LAW AND POLICY OF ENCAMPMENT SWEEPS IN THE NINTH CIRCUIT: HOW WE GOT FROM *MARTIN V. CITY OF BOISE* TO *CITY OF GRANTS PASS V. JOHNSON*

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This Note analyzes how the law and policy of encampment sweeps in the Ninth Circuit changed from Martin v. City of Boise *through the initial months following the U.S. Supreme Court's decision in* City of Grants Pass v. Johnson*. It also offers a few brief suggestions for how both cities and advocates for the rights of unsheltered homeless individuals can move forward in a post-*Grants Pass *world.*

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INTRODUCTION

This Note analyzes how the law and policy of encampment sweeps changed after the Ninth Circuit Court of Appeals' decision in *Martin v. City of Boise*,[1] how these changes led to the Supreme Court's decision in *City of Grants Pass v. Johnson*,[2] and the initial policy reactions to *Grants Pass*. It argues that while *Martin* resulted in some protections to the rights of homeless residents of Ninth Circuit cities, it also incentivized cities to dodge the requirements of the opinion, resulting in an "endgame" that obviated some of the rights that *Martin* intended to protect. *Grants Pass* eliminated some of these incentives, but enforcement policy has not drastically changed since then. The Note then offers a few brief policy suggestions for both cities and advocates to alleviate the problems the *Martin* decision produced, and it charts cities' and advocates' ways forward in a post-*Grants Pass* world.

Part I of this Note compares the city ordinances at issue in *Martin* to those in other Ninth Circuit cities before and after *Martin*, and it summarizes the opinion's central Eighth Amendment holding. Then, Part II summarizes the doctrinal and policy reactions to *Martin*. Part III analyzes the Supreme Court's *Grants Pass* opinion and initial policy reactions to that decision. Finally, Parts IV and V give a few suggestions to cities and advocates.

I. BACKGROUND AND HOLDING OF *MARTIN*

The Boise anti-camping ordinances that prompted the litigation in *Martin* forbade using any public place as a place of lodging, dwelling, or residence for any length of time, or using any public or private place for occupancy, lodging, or sleeping without permission.[3] Two additional aspects of these ordinances are useful

1. 920 F.3d 584 (9th Cir. 2019).
2. 603 U.S. 520 (2024).
3. 920 F.3d at 603–04 ("The first [ordinance], Boise City Code § 9-10-02 (the 'Camping Ordinance'), makes it a misdemeanor to use 'any of the streets, sidewalks, parks, or public places as a camping place at any time.' The Camping Ordinance defines 'camping' as 'the use of public property as a temporary or permanent place of dwelling, lodging, or residence.' The second [ordinance], Boise City Code § 6-01-05 (the 'Disorderly Conduct

for understanding anti-camping ordinances in general: (1) the scope of the ordinances, meaning the time and area where the ordinances are enforced; and (2) whether a violation of the ordinance qualifies as a criminal or civil offense. For example, in Boise, the ordinances defined camping broadly and lacked restrictions on when or where the ordinances would apply.[4] Violation of the ordinances was a misdemeanor.[5]

Boise's anti-camping ordinances—criminal penalty, broad in scope—were not unusual compared to other cities in the Ninth Circuit at the time. For example, in 2021, before litigation invoking *Martin* against enforcement of anti-camping laws, Portland's ordinances punished violations of its anti-camping ordinances as misdemeanors.[6] The scope of Portland's ordinance was similarly broad, generally forbidding any camping unless the mayor specifically authorized so during a state of emergency.[7]

However, not every city in the Ninth Circuit shared the same scope of anti-camping ordinances or the same punishment. For example, in Aberdeen, a small Washington city that was also later involved in litigation invoking *Martin*, some violations of anti-camping ordinances were punished as misdemeanors, but others were punished as civil infractions.[8] Moreover, the camping ban was limited to certain areas in the city.[9]

In *Martin*, the Ninth Circuit Court of Appeals held that Boise's anti-camping ordinances violated the constitutional prohibition against cruel and unusual punishments contained in the Eighth Amendment and incorporated to the states.[10] The court explained that the Eighth Amendment "places substantive limits on what

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Ordinance'), bans '[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof.'" (internal citations omitted)).

4. *Id.* While Boise's camping ordinance applied only to public places, its disorderly conduct ordinance arguably covered all conduct conceived by the camping ordinance by forbidding "occupying, lodging, or sleeping" in any public or private place. *Id.* at 604.

5. *Id.* at 603.

6. *See* O'Callaghan v. City of Portland, No. 3:21-cv-812-AC, 2021 WL 2292344, at *4 (D. Or. June 4, 2021). Here, O'Callaghan was unsuccessful in arguing that Martin applied to his case. *See id.* (holding that despite plaintiff's campsite being swept over 25 times, a "credible risk of prosecution" must exist for a plaintiff to have standing to use the Eighth Amendment to challenge anti-camping laws, so the plaintiff had no standing to make a *Martin* challenge).

7. *Id.* In the opinion, Portland City Code 14A.50.020 is cited in its entirety; there are no considerations of time, place, or manner of restrictions. *See Chapter 14A.50 Conduct Prohibited on Public Property*, *14A.50.020 Camping Prohibited on Public Property and Public Rights of Way*, PORTLAND.GOV, https://web.archive.org/web/20210824184951/https://www.portland.gov/code/14/a50#toc—14a-50-020-camping-prohibited-on-public-property-and-public-rights-of-way- [https://perma.cc/93X9-VGLD] (last visited Mar. 12, 2025).

8. Aitken v. City of Aberdeen, 393 F. Supp. 3d 1075, 1079–80 (W.D. Wash. 2019) (citing ABERDEEN MUN. CODE § 12.46.050).

9. *Id.* (citing ABERDEEN MUN. CODE § 12.46.040).

10. *Martin*, 920 F.3d at 603.

the government can criminalize."[11] These substantive limits can include forbidding punishments for not only a status,[12] but also acts that are "unavoidable consequence[s] of one's status or being."[13] Because sitting, lying down, and sleeping are all "unavoidable consequences of being human," and unsheltered[14] homeless people must sit, lie down, and sleep in the streets,[15] criminalization of such acts violated the Eighth Amendment.[16] Applying this reasoning, the court found that Boise's statutes as applied were unconstitutional.[17] Because there was no shelter space practically available to the plaintiffs due to the nature of the existing shelters and the broad scope of the camping laws, the plaintiffs had no choice but to violate the anti-camping laws.[18] The court emphasized that its holding was narrow; cities

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11. *Id.* at 613 (quoting Ingraham v. Wright, 430 U.S. 651, 667 (1977)).

12. *Id.* at 615 (citing Robinson v. California, 370 U.S. 660, 666 (1962)) ("*Robinson*, the seminal case in this branch of Eighth Amendment jurisprudence, held a California statute that 'ma[de] the "status" of narcotic addiction a criminal offense' invalid under the Cruel and Unusual Punishments Clause.").

13. *Id.* at 615–16 (discussing Powell v. Texas, 392 U.S. 514, 567 (1968) and *Robinson*, 370 U.S. at 666). While *Robinson* stands for the principle that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change," *Powell*, 392 U.S. at 567 (Fortas, J., dissenting), immutability does not seem to be the determinative factor of *Martin*, which uses the phrase "unavoidable *consequence* of one's status or being." *Martin*, 920 F.3d at 616 (emphasis added) (citations omitted). Therefore, what matters is not the status of unsheltered homelessness, but how those who are unsheltered and homeless by definition must violate anti-camping ordinances.

14. In this Note, the term "unsheltered" describes a person who has no option to obtain shelter.

15. *See* Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 315 (1991) (explaining that while an anti-camping ordinance may impose no explicit prohibition on sleeping in public, property law prevents homeless people, who lack private property and therefore have no right to be anywhere to sleep in private, from sleeping anywhere at all).

16. *Martin*, 920 F.3d at 616–17 (citing Jones v. City of Los Angeles, 444 F.3d 1118, 1136–37 (9th Cir. 2006)).

17. *Id.* at 618 ("We conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter.").

18. *See id.* The plaintiffs in *Martin* had standing to invoke this Eighth Amendment challenge to the ordinances because they faced a credible risk of prosecution based on their behavior or status. *Id.* at 610. While Boise's city code forbade the city from enforcing the ordinances when shelters were full, in practice, Boise's shelters almost never reported themselves to be full, and limits on length of stay or the mandatory religious focus of some shelters prevented plaintiffs from staying at "available" shelters at least some of the time. *Id.* at 609–10. In *Martin*, the plaintiffs personally objected to the religious nature of at least one of the religious-sponsored shelters in the city, but there were facts that suggested additional factors related to the religious nature of some shelters excluded some who were seeking help from those shelters, such as some programs not accepting plaintiffs who had participated in programs run by other denominations. *Id.* This arguably runs afoul of the First Amendment's Establishment Clause. *Id.* at 610 ("A city cannot, via the threat of prosecution, coerce an individual to attend religion-based treatment programs consistently with the Establishment Clause of the First Amendment." (citing Inouye v. Kemna, 504 F.3d 705, 712–13 (9th Cir. 2007)). Outside of shelters, plaintiffs were subject to the Boise police department's regularly

would not be required to construct shelters or allow people to sleep everywhere.[19] In other words, *Martin* required cities to ensure that accessible shelter space existed[20] before they could enforce broad anti-camping laws, or they risked violating the Eighth Amendment.

II. REACTIONS TO *MARTIN*'S EIGHTH AMENDMENT HOLDING

The reactions to *Martin*'s Eighth Amendment holding can be categorized as doctrinal or policy oriented. Doctrinally, the opinion was criticized by judges, scholars, and policymakers.[21] However, the policy reaction to the opinion was a mixed bag—it brought some positives for cities and the rights of homeless individuals, but some significant negatives, like the emergence of massive sanctioned campsites.[22]

A. Doctrinal Reactions to Martin*'s Eighth Amendment Holding*

Doctrinally, judges criticized the holding of *Martin* on constitutional grounds as a misapplication of the Eighth Amendment[23] and the standing doctrine.[24]

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issued citations; in the first three months following changes to the Boise City Code that allowed for enforcement of anti-camping ordinances only when there was shelter space available, Boise police had issued 175 citations. *Id.* Whether the plaintiffs would be prosecuted constituted enough of an issue of material fact to defeat a motion for summary judgment. *Id.*

19. *Id.* at 617.

20. In practice, cities viewed *Martin* as imposing a counting requirement, or requiring cities to keep regular counts of their available shelter beds and unsheltered homeless residents, and to enforce anti-camping ordinances only when available shelter beds remain unused. *See, e.g.*, Brief of Amicus Curiae City of Los Angeles in Support of Petitioner at 2, City of Grants Pass v. Johnson, 603 U.S. 520 (No. 23-175) ("[I]s the City of Los Angeles, and every other local government, required to conduct a temporal count of its homeless population and available shelter beds to determine whether there are enough beds for every homeless person within City limits before enforcing public space regulations against any individual?").

21. *See infra* Section II.A.

22. *See infra* Section II.B.

23. *See, e.g.*, Johnson v. City of Grants Pass, 72 F.4th 868, 914 (9th Cir. 2023) (Collins, J., dissenting), *rev'd*, 603 U.S. 520 (2024).

24. In *Martin*, the court explained that if "the state's very power to criminalize particular behavior or status" was challenged, then the initiation of the criminal process was sufficient to establish standing to bring an Eighth Amendment challenge. *Martin*, 920 F.3d at 614. However, in his *Martin* dissent, Judge Smith argued that Eighth Amendment claims have standing only "after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Id.* at 598 (Smith, J., dissenting) (citing Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977)). Therefore, the Cruel and Unusual Punishments Clause cannot protect those who have not yet been convicted of a crime—including the plaintiffs in *Martin*. *Id.* (Smith, J., dissenting). The question of what is required to establish standing in Eighth Amendment cases was heavily debated across the Ninth Circuit in the years following *Martin*—plaintiffs attempting to use the Eighth Amendment's Cruel and Unusual Punishments Clause to prospectively challenge anti-camping ordinances often lacked standing to do so, despite *Martin*'s supposed expansion of standing in Eighth Amendment complaints to apply pre-conviction. *See, e.g.*, O'Callaghan v. City of Portland,

Both local governments and judges criticized *Martin* as an obstacle to local governments' ability to tailor policy to the needs of their communities,[25] and as an aggravator of issues facing cities and their unsheltered homeless residents.[26] Some scholars also suggested that the opinion, while admirable, was underinclusive, or not well-suited to protecting those it intended to protect.[27] Other doctrinal issues, such as whether *Martin* could apply to civil as well as criminal cases, excessive fines arguments, and the role of due process in encampment sweeps, were also often invoked in these sorts of lawsuits after *Martin*.[28]

While none of these reactions was the sole rationale for its repudiation of *Martin*, the U.S. Supreme Court emphasized the Eighth Amendment and the role of the judiciary in crafting public policy in its *Grants Pass* decision.[29]

1. Substantive Eighth Amendment Reactions

An originalist critique, first made in a dissent to *Martin*, but repeated in a dissent from the Ninth Circuit's denial of en banc review for *Grants Pass*, and ultimately embraced by the U.S. Supreme Court, is that the Eighth Amendment's Cruel and Unusual Punishments Clause was not originally understood to affect

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No. 3:21-cv-812-AC, 2021 WL 2292344, at *4 (D. Or. June 4, 2021) (holding that despite plaintiff's campsite being swept over 25 times, a "credible risk of prosecution" must exist for a plaintiff to have standing to use the Eighth Amendment to challenge anti-camping laws, so the plaintiff had no standing to make a *Martin* challenge); Beram v. City of Sedona, 587 F. Supp. 3d 948, 956 (D. Ariz. 2022) (holding that a plaintiff who received a verbal warning from an officer for sleeping in her car on a trailhead, something she had done hundreds of times before, failed to show a credible threat of prosecution because she failed to allege any instances that the ordinances had been enforced). Courts, it seemed, were more likely to find that plaintiffs lacked standing when criminal prosecution for violations of anti-camping laws was unlikely. When it decided *Grants Pass*, the U.S. Supreme Court did not address the "credible risk of prosecution" standing-based arguments. It did not need to—by eliminating the substantive Eighth Amendment claim allowed under *Martin*, standing arguments became a non-starter.

