The Illusion of Public Space: Enforcement of Anti-Camping Ordinances Against Individuals Experiencing Homelessness

Peer Marie Oppenheimer
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ABSTRACT

In response to the growing homelessness problem, many state and local governments have developed anti-camping ordinances that criminalize the act of sleeping on public property. Anti-camping laws can devastate individuals experiencing homelessness, especially when alternative resources, such as shelters, are not easily accessible. This Comment addresses the extent to which municipalities may enforce anti-camping ordinances against individuals experiencing homelessness who have no alternative to sleeping in public without violating the Eighth Amendment. As municipal regulation and judicial interpretation narrow the scope of permissible use of publicly owned areas, this raises the question of to what extent, and to whom, public space is actually accessible. To best safeguard public spaces, protect individuals experiencing homelessness, and avoid the risks that a narrow interpretation may create, this Comment argues that courts should interpret Ninth Circuit precedent surrounding homelessness broadly and take into account individual complexities on a case-by-case basis.

I. INTRODUCTION

Over 326,000 individuals were experiencing homelessness¹ in the United States in 2021, according to the U.S. Department of Housing

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¹ In recognizing that the language used to describe people matters, new terms are increasingly being used instead of “the homeless,” which can be seen as having a dehumanizing connotation. Some alternatives are “unhoused”, “unsheltered”, “houseless,” as well as using “homeless” as an adjective as opposed to a collective noun. See Nicholas Slayton, Time to Retire the Word ‘Homeless’ and Opt for ‘Houseless’ or ‘Unhoused’ Instead?, ARCHITECTURAL DIG. (May 21, 2021), https://www.architecturaldigest.com/story/homeless-unhoused [https://perma.cc/Y6TN-KFCC]; Kayla Robbins, Homeless, Houseless, Unhoused, or Unsheltered: Which Term is Right?, INVISIBLE PEOPLE (Aug. 25, 2022), https://invisiblepeople.tv/homeless-houseless-unhoused-or-unsheltered-which-term-is-right/ [https://perma.cc/Y8JA-ECVM]; Alissa Walker & Emma Alpern, The Language Around Homelessness Is Finally Changing, CURBED (June 11, 2020),
and Human Development. In response to the growing homelessness problem, many state and local governments have developed anti-camping ordinances. Anti-camping ordinances are broadly defined as laws “that criminalize the act of sleeping or pitching tents or other structures on publicly owned property.” These types of laws can devastate individuals experiencing homelessness, especially when alternative resources, such as shelters, are not easily accessible.

The Eighth Amendment of the Constitution is frequently invoked in cases involving enforcing anti-camping ordinances against individuals experiencing homelessness. The Eighth Amendment protects against “cruel and unusual punishments.” In Jones v. City of Los Angeles, the Ninth Circuit held that “so long as there is a greater number of individuals experiencing homelessness in Los Angeles than the number of available beds” the city may not enforce the anti-camping ordinance “against homeless individuals for involuntarily sitting, lying, and sleeping in public.” The same reasoning was employed in Martin v. City of Boise when the court held that the government could not criminalize the act of sleeping on public property when there was no option for sleeping indoors. This holding was recently affirmed and expanded on by the Ninth Circuit in Johnson v. City of Grants Pass.


For the purposes of this paper, the word “homeless” will be used only as an adjective and the group in question will be referred to as “individuals experiencing homelessness.” Because the U.S. Department of Housing and Urban Development (HUD) has distinguished between “unsheltered” and “sheltered” individuals experiencing homelessness, those terms will not be used unless referencing those distinctions specifically. See HUD Releases 2021 Annual Homeless Assessment Report Part 1, U.S. DEP’T OF HEALTH AND URBAN DEV. (Feb. 4, 2022), https://www.hud.gov/press/press_releases_media_advisories/hud_no_22_022 [https://perma.cc/4A4V-QJ2A] [hereinafter 2021 Annual Homeless Assessment].

2 2021 Annual Homeless Assessment, supra note 1.


4 Id.

5 Id.

6 U.S. CONST. amend. VIII.

7 444 F.3d 1118, 1138 (9th Cir. 2006), vacated, 505 F.3d 1006 (9th Cir. 2007).

8 Id. at 1138.

9 920 F.3d 584 (9th Cir. 2019).

10 Id. at 617.

11 Johnson v. City of Grants Pass, 50 F.4th 787, 813 (9th Cir. 2022) (“Our decision reaches beyond Martin slightly. We hold, where Martin did not, that class certification is not categorically impermissible in cases such as this, that ‘sleeping’ in the context of Martin includes sleeping with rudimentary forms of protection from the elements, and that Martin applies to civil citations where, as here, the civil and criminal punishments are closely intertwined”).
Coupled with the enforcement of anti-camping laws is the increasing denial of public space, not only for individuals experiencing homelessness but also to the general public. In response to increasing homelessness, municipalities are enacting ordinances to restrict usage of public areas,12 as well as constructing hostile architecture that makes it uncomfortable to use or stay in public areas for extended periods of time.13 As municipal regulation and judicial interpretation narrow the scope of permissible use of publicly owned areas, this raises the question of to what extent, and to whom, public space is actually accessible.

This Comment will focus on the extent to which municipalities may enforce anti-camping ordinances against individuals experiencing homelessness who have no alternative to sleeping in public without violating the Eighth Amendment. To best safeguard public spaces, protect individuals experiencing homelessness, and avoid the risks that a narrow interpretation may create, this Comment argues that courts should interpret Ninth Circuit precedent surrounding homelessness broadly and take into account individual complexities on a case-by-case basis. Part II explains the method federal courts historically used in addressing anti-camping ordinances under the Eighth Amendment. Part III addresses enforcement of anti-camping ordinances after the Ninth Circuit’s ruling in Martin by analyzing district court treatment and responses from municipalities. Part IV analyzes the existing gaps in the law regarding anti-camping enforcement that courts have yet to address. Part V starts by advocating for a broad application of Ninth Circuit precedent in order to avoid inequitable application of the law to common situations that arise for individuals experiencing homelessness. Ultimately, Part V analyzes hostile architecture, possible climate exceptions to anti-camping enforcement, and the policy implications of denying access to public spaces to demonstrate the negative implications on these areas if, in application, courts were to narrow the scope of existing case law.

