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Enforcement of Spokane Municipal Ordinances in the Wake of *Martin v. Boise*

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Executive Summary

Martin v. City of Boise is a controversial Ninth Circuit decision that has caused confusion regarding the actions municipalities can and cannot take to ensure urban cleanliness and livability. Housing advocates, among others, have distilled the case down to a single proposition: If a city lacks shelter beds for the entirety of its unhoused population, it cannot enforce any restrictions on camping or sleeping in public spaces. This inaccurate recap fails to capture the narrowness of the actual holding. In fact, *Martin* states that the Eighth Amendment's prohibition on cruel and unusual punishment barred the City of Boise from criminally prosecuting people for the mere act of sleeping outside on public property when those people have no alternative shelter available. Yet the opinion also emphasized that the Eighth Amendment can be used only sparingly to limit government action. Stating that its holding was narrow, the court specified that it "in no way" required governments to "allow anyone who wishes to sit, lie, or sleep on the streets...at any time and at any place."[1]

Federal district courts that have heard cases following *Martin* have provided important guidance to officials who must address unauthorized encampments. Judges have rejected the soundbite holding and found that cities can: clear encampments that pose health and safety threats; implement and enforce time and place restrictions on where and when individuals can camp on public property; and enforce quality of life laws that do not relate to sleeping in public, including regulation of litter, public urination and defecation, obstruction of roadways, possession and distribution of drugs, harassment, and violence. Of all challenges to municipal ordinances in the wake of *Martin*, only two have clearly succeeded. The cities involved there sought to exclude all homeless individuals from their city limits, or they took superficial measures to assert adherence to the Ninth Circuit's instructions.

Spokane has undertaken extensive efforts to ensure that its ordinances comply with constitutional requirements. These not only comport with the letter of the law, but also the overarching principle that cities cannot punish their residents due to a lack of means. Spokane's ordinances regulating camping and sleeping in public spaces, which are analogous to those struck down in *Martin*, each contain an exception that already prevents enforcement against homeless individuals who have no other option for shelter. In addition, Spokane has a policy of referring individuals in violation of the city's quality of life ordinances to its Community Court for referral to needed services rather than imposing criminal or even civil punishments.

Allowing the uncontrolled spread of encampments carries its own set of legal risks. These include exposure to lawsuits by businesses and residents stemming from economic harms, property damage, constitutional violations, and violation of the rights of individuals under the ADA and related protections for the disabled. Aside from legal risks, Spokane's non-enforcement results in the substantial interference with intended uses of public facilities when encampments create health and safety hazards to camp residents and other community members. The increased costs from responding to emergency situations, damage to infrastructure, trees, and landscaping, and the loss of desirability of the downtown core and corresponding loss of tax revenue can all be attributed to non-enforcement of quality of life ordinances that penalize conduct other than the protected act of merely sleeping outside.

Thoughtful enforcement of Spokane's existing ordinances and policies addresses community needs while running a relatively low risk of a successful *Martin*-based challenge.

[1] *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019) (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)).

1. Summary of *Martin v. City of Boise* and Its Reduction to a Soundbite

In *Martin*, six plaintiffs brought suit against the City of Boise to prevent enforcement of two misdemeanor ordinances found in the Boise City Code. All plaintiffs were homeless individuals[2] who had been convicted under the city's camping ordinance for using "streets, sidewalks, parks, or public places" for camping, or for violation of the city's disorderly conduct ordinance for "[o]ccupying, lodging, or sleeping" in any building or public place without permission.[3] At the time, Boise's homeless population exceeded the number of shelter beds available in the city. At least one plaintiff testified that he was cited for violating the camping ordinance after he had been excluded from Boise's largest shelter for reaching the maximum stay. Another plaintiff was cited for sleeping with a blanket when she had not engaged in other activities of camping such as setting up a tent, cooking, or storing personal items. Given the lack of available shelter space, plaintiffs argued that they sometimes had no choice but to sleep in public spaces, and that the city code criminalized their status as homeless individuals.

After plaintiffs filed their complaint, Boise prohibited enforcement of either ordinance against any homeless person on any night when no shelter had an available space. At the time, Boise's three shelters could accommodate 446 people, compared to an estimated 867 homeless individuals living in the city. Two of three shelters had requirements that prevented at least some homeless individuals' access. For example, one shelter permitted stays of up to 17 consecutive days. At the end of that period, residents could either enroll in a religious program offered by the shelter's sponsor, or they could leave. There was effectively only one low-barrier shelter in Boise, with space for just over 100 people. That shelter reported that it was full on almost 40% of nights. The other two shelters never reported that they were full, though they may have denied entry for reasons other than capacity. Boise police continued to issue citations after the city adopted its policy of prohibiting enforcement unless shelter was available.

The Ninth Circuit held that, under these facts, the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no alternative shelter available. The opinion is "a narrow one."[4] Cities are not required to provide sufficient shelter for the homeless or to "allow anyone who wishes to sit, lie, or sleep on the streets...at any time and at any place."[5] The *Martin* opinion specifies that "[e]ven where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible."[6]

Martin has generated confusion throughout the states within the Ninth Circuit's jurisdiction—for good reason. First, the Ninth Circuit left many issues unresolved. The opinion does not contain a clear measure of "beds." While *Martin* rejected Boise's protocol under which the shelters had the responsibility to report to the city when they were full, the Ninth Circuit did not endorse a method for a city to determine whether shelters were at capacity. The opinion also raises but does not resolve

[2] Various terms are used to describe those who involuntarily reside or sleep outside of permanent shelter—e.g., *houseless*, *unsheltered*, and *unhoused*. This memorandum uses the term *homeless*, which follows the Ninth Circuit's apparent convention. *See*, *e.g.*, *Martin*, 920 F.3d at 604 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)) (referring to "homeless individuals").
[3] *Id.* at 603–04.
[4] *Id.* at 617.
[5] *Id.* (quoting *Jones*, 444 F.3d at 1138).
[6] *Id.* at 617 n.8 (citing *Jones*, 444 F.3d at 1123).

at what point shelters run by religious organizations are so coercive that a city cannot count their beds as available.