25. *See, e.g.*, *Johnson*, 72 F.4th at 936 (Smith, J., dissenting) ("[W]hen asked to inject ourselves into a vexing and politically charged crisis, we should tread carefully and take pains to ensure that any rule we impose is truly required by the Constitution—not just what our unelected members think is good public policy."), *rev'd*, 603 U.S. 520 (2024); *see also* Brief for LA Alliance for Human Rights et al., as Amici Curiae Supporting Petitioner at 3–4, Johnson v. City of Grants Pass, 72 F.4th 868 (9th Cir. 2024) (No. 23-175).

26. *See infra* Subsection II.B.5.

27. *See infra* Subsection II.A.4.

28. *See, e.g.*, *Johnson*, 72 F.4th at 877 ("In October 2018, approximately six weeks after the *Martin* opinion, Debra Blake filed her putative class action complaint against the City. The complaint alleged that enforcement of the City's anti-sleeping and anti-camping ordinances violated the Cruel and Unusual Punishment Clause of the Eighth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment. The complaint was amended to include additional named plaintiffs and to allege a claim that the fines imposed under the ordinances violated the Excessive Fines Clause of the Eighth Amendment.").

29. City of Grants Pass v. Johnson, 603 U.S. 520, 560 (2024) ("At bottom, the question this case presents is whether the Eighth Amendment grants federal judges primary responsibility for assessing those causes [of homelessness] and devising those responses. It does not.").

Congress's ability to criminalize statuses (or acts that are inseparable from statuses).[30] Therefore, the *Martin* panel misapplied precedent to find that the Eighth Amendment prohibited punishment of involuntary acts based on one's status.[31]

Judge Smith, dissenting in *Martin*, argued that the idea that the Eighth Amendment can forbid punishment of actions a person takes that are unavoidably linked to status was a misinterpretation of Eighth Amendment precedent.[32] He argued that the *Martin* majority misconstrued the precedential value of the dissent in *Powell v. Texas*,[33] a case about whether the Eighth Amendment can protect people with chronic alcoholism from being convicted of public drunkenness.[34] The *Powell* decision was split 4–1–4, with the majority upholding the defendant's conviction for public drunkenness because the law punished an act that the defendant had some control over, not his status (and the acts that invariably resulted from that status) as a person with chronic alcoholism.[35] While Justice White concurred in the judgment because the defendant made no showing that he was unable to stay off the street on the night he was arrested, Justice White shared the dissent's view that the Eighth Amendment could under some circumstances prevent punishment based on conditions that are inseparable from one's status.[36] Judge Smith argued that because the idea that the Eighth Amendment can prevent punishments for these actions was

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30. *See Johnson*, 72 F.4th at 914 (Collins, J., dissenting) ("There is simply no indication in the history of the Eighth Amendment that the Cruel and Unusual Punishments Clause was intended to reach the substantive authority of Congress to criminalize acts or status, and certainly not before conviction." (quoting Martin v. City of Boise, 920 F.3d 584, 602 (9th Cir. 2019) (Bennett, J., dissenting))); *see also City of Grants Pass*, 603 U.S. at 549.

31. *Martin*, 920 F.3d at 591 (Smith, J., dissenting); *see also* Brief for Petitioner at 35, City of Grants Pass v. Johnson, 683 U.S. 520 (2024) (No. 23-175) (noting that the Supreme Court has followed the *Powell* plurality opinion seven times and held that the Eighth Amendment cannot protect conduct associated with a status).

32. *Martin*, 920 F.3d at 591 (Smith, J., dissenting) (referring to Powell v. Texas, 392 U.S. 514 (1968)).

33. 392 U.S. 514 (1968).

34. The idea that the Eighth Amendment forbids punishment of statuses originates in *Robinson v. California*, 370 U.S. 660 (1962), which held that a law outlawing being addicted to narcotics as unconstitutional. *Id.* at 667. The difference between *Robinson* and *Powell* was that the law at issue in *Powell* did not punish one's being a person with chronic alcoholism; instead, it punished an act that was closely related to the status of chronic alcoholism: being drunk in public. *Powell*, 392 U.S. at 532.

35. *Powell*, 392 U.S. at 532 ("[A]ppellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion.").

36. *Martin*, 920 F.3d at 616 ("The four dissenting Justices adopted a position consistent with that taken by Justice White: that under *Robinson*, 'criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change,' and that the defendant, 'once intoxicated, . . . could not prevent himself from appearing in public places.' Thus, five Justices gleaned from *Robinson* the principle 'that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.'" (citations omitted)). Justice White's concurrence considers unsheltered homeless people who also have chronic alcoholism as a potential case that the Eighth Amendment could bar any punishment because it may be impossible for that person to avoid becoming drunk in public. *Powell*, 392 U.S. at 551 (White, J., concurring).

not the narrowest grounds of Justice White's concurrence in the final judgment, it could not be binding under the *Marks v. United States* rule.[37]

The issue, then, was whether *Marks* represents the idea that only the narrowest grounds of agreement that a concurrence shares with the majority opinion's final judgment is binding, or if *Marks* represents the idea that any principles shared by a concurring opinion and either the dissent or the majority opinion are binding. The latter interpretation of *Marks* has been criticized as likely to increase "the risk of unfairness, incoherence, and harm" of the Court's interpretations of precedent.[38] Additionally, scholars have argued that even if the *Martin* majority was justified in using Justice White's concurrence, the concurrence itself does not necessarily support the rationale of *Martin* because Justice White still based his concurrence on the voluntariness of the defendant's actions—his thoughts on when the Eighth Amendment could forbid punishments for acts invariably occurring as a result of status were therefore dicta.[39]

However, even if *Martin*'s status argument was a misapplication of precedent, there is strong support for the idea that the *Powell* majority's and *Martin* dissent's distinction between status and acts does not apply in the case of unsheltered homeless people's violation of anti-camping ordinances because the act of sleeping on public property is completely inseparable from one's status as an unsheltered homeless person.[40] In the *Powell* majority's view, even people with chronic alcoholism can exercise at least some degree of control over their ability to either avoid consuming alcohol to the point of intoxication or doing so in public; therefore, they are convicted for the act of public intoxication, not for their status as people with chronic alcoholism.[41] However, the act of sleeping is different from the act of consuming alcohol to the point of intoxication in public, which even people with chronic alcoholism must not always do—sleeping is an "unavoidable consequence of being human."[42] In other words, people with chronic alcoholism may be strongly compelled to drink and may sometimes become intoxicated in public, but they do not necessarily do so because of their status as people with chronic alcoholism.[43] In contrast, every unsheltered homeless person must sleep either on public property or private property—places where they do not have a right to be because of anti-

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37. *Martin*, 920 F.3d at 591 (Smith, J., dissenting) ("There, the Court held that '[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."'" (emphasis omitted) (citing Marks v. United States, 430 U.S. 188, 193 (1977))).

38. *See* Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1988–93 (2019).

39. *See, e.g.*, Andrew I. Lief, *A Prosecutorial Solution to the Criminalization of Homelessness*, 169 U. PA. L. REV. 1971, 1986 (2021).

40. *See* Waldron, *supra* note 15, at 315.

41. *Powell*, 392 U.S. at 535 ("We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of *either or both of these acts* and thus cannot be deterred at all from public intoxication." (emphasis added)).

42. *Martin*, 920 F.3d at 616–17.

43. *Powell*, 392 U.S. at 535.

camping ordinances or trespass law.[44] They therefore can exercise no degree of control over their violation of anti-camping ordinances; their actions that violate the law are inseparable from their status.[45]

Because the violation of anti-camping ordinances by unsheltered homeless people does not involve any act of will but is instead inseparable from one's status as an unsheltered homeless person, *Martin* might have been stronger argued if it did not invoke *Powell* at all and instead just relied on *Robinson v. California*, which held that a law that punished a status or condition that a person had no control over would violate the Eighth Amendment.[46]

2. The Role of the Judiciary in Policymaking

The main public policy critique leveled by judges and governments at *Martin* is that it is a case of the judiciary stepping into policymaking—and by doing this, it prevents local governments from creating policy that is tailored to addressing issues surrounding homelessness in their jurisdictions.[47]

The argument is that every community is different, and homelessness "require[s] carefully tailored, multifaceted solutions that courts are poorly equipped to manage."[48] Therefore, by imposing a counting requirement[49] on every city in the Ninth Circuit, which has great diversity in the size and administration of its cities,

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44. *See* Waldron, *supra* note 15, at 300 ("For the most part the homeless are excluded from all of the places governed by private property rules, whereas the rest of us are, in the same sense, excluded from all but one (or maybe all but a few) of those places.").

45. *Id.* at 315. For unsheltered homeless people, then, the "alternative" to violating anti-camping ordinances is violating trespass law.

46. Such as outlawing a narcotics addiction, which is different from outlawing the act of using narcotics. *See Martin*, 920 F.3d at 615–16. To be fair, *Martin* uses *Powell* to attempt to explain the logic of *Robinson*, which "did not explain at length the principles underpinning its holding." *Id.* at 616 (citing Jones v. City of Los Angeles, 444 F.3d 1118, 1133 (2006)). But if *Martin* was about a fundamentally different "status" than *Powell* was, then arguments using *Powell* do not add much. Similarly, arguments against *Martin* by way of *Powell* are also mostly irrelevant if the act of violating anti-camping ordinances is inseparable from the status of unsheltered homelessness. Indeed, this is the argument Justice Sotomayor makes in her *Grants Pass* dissent: the anti-camping laws at issue in the case criminalize status because unsheltered homeless individuals' definitionally must violate anti-camping laws, making *Robinson*—not *Powell*—the controlling rationale in the case. *See* City of Grants Pass v. Johnson, 603 U.S. 520, 581–85 (2024) (Sotomayor, J., dissenting) ("*Robinson* should squarely resolve this case. . . . [U]nlike the debate in Powell, this case does not turn on whether the criminalized actions are 'involuntary' or 'occasioned by' a particular status." (cleaned up)).

47. *See, e.g.*, *Martin*, 920 F.3d at 591 (Smith, J., dissenting) ("Perhaps most unfortunately, the panel's opinion shackles the hands of public officials trying to redress the serious societal concern of homelessness." (footnote omitted)).

48. Brief of Amicus Curiae District Attorney of Sacramento County in Support of Petitioner City of Grants Pass at 16, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175).

49. *See supra* note 20.

the court hindered cities' abilities to tailor their homelessness policy to be best suited to their needs.[50]

Moreover, while surveying the number of unsheltered homeless individuals in any jurisdiction is already a very difficult endeavor,[51] that difficulty was compounded to the point of impossibility in the very large cities of the Ninth Circuit.[52] Therefore, large cities arguably could not comply with *Martin*'s counting requirement, exposing them to liability if they ever enforced anti-camping ordinances.[53]

3. The Under-Inclusiveness Critique

Some scholars viewed *Martin* as not protecting unsheltered homeless individuals as intended, as it left many vulnerable to prosecution who, when shelter was available, chose to not use it because doing so would endanger personal health or safety or would separate them from their families.[54] Under *Martin*, unsheltered homeless people violated anti-camping laws because doing so was an act that invariably resulted from their status.[55] However, when shelter was available but homeless individuals chose not to use it,[56] sleeping on public or private property without permission became a difficult choice but not an act that invariably resulted from status. Therefore, the opinion was underinclusive, or ill-suited to protecting the

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50. *See* Brief of Amicus Curiae City of Los Angeles in Support of Petitioner, *supra* note 20, at 2.

51. Charles D. Cowan et al., *The Methodology of Counting the Homeless*, in HOMELESSNESS, HEALTH, AND HUMAN NEEDS 169, 170 (1988) (ebook) ("Counting the homeless population is extremely difficult because of the lack of a clear definition of homelessness, the mobility of the population, and the cyclical nature of homelessness for many individuals. In addition, homeless people are often reluctant to be interviewed, and many of them remain invisible even to the most diligent of researchers. There is no uniform method for counting the homeless . . . .").

52. Brief of Amicus Curiae City of Los Angeles in Support of Petitioner, *supra* note 20, at 13 ("While this broad holding would be difficult to implement in a small city like Grants Pass or Boise, it presents an impassable barrier to enforcement of basic public safety, sanitation, and health regulations in a city the size of Los Angeles.").

53. *See id.* at 13–14.

54. *See* Lief, *supra* note 39, at 1992; *see also* Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CALIF. L. REV. 559, 573–74 (2021) ("[O]ur 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." (quoting Martin v. City of Boise, 902 F.3d 1031, 1048 n.8 (9th Cir. 2018), *amended and superseded on denial of rehearing*, 920 F.3d 584 (9th Cir. 2019))).

55. *See* Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019) ("[J]ust 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.'" (citation omitted)).

