

# Hiding Homelessness: The Transcarceration of Homelessness

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*Cities throughout the country respond to homelessness with laws that persecute people for surviving in public spaces, even when unsheltered people lack a reasonable alternative. This widespread practice—the criminalization of homelessness—processes vulnerable people through the criminal justice system with damaging results. But recently, from the epicenter of the homelessness crisis along the West Coast, the Ninth Circuit extended the Eighth Amendment’s prohibition against cruel and unusual punishment to cities prosecuting unsheltered people for sleeping or camping in public spaces in *Martin v. Boise*. Boise, supported by amici from scores of other western cities and counties, filed a petition for a writ of certiorari with the U.S. Supreme Court, which the Court denied without comment. A landmark ruling, *Martin* might push cities to stop criminalizing homelessness and instead address its underlying causes. But rather than encouraging states to decarcerate homelessness or facilitate solutions, *Martin* instead may be leading states and cities to find new ways to hide unsheltered people. The case underscores a sort of transcarceration movement from openly punitive campaigns that incarcerate unsheltered people to alluring campaigns that confine unsheltered people through means such as involuntary commitment into psychiatric facilities or compulsory segregation into authorized zones or camps. These developments do not alleviate homelessness; they repackage its criminalization. Indeed, post-*Martin* efforts reframe displacement, forced confinement, and control over unsheltered people not as criminalization, but as compassion. While these efforts might technically comply with *Martin*, they threaten to undermine the very fundamental constitutional rights it sought to protect and do nothing to improve homelessness. Instead, cities should move to decarcerate homelessness by pursuing more humane and effective alternatives that not only comply with *Martin* but also promise to stem the crisis.*

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## INTRODUCTION

Homelessness is a monumental crisis in many cities throughout the country.<sup>1</sup> No city can arrest or sweep its way out of homelessness,<sup>2</sup> but cities

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1. The precise number of people experiencing homelessness is difficult to determine. The U.S. Department of Housing and Urban Development (HUD) reported at least 550,000 people were experiencing homelessness in 2018. MEGHAN HENRY, ANNA MAHATHEY, TYLER MORILL, ANNA ROBINSON, AZIM SHIVJI & RIAN WATT, U.S. DEP’T OF HOUS. & URB. DEV., THE 2018 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 10 (2018), <https://www.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf> [<https://perma.cc/MV83-KD8F>] [hereinafter AHAR 2018]. However, this figure is generated through volunteer efforts on a single night and is limited to observation within select areas, making it a dramatic undercount. See Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 42 n.231 (2016). As many as 5.6 million people may have experienced homelessness in 2018. LAVENA STATEN, SEATTLE UNIV. SCH. OF L. HOMELESS RTS. ADVOC. PROJECT, PENNY WISE BUT POUND FOOLISH: HOW PERMANENT SUPPORTIVE HOUSING CAN PREVENT A WORLD OF HURT 2 (Sara K. Rankin ed., 2019), <https://ssrn.com/abstract=3419187> [<https://perma.cc/ZYU9-3MNX>].

2. “Sweep” refers to the practice of “displacing homeless people from outdoor public spaces through harassment, threats, and evictions from living in camps.” NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS, <https://nlchp.org/wp-content/uploads/2018/10/criminalization-one-pager.pdf> [<https://perma.cc/2YM4-DAAR>]; see also David Kroman, *Are Arrests the Answer to*

across the country increasingly attempt to do so.<sup>3</sup> The “criminalization of homelessness” refers to increasingly popular laws that prohibit or severely restrict a person’s ability to engage in necessary life-sustaining activities in public, even when that person has no reasonable alternative.<sup>4</sup> Examples of criminalization laws include prohibitions on sitting, standing, sleeping, receiving food, excreting, asking for help, and protecting oneself from the elements: all actions necessary for survival.<sup>5</sup> But unsheltered people have no private place to survive, so they are virtually guaranteed to violate these pervasive laws.<sup>6</sup> Punishments are inescapable, ranging from incessant harassment and “move along” orders from law enforcement or private security to civil infractions or incarceration.<sup>7</sup> Criminalization thus saddles poor, unsheltered people with persecution, impossible fines, or criminal charges for merely surviving in public, rendering them much more likely to remain homeless.<sup>8</sup> The legal and policy flaws of criminalization are well documented.<sup>9</sup> Nonetheless, these punitive and counterproductive laws continue to proliferate across the country.<sup>10</sup>

But is it legal to punish people simply for being homeless? The answer is complicated. Criminalization laws have been shown to be unconstitutional under

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*Homelessness? Seattle Police Chief Says No*, CROSSCUT (Mar. 22, 2019), <https://crosscut.com/2019/03/are-arrests-answer-homelessness-seattle-police-chief-says-no> [<https://web.archive.org/web/20200310001842/https://crosscut.com/2019/03/are-arrests-answer-homelessness-seattle-police-chief-says-no>]; The Times Editorial Board, Editorial, *Everyone Knows We Can’t Arrest Our Way out of Homelessness. So Why Is L.A. Still Trying?*, L.A. TIMES (Feb. 16, 2018), <https://www.latimes.com/opinion/editorials/la-ed-homeless-arrests-not-working-20180216-story.html> [<https://web.archive.org/web/20200812210922/https://www.latimes.com/opinion/editorials/la-ed-homeless-arrests-not-working-20180216-story.html>].

3. See NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 37 (2019), <http://nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [<https://perma.cc/BB8F-TC8L>].

4. Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 102, 106–07 (2019).

5. *Id.* at 107.

6. Federal definitions of homelessness distinguish between sheltered and unsheltered homelessness. See, e.g., HUD, HOMELESS DEFINITION, [https://files.hudexchange.info/resources/documents/HomelessDefinition\\_RecordkeepingRequirementsandCriteria.pdf](https://files.hudexchange.info/resources/documents/HomelessDefinition_RecordkeepingRequirementsandCriteria.pdf) [<https://perma.cc/4EQ5-VGZZ>]. Sheltered homeless populations reside in emergency shelters, transitional housing, or safe havens. See HUD, A GUIDE TO COUNTING SHELTERED HOMELESS PEOPLE 1 (3d revision 2012), <https://www.hudexchange.info/sites/onecpd/assets/File/A-Guide-to-Counting-Sheltered.pdf> [<https://perma.cc/M2QB-F8LD>]. By contrast, unsheltered homeless populations live exposed outside, in makeshift dwellings, or “other places not meant for human habitation.” See HUD, A GUIDE TO COUNTING SHELTERED HOMELESS PEOPLE 1 (2d revision 2008), [https://files.hudexchange.info/resources/documents/counting\\_unsheltered.pdf](https://files.hudexchange.info/resources/documents/counting_unsheltered.pdf) [<https://perma.cc/4KS5-GW5H>].

7. See Rankin, *supra* note 4, at 119; see also Chris Herring, Dilara Yarbrough & Lisa Marie Alatorre, *Pervasive Penalty: How the Criminalization of Poverty Perpetuates Homelessness*, 67 SOC. PROBS. 131, 134–35 (2020); NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 3, at 37.

8. See Rankin, *supra* note 4, at 108.

9. See *The Criminalization of Homelessness: Additional Resources*, SEATTLE UNIV. SCH. OF L., <https://law.seattleu.edu/centers-and-institutes/korematsu-center/initiatives/homeless-rights-advocacy-project/additional-resources> [<https://perma.cc/6ELC-MF6M>].

10. See generally NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 3.

various provisions of the federal and state constitutions, including the First, Fourth, Sixth, Eighth, and Fourteenth Amendments.<sup>11</sup> Recently, the Ninth Circuit decided the landmark case of *Martin v. Boise*, announcing that the Eighth Amendment’s protection against cruel and unusual punishment prohibits cities from punishing people for the “unavoidable consequence” of being homeless.<sup>12</sup>

While homeless rights advocates celebrated, the backlash from many city officials and media outlets was swift and fierce.<sup>13</sup> Hundreds of news articles obsessed over *Martin*’s meaning.<sup>14</sup> The National League of Cities (NLC), a formidable entity that “serves the interests of 19,000 cities, towns and villages in the US as well as professionals working in municipal government,”<sup>15</sup> initially seemed to construe *Martin* as workable, humane, and even commonsensical. When the Ninth Circuit’s panel decision came down in September 2018, NLC advised its members that *Martin* doesn’t require cities to do anything; instead, it requires cities in the Ninth Circuit not do something: arrest people experiencing

11. Rankin, *supra* note 4, at 111 (citing NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: A LITIGATION MANUAL 11, <https://www.nlchp.org/documents/Housing-Not-Handcuffs-Litigation-Manual> [<https://perma.cc/6ZYX-UCJ9>]). Recently, results favoring homeless litigants have been reported in 75 percent of cases challenging encampment sweeps or seizure and destruction of homeless people’s belongings, 57 percent of cases challenging anti-camping or sleeping laws, and 100 percent of cases challenging anti-begging laws. Rankin, *supra* note 4, at 111.

12. *Martin v. City of Boise*, 902 F.3d 1031, 1035, 1048 (9th Cir. 2018), *reh’g en banc denied*, 920 F.3d 584 (9th Cir. 2019), *cert denied*, 140 S. Ct. 674 (mem.) (2019).

13. See, e.g., Maria L. La Ganga, *This City in Idaho Is Why L.A. Can’t Legally Clear its Streets of Homeless Encampments*, L.A. TIMES (Oct. 15, 2019), <https://www.latimes.com/california/story/2019-10-15/homeless-boise-martin-supreme-court> [<https://perma.cc/CAU2-8YZ3>] (“[I]t is this midsize city with its relatively manageable homeless population that is setting the enforcement standards for its much bigger counterparts in the West.”); David W. Myers, *Cities, Counties in Quandary After Major Ruling in Homeless Lawsuit*, HERALD-TRIB. (May 5, 2019), <https://www.heraldtribune.com/news/20190505/david-w-myers-cities-counties-in-quandary-after-major-ruling-in-homeless-lawsuit> [<https://perma.cc/58RD-K87V>] (“Elected leaders and law-enforcement agencies throughout the nation are struggling to decide how to react in the wake of the ruling.”).

14. The author conducted a search of U.S. news articles highlighting the case on Westlaw and Lexis Advance. *Martin* was highlighted in at least 164 news articles just in the eight months between the Ninth Circuit’s denial of rehearing en banc on April 1, 2019 and December 1, 2019, when the case was pending consideration by the U.S. Supreme Court (open-source search results on reserve with author). See, e.g., Scott Greenstone, *How a Federal Court Ruling on Boise’s Homeless Camping Ban Has Rippled Across the West*, IDAHO STATESMAN (Oct. 22, 2019), <https://www.idahostatesman.com/news/local/community/boise/article235065002.html> [<https://perma.cc/45KY-JGVT>]; Oskar Rey, *What Are Local Governments Doing in Response to Martin v. City of Boise?*, MUN. RSCH. SERVS. CTR. (Mar. 2, 2020), <http://mrsc.org/Home/Stay-Informed/MRSC-Insight/March-2020/Local-Response-to-Martin-v-Boise.aspx> [<https://perma.cc/DBQ2-QLK5>]; Gregory Scruggs, *Western Cities Scramble to Comply with Court Ruling on Homelessness*, U.S. NEWS (Feb. 10, 2020), <https://www.usnews.com/news/cities/articles/2020-02-10/western-cities-scramble-to-comply-with-court-ruling-on-homelessness> [<https://web.archive.org/web/20200211114031/https://www.usnews.com/news/cities/articles/2020-02-10/western-cities-scramble-to-comply-with-court-ruling-on-homelessness>].

15. *About NLC*, NAT’L LEAGUE OF CITIES, <https://www.nlc.org/about-nlc> [<https://perma.cc/Q8KS-HBZW>].

homelessness for sleeping outside in public spaces when they have nowhere else to go. The case also highlights a problem that many cities have: inadequate beds for people experiencing homelessness in non-coercive environments. If cities could help solve this problem, arresting people for sleeping outside wouldn't even be necessary.<sup>16</sup>

But within months, the NLC's tenor changed. As Boise lost its petition for rehearing en banc<sup>17</sup> and filed a petition for writ of certiorari with the U.S. Supreme Court,<sup>18</sup> the NLC joined the International Municipal Lawyers Association, the National Association of Counties, the International City/County Management Associations, and dozens of other cities, organizations, and associations as amici asking the Court to review and overturn *Martin*.<sup>19</sup> Boise's Los Angeles-based law firm<sup>20</sup> not only helped to facilitate the phalanx of amici, it also released a white paper ominously titled, "*Martin v. City of Boise* will ensure the spread of encampments that threaten public health and safety."<sup>21</sup>

State and city officials across the West Coast prepared for a battle outside of the courtroom as well. The Washington State House of Representatives held at least one hearing to brief representatives on the implications of *Martin*.<sup>22</sup> There, lawyers explained the case, and law enforcement and city officials vented

16. NLC Staff, *What the Ninth Circuit's Camping Ruling Means for Housing First Strategies in Cities*, NAT'L LEAGUE OF CITIES (Sept. 19, 2018), <https://cityspeak.org/2018/09/19/what-the-ninth-circuits-camping-ruling-means-for-housing-first-strategies-in-cities> [<https://perma.cc/AW6H-869Y>].

17. See *Martin v. City of Boise*, 920 F.3d 584, 588 (9th Cir. 2019).

18. *City of Boise v. Martin*, 140 S. Ct. 674 (mem.) (2019).

19. See generally Brief for the International Municipal Lawyers Association, National League of Cities, National Association of Counties, International City/County Management Association, Washington State Association of Municipal Attorneys, Washington Association of Sheriffs and Police Chiefs, and Washington State Sheriffs Association as Amici Curiae in Support of Petitioner, *City of Boise v. Martin*, 140 S. Ct. 674 (mem.) (No. 19-247) (2019); Benjamin Oreskes, *Homeless People Could Lose the Right to Sleep on Sidewalks if Western Cities Have Their Way*, L.A. TIMES (Sep. 25, 2019), <https://www.latimes.com/california/story/2019-09-25/boise-homeless-encampment-amicus-brief-supreme-court-appeal-cities> [<https://perma.cc/F39G-HE3W>] (describing the appeal and linking to amici briefs).

20. See Hayley Harding, *Boise Officially Asks U.S. Supreme Court to Hear Homeless Camping Case*, IDAHO STATESMAN (Aug. 22, 2019), <https://www.idahostatesman.com/news/local/community/boise/article234271652.html> [<https://perma.cc/92PE-26XY>] (explaining the city's decision to hire Gibson Dunn).

21. See Hayley Harding, *California Law Firm Seeks Friends for Boise in Homeless-Camping Appeal to Supreme Court*, IDAHO STATESMAN (Aug. 21, 2019), <https://www.idahostatesman.com/news/local/community/boise/article234198262.html> [<https://perma.cc/XN6M-LWFG>]; GIBSON DUNN, *MARTIN V. CITY OF BOISE WILL ENSURE THE SPREAD OF ENCAMPMENTS THAT THREATEN PUBLIC HEALTH AND SAFETY 1* (2019), <https://www.gibsondunn.com/wp-content/uploads/2019/08/Martin-v.-Boise-White-Paper.pdf> [<https://perma.cc/JST3-EARR>].

22. The Washington House of Representatives Committee on Civil Rights and Judiciary hosted a work session on *Martin*, which featured an overview of the implications of the Ninth Circuit decision and frustrated testimony by law enforcement. See generally House Civ. Rts & Judiciary Comm., *Work Session: Martin v. Boise: Responding to Homelessness in Light of the 9th Circuit's Opinion*, TVW (Apr. 2, 2019), <https://www.tvw.org/watch/?eventID=2019041060> [<https://perma.cc/74Z9-XD64>].

frustrations.<sup>23</sup> Washington's Municipal Research & Services Center<sup>24</sup> and the League of California Cities<sup>25</sup> hosted trainings to advise their members about *Martin* and grounds for challenging it.<sup>26</sup> Even the Trump administration jumped into the fray, partnering pointed criticisms of homelessness along the West Coast with threats of federal interference.<sup>27</sup>

*Martin* seemed a powder keg. When the Supreme Court finally declined review without comment in December 2019,<sup>28</sup> *Martin* did not detonate. However, its explosive potential still looms. City officials and advocates alike seem unsure of how to handle it safely.

The polarizing response to *Martin* is, in some ways, unsurprising. Homelessness is one of the most controversial and complex topics in contemporary America.<sup>29</sup> *Martin* forces cities to grapple more precisely with the

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23. *Id.*

24. *About MRSC*, MUN. RESEARCH & SERVS. CTR., <http://mrsc.org/Home/About-MRSC.aspx> [<https://perma.cc/D23R-2SSU>] (describing itself as “a nonprofit organization that helps local governments across Washington State better serve their citizens by providing legal and policy guidance on any topic”).

25. *About Us*, LEAGUE OF CAL. CITIES, <https://www.cacities.org/Top/About-Us> [<https://perma.cc/LJ6P-UAHT>] (describing itself as “an association of California city officials who work together to enhance their knowledge and skills, exchange information, and combine resources so that they may influence policy decisions that affect cities”).

26. *See, e.g.*, MUN. RESEARCH AND SERVS. CTR. WHAT COUNTIES AND CITIES CAN DO TO ADDRESS THE HOMELESSNESS CRISIS (Aug. 14, 2019) (MRSC webinar materials on reserve with the author); JOAN COX & MARK AUSTIN, LEAGUE OF CAL. CITIES, STRATEGIES FOR ADDRESSING HOMELESSNESS: POLICIES AND ENFORCEMENT ISSUES (Aug. 28, 2019), [https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/Summer-Webinar-2019/Strategies-for-Addressing-Homelessness-Webinar\\_FIN.aspx](https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/Summer-Webinar-2019/Strategies-for-Addressing-Homelessness-Webinar_FIN.aspx) [<https://perma.cc/MF7W-UQ9X>] (California League of Cities training materials).