Second, the press has disseminated an oversimplified reinterpretation of *Martin*. For example, after Portland Mayor Ted Wheeler announced his plan to issue an emergency order barring encampments along designated roadways, opponents called the move unconstitutional. In a public response letter to Wheeler, a "coalition of progressive advocates" wrote, "City officials proposing this emergency declaration are fully aware of the 9th Circuit Court ruling in *Martin v. Boise* that unless there is enough shelter space for the homeless population of Portland, we cannot prohibit them from camping outdoors on public property."[7] And an article in *The Spokesman-Review* recently summarized the opinion in a similar manner: "Without available shelter space, the city cannot legally enforce its laws against camping and sitting or lying on downtown sidewalks."[8] Although the Ninth Circuit has not issued so sweeping an opinion, this messaging has sowed confusion among the public and government officials.

Unsure of what they can and cannot do to ensure the cleanliness of the streets and safety of their residents, many western cities have scaled back enforcement of quality-of-life ordinances. Encampments have proliferated. Spokane in particular has seen a sharp increase in unauthorized camping on public rights-of-way in and around the downtown core. Subsequent interpretation of *Martin* provides important guidance to municipal officials who desire to care for indigent populations while maintaining a vibrant city center.

2. Review of Subsequent Cases

Federal district court opinions demonstrate that municipalities can enforce ordinances that prohibit camping in specified public areas, evict campers and remove their personal belongings from public property with notice and due process, and can possibly ban tents and other temporary structures so long as people are allowed to use bedding when sleeping in public areas. Even when the homeless population outstrips available shelter beds, these courts have been concerned primarily with whether enforcement actions by a city demonstrate a reasonable balance of community needs for clean public spaces and the needs of individuals who have no housing options.

To date, only two district courts within the Ninth Circuit have followed *Martin*'s logic to find a violation of the Eighth Amendment. In those cases, *Blake v. City of Grants Pass* and *Warren v. City of Chico*, plaintiffs challenged comprehensive prohibitions against sleeping on public property. Challenges to targeted sweeps of encampments, evictions from long-occupied areas, and prohibitions against unauthorized camping or erection of temporary structures in designated public areas have failed. District court opinions rejecting these claims for relief regularly repeat *Martin*'s assertion that its "holding is a narrow one."[9]

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[7] Sophie Peel, *Housing and Transportation Advocates Rebuke Mayor Ted Wheeler for Upcoming Ban on Camping Along Dangerous Roadways*, WILLAMETTE WK. (Feb. 4, 2022), https://www.wweek.com/news/city/2022/02/04/housing-and-transportation-advocates-rebuke-mayor-ted-wheeler-for-upcoming-ban-on-camping-along-dangerous-roadways/.
[8] Adam Shanks, *Fences Erected Under Browne Street Viaduct in Effort to Deter Camping*, SPOKESMAN-REV. (Feb. 9, 2022), https://www.spokesman.com/stories/2022/feb/08/fences-erected-under-browne-street-viaduct-in-effo/.
[9] *Martin*, 920 F.3d at 617.

a. Successful Challenges to Enforcement of Municipal Ordinances

***Blake v. City of Grants Pass* (D. Or. 2020)**[10]

Blake is the most robust example of a federal district court using *Martin* to strike down city ordinances that criminalize homelessness itself. In *Blake*, importantly, Grants Pass city leaders implemented a plan to oust homeless individuals from their city altogether. The only shelter available in the city was operated by a religious organization with strict rules, work requirements, and mandatory attendance at chapel twice a day. The challenged city ordinances included an anti-sleeping ordinance ($75 fine), an anti-camping ordinance ($295 fine), a 30-day park exclusion ordinance (to be issued after two citations in the park), and criminal trespass laws (for violating park exclusion), all as applied to homeless people who had no other shelter available.

The court found that together, the ordinances and the city's policy goals of excluding homeless people from the city violated the Eighth Amendment ban on cruel and unusual punishment under *Martin*. The court noted that the anti-sleeping and anti-camping ordinances defined the prohibited conduct so comprehensively that even a person trying to sleep on a cardboard box could be in violation of the laws ("campsite" defined as any place where bedding, sleeping bag, or other material used for bedding is placed).[11] The court also analyzed the severity of the fines—which increased when unpaid—while evaluating whether the city was in effect criminalizing homelessness. It found that if the punishment is similar to criminal prosecution and has an identical result, then labeling enforcement a civil violation does not change the analysis. The city's increase in ticketing (24 tickets in 2012 to 228 in 2014), and the way it used civil violations to later prosecute homeless individuals for trespassing back to the same area, resulted in punishment for homelessness.