56. This is quite common; for example, in Los Angeles, shelter occupancy numbers for fiscal years 2019 through 2023 was between 64% and 78%. KENNETH MEJIA, LA CITY CONTROLLER, HOMELESSNESS AUDIT: PATHWAYS TO PERMANENT HOUSING 3, (2024), https://firebasestorage.googleapis.com/v0/b/lacontroller-2b7de.appspot.com/o/PH%20Pathways_LAHSA%20Final_12.10.2024.pdf?alt=media&token=0f6681b8-a28b-44ed-8bfa-e040fd2a127f [https://perma.cc/5QAY-VHSJ].

rights of those very vulnerable people who did not categorically violate anti-camping ordinances but had no real choice but to do so.[57]

4. Civil or Criminal Applicability

The Ninth Circuit ostensibly limited its holding in *Martin* to laws imposing criminal penalties for violations of anti-camping ordinances by stating, "Our holding is a narrow one. . . . [A]s 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."[58]

Nevertheless, after *Martin*, some courts were open to the argument that the Eighth Amendment can apply to camping ordinances that assign civil penalties to violations.[59] The argument is that the purpose of the Eighth Amendment is to limit the government's ability to punish, not the government's ability to criminalize.[60] Therefore, the Eighth Amendment applies even to a civil penalty if the civil penalty has a punitive objective.[61]

The Ninth Circuit's *Grants Pass* opinions indicated that this argument was increasingly persuasive.[62] In 2018, the Grants Pass Municipal Code prohibited sleeping on sidewalks or in vehicles abutting sidewalks between 12 a.m. and 6 a.m. with violations resulting in a fine.[63] Camping, which was broadly defined as any place where bedding or any stove or fire was established to maintain a temporary place to live, was also punished by a fine.[64] Importantly, the Grants Pass Municipal Code provided that multiple violations of these ordinances within a year in city parks could result in a park exclusion order, and violation of an exclusion order could result in prosecution for criminal trespass.[65] These ordinances were actively enforced; in 2018, the year that the lawsuit was initially brought, the city issued 46 tickets under these statutes.[66] Three homeless plaintiffs initiated a class action against the city, alleging violations of the Eighth Amendment's Cruel and Unusual Punishments Clause and the Fourteenth Amendment's Due Process and Equal Protection Clauses.[67]

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57. *See* Lief, *supra* note 39, at 1987.

58. *Martin*, 920 F.3d at 617 (emphasis added).

59. *See, e.g.*, Aitken v. City of Aberdeen, 393 F. Supp. 3d 1075, 1082 (W.D. Wash. 2019) (refusing to determine that *Martin* could not apply to ordinances that provided for some civil and some criminal penalties for camping (citing Austin v. United States, 509 U.S. 602, 609–10 (1993))).

60. Austin v. United States, 509 U.S. 602, 609–10 (1993).

61. *Id.* at 610.

62. *See* Blake v. City of Grants Pass, No. 1:18-CV-01823-CL, 2020 WL 4209227 (D. Or. July 22, 2020), *aff'd in part, vacated in part*, Johnson v. City of Grants Pass, 72 F.4th 868 (9th Cir. 2023), *rev'd*, 603 U.S. 520 (2024).

63. Johnson v. City of Grants Pass, 72 F.4th 868, 876 (9th Cir. 2023) (citing GRANTS PASS MUN. CODE §§ 5.61.020, 5.61.030, 6.46.090), *rev'd*, 603 U.S. 520 (2024).

64. *Id.* (citing GRANTS PASS MUN. CODE § 5.61.010).

65. *Id.* at 890 (citing OR. REV. STAT. ANN. § 164.245 (2025)).

66. *Id.* at 877 n.4.

67. *Id.* at 877.

The *Grants Pass* trial court adopted the argument that any punishment, civil or criminal, is subject to the limits of the Eighth Amendment, and it found that the city's anti-camping statutes constituted cruel and unusual punishment in violation of the Eighth Amendment.[68] The court explained that while the statutes at issue in *Martin* assigned criminal punishments for violations, the holding of *Martin* was not necessarily limited to criminal punishments.[69] According to the court, "[i]t is the *punishment* of a person's unavoidable status that violates the constitution, not whether that punishment is designated civil or criminal."[70] The court further justified this idea by explaining that whether an act has a civil or criminal penalty attached to it is a matter of statutory construction, implying the distinction between the two is not well-founded.[71]

However, on appeal, the Ninth Circuit did not completely adopt the idea that any punishment invokes the Eighth Amendment.[72] Instead, the court held that the Grants Pass Municipal Code's distinction between civil and criminal punishments in the context of violations of anti-camping ordinances was meaningless because the path toward criminal liability after committing a civil infraction was very straightforward: repeated violation of ordinances could result in an exclusion order, the violation of which would carry a criminal penalty.[73] Because the civil penalties assessed by the city for violation of anti-camping ordinances had the potential to become criminal penalties (if a park exclusion order was issued and violated), the court saw the construction of these statutes as an impermissible way to dodge *Martin*.[74]

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68. *Id.* at 880.

69. Blake v. City of Grants Pass, No. 1:18-CV-01823-CL, 2020 WL 4209227, at *9 (D. Or. July 22, 2020), *aff'd in part, vacated in part*, *Johnson*, 72 F.4th 868, *rev'd*, 603 U.S. 520 (2024).

70. *Id.* (emphasis added) (citation omitted).

71. *Id.* at *10 (citing United States v. Ward, 448 U.S. 242, 248 (1980)). The court also conducted an excessive fines analysis, finding that the ordinances assigned both punitive and excessive fines for violations. *Id.* at *11. However, the Ninth Circuit ultimately did not use an excessive fines analysis in its review of the case. *Johnson*, 72 F.4th at 880. Before the Ninth Circuit reviewed *Grants Pass*, scholar Sara Rankin argued that an excessive fines proportionality analysis can be useful in determining whether a particular civil punishment is cruel or unusual because the impact of even a small civil fine is far greater for a homeless individual than the typical housed citizen. Sara K. Rankin, *Civilly Criminalizing Homelessness*, 56 HARV. C.R.-C.L. L. REV. 367, 386–87 (2021); *see also* Tim Donaldson, *More Than Lip Service is Required: Excessive Fines Clause Limitations upon Fining the Homeless*, 54 ST. MARY'S L.J. 629, 674–75 (2023) (arguing that one's ability to pay a fine should be considered when determining excessiveness).

72. *See Johnson*, 72 F.4th at 889.

73. *Id.* at 889–90.

74. *Id.* at 890 ("A local government cannot avoid [*Martin*] by issuing civil citations that, later, become criminal offenses."). The district court also entertained an excessive fines disproportionality argument based on the plaintiffs' status of homeless. *Id.* at 895. Because plaintiffs were "engaging in involuntary, unavoidable life sustaining acts," any fine, even one without the potential for criminal prosecution, would be unconstitutionally disproportionate. *Id.* at 895. However, on appeal, the Ninth Circuit held that because it was

In sum, the *Grants Pass* district and circuit court opinions indicated a trend in the Ninth Circuit toward allowing the Eighth Amendment to apply to civil punishments for violations of anti-camping ordinances, especially when those civil punishments had a clear path to later becoming criminal punishments.[75] However, this trend seems unlikely to continue after the Supreme Court's *Grants Pass* opinion.[76]

5. Excessive Fines Arguments

Another Eighth Amendment argument not addressed in *Martin*, but often invoked in litigation of anti-camping ordinances after *Martin*, is based on the Excessive Fines Clause.[77] The excessive fines argument is that any fine is grossly disproportionate to the violation of an anti-camping ordinance for unsheltered homeless people, whose violation of those ordinances cannot be helped, because it is inseparable from their status.[78] Therefore, any fining of unsheltered homeless individuals for violations of anti-camping ordinances violates the Eighth Amendment.[79]

While this argument—that all fines leveled at homeless individuals for engaging in conduct that is required for their survival are excessive—was successful at the trial level in *Grants Pass*,[80] the Ninth Circuit declined to perform a similar analysis in its 2022 review of the opinion.[81] This may indicate some reluctance to

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granting an injunction against the city, no class member would be fined for participating in these protected activities, so there was no need to analyze whether the theoretical fines would be excessive. *Id.*

75. *Id.* at 890 ("Here, the City has adopted a slightly more circuitous approach than simply establishing violation of its ordinances as criminal offenses. . . . The holding in *Martin* cannot be so easily evaded.").

76. *See* City of Grants Pass v. Johnson, 603 U.S. 520, 543 (2024).

77. *See, e.g.*, Blake v. City of Grants Pass, No. 1:18-CV-01823-CL, 2020 WL 4209227, at *10–11 (D. Or. July 22, 2020) (finding fines from violating anti-camping ordinances to be both punitive and excessive), *aff'd in part, vacated in part*, *Johnson*, 72 F.4th 868, *rev'd*, 603 U.S. 520 (2024). The Ninth Circuit avoided this approach at the circuit level. *Johnson*, 72 F.4th at 895.

78. *See Johnson*, 72 F.4th at 895 ("A central portion of the district court's analysis regarding these fines was that they were based on conduct 'beyond what the City may constitutionally punish.' With this in mind, the district court noted '[a]ny fine [would be] excessive' for the conduct at issue." (alterations in original)); Waldron, *supra* note 15, at 315.

79. *See* Rankin, *supra* note 71, at 386–87 ("A civil infraction, which does not severely impact a typical housed citizen, severely impacts unsheltered people and serves no remedial purpose. . . . [A] fine or forfeiture violates the Eighth Amendment if it is 'grossly disproportional to the gravity of a defendant's offense.' As a preliminary matter, when a homeless individual has no reasonable alternative but to engage in necessary, life-sustaining activities in public, no civil fine or forfeiture is proportionate to the offense of survival." (footnotes omitted)).

80. *See Blake*, 2020 WL 4209227, at *11 ("Fining a homeless person in Grants Pass who must sleep outside beneath a blanket because they cannot find shelter $295 ($537.60 after collection fees are inevitably assessed) is grossly disproportionate to the 'gravity of the offense.' *Any fine* is excessive if it is imposed on the basis of status and not conduct." (emphasis added)).

81. *Johnson*, 72 F.4th at 895.

view fines for violations of anti-camping ordinances by homeless individuals as categorically excessive. Other courts within the Ninth Circuit have expressed skepticism toward viewing fines levied against homeless individuals as categorically excessive.[82] In *Fitzpatrick v. Little*, for example, the District Court of Idaho rejected the argument that fines against homeless individuals were categorically disproportionate and thereby excessive; instead, it used a more conventional excessive fines analysis to find that a total fee of $72 was not grossly disproportionate to the gravity of the offense, and therefore not excessive.[83]

Fitzpatrick v. Little indicates that a more prudent argument might have been to simply make conventional excessive fines arguments (weighing the proportionality of the offense against the amount of the fines leveled) to the situation of unsheltered homeless individuals, whose culpability in this situation is nonexistent,[84] and whose ability to pay fines is drastically lower than other citizens.

Some argue that the appropriate use of fines can be used to better the situation of both cities and their homeless residents. For example, Tim Donaldson—a city attorney in Walla Walla, Washington—argues that a proportionality analysis in issuing fines for violations of anti-camping laws should not categorically prevent a city from fining homeless individuals for violations of anti-camping ordinances.[85] Instead, fines should be imposed for violations of anti-camping ordinances when the gravity of the offense outweighs the offender's ability to pay.[86] Donaldson argues that the gravity of some offenses is not always apparent to outside observers unfamiliar with local circumstances, and that real public policy problems can result from lax enforcement of anti-camping ordinances.[87] Many of Walla Walla's anti-camping laws were adopted to address health and safety concerns that resulted from the city's own efforts to support its homeless residents—placing porta-potties, a temporary campsite, and, eventually, a managed campsite.[88] After implementing these accommodations, the influx of people in the serviced areas resulted in "negative impacts" to those areas, such as debris, public disturbances like fights and increased substance abuse, and blockages of public sidewalks—all because of seemingly minor offenses like camping near the campsite, which eventually created an unsafe environment.[89] However, after implementing anti-camping laws in the areas surrounding the sanctioned campsite, the problems diminished.[90] Donaldson credits the improvement, in part, to a proportionate fine's ability to deter bad behavior when other "non-monetary remedies" had not succeeded.[91]

Proportionate fines may have aided city outreach efforts in Walla Walla, but every community is different, so proportionate fines against unsheltered

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82. *See* Fitzpatrick v. Little, No. 1:22-CV-00162-DCN, 2023 WL 129815, at *13–14 (D. Idaho Jan 9, 2023).
83. *Id.* at *14 (citing United States v. Bajakajian, 524 U.S. 321, 336–37 (1998)).
84. *See supra* notes 40–45 and accompanying text.
85. Donaldson, *supra* note 71, at 666–68.
86. *Id.* at 671–72.
87. *Id.* at 666–68.
88. *Id.* at 666.
89. *Id.* at 667.
90. *Id.*
91. *Id.* at 671.

homeless individuals who violate anti-camping ordinances may not be as effective elsewhere. Regardless of which approach is constitutionally correct or best for public policy, the implication in the *Grants Pass* opinions that cases regarding anti-camping ordinances should be grounded in the Cruel and Unusual Punishments Clause likely also implies that fines should continue to be a part of policymaking surrounding homelessness and leaves the door open to excessive fines arguments.[92] The U.S. Supreme Court's majority opinion in *Grants Pass* did not address excessive fines arguments.[93]

6. Due Process Issues with Encampment Sweeps

Because personal property is often at risk of confiscation during enforcement of anti-camping statutes, due process violations can often be argued in enforcement cases if law enforcement does not follow constitutional procedures.[94]

Encampment sweeps, or the removal of a person and his personal property from a particular place where he is staying,[95] may not implicate the Eighth Amendment unless the sweep is accompanied by some additional punishment from the government. However, sweeps often present potential due process issues because they involve the confiscation of personal property, which is protected by the Fourteenth Amendment's Due Process Clause.[96] In addition to showing how one's due process rights have been affected by a city's enforcement of anti-camping laws, plaintiffs arguing due process violations must allege that additional procedures would have prevented those violations and should have been implemented.[97]

The line between adequate and inadequate due process in the context of eviction notices for sweeps is unclear, as the idea of "due process" is intentionally flexible to apply to different situations as needed.[98] What certainly crosses the line is on-the-spot destruction of seized property without any advance notice.[99] Furthermore, advance notice of a sweep does not necessarily provide for adequate due process; if a notice does not provide enough time for a person to move his belongings, does not adequately explain where his belongings will be stored or how to recover them, or does not explain how long the city will hold his belongings, then

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92. *See* Johnson v. City of Grants Pass, 72 F.4th 868, 895 (9th Cir. 2023), *rev'd*, 603 U.S. 520 (2024).