27. *See, e.g.*, Elizabeth Thomas, *Trump Claims Homelessness Is ‘Phenomenon That Started 2 Years Ago,’ Blames ‘Liberal’ Mayors*, ABC NEWS (July 2, 2019), <https://abcnews.go.com/Politics/trump-claims-homelessness-phenomenon-started-years-ago/story?id=64083965> [<https://perma.cc/5KPE-4ABE>] (reporting Trump's characterization of the California homeless crisis as the result of failed “liberal” policies); Jordan Fabian & Christopher Palmeri, *Trump Vows to Take on Homelessness, Starts by Blaming Democrats*, BLOOMBERG (Sept. 18, 2019), <https://www.bloomberg.com/news/articles/2019-09-17/trump-vows-to-take-on-homelessness-starts-by-blaming-democrats> [<https://perma.cc/L5SJ-UMAZ>] (reporting the Trump administration as blaming California's “lax policing” and overabundance of shelters for creating the problem, while also considering “relocating homeless people” to vacant federal properties); Pam Fessler & Paolo Zialcita, *Trump Administration Blames Homeless for California's Water Pollution*, NPR (Sept. 26, 2019), <https://www.npr.org/2019/09/26/764759005/trump-administration-blames-homeless-for-californias-water-pollution> [<https://perma.cc/8UQM-VJAK>] (reporting President Trump's threats to go after California for purported violations of the Clean Water Act because cities “allow[] needles and other waste from homeless encampments to drain into the ocean”).

28. *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 674 (mem.) (2019).

29. *See, e.g.*, COMM. ON HEALTH CARE FOR HOMELESS PEOPLE, INST. OF MED., HOMELESSNESS, HEALTH, AND HUMAN NEEDS 17–18 (1988), [https://www.ncbi.nlm.nih.gov/books/NBK218232/pdf/Bookshelf\\_NBK218232.pdf](https://www.ncbi.nlm.nih.gov/books/NBK218232/pdf/Bookshelf_NBK218232.pdf) (Congressionally convened, interdisciplinary study noting homelessness is heterogenous and complex). Homelessness is a “wicked problem.” *See* Horst W. J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL'Y SCIS. 155, 160–67 (1973).

constitutional principle that it is cruel and unusual to punish people for circumstances they cannot control.<sup>30</sup> But *Martin* was not a mandate for cities to solve or even improve homelessness.<sup>31</sup>

So crucial questions remain. Even if cities must manage public spaces for everyone's use—housed and homeless—what is the practical impact of *Martin* if there is not adequate housing or shelter? Where do unsheltered people go? Can cities forcibly move them elsewhere, regardless of whether the new location makes unsheltered peoples' circumstances no better off or even worse? What is a city's obligation, if any, to show that compulsory displacement of unsheltered people does not further harm them? At what point do options that segregate vulnerable people and force them into confinement or programming amount to anything more than persecuting people for being homeless? *Martin* does not provide clear answers. Cities, desperate to remove unsheltered people from view, appear willing to gamble.<sup>32</sup>

*Martin* illuminates some constitutionally impermissible bounds of cruelty, but its legacy is still unsettled. In *Martin*'s wake, cities are becoming more creative and bolder in their efforts to hide homelessness rather than solve it.<sup>33</sup> In particular, *Martin* may have sparked at least three unintended and decidedly negative developments for unsheltered homeless people: (1) more frequent and less regulated encampment sweeps as a pipeline to confinement; (2) renewed interest in involuntary commitment, conservatorships, and forced treatment; and (3) efforts to round up unsheltered people into congregate FEMA-style tents or camps.<sup>34</sup>

This post-*Martin* Cerberus demonstrates transcarceration: it threatens criminalization in new forms. It reframes displacement, forced confinement, and control over unsheltered people not as criminalization, but as compassion.<sup>35</sup> While these developments might technically comply with *Martin*, they threaten to undermine the very constitutional right *Martin* sought to protect. Cities can still use transcarceral interventions to effectively punish unsheltered people for having no safe and legal place to go. Doing so is cruel. It is also bad policy.

Cities justify these interventions as necessary to improve outcomes for unsheltered populations, yet cities avoid accountability and transparency. Their proposals are starkly devoid of clear empirical support, sustained funding, or promises to monitor and evaluate outcomes. Perhaps this avoidance can be

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30. *Martin*, 920 F.3d at 617.

31. *See id.*

32. *See infra* Part III.

33. *See, e.g., infra* Part III.

34. *See infra* Part V.

35. *See, e.g.,* Tony Robinson, *No Right to Rest: Police Enforcement Patterns and Quality of Life Consequences of the Criminalization of Homelessness*, 55 URB. AFFS. REV. 41, 45 (2019) (noting that while laws criminalizing homelessness “are defended as compassionate strategies to compel self-destructive and service-resistant homeless people to leave the streets,” these strategies are counterproductive).

explained by the fact that none of these interventions are designed to solve homelessness.

Instead, cities are adapting to *Martin*, not by curbing punishment for homelessness but by giving punishment a makeover. Post-*Martin* narratives reframe what many progressive urbanites now find distasteful—mass incarceration, internment, and detention of undesirable populations—into practices that accomplish similar outcomes but seem more palatable.<sup>36</sup> Such reframing is key; after all, how can compassionate action be cruelty?

Such interpretations of *Martin*, the Eighth Amendment, as well as various other constitutional, civil, and human rights considerations should be rejected. *Martin* does not and cannot mandate solutions to homelessness. However, cities' persistent focus on hiding homelessness implicates both the constitutional and plain meanings of cruelty. Cruelty can be the intentional infliction of harm or the indifference to it. The failure to end homelessness is cruel. The distraction of criminalization is ineffective and expensive.<sup>37</sup> To finally stem the crisis, cities must pursue more humane and effective alternatives that not only comply with *Martin*, but also promise to improve the lives of people enduring unsheltered homelessness.

## I.

### THE TARGET: UNSHELTERED CHRONIC HOMELESSNESS

Criminalization targets a specific group: unsheltered people experiencing chronic homelessness. As a preliminary matter, most people do not understand the difference between homelessness generally and unsheltered homelessness in particular. Most homelessness, roughly defined as living in a place unfit for human habitation,<sup>38</sup> is brief and temporary.<sup>39</sup> Most people experiencing

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36. See, e.g., Jake Johnson, 'Internment Camps for the Homeless': Housing Advocates Horrified by Trump Push for 'Crackdown' on California Homelessness, COMMON DREAMS (Sept. 11, 2019), <https://www.commondreams.org/news/2019/09/11/internment-camps-homeless-housing-advocates-horrified-trump-push-crackdown> [<https://perma.cc/VST5-YSM3>]; *Readers React: Did a Letter Advocate Putting Homeless People into Concentration Camps?*, L.A. TIMES (June 15, 2019), <https://www.latimes.com/opinion/readersreact/la-ol-le-homeless-letter-concentration-camps-20190615-story.html> [<https://web.archive.org/web/20210112195544/https://www.latimes.com/opinion/readersreact/la-ol-le-homeless-letter-concentration-camps-20190615-story.html>]; Emma Ockerman, *This California City Wants to Build a Homeless Shelter That's Basically a Jail*, VICE NEWS (Nov. 22, 2019), <https://www.vice.com/en/article/mbmz94/a-california-mayor-wants-to-build-a-homeless-shelter-thats-basically-a-jail> [<https://perma.cc/N6PX-2NY3>].

37. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 9–11 (2015), [https://nlchp.org/wp-content/uploads/2019/02/No\\_Safe\\_Place.pdf](https://nlchp.org/wp-content/uploads/2019/02/No_Safe_Place.pdf) [<https://perma.cc/VP5X-3ST7>].

38. See 42 U.S.C. § 11302(a)(4) (2018).

39. See Rankin, *supra* note 4, at 103. People experiencing chronic homelessness—which by definition means they are homeless longer than homeless people generally—are not the majority of people experiencing homelessness. For example, HUD reported that in 2019 there was a total of 567,715

homelessness are also unseen: they are in shelters, in temporary housing, living doubled up, or couch surfing.<sup>40</sup> Thus, most homelessness is invisible and not on display in public spaces.

Visible, unsheltered homelessness most often concerns a specific, smaller part of the overall homeless population.<sup>41</sup> A disproportionate number of people commonly seen living on the street in sleeping bags, tents, or other makeshift shelters are chronically homeless.<sup>42</sup> The federal definition of chronic homelessness requires two hallmarks. First, a person experiencing chronic homelessness is homeless for longer periods of time. Second, that person must also have a documented qualifying disabling condition—such as a physical disability, untreated mental illness, or a chronic health problem—that prevents them from working.<sup>43</sup> These hallmarks of chronic homelessness are critical distinctions from the larger overall homeless population because the presence of the qualifying disability helps to explain the persistence of chronic homelessness.

Chronic homelessness is often neglected in city plans and overlooked by private funders. Chronically homeless people rarely generate the same level of sympathy or positive activism as other subpopulations, such as homeless families, veterans, or children.<sup>44</sup> As a result, cities underinvest in nonpunitive

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people experiencing homelessness, 105,583 of whom were chronically homeless. U.S. DEP'T OF HOUS. & URB. DEV., HUD 2019 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS HOMELESS POPULATIONS AND SUBPOPULATIONS (2019), [https://files.hudexchange.info/reports/published/CoC\\_PopSub\\_NatTerrDC\\_2019.pdf](https://files.hudexchange.info/reports/published/CoC_PopSub_NatTerrDC_2019.pdf) [<https://perma.cc/2XNM-44NS>].

40. See AHAR 2018, *supra* note 1, at 10.

41. See *id.* at 64 (showing those who are enduring chronic homelessness are not the majority of all people experiencing homelessness).

42. In 2018, at least 40 percent of unsheltered people experiencing homelessness in King County were experiencing chronic homelessness on the night of the Point-in-Time Count. See OFF. OF CMTY. PLANNING & DEV., U.S. DEP'T OF HOUS. & URB. DEV., HUD 2018 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS HOMELESS POPULATIONS AND SUBPOPULATIONS: WA-500 SEATTLE/KING COUNTY CoC (2018), [https://files.hudexchange.info/reports/published/CoC\\_PopSub\\_CoC\\_WA-500-2018\\_WA\\_2018.pdf](https://files.hudexchange.info/reports/published/CoC_PopSub_CoC_WA-500-2018_WA_2018.pdf) [<https://perma.cc/Y75P-53YU>].

43. See OFF. OF CMTY. PLANNING & DEV., U.S. DEP'T OF HOUS. & URB. DEV., THE 2017 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 2 (2017), <https://www.hudexchange.info/resources/documents/2017-AHAR-Part-1.pdf> [<https://perma.cc/LC3Z-BGNX>]. HUD defines a disabling condition as “a diagnosable substance abuse disorder, a serious mental illness, developmental disability, or chronic physical illness or disability, including the cooccurrence of two or more of these conditions” that “limits an individual’s ability to work or perform one or more activities of daily living.” OFF. OF CMTY. PLANNING & DEV. AND OFF. OF SPECIAL NEEDS ASSISTANCE PROGRAMS, U.S. DEP'T OF HOUS. & URBAN DEV., DEFINING CHRONIC HOMELESSNESS: A TECHNICAL GUIDE FOR HUD PROGRAMS 4 (2007), <https://files.hudexchange.info/resources/documents/DefiningChronicHomeless.pdf> [<https://perma.cc/RNG7-A5KU>].

44. See Melissa Johnstone, Jolanda Jetten, Genevieve A. Dingle, Cameron Parsell & Zoe C. Walter, *Discrimination and Well-Being Amongst the Homeless: The Role of Multiple Group Membership*, FRONTIERS PSYCHOL., 2015, at 1, 6–7, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4450171/pdf/fpsyg-06-00739.pdf> [<https://perma.cc/D2C4-VF46>].

solutions to chronic homelessness and instead rely on expensive, ineffective, and often illegal means to manage it, such as sweeps.<sup>45</sup> Because unsheltered homelessness disproportionately correlates with chronic homelessness, targeting solutions for unsheltered populations will also improve chronic homelessness.

Ending chronic homelessness should be a priority for several reasons. First, chronically homeless populations are the most visible, serving as a lightning rod for already polarized public debates on housing and homelessness.<sup>46</sup> If cities can make a difference in chronic homelessness, they may be able to change the way people think and talk about homelessness generally. If constituents can literally “see” changes in unsheltered homelessness on the street, they are more likely to support investments in solutions for homelessness broadly.

Second, people experiencing unsheltered chronic homelessness are among the most vulnerable. Living exposed on the street, they suffer from higher rates of poor physical and mental health<sup>47</sup> and substance use disorders<sup>48</sup> than homeless populations generally. They are also the least likely to exit homelessness without intervention.<sup>49</sup> Therefore, if cities do not focus on solutions to chronic homelessness, the problem will persist.

Third, chronic homelessness is costly. Typically, unsheltered chronically homeless people do not represent the majority of homeless neighbors, but they generate disproportionate costs. Costs include outlays of emergency services and hospitalization, as well as police, court, and probation resources, and jail time.<sup>50</sup> The longer cities ignore cost-effective solutions, the more these costs balloon.

Fortunately, proven solutions to chronic homelessness exist. They include the evidence-based solutions of Housing First and permanent supportive housing (PSH).<sup>51</sup> Providing PSH to individuals with chronic patterns of homelessness is

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45. See SAMIR JUNEJO, SEATTLE UNIV. SCH. OF L. HOMELESS RTS. ADVOC. PROJECT, NO REST FOR THE WEARY: WHY CITIES SHOULD EMBRACE HOMELESS ENCAMPMENTS 7 (Suzanne Skinner & Sara K. Rankin eds., 2016), <https://ssrn.com/abstract=2776425> [<https://perma.cc/Z77H-4ZF2>]. Cities must better prioritize nonpunitive solutions to chronic homelessness such as supportive housing, not only because such solutions are humane, but also because they are proven to be the most cost-effective. See STATEN, *supra* note 1, at 28–29.

46. Rankin, *supra* note 4, at 129.

47. *About Homelessness*, HOMELESS HUB, [https://www.homelesshub.ca/about-homelessness/topics/health?\\_ga=2.215176535.155110989.1530558055-2108360416.1526944142](https://www.homelesshub.ca/about-homelessness/topics/health?_ga=2.215176535.155110989.1530558055-2108360416.1526944142) [<https://perma.cc/XQ8H-E69L>].

48. See *Homelessness Programs and Resources*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Mar. 29, 2019), <https://www.samhsa.gov/homelessness-programs-resources> [<https://perma.cc/PP7X-75EL>]; see also SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., CURRENT STATISTICS ON THE PREVALENCE AND CHARACTERISTICS OF PEOPLE EXPERIENCING HOMELESSNESS IN THE UNITED STATES 2, 4–5 (2011), [https://www.homelesshub.ca/sites/default/files/attachments/hrc\\_factsheet.pdf](https://www.homelesshub.ca/sites/default/files/attachments/hrc_factsheet.pdf) [<https://perma.cc/42BK-7P9Z>].

49. Rankin, *supra* note 4, at 129.

50. See STATEN, *supra* note 1, at 25–26.

51. Housing First refers to homelessness intervention programs that prioritize providing permanent housing to people experiencing homelessness, ending their homelessness, and serving as a

proven to significantly reduce the use of expensive acute care services such as emergency shelters, hospital emergency rooms, and detoxification and sobering centers.<sup>52</sup> PSH can lead to significant savings.<sup>53</sup> Even among the heaviest service users, it may be a cost-neutral investment, with the cost of housing subsidies and services offset by reductions in spending on other public services.<sup>54</sup>

PSH has been proven to help chronically homeless people who will not accept other interventions. People in PSH programs stay housed and enjoy improved health and connectedness to the community.<sup>55</sup> Many communities throughout the country have ended or made significant progress toward ending chronic homelessness through PSH.<sup>56</sup> More cities should follow.

But often, governing is not a logical process.<sup>57</sup> Along the West Coast, the recent and rapid rise in homelessness has overwhelmed existing systems. Chronic homelessness, as the most visible form of homelessness, sparks fear and anger from constituents demanding quick fixes.<sup>58</sup> Cities revert to emergency-response mode, investing heavily in sweeps, law enforcement, and emergency shelters not capable of ending homelessness. The criminalization of homelessness feeds a well-worn instinct to purge visible poverty from view.<sup>59</sup>

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platform from which they can improve their quality of life. Housing First reflects the reality that people need basic necessities like food, sleep, and a stable place to live before attending to any secondary issues such as budgeting properly or addressing substance use issues. Housing First also reflects evidence that allowing residents to exercise choice in housing selection and supportive service participation is key to them remaining housed and improving their lives. Permanent supportive housing is not emergency shelter: it is an evidence-based housing intervention that combines non-time-limited affordable housing assistance with wrap-around support services for people experiencing homelessness, as well as other people with disabilities. *See id.* at 12–13.

52. *See id.* at 17–25.

53. *See id.* at 17–39.

54. *See id.* at 28–39.

55. *See* SEATTLE UNIV. SCH. OF L. HOMELESS RTS. ADVOC. PROJECT, THE EFFECTIVENESS OF HOUSING FIRST & PERMANENT SUPPORTIVE HOUSING (July 25, 2018), <https://law.seattleu.edu/Documents/korematsu/HRAP-Excerpts-of-Studies-on-Housing-First-Permanent-Supportive-Housing.pdf> [<https://perma.cc/T9C8-9S8G>] (providing “a non-exhaustive sampling of studies concerning the Effectiveness of Housing First and Permanent Supportive Housing . . .”); STATEN, *supra* note 1.

56. *See, e.g.*, David Bornstein, Opinion, *A Growing Drive to Get Homelessness to Zero*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/opinion/homelessness-built-for-zero.html> [<https://perma.cc/Y963-S442>].

57. *See, e.g.*, Mark Whitehead, Rhys Jones & Jessica Pykett, *Governing Irrationality, or a More Than Rational Government? Reflections on the Rescientisation of Decision Making in British Public Policy*, 43 ENV'T & PLANNING A: ECON. & SPACE 2819 (2011); Sara Gorman & Jack M. Gorman, *What Should we Do About Irrational Politicians?*, PSYCH. TODAY (Aug. 1, 2017), <https://www.psychologytoday.com/us/blog/denying-the-grave/201708/what-should-we-do-about-irrational-politicians> [<https://perma.cc/LPZ2-YJKA>].