II. ANTI-CAMPING ORDINANCES UNDER THE EIGHTH AMENDMENT

A. Historical Background

The Eighth Amendment has long been referenced to avoid criminalizing individuals based on status alone. For example, in *Robinson v. California*, the Supreme Court held that criminalizing drug addiction violated the Eighth Amendment because addiction is a status, not an act. The Court found that being addicted to narcotics is a status because it “is a continuing offense and differs from most other offenses in the fact that (it) is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms.” It ruled that a law criminalizing an individual based on status or chronic condition was cruel and unusual, noting that “even one day in prison would be cruel and unusual punishment for the ‘crime’ of having a common cold.” Courts later applied this reasoning to the enforcement of anti-camping ordinances against individuals experiencing homelessness.

In *Jones v. City of Los Angeles*, individuals experiencing homelessness in Los Angeles sought injunctive relief against enforcement of an anti-camping ordinance restricting sleeping in public, claiming that enforcement of the ordinance violated the Eighth Amendment. Using the same reasoning from *Robinson*, the Ninth Circuit remarked that cities cannot criminalize a person’s status, particularly when individuals experiencing homelessness have no option but to reside in public spaces. The court held that “so long as there is a greater number of individuals experiencing homelessness in Los Angeles than the number of available beds,” the city may not enforce the anti-camping ordinance “against homeless individuals for involuntarily sitting, lying, and sleeping in public.” Although *Jones* was vacated on procedural grounds, and therefore is not binding in the Ninth Circuit, the court’s

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15 *Id.* at 667.
16 *Id.* at 662–63.
17 *Id.*
18 See *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), vacated, 505 F.3d 1006 (9th Cir. 2007).
19 *Id.*
20 *Id.* at 1120.
21 *Id.* at 1136–37.
22 *Id.* at 1138.
reasoning is still utilized when discussing the Eighth Amendment and individuals experiencing homelessness.23

B. *Martin v. City of Boise*: A Pivotal Change for Anti-Camping Enforcement

The Ninth Circuit decided a pivotal case regarding the enforcement of anti-camping ordinances in *Martin v. City of Boise*, holding that the Eighth Amendment prohibits criminal penalties for “sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter.”24 In *Martin*, a group of individuals experiencing homelessness sued the city of Boise, Idaho, when they were cited for sleeping on public property after a local homeless shelter closed.25 The plaintiffs argued that, under the Eighth Amendment’s prohibition of cruel and unusual punishment, the anti-camping ordinance criminalizing use of “any of the streets, sidewalks, parks or public places as a camping place at any time”26 was unconstitutional because it punished individuals for sleeping in public areas when they had nowhere else to go.27

The Ninth Circuit held that “as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.”28 The *Martin* court, agreeing with the reasoning in *Jones*, said that these actions were “unavoidable consequences of being human.”29 The formula established in *Martin* stated that: “so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],’ the jurisdiction cannot prosecute homeless individuals for ‘involuntarily

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24 *Martin*, 920 F.3d at 616.

25 Id. at 606.

26 The City of Boise defined “camping” broadly as: “[t]he term “camp” or “camping” shall mean the use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation at anytime between sunset and sunrise, or as a sojourn. Indicia of camping may include, but are not limited to, storage of personal belongings, using tents or other temporary structures for sleeping or storage of personal belongings, carrying on cooking activities or making any fire in an unauthorized area, or any of these activities in combination with one another or in combination with either sleeping or making preparations to sleep (including the laying down of bedding for the purpose of sleeping).” *Martin*, 920 F.3d at 618.

27 Id.

28 Id. at 617.

29 Id. (quoting *Jones*, 444 F.3d 1118, 1136 (9th Cir. 2006), vacated, 505 F.3d 1006 (9th Cir. 2007)).
sitting, lying, and sleeping in public.” The Martin court cautioned that its reading was narrow in certain aspects, and did not specifically prohibit the government from enforcing all anti-camping ordinances. The Supreme Court denied a petition to hear Martin, therefore letting the Ninth Circuit’s precedent stand for the time being and making Martin the benchmark for enforcement of anti-camping ordinances.

C. Other Circuit Court Approaches

While most circuits have not yet addressed the Eighth Amendment issues that may arise from anti-camping ordinances, the Tenth Circuit recently addressed a similar issue regarding the displacement and removal of individuals experiencing homelessness in Denver Homeless Out Loud v. Denver, Colorado. In that case, the city of Denver had been conducting homeless encampment sweeps without notice, which prevented individuals experiencing homelessness from retrieving their property. The Tenth Circuit held that, due to procedural issues, the Plaintiffs’ claim was precluded. However, the Tenth Circuit’s decision does not prohibit municipalities from enforcing anti-camping ordinances through the ability to conduct homeless encampment sweeps.

Conversely, the Eleventh Circuit considered a similar issue to Martin in Joel v. City of Orlando. There, the Eleventh Circuit upheld an ordinance that prohibited camping on public property at any time, maintaining that the ordinance was not in violation of the Eighth Amendment and that targeting camping on public property was criminalizing an action, not a status.

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30 Id. at 618 (quoting Jones, 444 F.3d at 1138).
31 The court noted that there may be certain situations in which ordinances may be permissible, such as “an ordinance barring the obstruction of public rights of way or the erection of certain structures.” Id. at 617 n.8.
33 32 F.4th 1259 (10th Cir. 2022).
35 Denver Homeless Out Loud, 32 F.4th at 1264.
36 Id. at 1268.
37 232 F.3d 1353 (11th Cir. 2000).
38 Id. at 1362.
evidence that the nearby homeless shelter never reached capacity. It is unclear how the Eleventh Circuit would have responded if the homeless shelter had been full, thereby preventing individuals experiencing homelessness from sleeping anywhere in the city. Because the shelters had availability for individuals experiencing homelessness, the court in Joel did not have the opportunity to apply the shelter availability test set out in Martin.