93. City of Grants Pass v. Johnson, 603 U.S. 520, 588–89 (2024) (Sotomayor, J., dissenting) ("The Court today also does not decide whether the Ordinances violate the Eighth Amendment's Excessive Fines Clause. . . . On remand, the Ninth Circuit is free to consider whether the City forfeited its appeal on this ground and, if not, whether this issue has merit.").

94. Lavan v. City of Los Angeles, 693 F.3d 1022, 1033 (9th Cir. 2012).

95. ACLU WASH., HOMELESS SWEEPS: IMPORTANT CASE LAW AND FREQUENTLY ASKED QUESTIONS 1 (2017), https://www.aclu-wa.org/docs/homeless-sweeps-%E2%80%93-important-case-law-and-frequently-asked-questions [https://perma.cc/QTC7-HD3V].

96. *Lavan*, 693 F.3d at 1033.

97. O'Callaghan v. City of Portland, No. 3:21-CV-812-AC, 2021 WL 2292344, at *4–5 (D. Or. June 4, 2021).

98. *Id.* at *4 (citing Mathews v. Eldridge, 424 U.S. 319, 334 (1976)).

99. *See* Yeager v. City of Seattle, No. 2:20-CV-01813-RAJ, 2020 WL 7398748, at *7 (W.D. Wash. Dec. 17, 2020) (citing *Lavan*, 693 F.3d at 1032).

the notice may be insufficient.[100] But how much time a posted eviction notice must provide an unsheltered homeless resident to move his belongings, or how long the city must hold seized items before disposing of them is less clear.[101] Nevertheless, many cities have constructed their sweep procedures conservatively, requiring notice far enough in advance that facially challenging the procedures for lack of adequate process is difficult; therefore, the key issue for plaintiffs often becomes whether these procedures are followed during sweeps.[102]

B. Public Policy Reactions to Martin

Despite the criticisms of *Martin*, the Ninth Circuit's opinion prompted a number of policy changes, such as changing anti-camping laws to comply with the opinion,[103] providing more funding for outreach and opening more shelters,[104] and sanctioning massive campsites,[105] which in some cases has resulted in public nuisance lawsuits.[106]

1. Changes to Ordinances

Some cities changed their anti-camping laws to comport with the requirements of *Martin*. For example, Boise modified its anti-camping ordinances after *Martin*.[107] The modified ordinances remain very broad in scope, forbidding camping in public places at all times.[108] However, enforcement of the ban may not occur unless officers first confirm there is no available overnight shelter[109]—a clear attempt to conform with *Martin*.[110]

Martin stood for the principle that "total homelessness criminalization" in the form of extremely broad area restrictions on camping is not allowed if a city

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100. *See* Le Van Hung v. Schaaf, No. 19-CV-01436-CRB, 2019 WL 1779584, at *6 (N.D. Cal. Apr. 23, 2019).

101. *See Yeager*, 2020 WL 7398748, at *1, *7 (suggesting that the plaintiff could have argued the two-day eviction notices were inadequate notice by proposing a lengthier notice period).

102. *See, e.g.*, Miralle v. City of Oakland, No. 18-CV-06823-HSG, 2018 WL 6199929, at *3 (N.D. Cal. Nov. 28, 2018) ("The City's Standard Operating Procedure, on its face, provides adequate notice and opportunity for Plaintiffs to be heard before property is seized."). Some cities have played things very safe regarding notice and due process. For example, Chico's settlement of litigation of a *Martin* issue required that a seven-day notice be posted to all homeless persons within a specific campsite before a three-day illegal encampment notification could be posted. *See* Warren v. City of Chico, No. 221CV00640MCEDMC, at 14, ¶ 10(f) (E.D. Cal., Jan. 14, 2022), https://wclp.org/wp-content/uploads/2022/01/153.-Order-on-Stipulated-Agreement.pdf [https://perma.cc/DF9P-JKXK] (stipulated order incorporating settlement agreement and retaining jurisdiction).

103. *See infra* Subsections II.B.1–3.

104. *See infra* Subsection II.B.4.

105. *See infra* Subsection II.B.5.

106. *See infra* Subsection II.B.6.

107. BOISE CITY CODE § 7-3A-2 (2025).

108. *Id.* § 7-3A-2(A).

109. *Id.* § 7-3A-2(B).

110. At the time of publication, Boise has not significantly changed its approach to enforcement of anti-camping laws from the regulations adopted after *Martin*. *See id.* § 7-3A-2.

lacks accessible shelter.[111] However, not every city's anti-camping ordinances were as broad as Boise's, whose unsheltered homeless residents could be cited for violating anti-camping ordinances anywhere in the city at any time. [112] Therefore, under *Martin*, if a city allowed unsheltered homeless people to sleep at certain times or places, there was an argument that unsheltered homeless people may not unavoidably have to violate anti-camping ordinances, and the Eighth Amendment could not come into play.[113] But was "total homelessness criminalization" only when enforcement could happen at any time or place? Portland, which once had very broad camping restrictions,[114] implemented a "reasonable" daytime camping ban from 8 a.m. to 8 p.m.,[115] which presumably avoided triggering *Martin*.[116] But even "reasonable" restrictions may be functionally equivalent to total homeless criminalization because of the unique difficulties facing unsheltered homeless residents.[117]

2. Area Restrictions

Courts often did not apply *Martin* when anti-camping ordinances forbade camping in only a few areas in the city.[118] For example, in Aberdeen, Washington, a challenge to a general anti-camping ordinance and an eviction ordinance for a particular city park was unsuccessful in challenging eviction from that park but was successful in challenging the broader camping ordinances that applied to the whole city. [119] The district court saw *Martin*'s ruling as only applying to "total homelessness criminalization," so if a jurisdiction wanted to criminalize homelessness in a limited area, such as a park, it could. [120] This implied that enforcement of anti-camping ordinances that did not affect most or all of the areas

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111. Aitken v. City of Aberdeen, 393 F. Supp. 3d 1075, 1081–82 (W.D. Wash. 2019).

112. *See supra* note 3.

113. *See infra* Subsections II.B.2–3.

114. *See* O'Callaghan v. City of Portland, No. 3:21-CV-812-AC, 2021 WL 2292344, at *4 (D. Or. June 4, 2021).

115. *Time, Place, Manner Camping Ordinance*, PORTLAND.GOV, https://www.portland.gov/wheeler/time-place-manner [https://perma.cc/TW3V-EHBJ] (last visited Jan. 22, 2024).

116. Whether or not this time frame is reasonable has yet to be seen as a judge reviews the ordinance, but this is another example of a city changing its enforcement policies to accommodate *Martin*. Alex Zielinski, *Judge Halts Enforcement of Portland's Camping Ban*, OR. PUB. BROAD. (Nov. 9, 2023, 7:00 PM) https://www.opb.org/article/2023/11/09/portland-city-camping-ban-court-decision/ [https://perma.cc/Q8EB-EV5V]. For example, is 8 a.m. an unreasonably early time? *See id.* ("[Portland] crafted its daytime camping ban to align with House Bill 3115, a law that requires cities make 'objectively reasonable' rules about when, where and how people can sit and lie outdoors on public property. City attorneys argued that a policy allowing people to camp during some hours—8 a.m. to 8 p.m.—meets that requirement. Plaintiffs' lawyers disagreed.").

117. *See infra* Subsections II.B.2–3.

118. Aitken v. City of Aberdeen, 393 F.Supp.3d 1075, 1086 (W.D. Wash. 2019).

119. *Id.*

120. *Id.* at 1081–82 (citing Miralle v. City of Oakland, No. 18-CV-06823-HSG, 2018 WL 6199929, at *2 (N.D. Cal. Nov. 28, 2018)); *see also* Fitzpatrick v. Little, No. 1:22-CV-00162-DCN, 2023 WL 129815, at *13 (D. Idaho Jan. 9, 2023) (holding that *Martin* did not require the government to allow campers on the Idaho State Capitol grounds).

where camping was allowed may not have triggered *Martin*'s Eighth Amendment protections.[121]

The problem with this idea was it did not consider when enforcement was functionally equivalent to total homelessness criminalization in a jurisdiction. For example, if a city with 500 unsheltered homeless residents enforced anti-camping ordinances everywhere except for one park that could only feasibly house 300 unsheltered homeless residents, this would be functionally equivalent to total homelessness criminalization for the 200 residents who are excluded from the park. Also relevant is the distance that homeless individuals must travel to make use of public spaces to sleep. If the only shelter available is many miles away from where homeless individuals, whose means of transportation may be limited to walking, spend their days, then homeless individuals may violate anti-camping laws because shelter is functionally unreachable by the time restrictions take effect.[122]

3. Time Restrictions

Another dimension of "total homelessness criminalization" is the time that anti-camping ordinances apply. Wary of triggering *Martin*, cities started to experiment with when that could be; for example, Oregon passed a law requiring time restrictions on camping to be "reasonable."[123] Portland then tested the boundary of what could qualify as a reasonable time restriction for camping by adopting an ordinance that banned all camping on public property between 8 a.m. and 8 p.m.[124] However, before enforcement of the ordinance could begin, a preliminary injunction preventing enforcement was granted by a Multnomah County Circuit Court.[125] While this time restriction was presumably intended to be a reasonable part of an overall enforcement scheme, whether a court would hold this time frame as reasonable under *Martin* has yet to be seen.[126]

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121. *See Fitzpatrick*, 2023 WL 129815, at *13 (explaining that the Ninth Circuit's decision in *Martin* was not intended to allow the unsheltered homeless to sleep anywhere; it was intended to stop cities from forbidding the unsheltered homeless from sleeping everywhere, so a law forbidding camping at the Idaho state capital did not violate *Martin*).

122. *See* Anna Patrick, *Unhoused People Sue Burien Over New Homeless Camping Law*, SEATTLE TIMES (Jan. 3, 2024, 6:33 PM), https://www.seattletimes.com/seattle-news/homeless/unhoused-people-and-advocates-sue-burien-over-new-homeless-camping-law/ [https://perma.cc/2TXY-PJVB] ("Much of the discussion [of the *Martin* decision] focuses on how cities interpret the requirement to provide adequate alternatives to people living outside. Officials in nearby cities, like Edmonds, have interpreted that standard to mean they can send homeless people to shelters up to 35 miles away.").

123. Zielinski, *supra* note 116.

124. *Time, Place, Manner Camping Ordinance*, *supra* note 115. Place and manner restrictions were also part of this law. *Id.* Burien, Washington, also passed new time restrictions, though these are arguably much less reasonable than Portland's. "The [new Burien] ordinance allows a person to be convicted of a misdemeanor for 'unlawful public camping' if they are living or sleeping on public property between 7 p.m. and 6 a.m., replacing a previous city law that prohibited camping only in city parks." Patrick, *supra* note 122.

125. Duncan v. City of Portland, No. 23CV39824 (Or. Cir. Ct. Nov. 9, 2023), https://www.portland.gov/wheeler/documents/duncan-v-city-portland-23cv39824-opinion-and-order/download [https://perma.cc/VWC3-5LPC] (order granting preliminary injunction).

126. Zielinski, *supra* note 116.

Like with area restrictions, even "reasonable" time restrictions may be functionally equivalent to total homelessness criminalization because of the unique difficulties facing unsheltered homeless people. Many unsheltered homeless people do not get enough sleep at night because sleeping in the open exposes them to the dangers of crime or bad weather.[127] Additionally, the enforcement of anti-camping ordinances can disrupt sleep.[128]

4. More Shelter Spaces

Some cities have done more than alter enforcement policy in response to *Martin*; the construction of new shelter spaces to accommodate the opinion has occurred throughout the Ninth Circuit as a direct result of *Martin*. For example, in Chico—a smaller northern California city with a relatively large population of homeless individuals[129]—a city-sanctioned temporary campsite was determined to not be a shelter under *Martin*, thereby dramatically increasing the number of residents outside of shelters, which hindered the city's ability to enforce its anti-camping laws.[130] After this determination, the city purchased enough Pallet Shelters[131] to house 354 people (which allowed it to enforce its anti-camping

127. Katherine Hoops Calhoun & Stephanie Chassman, *Sleep Quality and Quantity Among Adults Experiencing Homelessness: An Ecological Systems Approach*, 32 J. HUM. BEHAV. SOC. ENV'T. 798, 798–800 (2022) (finding on average that sheltered and unsheltered homeless residents of Denver reported fewer than three hours of uninterrupted sleep per day) ("Sleep can place people experiencing homelessness in vulnerable positions, increasing threats to physical risks such as inclement weather or social risks such as abuse, violence, or theft. And while shelters can provide refuge from the elements, some people experiencing homelessness feel that the benefits of staying at a shelter do not outweigh the risks of theft, violence, and poor sanitary conditions that staying at a shelter can bring." (citations omitted)).

128. *Id.* at 808 (citing Marisa Westbrook & Tony Robinson, *Unhealthy by Design: Health & Safety Consequences of the Criminalization of Homelessness*, 30 J. SOC. DISTRESS HOMELESSNESS 107 (2021)).

