9-2015

Judicial Limits in Addressing Homelessness: Desertrain v. City of Los Angeles

Lindsay Walter

California Law Review Circuit

VOL. 6 SEPTEMBER 2015

Judicial Limits in Addressing Homelessness: *Desertrain v. City of Los Angeles*

Lindsay Walter

INTRODUCTION

Our concept of the law as a protector and a guarantor of human rights assumes the law protects all humans. But does the law protect those who are human, or only people who society recognizes as such? Historically, society has treated particular social groups as less than human, as community rejects outside the law's protection. Collectively, we shrink at the memory of the Founding Fathers' three-fifths compromise,[1] the Jim Crow South, and the World War II Japanese internment camps. But rather than using our regret to fuel efforts toward equality, society continues to blind itself to the damage caused by legal discrimination.

Legalized discrimination against homeless people often arises under laws that are facially neutral but discriminatory in their effect and enforcement. This disparity arises, at least in part, because people tend to regard homeless people as not "fully human," lacking the capacity to "experience complex human emotions or to share in-group beliefs."[2] Cities in California are increasingly enacting municipal codes such as "sit-lie" ordinances that prohibit lying on sidewalks[3] and living in vehicles.[4] These laws are written neutrally, but enforced

1. *See* U.S. CONST. art. 1, § 2.

2. Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low*, 17 PSYCHOL. SCI. 847, 848 (2006).

3. SAN JOSE, CAL., MUN. CODE § 10.10.010.

4. L.A., CAL., MUN. CODE § 85.02; *see also* OXNARD, CAL., MUN. CODE § 8–26.

disproportionately against homeless people.[5] One such law, Los Angeles Municipal Code section 85.02, banned people from using vehicles parked on city streets and lots as living quarters.[6] This facially neutral statute was the subject of recent litigation before the Ninth Circuit in *Desertrain v. City of Los Angeles*. In its June 2014 decision, the Ninth Circuit made three novel findings: section 85.02 (1) is unconstitutionally vague, (2) does not provide adequate notice of the conduct it criminalizes, and (3) promotes arbitrary enforcement against homeless people.[7] Accordingly, the Ninth Circuit struck down the statute.[8] While this holding is both socially just and legally sound, this Comment argues that the legal standard the court applied is unwieldy and unworkable. Part I discusses the historical use of municipal codes as a mechanism for discrimination. Part II discusses the Ninth Circuit's reasoning in *Desertrain*. Finally, Parts III and IV discuss how courts have applied the *Desertrain* vagueness standard to defer to state legislatures, how that deference affects the homeless, and what policy recommendations the state should adopt moving forward.

I.
BACKGROUND: MUNICIPAL CODES AS A VEHICLE FOR DISCRIMINATION

The persistence of homelessness reflects government's failure to provide a safety net for individuals living in a resilient cycle of poverty. Municipalities offer a number of reasons in defense of sit-lie ordinances, arguing that homeless people decrease the attractiveness of business establishments, reduce the cleanliness of city streets, and prompt citizen complaints to police.[9] Rather than addressing these related issues by providing shelter and increasing social services, municipalities instead deal with homelessness by shuffling homeless individuals through courtrooms, jail cells, and different street corners through the enforcement of city municipal codes.

City municipal codes tend to adopt neutral language to prohibit people from doing activities that only those without shelter must do in public. These laws, which are often dubbed anti-homeless laws,[10] generally prohibit four categories of behavior: (1) standing, sitting, and resting in public places; (2) sleeping, camping, and lodging in public places; (3) begging and panhandling; and (4)

---

5. *See, e.g.*, POLICY ADVOCACY CLINIC, UNIV. OF CAL., BERKELEY, SCH. OF LAW, CALIFORNIA'S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS IN THE GOLDEN STATE 6 (2015) [hereinafter CALIFORNIA'S NEW VAGRANCY LAWS], http://www.homelesslivesmatterberkeley.org/pdf/CA_New_Vagrancy_Laws.pdf (discussing "quality-of-life" laws).

6. This law states, "No person shall use a vehicle . . . as living quarters . . . overnight." L.A., CAL., MUN. CODE § 85.02.