D. Recent Developments: Johnson v. City of Grants Pass

Significantly, the Ninth Circuit recently attempted to clarify the broad implications of Martin in Johnson v. City of Grants Pass. The City of Grants Pass in Oregon had enacted several anti-camping statutes that would result in civil citations. If repeatedly violated, the statute authorized the police to issue criminal punishments. At the time, the homeless population of Grants Pass greatly exceeded its shelter availability. In response to the Martin holding, the city removed “sleeping” from the ordinance’s definition of camping because the original wording of the ordinance implied “sleeping in parks . . . automatically constitut[ed] ‘camping.’” The City of Grants Pass claimed that this change made the updated law in accordance with Martin, but the court disagreed.

The Ninth Circuit reaffirmed the holding in Martin and held that the ordinance prohibiting “bedding, sleeping bag, or other material used for bedding purposes” in public areas violated the Eighth Amendment. It explained that the city “cannot enforce its anti-camping ordinances to the extent they prohibit ‘the most rudimentary precautions’ a homeless person might take against the elements.” Because Grants Pass is cold in the winter, the court explained that a

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39 Id.
40 Id. (“The ordinance in question here does not criminalize involuntary behavior” because “the availability of shelter space means that Joel had an opportunity to comply with the ordinance.”).
41 See Martin v. City of Boise, 920 F.3d 584, 618 (9th Cir. 2019).
42 Johnson v. City of Grants Pass, 50 F.4th 787 (9th Cir. 2022).
43 Id. at 793–94.
44 Id. at 792.
45 Id. at 795.
46 Id. (“According to the City, ‘in direct response to Martin v. Boise, the City amended [the anti-camping ordinance] to make it clear that the act of ‘sleeping’ was to be distinguished from the prohibited conduct of ‘camping.’”).
47 Johnson, 50 F.4th 787, 798 (9th Cir. 2022).
48 Id. at 809.
49 Id. (quoting Martin v. City of Boise, 920 F.3d 584, 618 (9th Cir. 2019)).
resource like bedding is a “life-saving imperative.” 50 Notably, Johnson affirmed Martin and clarified that Martin is not limited to criminal cases: its holding can be applied to civil citations as long as they are closely related to criminal punishments. 51 Overall, Johnson solidified and expanded Martin’s fundamental holding in several areas, such as providing access to class certification and allowing individuals experiencing homelessness to protect themselves against the elements. 52

It is important to recognize that both the holdings in Martin and Johnson address only anti-camping ordinances and do not apply to other municipal actions that may be used to address homelessness, such as nuisance laws or ordinances hostile to panhandling. Furthermore, cities are still permitted to ban the use of tents in public areas after these rulings. 53 Whether fires, stoves, or structures can be banned is unclear. However, Johnson suggests that, considering the City’s interest in prohibiting these actions and the necessary precautions one must take against the elements, “these prohibitions may or may not be permissible” under Martin. 54

As shown by these rulings, the law remains unclear regarding what types of ordinances governments are permitted to enforce. Under the Ninth Circuit’s precedent, it is unclear if it is a violation of the Eighth Amendment to enforce anti-camping ordinances on all public property, or if local governments can enforce specific restrictions, such as prohibiting camping during certain time frames or at certain locations. District courts have addressed some applications of Martin, but courts have yet to address pertinent issues relating to anti-camping enforcement such as laws against sitting and sleeping in most public areas or restricting what an individual experiencing homelessness can keep with them. Additionally, district courts have not yet applied the Johnson holding, so it is unclear if that will provide more clarity for both courts and municipalities in practice.

III. ENFORCEMENT AND APPLICATION OF ANTI-CAMPING ORDINANCES AFTER MARTIN

A. District Court Treatment

District court decisions are helping define the vague guidelines created for anti-camping ordinances in Martin. In Miralle v. City of

50 Id. at 809 n.28.
51 Id. at 808.
52 Id. at 813.
53 Johnson, 50 F.4th 787, 812 n.32 (9th Cir. 2022).
54 Id. at 812.
Oakland, the Northern District Court of California held that “Martin does not establish a constitutional right to occupy public property indefinitely.” Additionally, a judge in Hawaii held that an ordinance prohibiting sleeping in parks did not violate Martin because the ordinance’s scope was limited only to a specific public location, rather than prohibiting sleeping in public more generally. In other cases, courts rejected Martin claims that did not involve criminal sanctions. However, it is unclear if those holdings still stand after Johnson defined Martin as being applicable to civil sanctions as well.

Other courts are more willing to interpret the Ninth Circuit broadly. In Wills v. City of Monterey, a judge denied Monterey’s motion to dismiss an Eighth Amendment complaint concerning its anti-camping ordinance that prohibited camping in public areas at night. The court found that the code could be interpreted to prohibit sleeping in all public spaces. Therefore, banning sleeping at night, even when space was available in the day, did not conform with Martin because most people sleep at night. The court did not provide an opinion on the constitutionality of this ordinance as it was only deciding a motion to dismiss. Additionally, a Washington court granted a temporary restraining order enjoining the city from enacting the city’s encampment eviction plan, saying the court needed more facts to “assess the City’s regime more thoroughly” to see if it complied with Martin.