129. *As Chico Works to Reduce Homelessness, a Somber Fact Remains. 'The Resources to Serve People Are in Short Supply'*, LEAGUE OF CAL. CITIES (Nov. 15, 2023), https://www.calcities.org/news/post/2023/11/15/as-chico-works-to-reduce-homelessness-a-somber-fact-remains.-the-resources-to-serve-people-are-in-short-supply [https://perma.cc/Q4XX-C3FC] ("Chico has long had a sizeable population of unsheltered individuals. Over 107,000 people live in the city; 925 are unsheltered. According to self-reported data . . . more than 80% of those people have been homeless for over a year."). *But see* Cowan et al., *supra* note 51, at 170.

130. *See Court Rules that City-Erected Structure at a Municipal Airport is Not "Shelter"*, BEST BEST & KRIEGER LLP (Aug. 23, 2021), https://bbklaw.com/resources/court-rules-that-city-erected-structure-at-a-municipal-airport-is-not-shelter [https://perma.cc/456W-YSKV].

131. Pallet is a brand of micro shelter, like a one-bedroom house or apartment. PALLET, https://palletshelter.com/ [https://perma.cc/PS78-77MX] (last visited Mar. 6, 2025). In Chico, the collection of Pallet Shelters was initially referred to as the "Pallet Shelter," but the name of the facility was later changed to the Genesis Center. *See An Exodus from 'Pallet' Leads to . . . Genesis?*, CHICO ENTER.-REC. (May 21, 2023, 3:25 AM) https://www.chicoer.com/2023/05/21/an-exodus-from-pallet-takes-us-to-genesis-editorial/ [https://perma.cc/RC6Q-38AV].

laws).[132] Nearby, a 2022 Sacramento ballot measure ("Measure O") authorized increased spending for emergency shelter spaces.[133] Moreover, the number of shelter beds in Los Angeles has tripled since 2019.[134]

5. Massive Sanctioned Campsites

More protections against sweeps, more shelters built; this all seems well and good, but scholars like Sara Rankin criticized *Martin*, arguing that it only posed as a policy victory for advocates.[135] What *Martin* brought was simply "a more nuanced framework that still allow[ed] the relentless expulsion of unsheltered people. . . . Tickets and jail [were] replaced with sweeps and forced confinement; control [was] recast as compassion."[136]

Rankin's skepticism was validated by the phenomenon of massive sanctioned campsites. Shelters are expensive to build and maintain, so politics can often prevent cities from enacting long-term shelter plans.[137] In their efforts to avoid building shelter and also to avoid the "total homeless criminalization" that would undoubtedly trigger *Martin*, some cities sequestered homeless citizens who could not stay in shelters into massive sanctioned campsites[138] by enforcing anti-camping

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132. *See Court Rules that City-Erected Structure at a Municipal Airport is Not "Shelter"*, *supra* note 130; Ava Norgrove, *Chico Prioritizes Temporary Housing with New 'Tiny Home' Pallet Shelter*, ORION (Feb. 6, 2022), https://theorion.com/89609/news/chico-prioritizes-temporary-housing-with-new-tiny-home-pallet-shelter/ [https://perma.cc/T52X-G8CC].

133. SACRAMENTO CITY ATT'Y, IMPARTIAL ANALYSIS OF MEASURE O 4, ch. 12.100.020 (n.d.), https://elections.saccounty.net/ElectionInformation/Documents/2022-November-General/MEASURE-O-EN-N2022.pdf [https://perma.cc/QC5A-LUQ3] (authorizing increases of up to 20% of a "minimum threshold" depending on how many spaces are used in a given month). The passing of Measure O was influenced by more politics than just *Martin*, as Measure O also changed violations of anti-camping ordinances from civil infractions to criminal misdemeanors. *See id.* at 6, ch. 12.100.040(F); Marlee Ginter, *Camping on Sacramento Sidewalks Could Soon Be a Misdemeanor*, CBS NEWS (Aug. 5, 2022, 11:38 PM), https://www.cbsnews.com/sacramento/news/homeless-encampments-on-sidewalks-could-soon-be-a-misdemeanor/ [https://perma.cc/YLB6-6G7L]. In proposing this change, Sacramento policymakers arguably were not concerned with *Martin* applying because of the classification of the punishment as criminal.

134. MEJIA, *supra* note 56, at 15.

135. *See* Rankin, *supra* note 54, at 580.

136. *See id.* In addition to increased camp sweeps, Rankin also points to the practice of erecting mass shelters as examples of this expulsion. *Id.* at 598–603.

137. Even a relatively small shelter is very expensive to operate. For example, in Burien, Washington, operating 35 Pallet Shelters with staffing support is estimated to cost the city $900,000–$1,100,000 every year. Greg Kim, *Burien Chooses Site for Homeless Shelter as County Deadline Passes*, SEATTLE TIMES (Nov. 29, 2023, 8:54 AM), https://www.seattletimes.com/seattle-news/homeless/burien-chooses-location-for-homeless-shelter-as-county-deadline-passes/ [https://perma.cc/WE3G-VX8U].

138. In this Note, the term "sanctioned campsite" refers to both those camps that cities have set aside through zoning for unsheltered homeless individuals to use and those camps that exist because cities have chosen to not enforce anti-camping laws in those areas. *See* Stephen Przybylinski, *From Rejection to Legitimation: Governing the Emergence of Organized Homeless Encampments*, 60 URB. AFFS. REV. 118, 119 (2024) (discussing how

ordinances only in certain areas of the city.[139] Such a policy was financially advantageous to cities because it avoided the costs of both operating shelters and litigating *Martin* issues, but it often created a less regulated and more dangerous living situation for those who live in and around massive campsites.[140]

Without clear limits on just how much a city can regulate camping, these campsites represented the apotheosis of *Martin*: total homelessness criminalization outside of shelters and massive sanctioned campsites (which often present less-than-ideal or even dangerous living situations compared to other options[141]) as an alternative to constructing more shelters.

In Chico, enforcement reached this endgame. A 2022 settlement between unsheltered homeless plaintiffs seeking an injunction for enforcement of sleeping or camping ordinances and the city required the city to verify that shelters had sufficient space for homeless individuals before enforcing ordinances against them for sleeping or camping in public.[142] Per the settlement, after the city showed that more shelter spaces were open than were people living at a particular camping area on public property, the city could enforce anti-camping ordinances in that area, with safeguards such as notice to those being enforced against and to the law firm that sued the city.[143] By late 2023, the last of the large homeless camps in town had been

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Portland's zoning code was modified to legitimize campsites). However, the legal arguments around public nuisance have centered around the organic sites created by lack of enforcement. *See, e.g.*, Brown v. City of Phoenix, No. CV 2022-010439, 2023 Ariz. Super. Ct. LEXIS 120 (Ariz. Super. Ct. June 12, 2023); *see also* Mila Versteeg et al., *The New Homelessness*, 113 CALIF. L. REV. (forthcoming 2025) (manuscript at 51–53) (available at https://papers.ssrn.com/ sol3/papers.cfm?abstract_id=4718929 [https://perma.cc/CQU3-LFA6]) (detailing the creation of sanctioned campsites in Sacramento, Portland, and Phoenix).

139. *See* Versteeg et al., *supra* note 138, at 48 (arguing that *Martin* is a factor in cities' decreasing enforcement of anti-camping ordinances and increasing reliance on sanctioned campsites).

140. *See, e.g.*, Brief for International Downtown Association et al., as Amici Curiae Supporting Petitioner at 31, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175) ("The *Martin-Grants Pass* regime encourages and emboldens individuals who could benefit from shelter and services to stay in unsafe and unhealthy conditions. In so doing, it allows criminal elements to prey upon the most vulnerable who need help rather than abandonment."). This is not to say that sanctioned campsites are all bad. While they do sequester and exclude homeless residents, they also provide those staying there a level of autonomy, and even dignity, that is unavailable in a more managed shelter. *See* Przybylinski, *supra* note 138, at 123.

141. *See supra* note 140 and accompanying text.

142. *Press Release: Settlement in* Warren v. Chico *– City to Build Individual Shelters, Unhoused Residents Won't Be Arrested or Cited for Sleeping Outside When Shelter Is Unavailable*, W. CTR. ON L. & POVERTY (Jan. 14, 2022), https://wclp.org/press-release-federal-judge-signs-settlement-in-warren-v-chico-city-to-build-individual-shelters-unhoused-residents-wont-be-arrested-or-cited-for-sleeping-outside-when-shelter-is-unavaila/ [https://perma.cc/3UH8-KW6H].

143. *See* Warren v. City of Chico, No. 221CV00640MCEDMC, at 12–13, ¶ 10(b) (E.D. Cal. Jan. 14, 2022), https://wclp.org/wp-content/uploads/2022/01/153.-Order-on-Stipulated-Agreement.pdf [https://perma.cc/DF9P-JKXK] (stipulated order incorporating settlement agreement and retaining jurisdiction).

enforced against, leaving homeless residents who could not live in one of the available shelters in town two options: (1) stay at the city-sanctioned campsite or (2) be forced to move around the city to avoid enforcements, which could be brought with increasing regularity against smaller populations.[144] While the initial settlement agreement comported with the spirit of *Martin* in many ways—particularly with the requirement for the city to purchase Pallet Shelters and verify available shelter spaces before it enforced against campsites—in running its course, the settlement has returned things to essentially a pre-*Martin* world, albeit one with a few more shelter beds and a slightly more regulated process for sweeps.[145]

6. The Emergence of Public Nuisance Claims as a Response to Massive Campsites

Public nuisance claims were brought against cities as more and more cities ran *Martin* to its conclusion—that is, as they stopped enforcing anti-camping laws in a select few areas to enforce everywhere else.[146] Phoenix, for example, opted to mostly avoid enforcement of anti-camping and related ordinances in an area known as the "Zone" after the *Martin* opinion.[147] As a result, many of the city's unsheltered homeless residents moved to the Zone.[148] This resulted in an increase in crime and environmental hazards in the area, and affected citizens brought a public nuisance lawsuit against the city.[149]

A public nuisance is created when the government's action causes an unreasonable interference with a right common to the general public.[150] The Maricopa County Superior Court found that Phoenix, by refusing to enforce anti-camping and other laws in the Zone and by sometimes transporting homeless residents into the Zone to receive treatment from the Arizona Department of Human Services ("ADHS"), was unreasonably interfering with a right common to the public

144. The smaller the group to be enforced against, the fewer open spaces in a shelter are required to allow enforcement. *See* Hayley Watts, *Chico Mayor Andrew Coolidge Provides Update on Homeless Crisis*, ACTION NEWS NOW (Oct. 4, 2023), https://www.actionnewsnow.com/news/chico-mayor-andrew-coolidge-provides-update-on-homeless-crisis/article_fc52bf28-62cb-11ee-817a-3f02ed6f1e2a.html [https://perma.cc/79Z5-9ZFU] ("The last major homeless camp at Depot Park – gone by the end of this August. Coolidge says now, it's about maintenance. 'As soon as these areas pop up, now we're instantly responding.").

145. Now, when enforcements happen, one 3-day and two 7-day notices are required to be served before people can be arrested. *Id.*

146. *See* Brief for LA Alliance for Human Rights et al., as Amici Curiae Supporting Petitioner, *supra* note 25, at 3–4. Instead of selectively enforcing anti-camping laws to avoid running afoul of the Eighth Amendment, cities may continue to selectively enforce for administrative or economic reasons.

147. Brown v. City of Phoenix, No. CV 2022-010439, 2023 Ariz. Super. Ct. LEXIS 120, at *2–3 (Ariz. Super. Ct. June 12, 2023).

148. *See id.* at *3.

149. *See id.* at *41.

150. *See, e.g.*, Venuto v. Owens-Corning Fiberglass Corp., 22 Cal. App. 3d 116, 123 (Cal. App. 1971) (citing WILLIAM L. PROSSER, LAW OF TORTS 605–06 (3d ed. 1964)) (explaining that public nuisance is "an act or omission which interferes with the interests of the community or the comfort and convenience of the general public and includes interference with the public health, comfort and convenience"); *Brown*, 2023 Ariz. Super. Ct. LEXIS 120, at *25.

and was thereby maintaining a public nuisance in the Zone.[151] This finding is arguably surprising, as courts tend to dismiss public nuisance claims that are a result of governmental inaction.[152] Perhaps the little action that Phoenix did take—transporting unsheltered homeless residents into the Zone to receive treatment from ADHS—was enough for the court to not be perturbed by the implication of finding the city responsible for maintaining a public nuisance in this situation.[153]

After this finding, the city began clearing the Zone by relocating those who lived there. Some unsheltered homeless residents of the Zone moved to newly opened shelters, but there was not sufficient shelter space to accommodate everybody.[154] Those who could not move to a shelter presumably had to find a new place in the city to live.

Putting aside the issue that many unsheltered homeless individuals have no real choice but to live in the sometimes awful conditions of large campsites or else risk punishment by anti-camping ordinances, cities' sequestration of their homeless residents into large campsites and the resulting public nuisance lawsuits represent a new way to obviate *Martin*'s Eighth Amendment holding and enforce anti-camping ordinances against homeless residents regardless of whether adequate shelter exists in the jurisdiction. For example, public nuisance lawsuits like *Brown v. Phoenix*

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151. *Brown*, 2023 Ariz. Super. Ct. LEXIS 120, at *26, *41.

152. *See* David A. Dana, *Public Nuisance Law When Politics Fails*, 83 OHIO ST. L.J. 61, 63 (2022) ("But the courts, by and large, have refused to acknowledge the regulatory failures that prompt public nuisance actions. On the contrary, the courts have often dismissed the public nuisance claims, explaining that the problems at issue are suitable for the legislatures and agencies, but not courts, to resolve.").