The *Blake* plaintiffs also argued that their Fourteenth Amendment substantive due process rights to "life, liberty, or property" included a protected liberty interest in being present in the public spaces of Grants Pass.[12] This attempted expansion of *Martin* would have made it unconstitutional to prevent camping in public spaces even when shelter is available. The district court rejected this argument, unconvinced that people have "a liberty interest to sleep or camp in a public place," and stated that even though the city's enforcement of its ordinance scheme was unconstitutional, that did not mean that city officials violated plaintiffs' fundamental rights under the Fourteenth Amendment.[13]

Like *Martin*, the *Blake* decision reassured Grants Pass that it need not "allow homeless camps to be set up at all times in public parks."[14] It reiterated *Martin*'s caveats that the city is not required to provide adequate shelter, nor tolerate camping by those who have access to adequate shelter but choose not to go there. A city need not permit "anyone who wishes to sit, lie, or sleep on the street at any time and at any place."[15] The court stated that Grants Pass may implement time and place restrictions to establish when homeless individuals may use their belongings to keep warm and dry, and when they must pack up their belongings. The court also endorsed passage of a more specific anti-camping ordinance, for example, one which bans tents in public parks but allows bedding sufficient to keep a person warm and dry while they sleep. Finally, the court pointed out that the city can still enforce its many laws restricting litter, public urination and defecation, obstruction of

[10] No. 1:18-cv-01823-CL, 2020 WL 4209227 (D. Or. July 22, 2020).
[11] *Blake*, 2020 WL 4209227, at *6.
[12] *Id.* at *14.
[13] *Id.* at *15.
[14] *Id.*
[15] *Id.* (citing *Martin*, 920 F.3d at 617).

roadways, possession and distribution of drugs, harassment, and violence. That "large toolbox for regulating public space" was unchanged by *Martin*.[16]

In deploying that toolbox, the *Blake* opinion noted that with respect to clearing campgrounds, then-current CDC guidance advised cities: "Unless individual housing units are available, do not clear encampments during community spread of COVID-19."[17] The opinion directed the city to take a less punitive approach than criminal enforcement to the crisis of homelessness by providing more services and interventions that avoid a cycle of citation, fines, warrants, incarceration, and recidivism, all of which exacerbate the circumstances preventing unhoused people from transitioning off the streets. Suggesting alternative models for addressing the crisis, the court demonstrated a low tolerance for enforcement actions against homeless individuals in a city where services were not also made available. In other words, *Blake* endorses the enforcement of quality of life laws only in a city where a real effort is underway to provide needed services to the homeless individuals subjected to that enforcement.

***Warren v. City of Chico* (E.D. Cal. 2021)[18]**

Plaintiffs challenged Chico's criminal ordinances declaring camping on any public property to be unlawful. No matter where an individual goes in the city, criminal penalties for "living outdoors" follow.[19] The court noted that the Ninth Circuit held in *Martin* that this type of ordinance is unenforceable unless there is enough shelter practically available for all unhoused individuals. Plaintiffs estimated that only 120 shelter beds were available for a homeless population of 500. In response, the city created a temporary shelter facility available at its municipal airport to accommodate each of these individuals and asked the court to allow it to enforce the challenged ordinances given the availability of "shelter."[20]

The court found the city's designated shelter, "an asphalt tarmac with no roof and no walls, no water and no electricity"—to be inadequate.[21] Although *Martin* did not define adequate shelter, it did describe shelter as a place to sleep "indoors."[22] The court enjoined the city from arresting or imposing criminal penalties on homeless individuals who violate those city ordinances that prohibit resting on all public property. The court also noted that by ordinance the temporary shelters were included in "camp facilities" that were prohibited on public property.[23] In other words, without a codified exception, the tarmac shelter itself remained illegal. Similar to *Blake v. Grants Pass*, the blanket prohibition on camping on public property without sufficient indoor shelter was unconstitutional under *Martin*.

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[16] *Id.*
[17] *Id.* In Spokane, the city has scaled back its mitigation of encampment impacts due to the pandemic. Specifically, the city has cited a lack of prison labor previously available to assist with removing litter from abandoned campsites, along with concerns over health risks to staff when clearing occupied sites. *See FAQ: Unauthorized Camping on Public Property in the City of Spokane*, CITY OF SPOKANE (Mar. 2021), https://static.spokanecity.org/documents/ neighborhoods/codeenforcement/illegal-camping-faq-2021-03-10.pdf. With vaccines widely available, these specific obstacles to enforcement should dissipate.
[18] No. 2:21-CV-00640-MCE-DMC, 2021 WL 2894648 (E.D. Cal. July 8, 2021).
[19] *Id.* at *2.
[20] *Id.* at *3.
[21] *Id.* at *4.
[22] *Id.* at *3.
[23] *Id.* at *3 n.3.

b. Unsuccessful Challenges to Enforcement of Municipal Ordinances

***Miralle v. City of Oakland* (N.D. Cal. 2018)[24]**

Immediately after *Martin* came down, plaintiffs in *Miralle* asked the court to enjoin removal of an encampment that they had established on a city-owned parcel for "sober, unsheltered women and their families."[25] The city had posted a notice that it would "clear and close" the site in three days because plaintiffs were trespassing.[26] The court initially granted plaintiffs an emergency restraining order so that it could hear arguments on whether the city's plan to clear the encampment would violate plaintiffs' Eighth Amendment rights under *Martin*. Because plaintiffs were not faced with what *Martin* prohibited, "punishment for acts inherent to their unhoused status that they cannot control," the court denied plaintiffs' request for an injunction, ruling that they had not shown a likelihood of success in their Eighth Amendment claim.[27]

