



August 19, 2015

***Via Electronic Mail***

City Attorneys  
Washington Association of Prosecuting Attorneys  
Association of Washington Cities  
Washington State Association of Municipal Attorneys  
Washington Association of Sheriffs and Police Chiefs

**Re: Department of Justice Statement on Unconstitutional Arrests of People  
Experiencing Homelessness and Implications for City and County Ordinances**

The American Civil Liberties Union of Washington, the Homeless Rights Advocacy Project (HRAP) of Seattle University Law School, the National Law Center on Homelessness & Poverty, and the organizations listed below (collectively, for purposes of this letter, “the Advocates”) write to bring to your attention the United States Department of Justice’s (DOJ’s) recent filing of a Statement of Interest in *Bell v. City of Boise et al.*<sup>1</sup> The DOJ’s brief explains that cities which prosecute people who are homeless for sleeping or camping in public places, when there is insufficient shelter space, violate the Eight Amendment prohibition on cruel and unusual punishment. Based upon the DOJ’s analysis, your city may have ordinances on the books that are unconstitutional and are being enforced in an unconstitutional manner through arrest and criminal prosecution of homeless individuals. This is particularly true if, as in many places throughout Washington, your city lacks adequate shelters, hygiene facilities, day centers, and storage facilities to serve those individuals.

The plaintiffs in the Boise case are people experiencing homelessness who were convicted under ordinances that criminalize sleeping or camping in public. As the DOJ brief discusses, such ordinances punish a person’s status, since the banned conduct is a necessity of human survival for a person who is homeless. Statutes or ordinances that criminalize an individual’s status rather than conduct are unconstitutional. *Robinson v. California*, 370 U.S. 660 (1962) (striking down statute criminalizing drug addiction, rather than drug use). DOJ points out that the conduct-versus-status analysis, which municipalities routinely rely upon to justify enforcement of ordinances that criminalize sleeping and camping in public, fails to pass constitutional muster when inadequate shelter beds leave homeless individuals with no choice but to sleep in public. *Id.* at 14-17 (citing *Powell v. Texas*, 392 U.S. 514, 548-51 (1968) (White, J., concurring in judgment)).

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<sup>1</sup> United States District Court for the District of Idaho, Civil Action No. 1:09-CV-540.

The DOJ grounded its reasoning on *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136-37 (9<sup>th</sup> Cir. 2006), *vacated per settlement*, 505 F.3d 1006(9<sup>th</sup> Cir. 2007). *Jones* struck down a Los Angeles ordinance that prohibited sitting, lying, or sleeping in public — even though the law on its face only prohibited conduct — because the homeless individuals impacted had no option but to sleep and lie in public spaces.

The DOJ brief points out that Boise’s ordinances,<sup>2</sup> which broadly prohibit camping or use of public places between sunset and sunrise, suffer from the same constitutional infirmities as the stricken Los Angeles ordinance. For neither Boise nor Los Angeles did the conduct-versus-status distinction pass constitutional muster because the practical implications of enforcement, and not just the language of the ordinance, had to be considered:

Those implications are clear where there is insufficient shelter space to accommodate the homeless population: the conduct of sleeping in a public place is indistinguishable from the status of homelessness.

Statement of Interest at 11. In short, an ordinance criminalizing sleeping in public is likely unconstitutional when it is enforced against homeless individuals who have no place else to go.

The reasoning of the cases cited by the Department of Justice applies with equal force to the many ordinances governing use of public spaces that Washington cities all-too-often enforce against homeless individuals, such as obstructing sidewalks, urinating in public, and panhandling<sup>3</sup>. The Homeless Rights Advocacy Project at Seattle University’s School of Law surveyed the municipal codes of seventy-two Washington cities and found that most have ordinances which outlaw necessary, life-sustaining activities for the visibly poor and homeless.<sup>4</sup> Of the cities analyzed, 78% have laws that prohibit the everyday harmless activity of sleeping or sitting in public places — just as Boise does. *Id.* at i, 4. Unless these cities can show that they are providing reasonable, adequate shelter beds or other accommodations, those ordinances are likely unconstitutional. The Seattle University study also found that 75% of the cities reviewed criminalized urination and defecation in public places, yet that these same cities often failed to provide reasonable alternatives such as 24-hour restrooms or hygiene centers. *Id.* That failure puts these cities at risk of constitutional liability.

We recognize that Washington cities have a legitimate interest in maintaining safe and accessible public parks, libraries, and offices. But current assault, harassment and disorderly conduct laws already empower police officers to cite or arrest those whose conduct poses a genuine risk of harm to others. By contrast, ordinances which criminalize essential life activities for individuals experiencing homelessness, such as sleeping and sitting in public places, do not promote public safety, impose needless costs on prosecutorial, defense, and court services, and do nothing to solve the underlying problems of poverty, homelessness, and mental illness. Instead of wasting

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<sup>2</sup> See Boise City Code § 9-10-02; § 6-01-05(A).

<sup>3</sup> Many cities’ panhandling and illegal solicitation laws may also be unconstitutional under the recent United States Supreme Court ruling in *Reed v. Town of Gilbert*, and its remand of a panhandling case, *Thayer v. City of Worcester*, pursuant to *Reed*.

<sup>4</sup> Justin Olson & Scott MacDonald, Seattle University Homeless Rights Advocacy Project, WASHINGTON’S WAR ON THE VISIBLY POOR: A SURVEY OF CRIMINALIZING ORDINANCES & THEIR ENFORCEMENT (May 2015), available at <http://ssrn.com/abstract=2602318>.

significant amounts of money on criminalization, a better approach is for cities to focus resources on providing housing and services to people who are homeless.<sup>5</sup>

We urge you to closely review your city ordinances governing the use of public spaces that are enforced against homeless individuals and to repeal any that are constitutionally suspect in light of the authority cited by DOJ and in this letter. Additionally, if your city provides insufficient alternatives for food, shelter, and hygiene facilities, enforcement practices should be revised to formally desist from enforcing those ordinances which criminalize conduct people must engage in to survive. Such action would not only serve your community by avoiding potential constitutional liability, but stop the total waste of taxpayer dollars caused by criminalizing behaviors which the poor have no choice but to repeat.

We look forward to discussing this matter further with you. Please do not hesitate to contact HRAP at 206-398-4393 or the ACLU at 206-624-2184.

Very truly yours,

Seattle University School of Law's Homeless Rights Advocacy Project (HRAP)  
American Civil Liberties Union of Washington  
National Law Center on Homelessness & Poverty  
Columbia Legal Services  
Washington Homeless Anti-Criminalization Committee (WHACC)  
Real Change  
Poverty Action Network  
Anne Kysar, Attorney  
Open Door Legal Services, Seattle's Union Gospel Mission  
Public Defender Association  
Seattle Human Rights Commission

CC: Committee to End Homelessness

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<sup>5</sup> Josh Howard & David Tran, Seattle University Homeless Rights Advocacy Project, AT WHAT COST: THE MINIMUM COST OF CRIMINALIZING HOMELESSNESS IN SEATTLE & SPOKANE (May 2015), available at <http://ssrn.com/abstract=2602530> (surveying national and statewide studies showing the enforcement of criminalization laws is more expensive than the provision of non-punitive alternatives that better address the problems of homelessness).