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KYLE GREEN/THE *NEW YORK TIMES*

Two men begin the day after sleeping outside a Boise shelter they couldn't access. A recent district court ruling is prohibiting the city from punishing homeless people for camping on public property.

LEGAL LESSONS

HOMELESS IN PUBLIC

Do camping bans on public property violate the Eighth Amendment? *By Elizabeth A. Garvin, AICP*

ACCORDING TO THE U.S. Department of Housing and Urban Development's 2018 Annual Point-In-Time Count of homeless Americans, about 35 percent of the nation's 552,830 total homeless population was living in "unsheltered" locations, such as on the street, in abandoned

buildings, or in other places not safe for habitation. The list of potential places for homeless residents to stay may also include parks and public places—except where a city has restrictions on sleeping or camping in public places.

That was the case in Boise, Idaho (pop. 228,790), a growing city with a homeless population of about 700. It is also the original defendant in *Martin vs. City of Boise*, in which the Ninth Circuit Court of Appeals ruled that enforcing municipal restrictions on camping in public spaces against homeless residents when shelter space is unavailable violates the Eight Amendment prohibition on cruel and unusual punishment. The remedy, according to the court, is to suspend enforcement of public sleeping bans when indoor shelter space is unavailable.

In December, the U.S. Supreme Court denied the city of Boise's appeal, meaning the Ninth Circuit's ruling will remain applicable to all local governments in the states it covers: Idaho, Montana, Washington, Oregon, Nevada, California, Alaska, and Hawaii. The Supreme Court's decision will likely result in the same argument being raised in other circuits, casting uncertainty on the manner in which local government is permitted to regulate public spaces and, possibly, the permissible public interests that must underlie those regulations.

The conduct of sleeping

Martin is premised on the enforcement of two Boise City Code sections: Section 7-3A-2, Camping in Public Places, prohibiting camping in public places including streets, sidewalks, parks, or public places; and Section 5-2-3, Disorderly Conduct, prohibiting the occupation of or sleeping in public or private buildings, structures, or places or motor vehicles without the owner's permission.

The case was brought by a group of six Boise residents who had experienced homelessness and had been cited under one or both ordinances. The plaintiffs challenged Boise's enforcement of the ordinances as cruel and unusual punishment prohibited by the Eighth Amendment, which states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Plaintiffs asserted that Boise's three homeless shelters had internal rules and policies that resulted in circumstances where residents seeking shelter might be denied a place to sleep. On those nights when beds were not available, public sleeping was their only option, but when the plaintiffs slept outside, they were cited and fined by the city for violation of the ordinances. Because the plaintiffs had to sleep, and sleeping inside was not an option, the plaintiffs claimed that the city's enforcement of the ordinances punished them for being homeless.

> Are homeless residents being punished for the status of being homeless, or for the conduct of sleeping in a public place?

The issue at the heart of this case is the distinction between status and conduct. Are homeless residents being punished for the status of being homeless, or for the conduct of sleeping in a public place?

In *Robinson v. California*, the Supreme Court held that the Eighth Amendment prohibited California from criminalizing the status of being a drug addict. According to the court, criminalizing the status of having a disease violates the Eighth Amendment. This is contrasted in the follow-up, multipart opinion in *Powell v. State of Texas*, where a plurality of the Court held that the state could criminalize a behavior or conduct that results from a status. For example, Texas could punish public drunkenness, but not alcoholism. The challenge in the *Martin* case, though, is that the conduct of public sleeping is "involuntary and inseparable from [the] status [of homelessness]."

Defining available shelter

Both the original camping ordinance and the disorderly conduct ordinance had been in the city code for some time, apparently without serious challenge. After the lawsuit was filed, the Boise Police Department adopted a policy to refrain from enforcing either ordinance when local shelters self-reported as full. The district court (lower court) found this change established a sufficient procedure to protect homeless residents from improper enforcement. The appellate court disagreed, finding that the policy was too discretionary and remanded the case to the lower court for reconsideration.

