Topics covered:

Lavan v. City of Los Angeles 693 F.3d 1022 (9th Cir. 2012): constitutionality of **removing personal pr**operty from the right of way

Desertrain v. City of Los Angeles 754 F.3d 1147 (9th Cir. 2014): constitutionality of **overnight camping ordinances**

Martin v. City of Boise 920 F.3d 584, 592 (9th Cir. 2019): constitutionality of **criminalizing sleeping on public property**

Johnson v. City of Grants Pass 72 F.4th 868 (9th Cir. 2023): expanded *Martin v. Boise* **to vehicles and RVs**, among other things

Janosko v. City of Oakland, 2023 WL 187499: Expansion of "**state created danger**" doctrine to encampment removals/clean-ups

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TONY LAVAN; CATERIUS SMITH; WILLIE VASSIE; ERNEST SEYMORE; LAMOEN HALL; SHAMAL BALLANTINE; BYRON REESE; REGINALD WILSON, *Plaintiffs-Appellees*, v. CITY OF LOS ANGELES, *Defendant-Appellant*.	No. 11-56253 D.C. No. 2:11-cv-02874-PSG-AJW OPINION

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Argued and Submitted
February 8, 2012—Pasadena, California

Filed September 5, 2012

Before: Stephen Reinhardt, Kim McLane Wardlaw, and
Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Wardlaw;
Dissent by Judge Callahan

Lavan v. City of Los Angeles 693 F.3d 1022 (9th Cir. 2012): constitutionality of removing personal property from the right of way

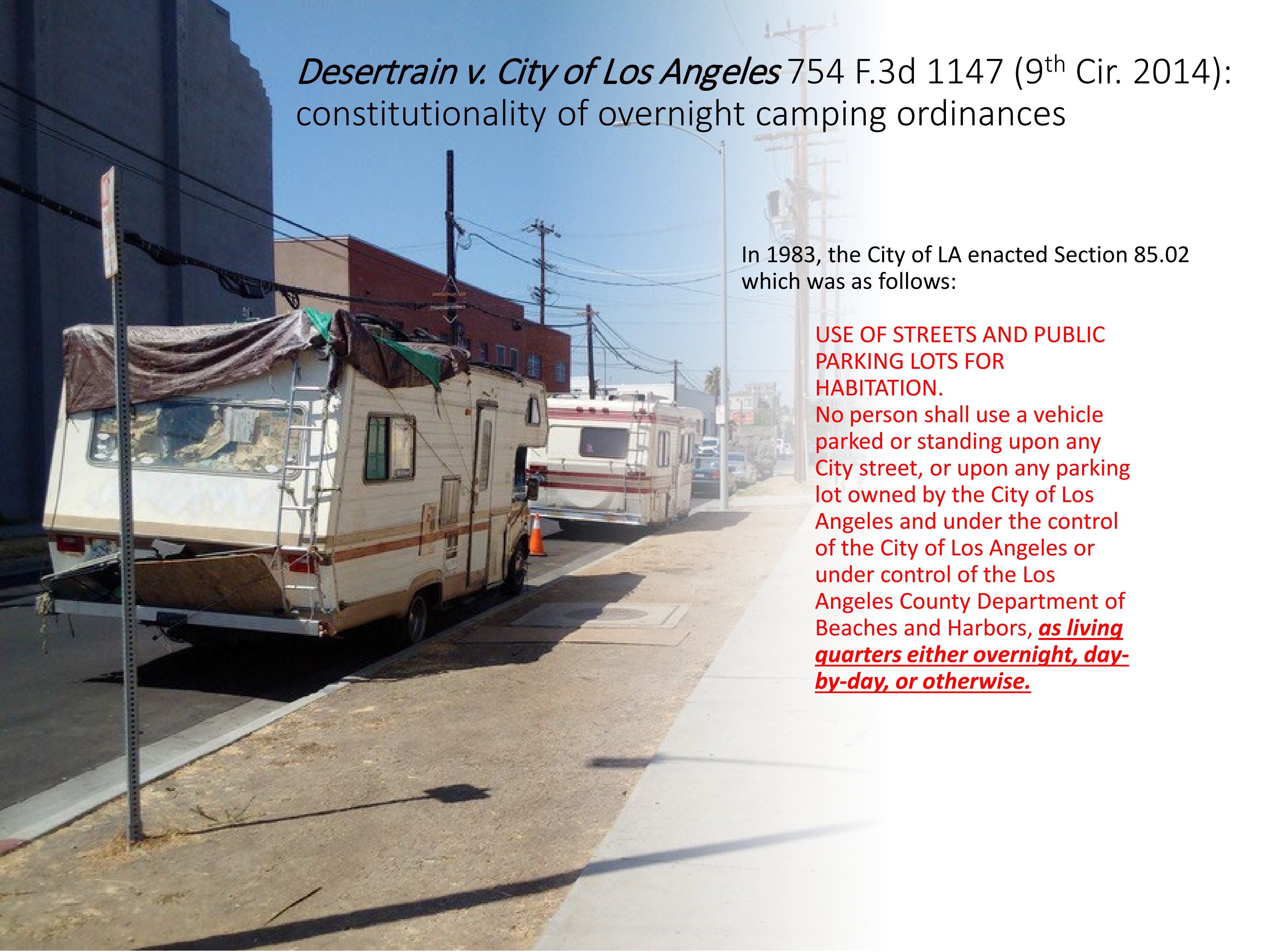
- The court held "*that the Fourth and Fourteenth Amendments protect homeless persons from government seizure and **summary** destruction of their unabandoned, but momentarily unattended, personal property*."
- "*This simple rule holds regardless of whether the property in question is an Escalade or an EDAR, a Cadillac or a cart.*"