58. *See, e.g.*, Barnini Chakraborty, *Seattle Residents Blame Inefficient Elected Officials for Homeless Problem, Say They've 'Lost Faith' in System*, FOX NEWS (Aug. 22, 2019), <https://www.foxnews.com/us/seattle-residents-blame-inefficient-elected-officials-for-homeless-problem-say-theyve-lost-faith-in-system> [<https://perma.cc/TQM5-QHBL>].

59. *See generally* Rankin, *supra* note 1.

Studies show criminalization is expensive, counterproductive, and often illegal.<sup>60</sup> And yet, cities across the country increasingly punish homelessness.<sup>61</sup>

## II.

### THE TEST: MARTIN

*Martin* stepped squarely into the unsheltered, chronic homelessness crisis. There, the Ninth Circuit considered whether a city can punish homeless people for surviving in public spaces—essentially for being homeless.<sup>62</sup> The plaintiffs, a group of people experiencing homelessness in Boise, Idaho, alleged that the city violated their Eighth Amendment rights by outlawing sleeping or camping in public, while the city failed to offer sufficient shelter.<sup>63</sup>

First, the *Martin* court surveyed Boise’s homelessness crisis. In 2016, at least 125 people were counted as unsheltered in Ada County where Boise sits.<sup>64</sup> Mathematically, Boise seemed to have sufficient shelter at three shelters,<sup>65</sup> offering a total of 354 beds and ninety-two overflow mats.<sup>66</sup> One shelter, the Interfaith Sanctuary, hosted ninety-six beds and some overflow mats for men, women, and children of all faiths without imposing religious requirements.<sup>67</sup> But the two other shelters, run by the Boise Rescue Mission (BRM), imposed restrictions. Restrictions included time-outs, where shelter residents could only stay for a specific number of days before having to leave and wait for several days before returning,<sup>68</sup> and check-in deadlines, where residents had to report by a certain time of day to be admitted.<sup>69</sup> Additionally, the BRM shelters exposed residents to religious messages or required them to participate in religious activities.<sup>70</sup>

As further context, the Ninth Circuit noted that since litigation began, Boise modified its enforcement policies to require each shelter to report to police, on a nightly basis, if it was full.<sup>71</sup> If all three shelters reported they were full, the police would refrain from citing unsheltered people for public camping.<sup>72</sup> But

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60. NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 3, at 16.

61. *Id.* at 37.

62. *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018), *reh’g en banc denied*, 920 F.3d 584 (9th Cir. 2019), *cert denied*, 140 S. Ct. 674 (mem.) (2019).

63. *See id.* at 1035, 1038.

64. *Id.* at 1036.

65. The Interfaith Sanctuary had ninety-six beds, open to men, women, and children of all faiths. *Id.* at 1036. The two remaining shelters stressed Christianity: one allowing only men, and the other allowing only women and children. *Id.* at 1036–37.

66. *Id.* at 1037.

67. *Id.* at 1036.

68. *Id.* at 1037.

69. *Id.*

70. *Id.*

71. *Id.* at 1038.

72. *Id.*

BRM promised it would never turn anyone away, so it never reported reaching capacity.<sup>73</sup> Accordingly, Boise police continued to issue citations.<sup>74</sup>

After resolving preliminary questions relating to standing<sup>75</sup> and relief,<sup>76</sup> the Ninth Circuit turned to the merits.<sup>77</sup> It reviewed U.S. Supreme Court and other federal precedent, which interpreted the Eighth Amendment as prohibiting the government from punishing the “universal and unavoidable consequences of being human.”<sup>78</sup> This protection extends to “conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets.”<sup>79</sup> Although the record suggested Boise would have had available shelter, at least in part due to the BRM’s stated policy of never turning anyone away,<sup>80</sup> the court concluded that BRM’s restrictions, especially the religious impositions, rendered its beds functionally inaccessible to the plaintiffs.<sup>81</sup> Thus, the Ninth Circuit held that Boise could not “criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.”<sup>82</sup>

*Martin* stands for the proposition that laws are unconstitutional when (1) a city punishes a homeless person for engaging in necessary, life-sustaining activity in public; and (2) that person has no reasonable alternative because existing shelters are inadequate in number or are functionally inaccessible.<sup>83</sup> Therefore, *Martin* is also significant because many shelters not only lack sufficient capacity, but also may impose various barriers to entry, rendering them functionally inaccessible to many homeless people.<sup>84</sup> Accordingly, many

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73. *Id.* (noting the Interfaith Sanctuary reported being full approximately 40 percent of the time).

74. *Id.*

75. *Id.* at 1040–42.

76. *Id.* at 1042–46.

77. *Id.* at 1046–49. The Eighth Amendment prohibits the infliction of cruel and unusual punishment, including “substantive limits on what can be made criminal and punished as such.” *Ingraham v. Wright*, 430 U.S. 651, 667 (1977).

78. *Martin*, 902 F.3d at 1048 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006), *vacated by Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2007)).

79. *Id.* (quoting *Jones*, 444 F.3d at 1137).

80. *Id.* at 1040.

81. *Id.* at 1041 (“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)); *id.* (“Yet at the conclusion of a 17-day stay at River of Life, or a 30-day stay at City Light, an individual may be forced to choose between sleeping outside on nights when Sanctuary is full (and risking arrest under the ordinances), or enrolling in BRM programming that is antithetical to his or her religious beliefs.”)).

82. *Id.* at 1048.

83. *Id.*

84. Rankin, *supra* note 4, at 117 (citing SUZANNE SKINNER, SEATTLE UNIV. SCH. OF L. HOMELESS RTS. ADVOC. PROJECT, SHUT OUT: HOW BARRIERS OFTEN PREVENT MEANINGFUL ACCESS TO EMERGENCY SHELTER (Sara K. Rankin ed., 2016), <https://ssrn.com/abstract=2776421> [<https://perma.cc/UEK9-LP43>]).

homeless rights advocates celebrated *Martin* as long-overdue recognition that unsheltered people should not be punished for being homeless.<sup>85</sup>

Boise did not take the decision lying down. Shortly after the September 2018 *Martin* decision, Boise petitioned for a rehearing en banc, which the Ninth Circuit denied in April 2019.<sup>86</sup> The denial exposed fault lines in the Ninth Circuit and five justices issued a spirited dissent.<sup>87</sup> Dissenters argued *Martin* was wrongly decided,<sup>88</sup> created circuit splits,<sup>89</sup> and “shackle[d] the hands” of local governments in their efforts to address homelessness, public health, and safety concerns.<sup>90</sup> The dissenting opinions telegraphed an opening for Boise to appeal, and in June 2019, the city requested an extension to file a writ of certiorari to the U.S. Supreme Court.<sup>91</sup> The Court approved the extension but ultimately denied the petition without comment in December 2019.<sup>92</sup>

*Martin*'s holding turned on the involuntary nature of the plaintiffs' resting and sleeping in public. The panel relied on U.S. Supreme Court precedent indicating that criminalization of an involuntary condition or status, or the unavoidable consequences of an involuntary condition or status, violates the Eighth Amendment.<sup>93</sup> But the panel described its holding as “a narrow one,” quoting prior Ninth Circuit precedent to explain the decision would not obligate

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85. Ashley Archibald, *Appeals Court Finds Criminalizing Homelessness Unconstitutional*, REAL CHANGE (Apr. 10, 2019), <https://www.realchangenews.org/2019/04/10/appeals-court-finds-criminalizing-homelessness-unconstitutional> [<https://perma.cc/Q38M-9BMF>] (noting “[t]he decision was cause for celebration among advocates for people experiencing homelessness who have long held that the enforcement of ordinances that penalize people for sitting, lying or sleeping in public spaces is a criminalization of poverty and homelessness”).

86. *Martin*, 920 F.3d at 584.

87. See *id.* at 590 (Smith, J., dissenting). Judges Berzon and Smith also sparred over Smith including in his dissent a photo of several tents on a public sidewalk. See *id.* at 597 (Smith, J., dissenting); *id.* at 589 (Berzon, J., concurring). Berzon pointed out the photo was of a Los Angeles sidewalk, not Boise, and was not part of the record. *Id.* at 589 (Berzon, J., concurring). Berzon also argued the photo only illustrated that “the ordinances criminalizing sleeping in public places were never a viable solution to the homelessness problem.” *Id.* at 589.

88. *Id.* at 590 (Smith, J., dissenting).

89. *Id.* at 598. But in July 2019, before Boise's request for extension was decided, the Fourth Circuit issued an en banc reversal of a panel opinion on a so-called “habitual drunkard” statute that was largely used to criminalize homeless alcoholics. *Manning v. Caldwell*, 930 F.3d 264, 268 (4th Cir. 2019) (en banc). The case eliminated a potential circuit split on Eighth Amendment issues, signaling agreement with *Martin* and overruling a contrary case in the circuit. See *id.* at 282 n.17.

90. *Martin*, 920 F.3d at 590 (Smith, J., dissenting).

91. *City of Boise Begins Process to Ask U.S. Supreme Court to Hear Martin v. Boise Camping Case*, CITY OF BOISE (June 3, 2019), <https://www.cityofboise.org/news/mayor/2019/june/city-of-boise-begins-process-to-ask-us-supreme-court-to-hear-martin-v-boise-camping-case/> [<https://perma.cc/UQ2E-FFRC>]. For the procedural history of the denied petition, see *City of Boise, Idaho v. Martin*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/city-of-boise-idaho-v-martin> [<https://perma.cc/6HCR-3SJ6>].

92. *City of Boise v. Martin*, 140 S. Ct. 674 (2019) (mem.) (denying petition for certiorari).

93. See *Martin v. City of Boise*, 902 F.3d 1031, 1047 (9th Cir. 2018), *reh'g en banc denied*, 920 F.3d 584 (9th Cir. 2019), *cert denied*, 140 S. Ct. 674 (mem.) (2019) (citing *Powell v. Texas*, 392 U.S. 514, 533 (1968); *Robinson v. California*, 370 U.S. 660, 667 (1962)).

cities to provide sufficient shelter and should not hamper cities from regulating public spaces:

“[W]e in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place.” . . . We hold only 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.”<sup>94</sup>

The Court further hinted at specific examples of regulations cities could still pursue despite the decision:

Naturally, our 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. Nor do we suggest that a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside. 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. So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the “universal and unavoidable consequences of being human” in the way the ordinance prescribes.<sup>95</sup>

Two other limitations also narrow *Martin*’s reach. First, to establish standing, any future plaintiffs need to set forth facts demonstrating a credible risk of prosecution.<sup>96</sup> This analysis would likely hinge on the plaintiffs’ “ability to avoid engaging in the illegal conduct in the future.”<sup>97</sup> In other words, *Martin* allows cities to enforce laws if alternative spaces exist for unsheltered people. This is because in such cases, their presence in the contested area arguably could be avoided. If a person can avoid future prosecution by going elsewhere, cities could argue they are off the hook.

Second, and most significant, even assuming a plaintiff can satisfy standing requirements, a merits inquiry still turns on whether plaintiffs’ presence in public

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94. *Martin*, 902 F.3d at 1048 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006) *vacated by Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2007)).

95. *Id.* at 1048 n.8 (internal citations omitted).

96. The *Martin* court noted “[a] plaintiff need not . . . await an arrest or prosecution to have standing to challenge the constitutionality of a criminal statute.” *Id.* at 1040. Instead, where a “plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.” *Id.* (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)); *accord Jones*, 444 F.3d 1118.

97. *Jones*, 444 F.3d at 1126.

is a matter of choice—whether reasonable alternatives exist.<sup>98</sup> Shortly after *Martin*, this inquiry was tested in the Northern District of California. There, the Court found homeless plaintiffs unlikely to succeed on the merits of their Eighth Amendment challenge to their removal from a city-owned parcel of land.<sup>99</sup> The court noted the availability of shelter space and the City of Oakland’s stated commitment to find beds for the plaintiffs.<sup>100</sup> It distinguished the facts from *Martin*, explaining, “Plaintiffs are not faced with punishment for acts inherent to their unhoused status that they cannot control. Nor are Plaintiffs unable to obtain shelter [somewhere else].”<sup>101</sup> Ultimately, the Northern District declined to extend *Martin* to “establish a constitutional right to occupy public property indefinitely at Plaintiffs’ option.”<sup>102</sup>

Notwithstanding *Martin*’s limits and Boise’s efforts to appeal, homeless rights advocates celebrated the *Martin* victory for its “potential to transform local government responses to visible homelessness in cities across the country.”<sup>103</sup> Initial reports suggested *Martin* persuaded some cities to decline enforcing criminalization laws.<sup>104</sup> But it soon became clear that post-*Martin* enforcement tactics were not slowing—they were evolving.

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98. *Martin*’s grounding on this principle is consistent with precedent in other jurisdictions as well. See, e.g., *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992) (holding “[a]s long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the eighth amendment—sleeping, eating and other innocent conduct”); see also *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994), *rev’d on other grounds*, 61 F.3d 442 (5th Cir. 1995) (emphasizing homeless individuals often “have no place to go other than the public lands they live on. In other words, they must be in public”).

99. *Miralle v. City of Oakland*, No. 18-cv-06823-HSG, 2018 U.S. Dist. LEXIS 201778, at \*5 (N.D. Cal. Nov. 28, 2018).

100. *Id.* at \*5–6.

101. *Id.*

102. *Id.* at \*6.

103. *In Just Times*, NAT’L L. CTR. ON HOMELESSNESS & POVERTY (Apr. 2019), <https://nlchp.org/ijt-april-2019/> [<https://perma.cc/BCH8-Y9AN>].

104. Patrick Sisson, *Cities Can’t Criminalize Homelessness, Federal Court Affirms*, CURBED (Apr. 5, 2019), <https://www.curbed.com/2019/4/5/18296772/homeless-lawsuit-boise-appeals-court> [<https://perma.cc/F7LL-P8DF>] (noting San Francisco, Portland, and Sacramento at least temporarily halted enforcement while several other West Coast cities were experimenting with other responses). Some cities are settling claims. For example, in *Vannucci v. County of Sonoma*, a federal case in the Northern District of California, homeless plaintiffs were successful in obtaining a stipulated preliminary injunction. Stipulation and Order for Preliminary Injunction, *Vannucci v. County of Sonoma*, No. 18-cv-01955-VC (N.D. Cal. July 12, 2019), <http://www.pilpca.org/wp-content/uploads/2019/08/Doc.-109-1.-Stipulation-and-Order-for-Preliminary-Injunction-2019-07-12.pdf> [<https://perma.cc/JY8R-Q4WS>]. The injunction, which applied to enforcement actions against homeless persons living on public property within the city of Santa Rosa, was in effect from August 12, 2019, through June 30, 2020. *Id.* at 12. It required that, before the City or County takes an enforcement action against a homeless individual who has established a dwelling outdoors, they must first (1) provide that individual reasonable notice and (2) make an offer of adequate shelter. *Id.* at 8, 6. The injunction defined adequate shelter based on a variety of factors, including an individual’s specific, disability-related needs, their having a service animal or pet, their gender, and their religious or ethical beliefs. *Id.* at 5. Adequacy also depended on the conditions

## III.

## INITIAL AFTERSHOCKS: TESTING THE LIMITS OF MARTIN

Some early reactions foreshadowed *Martin*'s paradoxical impact. Taking their cues from *Martin*, some cities sought to designate “alternative spaces” for unsheltered people to go but with criminal penalties if they did not retreat from contested public spaces. For example, in July 2019, Orange County, California settled two federal lawsuits<sup>105</sup> attempting to stop the city from sweeping encampments on a riverbed near a stadium venue. The settlement explicitly referenced *Martin* three times.<sup>106</sup> An official described the settlement as creating two zones in Orange County: one containing restricted public areas where unsheltered people could be “immediately arrested” for violating criminalization laws and a second where the city promised “to first try to send social workers” to help move people into shelters. However, if encampment residents refused these interventions, police could then proceed with arrests.<sup>107</sup>

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of the facility, including a requirement that the shelter be immediately available for thirty consecutive days or more, and that the shelter must be open both days and nights. *Id.* The injunction also established requirements for the preservation and storage of homeless individuals' personal property, including a prohibition against destroying homeless individuals' unattended (as opposed to abandoned) property and a requirement to store personal property for ninety days. *Id.* at 9. The injunction applied to the City of Santa Rosa (including the police and parks department), the County of Sonoma (including park rangers), the Sonoma County Community Development Commission, but not to the Sonoma County Sheriff's Office. *Id.* at 2–3; *see also* Bob Egelko, *Santa Rosa Agrees to New Rules in Dealing with Homeless Population*, S.F. CHRON. (July 12, 2019), <https://www.sfchronicle.com/bayarea/article/Santa-Rose-agrees-to-new-rules-in-dealing-with-14092255.php> [<https://perma.cc/HP3B-NBQZ>].

105. *See* Ashley Ludwig, *Homeless Lawsuits End, Working Model for California Emerges*, PATCH (July 23, 2019), <https://patch.com/california/orange-county/homeless-lawsuit-could-end-tuesday-supes-hopeful> [<https://perma.cc/AV8W-VW53>].

106. Settlement Agreement at 9–10, 24, Orange Cnty. Catholic Worker v. Orange Cnty., No. 8:18-cc-00155-DOC-JDE (C.D. Cal. July 23, 2019). One reference explained that the settlement could be modified if “the holding of *Martin* . . . is reversed or modified, or is otherwise no longer good law.” *Id.* at 24. Seven cities in Orange County were among the amici in the *Martin* petition to the U.S. Supreme Court. Brief for Seven Cities in Orange County as Amici Curiae Supporting Petitioner, *City of Boise v. Martin*, 140 S. Ct. 674 (mem.) (2019).

