Regulating the Use and Occupancy of Open Space and Other Public Property and Protecting Constitutional Rights

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I.

Introduction

Maintaining publicly accessible open space and ensuring their shared use and availability to all members of the public is a bedrock function of most local agencies. However, managing, regulating and enforcing laws to protect such open space is a very tough job for local governments. Members of the public, homeless and housed alike, have substantial constitutional rights to use and access such spaces. Those same constitutional provisions place substantial limits on local agencies' regulatory powers.

Of course, this job can be done with existing state law resources, and it can be done better through supplementing state law with additional local laws. While prosecution of such cases are often met with judicial obstacles and possible jury apathy, a rigorous, fair and progressive enforcement program can be effectively implemented.

II. Constitutional Protections Applicable to Use of Public Spaces

A. Freedom to Speak, Associate and Express Views

All persons, homeless or housed, have the right to use public open space for free speech, expression and association. The First Amendment of the United States Constitution and the Liberty of Speech Clause of the California Constitution both provide substantial protections to the public's right to engage in expressive activities in public. There is no doubt that, as a general matter, peaceful picketing, leafleting, marches, demonstrations and related activities, are expressive activities involving "speech" protected by the First Amendment and by the Liberty of Speech Clause. *U.S. v. Grace*, 461 U.S. 171, 176-77 (1983); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006); *Los Angeles Alliance For Survival v. City of Los Angeles*, 22 Cal.4th 352, 364 (2000). It is also beyond dispute that solicitations for funds on public streets also are protected by the First Amendment. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 553 (4th Cir. 2013).

Of course, the public's free speech rights are not without limits. Generally, the government may impose content neutral and reasonable time, place and manner restrictions on communicative activities. The precise level of governmental control that can be exercised largely depends on the location or forum of the communicative activity. One example of such control is public park closure laws that many jurisdictions have enacted.

Under this "forum based" approach, regulation of speech at a "public forum" (e.g. sidewalks and parks) or a "designed public forum" (places designated and opened by government for expressive activities) is subject to the highest scrutiny by courts. *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Regulation of expressive activities at a public forum must be "narrowly drawn to achieve a compelling state interest." *Id.* Regulation of speech at a "non-public forum" (any public property that is neither a public forum nor a designated public forum) is subject to lower scrutiny. *Id.* at 678-79. Such regulation will

be upheld as long as it is reasonable and viewpoint neutral. *Id*. Most of the time, public open spaces will be considered a public forum by the courts, thus regulation of these public spaces will most likely be subject to exacting judicial review.

B. Freedom to Engage in Street Performances Without Prior Restraints

The courts have held that street performances in public open spaces are subject to Free Amendment protections. *See Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009). In *Berger*, a performer challenged the City of Seattle's regulation requiring street performers at the Seattle Center, an 80 acre public space, to obtain permits before performing[1]. The Court concluded that the permitting requirement "is a prior restraint on speech and therefore bears a 'heavy presumption' against its constitutionality. *Id.* at 1037. The Court explained that

> It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.

Accordingly, a permitting requirement, especially as applied to individual performers, is particularly constitutionally suspect. *See Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1039 (9th Cir.2006) ("As the cautionary language in our earlier opinions indicates, the significant governmental interest justifying the unusual step of requiring citizens to inform the government in advance of expressive activity has always been understood to arise only when large groups of people travel together on streets and sidewalks.")

C. Freedom to Use Public Open Space For Ordinary Daily Activities Free From Vague Laws or Selective Enforcement

Courts have also held, correctly, that because public open space is created for public use, all persons are given wide latitude to use such spaces. Persons should be allowed to engage in ordinary daily human activities (e.g. sleeping, resting, socializing, and eating) without fear of arrest. Additionally, vague and overbroad laws targeting ordinary daily human activities are constitutionally suspect, especially when they are disproportionately enforced against a particular class of persons, e.g. homeless persons.

Recently, the 9th Circuit, in *Desertrain v. City of Los Angeles*, 754 F.3d 1147 (9th Cir. 2014), struck down City of Los Angeles Ordinance No. 85.02, which prohibits use of a vehicle as living quarters, because it is so vague that it provides no notice to the public on what behavior violates the law and this vagueness produced discriminatory enforcement. .

[1] Seattle Center Rule F.1, which was invalidated by the Berger case, requires "street performers" to obtain a permit before performing at the Center and to wear a badge displaying that permit while performing; Rule F.3.a bars street performers from "actively solicit[ing] donations"; Rule F.5 limits street performances to sixteen designated locations; and Rule G.4 prohibits all Seattle Center visitors, other than Center employees and licensed concessionaires, from engaging in "speech activities" within thirty feet of a "captive audience."