B. Municipal Ordinances

Some municipalities have existing ordinances that may conflict with the reasoning of Martin and the more recent ruling in Johnson. Additionally, local governments are continuing to enact ordinances that may possibly violate the Ninth Circuit’s ruling in action, such as

56 Id. at 2.
59 Johnson, 50 F.4th at 808.
60 No. 21-CV-01998-EMC, 2022 WL 3030528 (N.D. Cal. 2022).
61 Id. at *14.
62 Id. at *8.
the most recent Los Angeles City Council measure that authorizes police to clear and prevent homeless encampments near schools.⁶⁴

Given the magnitude of the homelessness issue in the city, Los Angeles, California, is a prime case study for enforcement and application of municipal anti-camping ordinances. More than half of unsheltered persons accounted for in the United States live in California.⁶⁵ It is estimated that Los Angeles has 24,616 available shelter beds on any given night,⁶⁶ and 69,144 individuals experiencing homelessness.⁶⁷ This means that there are enough beds available for less than half of the homeless population.

Additionally, Los Angeles continues to introduce new ordinances that, assuming the shelters are full, seem to be a direct violation of Martin. The City of Los Angeles Municipal Code, Section 41.18, as newly amended,⁶⁸ makes it illegal to “sit, lie or sleep in or upon any street, sidewalk or other public way.”⁶⁹ This restriction applies to a variety of areas, including within a certain distance from fire hydrants, schools, public parks, and public libraries.⁷⁰ While this ordinance applies only to specific areas, the broad range of designated restrictions greatly limits the already narrow permissible spaces for individuals experiencing homelessness to reside in.⁷¹ This may make it difficult for individuals to know where they are allowed to be if their current areas of residency become restricted. Furthermore, even if these displaced individuals were offered housing, there are not enough available beds in shelters that can be provided.⁷² This factor, combined with the limited availability of accessible space after Section 41.18, effectively

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⁶⁴ Klemack, supra note 12.
⁶⁸ The prior version of The City of Los Angeles Municipal Code § 41.18 was the ordinance in dispute in Jones v. City of Los Angeles.
⁶⁹ LOS ANGELES, CAL., CODE § 41.18 (2021).
⁷⁰ Id.
⁷² 2021 Housing Inventory Count, supra note 66.
criminalizes homelessness in Los Angeles and challenges the reasoning in both Martin and Jones.

After Martin, several municipalities altered, or defended, their existing ordinances in response to the new requirements. Some municipalities have claimed that the ruling does not explicitly prevent policies from outlining the specific times and locations where individuals experiencing homelessness may sleep. For example, the city of Sacramento, California, allows individuals experiencing homelessness to sleep outside of City Hall at night but restricts sitting or sleeping there during the day. Other cities have altered their existing anti-camping laws to verify the availability of shelter beds before enforcement to conform with Martin. In doing so, however, they cite logistical issues with verifying shelter availability and transporting individuals to these shelters.

Considering the recent ruling in Johnson, which clarifies the requirements from Martin, it will be interesting to see if municipalities, especially those which still have strict anti-camping ordinances on the books, will alter their laws. The ordinance struck down in Johnson itself was updated in direct response to Martin, redefining “camping” to exclude “sleeping,” but the court held that in practice that distinction was not enough. Some cities have already released statements attempting to distinguish their existing laws from the ruling in Johnson, but courts have yet to address whether these distinctions are sufficient.

IV. GAPS REMAINING IN THE LAW OF ANTI-CAMPING ORDINANCE ENFORCEMENT

Despite Johnson’s efforts to clarify when anti-camping ordinances can be enforced, several gaps remain in how these laws should be interpreted. Because so many anti-camping ordinances currently exist to combat issues with homelessness, it seems that the only way for mu-

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74 Id.
76 Id.
77 Johnson v. City of Grants Pass, 50 F.4th 787, 795 (9th Cir. 2022).
nicipalities to receive more streamlined guidance in enforcement is through the courts. As demonstrated by both Martin and Johnson, when considering challenges to anti-camping ordinances, the Ninth Circuit seems more inclined to favor the protections of individuals experiencing homelessness over the powers of the municipalities.

A. Martin Shelter Formula

The central formula laid out in Martin is that “so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds in shelters, the jurisdiction cannot prosecute homeless individuals for ‘involuntarily sitting, lying, and sleeping in public.’” Additionally, Martin notes that anti-camping ordinances may not be enforced “when no sleeping space is practically available in any shelter.” Because the Ninth Circuit did not define the phrase, “practically available,” there is substantial interpretive room for courts.

To calculate the formula set out by Martin, it is essential to accurately determine the number of individuals experiencing homelessness and the number of available shelter beds. Martin used a Point-In-Time (“PIT”) Count to determine the number of individuals experiencing homelessness on a given night. A PIT Count is a “count of sheltered and unsheltered people experiencing homelessness on a single night” conducted in January. Each count is carried out locally every other year, and data is reported to HUD.

This type of count, however, “likely underestimates the number of homeless individuals.” In areas like Los Angeles for example, where there is no dispute that individuals experiencing homelessness greatly outnumber shelter availability, the underinclusivity of a PIT Count would not be an issue for the Martin test. Alternatively, in cases where the number of shelter beds is closer to the number of individuals experiencing homelessness, it is important to have an accurate

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79 Martin v. City of Boise, 920 F.3d 584, 618 (9th Cir. 2019) (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006), vacated, 505 F.3d 1006 (9th Cir. 2007)).
80 Id. (emphasis added).
81 Id. at 604.
83 Id.
84 Martin, 920 F.3d at 604 (“It is ‘widely recognized that a one-night point in time count will undercount the homeless population,’ as many homeless individuals may have access to temporary housing on a given night, and as weather conditions may affect the number of available volunteers and the number of homeless people staying at shelters or accessing services on the night of the count.”).
85 2021 Housing Inventory Count, supra note 66.
count. While courts can use a PIT Count, they should be wary of possibly disenfranchising individuals experiencing homelessness because of a possible undercount and therefore assuming there was access to shelter when there was not enough shelter available.