107. Carol Sobel, one of the attorneys handling the case, says the settlement does not allow for immediate arrests. Email from Carol Sobel to author (July 25, 2019) (on file with author). While the settlement retains some restricted areas where unsheltered people may not go—such as railroad tracks or fenced areas—non-restricted areas required police to offer alternatives before enforcement. Notice of Filing Settlement of Class Action at 1–2, Orange Cnty. Catholic Worker v. Orange Cnty., No. 8:18-vc-00155 (C.D. Cal. July 23, 2019); Order Approving Settlement, Orange Cnty. Catholic Worker v. Orange Cnty., No. 8:18-vc-00155 (July 23, 2019) (C.D. Cal. July 23, 2019); Settlement Agreement at 1–51, *id.*; *see also* Theresa Walker, *Settlement in Homeless Lawsuit Sets Rules for Help, and Enforcement in North and Central Orange County*, ORANGE CNTY. REG. (July 23, 2019), <https://www.oeregister.com/2019/07/23/settlement-in-homeless-lawsuit-sets-rules-for-help-and-enforcement-in-north-and-central-orange-county> [<https://perma.cc/X58Z-T5FX>].

Although the official's description oversimplifies the settlement, this take certainly jived with some popular support. *See, e.g.*, KPDretired, Comment on Danielle Wallace, *Orange County Reached Settlement that Allows Cops to Arrest Homeless People in Some Areas*, FOX NEWS (July 17, 2019), <https://www.foxnews.com/us/orange-county-reached-settlement-immediately-arrest-homeless-people> [<https://perma.cc/NZ5A-YKJZ>] (“The only solution is to enforce laws making it illegal to be

Similarly, Sacramento Mayor Darrell Steinberg,<sup>108</sup> who heads California Governor Newsom’s Commission on Homelessness, recently announced that California should establish a right to shelter, explaining “[h]omeless people should have a legal right to shelter and a legal obligation to utilize it.”<sup>109</sup> Steinberg complained that building sufficient housing to end homelessness “will take too long and cost too much.”<sup>110</sup> Instead—presumably motivated by his impression that emergency shelter must be significantly quicker and cheaper to construct<sup>111</sup>—he argued California should build sufficient shelters.<sup>112</sup> To further this argument, Steinberg cited to the New York right to shelter model, which stemmed from a 1979 case<sup>113</sup> and has been repeatedly criticized as dangerous to the health and safety of shelter residents.<sup>114</sup> Steinberg argued that California

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homeless. If they have no where [sic] to go[,] make tent cities in the desert where they can live free until they want to be productive members of society.”); pjin922, Comment on *id.* (“You’re going to need a bigger jail Orange County! I applaud your win on this issue. Thank you!!”).

108. *Martin* was well-known to Steinberg and Sacramento lawmakers. Commentary from Sacramento City Council meetings often reflected on *Martin*. See, e.g., City of Sacramento, *Regular City Council Meeting: Update to the Homeless Services Funding Plan*, GRANICUS (Aug. 27, 2019), [http://sacramento.granicus.com/MediaPlayer.php?view\\_id=&clip\\_id=4475&caption\\_id=3720776#](http://sacramento.granicus.com/MediaPlayer.php?view_id=&clip_id=4475&caption_id=3720776#) [<https://perma.cc/58T2-EAP3>] (at 3:51:37, City Councilmember Jay Schenirer notes, “We also need beds so that we can enforce our no camping ordinance . . . because of the Boise decision”); City of Sacramento, *City Council Meeting: Homeless Sheltering and Re-Housing Approach*, GRANICUS (Feb. 12, 2019), [http://sacramento.granicus.com/MediaPlayer.php?view\\_id=&clip\\_id=4338&caption\\_id=3610135](http://sacramento.granicus.com/MediaPlayer.php?view_id=&clip_id=4338&caption_id=3610135) [<https://perma.cc/58NP-Z8H8>] (at 1:35:03, Mayor Darrell Steinberg states, “Once we have the shelter capacity, we then have moral high ground to say you can’t sleep outside, period . . . that’s the relationship for me between building this shelter capacity and enforcing our basic standards of public health and public safety”). The City and County of Sacramento were also among many California amici in the *Martin* appeal. Brief for California State Association of Counties and 33 California Counties and Cities as Amici Curiae Supporting Petitioner, *City of Boise v. Martin*, 140 S. Ct. 674 (mem.) (2019).

109. Darrell Steinberg, *Op-Ed: Building More Permanent Housing Alone Won’t Solve Homelessness in California*, L.A. TIMES (July 17, 2019), <https://www.latimes.com/opinion/story/2019-07-16/op-ed-building-more-permanent-housing-alone-wont-solve-homelessness-in-california> [<https://perma.cc/2JRQ-KRN6>].

110. *Id.*

111. Studies suggest it actually costs less to bring sufficient supportive housing to scale than it does to leave chronically homeless people unsheltered or rotating through emergency shelters. See STATEN, *supra* note 1.

112. See Steinberg, *supra* note 109.

113. Consent Decree, *Callahan v. Carey*, No. 42582/79 (N.Y. Sup. Ct. Aug. 26, 1981) (final judgment by consent), [https://www.escr-net.org/sites/default/files/callahanconsentdecree\\_0.pdf](https://www.escr-net.org/sites/default/files/callahanconsentdecree_0.pdf) [<https://perma.cc/W6LP-C59W>]. See also *The Callahan Legacy: Callahan v. Carey and the Legal Right to Shelter*, COAL. FOR THE HOMELESS, <https://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/the-callahan-legacy-callahan-v-carey-and-the-legal-right-to-shelter> [<https://perma.cc/8M4D-ZFJW>] (discussing the procedural history of *Callahan* and New York City’s right to shelter).

114. See, e.g., Jeffrey D. Klein, *Horrors in Homeless Housing: New York’s Unclean, Unsafe, Dangerous Temporary Shelter System and How to Finally Tackle the Homeless Epidemic*, N.Y. STATE SENATE (Jan. 19, 2017), <https://www.nysenate.gov/newsroom/press-releases/jeffrey-d-klein/horrors-homeless-housing-new-yorks-unclean-unsafe-dangerous> [<https://perma.cc/VF4L-9ZJZ>]; *NYC Report Shows Homeless Families Housed in “Dickensian” Conditions*, CBS NEWS (Mar. 12, 2015), <https://www.cbsnews.com/news/new-york-city-investigation-shows-homeless-routinely-sheltered-in-dangerous-living-situations/> [<https://perma.cc/4D9Y-5GTV>].

could improve on New York's model, not by ensuring shelters maintain certain standards of care and habitability, but by forcing unsheltered people to go into such shelters through some unspecified mechanism.<sup>115</sup>

Las Vegas, Nevada was not ready to articulate a right to shelter but instead focused on the idea of compulsory shelter. *Martin* explicitly influenced this idea.<sup>116</sup> In November 2019, the city enacted an ordinance prohibiting camping, lodging, and similar activities on public property when beds are available at established homeless shelters.<sup>117</sup> More than 6,500 individuals and families in Southern Nevada lack permanent housing, with 67 percent of its homeless population sleeping outside.<sup>118</sup> Under the new law, any of the 4,355 people surviving in public can be charged with a misdemeanor crime and fined up to \$1,000 or sentenced for up to six months in jail.<sup>119</sup> The law went into effect immediately upon passage, although the city said it would not enforce the criminal provisions until February 1 in part because the city needed time to increase its shelter capacity.<sup>120</sup> Even if the city succeeds in immediately securing thousands of new beds to meet the need, the city still lacks the apparent infrastructure to report bed availability in real-time.<sup>121</sup> Without clear procedures or transparent accounting, the potential for arbitrary enforcement of the new law is staggering. Still, the city argues the fines component of the law can be immediately enforced because a homeless resource center, which is still under

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115. Steinberg, *supra* note 109 (“The right to shelter must be paired with the obligation to use it.”).

116. KCLV Channel 2, *CLV 11-06-2019 City Council Meeting*, YOUTUBE, AT 5:29:48 (Nov. 6, 2019), [https://youtu.be/HHgiCcN\\_KEo?t=19452](https://youtu.be/HHgiCcN_KEo?t=19452); see also CITY OF LAS VEGAS, NEV., CITY COUNCIL AGENDA: ENCAMPMENT ORDINANCE BILL 2019-26, at 30–32, 37 (Nov. 6, 2019), <https://lasvegas.primegov.com/meetings/ItemWithTemplateType?id=8227&meetingTemplateType=2> [<https://perma.cc/HA2M-8QXR>]; Briana Erickson & Shea Johnson, *Las Vegas' Homeless Camping Ban Faces Legal, Logistical Hurdles*, LAS VEGAS REV.-J. (Oct. 21, 2019), <https://www.reviewjournal.com/news/politics-and-government/las-vegas/las-vegas-homeless-camping-ban-faces-legal-logistical-hurdles-1874954/> [<https://perma.cc/6PKZ-Z6LA>] (discussing *Martin* and noting, “Las Vegas intentionally drafted its bill to include ‘if beds are available’ language to avoid that particular controversy”).

117. LAS VEGAS, NEV., CODE §§ 10.86.010–.040 (2019).

118. *Encampment Ordinance Goes into Effect*, LASVEGASNEVADA.GOV (Oct. 29, 2019), <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#:~:text=More%20than%206%2C500%20individuals%20and,safety%20of%20the%20entire%20community> [<https://perma.cc/WZ9B-FDJF>].

119. See LAS VEGAS, NEV., CODE §§ 10.86.010–.040 (2019).

120. Anita Hassan, *Las Vegas Adopts Ban that Prohibits Sleeping, Camping on Streets and Sidewalks*, NBC NEWS (Nov. 6, 2019), <https://www.nbcnews.com/news/us-news/las-vegas-adopts-ban-prohibits-sleeping-camping-streets-sidewalks-n1078006> [<https://perma.cc/TXL5-ZC7T>] (reporting the slight delay was to afford the city time to “review[] additional locations for shelter needs and post[] signs with details of the ban”).

121. See *id.*

construction until 2021 and does not offer indoor shelter,<sup>122</sup> features an outdoor gravel lot that can accommodate some campers on mats.<sup>123</sup> Thus, Las Vegas bets it can characterize a compulsory, bounded outdoor area as a reasonable alternative under *Martin*.<sup>124</sup>

Other post-*Martin* developments are less ambitious than Orange County's allowed and prohibited zones, Mayor Steinberg's vision of a "right" to compelled shelter, or Las Vegas's vague new compulsory shelter law. For example, in April 2019, a federal judge allowed the City of Santa Cruz,<sup>125</sup> California to sweep encampments while officials distributed temporary shelter vouchers to campers.<sup>126</sup> The court accepted this outcome even though the plaintiffs argued that existing shelters were insufficient, both in terms of potential duration and capacity.<sup>127</sup> In such a context, the vouchers would likely prove meaningless. Still, the city's apparent promise to hand out vouchers was sufficient for the sweeps to proceed, despite the lack of any evidence establishing that the vouchers could actually result in a reasonable alternative for unsheltered residents.

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122. See *Homeless Services*, LASVEGASNEVADA.GOV, <https://www.lasvegasnevada.gov/Residents/Neighborhood-Services/Homeless-Services> [https://perma.cc/9N76-3AM5] (describing the Courtyard as "one-stop shop with access to medical, housing and employment services" and setting construction to be complete in 2021).

123. See Michael Lyle, *LV Blocks off Homeless Encampment Despite Scant Housing Alternatives*, NEV. CURRENT (Oct. 2, 2020), <https://www.nevadacurrent.com/2020/10/02/lv-blocks-off-homeless-encampment-despite-scant-housing-alternatives/> [https://perma.cc/8Z5Z-ZQ2R].

124. This is a poor bet; *Martin* specifically noted "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." *Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018), *reh'g en banc denied* *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). Compulsory mass shelters or camps are also vulnerable to attack on other grounds, discussed *infra* Part V.C.1.

125. Santa Cruz lawmakers were keenly aware of *Martin*. See *Santa Cruz City Council: Study Session*, CITY OF SANTA CRUZ (Mar. 19, 2019), <http://scsire.cityofsantacruz.com/sirepub/mtgviewer.aspx?meetid=1237&doctype=AGENDA> [https://perma.cc/34NR-UUDP] (City Attorney Tony Condotti stating the Santa Cruz ordinance is "strikingly similar" to the Boise ordinance at 36:50, and "For the purposes of abating—closing an encampment, what we have to be able to demonstrate is that there is a reasonable alternative temporary location available on that occasion. We don't have to be able to demonstrate that it's a shelter that will be available for any particular duration . . ." at 51:42).

126. Jessica A. York, *Federal Judge Rules, Homeless Camp Residents Given 72 Hours Notice to Vacate*, SANTA CRUZ SENTINEL (Apr. 30, 2019), <https://www.santacruzsentinel.com/2019/04/29/homeless-camp-follow-proceedings-from-todays-hearing-in-federal-court/> [https://perma.cc/TN3A-QSQ5]; Anser Hassan, *Santa Cruz Officials Working to Clear Large Homeless Camp*, ABC7NEWS (May 3, 2019), <https://abc7news.com/society/santa-cruz-officials-clearing-large-homeless-camp/5283889/> [https://perma.cc/Y79H-AQNA].

127. Jessica A. York (@Reporter Jess), TWITTER (Apr. 26, 2019) <https://twitter.com/ReporterJess/status/1121832844609744896> [https://perma.cc/KKV4-V7HT] (reporting the city's argument as "[p]olice won't enforce camping ban, so city doesn't legally have to provide alt [sic] shelter, but is" and the plaintiff's argument as "insufficient vacant shelter space countywide, and both new campsites . . . are only temporary").

In August 2019, the Los Angeles City Council announced a proposal restricting unsheltered people from sleeping within five hundred feet of homeless shelters, parks, bike paths, tunnels, or bridges along school routes.<sup>128</sup> In the aggregate, these restrictions would not only functionally exclude homeless people from accessing crucial public toilets in parks but would also concentrate homeless people in the few locations that comply with the ordinance criteria, creating zones like Skid Row, an area long notorious for neglect, poor conditions, and violence.<sup>129</sup> The proposed legislation is not reported to detail any additional funds or increased availability of services or outreach.

Such experimentation suggests some cities believe that, as long as they proffer an alternative space, *Martin* allows them to persist in forcibly removing unsheltered people from public spaces. Of course, the forced displacement of visibly poor people is nothing new. American cities have been engaged in such practices for hundreds of years,<sup>130</sup> and over the last decade, campaigns to exile unsheltered people from public spaces have reached a fever pitch.<sup>131</sup>

But *Martin*'s timing does seem to correspond with a shift in criminalization frameworks. While open calls to jail homeless people for the crime of surviving in public still persist,<sup>132</sup> movements against mass incarceration and debtor's prisons appear to make many urban cities circumspect about obviously ramping up incarceration for low-level offenses.<sup>133</sup> *Martin* and other successful anti-

128. See *New Proposal Would Restrict Homeless People from Sleeping Within 500 Feet of Parks, Homeless Shelters*, CBS L.A. (Aug. 23, 2019), <https://losangeles.cbslocal.com/2019/08/23/homeless-sleeping-ban/> [<https://perma.cc/Z4Y8-569J>].

129. See *id.*; Matt Tinoco, *LA's Rules About Where Homeless People Are Allowed to Sit and Sleep Could Get Even More Complicated*, LAIST (Aug. 22, 2019), <https://laist.com/2019/08/22/los-angeles-homeless-sit-lie-sleep-law.php> [<https://web.archive.org/web/20210112220013/https://laist.com/2019/08/22/los-angeles-homeless-sit-lie-sleep-law.php>].

130. See generally JAVIER ORTIZ & MATTHEW DICK, SEATTLE UNIV. SCH. OF L. HOMELESS RTS. ADVOC. PROJECT, *THE WRONG SIDE OF HISTORY: A COMPARISON OF MODERN AND HISTORICAL CRIMINALIZATION LAWS* (Sara K. Rankin ed., 2015), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1003&context=hrap> [<https://perma.cc/6TM4-RGQL>].

131. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 3, at 37–49 (showing increasing statistics of criminalization).

132. See Jonathan Ben-Menachem, *Media Frame: Stop Quoting Bill Bratton*, APPEAL (July 22, 2019), <https://theappeal.org/media-frame-stop-quoting-bill-bratton/> [<https://perma.cc/H9ZU-AJX8>] (discussing the persistent role of broken windows policing, which continues to “result[] in thousands of tickets issued to homeless people for crimes of poverty,” including jail for their inability to pay fines and fees). Similar efforts persist today. See generally NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 3.

133. A criminal record adds to the already difficult challenge of finding employment, getting housing, or being eligible for services. Additionally, the criminalization of homelessness adds to an already overburdened criminal justice system by detaining individuals who have not committed serious crimes. In Seattle, some city officials demonstrate an appreciation for these issues. See Kroman, *supra* note 2 (stating the Seattle Police Chief called “the revolving door between homelessness and jail for people living on the streets the result of a ‘failed process’”). Instead, Seattle has endeavored to move

criminalization litigation<sup>134</sup> creates additional pressure for local governments to avoid seeming like they are arresting and jailing unsheltered people for being homeless.

Instead, post-*Martin* cities appear to be adapting—creating a more nuanced framework that still allows the relentless expulsion of unsheltered people. The corresponding narrative is also evolving from one that openly advocates for punitive responses to unsheltered homelessness to one of “tough love.” Tickets and jail are being replaced with sweeps and forced confinement; control is recast as compassion.<sup>135</sup> This framing justifies forcible removals of unsheltered people as necessary to mitigate harm to them. However, a closer look reveals these developments are not designed to solve homelessness or even to improve the lives of unsheltered people. Instead, *Martin* appears to have sparked new innovations to hide homelessness without committing local governments to any improved outcomes for unsheltered people.

Rather than delivering the decriminalization of homelessness, *Martin* is accelerating transcarceration: a movement from openly punitive campaigns to incarcerate unsheltered people in jail or prison to alluring campaigns to confine unsheltered people through alternative means. Like an encampment sweep writ large, post-*Martin* efforts may be simply forcing unsheltered people from one space to another. If that alternative space is another form of forced confinement or segregation then, arguably, the distinction between a safe, legal place and a jail dissipates.

#### IV.

##### CONTEXT FOR MARTIN

*Martin*—its limited holding and its transcarceral effects—did not occur in a vacuum. America’s commitment to exile poor people from public spaces has a

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away from incarceration and toward diversion; this effort has generated enormous controversy, especially with respect to unsheltered chronically homeless defendants. See, e.g., Martin Kaste, *Criminal Justice Overhaul Sparks Backlash in Seattle*, NPR (July 5, 2019), <https://www.npr.org/2019/07/05/738873329/criminal-justice-overhaul-sparks-backlash-in-seattle> [<https://perma.cc/CFE3-7DNL>].

134. NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 3, at 75–81 (providing an overview of legal challenges to laws that criminalize homelessness and the outcomes of the cases challenging these laws).

135. See *City of Boise Begins Process to Ask U.S. Supreme Court to Hear Martin v. Boise Camping Case*, *supra* note 91 (condemning *Martin*, an attorney representing Boise stated: “The tragedy is that this decision harms the very people it purports to protect. . . . If local governments cannot limit public camping, they will be unable to stop the proliferation of dangerous encampments that trap the most vulnerable individuals and prevent them from seeking proper shelter and services.” (internal quotations omitted)); see also Nina Golgowski & Michael Hobbes, *America’s Homelessness Crisis Is Inspiring New Acts of Cruelty*, HUFFPOST (Aug. 2, 2019), [https://www.huffpost.com/entry/cruel-ways-homeless-punished\\_n\\_5d35ee4ee4b004b6adb3cc7d?sae](https://www.huffpost.com/entry/cruel-ways-homeless-punished_n_5d35ee4ee4b004b6adb3cc7d?sae) [<https://perma.cc/2KPN-8V35>] (“Politicians typically cast encampment sweeps and mass arrests as humanitarian interventions, a final, merciful push for ‘shelter resistant’ homeless people to make the leap into housing, employment and rehab. In reality, however, these campaigns are rarely paired with meaningful assistance . . .”).

long history bound up in the stigmatization of people who are marginalized, impoverished, and afflicted by mental and behavioral health issues. This stigma is fueled by discrimination and stereotypes and by fundamental misunderstandings about the realities of homelessness. A brief review of such influences helps explain the historical popularity of carceral responses to homelessness, as well as the evolution of transcarceral responses that similarly promote the forced confinement of unsheltered people.

*A. America's Legacy of Hiding and Confining Marginalized Groups*

*Martin* confronted modern criminalization laws rooted in English and colonial vagrancy laws, as well as a long lineage of exclusion laws aimed to eject marginalized groups from public view.<sup>136</sup> Homeless populations are disproportionately Black, brown, disabled, immigrant, refugee, and LGBTQ, suggesting the systemic nature of discrimination.<sup>137</sup> Systemic social rejection and alienation across such marginalized groups correlates with the acceptability of their persecution, internment, confinement, or segregation.<sup>138</sup> If someone is perceived as not deserving integration into the community, their exile is not only warranted, but also systemically facilitated.

A social control lens<sup>139</sup> reveals how people experiencing poverty and homelessness have long been stigmatized as abnormal or deviant and channeled

136. See ORTIZ & DICK, *supra* note 130 (comparing historic exclusion laws intended to segregate newly freed slaves, immigrants, and disabled people from public spaces with modern laws intended to exclude homeless people from public spaces, and concluding that modern laws are similarly discriminatory in effect, if not in their text).

137. See generally KAYA LURIE & BREANNE SCHUSTER, SEATTLE UNIV. SCH. OF L. HOMELESS RTS. ADVOC. PROJECT, DISCRIMINATION AT THE MARGINS: THE INTERSECTIONALITY OF HOMELESSNESS & OTHER MARGINALIZED GROUPS 1–51 (Sara K. Rankin, ed., 2015), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1002&context=hrap> [<https://perma.cc/E3VZ-MWSB>] (explaining that racial minorities, women, members of the LGBTQ community, people with mental disabilities, formerly incarcerated people, and veterans are overrepresented in the homeless population; thus, laws criminalizing homelessness systematically discriminate against these marginalized groups and should be rejected).

138. See generally RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL: ENFORCING THE BOUNDARIES OF BELONGING (Mary Bosworth, Alpa Parmar & Yolanda Vázquez eds., 2018) (discussing how race, migration, and criminal justice systems intertwine to create and enforce “boundaries of belonging”); DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007) (discussing how governments threaten deportation to control, segregate, and expel immigrant populations, citing examples such as the post-Revolutionary Alien and Sedition Laws, the Fugitive Slave laws, the Native American removals, the Chinese Exclusion Act, the Palmer Raids, and the internment of Japanese Americans during World War II).

139. See *Social Control*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100515340> [<https://perma.cc/MUH8-AVSE>] (defining *social control* in the sociological context as “the social processes by which the behaviour of individuals or groups is regulated. Since all societies have norms and rules governing conduct (a society without some such norms is inconceivable) all equally have some mechanisms for ensuring conformity to those norms and for dealing with deviance”). See generally FRANCES FOX PIVEN & RICHARD CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (1993) (applying social control theories to poverty).

into criminal justice and mental health institutions.<sup>140</sup> For example, poorhouses emerged in England during the 17th century to confine people who were poor, disabled, elderly, or otherwise unable to work.<sup>141</sup> Conditions were brutal and punitive, communicating the stigma of poverty and threatening confinement and exclusion for those suffering from it.<sup>142</sup> For hundreds of years, mental asylums were a more popular repository than prisons for the mentally ill. However, around the 1950s,<sup>143</sup> the tide started shifting, hitting ever higher marks of incarceration that have only recently ebbed.<sup>144</sup> This transition may have started with the transfer of mentally ill individuals from confinement in asylums to local jails.<sup>145</sup> The prevalence of mental illness in incarcerated populations suggests functional equivalences between asylums and incarceration as means of social

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140. See generally Geraldine L. Palmer, *People Who Are Homeless Are “People” First: Opportunity for Community Psychologist to Lead Through Language Reframing*, 9 GLOBAL J. COMMUNITY PSYCHOL. PRAC., Nov. 2018, at 2, 3 (explaining that words used to categorize people, such as “homeless,” influence public attitudes; powerful people and organizations influence who is labeled and how according to their biases and interests); SOCIAL POLICIES AND SOCIAL CONTROL (Malcolm Harrison and Teela Sanders eds., 2014); Sarah Johnsen, Suzanne Fitzpatrick & Beth Watts, *Homelessness and Social Control: A Typology*, 33 HOUSING STUD. 1106 (2018) (evaluating the practical and ethical implications of government policies designed to control homeless people); MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (Knopf, 2013) (suggesting mental asylums initially emerged as a tool of the wealthy and powerful to control and contain masses of poor people); W. Wesley Johnson, *Transcarceration and Social Control Policy: The 1980s and Beyond*, 42 CRIME & DELINQUENCY 114, 114–15 (1996) (analyzing data from fifty states and confirming the “transcarceral effects” of “noncriminal justice system control”); Henry J. Steadman, John Monahan, Barbara Duffee & Eliot Hartstone, *The Impact of State Mental Hospital Deinstitutionalization on United States Prison Populations, 1968–1978*, 75 J. CRIM. L. & CRIMINOLOGY 474, 489 (1979) (finding mental hospital patients were more likely to have been involved with the criminal justice system in 1978 than ten years previously, possibly the result of deinstitutionalization.).

141. See Erin Blakemore, *Poorhouses Were Designed to Punish People for Their Poverty*, HISTORY (Aug. 29, 2018), <https://www.history.com/news/in-the-19th-century-the-last-place-you-wanted-to-go-was-the-poorhouse> [<https://perma.cc/GBC4-UJY2>].

142. See *id.* (“These facilities were designed to punish people for their poverty and, hypothetically, make being poor so horrible that people would continue to work at all costs. Being poor began to carry an intense social stigma, and increasingly, poorhouses were placed outside of public view.”).

143. E. FULLER TORREY, AARON D. KENNARD, DON ESLINGER, RICHARD LAMB & JAMES PAVLE, *MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES* 1–4, 12–13 (2010), [https://www.treatmentadvocacycenter.org/storage/documents/final\\_jails\\_v\\_hospitals\\_study.pdf](https://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf) [<https://perma.cc/4PBF-C6FP>] (discussing how state efforts to reduce reliance on mental hospitals increased the number of mentally ill people in jails and prisons).

144. In recent years, declining crime rates and criminal justice reform have somewhat released the pressure valve on mass incarceration. Nevertheless, “the United States incarcerates a larger share of its population than any other country.” John Gramlich, *America’s Incarceration Rate Is at a Two-Decade Low*, PEW RSCH. CTR. (May 2, 2018), <https://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low> [<https://perma.cc/99DK-YK4S>].

145. See Steadman et al., *supra* note 140, at 488.

control.<sup>146</sup> Sociologists sometimes refer to this dynamic interchangeability between mental hospitals and incarceration as transcarceration because vulnerable people are transferred between carceral confinement and other forms of forced institutionalization.<sup>147</sup>

By contrast, decarceration reflects a commitment to reduce the number of people in prisons, mental hospitals, and other institutional confines.<sup>148</sup> The decarceration movement has seen some successes, such as diversion programs that send mentally ill people to case management and supportive housing in community-based residences, as opposed to jail.<sup>149</sup> Although such programs have demonstrated success, both in terms of outcomes for unsheltered individuals and their surrounding communities,<sup>150</sup> these programs remain modest in size, scope, and funding.<sup>151</sup> Similarly, permanent supportive housing—which offers but does not mandate treatment or services as a precondition to permanent housing—has proven to be the most cost-effective solution to chronic unsheltered homelessness. Permanent supportive housing has also proven more economically efficient than the rotating doors of hospitals, emergency shelters, courtrooms, and jails.<sup>152</sup> Thus, diversion and permanent

146. See *id.* See generally Johnson, *supra* note 140 (arguing that psychiatric hospitalization and incarceration function interdependently in a complex system of social policies designed to control people perceived as threats to the economic and social status quo); see also Matt Ford, *America's Largest Mental Hospital Is a Jail*, ATLANTIC (June 8, 2015), <https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/> [<https://perma.cc/NRU6-D8QQ>] (describing Cook County Jail in Chicago as America's largest mental health facility where one third of those incarcerated suffer from mental illness).

147. See, e.g., Johnson, *supra* note 140.

148. See *Decarceration*, ENCYCLOPEDIA.COM (Sept. 1, 2019), <https://www.encyclopedia.com/social-sciences/dictionaries-thesauruses-pictures-and-press-releases/decarceration> [<https://perma.cc/E4TP-AEG3>].

149. See, e.g., *Breaking the Cycle of Incarceration and Homelessness*, MARK RIDLEY-THOMAS SUPERVISOR, SECOND DISTRICT, L.A. CNTY., <https://ridley-thomas.lacounty.gov/index.php/breaking-the-cycle-of-incarceration-and-homelessness/> [<https://perma.cc/L3HT-SK4Y>]; *What Is LEAD?*, LEAD NAT'L SUPPORT BUREAU, <https://www.leadbureau.org/about-lead> [<https://web.archive.org/web/20191011180303/https://www.leadbureau.org/about-lead>] (describing Law Enforcement Assisted Diversion/ Let Everyone Advance with Dignity (LEAD)).

150. See, e.g., *Evaluations*, LEAD NAT'L SUPPORT BUREAU <https://www.leadbureau.org/evaluations> [<https://perma.cc/UMP6-2E95>] (demonstrating that LEAD significantly improved housing and employment rates and reduced recidivism rates for people experiencing homelessness).

151. For example, in a study conducted in a Los Angeles County jail, “an estimated 61 percent of the jail mental health population (about 3,368 individuals) were determined to be appropriate candidates for diversion.” See STEPHANIE BROOKS HOLLIDAY, NICHOLAS M. PACE, NEIL GOWENSMITH, IRA PACKER, DANIEL MURRIE, ALICIA VIRANI, BING HAN & SARAH B. HUNTER, RAND CORP., ESTIMATING THE SIZE OF THE LOS ANGELES COUNTY JAIL MENTAL HEALTH POPULATION APPROPRIATE FOR RELEASE INTO COMMUNITY SERVICES 1–4 (2020) [https://www.rand.org/pubs/research\\_reports/RR4328.html](https://www.rand.org/pubs/research_reports/RR4328.html) [<https://perma.cc/TCA2-GXKZ>]. However, while Los Angeles committed to investing in diversion programs, the city sought to cut funding for the program. See Celeste Fremon, *Is LA County About to Critically Underfund Diversion Just When It's Needed Most?*, WITNESS LA (Sept. 27, 2020), <https://witnessla.com/is-la-county-critically-underfunding-diversion-just-when-its-needed-most/> [<https://perma.cc/8VSC-W6RT>].

152. See STATEN, *supra* note 1, at 17–39.

supportive housing are examples of highly effective decarceral alternatives—both address unsheltered homelessness without punishing people for circumstances beyond their control and prioritize community integration over exile and confinement.

Yet decarceration remains novel rather than mainstream. Increasingly, cities are responding to the homelessness crisis with law enforcement and punitive measures, such as sweeps, civil infractions, criminal charges, and incarceration.<sup>153</sup> Old habits are hard to break, especially when reinforced by American attitudes that rationalize exclusion and reproduce social hierarchies.

### *B. Blame as a Historical Justification for Carceral Responses*

America's stubborn commitment to criminalization is also fueled by deep-rooted psychological responses to visible evidence of human poverty. Studies show that humans react to traditional markers of unsheltered chronic homelessness with unparalleled rates of negativity and disgust, which may become even more pronounced when the stigma of homelessness inevitably intersects with other prejudices.<sup>154</sup> American ideals such as independence and hard work nurture tendencies to blame others for their poverty.<sup>155</sup> Thus, Americans are culturally and cognitively predisposed to stigmatize unsheltered homeless people. This stigma expresses itself not only in punitive laws and policies but also in popular myths that justify the systemic rejection and confinement of poor and homeless people.<sup>156</sup>

Many argue that criminalization is necessary because some people resist services or shelter, which explains why they are homeless.<sup>157</sup> The logic of criminalization assumes unsheltered people are to blame for their own predicament; therefore, to solve homelessness, cities must use force to remove or confine them. Such assumptions are wrong.<sup>158</sup>

Offers of services and shelter are often smoke and mirrors. Just because someone offers an unsheltered person services does not mean there is capacity for that unsheltered person. Typically, even in best case scenarios, unsheltered people face a long waitlist.<sup>159</sup> Even if there is capacity, there is no guarantee that

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153. See, e.g., NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 3, at 6.

154. See Rankin, *supra* note 1, at 17.

155. *Id.* at 4, 21–22.

156. See generally *id.*

157. See, e.g., Maeve Reston, *Los Angeles' Homeless Crisis: Too Many Tents, Too Few Beds*, CNN (June 18, 2019), [https://amp.cnn.com/cnn/2019/06/18/politics/los-angeles-homeless-crisis/index.html?\\_twitter\\_impression=true](https://amp.cnn.com/cnn/2019/06/18/politics/los-angeles-homeless-crisis/index.html?_twitter_impression=true) [<https://perma.cc/Z2ZD-ZJKE>] (concluding “tent culture feeds resistance to housing” and implying “a 70-year-old woman named Lena living in Skid Row” would not have been “found [] dead in a pile of garbage” had she not been “resistant to housing”).

158. See Rankin, *supra* note 1, at 21–22.

159. Cities commonly overstress and underfund services, resulting in painfully long wait lists. See Alden Woods, *After a Pledge to End Family Homelessness, an 11-Week Waitlist for Emergency Shelter*, AZCENTRAL (Jan. 4, 2019), <https://www.azcentral.com/story/news/2019/01/04/wait-list->

any particular unsheltered person is eligible to receive that service. People commonly discover they are not eligible for shelter or services because of some barrier that screens them out.<sup>160</sup> Still others learn they cannot maintain a job because of shelter reporting times, or they cannot know whether a shelter has space without first taking a gamble by waiting in line for hours.<sup>161</sup> Lose the gamble at the first shelter, and they are too late for the others.

Even if eligibility is not a problem, people need reliable transportation for each visit.<sup>162</sup> For those who survive the gauntlet and successfully access emergency shelter, general shortages of shelter lead to overcrowding and create unhealthy, unsanitary, and even dangerous conditions in some facilities, including maggots, mold, physical violence, sexual abuse, vermin, contaminated food, scabies, sewage, and viral illnesses.<sup>163</sup> Of course, not all shelters are so nightmarish. But many shelters, and in some places most shelters, impose a series of obstacles that render shelters functionally inaccessible to many who need them.<sup>164</sup>

Problems with capacity, waitlists, eligibility, transportation, and safety aside, unsheltered people still have to grapple with the reality that services, when not paired with stable housing, are not likely to succeed.<sup>165</sup> Successful services

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families-seeking-emergency-shelter-grows-longer/2223705002/ [https://perma.cc/J5RL-PY9Q] (reporting an eleven-week shelter waitlist for over two hundred families seeking emergency shelter in one Arizona county); Sara Bloomberg, *As Shelter Wait Times Soar, Older Homeless in Limbo Daily*, S.F. PUB. PRESS (June 28, 2017), <https://sfpublicpress.org/as-shelter-wait-times-soar-older-homeless-in-limbo-daily/> [https://perma.cc/4MMH-DXPV] (reporting a ninety-seven-year-old man and three people in their eighties may have waited up to two months to secure a bed in a ninety-day shelter in San Francisco).

160. See SKINNER, *supra* note 84, at 15, 21–34 (finding people are commonly denied shelter because of their sex, gender identity, age, addiction, pets, or ongoing vulnerability to domestic violence).

161. See *id.* at 11.

162. See Tony Black, *Seattle's Mary's Place Partnering with Lyft to Offer Free Rides to Homeless Families*, K5 (July 23, 2019), <https://www.king5.com/article/news/local/seattles-marys-place-partnering-with-lyft-to-offer-free-rides-to-homeless-families/281-6cab5c4d-5c4b-4674-83aa-e6e0ce979c09> [https://perma.cc/K8PK-H6L9].