EDAR: Everyone Deserves a Home

Lavan v. City of Los Angeles 693 F.3d 1022 (9th Cir. 2012): constitutionality of removing personal property from the right of way

- Provide notice of the pending clean-up unless the property constitutes a hazard

- Must separate personal property from the trash and store the personal property for 90 days and "*take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return*."


Desertrain v. City of Los Angeles 754 F.3d 1147 (9th Cir. 2014):
constitutionality of overnight camping ordinances
In 1983, the City of LA enacted Section 85.02 which was as follows:
USE OF STREETS AND PUBLIC PARKING LOTS FOR HABITATION.
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.

Lavan v. City of Los Angeles 693 F.3d 1022 (9th Cir. 2012): constitutionality of removing personal property from the right of way

- Section 85.02 fails to provide adequate notice of the conduct it criminalizes

"Plaintiffs are left guessing as to what behavior would subject them to citation and arrest by an officer. Is it impermissible to eat food in a vehicle? Is it illegal to keep a sleeping bag? Canned food? Books? What about speaking on a cell phone? Or staying in the car to get out of the rain? These are all actions Plaintiffs were taking when arrested for violation of the ordinance, all of which are otherwise perfectly legal."

Lavan v. City of Los Angeles 693 F.3d 1022 (9th Cir. 2012): constitutionality of removing personal property from the right of way

- Section 85.02 promotes arbitrary enforcement that targets the homeless.

"Arbitrary and discriminatory enforcement is exactly what has occurred here. As noted, Section 85.02 is broad enough to cover any driver in Los Angeles who eats food or transports personal belongings in his or her vehicle. Yet it appears to be applied only to the homeless."

Martin v. City of Boise 920 F.3d 584, 592 (9th Cir. 2019): constitutionality of criminalizing sleeping on public property

- City of Boise Ordinance:
  - Banned "[o]ccupying, lodging or sleeping in any…place…without…permission."
  - Barred the "use [of] any…street, sidewalk, parks or public places as a camping place at any time."
  - Imposed criminal penalties.