In *Desertrain*, the Plaintiffs, various homeless persons who slept in their vehicles, sued the City of Los Angeles for its enforcement of Ordinance 85.02[2], which essentially prohibited use of a vehicle as living quarters. Plaintiffs contended that Ordinance 85.02 violated their constitutional rights under the Fourth, Fifth and Fourteenth Amendments of the United States constitution, similar sections of the California Constitution and various state and federal statutes.

The Ninth Circuit reversed the District Court's summary judgment in favor of the City and concluded that Ordinance No. 85.05 is unconstitutionally vague as it violated the Due Process Clause of the Fourteenth Amendment.

The Court found that Ordinance 85.02 "offers no guidance as to what conduct it prohibits." *Desertrain*, 754 F.3d at 1155. The Ordinance "does not define living quarters, or specify how long – or when – is 'otherwise.'" *Id.* The Court questioned whether the Ordinance prohibits eating food in a vehicle, keeping a sleeping bag, storing household items, talking on the phone or using a vehicle as a shelter against weather. *Id.* The Court observed that "these are all actions Plaintiffs were taking when arrested for violation of the ordinance, all of which are otherwise perfectly legal." *Id.* (Emphasis Added.) Comparing Ordinance 85.02 to anti-loitering ordinances struck down by the Supreme Court, this Court found that "this broad and cryptic statute criminalizes innocent behavior, making it impossible for citizens to know how to keep their conduct within the pale." *Id.* Additionally, the Court also found Ordinance 85.02 to be so vague that it encourages and indeed creates arbitrary and discriminatory enforcement. *Id.* While Ordinance "85.02 is broad enough to cover any driver in Los Angeles who eats food or transports personal belongings in his or her vehicle, . . . it appears to be applied only to the homeless." *Id.* at 1156.

Los Angeles argued that this law is targeted at only protecting public health and safety and that the City's internal policy memos sufficiently clarified any vagueness concerns. In rejecting this contention, the Court noted that police officers regularly failed to follow the internal policy memos, and police command staff openly rejected these policy memos. *Desertrain*, 754 F.3d at 1157.

In sum, the Court concluded that "for many homeless persons, their automobile may be their last major possession." *Desertrain*, 754 F.3d at 1157. Ordinance 85.02 fails constitutional muster because it selectively prevent[s] the homeless and the poor from using their vehicles for activities many other citizens also conduct in their cars." *Id.* at 1158.

Similarly, in *Pottinger v. City of Miami*, 810 F.Supp. 1551 (S.D. Fla. 1992), a Florida federal trial court concluded that the City of Miami had misused its police powers and unlawfully interfered with the right of homeless people to engage in basic activities of daily life—including sleeping and eating—in the public places.

The court in *Pottinger* found that the City used various state and local laws (e.g. anit-loitering laws, and prohibitions against sleeping on benches, sidewalks, parks) almost

[2] Ordinance 85.02 provides that "No person shall use a vehicle parking 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 . . ., as living quarters either overnight, day-by-day, or otherwise."

exclusively for the purpose of chasing homeless persons from the City. *Pottinger*, 810 F.Supp. at 1559-60. The Court further found that there was no public place where homeless persons can perform basic, essential acts such as sleeping, resting or even eating without the possibility of being arrested. *Id.*

The City argued that it had compelling interests in maintain the aesthetics of public areas and promoting tourism and business. The Court recognized these are important interests, but found that less intrusive means are available to achieve these interests. *Pottinger*, 810 F.Supp. at 1581-83. The Court suggested that the City could erect additional homeless shelters, conduct more street/park cleanings, and increased police patrols to catch actual criminal elements-homeless or not. *Id.*

Accordingly, the Court concluded that the local ordinances at issue are unconstitutionally overbroad and impose cruel and unusual punishments, because they prohibit conduct that is beyond the reach of the City's police power (e.g. ordinary daily human activities such as sleeping, resting, socializing and eating). *Pottinger*, 810 F.Supp. at 1576-77 ("plaintiffs have shown that the challenged ordinances as applied to them are overbroad to the extent that they result in class members being arrested for harmless, inoffensive conduct that they are forced to perform in public places."). The Court also concluded that the City's actions infringed on homeless persons' fundamental right to engage in life-sustaining activities in public and on their fundamental right to travel. *Id.* at 1578-79.

D. Freedom to be Secure In Personal Property

While local governments are not required to tolerate uncontrolled littering of properties within its public open spaces, it may not indiscriminately remove and destroy personal property of public property users.

