RETHINKING HOMELESSNESS

A Summary of: Panhandling & Public Space Management Case Law

In recent years new legal concerns have arisen regarding homelessness. Due to the growth of the homeless population throughout America, communities everywhere are struggling to craft ordinances pertaining to panhandling, sitting and lying in public spaces, and camping in public spaces that are both effective and humane while being compliant with federal case law.

PANHANDLING

Current case law pertaining to panhandling was initially established through a court ruling that seemingly had nothing to do with panhandling. In *Schaumburg v. Citizens for a Better Environment*, the United States Supreme Court ruled that door-to-door solicitations should be regarded as a form of free speech under the First Amendment to the Constitution and that such speech must be protected from undue limitations by the government. This ruling, therefore, defined all charitable solicitations, including panhandling, as a form of protected speech.

Schaumburg v. Citizens for a Better Environment

Prior to the court's ruling, the Village of Schaumburg (Illinois) had restricted charitable organizations from engaging in door-to-door solicitations unless the charities could prove that they used at least 75 percent of those donations for charitable purposes. In other words, if the organizations used 25 percent or more of their collected funds for marketing, fundraising, or administrative purposes, they would be in violation of the local ordinance.

In the court's ruling in 1980, eight of the nine justices determined that the ordinance was a violation of the First and Fourteenth Amendments, because the ordinance was overly broad, and the Village of Schaumburg was enjoined to find a less restrictive way to protect the public from unwarranted solicitations. So for more than 30 years, this ruling served as the standard for how solicitation cases were reviewed by the federal courts.

In 2015, however, another ruling brought more clarity to the court's stance on this issue. In *Reed v. Town of Gilbert (Arizona)*, the content of communications became the topic of concern.

Reed v. Town of Gilbert, AZ

In 2005, the town of Gilbert, Arizona adopted a local ordinance that restricted signage based in part on the sign's content. For instance, directional signs were treated differently than signs that communicated "political" or "ideological" messages, and each category of signage was governed by different rules regarding number, size, and duration of display.

In 2008, Clyde Reed was the pastor of a small church in Gilbert known as Good News Community Church. The church did not have its own facility at the time, so it held services in school buildings or other temporary sites. To help worshippers locate each Sunday's services, Pastor Reed would display 15 to 20 temporary directional signs throughout Gilbert on Saturday morning and then remove those signs on Sunday, following the church's weekend service. However, this surpassed the timespan for directional signage as permitted in the local ordinance, so the church was cited twice, which prompted the church to sue because the Town of Gilbert had "abridged their freedom of speech in violation of the First and Fourteenth Amendments."

After winding its way through district court and the Ninth Circuit Court of Appeals, the case finally made its way to the United States Supreme Court, where the nine justices, without a single dissenting vote, decided in favor of Reed. But in the context of their ruling, the justices established another important precedent that would have a direct impact on American communities' responses to panhandling. The justices determined that speech couldn't be regulated based on its content. In other words, the regulation of speech is content based when the regulation focuses on the topic that is discussed or the message that is expressed, and Justice Clarence Thomas, who wrote the majority opinion, determined that "strict scrutiny" must always be applied whenever a governing body creates a law that exhibits any kind of content preference.

Levels of Legal Review

To understand the importance of this ruling, legislators must understand the three levels of scrutiny the courts will use to test the constitutionality of a particular statute or ordinance.

- **RATIONAL BASIS** is the lowest level of legal review. To pass the "rational basis" test, a statute or ordinance must meet a specific need of the governmental body, and there must be a rational connection the statute or ordinance and the goal.

- **INTERMEDIATE SCRUTINY** is the middle level of legal review. To pass "intermediate scrutiny," a law or statute must advance an important government interest and must do so in a way that substantially relates to that interest.

- **STRICT SCRUTINY** is the highest level of legal review. To pass the "strict scrutiny" test, the statute or ordinance must promote a compelling government interest and must be as narrowly tailored as possible in order to meet that goal.

In *Reed v. Town of Gilbert*, Justice Thomas and the majority of the justices were making the point that the content of speech can only be regulated by a governmental entity when there is a "compelling government interest" to do so, and they were saying that all statutes and ordinances must be as narrowly tailored as possible in order to meet that compelling government need. This fact is extremely important when it comes to ordinances pertaining to panhandling.

Thayer v. Worcester

In 2013, the City of Worcester, MA passed two ordinances, one making it "unlawful for any person to beg, panhandle or solicit in an aggressive manner" and the other prohibiting "standing or walking on a traffic island or roadway except for the purpose of crossing at an intersection or crosswalk, or entering or exiting a vehicle or for some other lawful purpose."

Although the district and appellate courts ruled in favor of Worcester, the Supreme Court, in 2015, referred the case back to the First Circuit Court of Appeals with instructions for them to review their decision in light of the Supreme Court's recent ruling in *Reed v. Town of Gilbert*. In other words, the Supreme Court was calling upon the First Circuit Court of Appeals to apply "strict scrutiny" to this case. The court was not questioning Worcester's need to regulate "aggressive" behavior or human activity in and around intersections and crosswalks (these are legitimate governmental needs). The court was requiring the First Circuit to change its application of "intermediate scrutiny" to "strict scrutiny" in this particular case because the case involved content-based speech, so this ruling confirmed that there would be a new level of scrutiny going forward whenever the courts reviewed laws addressing the content of speech (which includes panhandling laws).

