



# **NAVIGATING *MARTIN V. BOISE***

**HOW CITIES CAN ENFORCE LAWS AGAINST PUBLIC CAMPING  
AND REMAIN IN COMPLIANCE WITH THE NINTH CIRCUIT DECISION**

**BY JOSEPH TARTAKOVSKY**

**DISCOVERY INSTITUTE CENTER ON WEALTH & POVERTY**



# THE LEGAL LANDSCAPE AFTER *MARTIN V. BOISE*

The 2018 decision of the U.S. Court of Appeals for the Ninth Circuit in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), has called into question laws against public camping. The decision held that because “human beings are biologically compelled to rest,” a city “may not criminalize conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets.” The Ninth Circuit declared that these restrictions violate the Cruel and Unusual Punishments clause of the Eighth Amendment. The U. S. Supreme Court declined to review the decision.

*Martin* has caused alarm among cities—the entities primarily tasked with ensuring day-to-day health and safety—because the decision imposes a sweeping yet impractical constitutional rule. Judge Marsha Berzon, the decision’s author, all but adopted the rallying cry of homeless rights activists when she wrote that “ordinances criminalizing sleeping in public places were never a viable solution to the homelessness problem.” Yet few cities had actually claimed that “criminalizing” sleeping was meant as a “solution” to homelessness; to the contrary, cities have argued that these laws serve to maintain immediate order, public health, and safety.

Ultimately, *Martin* was more a moral statement by three judges than a workable rule of law. It forbids enforcement of anti-camping laws unless an “alternative sleeping space” is “practically available.” *Martin* thus places cities in an untenable position: most municipalities with a significant homeless population have far more unhoused individuals than shelter beds—hence the crisis—and so *Martin* makes many camping bans unenforceable as written.

The key phrase in the decision, “practically available,” is too vague to have much real-world meaning. Does it mean public shelter or *any* alternative to sidewalk-sleeping? In *Martin*, the named plaintiff himself, Robert Martin, had a home elsewhere in Idaho but camped when he visited family in the City of Boise. Couldn’t he have stayed with them? What if the individual himself caused the “unavailability” (e. g. violating a shelter’s rules)? The court doesn’t say. The much-discussed footnote 8 of the decision created further confusion by indicating that, for instance, ordinances that ban camping *may* be lawful “at particular times or in particular locations.”

So far, *Martin* has been tested against anti-camping laws and encampment clean-ups or closures, but has not yet been tested against laws that have similar effects: laws against sitting or lying in public, keeping or storing personal belongings in public, or living in vehicles. Testing *Martin*’s true scope will require years of lawsuits.



# GENERAL GUIDANCE ON CREATING EFFECTIVE, CONSTITUTIONAL ORDINANCES

Ordinances that regulate the conduct of the homeless result in this unavoidable tension: cities must balance the rights of the unfortunate few and the rights of everyone else in the community. Laws—whether called “quality of life” laws or otherwise—are not “solutions” to the homelessness crisis. They are solutions to, or at least attempts to mitigate, immediate safety and health issues: a tent obstructing a walkway to a school; a ranting individual scaring the patrons of a sidewalk cafe; encampments that amass deposits of blood-stained needles.

Cities should keep in mind the following principles as they craft anti-camping ordinances that comply with *Martin v. Boise* and ultimately strike a balance that courts deem reasonable:

- **Be specific about the terms of enforcement:** The laws that best balance the rights of the homeless and the rights of the public are those that delineate specific prohibited conduct as narrowly as possible: no camping before 8 p. m., no lying on the sidewalk in public parks or near schools or in certain neighborhoods, and so on. Still, some measure of enforcement must be left to the responsible discretion of officers.
- **Create a record of real harms behind every law:** Cities should prepare against legal challenges by creating a strong record of the concrete harms that the ordinance is designed to combat. By amassing this evidence, cities can defend their ordinances on the basis of documented necessity and avoid putting courts in a position they dislike—weighing abstract interests such as convenience and aesthetics (important as they are) against basic property rights or even life-and-death perils cited by homeless rights activists.
- **Let the hand of the law be gentle:** Laws in this area should not be designed to punish offenders; they should be designed to mitigate urgent health and safety problems. Accordingly, officers should give out warnings that request voluntary compliance first. Fines for disobedience or repeat offenses should be small. When possible, police should offer information and provide a referral to services, and cities should waive potential penalties if individuals accept shelter or services.