The court pointed to the narrowness of *Martin*'s holding, and to the city's plan to close any encampment in accordance with its standard operating procedure. Those procedures included a 72-hour notice requirement, storage of personal property that is not unsafe or hazardous (e.g., food, soiled items, personal hygiene items) for 90 days with information for retrieval given, an offer of shelter beds and resources to displaced individuals, and offers of assistance with moving belongings. In this particular case, the city also offered a temporary indoor bed space for each resident of the encampment to be cleared. Despite plaintiffs' declarations that the city had not followed these procedures in the past and had destroyed their property on the spot, the court declined to stop the encampment clearing. The court refused to force the city to allow plaintiffs to remain at their chosen site on city-owned land, instead allowing the city to decide "how to best maintain public health and safety."[28]

***Aitken v. City of Aberdeen* (W.D. Wash. 2019)[29]**

In *Aitken*, the city of Aberdeen had purchased a strip of land between a train yard and the Chehalis River where much of the city's homeless population had resided for several years. City ordinances were passed evicting all persons who were residing on the newly acquired land and barred its use by the general public. Plaintiffs, a group of homeless individuals who faced displacement sought a temporary restraining order, arguing that four of Aberdeen's ordinances worked together to make homelessness illegal, in violation of the Eighth Amendment under *Martin*.

The first ordinance authorized the eviction of the riverside camp and prohibited further public access to the area. The court initially stayed the eviction so plaintiffs and the city could determine where within the city limits campers would go. The parties came to an agreement allowing displaced individuals to camp on the portion of sidewalks outside the four-foot-wide public access route, required under the Americans with Disabilities Act, in downtown Aberdeen. The location provided ready access to social services.

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[24] No. 18-cv-06823-HSG, 2018 WL 6199929 (N.D. Cal. Nov. 28, 2018). The Ninth Circuit issued the original *Martin* opinion on September 4, 2018, and then filed an amended and superseding opinion on April 1, 2019, following denial of the City of Boise's motion for rehearing.
[25] *Id.* at *1.
[26] *Id.*
[27] *Id.* at *2.
[28] *Id.* at *4.
[29] 393 F. Supp. 3d 1075 (W.D. Wash. 2019).

The court ruled that *Martin* does not prevent cities from evicting homeless individuals from particular public places. Removal of the riverside camp was allowed to proceed.

The other legal challenges targeted an anti-camping ordinance and a sit-lie ordinance that imposed civil liability, and a sidewalk law that imposed criminal liability for obstructing sidewalks. The court stayed enforcement of these laws until after the riverside camp residents relocated to the new area and the court would be able to evaluate how those ordinances were being enforced against them. The decision noted that among the arguments the court needed to consider was whether civil penalties for the anti-camping ordinance could violate *Martin*. Roughly four months later, the parties agreed to dismiss the action with prejudice, leaving the court's civil-penalty question unanswered.[30]

***Rose v City of Reno* (D. Nev. 2020)[31]**

In *Rose*, plaintiff claimed that he was denied access to a series of casinos because of his disabilities and chronic homelessness. Following incidents at some of those casinos, he had been prosecuted for trespassing. Among other claims, plaintiff asserted violation of his Eighth Amendment rights on the basis that his prosecution had "criminalized his status of being chronically homeless."[32] The court rejected the argument, finding that *Martin* "would not extend to a charge of trespass to a person on *private property*, even if it is a place of public accommodation under the ADA."[33] The court dismissed the claim with prejudice.[34]

***Carlos-Kahalekomo v. County of Kauai* (D. Haw. 2020)[35]**

In *Carlos-Kahalekomo*, plaintiffs sued the county after they were cited at a county park for violating ordinances prohibiting camping without a permit, erecting an unauthorized structure, and abandoning a vehicle. Plaintiffs were homeless. They contended that because no shelter space was available to them, the citations constituted a violation of the Eighth Amendment under *Martin*. The court dismissed plaintiffs' complaint for failure to state a claim.

The opinion emphasizes *Martin*'s avowed narrowness and language to the effect that government regulation of "sitting, lying, or sleeping outside at particular times or in particular locations" does not constitute a per se violation of the Eighth Amendment.[36] Approving citations to other district court cases interpreting *Martin* appear in *Carlos-Kahalekomo*. This includes the *Aitken* decision permitting the removal of encampments from specified areas.

The court's analysis notes that, "[e]ven assuming [the county] lacks adequate shelter space, *Martin* does not implicate the [code] sections at issue here."[37] Despite similarity to Boise's ordinances,

[30] Stip. & Agreed Order of Dismissal, *Aitken v. City of Aberdeen*, No. 3:19-cv-05322 (Nov. 1, 2019), ECF No. 73.
[31] No. 3:19-cv-00166-RCJ-WGC, 2020 WL 2563283 (D. Nev. Apr. 4, 2020).
[32] *Id.* at *4.
[33] *Id.* (emphasis in original).
[34] *Rose v. City of Reno*, No. 3:19-CV-00166-RCJ-WGC, 2020 WL 2566819, at *1 (D. Nev. May 20, 2020) (adopting and accepting report and recommendation of magistrate judge).
[35] No. 20-00320 JMS-WRP, 2020 WL 4455101 (D. Haw. Aug. 3, 2020).
[36] *Id.* at *3 (quoting *Martin*, 920 F. 3d at 617 n.8).
[37] *Id.* at *3.