Accurate reporting is crucial for courts applying the Martin test. In Butcher v. City of Marysville, the court refused to apply Martin because, while Plaintiffs alleged a quantity of unsheltered individuals, they did “not include information about the capacity of these shelters, and whether they could house the people who were without shelter at the time of the incident.” The court did not specify what factors they would consider adequate to establish the capacity of the shelters. This case illustrates how important it is for plaintiffs to provide adequate data to establish not only the number of individuals experiencing homelessness in a given area but also the capacity of shelters. If courts do not choose a consistent counting method, then municipalities have no incentives to come up with more accurate systems because undervaluing the homeless population allows them to continue enforcing anti-camping ordinances.

An important question that courts have left unanswered is where the available shelter is required to be in order to be considered “practically available.” In Martin, the shelters discussed as possible options were located in the City of Boise. However, the court notes that those were the only shelters in the entire county as well. Because of this, it is unclear if the court would have considered it permissible to evaluate other shelters in the county, even if they fell outside the City of Boise. The Ninth Circuit has provided no guidance regarding how close a shelter must be to individuals experiencing homelessness, or even whether shelters relevant to the Martin inquiry must be within the same city or county.

Shelters that are located far distances away from city centers are likely inaccessible for individuals experiencing homelessness to access if their primary method of transportation is by foot. For example, if the only available shelter in the city is fifty miles away from the individual seeking shelter, does that mean the city could enforce anti-camping ordinances against them? Or what if the next available shelter was only a five-minute walk away from the individual in question?

87 Id. at *7.
88 See Kimberly J. Winbush, Eighth Amendment Challenges to Laws that Limit, Penalize, or Ban Camping or Sleeping in Public known as Anti-Homeless or Anti-Vagrancy Ordinances, 62 A.L.R. Fed. 3d Art. 4 (2021).
89 Martin v. City of Boise, 920 F.3d 584, 618 (9th Cir. 2019).
90 Id. at 605.
91 Id.
but located in a different city? These issues are further exacerbated if the geographic landscape of the area makes traveling to even nearby shelter dangerous. Having to cross geographic obstacles, such as rivers or highways, can make the journey treacherous. Courts at this point do not provide any guidance as to what distance or level of accessibility is acceptable to qualify shelters as available. This is an important factor for local municipalities that are attempting to enforce or write new ordinances.

Even if shelters are not technically full, courts should not punish individuals experiencing homelessness for refusing any available type of shelter under current law. *Martin* already establishes that cities cannot make an individual experiencing homelessness stay in a primarily religious-focused shelter, even if that may be their only alternative to sleeping on the streets.\(^{92}\) In addition to refusing religious shelters, individuals experiencing homelessness frequently cite privacy and safety concerns, as well as never being reached to complete the housing intake process, for not accessing rooms in available shelters.\(^{93}\) These concerns are repeatedly offered by individuals who refuse to utilize group shelters.\(^{94}\)

Safety concerns are especially prevalent when individuals may require collective housing for their entire family unit and dependents, or gendered housing based on a history of domestic abuse. Additionally, reports of sexual abuse within shelters are widespread,\(^{95}\) which discourage individuals from seeking shelter even if it is available. Distance and accessibility may also play a role, for example, when there are available shelter beds, but they are not accessible to individuals experiencing homelessness who are disabled. Some may argue that subjective decisions should not be considered by courts when evaluating the choice of individuals to refuse shelter, especially as it applies to the shelter test in *Martin*. These limiting factors, however, may qualify as making “alternative sleeping space” not “practically available,”\(^{96}\) therefore preventing enforcement of anti-camping laws under *Martin* even when there may be available beds in shelters.

\(^{92}\) *Id.* at 610.


\(^{94}\) *Id.*


\(^{96}\) *Martin*, 920 F.3d at 618.
The law remains unclear as to when individuals are required to accept shelter. Some policymakers are advocating for programs in which individuals experiencing homelessness, particularly those with mental illness, are obligated to accept care or risk criminal charges. Comparably, although case law currently prohibits forcing people into religious shelters, there is a legal grey area regarding whether individuals are required to accept any other housing or risk being cited or facing criminal charges.

In determining whether shelter is “practically available,” courts should take into consideration whether that particular shelter would be dangerous to the individual in need, even if based on a subjective opinion. Just as Johnson allows individuals to use blankets as a “life-saving imperative,” the law should not force people into shelters that are possibly dangerous to them. If the only options are a dangerous shelter or facing criminal charges on the streets, individuals experiencing homelessness are once again punished for “the false premise [that] they had a choice in the matter.”

Furthermore, from an enforcement perspective it is likely difficult for both the homeless population and the enforcement officers to determine when the number of individuals experiencing homelessness outweighs the number of available shelter beds. In cities like Los Angeles, where shelter beds are almost always full, this would not be an issue. However, in cities where the number of shelter beds are comparable with the number of individuals experiencing homelessness, it may be difficult to determine whether shelter beds are available on any given night. In those circumstances, individuals experiencing homelessness will certainly not know if anti-camping ordinances can be enforced against them, and enforcement officers may have trouble correctly sourcing this information from shelters as well.

Under a strict interpretation of Martin’s holding, it may be difficult to advocate for restricting enforcement when shelters are not technically full. However, it is worth considering subjective factors and how they affect the “practically available” requirement for shelter

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98 Martin, 920 F.3d at 610.

99 Id. at 618.

100 Johnson v. City of Grants Pass, 50 F.4th 787, 809 n.28 (9th Cir. 2022).

101 For example, the court should not require a woman with a history of domestic abuse to accept room in a mixed gender shelter if that may expose her to sexual assault because the local women’s shelter was at capacity.

102 Martin, 920 F.3d at 617.

103 2021 Housing Inventory Count, supra note 66.
While this may seem like a fact-intensive inquiry for the courts, it is necessary given the severity of consequences for individuals experiencing homelessness. If individuals experiencing homelessness establish that their only option for housing is unsafe, then the courts should not consider that a “practically available” alternative. Additionally, a more accurate “practically available” requirement will encourage municipalities to develop stronger record keeping systems for the availability of shelter beds, and increase the variety of shelters available, if localities want to continue enforcing anti-camping ordinances.