7. Desertrain v. City of Los Angeles, 754 F.3d 1147, 1155–56 (9th Cir. 2014).

8. *Id.* at 1147.

9. *See* CALIFORNIA'S NEW VAGRANCY LAWS, *supra* note 5, at 19, 22.

10. Also known as "quality-of-life" laws. However, this is a misnomer because these laws do not "improve the quality of life for anyone, and certainly not for homeless people." *Id.* at 6.

sharing food with homeless people.[11] For example, San Jose, a northern California city, has the following city code prohibiting sitting or laying down in public places: "No person shall sit or lie down upon a public sidewalk, or upon a blanket, chair, stool, or any other object placed upon a public sidewalk, in the pedestrian facilitation zone, during the hours between 10:00 a.m. and 12:00 a.m. (midnight)."[12] The city can use this code's broad language against individuals that the city wants to keep out of the public view—homeless people.

These four categories of anti-homeless laws do not comprise an exhaustive list of laws that can be discriminately enforced against homeless people. Indeed, these facially neutral codes aimed at hiding undesirable populations resemble and descend from past facially discriminatory laws designed for the same purpose: sundown town laws banning minorities from remaining in town after sunset starting in the 1890s; anti-Okie laws criminalizing displaced persons from the Great Plains in the 1930s; and ugly laws banning those who looked diseased or deformed from being in the public view remained in force from the late 1860s through the 1970s.[13] While these laws directed their discriminatory language at specific targets, contemporary anti-homeless laws, such as San Jose's municipal code section 10.10.010, are written neutrally. But, as the court in *Desertrain* pointed out, they are not enforced neutrally.

II.
THE NINTH CIRCUIT'S ATTEMPT TO CURTAIL MUNICIPAL CODES' DISCRIMINATORY IMPACT

The controversy in *Desertrain* centers on the City of Los Angeles's Municipal Code section 85.02.[14] At the time, section 85.02 read:

> 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 and under the control of the City of Los Angeles or under control of the Los Angeles County Department of Beaches and Harbors, as living quarters either overnight, day-by-day, or otherwise.[15]

The plaintiffs—four homeless individuals—challenged section 85.02, arguing that the code violated their right to due process.[16] The district court granted

11. *Id.* at 7.

12. SAN JOSE, CAL., MUN. CODE § 10.10.010.

13. CALIFORNIA'S NEW VAGRANCY LAWS, *supra* note 5, at 6.

14. This code, enacted in 1983, followed President Reagan's Omnibus Budget Reconciliation Act, which decreased federal mental-health spending by 30 percent. Deanna Pan, *TIMELINE: Deinstitutionalization and Its Consequences*, MOTHER JONES (Apr. 29, 2013, 6:00 AM), http://www.motherjones.com/politics/2013/04/timeline-mental-health-america; *see* Gerald N. Grob, *Public Policy and Mental Illnesses: Jimmy Carter's Presidential Commission on Mental Health*, 83 MILBANK Q. 425, 449 (2005), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690151.

15. Desertrain v. City of Los Angeles, 754 F.3d 1147, 1149 (9th Cir. 2014).

16. Specifically, the plaintiffs alleged that section 85.02 violated their rights under the Fourth, Fifth, and Fourteenth Amendments, various sections of the California Constitution, and several state and federal statutes. *Id.* at 1152.

summary judgment to the defendants—the City of Los Angeles, Venice Homelessness Task Force ("Task Force") Captain Jon Peters, and Task Force Officers Randy Yoshioka, Jason Prince, and Brianna Gonzales—because plaintiffs failed to claim that section 85.02 was unconstitutionally vague in their First Amended Complaint.[17] The Ninth Circuit disagreed with the lower court, holding that the district court abused its discretion by not addressing plaintiffs' vagueness claims on the merits.[18] The Ninth Circuit held that section 85.02 was unconstitutionally vague because the code both failed to provide adequate notice of the criminalized conduct and promoted arbitrary enforcement that targeted homeless people. Because the plaintiffs made their vagueness argument in their motion for summary judgment and in their opposition to the defendant's motion for summary judgment, the Ninth Circuit admonished the lower court for failing to consider the vagueness challenge.[19]

