



The Unsheltered Residing in our Communities: Navigating Constitutional and Practical Concerns

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I. Overview

California is home to nearly one-fourth of the nation's unsheltered population,¹ and homelessness in California continues to rise.² For example, from 2019 to 2022, California's unhoused population increased from approximately 151,000 to 171,000. Of the 171,000 unhoused individuals, 67%, or 115,000 persons, were unsheltered, living in places not intended for human habitation.³ The growing homeless population continues to put pressure on local governments, which are tasked with creating plans to reduce homelessness in their communities. Both the State and federal government have recently provided millions of dollars of additional funding, some of it pandemic-related, to address this issue. Local governments face an enormous challenge in creating these plans, especially given that homelessness largely results from the state's decades-long housing crisis and the resulting lack of affordable housing.⁴

Both the lack of affordable housing and insufficient shelter capacity leads many unhoused individuals to reside in encampments, resulting in communities demanding that local and state leaders do more to address a proliferation of encampments. Public pressure may force local leaders to resort to abating encampments. Indeed, abatement may be necessary because conditions may threaten the public health and safety of the community as well as those living in the encampments.

Nevertheless, abatement requires careful consideration because courts have made clear that there are constitutional limits to such measures. Moreover, if done improperly, abatement just shifts people to other locations and perpetuates the cycle of trauma already suffered by many of those unhoused. Abatement can also result in the cutting off of certain community and social support ties. As a result, rather than immediately abating homeless encampments, many cities have opted for a cooperative approach—assisting those experiencing homelessness with relocating them away from sensitive areas, such as schools and creeks and waterways, providing intensive case management as well as sanitation and trash service, and carrying out abatement as a last resort.

Below we summarize some of the constitutional limits on abatement of encampments.

II. Constitutional Considerations for Addressing Encampments

a. Abating encampments may violate the Fourth Amendment's prohibition on unreasonable searches and seizures

The Fourth Amendment protects people from unreasonable searches and seizures by the government. The government may not seize property unless it has an objectively reasonable

belief that the property is (1) abandoned, (2) presents an immediate threat to public health or safety, or (3) is evidence of a crime, or contraband.⁵

In *Lavan v. City of Los Angeles*, the Ninth Circuit Court of Appeals upheld an injunction preventing the City of Los Angeles from seizing and destroying unattended property of unhoused individuals. There, the City seized and destroyed property it believed was abandoned, which would have rendered the seizure reasonable under the Fourth Amendment. However, plaintiffs alleged their belongings included forms of identification and, in some cases, were neatly packed in a manner displaying ownership. The court concluded the City seized and destroyed property it knew was not abandoned.

The seizure and immediate destruction of unattended items based on size is also unconstitutional. Citing *Lavan*, the court in *Garcia v. City of Los Angeles*, enjoined the City from enforcing an ordinance allowing it to immediately seize and destroy “bulky” personal property (defined as property larger than can fit in a 60 gallon trash can) stored in public areas.⁶ The City argued that it was too complex to determine whether a bulky item is abandoned. The court agreed that the bulky item provision would “make it easier to clean up sidewalks” but noted that the rule would “eviscerate the Fourth Amendment.”

These restrictions require local agencies to carefully consider whether their handling of a person’s property is constitutional, even in circumstances that may appear burdensome to decisionmakers. In *Smith v. Reiskin*, District Court for the Northern District of California considered whether the San Francisco Municipal Transportation Agency could lawfully withhold a vehicle from a homeless individual who received thirty (30) parking citations, but could not pay the \$11,116.75 in outstanding fines.⁷ The vehicle could be seized without warrant if the community caretaking doctrine were satisfied, which allows for the impoundment of a vehicle that may “jeopardize public safety and the efficient movement of vehicular traffic.”⁸ Because non-payment of fines is not such an interest, the Northern District held the vehicle needed to be returned so that plaintiff would have the ability to work toward paying off the outstanding fines.⁹

b. Abating encampments may violate the Due Process Clause of the Fourteenth Amendment

Under the Fourteenth Amendment, the government may not deprive any person of life, liberty, or property without due process of the law.

In addition to the Fourth Amendment violation in *Lavan*, the court also found a Fourteenth Amendment violation related to the immediate destruction of seized property because the City of Los Angeles had failed to provide the property owners with notice and a meaningful opportunity to be heard. The City argued it was impracticable to provide a pre-deprivation hearing when seizing property, and while the court agreed, it noted that “efficiency must take a backseat to constitutionally protected interests” and that Los Angeles’ interest in keeping its parks clean was outweighed by the plaintiffs’ interest of not having their personal property destroyed.

