

4-1-2017

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Recommended Citation

76 Md. L. Rev. 47 (2017)

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Response

RESPONSE TO *THE INFLUENCE OF EXILE*: THREE STORIES

BILL QUIGLEY*

When I read Professor Sara Rankin's article, *The Influence of Exile*,¹ I was reminded of three recent stories of how law, government, and business worked together to try to exile the homeless in our community. Though all parties continuously profess to be concerned only with the well-being of homeless people themselves, the laws transparently marginalize them. Though the following three stories about the impact of these laws are local to New Orleans, Louisiana, I am absolutely sure there are similar stories of similar happenings in most communities across the nation.

Professor Rankin's article examines the very big picture into which the following three stories fit. Her article identifies and critiques the many ways law is used to exclude visibly poor and homeless people from public places and public spaces. It proposes a transformative reconceptualization of who deserves to be in public spaces. And it outlines ways to reintegrate homeless people into public spaces, thus prompting the law and society to act in ways more consistent with democratic principles. *The Influence of Exile* examines the way our laws push aside, marginalize, and control poor, especially homeless, people. The homeless of New Orleans would absolutely understand these themes as they are applied to them.

I. SUPER BOWL STORY

Whenever New Orleans hosts a Super Bowl, or Sugar Bowl, or some other high profile event, the homeless people in our community are gathered up and pushed out of sight through concerted official actions.² This is not an

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1. Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4 (2016).

2. Janet McConnaughey, *New Orleans Clears Out Homeless Camp of 160 People*, A.P. (Aug. 14, 2014, 7:40 PM), <http://pro32.ap.org/article/new-orleans-clears-out-homeless-camp-160-people>.

unusual urban experience.³ It is familiar to homeless advocates and legal services attorneys across our country. Most offensively, these official actions to exile the homeless are often accompanied by patently false and patronizing statements that government is pushing homeless people out for health or safety reasons.⁴ The government actions are certainly not in bad faith, they claim, because government is acting against the homeless “for their own good.” This sort of state action, however, illustrates how authorities use the law to make people invisible when their existence does not fit the public need for a narrative that emphasizes happy times and celebrations, a narrative often created only for the enjoyment of affluent tourists and big corporations.

Rankin begins her article with a discussion of the idea of social distancing.⁵ Social distancing looks at who is in the group with the power, and who is out. Groups manifest this in terms of who deserves respect and compassion and even in terms of who is entitled to live in physical proximity. Who is one of us, and who is an outsider? Examples of social distancing include private schools, segregated neighborhoods, gated communities, private clubs, private resorts, and the like.

Those who are identified as the “other” or the “stranger” are not only pushed aside but are also feared. The stranger is often not even perceived as fully human. This bias and social distancing may be implicit or explicit, but it is totally real. Thus, in order for the “good” to be protected from them, the “bad” must be marginalized, kept away, and controlled. In addition to making people uncomfortable and fearful, homeless people are usually viewed by society as responsible for their own problems. Thus, they can be blamed for their own problems. Once people can be blamed for their own problems, society has an excuse to withdraw support because what can society do about individual failings? Once society withdraws support and blames people for their own problems, it is easier to withdraw the legal protections that society would give to others who are “accepted.” For example, do cities push out young office workers who regularly eat or read in city parks? No. But cities do push out homeless people who congregate in parks and public spaces even though they are entitled to the same constitutional protections.

Whereas public spaces should be the foundation of democratic principles of association and freedom, they are limited by those with power.

3. Julia Carrie Wong, *Super Bowl Protests Flare Up Over Plight of San Francisco’s Homeless Residents*, GUARDIAN (Feb. 4, 2016, 10:00 AM), <https://www.theguardian.com/us-news/2016/feb/04/super-bowl-san-francisco-homeless-residents>.

4. NAT’L COAL. FOR THE HOMELESS, SWEPT AWAY: REPORTING ON THE ENCAMPMENT CLOSURE CRISIS (2016), <http://nationalhomeless.org/wp-content/uploads/2016/08/Swept-Away-2016.pdf>.

5. Rankin, *supra* note 1, at 8–24.

Who is excluded? The powerless and the stranger and the other are discouraged from staying around. Homeless people most of all. Once criminalized, society justifies its efforts to push the homeless out of public spaces.

II. NO SHELTER IN MY BACKYARD STORY

The Mayor of New Orleans recently proposed construction of a 100-bed shelter for the homeless, partially paid for by downtown business interests who want to move homeless people out of the central business district. The new homeless shelter is planned to be located in a predominately African-American neighborhood, several miles from downtown and close to two public schools, which has prompted opposition from the people in that neighborhood.⁶ All parties, the Mayor, the business interests, and neighborhood opponents pledge they are not against the homeless, but that another place would be better for them.