Homeless Helping Homeless v. City of Tampa

Another example of how legal precedent is impacting local ordinances pertaining to panhandling and how the courts are demanding "strict scrutiny" in the application of all such laws is the 2016 case, *Homeless Helping Homeless v. City of Tampa.*

Tampa, at that time, had an ordinance in place that made it unlawful for a person to solicit donations (panhandle) in certain places or under specific circumstances. For instance, the ordinance made panhandling illegal in the downtown area and within the Ybor City Prohibited Zone. The ordinance also made panhandling illegal at bus stops, in or near sidewalk cafes, and within 15 feet of any ATM machine or the entrance to a financial institution.

By means of this ordinance, Tampa was trying to meet a legitimate governmental need (the safety and security of its citizens). However, Tampa did not achieve this legitimate need through "strict scrutiny." In other words, the city did not take the least restrictive approach necessary for achieving its goal, so a federal court struck down the ordinance and sent city officials back to the drawing board to craft an ordinance that would be acceptable to the courts.

Lesson Learned

In 2016, Orlando, Florida, located just 88 miles from Tampa, was reviewing its local panhandling ordinance. Wisely, the city decided to review recent court rulings on the subject, because, at the time, Orlando had a panhandling ordinance in place that was even more severe than the one the courts had struck down in Tampa. For instance, in downtown Orlando, prior to 2017, panhandlers could only solicit contributions during daylight hours, and they could only do so while standing in designated boxes that had been painted on the sidewalks in the downtown corridor.

After careful review and consideration, however, the city utilized "strict scrutiny" to devise a new approach to regulating this form of protected speech. In other words, the city narrowly tailored a new ordinance to achieve certain specific goals that were well within its jurisdiction to safeguard public safety.

For instance, the city made it unlawful for a person to solicit a contribution from another person:

- When the target of the solicitation was considered "captive" and had refused an initial request.
- When the target of the solicitation was using an ATM.
- When the target of the solicitation was being harassed.
- When the target of the solicitation was located on private property where "no soliciting" signs are posted.

HOMELESS ENCAMPMENTS

What Is "Camping?"

The word "**camping**" can mean many different things. In the context of homelessness, camping is typically defined as:

- Sleeping or otherwise being in a temporary shelter out-of-doors,
- Sleeping out-of-doors, or
- Cooking over an open flame or fire out-of-doors.

Camping on public property is another divisive issue in contemporary America, because the number of homeless encampments has risen 1,342 percent over the past decade, propelling the subjects of homelessness and camping into the national consciousness. But while some communities are allowing homeless encampments to thrive, other communities are seeking to end this behavior within their jurisdictions.

The argument in favor of homeless encampments is that it is compassionate to allow the homeless to establish makeshift residences until permanent housing can be provided for them. Consequently, many cities are actually assisting in the development of these small communities. Some cities, particularly cities on the West Coast, are providing the residents of encampments with directional signage, complimentary storage facilities, and relative self-government. They are providing the residents of homeless encampments with water and other provisions that are ostensibly offered to make life better for the people who reside there.

At Lead Homelessness, however, we believe it is dangerous and irresponsible to surrender public spaces to this type of inhumane and unhealthy development. In our opinion, unauthorized camping in public spaces is a public safety catastrophe that can only lead to a growing number of problems for the people who live in these makeshift shelters and for the rest of the citizens in the broader community. It is not compassionate, in our view, to allow people to sleep in their own waste or to dwell in breeding grounds of crime. Instead of tolerating encampments or condoning them, communities should solve the underlying problems that have given rise to them.

As with panhandling, however, there is an emerging body of case law that is starting to define how communities should address the issue of camping. The protection of public spaces is certainly a matter of compelling interest for the governments of the cities and towns affected by them. But recent lower court rulings are starting to show a trend. Judges seem to side with the ACLU and other advocates for the residents of these encampment unless the community in question can show that:

1. The people living in these encampments are doing so by choice, not necessity.

2. The city has been consistent in the enforcement of its camping ordinances.

In one court case involving a homeless man who was arrested twice for sleeping on the city's streets (*Joel v. City of Orlando, 2000*), the city prevailed in its defense of its ordinance by showing that the plaintiff had access to a shelter system that had not reached maximum capacity. The city was also able to show that the plaintiff had not been refused access to a shelter due to his inability to pay the nightly fee or his unwillingness to consent to any unreasonable demands placed on him by shelter administrators. A community cannot criminalize involuntary behavior, but a city can constitutionally regulate camping in its public spaces if available housing and available shelter makes it possible for homeless individuals to comply with city ordinances.

Consequently, the best approach a city can take to safeguard its public spaces and to prohibit the rise of encampments within its city limits is to:

- Ensure that low-income housing is available, if possible.

- Ensure that shelter space is consistently available.

- Be able to show that camping is a choice, not an involuntary behavior caused by the absence of any alternative choices.

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