden of the large group feedings. To support its finding, the court found that this was true where the permit requirement was less restrictive than the sleeping ordinance in *Clark*. Unlike *Clark*, under Orlando's regulations, one could obtain two permits a year for each of the 42 parks which allowed 84 group feedings per year within a two-mile radius of City Hall, there were no restrictions on the number of large group feedings that could be sponsored at 66 other parks outside downtown and there not an absolute ban on large group feedings.

Next, the court found that the regulations passed the four part test enumerated in *United States v. O'Brein*, 391 U.S. 367 (1968). Specifically, the court found that:

> 1) It is within the power of the City to enact ordinances that regulate park usage;
>
> 2) City has a substantial interest in managing park property and spreading the burden of large group feedings throughout a greater area and those interests are served by the ordinance;

3) City interest in managing the parks and spreading large group feedings is unrelated to suppression of speech; and

4) The incidental restriction of alleged freedoms under the First Amendment is not greater than necessary to further the interest of the City.

Great for City's the Eleventh Circuit! Right?

In 2018, the Eleventh Circuit was again faced with determining whether food distribution is expressive activity protected by the First Amendment. *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, No. 16-16808, 2018 WL 4000057 (11th Cir. Aug. 22, 2018). While it had previously assumed without deciding whether food distribution was expressive conduct, the Eleventh Circuit specifically answered the question in the *Fort Lauderdale Food Not Bombs* 2018 decision.

The court noted that the Supreme Court formulated a two-part inquiry to determine whether conduct is sufficiently expressive under the First Amendment.

First ask:

Whether "[a]n intent to convey a particularized message was present.

Next ask:

Whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." (citing *Spence v. Washington*, 418 U.S. 405, 410–411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)) Id. at 3.

So, "in determining whether conduct is expressive, we ask whether a reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman*, 370 F.3d at 1252, 1270 (emphasis in original) (citing *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338). *See also Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 66, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) ("*FAIR*") (explaining that, to merit First Amendment protection, conduct must be "inherently expressive").

The critical question, to determine whether food distribution is expressive activity is "whether the reasonable person would interpret Fort Lauderdale Food Not Bombs' conduct as *some* sort of message." *Holloman*, 370 F.3d at 1270. Id. at 4.

The Eleventh Circuit found that Food Not Bombs was conveying some sort of message because: 1) it sets up tables and banners (including one with its logo) and distributes literature at its events; 2) the food sharing events are open to everyone, and the organization's members or volunteers invite all who are present to participate and to share in their meal at the same time; 3) food sharing is held in Stranahan Park, a public park near city government buildings; 4) the record

demonstrates without dispute that the treatment of the City's homeless population is an issue of concern in the community: City held workshops on the Homeless Issue, local news coverage, and local discussion added to the likelihood that a reasonable observer would understand food sharing sought to convey some message; and 5) the historical use of sharing of food as the means for conveying its message, for example the significance of sharing meals with others dates back millennia, including Biblical recounts of Jesus shared meals and the Pilgrims and Native Americans sharing the First Thanksgiving in Plymouth.

Should other circuits follow the lead of the Ninth and Eleventh Circuits, regulation of food distribution must meet the time, place, and manner and the *O'Brien* test to survive. Should other courts not agree with the Eleventh Circuit, then a court would apply a rational basis review. Under either scenario, it would appear that such regulations can withstand judicial scrutiny.

II. FOURTH AMENDMENT CLAIMS

Another constitutional challenge arises as a result of "cleaning up" and the destruction of property left on public property, including shopping carts, bags, tents or other structures and miscellaneous property left in encampments. Local government has been challenged under both the Fourth Amendment and the Fourteenth Amendment, but my focus will be on the Fourth Amendment.

The Fourth Amendment of the United States Constitution protects the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures. The Fourth Amendment protects against unreasonable interference in property interests regardless of whether there is an invasion of privacy. *Lentz v. Winburn*, 51 F. 3d 150 (11th Cir. 1995); *Bonds v. Cox*, 20 F. 3d 702 (6th Cir. 1994). In the context of property found on public property, courts have held that individuals retain Fourth Amendment interest in unattended property, but relinquish all Fourth Amendment interest in abandoned property. *Laven v. City of Los Angeles*, 693 F. 3d 1022 (9th Cir. 2012). *Proctor v. D. C.*, 310 F. Supp. 3d 107, 114 (D.D.C. 2018).