In *Lavan v. City of Los Angeles*, the 9th Circuit Court of Appeals upheld a trial court decision finding likelihood of success on homeless individuals' due process claim against the City of Los Angeles for its program of seizing and destroying personal property left on public property. 693 F.3d 1022 (9th Cir. 2012). The plaintiffs in the case were homeless individuals who largely resided on the streets of the Skid Row district of Los Angeles. Historically, many individuals residing on the streets of Skid Row stored their personal possessions (personal identification documents, birth certificates, medications, family memorabilia, toiletries, cell phones, sleeping bags and blankets) within mobile containers provided to them by social service organizations.

In early 2011, on several occasions, while the plaintiffs stepped away from their personal property (leaving them on the sidewalk) to attend to other tasks (e.g. showering, eating, using bathrooms, or attending court), the City seized and summarily destroyed their unattended personal property. Because of the historical pattern of use of personal property within Skid Row, the court found that the City "did not have a good-faith belief" that the personal possessions were in fact abandoned by the homeless individuals. 693 F.3d at 1025.

The City argued that the Fourth Amendment authorizes summary seizure and destruction of the personal property, because leaving the property unattended violated Los Angeles Municipal Code Section 56.11, which prohibits the leaving of personal property upon any sidewalk or parkway. The Court disagreed and reasoned that violation of an applicable law does not vitiate Fourth Amendment Protections. 693 F.3d at 1029 ("Were it otherwise, the government could seize and destroy any illegally parked car or unlawfully unattended dog without implicating the Fourth Amendment."). The Court concluded that "by seizing and destroying [the Plaintiffs'] unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with [the Plaintiffs'] possessory interests in that property," and thus acted unreasonably under the Fourth Amendment. *Id.* at 1030-31.

The Court suggested that the City may lawfully enforce Section 56.11 by announcing "its intentions and [giving] the property owner a chance to argue against the taking." *Id.* at 1032. At the very minimum, the Court believed that the City must at least provide a post seizure hearing opportunity so that owners may seek return of the property. *Id.*

E. Remedies Available to Ensure Shared and Public Use of Public Spaces

While members of the public, homeless or housed alike, have substantial rights to use and access public spaces, the government is not without any ability to control the use of such spaces in order to ensure their shared use and availability to all members of the public.

A. Preexisting State Law Remedies To Control Use

To begin with, there is a substantial body of state criminal laws that can be effectively used to control the use of public property, especially if the use at issue involves some level of disruption to public order or peace.

Vehicle Code Section 21950(b) is helpful in ensuring the safety of pedestrians and vehicles alike. It prohibits pedestrians from unnecessarily stopping or delaying traffic while in a marked or unmarked crosswalk, or suddenly leaving a curb or other place of safety and walk or run into the path of a vehicle. Additionally, Penal Code Section 647c provides similar relief. It prohibits willful and malicious obstructions of free movement of any person on any street, sidewalk, or other public places.

Additionally, Penal Code Section 647 provides a wealth of tools to combat a variety of disorderly public conduct. Subsection (c) prohibits the accosting of other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms. Subsection (e) prohibits lodging in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control of it. Subsection (f) prohibits public intoxication. In a similar vein, Business and Professions Code Section 25620 prohibits the possession of open alcoholic containers on public property (assuming local authorities prohibit such conduct).

If any person(s) disturbs the public peace, either by fighting, challenging fights, or maintaining loud and unreasonable noise, Penal Code Section 415 can be a useful tool to combat such behavior.

Penal Code Section 602 provides substantial assistance in combating common trespass issues. Subsection (h) precludes trespassing into large open land areas where animals are being raised. Subsection (k) precludes entering any lands for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation. Subsection (o) precludes refusing or failing to leave land, real property, or structures belonging to another and not open to the general public, upon being requested to leave. Subsection (q) precludes refusing or failing to leave a public building of a public agency during closed hours.

Subsection (m) of Section 602 prohibits entering and occupying real property or structures without the consent of the owner. While the plain wording of Subsection (m) appears to be extremely helpful, as it appears to preclude entering and occupying real property or structures of any kind without the consent of the owner, case law has made this subsection quite useless in many instances. In *People v. Wilkinson*, 248 Cal.App.2d Supp. 906 (1967), the court interpreted Penal Code Section 602(l) (the predecessor version of PC602(m)) to require an intent to dispossess those lawfully entitled to possession. ("some degree of dispossession and permanency [is] intended"); *see also, CALCRIM* 2931 (relying on *People v. Wilkinson*). This dispossession and permanency requirement is difficult to prove in most cases relevant here.