163. See, e.g., JULIA DEVANTHERY & EVE GARROW, ACLU S. CAL., THIS PLACE IS SLOWLY KILLING ME: ABUSE AND NEGLECT IN ORANGE COUNTY EMERGENCY SHELTERS 4, 8, 18–19, 58 (2019), [https://www.aclusocal.org/sites/default/files/aclu\\_socal\\_oc\\_shelters\\_report.pdf](https://www.aclusocal.org/sites/default/files/aclu_socal_oc_shelters_report.pdf) [https://perma.cc/3QSQ-VUD5]; INDEP. DEMOCRATIC CONF., HORRORS IN HOMELESS: NEW YORK'S UNCLEAN, UNSAFE, DANGEROUS TEMPORARY SHELTER SYSTEM (2017), [https://www.nysenate.gov/sites/default/files/horrors\\_in\\_homeless\\_housing\\_-\\_full\\_report.pdf](https://www.nysenate.gov/sites/default/files/horrors_in_homeless_housing_-_full_report.pdf) [https://perma.cc/6JVA-M8RA] (identifying health and safety hazards at temporary shelters in New York City such as lead paint, broken carbon monoxide detectors and smoke alarms, broken door locks, exposed electrical wiring, and blocked fire escapes); Jeniffer Solis, *Unhealthy and Unregulated: Conditions in Local Shelters Draw Complaints*, NEV. CURRENT (June 6, 2018), <https://www.nevadacurrent.com/2018/06/06/unhealthy-and-unregulated-conditions-in-local-shelters-draw-complaints/> [https://perma.cc/N6CF-RXKA].

164. See SKINNER, *supra* note 84, at 15.

165. See generally STATEN, *supra* note 1.

require sustained and regular participation.<sup>166</sup> People who are not stably housed are not in a position to get to services on a regular basis, in part because of the persistent interruptions of sweeps. Even if they could regularly engage, so long as they remain unsheltered, they return from each service back to the streets: a major source of the trauma that causes the need for services in the first place.<sup>167</sup> This process is “akin to treating burn victims who are still on fire.”<sup>168</sup> For services to be successful, they should be paired with stable housing. But this pairing is not available for the vast majority of people.

Finally, people who express typical judgments about “the service-resistant homeless” do not pause to consider whether any rational person would be willing to split from family members, loved ones, companion pets, or their community for one night of shelter. Mainstream stereotypes do not encourage reflection, such as: How would you feel giving up your personal belongings? Would you be willing to satisfy all the varying conditions any shelter might require? Are you willing to sacrifice your privacy, autonomy, or dignity? Is it reasonable to expect another human being to give up all these things for one night of uneasy sleep next to a bunch of strangers, only to be ejected back on to the streets by the crack of dawn the next day?

The bottom line is American cities have taught many people to distrust offers of services and shelter. Through experience, many people experiencing homelessness have learned these offers do not promote safety, stability, and dignity. They do not spare people from the endless trauma of homelessness. These lessons are so well-worn for chronically unsheltered people that even if a meaningful offer of service were eventually extended, many reasonable people have already learned to decline it.<sup>169</sup>

But these realities are poorly understood or appreciated by city officials and the general public. They do little to pierce the deep-rooted construct of the blameworthy poor that continues to fuel carceral responses to homelessness. In recent years, even so-called progressive narratives around homelessness are

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166. MARTHA R. BURT, JENNETH CARPENTER, SAMUEL G. HALL, KATHRYN A. HENDERSON, DEBRA J. ROG, JOHN A. HORNIK, ANN V. DENTON & GARRETT E. MORAN, OFF. OF POL’Y DEV. & RSCH., U.S. DEP’T OF HOUSING & URB. DEV., STRATEGIES FOR IMPROVING HOMELESS PEOPLE’S ACCESS TO MAINSTREAM BENEFITS AND SERVICES 79 (2010), <https://www.urban.org/sites/default/files/publication/28626/412089-Strategies-for-Improving-Homeless-People-s-Access-to-Mainstream-Benefits-and-Services.PDF> [https://perma.cc/N2M6-JEZ7].

167. See Rankin, *supra* note 4, at 123–24 (discussing the role of trauma in homelessness).

168. STATEN, *supra* note 1, at 9.

169. See, e.g., NYU Silver Study Counters Narrative That Street Homeless Are “Service Resistant,” NYU SILVER SCH. OF SOC. WORK (June 4, 2019), <https://socialwork.nyu.edu/news/2019/06/04/nyu-silver-study-counters-narrative-that-street-homeless-are-service-resistant.html> [https://perma.cc/7MY7-9T78] (identifying barriers to housing, including experiences that make “homeless people . . . rational actors all too familiar with unkept promises”).

starting to evolve, suggesting a kinder, gentler way to justify the exile of undesirable people from public view.<sup>170</sup>

### C. Transcarcerating Homelessness as a Public Health Crisis

One example of this narrative is the increasingly popular frame of homelessness as a public health crisis. In 2015, just a few months after the *Martin* litigation began, several western cities and the State of Hawaii, all within the Ninth Circuit, announced states of emergency regarding homelessness.<sup>171</sup> Such declarations presumably allowed city officials greater flexibility in responding to homelessness; freed local, state, and federal funds; and expedited options for government action, such as executive orders.<sup>172</sup>

Around the same time, government and health officials began constructing homelessness as a public health crisis.<sup>173</sup> Such constructions are warranted: the socioeconomic, psychological, physical, and health implications of homelessness are vast.<sup>174</sup> Unsheltered people endure extraordinary trauma, violence, sickness, and even death.<sup>175</sup> The healthcare industry began significant investments in housing, drawing attention to relationships between homelessness and poor health indicators.<sup>176</sup> These signals suggested official responses to the

170. See, e.g., Steinberg, *supra* note 109.

171. *Homelessness: A State of Emergency*, NAT'L ALL. TO END HOMELESSNESS (Feb. 6, 2016), <https://endhomelessness.org/resource/homelessness-a-state-of-emergency/> [https://perma.cc/FC93-JRF2].

172. See *id.*; see also David Kroman, *Seattle's Homeless Emergency: No End in Sight*, CROSSCUT (June 28, 2016), <https://crosscut.com/2016/06/seattles-homeless-emergency-no-end-in-sight> [https://web.archive.org/web/20190928072601/https://crosscut.com/2016/06/seattles-homeless-emergency-no-end-in-sight] (noting Seattle Mayor Murray's hope that "the state of emergency would get the federal and state governments to step up support for housing, mental health and drug rehab programs," but revealing that this hope was never realized).

173. See Shaun Donovan & Eric K. Shinseki, *Homelessness Is a Public Health Issue*, 103 AM. J. PUB. HEALTH S180 (2013).

174. See, e.g., *id.* (discussing homelessness as a "public health crisis" in an article by the U.S. Secretary of Housing and Urban Development and the U.S. Secretary of Veterans Affairs); Nat'l Health Care for the Homeless Council, *Homelessness and Health: What's the Connection?*, IGHUB (2011), <https://ighub.org/resource/homelessness-and-health-whats-connection> [https://perma.cc/Y6PQ-8NKC] (describing the interplay between poor health and homelessness); AM. PSYCHOL. ASS'N, HEALTH & HOMELESSNESS 1, <https://www.apa.org/pi/ses/resources/publications/homelessness-health.pdf> [https://perma.cc/C2WZ-B8RU] (summarizing surveys, studies, and reports that connect poor physical and mental health with homelessness).

175. See Bill Daniell & Ben Danielson, *Homelessness is Seattle's Public Health Crisis*, CROSSCUT (Oct. 24, 2017), <https://crosscut.com/2017/10/homelessness-seattles-public-health-crisis-city-budget> [https://perma.cc/5VB9-SSFD].

176. See, e.g., Kriston Capps & Benjamin Schneider, *A Healthcare Giant Enters the Battle for Cheaper Housing*, CITYLAB (May 21, 2018), <https://www.citylab.com/equity/2018/05/a-healthcare-giant-enters-the-battle-for-cheaper-housing/560741/> [https://web.archive.org/web/20190928073829/https://www.citylab.com/equity/2018/05/a-healthcare-giant-enters-the-battle-for-cheaper-housing/560741/] (announcing in 2018 Kaiser Permanente's \$200 million investment in affordable housing in several states, including California); see also Husna Haq, *Housing as Health Care: How Connecting the Two Is Saving Los Angeles Money*, CHRISTIAN SCI.

crisis would be swift and serious, centered on the needs and interests of unsheltered people.

But years after the declarations of emergency, criminalization remains pervasive,<sup>177</sup> just as homelessness along the West Coast appears to be worsening.<sup>178</sup> Advocates lament the lack of bold, comprehensive, and positive interventions, sometimes complaining that a declaration of emergency due to natural causes, such as hurricanes or droughts, would have generated more immediate and significant support for relief.<sup>179</sup> West Coast cities may announce new investments and strategies,<sup>180</sup> but severe affordable housing shortages persist, service providers remain overstretched and underfunded, and the

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MONITOR (Mar. 19, 2018), <https://www.csmonitor.com/World/Progress-Watch/2018/0319/Housing-as-health-care-How-connecting-the-two-is-saving-Los-Angeles-money> [<https://perma.cc/5J8Y-Y9TC>] (reviewing a RAND Corporation study showing the cost-effectiveness of the Housing for Health program in L.A. between 2012 and 2018); Timothy Zaricznyj, *Housing Is Health Care*, PROVIDENCE HEALTH & SERVS.: TO YOUR HEALTH BLOG (June 28, 2018), <https://blog.providence.org/archive/housing-is-health-care> [<https://perma.cc/9E6E-T25D>] (describing Providence Health's sixteen affordable housing programs in Washington, Oregon, and California as of 2018); *Housing Is Health*, CENT. CITY CONCERN, <https://www.centralcityconcern.org/housingishealth> [<https://perma.cc/GN2A-XC4Q>] (announcing a 2016 Housing is Health Initiative in Portland, Oregon).

177. See e.g., NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 3; SASHA FELDSTEIN, MARINA FISHER & NATHANIEL MILLER, BERKELEY LAW UNIV. OF CAL. POL'Y ADVOC. CLINIC, CALIFORNIA'S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS IN THE GOLDEN STATE (2016), <https://www.law.berkeley.edu/wp-content/uploads/2015/12/Californias-New-Vagrancy-Laws.pdf> [<https://perma.cc/N7QN-47ZJ>]; JUSTIN OLSON & SCOTT MACDONALD, SEATTLE UNIV. SCH. OF L. HOMELESS RTS. ADVOC. PROJECT, WASHINGTON'S WAR ON THE VISIBLY POOR: A SURVEY OF CRIMINALIZING ORDINANCES & THEIR ENFORCEMENT (Sara K. Rankin ed., 2015), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1001&context=hrap> [<https://perma.cc/SCS3-PLUM>]; RACHEL A. ADCOCK, REBECCA BUTLER-DINES, DAVID W. CHAMBERS, MICHAEL J. LAGARDE, ALEXANDRA M. MOORE, CHARLOTTE F. NUTTING, SUZETTE M. REED, ARIELLE M. SCHREIBER, PAUL M. WARREN, KOBİ A. WEBB & ELIE M. ZWIEBEL, TOO HIGH A PRICE: WHAT CRIMINALIZING HOMELESSNESS COSTS COLORADO (2016), <https://www.law.du.edu/documents/homeless-advocacy-policy-project/2-16-16-Final-Report.pdf> [<https://perma.cc/QE2W-KVJY>].

178. See AHAR 2018, *supra* note 1, at 66–67 (showing states up and down the West Coast face some of the highest total numbers of chronically homeless people, and the rate of chronic homelessness is increasing in Washington, Oregon, thirty-two other states, and D.C.).

179. Cf. Project Homeless Team, *Three Years into a State of Emergency, What We've Learned About Homelessness*, SEATTLE TIMES (Nov. 3, 2018), <https://www.seattletimes.com/seattle-news/homeless/three-years-into-a-state-of-emergency-what-weve-learned-about-homelessness> [<https://perma.cc/33FP-MS9F>] (explaining that advocates pushed for a homeless state of emergency believing emergency funding would be comparable to natural disasters, but this has not been the case).

180. See *The 222 Plan: United Way of Greater Los Angeles' Everyone In™ Campaign Is Tracking Progress*, UNITED WAY GREATER L.A. (Sept. 7, 2018), <https://www.unitedwayla.org/en/news-resources/blog/222-plan-united-way-greater-los-angeles-everyone-campaign-tracking-progress> [<https://perma.cc/EHS2-DNGW>] (reporting in 2018 the Los Angeles City Council unanimously agreed that each city council district would build at least 222 PSH units before 2022).

growing visibility of unsheltered homelessness continues to spark palpable anger from housed constituents.<sup>181</sup>

The backlash to *Martin* often featured environmental and public health crises at its core. Boise’s lawyers publicly announced that *Martin* posed a threat to public health and safety;<sup>182</sup> the Trump administration repeatedly threatened to intervene in California’s homelessness crisis due to the purported environmental issues it posed;<sup>183</sup> local media mused that homelessness was a plague rotting cities from the inside out.<sup>184</sup> But if homelessness were the problem, then afflicted cities should be focused on a cure. Instead, these narratives generally frame the visibility of homeless people as the problem: homeless people themselves become pathogenic. So rather than prioritize solutions to homelessness, cities continue to excise homeless people.

For cities, criminalization is the common default. It empowers the most immediate, albeit temporary, removals of homeless people from public view and creates the short-term illusion that the problem has been mitigated. But criminalization does not solve homelessness or its health ramifications. To the contrary, it is proven to be expensive, often illegal, ineffective, and even counter-productive.<sup>185</sup> As long as unsheltered people have no permanent, safe, and legal place to go, sweeps, arrests, and move-along warnings merely shuffle unsheltered people from one place to another in an endless and futile cycle.<sup>186</sup>

Thus, the emergence of “homelessness as a public health crisis” messaging has yet to prompt cities to bring nonpunitive, housing-oriented solutions to scale with the need. Instead of prioritizing the urgent needs and interests of the most

181. See e.g., Scott Greenstone, *Ballard’s Homelessness Quadrupled Last Year, and Anger Is Spilling Over*, SEATTLE TIMES (Mar. 13, 2019), <https://www.seattletimes.com/seattle-news/homeless/ballards-homelessness-quadrupled-last-year-and-anger-is-spilling-over> [<https://perma.cc/7QZ4-GA2S>] (reporting public anger regarding a rise in homeless populations in a Seattle neighborhood); Kip Hill, ‘*Seattle Is Dying*’ Report Prompts Political Response to Homelessness in Spokane, SPOKESMAN-REV. (Mar. 31, 2019), <http://www.spokesman.com/stories/2019/mar/31/seattle-is-dying-report-prompts-political-response/> [<https://perma.cc/R96B-3T3E>] (describing a viral Seattle broadcast story that suggested Seattle was “dying” due to visible homelessness and discussing the public frustration and anger at the state of homelessness in Spokane); Anna Scott, *Homelessness Strains Compassion for Some Los Angeles Residents*, NPR (Jan. 1, 2019), <https://www.npr.org/2019/01/01/681208503/homelessness-strains-compassion-for-some-los-angeles-residents> [<https://perma.cc/P3VC-3FJU>] (discussing public anger and frustration regarding encampments and public safety concerns as a result of the increased visible homelessness).

182. GIBSON DUNN, *supra* note 21.

183. See Fessler & Zialcita, *supra* note 27.

184. See Eric Johnson, *KOMO News Special: Seattle Is Dying*, KOMO NEWS (Mar. 14, 2019), <https://komonews.com/news/local/komo-news-special-seattle-is-dying> [<https://perma.cc/797P-CKRF>]. But see Letter from Heather McKimmie & Helen Gebreamlak, Disability Rts. Wash., to Eric Johnson and KOMO News (Apr. 9, 2019), <https://www.disabilityrightswa.org/wp-content/uploads/2019/04/DRW-Response-to-KOMO-4.9.19.pdf> [<https://perma.cc/H25A-9LMZ>] (noting that “this country has already tried the ‘lock ‘em up’ approach and it failed miserably”).

185. Rankin, *supra* note 4, at 104–06.

186. See generally *id.*

vulnerable people at the core of the homelessness crisis, cities are experimenting with nonpunitive actions around the margins. Yet policymakers still primarily define “public health” by reference to housed constituents.<sup>187</sup> From this perspective, unsheltered people are often perceived as threats to public health and safety, justifying their removal from public spaces.<sup>188</sup> Their removal is framed as compassion, even while cities fail to provide clear evidence that such removals improve outcomes for unsheltered people.

Given the sacrosanct power of local governments to regulate public health and safety, the “homelessness as a public health crisis” framing aims to transport the forced confinement of homeless people beyond *Martin*’s reach. Indeed, this point was the basis of Boise’s petition for certiorari in the *Martin* case.<sup>189</sup>

## V.

### TRANSCARCERATION AFTER MARTIN

Given America’s historical commitment to hiding homelessness, the explicit limits of the *Martin* decision itself, and clear evidence that local governments are already experimenting with ways to circumvent *Martin*, the decision’s decarceral potential seems fanciful. Instead, cities are embracing transcarceration post-*Martin*, forcibly confining unsheltered people through (1) more frequent and less regulated encampment sweeps; (2) more robust paths to involuntary commitment, conservatorships, and forced treatments; and (3) increased efforts to round unsheltered people into congregate FEMA-style tents or camps. Each of these developments promise to reduce the visibility of homelessness, but none promises to protect unsheltered people from being punished for the “unavoidable consequences of being human.”

#### A. More Frequent and Less Regulated Encampment Sweeps

One post-*Martin* trend is for urban cities to increase the frequency and severity of sweeps, without associated increases in meaningful offers of service, shelter, or housing. As a result, cities continue to persecute unsheltered people. By justifying sweeps as necessary for public health or safety, cities attempt to

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187. Many cities demonstrated the centering of public health interventions around housed people in the Covid-19 crisis. *See, e.g.*, Jakob Rodgers, *Sweeps of Homeless Camps Run Counter to COVID Guidance and Pile on Health Risks*, KHN (June 26, 2020), <https://khn.org/news/sweeps-of-homeless-camps-run-counter-to-covid-guidance-and-pile-on-health-risks/> [https://perma.cc/ZS6G-PD5S] (reporting “[s]everal cities across the U.S. are bucking recommendations from the Centers for Disease Control and Prevention [CDC] by continuing sweeps of homeless encampments, risking further spread of the virus,” especially among unsheltered homeless populations). Other cities ignored CDC guidance by placing unsheltered people in congregate shelters, resulting in higher rates of contagion among shelter residents. *See, e.g.*, Vivian Ho, *‘It Could Have Been Averted’: How 92 Residents at a San Francisco Homeless Shelter Got Covid-19*, GUARDIAN (Apr. 15, 2020), <https://www.theguardian.com/us-news/2020/apr/15/san-francisco-homeless-coronavirus-msc-shelter> [https://perma.cc/5J4Q-HVTJ] (reporting an early Covid-19 outbreak in a San Francisco shelter).

