Regulating Homeless Encampments – A Bicoastal Perspective

Encampment Update

Post-*Grants Pass*

WILSONVILLE
OREGON

Backdrop to Grants Pass – Martin v. Boise

- *Martin v. City of Boise*, 9th Circuit (2018; amended 2019); SCOTUS denied cert in 2019
  - Two Boise Ordinances:
    - Prohibit using public spaces as a camping place
    - Prohibit using public or private structure without permission
  - Facts:
    - Significant and increasing homeless population
    - 3 homeless shelters run by nonprofits, not enough beds
  - Holding: Ordinances violated Eighth Amendment prohibition against cruel and unusual punishment due to lack of access to shelter

The District Court Filing – Blake v. Grants Pass

- Grants Pass removed the word “sleeping” from regulations, but kept in other anti-camping regulations
- Certified class of unhoused individuals challenged
- PIT Count: 602 unhoused individuals
- One shelter run by Gospel Rescue Mission
- Holding: Violated Eighth Amendment
  - Cannot punish people for taking minimal measures to stay warm and dry while sleeping
  - TPM regulations okay

Ninth Circuit Appeal – Johnson v. Grants Pass

- Upheld District Court ruling
  - Cannot prohibit individuals from taking minimal measures to stay warm and dry while sleeping
- Key takeaways:
  - Outright bans on camping impermissible
  - TPM regulations are permissible; cannot have effect of essentially banning camping
  - Civil v. criminal penalties inconsequential
  - Many questions left unresolved

Set-Up for SCOTUS

- Impacts of pandemic and ballooning of homelessness in US, particularly 9th Circuit cities
- Scathing dissents by 9th Circuit judges on denial of motion for rehearing *en banc*
- New Justices
- Differences in Circuits

Grants Pass v. Johnson

- 6-3 Decision
  - Thomas Concurrence
  - Sotomayor, Kagan, Jackson Dissent
- Eighth Amendment typically about what happens *after* conviction: the punishment
  - Cruel: resorting to punishments that add terror, pain, disgrace
  - Unusual: long fallen out of use

Grants Pass v. Johnson (cont.)

- Punishment not cruel and unusual
  - Limited fines, minimal jail time for repeat offenders
  - Typical type of punishment for criminal offenses
- Robinson v. California not persuasive
  - Law: person could not be addicted to narcotics
  - There, problem was status, not behavior
  - Grants Pass not punishing someone for being homeless, punishing someone for camping
  - Already rejected in *Powell v. Texas*

9th Circuit Remand in San Francisco Case

- *Coalition on Homelessness et al. v. City and County of San Francisco*
- Preliminary injunction against City and County of San Francisco remanded
- Still unresolved issues:
  - Fourth Amendment search and seizure
  - Personal property storage requirements
    - Local and/or state regulations

Oregon: A Unique Case?

- HB 3115 (2021)
  - "Codified" Martin v. Boise
  - "Objectively reasonable" TPM regulations required if regulating camping on public property
  - "Reasonableness"
    - Totality of circumstances
    - Including, but not limited to, impact of law on persons experiencing homelessness
  - Allows facial challenges
    - With attorney fees

Bicoastal Perspectives

- City of Sacramento
  - Under 9th Circuit jurisprudence
  - Population over 500,000
  - Seat of Sacramento County
- City of Wheeling, West Virginia
  - Under 4th Circuit jurisprudence
  - Population over 25,000
  - Seat of Ohio County

Questions?