Cities may also violate the substantive Due Process Clause of the Fourteenth Amendment if they place a person in a situation of known danger with deliberate indifference to their personal or

physical safety. In *Sacramento Homeless Union v. County of Sacramento* unhoused individuals brought action against the county, city, and others, alleging they had been subjected to state-created danger in violation of federal and state constitutions by the clearing or sweeping of existing encampments during periods of extreme heat and by failing to open a sufficient number of cooling centers and other safe, air-conditioned locations.¹⁰ Relying on *Kennedy v. Ridgefield*¹¹, the court granted a preliminary injunction barring the City of Sacramento from clearing encampments. Relying on this state-created danger doctrine, district courts have likewise barred several cities from carrying out abatements during the height of the pandemic, which occurred, for example, in Sausalito¹² and Santa Cruz¹³.

More recently, in *Fitzpatrick v. Little*, the District Court considered such a claim, noting that the state-created danger doctrine requires proof that: “(1) the state officers’ affirmative actions created or exposed the plaintiff to an actual, particularized danger that he or she would not otherwise have faced; (2) the plaintiff suffered an injury that was foreseeable; and (3) the officers were deliberately indifferent to the known danger.”¹⁴ Because the complainants failed to identify any actual injuries, the District Court dismissed this claim.¹⁵

c. Barring individuals from sleeping in public can violate the Eighth Amendment’s prohibition on cruel and unusual punishment

Under the Eighth Amendment, the government cannot require excessive bail, impose excessive fines, or inflict cruel and unusual punishment.

Courts have held that the Eighth Amendment bars enforcement of anti-camping ordinances unless shelter is available. In *Martin v. City of Boise*, the Ninth Circuit Court of Appeals issued a unanimous decision finding the City’s prohibition against sleeping in public violated the Eighth Amendment’s prohibition on cruel and unusual punishment when the homeless individuals have no access to alternative shelter. After *Martin*, cities generally cannot enforce ordinances that criminalize sleeping in public unless the city has shelter space available within its jurisdiction. However, the court in *Martin* made clear that limitations could still be placed on camping or sleeping during certain times and in certain places. Recently, the Ninth Circuit extended *Martin* to civil infractions. In *Johnson v. City of Grants Pass*, the Ninth Circuit ruled that an ordinance precluding the use of bedding supplies, such as a blanket, pillow, or sleeping bag, when sleeping in public violated the Eighth Amendment.¹⁶

Other courts have limited the application of *Martin* in various contexts. This is not surprising because *Martin* itself cautions that its holding is a “narrow one,” explaining, “‘we 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.’ [Citation.] 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.’”¹⁷ Likewise, the *Martin* decision specifies that, “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.”¹⁸

In *Gomes v. County of Kauai*, the District Court for the District of Hawaii considered whether the County of Kauai could penalize a homeless person for camping at Salt Pond Beach Park.¹⁹ The District Court quoted a portion of the above language from *Martin* indicating that prohibitory ordinances may be validly enforced “at particular times or in particular locations,” and dismissed the complaint where there was no indication that camping was prohibited at more than one public park in Kauai.²⁰

Similarly, in *Fitzpatrick v. Little*, the District Court for the District of Idaho reviewed whether Idaho officials could lawfully proscribe camping at Idaho’s Capitol Complex.²¹ However, the regulation at issue limited in scope as to the area of enforcement.²² Because *Martin* ruled the Eighth Amendment is not violated by such limited laws, and because plaintiffs’ actions were other than involuntary, the District Court held that plaintiffs failed to state any Eighth Amendment violation.²³

d. Homeless encampments may be expressive conduct protected under the First Amendment

Courts have held that homeless encampments may be symbolic of speech and therefore protected under the First Amendment.

In *Phillips v. City of Cincinnati*, the court held that the action of living in a homeless encampment can be expressive conduct protected by the First Amendment.²⁴ In *Phillips*, plaintiffs alleged that by living in encampments located in open and obvious areas, including the City’s central business district, they were calling attention to the city’s affordable housing crisis. The court agreed, noting the “nature and location” of the encampments made it plausible that onlookers would understand the residents were “communicating a message about the City’s inability to provide sufficient affordable housing.”