153. *See Brown*, 2023 Ariz. Super. Ct. LEXIS 120, at *5–6. The court's view that the city's action, not its inaction, is what produced the public nuisance may be evidenced by the active language of its order in *Brown*: "The City of Phoenix is prohibited from continuing to *maintain* a public nuisance. . . . The City shall abate the nuisance it presently *maintains* . . . ." *Id.* at *40 (emphasis added).

154. Jack Healy, *Phoenix Dismantles a Homeless Encampment, One Block at a Time*, N.Y. TIMES (May 10, 2023), https://www.nytimes.com/2023/05/10/us/phoenix-homeless-camp-the-zone.html [https://perma.cc/M3KV-XHZA] ("People who provide services for the homeless say clearing the Zone will not resolve the high rents or lack of mental-health services and substance abuse treatment that are a root of homelessness. Some people will simply get pushed into new neighborhoods, they say, or into hiding, and farther away from services. 'This is a shell game,' said Amy Schwabenlender, the chief executive of Phoenix's Human Services Campus."); Erica Stapleton, *It's Been a Year Since 'The Zone' Homeless Encampment Shut Down in Phoenix. What Does the City's Homeless Crisis Look Like Now?*, 12 NEWS (Oct. 30, 2024), https://www.12news.com/article/news/local/valley/its-been-a-year-since-the-zone-homeless-encampment-shut-down-in-phoenix-what-does-the-citys-homeless-crisis-look-like-now/75-56e98bf2-7ceb-474d-83fd-230aa84132f4 [https://perma.cc/WBR4-2WEZ]. To be fair, Phoenix *did* open new shelters to accommodate people from the Zone, and even the new "Safe Outdoor Space" (which sounds just as dystopic as "the Zone"), which functions as an alternative to shelters, provides key amenities like air conditioned and shades spaces, bathrooms, laundry, and rooms. *Id.*

were also initiated in Sacramento[155] and Tucson,[156] arguing that public nuisances had resulted from the cities' refusal to enforce anti-camping ordinances in certain areas.

However, there are notable differences between Phoenix's situation and those of Sacramento and Tucson, which might have tested the limits of the public nuisance argument against *Martin*. Take Sacramento, where the lawsuit does not seek enforcement against one large area, but instead against 14 encampments spread throughout the city.[157] The Tucson complaint took things even further, as the contested area there was notably smaller than the Zone in Phoenix and many of the Sacramento encampments.[158] The contested area, a wash, was about 650 feet wide, and the number of people staying there fluctuated from 0 to 30, according to one plaintiff.[159] A finding that a city's lack of enforcement of anti-camping laws in these cases, which concern areas much smaller than the Zone, would significantly bolster the use of public nuisance as a tool against *Martin*, but a finding that allowing these encampments are not a nuisance would have the opposite effect. In May 2024, before the Supreme Court decided *City of Grants Pass v. Johnson*,[160] a Pima County judge found that the City of Tucson was not liable for public nuisance.[161] Litigation in the Sacramento case is ongoing.[162]

Whether lawsuits like these can successfully argue that encampments smaller than the Zone, for example, will be considered an unreasonable interference to plaintiffs will depend on facts specific to each case. However, despite *Brown v. Phoenix*'s finding of public nuisance arguably based on governmental inaction,[163] when governmental inaction is the cause of the nuisance, plaintiffs still have a difficult argument to make because of courts' general hesitancy to step into

155. Julie Watts, *Landmark Homeless Lawsuit,* The People vs. City of Sacramento, *Could Impact Policies Statewide*, CBS NEWS (Sept. 19, 2023, 10:40 AM) https://www.cbsnews.com/sacramento/news/landmark-homeless-lawsuit-people-vs-city-of-sacramento/ [https://perma.cc/EC7H-H7AU].

156. Nicole Ludden, *Legal Challenge of Tucson Homeless Camp Could Have Major Repercussions*, ARIZ. DAILY STAR (Sept. 22, 2023), https://tucson.com/news/local/government-politics/homeless-camp-lawsuit-navajo-wash-tucson/article_ae435e1a-58cf-11ee-8aaf-dfab841d85e8.html [https://perma.cc/CBN7-DW9U].

157. Tran Nguyen, *Sacramento Prosecutor Sues California's Capital City Over Failure to Clean Up Homeless Encampments*, AP NEWS (Sept. 19, 2023), https://apnews.com/article/california-lawsuit-sacramento-homelessness-68c98c9a3856ae89f6aa44165b02701a [https://perma.cc/V255-WXCH].

158. *See* Ludden, *supra* note 156.

159. *Id.*

160. 603 U.S. 520 (2024).

161. Paul Ingram, *Judge Rejects Neighbors' Lawsuit Over Homeless Camp in Tucson's Navajo Wash*, TUCSON SENTINEL (May 7, 2024, 7:33 PM) https://www.tucsonsentinel.com/local/report/050724_navajo_wash/judge-rejects-neighbors-lawsuit-over-homeless-camp-tucsons-navajo-wash/ [https://perma.cc/4NKQ-NC8D].

162. An earlier version of the lawsuit was dismissed, but District Attorney Thien Ho filed an amended complaint, which included public nuisance claims, in June of 2024. Theresa Clift, *Sacramento DA Files New Complaint Against City in Homeless Lawsuit. Will It Be Scaled Back?*, SACRAMENTO BEE (June 7, 2024, 5:51 PM), https://www.sacbee.com/news/local/article289096824.html [https://perma.cc/JHS8-P3RR].

163. *See supra* notes 150–53 and accompanying text.

problems suited to the legislature or agencies.[164] Moreover, when public nuisance lawsuits are brought against businesses or providers assisting homeless individuals, courts tend to defer to zoning—if the use was authorized by zoning and the provider complied with zoning laws, there tends to be no finding of public nuisance.[165] But in cases like those in Phoenix, Sacramento, and Tucson, the government did not zone an area to be used as an encampment, so there is no argument that allowing people to use the land as an encampment is considered reasonable by the legislature.[166]

Despite these complications, the finding of public nuisance in *Brown v. Phoenix*[167] likely means that citizens and officials[168] will continue to argue public nuisance, especially in cities with larger unofficial campsites. The Supreme Court's *Grants Pass* decision can only make this approach more attractive to citizens and officials because the additional constitutional protections *Martin* provided are now gone.

III. THE *GRANTS PASS* HOLDING AND EARLY POLICY CHANGES

After a few short years of doctrinal debates and policy changes, in 2023, the U.S. Supreme Court granted certiorari to *City of Grants Pass v. Johnson*[169]—a lawsuit that was initiated in 2019, only a few months after the Ninth Circuit Court of Appeals decided *Martin*.[170]

A. The Supreme Court's Analysis of Grants Pass

In its review of *Johnson v. City of Grants Pass*, the U.S. Supreme Court did not quibble with the technicalities of whether the Ninth Circuit Court of Appeals correctly or incorrectly applied precedent, or whether plaintiffs had standing based on the construction of the anti-camping law; instead, the Court simply overturned the substantive Eighth Amendment holding of *Martin* by holding that the Eighth

164. *See* Dana, *supra* note 152, at 63.

165. Marc L. Roark, *Homelessness at the Cathedral*, 80 MO. L. REV. 53, 113–17 (2015).

166. *See* Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz., 712 P.2d 914, 921–22 (Ariz. 1985) (en banc) ("We would hesitate to find a public nuisance, if . . . the legislature enacted comprehensive and specific laws concerning the manner in which a particular activity was to be carried out. . . . However, the judgment concerning the manner in which that business is carried out is within the province of the judiciary.").

167. Brown v. City of Phoenix, No. CV 2022-010439, 2023 Ariz. Super. Ct. LEXIS 120, at *41 (Ariz. Super. Ct. June 12, 2023).

168. It was the Sacramento District Attorney who sued the city for public nuisance, not concerned groups of citizens like in Phoenix. Nguyen, *supra* note 157; *see also* Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 12–16 (2011).

169. 603 U.S. 520 (2024).

170. *See* Blake v. City of Grants Pass, No. 1:18-CV-01823-CL, 2019 WL 3717800, at *3 (D. Or. Aug. 7, 2019). It is interesting to note that the Supreme Court had previously denied the City of Boise's petition to the Court to review *Martin* in late 2019, not long before Justice Amy Coney Barrett replaced Justice Ruth Bader Ginsburg on the Court. *See* City of Boise v. Martin, 140 S. Ct. 674, 674 (2019) (mem.).

Amendment does not prevent cities from enforcing anti-camping laws.[171] In doing this, the Court did not overrule *Robinson*'s central Eighth Amendment holding, but instead distinguished the law criminalizing the status of being addicted to narcotics at issue in *Robinson* from the laws that criminalize camping and related acts at issue in *Grants Pass*.[172] Justice Gorsuch's majority opinion reiterates the argument of the *Powell* plurality that the punishment of acts resulting from status is not barred by the Eighth Amendment.[173] Therefore, the anti-camping laws at issue in *Grants Pass* do not punish status, so they do not offend the Eight Amendment as contemplated by *Robinson*.[174]

While not the constitutional rationale for its holding, the Court further justified its holding by arguing that *Martin* represented an inappropriate amount of judicial overreach into local policymaking.[175]

The Court was closed to the idea that the Eighth Amendment can protect against civil punishments, stating that it "has never held that the Cruel and Unusual Punishments Clause extends beyond criminal punishments to civil fines and orders," and that *Grants Pass* did not "present any occasion to do so *for none of the city's sanctions defy the Clause*."[176] Because fines and expulsion are not unusual or uncommon and do not "superadd pain, terror, or disgrace," such measures are very unlikely to offend the Cruel and Unusual Punishments Clause, even if the Clause applied to civil punishments.[177] Therefore, whether the Eighth Amendment's Cruel and Unusual Punishments Clause applies to a civil punishment that can never become a criminal punishment in the anti-camping context is still technically an

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171. *City of Grants Pass*, 603 U.S. at 556 ("The Eighth Amendment provides no guidance to 'confine' judges in deciding what conduct a State or city may or may not proscribe.").

172. *Id.* at 546 ("[N]o one has asked us to reconsider *Robinson*. Nor do we see any need to do so today. . . . In criminalizing a mere status, *Robinson* stressed, California had taken a historically anomalous approach toward criminal liability. One, in fact, this Court has not encountered since *Robinson* itself."); *cf. id.* at 561 (Thomas, J., concurring) ("[T]he precedent that the respondents primarily rely upon, *Robinson v. California*, 370 U.S. 660 (1962), was wrongly decided.").

173. *See id.* at 547–50. *Grants Pass* is therefore a tacit rejection of the view that *Marks* allows for precedential weight to be given to those ideas shared both the majority and dissent. *See* Re, *supra* note 38, at 1953–54 ("There are . . . examples of the Court alluding to the *Marks* rule without citing *Marks*. Yet the Court more often glides over potential *Marks* rule issues without confronting them. For example, the Court sometimes describes plurality opinions as the voice of 'the Court,' without noting either that the ruling was a plurality or that the case involved a concurrence in the judgment." (footnotes omitted)).

174. *City of Grants Pass*, 603 U.S. at 549 ("This case is no different from *Powell*.").

175. *See, e.g.*, *id.* at 560 ("Homelessness is complex. Its causes are many. So may be the public policy responses required to address it. At bottom, the question this case presents is whether the Eighth Amendment grants federal judges primary responsibility for assessing those causes and devising those responses. It does not."); *id.* at 533 ("Different governments may use these laws in different ways and to varying degrees. But many broadly agree that 'policymakers need access to the full panoply of tools in the policy toolbox' to 'tackle the complicated issues of housing and homelessness.' Five years ago, the U. S. Court of Appeals for the Ninth Circuit took one of those tools off the table." (citations omitted)).

176. *Id.* at 543 n.4 (emphasis added) (citations omitted).

177. *Id.* at 521 (citing Bucklew v. Precythe, 587 U.S. 119, 130 (2019)).

open question, but it seems very unlikely that enforcement of anti-camping ordinances against unsheltered homeless individuals will be held to violate the Clause.[178]

Justice Sotomayor's dissent argued that *Robinson* did apply to Grants Pass's anti-camping laws because sleeping outside is inseparable from the status of unsheltered homeless individuals, so the laws impermissibly criminalized status.[179] Therefore, the distinction between acts and status from *Powell* cannot determine the case; [180] and while cities need flexibility to address the issues surrounding homelessness, they cannot do so at the expense of their residents' constitutional rights.[181]

As frequently seems to be the case, the majority and dissenting coalitions of the Court appear to be talking past each other here. The majority holds tightly to *Powell*'s distinction between acts and status, insisting that the act of sleeping outside is separable from one's status of unsheltered homelessness, so states can criminalize that act.[182] On the other hand, the dissent insists that sleeping outside is inseparable from the status of unsheltered homelessness, so broad-in-scope anti-camping laws violate *Robinson*.[183]

So, what is it? Unsheltered homeless individuals, by definition, have no choice but to sleep outside, and when anti-camping laws are broad in scope, they may have no choice but to violate those laws.[184] But that ultimately may not have mattered much to the Court. Ben McJunkin argues that the Court's decision is not really justified by the "thin" distinction between status and conduct, but by deference to states' ability to create criminal law.[185] Substantive Eighth Amendment concerns certainly contributed to the holding, but it seems that the concerns about local governments' ability to make policy are probably the primary motivator for the Court's decision.[186] For example, the majority suggests that *Martin* lacks a limiting

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178. *Cf.* Yeager v. City of Seattle, No. 2:20-CV-01813-RAJ, 2020 WL 7398748, at *5 (W.D. Wash. Dec. 17, 2020) ("The Court will not stretch the self-professed "narrow" holding in *Martin* to now include non-criminal statutes.").

179. *See City of Grants Pass*, 603 U.S. at 584–85 (Sotomayor, J., dissenting).

180. *Id.* (Sotomayor, J., dissenting) ("[U]nlike the debate in *Powell*, this case does not turn on whether the criminalized actions are 'involuntary' or 'occasioned by' a particular status." (cleaned up)).