Martin v. City of Boise 920 F.3d 584, 592 (9th Cir. 2019): constitutionality of criminalizing sleeping on public property

- Janet Bell, Robert Martin and nine other unhoused individuals sued the City of Boise claiming the ordinances were unconstitutional under the 8th Amendment because is criminalized them for carrying out basic bodily functions – i.e. the act of sleeping.

- Population of Boise is 226,115 (2019)
- 867 unhoused individuals in Boise according to 2016 point in time count
- 3 homeless shelters in the City, all run by private non-profit organizations:
  - "Sanctuary" has 96 beds and is usually full. Limited restrictions.
  - Boise Rescue Mission has 2 facilities: "River of Life" (188 beds, men only) and "City Life" (150 beds, women and children only)
  - Religious based. Lots of religious messaging. After 17 (ROL) or 30 ("CL") days of stay the individual must enroll in the "Discipleship Program" which is described as "intensive, Christ based residential recovery program" of which "[r]eligious study is the very essence."

This principle compels the conclusion that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter. As *Jones*

reasoned, "[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human." *Jones*, 444 F.3d at 1136. Moreover, any "conduct at issue here is involuntary and inseparable from status — they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping." *Id.* As a result, just as the state may not criminalize the state of being "homeless in public places," the state may not "criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets." *Id.* at 1137.

Our holding is a narrow one. Like the *Jones* panel, "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." *Id.* at 1138. 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." *Id.* That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.[8]

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[8] Naturally, 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. *See Jones*, 444 F.3d at 1123. So, too, might an ordinance barring the obstruction of public rights of way or the erection

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of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the "universal and unavoidable consequences of being human" in the way the ordinance prescribes. *Id.* at 1136.

Some post *Martin v. Boise* cases:

- ***Gomes v. Cty. of Kauai***, 481 F. Supp. 3d 1104, 1106 (D. Haw. 2020); *Ordinance prohibiting sleeping in public parks was not unconstitutional because the ordinance was limited to parks and did not apply to public property anywhere.*

- ***Young v. City of L.A.***, 2020 WL 616363, at 5 (C.D. Cal. Feb. 10, 2020); Plaintiff's allegation that the City has not permitted him to stay at one encampment for the past three years fails to state an Eighth Amendment claim.

- ***Miralle v. City of Oakland***, 2018 WL 6199929, at 2 (N.D. Cal. Nov. 28, 2018); "*Martin* does not establish a constitutional right to occupy public property indefinitely at Plaintiffs' option."

- ***Yeager v. City of Seattle***, 2020 WL 7398748; "*The Court will not stretch the self-professed 'narrow' holding in Martin to now include non-criminal statues.*"

Johnson v. City of Grants Pass

- City population of 38,000 with as many as 600 homeless persons living in the city.
- Not enough homeless shelters to house all 600 homeless individuals.

Johnson v. City of Grants Pass

- City enacted several city-wide ordinances which are described as:
  - “Anti-sleeping ordinance”
  - “Anti-camping ordinance” and
  - A “parks exclusion ordinance.”
- The “Anti-camping ordinance” prohibited “overnight parking” in city parks homeless individual would violate this parking prohibition if she parked or left “a vehicle parked for two consecutive hours [in a City park] ... between the hours of midnight and 6:00 a.m.”
- Enforcement was first civil fines.

City of Grants Pass

- Only four locations in the City that temporarily housed homeless individuals:
  - Gospel Rescue Mission (explicitly religious org), 2 locations:
    - Had to work 6 hours a day and attend an approved place of worship on Sundays and the place “to espouse “traditional Christian teachings such as the Apostles Creed.”
  - City sobering facility with 12 locked rooms and no beds
  - Mission Youth Shelter: 18 bed facility for unaccompanied minors

City of Grants Pass

Civil v. Criminal enforcement

- City says Martin v. Boise doesn't apply because violations of the City's ordinances are civil citations, not criminal enforcement.