B. Johnson “Involuntarily Homeless” Test

Like Martin, the test laid out in Johnson leaves much room for interpretation. Johnson established that “a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one’s status.”105 The Plaintiffs in Johnson were a certified class of “involuntarily homeless” individuals,106 with the court noting that a “person with access to temporary shelter is not involuntarily homeless unless and until they no longer have access to shelter.”107 The majority asserted that there was no dispute that the Plaintiffs were “involuntarily homeless,” however the dissent implied that Plaintiffs must meet an “extremely high standard to show they are involuntarily homeless.”108

While in Martin, the court did not require Plaintiffs to bear the burden of proving that they were involuntarily experiencing homelessness, this issue was relevant in some district court cases.109 The Johnson court refused to decide who would bear the burden in cases such as these.110 The problem for future cases then becomes whether the burden of proving “involuntary homelessness” falls on the municipalities or the individuals experiencing homelessness.

Once again, this question returns to the issue of whether adequate shelter should be properly considered through a subjective or objective lens. The Johnson court entertains this issue in its analysis of possible shelters, listing religious facilities, a short-term facility for youth, and two other shelter facilities without beds as unsuitable for

104 Martin, 920 F.3d at 618.
105 Johnson v. City of Grants Pass, 50 F.4th 787, 811 (9th Cir. 2022).
106 Id. at 805.
107 Id. at 805 n.24.
108 Id. at 811.
109 Id. at 811 n.31; see, e.g., Butcher, 2019 WL 918203 at *7; Mc Ardle v. City of Ocala, 519 F. Supp. 3d 1045, 1052 (M.D. Fla. 2021).
110 Johnson, 50 F.4th at 811 n.32.
the individual Plaintiffs to seek shelter.\textsuperscript{111} Individuals experiencing homelessness should be able to forgo housing that is either not accessible or dangerous to them while still being considered “involuntarily homeless” for the purposes of class certification under \textit{Johnson}’s reasoning. The burden to prove involuntarily homelessness should not rest on these individuals who are already in a vulnerable position and lack access to information. At this time, no district court has applied \textit{Johnson}, so it is unclear how these issues will be decided in the future.

V. \textbf{BROAD APPLICATION OF NINTH CIRCUIT PRECEDENT AS A PROTECTION FOR INDIVIDUALS EXPERIENCING HOMELESSNESS}

As the Ninth Circuit and courts across the country grapple with the legality of anti-camping ordinances, weight should be given to the individual complexities that are inherent to the issues of homelessness. Too narrow of an interpretation creates risks of inequitable consequences, particularly as the law applies to hostile (anti-homeless) architecture, geographic and climate considerations, and public policy. In order to properly balance the governing interests of the municipalities while still maintaining an empathetic stance towards the homeless population, courts should interpret existing Ninth Circuit precedent broadly and evaluate the circumstances on a case-by-case basis.

A. Right to \textit{Access} Public Spaces is Treated Differently Than the Right to \textit{Stay} in Public Spaces

While both \textit{Martin} and \textit{Johnson} maintain that individuals cannot be penalized for their involuntary status of being homeless under \textit{Robinson}’s reasoning,\textsuperscript{112} certain types of restrictions to public use do just that. Ordinances that attempt to distinguish between camping and sleeping—that is, saying it is permissible to sleep on public property but not to camp, typically distinguished as utilizing blankets or storing other personal possessions—risk targeting only individuals experiencing homelessness.\textsuperscript{113} Anti-camping ordinance enforcement creates a paradox surrounding public spaces: individuals experiencing homelessness may \textit{access} public spaces but may not \textit{stay} in public spaces.

Anti-camping creates a double standard for what public space can or cannot be used for, and by whom. First, it may be difficult for enforcement officers to determine if an individual is sleeping or camping,

\textsuperscript{111} \textit{Id.} at 796.
\textsuperscript{112} See \textit{Martin v. City of Boise}, 920 F.3d 584, 616 (9th Cir. 2019); \textit{Johnson}, 50 F.4th at 810.
\textsuperscript{113} See \textit{Johnson}, 50 F.4th at 795; see \textit{New Ninth Circuit Opinion in Grants Pass Case Does Not Affect Santa Barbara’s Camping Regulations}, supra note 78.
especially after Johnson permitted individuals to sleep with blankets and other protections that would be similar to what would qualify as camping.\footnote{Johnson, 50 F.4th at 809.} Second, ordinances targeted towards homelessness seem less likely to be enforced equally to all members of the public. For example, if a public park is open twenty-four hours a day, but an anti-camping ordinance goes into effect at 9:00 P.M., individuals who appear homeless are much more likely to be using that space at that time than the general public and therefore more likely to be cited.

B. Hostile (Anti-Homeless) Architecture is an Unjust Restriction on Public Space

Municipal laws intended to combat the homelessness crisis reinforce the increasing denial of access to public spaces, not only for individuals experiencing homelessness, but also for the general public. Public spaces are important for the exercise and enjoyment of human rights and are essential to those who don’t have consistent access to private spaces. Public spaces “have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”\footnote{Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).} Denial of public spaces, whether by physical obstructions or threat of legal punishments, reduces these forums for individuals to exercise their rights. Furthermore, for individuals who are experiencing homelessness, denying them access to public spaces, or restricting how those spaces are able to be used, can leave them with nowhere else to go.