Not all courts have arrived at the same conclusion reached in *Phillips*. In *Fitzpatrick v. Little*, the District Court considered, *inter alia*, whether homeless persons camping in Boise’s Capitol Complex were protected by the First Amendment.²⁵ Upon finding the Capitol Complex to be a traditional public forum and the homeless’ alleged speech protected, and through the lens of the complainant’s as-applied challenge, the District Court explained the relevant inquiry is whether the anti-camping ordinance in question was content-neutral.²⁶ In other words, that the “restrictions are justified without reference to the content of the regulated speech, they are narrowly tailored to serve a significant government interest, and they leave open ample alternative channels for communication of the information.”²⁷

The *Fitzpatrick* Court reasoned that because the complainants made an as-applied challenge, the content-neutral analysis needed to consider whether so-called “viewpoint discrimination” occurred.²⁸ “A regulation engages in viewpoint discrimination when it regulates speech based on the specific motivating ideology or perspective of the speaker.”²⁹ “In other words, the

government engages in viewpoint discrimination when it ‘targets ... particular views taken by speakers on a subject.’”³⁰

The District Court found that: (1) “the Campers have failed to plausibly allege that these statements and enforcement actions taken targeted the particular views of the Campers, rather than being utilized to enforce the anti-camping statute, indifferent to their actual message;” (2) the ordinance was “content-neutral because it doesn’t require any officer to ‘examine the content of the message conveyed to determine whether conduct violates the statute;” (3) the ordinance advanced the government’s “interest[s] in maintaining the Capitol grounds in an attractive and intact condition, ... ensuring the health and safety of its citizens, and providing unobstructed grounds and convenient access to the Capitol Mall area;” (4) the ordinance was narrowly tailored; and (5) the homeless had alternative channels to communicate their views.³¹ Consequently, the District Court dismissed the complainants’ First Amendment claims.³²

e. Fining homeless persons may provoke Excessive Fines claims under the Eighth Amendment

Some homeless persons and/or their advocates, have claimed that fines associated with the abatement of homeless encampments violate the Eighth Amendment’s proscription against excessive fines. In *Fitzpatrick v. Little*, the District Court recited that such a claim requires one to establish that the amount of the fine is “grossly disproportional to the gravity of the defendant’s offense.”³³ The factors to be reviewed in making such a determination are: “(1) The nature and extent of the underlying offense; (2) whether the underlying offense related to other illegal activities; (3) whether other penalties may be imposed for the offense; and (4) the extent of harm caused by the offense.”³⁴ Moreover, reviewing courts “should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.”³⁵ Because the complainants were fined a total of \$72 (\$15.50 for each offense), and a parking fine of \$63 had been upheld in another case, the District Court held the fines did not violate the Excessive Fines Clause and dismissed that claim accordingly.³⁶

III. Considerations Moving Forward

Local governments should be aware of the constitutional limits on abating encampments. In situations where it is necessary, consideration should be given to a more cooperative approach that may involve:

- Notice: Giving ample notice to those who are to be affected by the abatement;
- Fines: Ensuring that any fines imposed are proportional to the specific offense at issue;
- Coordination: Engaging county, nonprofit, and community partners to let them know the need to abate a location to coordinate resources which will be necessary, including available shelter beds, as well as available transitional and other housing resources;
- Potential Relocation: If necessary, assisting with relocation away from sensitive areas;
- Manage Personal Property: Establish a personal property management system that will provide guidance to those working with unhoused residents to sort property that can be stored for later retrieval, and that which can be discarded;

- Hygiene and Trash Service: for larger encampments, providing hygiene and trash services so long as the encampment is not in a sensitive area while further enlisting those agencies that can provide needed services.

Abatelements do little to address the primary cause of homelessness – the lack of affordable housing. The “Housing First” approach is one potential alternative because it focuses on providing housing to unsheltered persons before addressing job instability, substance abuse and other factors that otherwise might prevent one from obtaining shelter. However, the building of sufficient new affordable housing takes time and, therefore, local governments should look for creative solutions that address the health and trauma of those community members living on the streets.

¹ *How Does Homelessness In California Compare With Other States?*, available at: <https://www.nytimes.com/2019/10/17/us/homelessness-california-population-states-comparison.html>.