The “Not in My Backyard” placement of the homeless shelter story explains how powerful business interests who wish to “invisibilize” the downtrodden will leverage resources to get government to move the homeless to a less desirable location without any regard to the problems of the location they are being moved to. And, because of the strong negative stigma against homeless people and the visibly poor, that new neighborhood will in turn use its resources to try to move the site of the shelter to yet another neighborhood.

Poor people in general are stigmatized, socially isolated, and categorized as “other” or “stranger.” Rankin’s article highlights social science research which finds homeless people, of whom there are over half a million or so on any given night,⁷ are seen as the worst of the poor and are viewed with disgust, fear, and rejection at higher rates than almost any other group.⁸ One consequence of this view of the homeless is the increasing privatization of public space combined with the use of private security employed by major business spaces, which severely limits the places where homeless people can be. Rankin reviews and finds wanting theories of progressive property rights and First Amendment law as vehicles to protect the rights of homeless people to enjoy public spaces.⁹

6. Jessica Williams, ‘Low-Barrier’ Homeless Shelter in New Orleans Facing Early Opposition for One Key Reason, NEW ORLEANS ADVOC. (Oct. 3, 2016, 1:14 PM), http://www.theadvocate.com/new_orleans/news/politics/article_30a4b55a-8995-11e6-ae84-5b78cdc35f76.html.

7. *Snapshot of Homelessness*, NAT’L COAL. FOR THE HOMELESS, http://www.endhomelessness.org/pages/snapshot_of_homelessness (last visited Mar. 26, 2017).

8. Rankin, *supra* note 1, at 14–17.

9. *Id.* at 28–36.

Virtually no urban areas have enough public shelters to accommodate all the homeless in their community. The gap between rich and poor grows. Add in the dearth of affordable housing—in part because of gentrification—and one can see the plight of homeless people only increasing.

Given that homeless people by definition have to sleep, eat, drink, rest, and relieve themselves in public places, the criminalization of any of these daily activities essentially negates their existence in public spaces. While there is nothing new about government moving people considered undesirable out of sight or into other parts of town, criminalizing essential life activities is not consistent with the principles of democracy. The result is growing numbers of homeless people being pushed out of more and more public places under growing threat of arrest, jail, and fines. No one really argues that the criminal legal system is the right response to homeless people living in public places, but it is often one of the most common responses.

III. LICENSE TO BEG STORY

The police department in Slidell, Louisiana, a suburb of New Orleans, posted a picture on Facebook of hundreds of dollars in bills they reportedly found on a homeless man arrested for being intoxicated and urinating in public.¹⁰ The page was shared more than a thousand times and had more than a thousand likes. Using this picture as their ostensible motivation and proof that the homeless are not financially destitute, Slidell then enacted an ordinance requiring people who want to beg or panhandle to apply for a permit from the police before holding up signs asking for money on public property.¹¹ Again, they claim that no one is openly or officially against the homeless; this is being done only for “safety reasons.”

Even worse than withdrawing legal protections from the homeless, however, the law criminalizes them. Rankin notes the rise of city-wide bans on begging despite the many cases protecting this as a constitutional right. Other local governments are outlawing “aggressive panhandling,” which, since people are disgusted by and afraid of the needy homeless, effectively conflate constitutionally protected begging with criminality. Cities often cite public safety as a rationale for excluding beggars. But, if safety is in the eye of the beholder, all needy homeless people who make others uncomfortable and fearful are transformed into criminals.

10. Slidell Police Department, “Homeless” Man Found With Over \$800 Cash, FACEBOOK (May 22, 2015), <https://www.facebook.com/SlidellPD/photos/a.185393221506847.41278.109104582469045/877106039002225/?type=3&theater>.

11. Sara Pagonis, *No Permit, No Panhandling: Slidell Soon to Enforce Law That Could Result in Jail Time, Fines*, NEW ORLEANS ADVOC. (Oct. 26, 2016, 6:15 PM), http://www.theadvocate.com/new_orleans/news/communities/st_tammany/article_55d5f364-9bbc-11e6-9734-e391508ffa17.html.

Undesirable people are equated with criminal people. People who live on the street are constant subjects of “broken window” policing which aims to criminalize even the smallest infraction. Because society can blame homeless people for their situation, it feels justified to take punitive steps to isolate and exclude them.

IV. APPROPRIATE RESPONSES

Rankin’s article concludes with a call to identify and confront the pervasive influence of exile in our laws and to challenge the increasing criminalization of the poorest in our communities. Rankin urges us to follow the suggestion of Bryan Stevenson, who insists that the first thing we have to do to fight injustice is to get proximate to injustice; we must show up and see things with our own eyes. Seeing injustice up close, Stevenson argues, will force us to act.¹²

Rankin insists our society and our laws need to reject the criminalization of poor people in public spaces. Though poor people make others uncomfortable, democratic principles can and must lead to the denial of the urge to exile poor people from public spaces. The criminal justice system cannot be the response to the visibility of poor and homeless people.