The city's lack of oversight of the police enforcement of section 85.02 reflects a problem underlying much discriminatory enforcement litigation: enforcement practices do not adhere to the enforcement process the code requires. In *Desertrain*, police did not honor the process the city outlined to address its concerns. These concerns were specified at a "Town Hall on Homelessness," where city officials repeatedly asserted that section 85.02 was not concerned with "homelessness" but rather "illegal dumping of trash and human waste on city streets that was endangering public health."[20] To address these concerns, the city outlined an enforcement process. It instructed twenty-one officers to use section 85.02 to cite and arrest homeless people using their cars as "living quarters" and to distribute information about shelters and social services.[21] City officials required officers to issue a warning and provide information about local shelters on the first violation, to issue a citation on the second, and to arrest on the third. But section 85.02 states, "No person shall use a vehicle parked or standing upon any City street," without specifying homeless people as a target. It also does not outline the enforcement process of first issuing a warning, then a citation, and then an arrest.

The Ninth Circuit's detailed description of the enforcement process actually used by police stands in contrast to the city's outlined procedures. Of the four plaintiffs, only one—Steve Jacobs-Elstein—received information about homeless shelters and social services and only then during his sixth encounter with the police.[22] Police did not adhere to required procedures when interacting with the other three plaintiffs either.[23] Although the police pulled over the second plaintiff, Patricia Warivonchik, for failing to turn off her left blinker, the officer

17. *Id.* at 1153.
18. *Id.* at 1154.
19. *Id.*
20. *Id.* at 1149.
21. *Id.*
22. *Id.* at 1150–51.
23. *Id.* at 1149, 1151.

gave her a written warning for violating section 85.02. Further, the officer told Warivonchik that police would arrest her if they saw her again in Venice in her RV.[24] The third plaintiff, Chris Taylor, was also arrested without warning or citation.[25] The fourth and last plaintiff, William Cagle, was cited and then arrested, with no warning given.[26]

The court additionally pointed out that the officers themselves acknowledged their inconsistent enforcement of section 85.02. Task Force officers provided different interpretations of the municipal code in court proceedings. Defendant Captain Jon Peters said that he instructed Task Force officers to follow the Four C policy (Commander's Intent, Constitutional Policing, Community Perspective, and Compassion), and that a person who slept at a shelter at night but was found in the car during the day, like plaintiff Cagle, would not violate section 85.02.[27] In contrast, Officer Jason Prince said that he used the "totality of the circumstances" to determine violations of section 85.02.[28]

The Ninth Circuit considered the confusion over the interpretation of section 85.02 an important factor in overturning the statute. To support its reasoning, the court relied on *City of Chicago v. Morales*, which held that a court may invalidate a criminal law if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or independently, if it "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement."[29] In *Morales*, the Supreme Court overturned a Chicago municipal code targeted at loitering gang members because the law's prohibition on "remain[ing] in any one place with no apparent purpose" did not distinguish between innocent and unlawful conduct and merely prohibited all conduct lacking "apparent purpose."[30] The Ninth Circuit's holding in *Desertrain* reinforces *Morales* in an effort to protect homeless people from harassment and arrests. Like the ordinance in *Morales*, under which "[f]riends, relatives, teachers, counselors, or even total strangers might [have] unwittingly engaged in forbidden loitering if they happen[ed] to engage in idle conversation with a gang member," section 85.02's language did not give the public adequate notice of illegal behavior. The *Desertrain* plaintiffs' actions were "perfectly legal"—eating food in a vehicle; storing a sleeping bag, canned food, and books in a car; speaking on the phone; staying in a car to get out of the rain.[31] Thus, the Ninth Circuit in *Desertrain* found that section 85.02 failed the *Morales* test on both counts: unconstitutional vagueness and discriminatory enforcement.

---

24. *Id.* at 1151.
25. *Id.*
26. *Id.*
27. *Id.* at 1152.
28. *Id.*
29. *Id.* at 1152 (citing City of Chicago v. Morales, 527 U.S. 41, 56 (1999)).
30. *Morales*, 527 U.S. at 57–60.
31. *Desertrain*, 754 F.3d at 1155–56.