The city then amended the municipal code to include the exception, stating that: "[l]aw enforcement officers shall not enforce [the] camping section when the individual is on public property and there is no available overnight shelter," and clarifying what actions constitute "camping."

The district court again found this action sufficient to protect the homeless residents against improper enforcement of the ordinances. The appellate court again disagreed, focusing on flaws in the system used to make a determination of "no available shelter."

The court highlighted a list of considerations: the fact that one shelter would not turn anybody away for lack of space, but would for other reasons; problems with the shelters' mismatched policies about time of day for entrance; and potential Establishment Clause problems with requiring individuals to stay at shelters with religious-based "treatment" programs. The court determined that homeless individuals still "run a credible risk" of being cited and fined for sleeping in public for reasons other than lack of shelter capacity. It also held that "as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless individuals for involuntarily sitting, lying, and sleeping in public."

In the case of homeless individuals, then, the status and conduct is considered

inseparable. Local government under the Ninth Circuit is prohibited by the Eight Amendment from punishing the conduct.

Camping bans post-*Martin*

The ruling specifies this as a narrow holding, meaning it is specifically applicable to certain facts. Municipalities are not required to provide more shelter space, nor are either camping or disorderly conduct ordinances broadly invalidated; they can still be enforced "at particular times or in particular locations." For now, the *Martin* decision impacts one specific activity: Municipalities cannot prosecute homeless individuals for "sitting, lying, and sleeping" in public when shelter space is not available.

There are three variables for municipalities to consider post-*Martin*: total available shelter space, number of homeless individuals, and scope of applicability of any public sleeping ordinance. The difference between the number of homeless individuals and actual available shelter space is key. Municipalities required to comply with *Martin* (or any of the similar cases that are working their way through other circuits, including the Fourth and Sixth) must be cognizant of how much shelter space is available (public and private), how the logistics of securing shelter work, and the count of its homeless population without shelter.

These calculations are not simple, but a good-faith effort to understand the relationship between these factors will be critical to supporting policy, law, and enforcement decisions. Once a municipality can quantify roughly how many homeless residents may be unsheltered, it can consider a range of available options for compliance. At a minimum, and in compliance with *Martin*, this might include regulatory changes to the scope of applicability of ordinances that limit public sleeping, such as designation of public spaces where public sleeping is permitted when shelter space is not available.

Garvin is an attorney, planner, and the founding principal of Community ReCode in Denver.

A.T. WILLETT

A years-long effort to restore the iconic diving girl sign on the Pueblo Hotel in Tucson prompted the city to rewrite its sign code to allow for preservation of local landmark signs.

THE COMMISSIONER | BEST PRACTICES

SAVING VINTAGE AND HISTORIC SIGNS

Three cities tackle the challenge of preserving these nonconforming community landmarks. *By James B. Carpentier, AICP*

TUCSON'S EIGHT-YEAR OLD historic landmark sign ordinance started with one man's effort to save the "diving lady" sign (above), which for more than 60 years had welcomed visitors to the Pueblo Hotel. Barry Davis, the new owner, converted the property into law offices in 1993 and then started a years-long effort to get the city to grant a permit to restore the dilapidated sign.

It wasn't easy. The existing code banned signs that were located in a right-of-way, exceeded the 12-foot maximum height, and/or failed to meet the required setback. The fact that the diving lady topped a pole was another mark against it.

The good news is that the battle to save one sign started a discussion about Tucson's past and whether icons and community landmarks with significant ties to the past like this one should be saved—and provides a few best practices for other communities looking to do the same.

How they did it

First came a new sign code. A small group that included the Tucson-Pima County Historical Commission, the Citizen Sign Code Committee, the Downtown Partnership, and the business owner with the historic sign worked together to develop a code that allowed for the preservation of signs such as the diving lady. Forming a broad stakeholder group, as Tucson did, ensures sign regulations that are representative of the entire community.