# THE CASE LAW REGARDING ENCAMPMENT CLEANUPS AND CLOSURES AFTER *MARTIN*

Encampments—semi-permanent tent communities—are the most dangerous manifestation of the homelessness crisis. Encampments threaten those outside as well as those inside of them, not because of the mere sleeping that occurs, but because of vandalism, defecation and urination, littering of biohazardous or toxic substances, blocking of walkways, harassment of pedestrians, tent fires, open drug sales and use, and more.

Courts, faced with the new *Martin* “rule” have been inconsistent in applying it to encampments. But some lessons are emerging from a limited judicial consensus. First, a complete citywide ban on encampments, without exceptions, is likely to run into trouble under *Martin*, unless shelter is available for those being displaced. Second, the safest approach is to eschew enforcement using criminal law (i. e., fines, arrests, or prosecutions), as many courts are holding that *Martin*, which rests on the Eighth Amendment, only applies when “punishment” is at issue.

Some recent decisions provide support for cities to engage in encampment cleanups or closures under civil laws:

- ***Butcher v. City of Marysville***, No. 2:18-CV-2765-JAM-CKD, 2019 WL 918203, at \*1 (E. D. Cal. Feb. 25, 2019): Members of homeless encampments on the Yuba and Feather Rivers alleged that 300-500 people were forcibly removed. The city claimed to be evacuating them from dangerous flood zones. The court found that the *Martin* claim could not proceed because, although two plaintiffs had been threatened with arrest, the threat came not pursuant to enforcement of a criminal ordinance but to evacuate a flooded area—a purely public health and safety reason. (Note that the court allowed the case to proceed on the grounds that property was taken in violation of the Fourth and Fourteenth Amendments and *Lavan v. City of Los Angeles*, which regulate when the property of homeless individuals can be taken or moved.)
- ***Shipp v. Schaaf***, No. 19-CV-01709-JST, 2019 WL 1644401, at \*1 (N. D. Cal. Apr. 16, 2019): Activists challenged Oakland’s procedure to remove homeless encampments from public rights of way, parks, and other city-owned property as part of a cleanup. The court rejected a *Martin* claim because Oakland only required temporary vacation of the encampment and this effort by itself did not implicate criminal sanctions. The court noted that *Martin* recognized that there was no right to be on streets at any time or place. Displaced individuals could go elsewhere for the period of time. (Regarding the seizure of property, the court found that Oakland had to provide lawful notice, give people time to retrieve items, avoid confiscation if the owner is present and the items do not constitute an immediate threat to public safety or evidence of a crime, itemize most seized property, offer notice of where to retrieve it, and hold the property for 90 days.)

- **Hous. is a Human Right Orange Cty. v. Cty. of Orange**, No. 19-cv-388-PAJ-DEX, 2019 WL 8012374, at \*5 (C. D. Cal. Oct. 28, 2019): *Martin* only applies with “the initiation of the criminal process.” **Le Van Hung v. Schaaf**, No. 19-CV-01436-CRB, 2019 WL 1779584, at \*1 (N. D. Cal. Apr. 23, 2019): “Clear and clean” operation does not invoke *Martin* since, even if no beds were available, such a sweep does not require the arrest of plaintiffs. **Quintero v. City of Santa Cruz**, No. 5:19-CV-01898-EJD, 2019 WL 1924990, at \*1 (N. D. Cal. Apr. 30, 2019): *Martin* does not apply where there are no prosecutions. **Young v. City of Los Angeles**, No. 20-cv-709-JFW-RAO, 2020 WL 616363, at \*5 (C. D. Cal. Feb. 10, 2020): *Martin* covers only “criminally prosecuting” homeless individuals.
- **Frank v. City of St. Louis**, No. 4:20-CV-00597-SEP, 2020 WL 2116392, at \*4 (E.D. Mo. May 2, 2020): St. Louis could close a downtown encampment, at least during the COVID-19 pandemic, because the “order to vacate is limited in [geographic] scope, because there is no evidence that [the homeless plaintiff] faces a genuine threat of criminal punishment, and because the City has represented that it is capable of housing every resident of the current encampment.”