188. *See infra* Parts V.A., V.C. (discussing homeless encampment sweeps and mass shelters).

189. Petition for Writ of Certiorari, *Martin v. City of Boise*, 140 S. Ct. 674 (mem.) (2019).

distinguish such practices from the criminal punishment *Martin* rejects. However, as discussed further below, post-*Martin* sweeps are increasingly likely to serve as a feeder for involuntary commitment hospitalizations or mandatory segregation in congregate camps.

Seattle is a helpful case study of how cities are renewing their commitments to sweeps post-*Martin*. In 2017, Seattle announced the Navigation Team as an innovative response to unsheltered homelessness.<sup>190</sup> By partnering police officers with outreach workers, the Navigation Team suggested it would reduce harm and improve outcomes for encampment residents.<sup>191</sup> The team would use trauma-informed care practices and connect unsheltered people with services and housing.<sup>192</sup> But in its first few years, the team reported poor results: encampment residents rarely accepted the team's offers,<sup>193</sup> and even when residents expressed interest, the team frequently lacked sufficient resources to meaningfully connect them.<sup>194</sup>

Despite being unable to deliver on its harm mitigation goals, Seattle's rates of encampment sweeps doubled from 2017 to 2018,<sup>195</sup> and early 2019 rates skyrocketed another 75 percent over the prior year.<sup>196</sup> At the same time, Seattle acknowledged sweeps were peaking despite the persistent lack of sufficient

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190. See Office of the Mayor, *City Launches Navigation Team, Announces Navigation Center Location*, SEATTLE.GOV (Feb. 8, 2017), <http://murray.seattle.gov/city-launches-navigation-team-announces-navigation-center-location/> [<https://perma.cc/PS7L-NT49>]; Seahomeless, *The Navigation Team*, SEATTLE.GOV: HOMELESSNESS RESPONSE BLOG (Feb. 20, 2017), <https://homelessness.seattle.gov/meet-the-nav-team/> [<https://perma.cc/7L5D-L49R>].

191. Office of the Mayor, *supra* note 190.

192. See *Navigation Team: 10th & Dearborn Encampment Removal*, SEATTLE.GOV: HOMELESSNESS RESPONSE BLOG (May 20, 2019), <https://homelessness.seattle.gov/navigation-team-10th-dearborn-encampment-removal> [<https://perma.cc/6MPV-F5QT>] (stating the Navigation Team takes trauma into account when engaging people during outreach).

193. See, e.g., Nick Bowman, *Seattle Council Slams Navigation Team on Homeless Camp Sweeps* (Feb. 27, 2020), <https://mynorthwest.com/1737931/seattle-council-navigation-team-homeless-sweeps/> [<https://perma.cc/93AP-R65R>] (reporting that only about 24 percent of encampment residents accept offers from the Navigation Team); Memorandum from Jason Johnson, Human Servs. Dep't, to City Clerk and Seattle City Council (Jan. 31, 2020), [http://clerk.seattle.gov/~cfpics/cf\\_321596\\_q1.pdf](http://clerk.seattle.gov/~cfpics/cf_321596_q1.pdf) [<https://perma.cc/2BKF-BWN2>] (reporting that less than 30 percent of encampment residents accepted offers of shelter between October and December of 2019).

194. See Kevin Schofield, *Council Hears Quarterly Report on the Navigation Team*, SCC INSIGHT (June 25, 2019), <https://sccinsight.com/2019/06/25/council-hears-quarterly-report-on-the-navigation-team/> [<https://perma.cc/B23R-ZM6F>].

195. Neal McNamara, *Seattle Sweeping More Homeless Camps: Report*, PATCH (Aug. 22, 2018), <https://patch.com/washington/seattle/seattle-sweeping-more-homeless-camps-report> [<https://perma.cc/R8QM-YVQF>]; see also Rankin, *supra* note 4, at 115.

196. Daniel Beekman & Sydney Brownstone, *On Way to Long-Term Changes, Seattle Mayor Jenny Durkan Quietly Clears Homeless Camps*, SEATTLE TIMES (July 6, 2019), <https://www.seattletimes.com/seattle-news/homeless/on-way-to-long-term-changes-seattle-mayor-jenny-durkan-quietly-clears-homeless-camps> [<https://perma.cc/9KEG-5RJT>].

shelter.<sup>197</sup> Media reports<sup>198</sup> and advocates<sup>199</sup> were quick to articulate tension between the aggressive sweeps and *Martin*, but a standoff formed over a niche Seattle knew it could exploit: the use of civil enforcement for the purported interests of public safety and health.<sup>200</sup>

By justifying the intensified schedule of sweeps as necessary for “public health or safety,” the city also excused itself from offering notice, services, or shelter before sweeping an encampment.<sup>201</sup> By mid-2019, the outreach program contracted with the city’s Navigation Team withdrew from sweeps, citing the team’s persistent failure to practice trauma-informed care and demonstrated indifference to the negative impacts of Seattle’s intensified sweep campaign on encampment residents.<sup>202</sup> A city official later publicly acknowledged that sweeps rarely involve efforts to improve outcomes for encampment residents.<sup>203</sup>

Such instances underscore how even the most “innovative” or “well-intended” sweeps do not prioritize the needs and vulnerabilities of encampment residents. Instead, their primary motivation is to clean areas of homeless people. Cities should not be free to perpetually displace the most vulnerable without

197. See Erica C. Barnett, *Morning Crank Part 1: City Acknowledges Navigation Team Rarely Provides Services or Outreach*, THE C IS FOR CRANK (July 2019), <https://thecisforcrank.com/2019/07/23/morning-crank-part-1-city-acknowledges-navigation-team-rarely-provides-services-or-outreach> [<https://perma.cc/H2YS-WRDV>].

198. See, e.g., Beekman & Brownstone, *supra* note 196 (discussing *Martin*’s tension with Seattle’s new sweeps campaign).

199. See, e.g., Scott Greenstone & Sydney Brownstone, *The Supreme Court Won’t Hear a Case on a ‘Constitutional Right to Camp.’ Here’s What That Means for Homelessness in Washington*, SEATTLE TIMES (Dec. 16, 2019), <https://www.seattletimes.com/seattle-news/homeless/the-supreme-court-wont-hear-a-case-on-a-constitutional-right-to-camp-heres-what-that-means-for-homelessness-in-washington> [<https://perma.cc/Y565-RT9H>] (noting tension between *Martin* and city sweeps).

200. This niche is recognized in the *Martin* Respondent’s October 25, 2019 brief in opposition to the petition for certiorari. Brief in Opposition for Respondents, *City of Boise v. Martin*, 140 S. Ct. 674 (mem.) (2019).

201. See Schofield, *supra* note 194; see also Beekman & Brownstone, *supra* note 196, which notes:

Early in Durkan’s term, most removals involved large camps, which under city rules require extensive outreach, 72-hour notice, and offers of shelter to everyone. Cleanups of smaller encampments [judged to be obstructions, hazards, or persistently troublesome] that don’t require notice have surged—from 11 in the first four months of 2018 to 93 in . . . [the first four months of 2019].

202. Ashley Archibald, *Homeless Outreach Program REACH Asks to Change Its Relationship with the City’s Navigation Team*, REAL CHANGE (July 24, 2019), <https://www.realchangenews.org/2019/07/24/homeless-outreach-program-reach-asks-change-its-relationship-citys-navigation-team> [<https://perma.cc/FH7N-32AK>] (reporting the director of the outreach worker team as explaining their divestment from police sweeps: “We do not see a movement in the Navigation Team operations toward more trauma-informed, person-centered outreach, as was discussed last year.”); see also *City’s Outreach Partner Disengages from Navigation Team as City Removes More Encampments Without Notice*, THE C IS FOR CRANK (May 20, 2019), <https://thecisforcrank.com/2019/05/20/citys-outreach-partner-splits-from-navigation-team-as-city-removes-more-encampments-without-notice/> [<https://perma.cc/DE5Y-6K8X>] (reporting the Navigation Team’s increased focus on removing “obstructions” rather than offering services to homeless residents during sweeps and how that impacted the outreach worker team’s involvement).

203. See Barnett, *supra* note 197.

demonstrating that such interventions promote positive and nonpunitive outcomes for unsheltered people.

First, cities should not be permitted to invoke terms such as “obstruction” and “hazard” as a pretext to justify any sweep. Seattle’s intensified sweep campaign intentionally exploits the vagueness of these terms. Arguably, any unauthorized encampment could be considered an obstruction or hazard. Under this low threshold, no encampment would be entitled to basic notice, due process, or other civil or constitutional rights protections. Such an outcome not only presses up against the boundaries of *Martin* but also runs afoul of precedent finding similar sweep practices to be inhumane and unlawful.<sup>204</sup>

Second, Seattle’s campaign—like so many across the country—lacks evidence that sweeps do anything to alleviate homelessness. The Navigation Team’s own numbers show that very few encampment residents with whom they repeatedly engage actually develop trust with the officers.<sup>205</sup> Predictably, acceptance rates for services and shelter are low, due in large part to encampment residents’ learned experience that such offers are often meaningless.<sup>206</sup> To the extent that any residents do develop some fragile trust with the officers, imagine how difficult that trust would be for residents to maintain when the same officers forcibly remove them without providing a safe and legal alternative place to go.<sup>207</sup> Indeed, some argue Seattle measures the success of its sweeps, not by improvements in the lives of unsheltered people, but by “tons of garbage” cleared.<sup>208</sup>

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204. Encampments are entitled to notice, due process, and other protections to prevent unlawful and inhumane sweeps. *See, e.g., Kincaid v. City of Fresno*, No. 1:06-CV-1445 OWW SMS, 2006 WL 3542732, at \*38 (E.D. Cal. Dec. 8, 2006) (concluding “the process provided by the City is constitutionally inadequate, particularly in light of the fact that the City is seizing from homeless people the very necessities of life: shelter, medicine, clothing, identification documents, and personal effects of unique and sentimental value”); *Smith v. City of Corvallis*, Civ. No. 6:14-cv-01382-MC, 2016 WL 3193190, at \*5–6 (D. Or. June 6, 2016) (refusing to dismiss homeless plaintiffs’ claims alleging sweeps violated their Fourth, Fifth, Eighth, and Fourteenth Amendment rights and rejecting the city’s argument that its tactics were constitutional because the plaintiffs allegedly abandoned their property); *Cash v. Hamilton Cnty. Dep’t of Adult Prob.*, 388 F.3d 539, 545 (6th Cir. 2004) (reversing the trial court order on summary judgment and noting destruction of plaintiffs’ property at a homeless encampment without proper notice or the ability to reclaim belongings would violate plaintiffs’ right to due process).

205. Bowman, *supra* note 193; *see also* SEATTLE.GOV, WHO IS THE NAVIGATION TEAM 6, <http://www.seattle.gov/documents/departments/homelessness/committee/mdar-navigation-team.pdf> [<https://perma.cc/CW9T-DS62>].

206. Offers can be meaningless for a variety of reasons: unsheltered residents may learn that by the time they arrive, shelter space may no longer be available; the resident may lack transportation to the recommended shelter or service; or the resident may not be eligible because of some shelter-imposed barrier, among other common challenges. *See SKINNER, supra* note 84, at 15, 21–34.

207. SEATTLE.GOV, *supra* note 205; *see also* Schofield, *supra* note 194.

208. “The city’s Navigation Team, which removes encampments, continues to use ‘tons of garbage cleared’ as a performance metric . . . [yet,] much of the trash the city picks up at encampments is the result of dumping by people with homes.” Erica C. Barnett (@ericac Barnett), TWITTER (July 22, 2019), <https://twitter.com/ericac Barnett/status/1153374362243870721?s=09> [<https://perma.cc/DHW7-5QN7>]. In summer of 2019, Seattle officials again suggested the Navigation Team was increasing offers,

Evidence overwhelmingly suggests sweeps are expensive exercises in futility.<sup>209</sup> Instead of improving homelessness, sweeps destroy property and disrupt fragile communities, often leaving unsheltered people more likely to remain homeless.<sup>210</sup> The traumatizing effects of sweeps are well documented. In addition to the psychological and emotional trauma of displacement, unsheltered people commonly experience the destruction of their property; separation from community, family, and pets; the burden of civil infractions; and ensnarement in the criminal justice system.<sup>211</sup>

As long as local officials fail to pair sweeps with meaningful strategies to place people in stable housing, sweeps will continue to be a costly rotating door of attempts to manage rather than end homelessness.<sup>212</sup> Instead, post-*Martin* sweeps such as Seattle's are likely to become tools to push people into two other renewed channels of forcible confinement: involuntary commitment and segregated congregate camps.

*B. Confinement as Mental and Behavioral Health: Involuntary  
Commitment and Conservatorship*

A second post-*Martin* trend is renewed interest in involuntary commitment and conservatorship laws, despite a lack of evidence these interventions would result in better outcomes for involuntarily confined people. Some cities are threatening to jail homeless individuals who do not accept offers of service in attempts to coerce treatment, ignoring clear evidence that coerced treatment is ineffective<sup>213</sup> and incarceration is expensive, ineffective, and counterproductive

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while at the same time acknowledging the lack of placement options. See Sydney Brownstone & Vianna Davila, *Seattle Says Its Navigation Team Is Getting More People into Shelter*, SEATTLE TIMES (Aug. 2, 2019), <https://www.seattletimes.com/seattle-news/homeless/seattle-says-its-navigation-team-is-getting-more-people-into-shelter> [https://perma.cc/9RA2-TWUJ] (reporting skepticism about the team's purported increase in referral rates because the city failed to provide any data about what happened as a result of the referral).

209. JUNEJO, *supra* note 45, at 17.

210. *Id.* at 17–19.

211. *Id.*

212. Vianna Davila, *Before Homeless Camps Are Cleared, a Seattle Team Coaxes People to Shelter*, SEATTLE TIMES (Dec. 2, 2017), <https://www.seattletimes.com/seattle-news/homeless/before-the-tent-camps-are-cleared-this-seattle-team-coaxes-the-homeless-toward-shelter> [https://perma.cc/HC58-ECGC] (noting the lack of placement options); Erica C. Barnett, *Only Two People Have Found Permanent Homes Through Seattle's New Low-Barrier Shelter*, SEATTLE MAG. (Nov. 27, 2018), <http://seattlemag.com/news-and-features/only-two-people-have-found-permanent-homes-through-seattles-new-low-barrier> [https://perma.cc/4UFS-7K6U] (reporting the Navigation Team's associated shelter, the Navigation Center, was only able to move two people from shelter to permanent housing in its first year of operation).

213. Dan Werb, A. Kamarulzaman, M.C. Meacham, C. Rafful, B. Fischer, S.A. Srathee & E. Wood, *The Effectiveness of Compulsory Drug Treatment: A Systematic Review*, 28 INT'L J. DRUG POL'Y 1, 8 (2016).

to housing stability and community integration goals.<sup>214</sup> But several West Coast cities are seeking to achieve the same outcomes—forced treatment, removal from public spaces, and confinement—through more robust involuntary commitment laws.<sup>215</sup> While involuntary commitment is an increasingly popular topic, cities have yet to announce clear and sustained plans, details, or increased funding to ensure the success of such interventions.

Renewed interest in involuntary commitment, conservatorships, and forced treatment often focuses on chronically homeless populations that may suffer from co-occurring disorders such as severe untreated mental illness and substance use disorders.<sup>216</sup> People with housing instability already account for approximately 28 percent of all involuntary treatment cases and 41 percent of people who have had more than three prior commitments.<sup>217</sup> Such laws generally provide that anyone causing an immediate danger to themselves or others or who are gravely disabled and cannot secure their own food, clothing, and shelter because of serious mental illness or chronic alcoholism can be compelled into treatment.<sup>218</sup> Rather than receive treatment in the community, those ensnared

214. Julian Mark, *SFPD to Arrest Service-Resistant Homeless Residents*, MISSION LOCAL (Feb. 1, 2018), <https://missionlocal.org/2018/02/sfpd-to-arrest-chronically-homeless-residents/> [<https://perma.cc/7STC-S3SK>] (discussing San Francisco’s plan to arrest homeless people who refuse treatment under nuisance laws with the purported goal of getting them treatment in jail). But jails are not therapeutic environments. They are a less effective and more costly approach to substance use disorders and mental health than options outside of the jail context. Once someone is discharged from jail, they are more likely to become homeless and to recidivate. Therefore, jailing someone for treatment purposes can result in worsened individual outcomes and decreased public safety. Not to mention that the cycle between incarceration and homelessness is an already costly, rotating door. *See Rankin, supra* note 4, at 101 (discussing the connection between homelessness and incarceration); STATEN, *supra* note 1, at 25–27 (describing the financial costs of police engagement with unsheltered homeless people).

215. *See, e.g.*, S. B. 1045, 2018 Leg., Reg. Sess. (Cal. 2018); S. B. 40, 2019 Leg., Reg. Sess. (Cal. 2019); Janie Har, *San Francisco to Force Treatment on Mentally Ill Drug Users*, SEATTLE TIMES (June 4, 2019), <https://www.seattletimes.com/seattle-news/health/san-francisco-eyes-forced-treatment-for-mentally-ill-addicts> [<https://perma.cc/F9CH-F948>]; Raquel Maria Dillon, *Should S.F. Be Able to Compel Mentally Ill Homeless People into Treatment?*, KQED NEWS (Apr. 25, 2019), <https://www.kqed.org/news/11742865/should-s-f-be-able-to-compel-mentally-ill-homeless-people-into-treatment> [<https://perma.cc/WJ9N-5L24>].