Here, the City has adopted a slightly more circuitous approach than simply establishing violation of its ordinances as criminal offenses. Instead, the City issues civil citations under the ordinances. If an individual violates the ordinances twice, she can be issued a park exclusion order. And if the individual is found in a park after issuance of the park exclusion order, she is cited for criminal trespass…The holding in Martin cannot be so easily evaded.

City of Grants Pass

Does MvB Apply to people living in their vehicles?

- Expanded the anti-camping to individuals sleeping in their vehicles.

*We affirm the district court's ruling that the City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, **or for sleeping in their car at night**, when there is no other place in the City for them to go.*

No.

IN THE

Supreme Court of the United States

CITY OF GRANTS PASS,

Petitioner,

v.

GLORIA JOHNSON AND JOHN LOGAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Where do I think this will go?

The dissent in *Coalition on Homelessness v. City and County of San Francisco* filed on 1/11/2024*:*

- Looks at the history of the 8th amendment and what type of punishment the founding fathers were trying to prohibit;
- Carefully describes the long-standing history of anti-vagrancy laws; and
- Frames the analysis with separation of powers.

Francisco home. This only counsels in favor of resolving these questions with the benefit of two-level consideration and a developed factual record on key issues that would affect the constitutional analysis. *Ecological Rts. Found.*, 230 F.3d at 1154 ("two-level consideration" is more likely to yield the correct result, both because "more judges will consider" the issue and because "trial judges often bring a perspective to an issue different from that of appellate judges"). As our dissenting colleague admirably states, our goal is to get the law right. Allowing the district court to develop the record and consider the City's new arguments in the first instance makes it more likely that we will. Particularly because the City's attempts to distinguish this case from *Martin* and *Johnson* ultimately turn on factual questions, we are not inclined to reach these questions in the first instance.

AFFIRMED.

BUMATAY, Circuit Judge, dissenting:

Today, we let stand an injunction permitting homeless persons to sleep *anywhere*, *anytime* in public in the City of San Francisco unless adequate shelter is provided. The district court's sweeping injunction represents yet another expansion of our court's cruel and unusual Eighth Amendment jurisprudence. Our decision is cruel because it leaves the citizens of San Francisco powerless to enforce their own health and safety laws without the permission of a federal judge. And it's unusual because no other court in the country has interpreted the Constitution in this way.

Based on a misreading of the Eighth Amendment's Cruel and Unusual Punishments Clause, the district court now

Judge Patrick Bumatay

Five years ago, this court began its campaign to increase the power of the federal judiciary over States' and localities' management of the homelessness crisis. In *Martin v. City of Boise*… this circuit transformed the Eighth Amendment's prohibition on cruel and unusual punishments into a tool to constitutionalize anti-vagrancy laws—barring local governments from penalizing "homeless people for sleeping outdoors, on public property," unless given an "option of sleeping indoors." *Martin*, 920 F.3d at 617. But there's nothing in the text, history, and tradition of the Clause that comes close to prohibiting enforcement of commonplace anti-vagrancy laws, like laws against sleeping on sidewalks and in parks.

State Created Danger

- *DeShaney v. Winnebago County Department of Social Services* (489 U .S. 189 (1989)) the Supreme Court held that “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”
- 2 Exceptions:
  - 1. “special relationship” by taking custody of the individual which then results in harm; or
  - 2. where the state “affirmatively places [a plaintiff] in danger by acting with deliberate indifference to a known or obvious danger.”