Anti-camping ordinances are often directly targeted towards individuals experiencing homelessness. Johnson described a roundtable organized by the City Council “to identify solutions to the current vagrancy problem” where one of the ideas suggested was “driving repeat offenders out of town and leaving them there.”\footnote{CITY OF GRANTS PASS, CITY COUNCIL COMMUNITY ROUNDTABLE (Mar. 28, 2013), https://www.grantspassoregon.gov/AgendaCenter/ViewFile/Minutes/181?MOBILE=ON [https://perma.cc/TQZ3-R42G].} Another individual suggested that the ultimate goal should be “to make it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road.”\footnote{Id.} While the law indisputably prohibits criminalizing people based on their status,\footnote{See Robinson v. California, 370 U.S. 660, 667 (1962).} laws targeting involuntary actions of a
specific group of individuals seems to tread a fine line of illegally crim-
inalizing status.

The idea of regulating public space to make certain groups of indi-
viduals uncomfortable is not a new idea:

Out of an almost obsessive fear of their presence, civic leaders
worry that if a place is made attractive to people it will be attrac-
tive to undesirable people. So it is made defensive. There is
to be no loitering . . . and . . . no eating, no sleeping. So it is that
benches are made too short to sleep on, that spikes are put in
ledges.119

In an attempt to regulate individuals experiencing homelessness
as “undesirable people,” some cities across the world are building hos-
tile architecture. Hostile architecture is defined as “the design of pub-
lic spaces in a way that stops unwanted behavior, for example putting
spikes . . . in doorways to stop people who have nowhere to live from
sleeping there.”120 Some examples of hostile architecture are spikes
implanted in the ground, sloped seats, or benches partitioned with
armrests to prevent laying down.121 All of these features restrict the
behaviors that the public can engage in and how individuals may uti-
lize public spaces, mainly by making it uncomfortable to sit or sleep on
these fixtures.

Martin and Johnson may have created an avenue for individuals
experiencing homelessness to challenge hostile architecture. These
types of designs are used for the purpose of targeting individuals ex-
periencing homelessness, often even referred to as “anti-homeless ar-
chitecture.”122 While hostile architecture in the form of a divided seat
may be a mere inconvenience to some, it can greatly negatively inter-
fere with life necessities for individuals experiencing homelessness.
Under Johnson, hostile architecture may challenge the “rudimentary
precautions a homeless person might take against the elements.”123
For example, if there is ice or snow on the ground, or if the area is
flooded due to excess precipitation, there may be no other alternatives
than sleeping on a bench.

Some scholars disagree with this view and argue that “undesira-
ble actors” need to be pushed out by being made uncomfortable; oth-

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120 Hostile Architecture, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us
121 Geraghty, supra note 13.
122 See id.
123 Johnson v. City of Grants Pass, 50 F.4th 787, 809 (9th Cir. 2022) (quoting Martin v. City
of Boise, 920 F.3d 584, 618 (9th Cir. 2019)).
erwise an increase of crime is ushered into the streets.\textsuperscript{124} It seems reasonable that civic leaders would want to discourage people who are committing crimes that are harmful to other community members. However, on average, “increases in the size of homeless camps are not associated with increases in property crime.”\textsuperscript{125} In fact, individuals experiencing homelessness are more likely to be victims of violent crimes than perpetrators of such crimes.\textsuperscript{126} Suggesting that everyone experiencing homelessness is an aggressor contributes to the dangerous narrative of criminalizing and dehumanizing this group of people.

Individuals experiencing homelessness, whose only “crime” is sleeping in a public area, should not fall into this “undesirable” category. This reasoning suggests that individuals of a certain social group are undesirable simply for existing in a place that others can see them. Despite countering the Ninth Circuit’s principles in Martin and Johnson, this hostility towards individuals experiencing homelessness is incredibly common.\textsuperscript{127}

Although hostile architecture’s most consequential effect is prohibiting individuals experiencing homelessness from sleeping in public places, this policy choice further gives way to the growing denial of public spaces for the general population. A slanted park bench that makes it uncomfortable to sit on not only inconveniences the general public who appreciates a place to rest but also disenfranchises those who are elderly or disabled and may rely on a public place of refuge. Public amenities that are altered to discourage use by individuals experiencing homelessness call into question who can actually use public resources, and whether those public goods are actually meant to be used by all members of the public or just a preferred subsection.

C. Geographic and Climate Exceptions to Municipal Anti-Camping Ordinance Enforcement

Consistent with existing case law, individuals experiencing homelessness should receive greater protections in areas where geographic


\textsuperscript{127} Often referred to as “Not In My Backyard,” or “NIMBY,” this disposition is defined as “one’s opposition to the locating of something considered undesirable in one’s neighborhood.” Peter D. Kinder, Not in My Backyard Phenomenon, BRITANNICA, https://www.britannica.com/topic/Not-in-My-Backyard-Phenomenon [https://perma.cc/S8GM-5JMX] (last visited Dec. 18, 2022).
and climate conditions pose a threat to their livelihoods. The Ninth Circuit, where both Martin and Johnson were heard, covers a broad array of climates and an expansive geographic scope. Given that the Ninth Circuit’s jurisdiction stretches from Alaska’s tundra to the deserts in California, unhoused individuals may experience diametrically opposed climate and geographic conditions depending on where they reside.

While Martin did not specifically address climate or geographic exceptions to anti-camping enforcement, Johnson explicitly discusses this topic. Johnson explained that, because of the city’s cold-weather conditions, there were documented cases of frostbite amongst individuals experiencing homelessness, as they spent every minute outside. Protection against snow and rain is, in the court’s opinion, “not volitional; it is a life-preserving imperative.” It is important to note, however, that Johnson’s holding extends only to “the most rudimentary precautions against the elements.” Determining whether access to fires, stoves, or additional structures satisfies this requirement is an open question for the lower court on remand. Johnson’s holding provides a framework for other cases in which ordinances attempt to restrict protections for individuals experiencing homelessness in areas with elemental conditions that may threaten survival.

Additionally, some areas have more public spaces than others due to the geography of the location. In those areas where public space is scarce, it raises the question of whether cities can still place restrictions on anti-camping if it means greatly limiting the options for where individuals experiencing homelessness may sleep. Furthermore, if numerous public spaces do exist, but municipalities place restrictions on most of their accessibility, the same considerations should apply. If weather or geographic conditions make these scarce public areas inaccessible to individuals experiencing homelessness, the courts should take that into consideration as well.