III.
AN ATTEMPT FAILED: DEFERENCE TO STATE LEGISLATURES IN THE WAKE OF *DESERTRAIN*

While the court's reasoning in *Desertrain* could be applied to many municipal codes in California and across the United States, the level of detail that the court used to support its reasoning limits the opinion's precedential value. In detailing each plaintiff's living conditions and the inconsistent police interpretations of section 85.02, the court may have set a high bar for what future plaintiffs need to show to establish vagueness. This will make it easier for other courts to avoid finding constitutional vagueness, especially given judicial concerns about the limited policy tools that municipalities have to address homelessness without such laws.

The California Third District Court of Appeal is one such court unwilling to apply the Ninth Circuit's vagueness standard. In *Allen v. City of Sacramento*, the court upheld the challenged ordinance as constitutional because it did not have the same language as section 85.02.[32] Distinguishing the statutes' language, the court held that *Desertrain* did not apply. The court's narrow reading of *Desertrain*, however, is not the only factor that threatens the Ninth Circuit's attempt to recognize and combat vague laws that allow for enforcement discretion. More threatening yet is the *Allen* court's characterization of homelessness, particularly because its characterization is not appealable to the Ninth Circuit. The court stated that homelessness is "not necessarily . . . an involuntary condition or status."[33] This reasoning perpetuates the misconception that homeless people are responsible for their housing status, excusing society from the responsibility of providing for those most in need.[34] Though *Desertrain* set out to protect homeless people, courts may use its exacting standard to insulate city ordinances from a finding of unconstitutional vagueness. After *Desertrain*, fewer courts may find such laws unconstitutional, knowing that such a ruling would leave cities without an effective mechanism to police homeless people on their streets.[35]

Desertrain's paradoxical holding—establishing a broad standard but potentially creating unworkable precedent—highlights why the court system is limited in its ability to rectify the pattern of select criminalization of homeless people. Courts cannot proactively bring cases; the public has to bring cases to the courts. And since *Desertrain*, other courts have made it difficult for homeless people to avail themselves of legal routes to end unwarranted harassment and criminalization. For example, less than six months after *Desertrain*, the Iowa Court of Appeals prevented homeless people from asserting the necessity

32. Allen v. City of Sacramento, 234 Cal. App. 4th 41, 55 n.2 (2015).

33. *Id.* at 59.

34. However, the *Allen* court concluded that the allegations sufficed to state a cause of action for declaratory relief asserting an as-applied challenge based on equal protection. *Id.* at 63.

35. *Desertrain*, 754 F.3d at 1155–56.

defense in *City of Des Moines v. Webster*. The *Webster* court held that the lack of available shelter beds and the cold weather in Des Moines did not create a necessity for homeless people to continue residing under a bridge.[36] Additionally, the California Court of Appeal in *Allen* precluded homeless people from claiming that an ordinance unconstitutionally restricts their freedom to travel because "the right to travel does not give plaintiffs the right to live or stay where they want."[37]

The *Allen* court's understanding of vagueness and homelessness is emblematic of the unwillingness of courts to prescribe policy solutions to local and state governments. The court also overlooked the broader policy concerns underlying the Supreme Court's homelessness jurisprudence. In *Papachristou v. City of Jacksonville*, a landmark case regarding anti-homelessness laws, the Court overturned a vagrancy ordinance for failing to give adequate notice of the forbidden conduct and encouraging arbitrary enforcement. The *Papachristou* Court held that a city ordinance prohibiting "vagrancy" was unconstitutionally vague, noting that "[v]agrancy laws . . . teach that the scales of justice are so tipped that evenhanded administration of the law is not possible."[38] The Court warned against legislation with a "net large enough to catch all possible offenders."[39] It also expressed concern that this "net" enabled the city to prosecute those who are "undesirable in the eyes of police . . . though not chargeable with any particular offense," and required courts to step in and say who could be "rightfully detained."[40] The Court further observed, "The poor among us, the minorities, the average householder are not in business and not alerted to the regulatory schemes of vagrancy laws [. . .] they would have no understanding of their meaning and impact if they read them."[41] Rather than address a problem the Court observed four decades prior, the California Court of Appeal in *Allen* and the Iowa Court of Appeals in *Webster* granted cities wide breadth to deal with homelessness contrary to the Ninth Circuit's ruling in *Desertrain*.[42]