However, other courts have been less friendly to cities and have suggested new limitations on cleanup policies:

- **Aitken v. City of Aberdeen**, No. 3:19-CV-05322-RBL, 2019 WL 2764423, at \*1 (W. D. Wash. July 2, 2019): Homeless individuals contested the city’s decision to evict roughly 100 residents of a longstanding encampment on city property that was plagued by untreated human waste, needles, theft, drug use, sexual assault, and tent fires. The city prepared to clear the encampment and enforce its ordinance against camping on public property, but the court blocked the effort on grounds that, in part, the court had to “assess the City’s regime more thoroughly” for compliance with *Martin*. The city eventually settled.
- **Blake v. City of Grants Pass**, No. 1:18-CV-01823-CL, 2019 WL 3717800, at \*1 (D. Or. Aug. 7, 2019): Homeless individuals alleged that the city “implemented a web of ordinances, customs, policies, and practices that ... criminalize the existence of homeless people,” including approximately 200 anti-sleeping and anti-camping citations over two years. The court went further than any other in holding that *Martin* can forbid not just arrests, fines, or prosecutions, but even non-punitive measures like “move-along orders” and “warnings.” See also **Mahoney v. City of Sacramento**, No. 2:20-cv-0258-KJM-CKD, 2020 WL 616302, at \*3 (E. D. Cal. Feb. 10, 2020): This case interpreted *Martin* to apply to relieving oneself in public.

In order to avoid *Martin* lawsuits, some cities have designated specific areas in which camping is allowed, e. g., a set-aside or secure location where the city can provide lighting, water, and bathroom facilities. Cities have also established parking zones for those living in vehicles. This strategy allows a city to control the location of encampments, direct services there, and keep encampments away from shopping districts and residential areas.

# MODEL ORDINANCES FOR “COMPASSIONATE ENFORCEMENT”

The City of Las Vegas recently enacted an ordinance that provides a model for compassionate and effective regulation of public camping. It took effect in November 2019 and, like most anti-camping laws, made it unlawful to sit, lie, camp, or lodge on a public right of way. By enacting the law, the city expressed the hope that the ordinance would “connect those in need to services and help break the cycle of homelessness.”

In order to comply with the *Martin* decision, the ordinance includes these notable features:

- **Enforcement can only occur when shelter beds are available.** Las Vegas authorities must inform the police department when all public shelters are full; when that happens, enforcement is temporarily suspended. This allows the city maximum flexibility on enforcement, while still complying with the legal requirement of providing “alternative sleeping space.”
- **The camping prohibition only applies to residential areas and certain downtown commercial areas.** This limits the scope of the ordinance as to location, though not as to time or manner. The city has limited its restrictions to areas that would be most harmed by homeless encampments.
- **The ordinance avoids being punitive unless necessary.** The city has stipulated that “enforcement is a last resort” and prohibits prosecution when individuals comply with an order to move. By providing officers with wide discretion, the city can enforce the law as necessary for public health and safety.
- **The ordinance is designed to link people to services.** Officers must notify individuals of their prohibited conduct, inform them about resources available at the Courtyard Homeless Resource Center, and direct them to a public location where they can lie or sleep.

The text of the Las Vegas ordinance is available here: <https://www.lasvegasnevada.gov/News/Blog/Detail/city-council-to-hear-first-reading-of-new-ordinance-designed-to-connect-homeless-with-services-and-off-the-streets>.

Smaller jurisdictions should look at the post-*Martin* ordinance enacted by Spokane Valley, Washington. It bans camping in public (and the keeping of property in public), but provides for the “suspension” of enforcement “at any time there is no space or beds available in regional homeless shelters that accept patrons from the City.” Still, it leaves camping permanently banned, regardless of shelter availability, in certain locations, like City Hall or parks.

The text of the Spokane Valley ordinance is available here: [https://spokanevalley.granicus.com/MetaViewer.php?view\\_id=3&clip\\_id=691&meta\\_id=50150](https://spokanevalley.granicus.com/MetaViewer.php?view_id=3&clip_id=691&meta_id=50150)

## ABOUT THE AUTHOR



Joseph Tartakovsky is an attorney at Gibson, Dunn & Crutcher LLP in San Francisco, where he practices in the firm's Appellate and Constitutional Law group. He was a member of the team that challenged *Martin v. City of Boise* in the U. S. Supreme Court. He is also the former Deputy Solicitor General of Nevada and the author of *The Lives of the Constitution: Ten Exceptional Minds that Shaped America's Supreme Law* (2018).