D. Safeguarding Public Spaces Restores Humanity to Individuals Experiencing Homelessness

The Ninth Circuit’s rulings raise contentious debates about whether these decisions help or harm individuals experience homelessness. Some groups advocate that the protections created by Martin

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128 Johnson v. City of Grants Pass, 50 F.4th 787, 809 (9th Cir. 2022).
129 Id. at 809 n.28.
130 Id. at 812.
131 Id. at 812.
132 Id.
133 See Shover, supra note 71.
are a pivotal step toward decriminalizing homelessness and therefore is a victory for the individuals experiencing homelessness.\textsuperscript{134} Other groups, however, claim that the holding in \textit{Martin} limits the government’s ability to regulate health and safety by preventing municipalities from restricting broad types of anti-camping ordinances, which in turn limits aid that the government can provide.\textsuperscript{135} Some also argue about the vagueness of \textit{Martin}’s “practically available” standard.\textsuperscript{136} This debate centers on whether that phrase applies only to shelter beds, as opposed to having an option to stay with family, or what happens if the individual causes the unavailability by disobeying shelter rules.\textsuperscript{137} Moreover, when municipalities cannot enforce anti-camping laws, this may lead to an increase in individuals sleeping and congregating in public areas such as parks. This poses a challenge for the municipalities because it may result in requirements to provide resources like bathrooms, showers, water, and other hygiene materials, all of which can be expensive.

Furthermore, cities are expressing that it is challenging to find clarity in the Ninth Circuit’s ruling, saying it is “difficult for a local county or jurisdiction to balance the needs of homeless residents and other residents,” such as health and safety.\textsuperscript{138} While more clarity for municipalities would be beneficial in terms of application, clarity at the expense of protections for individuals experiencing homelessness should be avoided. Ultimately, more guidance for municipalities is ideal, but that guidance should strive to grant the greatest possible protection for the homeless population, a group that is often left vulnerable in both the political and legal systems. When faced with this issue in the future, courts will likely have to establish some sort of balancing test to uphold municipalities’ interests in protecting general health and safety, while also ensuring that they do not criminalize actions spurring from the involuntary status of being homeless.

While recognizing that “the reconciliation of individual rights and community values on the streets is a profoundly difficult problem,” some scholars advocate for areas with less enforcement to contain


\textsuperscript{136} Martin v. City of Boise, 920 F.3d 584, 618 (9th Cir. 2019).


\textsuperscript{138} Clift & Yoon-Hendricks, \textit{supra} note 73.
conduct that would otherwise be illegal.\(^\text{139}\) One possible approach is creating red, yellow, and green “zones” that allow different enforcement levels of disorderly crime, with the green zone having strict enforcement.\(^\text{140}\) However, this approach once again treats individuals experiencing homelessness as second-class citizens purely because of their status. While this approach may work with violent crimes, individuals whose only crime is sleeping in public where they have nowhere else to go should not be forced to move to an area where they could be placed in dangerous situations.

The strongest counterargument to a broad reading of Martin and Johnson is that, by restricting enforcement of anti-camping laws, courts are constraining the police powers of the municipalities. To counter that assumption, Martin and Johnson both indicate that they are not telling municipalities they can never enforce anti-camping laws.\(^\text{141}\) Municipalities can still regulate the health and safety of their communities while respecting the homeless populations. In doing so, they can be consistent with court precedent by being specific regarding the terms of enforcement. For example, even if shelters are full, a municipality would likely be able to create an ordinance preventing camping in front of a specific government building during specific hours of the day. Additionally, these ordinances should focus on the mitigation of health and safety issues before the punishment of individuals experiencing homelessness. One possible solution is for municipalities to set aside specific public areas where individuals experiencing homelessness are allowed to camp or live in their cars.\(^\text{142}\)

VI. CONCLUSION

Although the extent to which anti-camping ordinances may be enforced without violating the Eighth Amendment remains unclear in particular areas, recent developments suggest federal courts, particularly in the Ninth Circuit, will have the opportunity to define these gaps soon. Just as the Johnson court reaffirmed the protections to in-


\(^{140}\) Ellickson, supra note 124, at 1221.

\(^{141}\) Martin, 920 F.3d at 617 n.8 (9th Cir. 2019) (citing Jones v. City of Los Angeles, 444 F.3d 1118, 1123 (9th Cir. 2006), vacated, 505 F.3d 1006 (9th Cir. 2007)) (“Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible.”).

\(^{142}\) See Santa Barbara County, California: Affordability as the Defining Challenge, ARNOLD VENTURES (2019), https://craftmediabucket.s3.amazonaws.com/uploads/AV-homelessness-Santa-Barbara.pdf [https://perma.cc/9SKF-LQFC] (Santa Barbara set aside parking lots that were protected from ticketing for unsheltered individuals to live in their cars); see also Ellickson, supra note 124, at 1221 (zoning of public spaces for levels of enforcement).
individuals experiencing homelessness established in *Martin*, courts addressing homelessness issues in the future have the opportunity to protect this vulnerable population and grant humanity to those living without access to shelter. Although the Ninth Circuit recommended a narrow interpretation of their holdings, interpreting *Martin* and *Johnson* too narrowly would lead to absurd results. In order to account for these externalities while similarly protecting public space and individuals experiencing homelessness, it is essential for courts to broadly apply the rules set out by the Ninth Circuit, with consideration for the particular circumstances of each case. As the number of individuals experiencing homelessness continues to increase, courts can use this opportunity to make the law more sympathetic to a group traditionally relegated by the legal system.

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143 See *Johnson v. City of Grants Pass*, 50 F.4th 787, 813 (9th Cir. 2022).
144 *2021 Annual Homeless Assessment, supra* note 1.