---

36. City of Des Moines v. Webster, 861 N.W.2d 878, 885–86 (Iowa Ct. App. 2014).

37. *Allen*, 234 Cal. App. 4th at 61. The municipal ordinance in this case makes it "unlawful and a public nuisance for any person to camp, occupy camp facilities, or use camp paraphernalia in . . . [a]ny public property; or . . . [a]ny private property." *Id.* at 48–49. There is a "strong presumption" that ordinances are constitutionally valid unless the unconstitutionality "clearly, positively, and unmistakably appears." *Id.* at 53, 56.

38. Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972).

39. *Id.* at 166.

40. *Id.*

41. *Id.* at 162.

42. The California Court of Appeal in *Allen* states, "It is not our role to determine appropriate City policy . . . we may not opine on the wisdom of the policies embodied in such legislation." 234 Cal. App. 4th at 47. Similarly, in declining to extend the necessity defense to the homeless, the Iowa Court of Appeals in *Webster* reasoned, "[I]t is not our role to rewrite the law and substitute our views of public policy. The Iowa judicial system is not the proper place, in this instance, to change the City of Des Moines' policy concerning the encroachments of the homeless persons residing within its borders." City of Des Moines v. Webster, 861 N.W.2d 878, 886 (Iowa Ct. App. 2014).

IV.
DOWNSIDES OF DEFERENCE TO LOCAL POLICY MAKERS

Despite its shortcomings, *Desertrain* represents a strong step forward in protecting basic human and social rights of all people by following *Papachristou*'s central holding: discriminatory enforcement is unconstitutional.[43] Unfortunately, the Ninth Circuit's decision is a win for advocates of the homeless population only in theory. In practice, cities continue to enact discriminatory laws. Although *Desertrain* did not explicitly task the legislature to solve the root causes of homelessness, it impliedly did so by being so fact-specific. Likewise, the courts in *Allen* and *Webster* deferred to the legislature to deal with homelessness—a practice that is not new.[44] But courts' tendency to defer to the legislature creates problems for homeless people and their advocates, who lack the resources necessary to effectively participate in the political process.

On the other hand, a court's pronouncement that a law is unconstitutional—like the Ninth Circuit's strong strike-down of the homelessness ordinance in *Desertrain*—often provides a powerful tool for underfunded advocates seeking legislative reform. In the case of homelessness, budgetary constraints often bind the legislature from providing social services to all those in need. The legislature needs convincing—by voters, lobbyists, interest groups, and legislative members—to devote large amounts of resources to building affordable housing and providing social services. Advocates can use the court's opinion to legitimize their efforts, mobilize constituents, and increase publicity, all of which provide leverage and bargaining power.[45] Policy makers and community advocates can come together to successfully overcome a bias against marginalized groups—a bias that has resulted in the oppression of people in the United States since the country's founding.[46]

CONCLUSION

The lack of permanent shelter leaves over 610,000 people across the United States vulnerable to legally sanctioned police harassment and criminalization for merely their public presence. *Desertrain* recognized how vague city municipal codes, such as section 85.02, enable police to abuse their discretion in enforcing facially neutral code provisions against homeless people.

Unfortunately, while a strong step forward, *Desertrain* is not enough to overcome the perception that homeless people are responsible for their homelessness. The court in *Allen* narrowly interpreted *Desertrain*, an opinion

43. *Papachristou*, 405 U.S. at 156.

44. Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 631 (2008).

45. *See* Sara K. Rankin, *A Homeless Bill of Rights (Revolution)*, 45 SETON HALL L. REV. 383, 421 (2015).

46. *See* CALIFORNIA'S NEW VAGRANCY LAWS, *supra* note 5, at 6.

that the Ninth Circuit had hoped would make it easier to invalidate city ordinances as unconstitutionally vague. More than anything, courts have made clear that they are not the proper venue for crafting new policy. Without the ability to make homelessness per se illegal, municipalities are left with limited and expensive policy options to not only reduce the visibility of homeless people but also to address the root causes of homelessness. Thus, politicians and community advocates will have to work alongside courts and state legislatures to achieve true change on the ground for those affected by homelessness.