"[n]one of the [Kauai] County Codes criminalizes the simple act of sleeping outside, or someone's status as homeless, as necessary to state an Eighth Amendment claim under *Martin*."[38]

***Yeager v. City of Seattle* (W.D. Wash. 2020)[39]**

Plaintiff in *Yeager* was one of an estimated 50 people who occupied a protest camp in a Seattle park. The city had given campers two days' notice to remove their personal belongings before police would sweep the camp. (Allegedly, police had seized and destroyed personal property during prior sweeps of the same encampment.) The motion for temporary restraining order claimed that the impending sweep would violate the First Amendment (freedom of expression), Fourth Amendment (personal property seizure and destruction), Eighth Amendment (criminalizing survival under *Martin*), and Fourteenth Amendment (due process). The court denied the requested relief.

Although no criminal statute was at issue, plaintiff requested that the court consider police sweeps to be "criminaliz[ing] survival under a government that does not provide sufficient resources to allow survival."[40] The court declined to extend Eighth Amendment protection to the enforcement of non-criminal statutes, reasoning that *Martin*'s holding was narrow.

The court rejected the remaining claims because plaintiff could not show how the city's policies caused a constitutional violation. For the sweep at hand, notice was given and those belongings left behind were to be held by the city for 70 days at no charge. Because plaintiff claimed that officers violated their rights when they did not follow city policies, the city's policy could not be the reason for the violation.

***Gomes v. County of Kauai* (D. Haw. 2020)[41]**

Plaintiff's initial lawsuit had challenged Kauai's county park ordinances requiring a permit to camp and prohibiting structures other than prefabricated quick tents. After the district court dismissed that lawsuit for failure to state a claim, plaintiff amended his complaint to re-assert a claim under *Martin*, this time focusing on the lack of shelter beds available in Kauai and the long record of criminal citations that Plaintiff had been issued for camping on "public property."[42]

The court dismissed this second complaint for failure to state a claim. Under *Martin*, the court explained, the city of Boise had criminalized sleeping on public property anywhere in that city. The Kauai ordinances under which plaintiff had been cited only restricted use of public parks, not all public property. Thus, Kauai's code did not criminalize "the simple act of sleeping outside" that *Martin* prohibited.[43] A complaint that alleges only that a plaintiff is barred from sleeping in one particular public park did not amount to criminalizing homelessness.

The district court reiterated the narrowness of *Martin*'s holding in stating that nothing in *Martin* requires a city to provide housing or permit people to sit, lie, or sleep in any public place at any time they wish. Nor does *Martin* prevent a city from barring the obstruction of rights of way or the erection of certain structures on public property. The opinion cited to *Aitken* and other district court opinions

[38] *Id.*
[39] No. 2:20-cv-01813-RAJ, 2020 WL 7398748 (W.D. Wash. Dec. 17, 2020).
[40] *Id.* at *5.
[41] No. 20-00189 JMS-WRP, 2020 WL 6937435 (D. Haw. Nov. 24, 2020).
[42] *Id.* at *1–3.
[43] *Id.* at *3.

to demonstrate that district courts have declined to expand Eighth Amendment protections. *Martin* does not establish a constitutional right to occupy any given public property indefinitely.

Finally, the court noted that plaintiff also failed to allege that Kauai had a "policy or custom" that was unconstitutional, as required for this type of federal constitutional claim against a municipality.[44]

***Young v. City of Los Angeles* (C.D. Cal. 2020)[45]**

Pro se plaintiff here alleged that the city violated his First Amendment right to assemble and his Eighth Amendment rights to be free from cruel and unusual punishment by removing his encampments from public property and destroying his personal property during cleanups. Additionally, the court liberally construed plaintiff's claims, allowing him to include unstated Fourth and Fourteenth Amendment claims. Before assessing plaintiff's claims, the court noted that holding a city liable for such claims required a showing that the constitutional violation flowed from a custom or policy of the city, or from the city's deliberate indifference to plaintiff's constitutional rights, such as through inadequate training of its officers.

The court dismissed the First Amendment claim because plaintiff did not allege what protected expressive activity was at issue. The court referred to *Aitken* for its holding. There plaintiffs had not identified any case where "freedom of association was applied to enjoin an ordinance affecting the homeless,"[46] implying that this novel theory exceeded the reach of *Martin*.

The court then dismissed plaintiff's Eighth Amendment claim. Like *Gomes*, the opinion reiterates the narrowness of *Martin*'s holding and declines to extend it to include allowing people to sit, lie, or sleep at any time and in any public place. Referencing plaintiff's contention that police officers wrote false tickets or reports relating to plaintiff's loitering or failure to take down tents, the court ruled that such allegations were not sufficient to state a claim, because "an ordinance that prohibits tenting or loitering at particular times or particular locations may be permissible."[47] The court also rejected plaintiff's claim that forcing him to move his encampment violated his rights because the Eighth Amendment only bars the city from criminally prosecuting people for sleeping on public streets when they have no place to go. *Martin* did not force the city to permit plaintiff to stay at one encampment for three years, because it did not limit a city's ability "to evict homeless individuals from particular public places."[48]

The court also dismissed plaintiff's Fourth Amendment claim for lack of details that could show the seizure of personal property was unreasonable. The court distinguished between a situation where property is seized without warning and destroyed on the spot, versus a situation where notice is given and items are stored for a period of time. Because the complaint did not explain with some precision when and where plaintiff's property was seized, and whether he could retrieve it, that claim failed. For similar reasons, the court dismissed the Fourteenth Amendment claim. The complaint showed that the city did provide notice about encampment cleanups with information about how to retrieve seized items. In addition, plaintiff did not show how the city's cleanup of an area put his life,

[44] *Id.* at *4.
[45] No. CV 20-00709 JFW (RAO), 2020 WL 616363 (C.D. Cal. Feb. 10, 2020).
[46] *Id.* at *4 (quoting *Aitken*, 393 F. Supp. 3d at 1081–82).
[47] *Id.* at *5 (citing *Martin*, 920 F.3d at 617 n.8).
[48] *Id.* (citing *Aitken*, 393 F. Supp. 3d at 1082).

liberty, or property at greater risk than it would have been at without the cleanups, nor do individuals have a substantive right to government aid under the Fourteenth Amendment.