² *California Homeless Population Grew By 22,000 Over Pandemic*, available at, <https://calmatters.org/housing/2022/10/california-homeless-crisis-latinos/>.

³ The Point-in-Time (PIT) count is a count of sheltered and unsheltered people experiencing homelessness on a single night in January. HUD requires that Continuums of Care conduct an annual count of people experiencing homelessness who are sheltered in emergency shelter, transitional housing, and Safe Havens on a single night. Continuums of Care also must conduct a count of unsheltered people experiencing homelessness every other year (odd numbered years). Each count is planned, coordinated, and carried out locally. See [U.S. Department of Housing and Urban Development Continuum of Care \(CoC\) Homeless Assistance Programs Homeless Populations and Subpopulations Reports](#).

⁴ HOMELESSNESS IS A HOUSING PROBLEM: HOW STRUCTURAL FACTORS EXPLAIN U.S. PATTERNS (Gregg Colburn & Clayton Page Aldern, 2022); see also, Streeeter, Jialu L., *Homelessness in California: Causes and Policy Considerations*, Policy Brief, Stanford Institute for Economic and Policy Research.

⁵ *Lavan v. City of Los Angeles*, 693 F.3d 1022 (2012).

⁶ *Garcia v. City of Los Angeles*, 11 F.4th 1113 (2021).

⁷ *Smith v. Reiskin* (N.D. Cal. 2018) 2018 WL 7820727, *1.

⁸ *Id.* at *3 (quoting *South Dakota v. Opperman* (1976) 428 U.S. 364, 368-69).

⁹ *Id.* at *4.

¹⁰ *Sacramento Homeless Union v. County of Sacramento* (E.D. Cal., July 29, 2022, No. 222CV01095TLNKJN) 2022 WL 3019735.

¹¹ In *Kennedy v. Ridgefield*, 439 F.3d 1055 (2006) the court ruled that the government could be held liable for affirmatively, and with deliberate indifference, placing an individual in a dangerous situation they would not have otherwise faced.

¹² *Sausalito/Marin County Chapter of California Homeless Union v. City of Sausalito* (N.D. Cal. 2021) 522 F.Supp.3d 648, modified in part sub nom. *Sausalito/Marin County Chapter of California Homeless Union v. City of Sausalito* (N.D. Cal., May 26, 2021, No. 21-CV-01143-EMC) 2021 WL 2141323.

¹³ *Santa Cruz Homeless Union v. Bernal* (N.D. Cal. 2021) 514 F.Supp.3d 1136, modified (N.D. Cal., Apr. 1, 2021, No. 20-CV-09425-SVK) 2021 WL 1256888.

¹⁴ *Id.* at *14-15.

¹⁵ *Id.* at *15.

¹⁶ *Johnson v. City of Grants Pass* (9th Cir. 2022) 50 F.4th 787.

¹⁷ *Martin v. City of Boise* (9th Cir. 2019) 920 F.3d 584 (quoting *Jones v. City of Los Angeles* (9th Cir. 2006) 444 F.3d 1118, 1138).

¹⁸ *Id.* at 617, fn. 8.

¹⁹ *Gomes v. County of Kauai* (D. Haw. 2020) 481 F.Supp.3d 1104, 1106-07.

²⁰ *Id.* at 1108-09.

²¹ *Fitzpatrick v. Little* (D. Idaho 2023) 2023 WL 129815, *11-13.

²² *Id.* at *13.

²³ *Id.*

²⁴ *Phillips v. City of Cincinnati* (S.D. Ohio 2020) 479 F.Supp.3d 611.

²⁵ *Fitzpatrick*, 2023 WL 129815, *6-9.

²⁶ *Id.* at *6-7.

²⁷ *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.

²⁸ *Fitzpatrick*, 2023 WL 129815, *7.

²⁹ *Boardman v. Inslee* (9th Cir. 2020) 978 F.3d 1092, 1110.

³⁰ *Id.* (internal citation omitted).

³¹ *Fitzpatrick*, 2023 WL 129815, *7-8.

³² *Id.* at *9.

³³ *Id.* at *14 (quoting *United States v. Bajakajian* (1998) 524 U.S. 321, 336-37).

³⁴ *Id.* (quoting *Pimentel v. City of Los Angeles* (9th Cir. 2020) 974 F.3d 917, 921).

³⁵ *Id.* (quoting *Bajakajian* 524 U.S. at 336).

³⁶ *Id.*