181. *Id.* at 592 (Sotomayor, J., dissenting).

182. *Id.* at 549 ("This case is no different from *Powell*.").

183. *Id.* at 585 (Sotomayor, J., dissenting) ("This case . . . called for a straightforward application of *Robinson*.").

184. *See supra* notes 40–45 and accompanying text.

185. *See* Ben A. McJunkin, Grants Pass *and the Pathology of the Criminal Law*, 102 WASH. U. L. REV. (forthcoming 2025) (manuscript at 1) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4980279 [https://perma.cc/T9YF-QGTB]) ("As this Essay explains, however, the outcome in *Grants Pass* was necessitated not by the merits of a thin status–conduct distinction, but by judicial deference to an ever-expanding criminal law."). Professor McJunkin argues that while "severely detrimental to the interests of the nation's unhoused residents," *Grants Pass* "sits more consistently within the practices of the U.S. criminal legal system than had the Ninth Circuit's approach to the status crimes doctrine, endorsed in dissent by Justice Sotomayor." *Id.* at 30.

186. *See id.* at 14.

principal on what the Eighth Amendment can proscribe—suggesting that because it is necessary to have warmth during winter months, *Martin* could invalidate laws forbidding campfires, for example.[187] But the majority's problem with this does not seem to be *Martin*'s misunderstanding of the Eighth Amendment, but its invitation of the judiciary into policymaking: "By extending *Robinson* beyond the narrow class of status crimes, the Ninth Circuit has created a right that has proven 'impossible' for judges to delineate except 'by fiat.'"[188] And of course, the majority begins and ends its opinion by stating the importance of varied public policy responses to issues surrounding homelessness, arguing that the judiciary is unsuited to crafting these responses.[189]

Understanding this, it seems like it makes more sense for the Court to have just overruled *Robinson*—a measure *Grants Pass* toys with. According to Justice Gorsuch, "*Robinson* already sits uneasily with the [Eighth] Amendment's terms, original meaning, and our precedents."[190] Justice Thomas's concurrence goes a step further, arguing that *Robinson* was wrongly decided.[191] Overruling *Robinson* would have eliminated the Eighth Amendment's "small intrusion into substantive criminal law,"[192] but apparently, some of the justices in the *Grants Pass* majority were unwilling to go that far.

B. Policy Changes from Grants Pass

In the initial months after *Grants Pass*, a number of state and local governments, now empowered to enforce anti-camping laws without the strictures of *Martin*,[193] changed policy and law to allow for stricter enforcement of anti-camping laws. For example, California Governor Gavin Newsom signed an executive order directing state agencies and departments to enforce against all campers on state property.[194] Legislatures across the Ninth Circuit passed a wave of new laws increasing cities' abilities to enforce against their unsheltered homeless residents.[195]

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187. *See City of Grants Pass*, 603 U.S. at 555.

188. *Id.* at 523 (citing Powell v. Texas, 392 U.S. 514, 534 (1968)).

189. *See id.* at 525, 560.

190. *Id.* at 549.

191. *Id.* at 561 (Thomas, J., concurring).

192. *Id.* at 549 (cleaned up).

193. Stephanie Martinez-Ruckman & McKaia Dykema, *SCOTUS Issues Win for Local Control in* Grants Pass v. Johnson, NLC (June 28, 2024), https://www.nlc.org/article/2024/06/28/scotus-issues-win-for-local-control-in-grants-pass-v-johnson/ [https://perma.cc/Z3RP-6BSD].

194. Exec. Dep't State of Cal., Executive Order N-1-24 (July 25, 2024), https://www.gov.ca.gov/wp-content/uploads/2024/07/2024-Encampments-EO-7-24.pdf, [https://perma.cc/V7V8-39PD].

195. Marisa Kendall, *No Sleeping Bags, Keep Moving: California Cities Increase Crackdown on Homeless Encampments*, CALMATTERS (Sept. 12, 2024), https://calmatters.org/housing/homelessness/2024/09/camping-ban-ordinances/ [https://perma.cc/HE4F-7GTL] ("At least 14 California cities and one county have passed new ordinances that prohibit camping or updated existing ordinances to make them more punitive, another dozen are considering new bans, and at least four have dusted off old camping bans that hadn't been fully enforced in years.").

However, *Grants Pass* has not been a silver bullet for cities and states looking to enforce anti-camping laws more against their unsheltered homeless residents. For example, even with more legal tools at their disposal, cities have struggled to determine exactly what the best enforcement policy is.[196] Some cities, such as Los Angeles, have (ever so slightly) pushed back against state government orders for stricter enforcement.[197]

Some of the arguments regarding changes in the law from *Martin* (such as from settlements and new ordinances) illustrate more difficulties for cities that want things to change quickly. For example, the city of Chico, which entered into a settlement to comply with *Martin* in 2022, argued after *Grants Pass* that it should no longer be bound by the settlement because the settlement outcome was based on outdated law.[198] This led to resistance from Legal Services of Northern California—the firm that represented Bobby Warren in his suit against the city that led to the settlement.[199] In March 2025, the District Court for the Eastern District of California denied the city's request to be excused from its obligations under the settlement agreement.[200] This illustrates an important point—many of the legal and policy

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196. *See, e.g.*, Yana Kunichoff, *Tucson Withdraws Ordinance to Ban Camping in Washes Amid Community Concerns*, ARIZ. LUMINARIA (Sept. 26, 2024), https://azluminaria.org/2024/09/26/tucson-withdraws-ordinance-to-ban-camping-in-washes-amid-community-concerns/ [https://perma.cc/8HZT-6UHR] ("The week before, the planned city council agenda had included an ordinance that would have banned camping in washes. By Tuesday, the agenda item was gone, in large part, Romero said, because of concerns she heard about whether there was a place for people to go if they were removed from washes. 'If we displace somebody from washes, do they go to the neighborhood, do they go to the park?' she asked. 'If we're going to move people from washes or from parks, where are we going to take individuals that need assistance or help?'").

197. *See* Josh Haskell, *LA County Officials Respond to Newsom's Warning About Not Clearing Homeless Encampments*, ABC7 (Aug. 9, 2024), https://abc7.com/post/la-county-officials-respond-newsoms-warning-not-clearing-homeless-encampments/15166877/ [https://perma.cc/ZNW9-VJYB].

198. *See* Michael Weber, *City Seeks to Exit* Warren v. Chico *Settlement*, CHICO ENTERPRISE-RECORD (July 18, 2024, 11:32 AM), https://www.chicoer.com/2024/07/17/city-claims-warren-v-chico-agreement-unworkable-seeks-judicial-relief/ [https://perma.cc/2C43-SLEE].

199. *See id.*; *see also* Michael Weber, *LSNC Defends Dispute Process in City's Exit of* Warren v. Chico, CHICO ENTER.-REC. (Nov. 30, 2024, 4:10 AM), https://www.chicoer.com/2024/11/30/lsnc-defends-dispute-process-in-citys-exit-of-warren-v-chico/ [https://perma.cc/JPM7-A5NY] ("The reply comes after a back-and-forth argument initiated by Chico's Sept. 10 filing for Rule 60 of the Federal Rules of Civil Procedure, when it asked the court for relief from all components of the Warren v. Chico settlement agreement, citing Gov. Gavin Newsom's July 25 order for jurisdictions to address public camping.").

200. Order Denying Defendants' Motion for Relief from Final Judgment at 1, Warren v. City of Chico, No. 221CV00640MCEDMC, 2025 WL 974068 (E.D. Cal. Mar. 31, 2025), https://bloximages.newyork1.vip.townnews.com/actionnewsnow.com/content/tncms/assets/v3/editorial/8/15/8151ce58-5dd4-40be-aa05-b50d76a9eba5/67ec469f27e8c.pdf.pdf [https://perma.cc/ZP6Y-S254]; Mike Wolcott & Jake Hutchison, *Judge Denies Chico's Motion to Exit Warren Homeless Camp Settlement*, CHICO ENTER.-REC. (Apr. 1, 2025, 10:43 PM), https://www.chicoer.com/2025/04/01/judge-denies-chicos-motion-to-exit-

consequences brought about by *Martin* will take time to change. As another example, while shelters may be dependent on continued government funding and cities now arguably have less incentive to fund shelter spaces, shelters should not disappear overnight—their existence is tied to local law and local, state, and federal funding, which did not disappear with *Martin*.[201]

And what of *Martin*'s more negative effects, such as massive sanctioned campsites?[202] At first, it might seem like with *Martin*'s prohibition on "total homelessness criminalization" gone, cities will no longer be incentivized to form massive sites through selective enforcement. Unfortunately, this does not seem to be the case. For example, Grants Pass's first response to the *Grants Pass* opinion was to consolidate 15 dispersed campsites into 4 larger sanctioned sites that may have been permissible under *Martin* anyway,[203] citing ease of law enforcement as a primary reason for this consolidation.[204] This indicates that while *Martin* provided cities a legal incentive to form large sanctioned campsites, other practical incentives continue to push cities toward sequestering unsheltered homeless residents in large sanctioned sites.[205]

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warren-homeless-camp-settlement/ [https://perma.cc/7ZR2-M8KL] ("The city argued that the change in law 'brought about by the Supreme Court's decision in Grants Pass constitutes an extraordinary circumstance which warrants relief' . . . . But [the court] sided with the plaintiffs . . . who argued "an intervening change in the law does not by itself constitute extraordinary circumstances.").

201. For example, Chico's Pallet Shelter is funded by local taxes, state grants, and the American Rescue Plan Act of 2021—none of which were directly affected by the ruling in *Grants Pass*. *See* Camille Acevedo, *What Is the Cost to Help Homeless People*, ACTION NEWS NOW (Dec. 19, 2023), https://www.actionnewsnow.com/news/what-is-the-cost-to-help-homeless-people/article_71524ca4-9edf-11ee-a446-af6cd1f1893d.html [https://perma.cc/YK7V-UX2R]. After the *Grants Pass* ruling, Chico stated it planned to operate the Pallet Shelter through 2027. Munda Sadek, *Chico Pursues Closure of Alternate Campsite, Changes to Pallet Shelter Post-Grants Pass*, KRCR (July 31, 2024, 5:57 PM), https://krcrtv.com/news/local/residents-of-chicos-alternate-site-react-to-citys-plans-to-pursue-slow-close-process [https://perma.cc/X3XT-PGAC].

202. *See supra* Subsection II.B.5.

203. *See supra* Subsections II.B.1–3.

204. Rocky Walker, *Grants Pass Mayor Answers Some of Communities' Most Pressing Questions About New Homeless Campsites*, KRDV (Oct. 16, 2024), https://www.kdrv.com/news/top-stories/grants-pass-mayor-answers-some-of-communities-most-pressing-questions-about-new-homeless-campsites/article_a8e5d44c-577b-11ef-bad9-3bf27de1a5c4.html [https://perma.cc/LS4C-X74W].

205. For example, clearing land for a campsite will generally be less expensive than constructing a shelter. Sanctioned sites with many of the same amenities of an actual shelter can be increasingly expensive to construct and operate, but cities do seem increasingly open to this approach over building new shelters. *See* Helen Rummel, *Phoenix's Campground Now Open for People Who Are Experiencing Homelessness*, ARIZ. REPUBLIC (Nov. 13, 2023, 2:49 PM), https://www.azcentral.com/story/news/local/phoenix/2023/11/13/phoenix-structured-campground-open-for-homeless-population/71524369007/ [https://perma.cc/WJ5T-RPS2] ("As Phoenix officials work to keep the area formerly known as 'The Zone' clear of people, construction continues at a nearby structured campground that opened earlier this month. . . . The campground, previously used for the state's surplus property, features tents, indoor

IV. SUGGESTIONS FOR POLICYMAKERS

In crafting policy, cities can be both cruel towards and cognizant of the struggles that their unsheltered homeless residents face every day.[206] This Note has mostly focused on the cruelty of law enforcement against those who have no other place to go; however, it is important to note that cities have attempted to (and may continue to attempt to) represent the needs of all their citizens.[207] Obviously, one could read city policy objectives purporting to respect the dignity of unsheltered homeless residents cynically, as posturing or as an attempt to limit liability. However, good governance "thrives on legitimate process and transparency."[208] Therefore, even though *Martin* no longer constitutionally prevents "total homelessness criminalization," cities should craft policy that is (1) effective but (2) also respects the dignity of their unsheltered homeless residents, because doing so will show good governance and improve their legitimacy.

As the aftereffects of *Grants Pass* run their course throughout the Ninth Circuit, cities large and small may continue to find themselves in the same situation as Chico[209]—where homeless residents are enforced against for sleeping anywhere except for a select few sanctioned sites—or Sacramento, Phoenix, and Tucson, where the situation produced public nuisance lawsuits.[210] Conversely, unsheltered homeless residents may be forced to move around regularly because of cities' increased ability to enforce anti-camping laws, even if no shelter space is available. All of this is antithetical to the intention and aim of *Martin*,[211] but it is also antithetical to the safety and well-being of cities' unsheltered homeless residents, who may still endure the dangers of large sanctioned sites in a post-*Grants Pass*

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facilities and other resources for people experiencing homelessness in downtown Phoenix. The operation has cost roughly $13 million, including the price of the property.").

206. *E.g.*, *compare* Brief of Amici Curiae National Coalition for Homeless Veterans et al. in Support of Respondents at 18–39, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175) (arguing the experiences of some unsheltered homeless veterans: Erin Spencer, Duane Nichols, Bob, Lucrecia, Doug Higgins, Emilio Rodriguez, Ken, Jerry Roderick Burton, and Thomas Peterson illustrate "the callousness of some localities, including banishment threats and dehumanizing treatment"), *with* Kunichoff, *supra* note 196 (explaining how in Tucson, citizens' concerns about enforcement against unsheltered homeless residents delayed passage of a new enforcement law after *Grants Pass*).