***O'Callaghan v. City of Portland* (D. Or. 2021)[49]**

In *O'Callaghan*, plaintiff challenged Portland's alleged practice of evicting him from campsites and destroying his belongings. Plaintiff did not claim he had ever been arrested, charged, or convicted under Portland's anti-camping ordinance. The court cited *Yeager* in ruling that *Martin* and the Eighth Amendment had no relevance when a person was not criminally arrested or punished. The court also followed *Yeager*'s logic in rejecting plaintiff's claims under the Fourth and Fourteenth Amendments with respect to the alleged destruction of plaintiff's personal property during previous sweeps.

***Potter v. City of Lacey* (W.D. Wash. 2021)[50]**

The question in *Potter* was whether a $35 fine and possible impoundment for a parking violation was constitutional. Plaintiff lived in a vehicle and argued that the city's ordinance prohibiting recreational vehicle parking on city streets for more than four hours violated his rights. The court disagreed, finding that because criminal punishment was not at issue, *Martin* did not apply.

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District courts that have considered *Martin*-based actions have emphasized the narrowness of the Ninth Circuit's holding. Municipalities can regulate their public spaces by excluding unauthorized shelters and encampments from designated areas, including rights-of-way. Where eviction or small fines are involved, courts have generally determined that no criminalization concerns arise—making *Martin* inapplicable. As demonstrated in *Blake* and *Warren*, blanket exclusion from all public spaces crosses the constitutional line. To date, these are the only two in-circuit examples of municipalities squarely losing legal challenges on Eighth Amendment grounds.

3. Spokane's Compliance with *Martin*

At the heart of any *Martin*-based challenge lies a set of municipal code provisions and how they are enforced. The Spokane Municipal Code includes prohibitions against camping on public property, blocking public rights-of-way, and residing in specified areas—all of which resemble ordinances throughout western cities.

Critically, Spokane has implemented several measures to ensure compliance with both the letter and spirit of *Martin*'s holding. The most direct of these safeguards is an express prohibition on enforcement of the unauthorized camping ordinance when insufficient shelter beds are available. Although this still allows for regulation of public spaces, including targeted sweeps of encampments that pose a threat to health and safety, Spokane has made a good-faith response to the Ninth Circuit's instruction that municipalities cannot criminalize homelessness. Instead, Spokane's ordinances and policies aim to lead homeless individuals to resources and assistance.

[49] No. 3:21-cv-812-AC, 2021 WL 2292344 (D. Or. June 4, 2021).
[50] No. 3:20-cv-05925-RJB, 2021 WL 915138 (W.D. Wash. Mar. 10, 2021).

a. Review of Relevant Sections of the Spokane Municipal Code

Spokane has several quality-of-life ordinances that may address unauthorized encampments on public property, notably under Title 10: Regulation of Activities and Title 12: Public Ways and Property:

SMC § 12.02.1010 (Unauthorized Camping, effective 2018):

A. No person may camp in or upon any public property including, but not limited to, conservation lands and natural areas abutting the Spokane River and its tributaries unless specifically authorized by declaration of the Mayor in emergency circumstances.
B. A violation of this section is a misdemeanor.
C. Unless otherwise subject to custodial arrest under RCW 10.31.100, individuals subject to enforcement under this section shall be cited and released rather than being booked into jail.
D. With the exception of those who do not meet the criteria for acceptance into community court, individuals subject to enforcement under this chapter shall be directed to community court by officer referral.

SMC § 12.02.1002 (Definitions, effective 2018):

A. "Camp" or "camping" shall mean residing on or using public property for living accommodation purposes, as exemplified by remaining for prolonged or repetitious periods of time not associated with ordinary use of such public property with one's personal possessions (including but not limited to clothing, sleeping bags, bedrolls, blankets, sheets, cots, tarpaulins, hammocks, luggage, backpacks, kitchen utensils, cookware, or similar material), sleeping or making preparations to sleep, storing personal belongings as above defined, regularly cooking or consuming meals. This ordinance will not be enforced if there is no available shelter space for the individual/s engaging in otherwise prohibited camping conduct.

SMC § 10.10.026 (Sidewalk Sit-Lie in Designated Zone, effective 2014):

A. Prohibition.
    1. No person may sit or lie down upon a public sidewalk, or upon a blanket, chair, stool, or any other object placed upon a public sidewalk, during the hours between six a.m. and midnight in the zone designated in this section.
    2. At all times it is unlawful to sit or lie on any drinking fountain, trash container, planter, bicycle rack, or any other sidewalk fixture not designed primarily for the purpose of sitting.
    3. At all times it is unlawful to sit or lie in any entrance to or exit from any building or parking lot, or on any loading dock.
B. Exceptions.

The prohibition in subsection (A) of this section does not apply to any person:

    1. sitting or lying down due to a medical emergency or due to a sensory, mental, or physical disability;
    9. who is homeless during a time frame when shelter space is unavailable.

C. No person shall be subject to enforcement under this section unless the person engages in conduct prohibited by this section within the entirety of the zone designated in this

section after having been notified by a law enforcement officer that the conduct violates this section and has been given a reasonable amount of time to comply or has refused to comply. If the individual fails to comply in a reasonable time or engages in prohibited conduct in another location within the designated zone, a law enforcement officer may than enforce this section.