Several recent legal developments reinforce Rankin’s suggestions. The Ninth Circuit Court of Appeals ruled in 2012, in *Lavan v. City of Los Angeles*,¹³ that it was wrong for the City of Los Angeles to sweep up and destroy the belongings of homeless people. The court concluded: “The Fourth and Fourteenth Amendments protect homeless persons from government seizure and summary destruction of their unabandoned, but momentarily unattended, personal property.”¹⁴ Similarly, in another recent federal case, the U.S. Department of Justice filed a statement of interest challenging Los Angeles’ action of prosecuting homeless people for sleeping in public, saying:

It should be uncontroversial that punishing conduct that is a universal and unavoidable consequence of being human violates the Eighth Amendment. . . . Sleeping is a life-sustaining activity—i.e., it must occur at some time in some place. If a person literally has nowhere else to go, then enforcement of the anti-camping

12. Rankin, *supra* note 1, at 53 (citing BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2015)).

13. 693 F.3d 1022 (9th Cir. 2012).

14. *Id.* at 1027.

ordinance against that person criminalizes her for being homeless.”¹⁵

In 2015, Peter Fels, a lawyer who volunteered at a legal clinic for the homeless, heard about how Clark County in Washington State was destroying the property of homeless people. Local government directed work crews to take and throw away any unattended property of homeless people, such as tents, clothes, camp stoves, personal photographs, utensils, toiletries and backpacks. The work crews took these away and destroyed them and, even further, took away and destroyed property even if the homeless owner was physically present. Fels, who followed the Brian Stevenson directive to get proximate to justice by volunteering at a homeless shelter, realized how devastating this was to the homeless people he met and decided to file a civil rights suit in 2015 on behalf of several homeless people whose property was taken and destroyed.¹⁶

Fels’s clients won the case in September 2016 when the U.S. District Court for the Western District of Washington, adopting the reasoning of the *Lavan* court, held, “[t]he Fourth and Fourteenth Amendments protect homeless persons from government seizure and summary destruction of their unabandoned, but momentarily unattended, personal property.”¹⁷ The court granted summary judgment on the Fourth and Fourteenth Amendment claims in favor of most of the homeless plaintiffs.¹⁸ Within two weeks, Clark County agreed to pay the six prevailing homeless litigants a total of \$85,000 and an additional \$165,000 in attorney fees to settle the case.¹⁹ The outcome of this case was similar to *Lavan*, which also involved the destruction of property of homeless people and ended up settling for \$820,000 in damages and attorney fees this summer.²⁰

15. Press Release, Dep’t of Justice Office of Public Affairs, Justice Department Files Brief to Address the Criminalization of Homelessness (Aug. 6, 2015), <https://www.justice.gov/opa/pr/justice-department-files-brief-address-criminalization-homelessness>.

16. Gene Johnson, *Judge: County Owes Homeless People Whose Belongings Were Seized*, SEATTLE TIMES (Sept. 16, 2016, 7:57 PM), <http://www.seattletimes.com/seattle-news/judge-county-owes-homeless-people-whose-belongings-were-seized/>.

17. *Ellis v. Clark Cty. Dep’t of Corrs.*, No. 15-5449 RJB, 2016 WL 4945286, at *9 (W.D. Wash. Sept. 16, 2016) (order on cross motions for summary judgment) (quoting *Lavan*, 693 F.3d at 1027).

18. *Id.* at *15.

19. Katie Gillespie, *Clark County Settles Homeless Case for \$250,000*, COLUMBIAN (Sept. 28, 2016, 8:57 PM), <http://www.columbian.com/news/2016/sep/28/clark-county-settles-homeless-case-for-250000/>.

20. Emily Alpert Reyes, *L.A. Agrees to Pay Nearly \$950,000 in Two Cases Involving the Homeless*, L.A. TIMES (June 14, 2016, 11:08 AM), <http://www.latimes.com/local/lanow/la-me-ln-attorney-fees-homeless-case-20160613-snap-story.html>.

CONCLUSION

If taken with the seriousness that it deserves, Rankin's article offers a conceptual way to prompt a review of policing practices which penalize the poor for their poverty. Perhaps the sweeps of homeless people from the public places of our communities when big events occur will cease because of a newfound awareness of their human dignity. Perhaps the pushing of homeless people from one neighborhood to another will cease. Perhaps the criminalization of their basic existence and the criminalization of begging will cease. Perhaps the damage awards granted against governments for violating the rights of the homeless will make governments think twice about treating the homeless as the "other." We can only hope that the combination of new scholarship and new and creative litigation will make these formerly invisible and exiled people visible and full persons under the law.