State Created Danger
Janosko v. City of Oakland 2023 WL 187499

- Applied State Created Danger Exceptions to homeless camp clean-ups:
- 42 Oakland residents living in an encampment.
- City posted notices to vacate and move their belongings for “deep cleaning” of the site.
- There was a 170 unit affordable housing project slated for the site.
- Individuals complained that moving them would expose them to the elements and there was not sufficient shelter space available.
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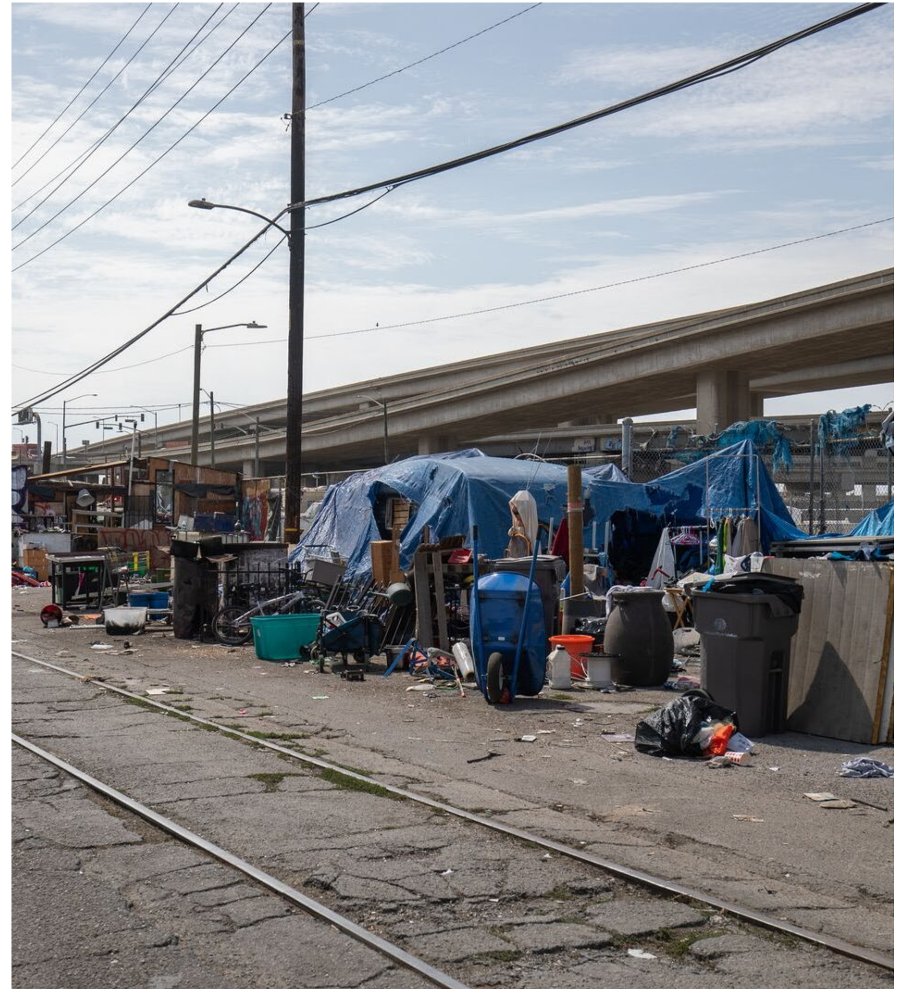

State Created Danger (rainstorms)

Janosko v. City of Oakland 2023 WL 187499

"With respect to the state-created danger argument, the plaintiffs say that by evicting the residents of the 1707 Encampment, the City will affirmatively act to expose residents to known and obvious dangers from the severe rainstorms, other inclement weather, and ongoing pandemic and "tripledemic" conditions."

"Accordingly, I find that the plaintiffs have established serious questions going to the merits of the state-created danger claim, at least at this juncture, that the injury threatened is irreparable, and that a short, defined delay in the planned evictions is in the public interest."