Finally, in situations where occupation of public properties are more permanent, Penal Code Section 372 may be of assistance. It is a general catch-all provision which prohibits the maintenance of any public nuisance. Penal Code Section 370 defines "public nuisance" as "[a]nything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood."

B. Additional Local Regulations of Manner and Hours of Use

In addition to the many available state law remedies, local authorities may adopt additional laws to govern use of their public spaces.

Perhaps the most common and useful law is one that limits the hours of operations of public parks. Courts have repeatedly upheld facially neutral and broadly applicable park closure laws. *See, e.g., People v. Trantham*, 161 Cal.App.3d Supp. 1 (1984) (upholding Los Angeles ordinance providing that "No person shall enter, remain, stay or loiter in any park between the hours of 10:30 o'clock p.m. and 5:00 o'clock a.m."); *Occupy Sacramento v. City of Sacramento*, 878 F.Supp.2d 1110 (E.D. Cal. 2012) (upholding Sacramento's park closure ordinance); *State v. Bailey*, 166 N.H. 537 (2014) (upholding Manchester's park closure ordinance).

Another tool commonly used to regulate use of public properties are anti-camping laws. Many jurisdictions have adopted some version of this type of law. Case law demonstrates that

such laws can be successfully defended against constitutional challenges, especially when there is sufficient shelter space available to house the unlawful campers.

In *Tobe v. City of Santa Ana*, the Supreme Court of California upheld a City of Santa Ana anti-camping against a broad-based constitutional challenge. 9 Cal.4th 1069 (1995). The Santa Ana law prohibited camping on various public properties, including parks, streets, and parking lots.[3] In rejecting a right to travel challenge, the Court noted that, unlike previous laws struck down on this ground, Santa Ana's camping law does not classify persons on the basis of the duration of their residence nor does it directly restrict travel. 9 Cal.4th at 1100-91. The Court also approvingly noted that the law was facially neutral, as it similarly applied to the homeless and the housed. *Id.* The Court also rejected a punishment for status challenge and held that "homelessness is not readily classified as a status." *Id.* at 1105. The Court reasoned that the facts of the case do not indicate that the homeless persons indeed had no alternatives to homelessness, even though that the evidence showed that "on any given night . . .the number of shelter beds available was more than 2,500 less than the need." *Id.* While not every court has reached this lenient of a conclusion given similar facts, one could at least surmise that availability of shelter housing can be critical to defeating a punishment for status (a.k.a. 8th Amendment Cruel and Unusual Punishment) claim. Finally, the Court also rejected a vagueness challenge, as both common sense and ordinary dictionary definitions can be used to assist in interpreting undefined words in the law, such as "camp," "living," and "storage." *Id.* at 1167-68.

Other courts have also upheld similar anti-camping regulations. In *People v. Mannon*, 217 Cal.App.3d Supp. 1 (1989) the Appellate Department of the Superior Court in Santa Barbara County upheld local camping prohibitions on public property. Similarly, in *People v. Scott*, 20 Cal.App.4th Supp. 5 (1993), the Appellate Department of the Superior Court in Los Angeles County upheld a City of West Hollywood ordinance which prohibited camping in city parks.

In the street performance area, even in light of *Berger*, there is room for additional local regulation. The *Berger* court recognized that safety is a legitimate basis for regulation. 569 F.3d at 1041. The Court rejected Seattle's safety argument because Seattle never tied its permitting system to safety and did not actually use its permitting system to manage competing uses. *Id.* at 1041-42. Additionally, sheer size of the park at issue in the *Berger* case makes the safety argument difficult to sustain. *Id.* at 1034 ("80–acre expanse of public space"). It is reasonable to believe that a narrowly tailored set of regulations, targeted at safety concerns, regulating a less expansive area could pass constitutional muster. *See. E.g.* Santa Monica Municipal Code Chapter 6.112.

In the area of regulating unattended items on public property, local authorities may outright preclude such activities, even in light of *Lavan* and *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006). In *Santa Monica Nativity Scenes Committee v. City of Santa Monica*,

[3] Santa Ana Ordinance Section 10-402 provides that: "It shall be unlawful for any person to camp, occupy camp facilities or use camp paraphernalia in the following areas, except as otherwise provided: (a) any street; (b) any public parking lot or public area, improved or unimproved." Section 10-402 provides that: "It shall be unlawful for any person to store personal property, including camp facilities and camp paraphernalia, in the following areas, except as otherwise provided by resolution of the City Council: (a) any park; (b) any street; (c) any public parking lot or public area, improved or unimproved."