207. For example, see City of Grants Pass v. Johnson, 603 U.S. 520, 526–28 (2024) ("Like many local governments, the city of Grants Pass, Oregon, has pursued a multifaceted approach. Recently, it adopted various policies aimed at 'protecting the rights, dignity[,] and private property of the homeless.' It appointed a 'homeless community liaison' officer charged with ensuring the homeless receive information about 'assistance programs and other resources' available to them through the city and its local shelter. And it adopted certain restrictions against encampments on public property." (citations omitted)).

208. Karen A. Snedker, *Rise in Homelessness Reflects a Governance Crisis*, SEATTLE TIMES (Jan. 7, 2024, 12:01 PM), https://www.seattletimes.com/opinion/rise-in-homelessness-reflects-a-governance-crisis [https://perma.cc/K8FQ-R8AG].

209. *See supra* notes 142–45 and accompanying text.

210. *See supra* Subsection II.B.6.

211. *See* Fitzpatrick v. Little, No. 1:22-CV-00162-DCN, 2023 WL 129815, at *13 (D. Idaho Jan. 9, 2023) ("[W]hat Martin commands [is] that the State cannot prevent individuals from sleeping anywhere.").

world.[212] Therefore, cities should craft policy to reverse this "endgame" of enforcement that obviated, and exists beyond, *Martin* and is damaging to cities and their homeless residents. To do this, policymakers should make the scope of time and place restrictions reasonable from the point of view of the homeless residents of that jurisdiction. Cities should also reduce reliance on massive sanctioned campsites, as doing so will cut down on public nuisance claims and better preserve the safety and dignity of homeless residents. Instead, cities should engineer campsites to be smaller, safer, and more accessible to those who cannot obtain shelter.

A. Reasonable Time and Place Restrictions

One way to do this is to ensure that time and place restrictions on camping are reasonable from the point of view of the typical homeless resident in that jurisdiction.[213] This is an objective standard, an abstraction that cities should aspire to in designing their anti-camping ordinances. Judges can further articulate this abstraction by reviewing whether ordinances meet this standard.[214]

Time restrictions that are reasonable from the typical homeless resident's point of view in a jurisdiction will account for environmental factors that affect the ability of the city's unsheltered homeless residents to sleep at night. For example, Portland's "reasonable" 8 a.m. camping ban may not be reasonable for its typical homeless resident. The sun is always up by 8 a.m. in Portland, but sometimes only just.[215] Moreover, many unsheltered homeless individuals cannot sleep through the night because of the dangers of crime or bad weather, or other difficulties such as insomnia or working night shifts.[216] These individuals may be only beginning to rest by 8 a.m. Finally, even if a person is awake and ready for the day by 8 a.m., the removal of personal property or camping accoutrements by 8 a.m. is likely extremely difficult.

Area restrictions that are reasonable from the point of view of the jurisdiction's typical homeless resident will similarly account for environmental factors that affect unsheltered homeless residents' ability to access areas where anti-camping ordinances will not be enforced. Again, this will vary by jurisdiction. For example, if a city's only sanctioned campsite is miles away from where those who would use it typically go during the day or if it is readily accessible only by

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212. *See supra* note 140 and accompanying text.

213. *See* Zielinski, *supra* note 116.

214. *See id.*

215. S*ee Portland, Oregon, USA — Sunrise, Sunset, and Daylength*, TIMEANDDATE, https://www.timeanddate.com/sun/usa/portland-or?month=12&year=2023 [https://perma.cc/WDU5-RKVQ] (last visited Mar. 14, 2025). In 2023, the latest sunrise was 7:50 a.m.

216. *See* Calhoun & Chassman, *supra* note 127, at 798–800, 807 ("Our findings confirm the presence of poor quality and quantity of sleep among our participants. In particular, the average amount of sleep in the sample was 3.6 hours . . . ."); Benjamin F. Henwood et al., *Investigating Sleep Disturbance and Its Correlates Among Formerly Homeless Adults in Permanent Supportive Housing*, MED. CARE, Apr. 2021, at 1, 2, doi: 10.1097/MLR.0000000000001446 ("Homelessness is associated with poor sleep, insomnia, and daytime fatigue due to the daily struggle to obtain quality sleep in emergency shelter or unsheltered environments that are typically noisy, overcrowded, uncomfortable and perceived as unsafe." (footnotes omitted)).

traversing high-speed roads, then this area restriction would be unreasonable from the point of view of the jurisdiction's typical homeless resident.

B. Eliminate Massive Sanctioned Campsites

While sanctioned campsites may make things tidier for the city from a legal or administrative point of view[217] and larger campsites may grant their residents greater access to amenities and outreach,[218] they can still create hazardous living conditions for those who must live there or risk violating anti-camping laws.[219] However, despite the many issues created by sanctioning large campsites, group campsites are likely here to stay because of the incentives they provide cities, even with *Martin* gone.[220] Moreover, assuming basic health and safety are met, a stay in a campsite may even be more beneficial to their residents than a stay in a shelter because of the flexibility and autonomy they by design provide their residents.[221] Policymakers, recognizing this, should work to engineer campsites to be safe and attractive alternatives to shelter stays by making them smaller and striking a balance between providing amenities and maintaining a flexible regulatory approach.

Cities should engineer campsites to be attractive alternatives to indoor shelters. This is a fine line to walk; campsites must be neither too big nor too small, for campsites that are too large may endanger their residents, and campsites that are too small will not sufficiently meet the burdens facing individuals and cities. Smaller sites offer several advantages to larger ones; for example, sanctioning smaller sites in more locations across the city will make them more accessible to homeless residents who spend their days in different parts of the city. The hazards of very large sites—e.g., public health issues, crime—will be greatly reduced by smaller sites. By doing this, the risks of personal harm to those who stay in the sites and harm to the city through public nuisance lawsuits will be minimized.

Another difficult balance to strike is how cities should regulate the campsites. Cities should provide a basic level of safety as well as access to amenities and outreach at a campsite. However, if there is too much regulation, the attractiveness of the site will diminish, as those who opt to camp in sanctioned sites or by themselves elsewhere in the city often do so because past negative experiences

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217. *See* Brief for LA Alliance for Human Rights et al., as Amici Curiae Supporting Petitioner, *supra* note 25, at 3–4.

218. *See* Chris Herring & Manuel Lutz, *The Roots and Implications of the USA's Homeless Tent Cities*, 19 CITY 689, 692 (2015).

219. *See* Brown v. City of Phoenix, No. CV 2022-010439, 2023 Ariz. Super. Ct. LEXIS 120, at *26 (Ariz. Super. Ct. June 12, 2023) (detailing the public health consequences of a large encampment, which endangers not only those living near the encampment, but those who live in it as well).

220. *See supra* notes 202–05 and accompanying text.

221. Chris Herring and Manuel Lutz explain that campsites are an alternative to the "seclusion" of policing and homeless shelters. "[W]hile durable encampments function as complementary strategies to exclusionary policing for the local state that partially relieve the fiscal and legitimation crises of criminalization, they simultaneously serve as preferred safe grounds for homeless campers from the heavily policed zones of exclusion, but also to the traditional institution of homeless seclusion—the shelter." Herring & Lutz, *supra* note 218, at 695.

with outreach personnel or shelters have made them wary of outreach efforts.[222] Moreover, as campsites become more regulated, the autonomy and dignity that staying at a campsite provides homeless residents will decrease.[223] Cities should therefore work to foster trust with the residents of their sanctioned campsites to be able to make them safer without excessive regulation or surveillance.

A potential advantage of engineering smaller campsites will be that nearby housed residents and businesses may not experience the same hazards that can result from very large campsites. While the potential for nuisance claims may increase if campsites are spread throughout a city, their smaller size may reduce risk of lawsuits on public nuisance grounds.

V. SUGGESTIONS FOR ADVOCATES

To best advocate for the needs of unsheltered homeless individuals, advocates should double down on legal arguments that have been unaffected by *Martin*'s disappearance while also advancing new legal arguments.

Martin is gone, but unsheltered homeless residents of the Ninth Circuit are not totally defenseless. For example, the statutory changes prompted by *Martin* protecting the rights of homeless individuals (for example, by limiting the scope of enforcement[224] or by putting more money toward building or maintaining shelters[225]) will endure until changed by legislatures or reviewed by courts.[226] Moreover, procedural due process violations during sweeps will remain actionable, and excessive fines arguments[227] can still be made, as *Martin* did not turn on those issues.

In addition to holding the ground gained by statutory changes and arguing procedural due process and excessive fines, advocates can make substantive due process arguments[228] based on the idea that anti-camping ordinances violate a fundamental right of unsheltered homeless individuals, such as the right to travel,

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222. *See* Amy M. Donley & James D. Wright, *Safer Outside: A Qualitative Exploration of Homeless People's Resistance to Homeless Shelters*, 12 J. FORENSIC PSYCH. PRAC. 288, 290 (2012).

223. *See* Przybylinski, *supra* note 138, at 123.

224. Zielinski, *supra* note 116. A recent push by the Oregon League of Cities is to change the law to allow cities to always be able to enforce anti-camping laws in certain designated areas. Dirk VanderHart, *A Fight over Oregon's Laws on Homeless Camping Looms in 2025*, OR. PUB. BROAD. (Dec. 12, 2024, 1:47 PM) https://www.opb.org/article/2024/12/12/a-fight-over-oregons-laws-on-homeless-camping-looms-in-2025/ [https://perma.cc/YFY2-TX3E].

225. *See* SACRAMENTO CITY ATT'Y, *supra* note 133, at 4–5, ch. 12.100.020.

226. *See* City of Grants Pass v. Johnson, 603 U.S. 520, 588 (2024) (Sotomayor, J., dissenting) ("The Court today does not decide whether the Ordinances are valid under a new Oregon law that codifies *Martin*. . . . Courts may need to determine whether and how the new law limits the City's enforcement of its Ordinances.").

227. *See id.* at 588–90.

228. *See id.* at 590.

the right to familial association, or even the liberty to be somewhere without being moved.[229]

Scholars and advocates are already formulating new legal arguments to protect homeless individuals from unfair enforcement of anti-camping laws. For example, Ezra Rosser argues that the oral argument and majority opinion of *Grants Pass* indicate that the necessity defense could be a viable legal shield against enforcement of anti-camping laws.[230] Therefore, while the Constitution may not limit the scope of anti-camping ordinances, necessity might.[231] Others have argued that advocates can also use existing federal antidiscrimination laws, such as the Fair Housing Act, to make a statutory argument that anti-camping laws illegally discriminate against unsheltered homeless individuals. [232] Existing state antidiscrimination laws can also help advocates protect the rights of unsheltered homeless individuals.[233]

In sum, advocates can defend the ground they gained from *Martin* by continuing to make procedural and substantive due process and excessive fines arguments while they explore new ways to protect the rights of homeless individuals.

CONCLUSION

While some cities changed their laws and policies to protect the rights of homeless residents in response to *Martin*, reliance on massive sanctioned campsites changed enforcement of anti-camping laws to be less protective of individual rights, allowing challenges to the rights of homeless residents on public nuisance grounds and creating hazards for all. Then, the Supreme Court eliminated the right created

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229. *See* Tim Donaldson, *Federal Substantive Due Process Rights of Homeless Persons*, 58 U.S.F. L. REV. 39, 66–67 (2023); David Rudin, *You Can't Be Here: The Homeless and the Right to Remain in Public Space*, 42 N.Y.U. REV. L. & SOC. CHANGE 309, 343 (2018).

230. Ezra Rosser, *The New Necessity*, 67 WM. & MARY L. REV. (forthcoming 2026) (manuscript at 52) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5052607) ("Traditionally . . . the necessity defense—which can arise in criminal law, torts, and property law—has been narrowly construed . . . . But the reach of the *Grants Pass* version of necessity as suggested by both the oral argument and the majority opinion arguably is not limited to a narrow doctrinal understanding. If the justices are serious that necessity could provide an excuse for violating a statute criminalizing homelessness, necessity would include within its protection a whole host of activities that infringe on public and private property rights." (citations omitted)).

231. *Id.* at 53. Professor Rosser's argument takes the Court at its word—it assumes that the Court's evocation of the necessity and other legal defenses is not cynical. *Id.* at 4. For an analysis of *Grants Pass* that doesn't quite believe the Court's mentioning of these legal defenses was not cynical, see Leading Case, *Eighth Amendment—Cruel and Unusual Punishment Clause*—City of Grants Pass v. Johnson, 138 HARV. L. REV. 375, 381–82 (2024) (arguing that post-enforcement defenses are unlikely to be of much use to unsheltered homeless individuals).

232. Tom Stanley-Becker, *Challenging the Criminalization of Homelessness Under Fair Housing Law*, 42 MINN. J.L. & INEQ. 109, 134–52 (2024).

233. *See* Jane Vaughan, *Grants Pass Must Fulfill Court-Mandated Conditions Before Enforcing Camping Ban*, OR. PUB. BROAD. (Mar. 28, 2025, 6:59 PM), https://www.opb.org/article/2025/03/28/grants-pass-camping-ban-halted/ [https://perma.cc/67FC-Q93S].

by *Martin*. This legal decision lessened some incentives for cities to create massive sanctioned sites, but others remain. Therefore, cities should work to create smaller, safer sites as an alternative. To increase the legitimacy of their governance and protect the wellbeing of their homeless residents, cities should also design anti-camping ordinances to be reasonable from the jurisdiction's typical homeless resident's point of view. Advocates can defend the ground they gained from *Martin* and can continue to use due process rights and excessive fines arguments while advancing new legal arguments.