State Created Danger (heat waves)

Sacramento Homeless Union v. County of Sacramento

1 clearing of encampments constitutes "affirmative conduct" that places unhoused individuals at an
2 increased risk of the "known and obvious danger" of exposure to extreme heat. (ECF No. 22 at
3 13–14; ECF No. 33 at 9.) The City indicates in the parties' joint statement that it agrees to
4 provide more shade structures and tents that may provide more heat protection at Miller Park.
5 (ECF No. 47 at 3.) However, the available evidence suggests that, even though Miller Park offers
6 some facilities and services, the current structures and tents at Miller Park do not offer sufficient
7 protection from the heat. The parties do not discuss any alternative safe ground sites or housing
8 options available to unhoused individuals. Although the City indicates the City Council
9 authorized the City Manager to create new safe ground sites on August 1, 2023, it is unclear when
10 those sites will be available and whether they will offer more protection from the heat than
11 existing encampments. (ECF No. 45 at 6.)
12 For the foregoing reasons, the Court finds a likelihood of success on the merits.

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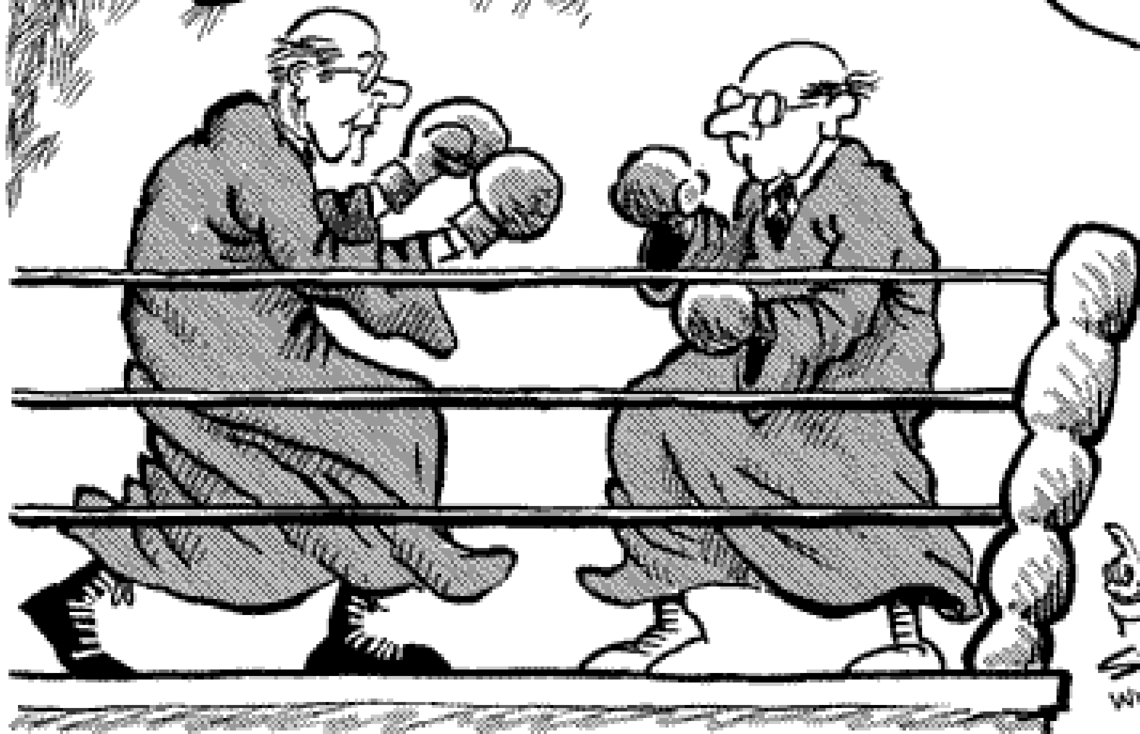
Article 1

ACTIVIST JUDGES

Fuller, Jake


THE HONORABLE JUSTICE
VS.
THE JUDICIAL ACTIVIST
HOW CAN YOU TELL WHICH ONE IS WHICH ?
DEPENDS ON WHICH ONE YOU AGREE WITH.
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