D. The zone where such conduct is prohibited is established in the map set forth in Attachment A.
F. It is the intent of the city council that homeless individuals subject to enforcement under this section be directed to emergency shelters, community/drug/mental health court, or other interventional services.
G. A violation of SMC 10.10.026 is a misdemeanor.

SMC § 10.08.010 (Littering, effective 2007):

A. The term "litter" as used in this section means and includes refuse, rubbish, garbage, discarded items and all waste material of every kind and description. No person may place:
    1. throw, deposit or otherwise dispose of litter in any public place, public park or in the waters within the City limits, except in accordance with the regulations of the solid waste management department;
    2. or deposit litter on the private property of another without the property owner's permission;
    3. litter accumulated on private property, or burning or smoldering materials, or dead animals, in any receptacle provided by the City for litter disposal; or remove or disturb the contents of any such receptacle except as authorized by the City;
    4. or deposit any litter or any other thing into any garbage can, dumpster or other receptacle located on the property of another, except such containers or receptacles placed in an area open to the public and designated for deposit of litter by the public.
C. No owner or occupant of abutting property may allow the accumulation of litter on sidewalks or planting strips, whether or not such litter is deposited by such owner or occupant.
E. A violation of this section is a civil infraction.

SMC § 12.02.0208 (General Nuisance, effective 2007)

In addition to the conditions above described, the City expressly declares that creation or maintenance of conditions affecting directly or indirectly the safe or free use and enjoyment of public ways by the public to be a nuisance and violation of this chapter.

The above code provisions demonstrate Spokane's commitment to compliance with *Martin*. The Unauthorized Camping ordinance has an express exception when "there is no available shelter space for the individual/s engaging in otherwise prohibited camping conduct." SMC § 12.02.1002(A). This condition addresses *Martin*'s holding directly—it is not a crime to sleep outdoors in Spokane when no shelter is available.

b. Challenged Spokane Municipal Code Provisions and Policy Response

Despite Spokane's facial compliance with *Martin*, homeless individuals sued in 2019 after the city cleared an encampment and disposed of personal property left unattended by its residents. Plaintiffs

in *Ham v. City of Spokane* claimed that the enforcement of the Unauthorized Camping ordinance when there were insufficient shelter beds available violated their constitutional rights under *Martin.* Further, they claimed that their personal property was taken and destroyed despite the City's promises to store all items of obvious value. Unlike their counterparts in *Martin*, the *Ham* plaintiffs were not cited or arrested under the Unauthorized Camping ordinance—they instead advanced a theory that the mere threat of citation caused them harm. The parties settled before the court could assess the Eighth Amendment claim. That the *Ham* plaintiffs never received citations would likely have led to dismissal of that claim, in light of cases such as *Yeager*, *Potter*, and *O'Callaghan*.

Spokane's response indicated greater concern with the takings and due process claims arising from disposal of plaintiffs' personal property than with the *Martin*-based claim. In response to *Ham*, Spokane implemented an "Encampment Removal and Cleanup Policy" that required:

- written notice to campers 48 hours prior to removal of an encampment
- reposting written notice if no cleanup occurred within 5 business days of posting a written notice
- special assistance for campers with a disability or equivalent hindrance in vacating
- storage of unclaimed items for 60 days, so long as it is safe to collect them
- notice on how to retrieve unclaimed items
- information on available shelters

The policy also allows for expedited removal of encampments under some circumstances, for example, in areas clearly signed as entirely closed to the public, or where blocking doorways or sidewalks. However, even scrupulous adherence to this policy may not have prevented the *Ham* action if plaintiffs' personal property had been deemed unsafe to collect and store. *Martin* did not address a city's obligations when disposing of homeless individuals' personal items left unattended on public property.

c. Community Court as an Assistance-Based Alternative to Municipal Court

Spokane's policy when cleaning up camps is to send individuals ticketed for violations of quality-of-life ordinances to Spokane Municipal Community Court rather than regular municipal court. A 2019 study of the community court found that program participants had reduced rates of recidivism and convictions when compared to individuals prosecuted for the same conduct in regular court proceedings.[51] The community court program was established in 2013 and is designed to be non-punitive with a focus on addressing the underlying problems that correlate with participants' committing crimes. Individuals can be referred to community court by police officers after a violation but before (or instead of) citation, or they may be able to screen into community court after citation. Community court is also generally open to voluntary participants seeking services.

Participants in the community court program complete a risk evaluation that screens for unmet basic needs and refers the individual to on-site service providers. The extensive list of services offered includes assistance with obtaining basics like housing, food, clothing, health care, insurance, social security and disability payments, and identification cards. Participants may also be referred to providers of behavioral health, therapy, programs for veterans, education, and job training. Triaging

[51] ZACHARY K. HAMILTON ET AL., WASH. STATE INST. FOR CRIM. JUST., CITY OF SPOKANE MUNICIPAL COMMUNITY COURT: PROCESS AND OUTCOME EVALUATION (2019), https://static.spokanecity.org/documents/municipalcourt/therapeutic/smcc-evaluation-report-2019.pdf.

non-violent offenders to community court is one of many components demonstrating that Spokane's policies do not amount to criminal prosecution by another name.