The question of whether property was voluntarily abandoned and whether the seizure is reasonable is intertwined with the adequacy of notice provided prior to removing the property. Factors used in determining whether notice was sufficient include 1) the number of days or amount of time given to voluntarily remove property before the date it is actually picked up; 2) whether the property is immediately destroyed or a location of where the property was taken and a process for claiming the property provided; 3) was the notice oral or written; and 4) is there a written process for clean-up staff to follow? *See generally*, *Lavan v. City of Los Angeles*, 693 F. 3d 1022 (9th Cir 2012); *Stone v. Pamoja House*, 111 F. App'x 624, 626 (2d Cir. 2004); *Proctor v. D.C.*, 310 F. Supp. 3d 107 (D.D.C. 2018); *Ellis v. Clark Cty. Dep't of Corr.*, No. 15-5449 RJB, 2016 WL 4945286, at *2 (W.D. Wash. Sept. 16, 2016); *Smith v. City of Corvallis*, No. 6:14-CV-01382-

MC, 2016 WL 3193190 (D. Or. June 6, 2016); *Love v. City of Chicago, Illinois*, No. 96 C 0396, 1996 WL 627614 (N.D. Ill. Oct. 25, 1996); *Love v. City of Chicago*, No. 96 C 0396, 1998 WL 60804(N.D. Ill. Feb. 6, 1998).

Regulation in this area takes thoughtful consideration and a balance between the government's need and the property rights of the homeless. Based on the cases reviewed, this can be accomplished by adopting policy and regulations that provide adequate notice.

III. EIGHTH AMENDMENT

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. Amend VIII. One of the ways the Cruel and Unusual Punishment Clause circumscribes the criminal process is that it "imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). The seminal case applicable to this substantive limit is of the Cruel and Unusual Punishment's Clause is *Robinson v. California*, 370 U.S. 660 (1962)(holding a statute that made the status of narcotic addiction a criminal offense invalid because addiction is an illness or disease which may be contracted innocently or involuntarily) as elaborated in *Powell v. Texas*, 392 U.S. 51 (1968)(distinguishing a statute criminalizing public drunkenness from the criminalization of narcotic addiction explaining the difference between the statute in question making conduct "appearing in public" illegal not mere status of "alcoholism"). Until recently, outside lower courts reviews and an opinion that had been withdrawn by the Ninth Circuit, only the Eleventh Circuit had rendered an opinion addressing whether anti-camping ordinances violate Eight Amendment protections.

In *Joel v. City of Orlando*, 232 F. 3d 1353 (11th Cir. 2000), the City of Orlando adopted an ordinance that prohibited camping, i.e. sleeping or otherwise being in a temporary shelter out-of-doors or sleeping out-of-doors or cooking over an open flame or fire out of doors. Camping was prohibited on all public property and residential property without the owner's consent. Orlando did have a shelter that accommodated 500 homeless men, that was open 24 hours per day, and never reached its maximum capacity. Joel challenged the ordinance under several grounds including a violation of his right to be free from cruel and unusual punishment.

Joel argued that the Ordinance violated the Cruel and Unusual Punishment Clause of the Eight Amendment because it punished persons as a result of their status of being homeless. In refusing to find an Eight Amendment violation, the Eleventh Circuit distinguished *Johnson v. City of Dallas* and *Pottinger v. City of Maimi*, emphasizing that both found a violation of the Eighth Amendment where there were not sufficient shelters available for the homeless and pointing out that in this case there were homeless shelters available that had never reached maximum capacity and in which no individual had been turned away. In its opinion, the court makes clear that a government is constitutionally allowed to regulate where

camping can occur and when shelter is available one challenging the regulation has an opportunity to comply. Citing *Powell*, the court also stated that the ordinance challenged targets conduct and does not provide criminal punishment based on a person's status.

On September 4, 2018, in *Martin v. City of Boise*, No. 15-35845, 2018 WL 4201159 at 2, the Ninth Circuit held that Boise's ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them.

In that case two City codes were at issue:

> § 9-10-02 (the "Camping Ordinance"), 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 defines "camping" as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence."
>
> § 6-01-05 (the "Disorderly Conduct Ordinance"), bans "[o]ccupying, 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."

On review, the Ninth Circuit held that the Cruel and Unusual Punishment Clause of the Eight Amendment precludes the enforcement of a statute prohibiting sleeping outside against homeless individuals who have no access to alternative shelters for the same reason as it articulated in the now-vacated *Jones v. City of Los Angeles* opinion. In *Jones* the court concluded "so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds in shelters for the homeless, Los Angeles could not enforce a similar ordinance against homeless individuals for involuntarily sitting, lying, and sleeping in public." *Id*. at 2, 11.

To support its holding, the court cites to the *Powell* decision where five of the dissenting Justices gleaned a principal from *Robinson* "that 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." Based on this principal the court went on to explain "[a]s *Jones* reasoned, '[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human." *Jones*, 444 F.3d at 1136. It further relied on *Jones* findings that "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" and explained, 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."

The court then held "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." *Martin v. City of Boise*, No. 15-35845, 2018 WL 4201159, at *13 (9th Cir. Sept. 4, 2018).

Like *Joel*, the Court in footnote 8 specifically provides that its 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. *See Jones*, 444 F.3d at 1123. So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures. 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."

Martin is a case to watch, at least in the Ninth Circuit, as its impact on arrests of the homeless for what the court considers to be unavoidable consequences of being homeless has far reaching impacts.