784 F.3d 1286 (9th Cir. 2015), both the District Court and the Ninth Circuit upheld the constitutionality of Santa Monica Municipal Code Section 4.55.060, which provides that "No person shall, in any park, erect, maintain, use or occupy any tent, lodge, shelter, structure or unattended installation or display." The Court concluded that this law was a reasonable content neutral regulation that sought to vindicate important governmental interests, namely protection of park aesthetics and conservation of the City's resources in dealing with unattended items.

Finally, even in the area of community events on public property, an area unquestionably subject to strong constitutional protection, local government's reasonable and content neutral time, place and manner regulations have been consistently upheld. *See, e.g., Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006) (upholding Santa Monica's community events law, including permitting, time, place and size limitations, against broad based constitutional attack); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011 (9th Cir. 2009) (approving 75 person threshold for events permit limitation).

C. Practical Challenges and Solutions

Even though a myriad of tools are available to help local governments regulate their public spaces, actual enforcement of these laws remains a significant challenge.

For instance, in many counties, the jail system is both extremely aged and very overcrowded. Similarly, courtroom reductions from the past few years have led to insufficient trial court rooms or bench officers. Thus, bench officers are particularly interested in disposing of misdemeanor cases (none of the available enforcement tools are felonies) and are extremely reluctant to bring such cases to trial. Even if a jury is empaneled, prosecutors likely face both judicial and jury apathy about the case, even if the case at issue is perfectly righteous, simply because it may be perceived as being a case about an unimportant crime.

There are, of course, many tools to combat these practical problems. Here are just a few that come to mind. First, seeking to try first or sometimes even second time offenders is almost never a great idea. Both courts and juries expect that local agencies use progressive enforcement, with the goal of obtaining compliance, not punishment. Thus, it is important to work with the responsible police agencies to develop such a progressive enforcement program. It could look something like: verbal warning, written warning, citation (likely leading to judicial diversion), then finally arrest and trial. Courts are much more willing to try cases if they see that law enforcement personnel has done everything possible and that prosecutors have done the same (e.g. by offering diversion on initial cases).

Second, it is important to document each law enforcement encounter with the defendant. Courts want to see a record of encounters, and they are much more willing to accept written documentation than the prosecutor's or the officer's word that progressive enforcement has taken place.

Third, if enforcement is taken against persons without means (e.g. a homeless individual), it is important to offer assistance along with enforcement. For instance, Santa Monica has a relatively long history of having police officers specifically trained in homeless issues. These

officers understand the social service needs in addition to law enforcement. They often make contact with such individuals along with a social worker. Thus, when the officer gives a warning to a homeless individual that the park is closed and the law requires this person to leave, the social services person could direct the defendant to a shelter to spend the night and to connect him or her with additional social services so that this person can be placed on the path to being housed. This holistic approach ensures that persons who can be helped by the system are not left behind, and it also makes for a much stronger case if subsequent prosecution is necessary.

Fourth, when trying a case involving a needy defendant (e.g. a homeless individual) that has gone through the progressive enforcement process, the People's case truly must begin at Voir Dire. This is the time that prosecutors should begin educating the jury not only about the People's theory of the case, but also about the reasons why the case is even brought (e.g. one's refusal to follow the law despite all attempts to warn, advise and help), through carefully scripted Voir Dire questions. It is also a time to begin immunizing the prosecution's case against the most likely defense attacks (e.g. the city just wants to eliminate all homeless folks and they are enforcing this law to strip my client of his or her basic human dignity). One possible response is to educate the jury about the fact that public open spaces are designed for shared use by ALL members of the public and not EXCLUSIVE use by any one person or group. Thus, the jury could be given the foundation, early on in the case, that the pending prosecution is about vindicating the entire public's right to use this space.

Finally, perhaps most importantly, proper exercise of prosecutorial discretion is particularly important in the cases at issue here. Even though it is a bedrock principal, I often have to remind myself the importance of this first and core prosecutorial mission: it is not our job to win cases but to do justice. *See Berger v. U.S.*, 295 U.S. 78 (1935). While justice most often times requires us to vigorously vindicate the public good by seeking to hold those responsible for refusing to comply with the law, justice will also many times counsel against prosecution, perhaps because the circumstances of the individual case does not deserve such action. Prosecution is not always the right answer in every case. This is the same calculus that bench officers undertake when they consider whether to empanel a jury or dismiss pursuant to Penal Code Section 1385 (or offer judicial diversion if the court is in Los Angeles County). A prosecutor who properly exercises his or her prosecutorial discretion will earn the respect of the bench and the defense, and hopefully eliminate some unnecessary judicial obstacles, all of which will further effectuate the work of justice.

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