4. Risk Factors Arising from Non-Enforcement of Local Ordinances

Enforcement of quality-of-life ordinances will always run at least a minimal risk of litigation. Yet non-enforcement imposes significant costs, such as the loss of intended uses of public parks; increased need to respond to uncontained fires, contaminated needles, and biohazardous waste; damage to critical infrastructure and nature areas; reduced urban livability and desirability; and loss of tax revenue. Moreover, officials who decline to regulate occupation of public spaces run the risk of claims brought by property owners, businesses, and individuals under a variety of theories ranging from unconstitutional takings to violations of the Americans with Disabilities Act. Cities that have declined to enforce quality-of-life ordinances in the wake of *Martin*, including San Francisco and Seattle, have faced legal action precisely because of their refusal to act.

Hastings College of the Law v. City and County of San Francisco **(N.D. Cal.)[52]**

In May 2020, plaintiffs in *Hastings* brought 14 constitutional claims against the city of San Francisco based on the dramatic decline of livability and safety in San Francisco's Tenderloin neighborhood. Plaintiffs were a law school, the manager of a hotel with low-income residents, an association of business owners, a restaurant owner, and residents of the neighborhood, including a plaintiff who relied on a wheelchair for mobility. Plaintiffs alleged specific damages based the degraded conditions of the sidewalks due to unsanitary encampments and rampant drug use. These losses included direct increases in safety and security costs on their properties, extra cleaning services, and physical damage like broken windows. The complaint also details losses that are more difficult to value, such as lost customers due to the condition of the sidewalks, students declining offers of admission due to safety concerns, and the risks of walking in the street to avoid the sidewalk. Notably, the *Hastings* plaintiffs sought only injunctive relief, not damages. This approach removed San Francisco's ability to invoke municipal immunity to avoid liability.

The relevant claims in *Hastings*[53] included:

- Violation of Due Process for denying residents liberty and use of their property;
- Violation of Equal Protection for enforcing the laws in select neighborhoods while ignoring the Tenderloin;
- State-Created Danger for creating or increasing risk to Plaintiffs of exposure to dangerous conditions;
- Uncompensated Taking for burdening Tenderloin properties so substantially by allowing the adjacent public property decline that a regulatory taking has occurred;
- Violation of Title II of the Americans with Disabilities Act for failing to maintain clear and accessible sidewalks and public rights-of-way for disabled people;
- Violation of the Rehabilitation Act for receiving federal funds while excluding disabled people from participating in city services, programs, or activities that require use of public rights-of-way; and

[52] Complaint, No. 4:20-cv-03033, 2020 WL 4607377 (N.D. Cal. May 4, 2020).
[53] Several other claims were brought under provisions of California state law, including public and private nuisance and corollary state-law disability and constitutional claims.

- Negligence for failing in its duty to maintain the public streets and sidewalks, with foreseeable damages to plaintiffs.

In June 2020, this lawsuit settled based in part on the city's promise to remove 300 tents (or 70% of encampments) from the Tenderloin neighborhood by July 20, 2020.[54] After a brief period of court supervision, the action was dismissed in October 2020.

***Hunters Capital LLC v. City of Seattle* (W.D. Wash.)[55]**

Also in 2020, the *Hunters* lawsuit was filed in the aftermath of the Capitol Hill Organized Protest (CHOP). The local business plaintiffs sought to certify a class comprised of those who suffered extensive economic and other damage as a result of the city's abandonment of the area occupied by protesters. Examples of the harm included a decline in business revenues, physical damage and vandalism to private property, shipping delays and cancellations, utilities interruptions, barricades and encampments physically blocking access to private property, a complete lack of police response to property crime, and threats and harassment of employees and others.

The claims included:

- Substantive Due Process violations;
- Procedural Due Process violations;
- Unlawful Taking; and
- Equal Protection violations.

The city tried to dismiss the lawsuit in its entirety, arguing that plaintiffs had failed to state any viable claims, and asking the court to deny class certification. These arguments did not persuade the court, which allowed plaintiffs to proceed on the first three claims, and allowed discovery to proceed to determine whether a class action could be certified. As of February 2022, this litigation is ongoing with plaintiffs' motion to certify the class currently pending before the district court.

5. Conclusion

Post-*Martin* opinions must inform responsible enforcement efforts. When assessing available shelter space, it is important to note that we have found no case in which a court determined that enough low-barrier shelter space was available for all homeless individuals in a particular municipality. Therefore, to the extent that a city decides not to enforce an ordinance based on shelter availability, that ordinance is not likely to ever be enforced while the homeless crisis continues. This makes clearing problem camps or prohibiting camping in a limited area a more realistic focus for cities in the near-term.

With a reasonably low risk of running afoul of *Martin*, Spokane can take steps to clear encampments that substantially interfere with downtown public spaces by ensuring that homeless individuals have an alternative place to sleep on public property. If an encampment has features that threaten public safety or obstruct passageways, or is the subject of repeated reports of criminal activity, the city may elect to clear the encampment and clean up the area pursuant to the Encampment Removal and

[54] Dean David L. Faigman, *Tenderloin Settlement Agreement: Updates and Progress*, UC HASTINGS COLL. L. (June 30, 2020), https://www.uchastings.edu/2020/06/30/tenderloin-settlement-agreement/.
[55] *Hunters Capital LLC v. City of Seattle*, 499 F. Supp. 3d 888 (W.D. Wash. 2020).

Cleanup Policy. If workers follow the City's policies, there is low risk to the City from a claim premised on *Martin*, given Spokane's well-crafted ordinances and policies.

To the extent that Spokane is wary of litigation, the *Hastings* and *Hunter* actions demonstrate that cities may run more risk from non-enforcement than from permissible, responsible enforcement of quality-of-life ordinances.