216. Rankin, *supra* note 4, at 103 (explaining the technical definition of chronic homelessness includes the presence of a disabling condition that prevents a person from working, such as severe behavioral health and substance use disorders).

217. LAINA POON, KAYVON ZADEH & BROOKE LEARY, KING CNTY. AUDITOR’S OFF., INVOLUNTARY TREATMENT ACT COURT: REENTRY AND COURT OUTCOMES 6–7 (2019), <https://www.kingcounty.gov/~media/depts/auditor/new-web-docs/2019/ita-court-2019/ita-2019> [<https://perma.cc/6EUJ-SK7W>].

218. *See, e.g.*, S.B. 1045, 2018 Leg., Reg. Sess. (Cal. 2018) (“[A] conservator . . . may be appointed for a person who is incapable of caring for the person’s own health and well-being due to a serious mental illness and substance use disorder, as evidenced by frequent detention for evaluation and treatment . . . .”); WASH. REV. CODE § 71.05.153 (2020) (“When a designated crisis responder receives information alleging that a person as the result of a mental disorder [or substance abuse disorder], presents an imminent likelihood of serious harm . . . the designated crisis responder may take such person . . . into emergency custody . . . .”); Sandy Finn, *Involuntary Commitment in Washington State—Part 1*, CITIZEN COMM’N ON HUM. RTS. WASH. ST. (Jan. 27, 2015), <http://cchrseattle.org/involuntary-commitment-in-washington-state-part-1-2/> [<https://perma.cc/V8W8-L5H6>].

through involuntary commitment are typically sent to a state psychiatric hospital and confined for the duration of their coerced treatment.<sup>219</sup>

Supporters frame these efforts as compassionate.<sup>220</sup> State-sponsored intervention for certain individuals suffering from mental disorders may seem well intended. For example, people suffering from schizophrenia or dementia may suffer from anosognosia, a physiological condition that prevents people from knowing they need help.<sup>221</sup> But even if some people do not know they are sick, cities lack proof that involuntary commitment or coerced treatment works.<sup>222</sup> Not only is there a lack of clear evidence that current procedures help patients, but renewed discussions about ramping up involuntary commitment appear similarly devoid of plans to monitor, evaluate, or even publicly report program success or failure.

Current analyses suggest involuntary commitment is not only ineffective but could negatively impact patients. These analyses may explain local governments' lack of clear plans to measure the efficacy of new involuntary commitment programs. Even if patients are not convicted of any crime, they may first be forced to spend significant time in jail or other state-sponsored confinement while they wait for assessment or for a psychiatric bed to become available.<sup>223</sup> Solitary confinement, abuse, and worsening mental and physical health outcomes often follow.<sup>224</sup> As with homeless services and emergency shelters generally, involuntary commitment programs are underfunded,

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219. Susan A. McMahon, *Reforming Competence Restoration Statutes: An Outpatient Model*, 107 GEO. L.J. 601, 603–04 (2019), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3198&context=facpub> [<https://perma.cc/N9U8-MKEC>]. See also Daniel Gilbert, *Free to Check in, but Not to Leave*, SEATTLE TIMES (Dec. 19, 2019), <https://www.seattletimes.com/seattle-news/times-watchdog/public-crisis-private-toll-free-to-check-in-but-not-to-leave-washington-mental-health-care> [<https://perma.cc/534F-U8JX>] (reporting on a woman who voluntarily committed herself to a psychiatric hospital and was held against her will for three days after she asked to leave).

220. Heather Knight, *Why Are More Mentally Ill People Wandering SF Streets? Reports Give Answers*, S.F. CHRON. (Aug. 21, 2019), <https://www.sfchronicle.com/bayarea/heatherknight/article/Why-are-more-mentally-ill-people-wandering-SF-14226599.php> [<https://perma.cc/R8QL-2249>] (quoting California State Senator Scott Weiner as saying, “Allowing someone to deteriorate and die on our streets, allowing someone to sleep in their feces, that’s not progressive, it’s not compassionate, it’s frankly the opposite.”).

221. NAT’L ALL. ON MENTAL ILLNESS, SCHIZOPHRENIA (2015), <https://www.nami.org/NAMI-Media/NAMI-Media/Images/FactSheets/Schizophrenia-FS.pdf> [<https://perma.cc/88Y4-N4RY>].

222. Paul P. Christopher, Debra A. Pinals, Taylor Stayton, Kelly Sanders & Lester Blumberg, *Nature and Utilization of Civil Commitment for Substance Abuse in the United States*, 43 J. AM. ACAD. PSYCHIATRY & L. 313, 319 (2015) (“Despite the longstanding existence of civil commitment for substance abuse, data on short- and long-term outcomes following commitment are surprisingly limited, outdated, and conflicting. On balance, the recent evidence suggests that commitment does little to deter future substance abuse . . . .” (footnote omitted)).

223. McMahon, *supra* note 219, at 601–02.

224. *Id.* at 613–17.

understaffed, and overstressed.<sup>225</sup> Recidivism is a significant problem, especially when patients suffer from a history of homelessness.<sup>226</sup> While voluntary outpatient programs—which retain greater levels of patient independence and community integration—are also underfunded, they have been successful.<sup>227</sup> But outpatient interventions currently do not attract the same frenzied attention as inpatient involuntary commitment.

National calls to involuntarily commit people suffering from mental illness communicate a growing appetite fueled by emotion and stigma, but unsupported by details or evidence.<sup>228</sup> Furthermore, cities fail to articulate sufficient safeguards to protect against the mass diversion of unsheltered people into asylums (or into jails awaiting psychiatric commitment). Officials should acknowledge that involuntary commitment is inappropriate for most unsheltered people and should be limited to only extreme and isolated cases.<sup>229</sup> However, evaluation and commitment procedures are neither clear nor consistently followed. This lack of clarity and consistency commonly results in the violation of civil, constitutional, and human rights of already-vulnerable people.<sup>230</sup>

Despite such varied and significant concerns about the threat of involuntary commitment for unsheltered people, the benefits of removing unsheltered people

225. See, e.g., *Washington*, TREATMENT ADVOC. CTR., <https://www.treatmentadvocacycenter.org/washington> [<https://perma.cc/H27K-E6JT>]; Knight, *supra* note 220 (noting San Francisco lacks sufficient psychiatric beds but has “more people per capita on short-term holds lasting up to 30 days than other counties, perhaps signaling San Francisco is OK with whisking troublesome people off our sidewalks but unwilling to ensure they get the long-term treatment they need”).

226. Daniel Beekman, *Mental-Health Detentions Have Surged in King County, with Homeless People More Likely to Return*, SEATTLE TIMES (July 15, 2019), <https://www.seattletimes.com/seattle-news/politics/mental-health-detentions-have-surged-in-king-county-with-homeless-people-more-likely-to-return> [<https://perma.cc/KS4F-AE4R>] (stating half of involuntary commitment patients with unstable housing returned within five years, compared to 36 percent of people with stable housing).

227. McMahon, *supra* note 219, at 604–05; see also *MAT-Proficient Recovery Housing*, C4 INNOVATIONS, <https://c4innovates.com/training-technical-assistance/recovery-housing/best-practices-in-recovery-housing> [<https://perma.cc/EU2C-S29B>] (outlining successes in medically-assisted treatment (MAT) residential settings and suggesting replicable practices).

228. Grace Panetta, *Trump Said People with Mental Illness Should Be ‘Involuntarily Confined’ if Necessary to Prevent Mass Shootings, Despite Research Showing a Lack of Connection Between Mental Illness and Gun Violence*, BUS. INSIDER (Aug. 5, 2019), <https://amp.businessinsider.com/trump-says-mentally-ill-people-should-be-involuntarily-confined-2019-8?fbclid=IwAR0LyaxI8mDd1T48MvwiMehdSLvj0Nn8JoyLJBKHR8olsaN7qdsGeAg5XKI>

[<https://perma.cc/U47K-UCH6>]; Sara Pearl Kenigsberg, *You Can’t Stop Mass Shooting by Punishing People with Mental Illnesses*, WASH. POST (Aug. 7, 2019), <https://www.washingtonpost.com/outlook/2019/08/07/you-cant-stop-mass-shootings-by-punishing-people-with-mental-illnesses> [<https://perma.cc/T5XS-JUM7>].

229. Knight, *supra* note 220 (quoting California Senator Scott Weiner: “For the large majority of people on our streets, conservatorship is not the right answer . . . But for a small percentage of people on our streets, they are in such severe crisis, they can benefit from a conservatorship.”).

230. McMahon, *supra* note 219, at 643–45; see Martha Bellisle, *Lawsuit Settlement Gives Some Washington State Psychiatric Patients More Rights*, SEATTLE TIMES (Aug. 8, 2019), <https://www.seattletimes.com/seattle-news/lawsuit-settlement-gives-some-washington-state-psychiatric-patients-more-rights> [<https://perma.cc/QH5E-K9EV>].

from public view inures to housed constituents. Once confined and out of view, the plight and suffering of unsheltered people are hidden and no longer a pressing concern to the public.

Given America's historical default of persecuting, exiling, and confining poor and homeless people, advocates should push back on revitalized enthusiasm for involuntary commitment. Without clear, evidence-based plans that both safeguard civil and constitutional rights and improve outcomes for unsheltered people, cities should not expand involuntary commitment laws. Considering the lack of evidence of the benefits of involuntary commitment and coerced treatment, as well as the accompanying civil rights, ethical, and psychological threats they pose to historically persecuted people, cities must be held accountable to their most vulnerable residents. Cities should explain in detail why involuntary commitment and forced treatment are better than proven, nonpunitive alternatives.<sup>231</sup> They should provide plans for sustained funding, accountability, and transparency to ensure these interventions are humane, effective, and fiscally sound.<sup>232</sup> But such is not the instinct of American cities, even post-*Martin*.

### C. Congregate Confinement: Mass Shelters

The “homelessness as public health crisis” frame has also facilitated a growing trend in government-sponsored confinement, even for people whose only crime is homelessness.<sup>233</sup> West Coast cities are experimenting with partnering a “right to shelter” in giant FEMA-style tents or similar mass shelters

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231. See Ted Goldberg & April Dembosky, *Supervisors Propose Universal Mental Health Care in San Francisco*, KQED NEWS (May 28, 2019), <https://www.kqed.org/news/11750281/supervisors-propose-universal-mental-health-care-in-san-francisco> [<https://perma.cc/KJC3-BQ8B>] (describing the nonpunitive alternative of universal mental health care in San Francisco).

232. When it comes to government segregation and confinement of vulnerable populations, advocates have reason to be skeptical that accountability and transparency will occur absent explicit guarantees. Consider the federal government's recent effort to obfuscate already limited public information about the conditions of refugee camps. Barbara Bradley Hagerty, *If a Child Is Jailed and No One Is There to Hear Him Cry*, ATLANTIC (Aug. 22, 2019), <https://www.theatlantic.com/family/archive/2019/08/trump-administration-unveils-new-family-separation-rule/596587> [<https://perma.cc/LT7D-F6LQ>] (noting that the availability of limited information regarding refugee detention centers is not voluntary, but rather the result of “the Flores settlement, a 22-year-old consent decree that governs the care of migrant children in custody. But with new rules that the Trump administration is expected to publish this week, even that single, infrequent geyser of information could go away”).

233. Asia Fields, *FEMA-Style Tents as Homeless Shelters? Maybe, Say Some King County Officials, Who Believe We Have a ‘Public Health Disaster,’* SEATTLE TIMES (July 22, 2018), <https://www.seattletimes.com/seattle-news/homeless/board-of-health-members-concerned-with-lack-of-action-on-homelessness-emergency> [<https://perma.cc/BDT4-KEE8>] (discussing public health motivations for FEMA-style tent projects in Washington cities like Seattle and Tacoma, as well as Sacramento and San Diego, California).

with a legal obligation to use it.<sup>234</sup> One functional outcome is that cities round up unsheltered people and segregate them into particular areas. Cities then cite or arrest them if they either refuse to go into a shelter or if they are found attempting to survive outside of one. The mechanisms for forcing people into these mass shelters are not yet clear, but the potential adverse effects to already vulnerable people are. First, without adequate funding for these mass shelters, advocates can expect poor outcomes for the residents. Second, many unsheltered people struggle with physical health issues that make congregate settings untenable or<sup>235</sup> suffer from mental or behavioral health challenges that can be worsened by congregate living.<sup>236</sup> Indeed, these threats are among the reasons why many unsheltered people refuse offers of shelter. Even if shelter is available, clients may feel it is too dangerous, unhealthy, unclean, destructive, or stressful to go.<sup>237</sup>

As with other city proposals, questions and concerns eclipse any details. What other barriers or rules might be imposed, and how will these comport with *Martin* as well as other best practices?<sup>238</sup> How do we know mass shelters will deliver adequate services like hygiene, waste disposal, counseling, or

234. See Steinberg, *supra* note 109; Danny Westneat, *Court Pours Cold Dose of Reality on Seattle's Hot Homelessness Debate*, SEATTLE TIMES (Apr. 8, 2019), <https://www.seattletimes.com/seattle-news/court-pours-cold-dose-of-reality-on-seattles-hot-homelessness-debate> [<https://perma.cc/F388-QQZ5>] (“[W]e should put up giant FEMA-like tents, perhaps down at the vacant Terminal 5 at the Port of Seattle. Then sweep the encampments, and say: You can’t stay here, under this bridge. But you can stay over there, in that giant, managed tent barracks, complete with supportive services.”).

235. People experiencing homelessness often have infectious diseases, tuberculosis, and autoimmune diseases such as HIV/AIDS. Adam M. Lippert & Barrett A. Lee, *Stress, Coping, and Mental Health Differences Among Homeless People*, 85 SOC. INQUIRY 343, 347 (2015). Congregate living is not compatible with these concerns, as private rooms are recommended for individuals with infections and those susceptible to infection. JANE D. SIEGEL, EMILY RHINEHART, MARGUERITE JACKSON, LINDA CHIARELLO & THE HEALTHCARE INFECTION CONTROL PRACTICES ADVISORY COMM., 2007 GUIDELINE FOR ISOLATION PRECAUTIONS: PREVENTING TRANSMISSION OF INFECTIOUS AGENTS IN HEALTHCARE SETTINGS 41 (2019) <https://www.cdc.gov/infectioncontrol/pdf/guidelines/isolation-guidelines-H.pdf> [<https://perma.cc/7Y8Y-2YF8>].

In fact, congregate living for people experiencing homelessness recently resulted in a Hepatitis A outbreak in multiple states. See CDC Health Alert Network, *HAN 00412*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 11, 2018), <https://emergency.cdc.gov/han/han00412.asp> [<https://perma.cc/QYV2-VAHA>] (reporting Hepatitis A outbreaks among people reporting drug use and/or homelessness in multiple states).

236. People experiencing homelessness disproportionately experience severe mental illness, including post-traumatic stress disorder and schizophrenia, see Rankin, *supra* note 4, at 108, and congregate living worsens those issues. See, e.g., LINDA L. EMANUEL & S. LAWRENCE LIBRACH, *PALLIATIVE CARE: CORE SKILLS AND CLINICAL COMPETENCIES* 533 (2d ed. 2011) (explaining that for people with PTSD, namely veterans, “[i]t can [be] challenging . . . to be around others in a congregate living situation with frequent interruptions . . .”); Gary R. Bond & Rebecca De Graaf-Kaser, *Group Approaches for Persons with Severe Mental Illness: A Typology*, in *GROUP WORK WITH THE EMOTIONALLY DISABLED* 21, 27 (Baruch Levine ed., 2014) (stating “congregate living may be psychologically harmful for clients with schizophrenia”).

237. See DEVANTHERY & GARROW, *supra* note 163; INDEP. DEMOCRATIC CONF, *supra* note 163, and accompanying text.

238. SKINNER, *supra* note 84, at 22.

treatment?<sup>239</sup> How long would these mass shelters be authorized or otherwise supported by the state or local jurisdictions? And how would these plans relate to—or distract from—longer-term solutions such as the construction of supportive housing?<sup>240</sup> Experience does not suggest promising answers to these questions.

Mass shelters in San Diego demonstrate how transcarceratory approaches framed as compassion often center the interests of housed constituents rather than the homeless constituents cities claim to help. San Diego's mass shelters first started in 2017 with an authorized encampment—an effort to stem a significant Hepatitis A outbreak.<sup>241</sup> The disease thrives in conditions where people lack resources for basic sanitation and hygiene so the outbreak disproportionately ravaged the city's unsheltered homeless population.<sup>242</sup> To keep homeless people away from the downtown areas most affected by the outbreak, San Diego opened an authorized encampment for approximately 136 people on city-owned land.<sup>243</sup> A third-party nonprofit managed the site and shuttled residents to off-site services and treatment.<sup>244</sup> At the same time, the city ramped up police presence and prohibited any further camping in downtown San Diego, effectively compelling unsheltered people to move to the new authorized site.<sup>245</sup>

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239. Consider Seattle's position on public health. The City recently reported "a long list of city-funded sites where some level of hygiene services are providers, including shelters, day center, parks and community centers. But upon reviewing that list, the auditor discovered that only six of the city-funded facilities that provide restroom access are open at night." Kevin Schofield, *City Auditor Criticizes Aspects of City's Homeless Response*, SCC INSIGHT (Feb. 7, 2019), <https://sccinsight.com/2019/02/07/city-auditor-criticizes-aspects-of-citys-homeless-response/> [<https://perma.cc/JV52-ULBM>]. Aside from illustrating common sense problems, this dismal rate flunks international human rights standards. Neal McNamara, *Lack of Bathrooms for Seattle's Homeless Counter to U.N. Standard*, PATCH (Feb. 27, 2019), <https://patch.com/washington/seattle/lack-bathrooms-seattles-homeless-counter-u-n-standard> [<https://perma.cc/ZM8T-3U59>].

240. See Fields, *supra* note 233 (highlighting the tension between FEMA-style tent crisis responses and long-term solutions like supportive housing).

241. Mike McPhate, *California Today: Homeless Camps, with Official Blessing*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/us/california-today-homeless-camps-with-official-blessing.html> [<https://perma.cc/2RYP-8U6A>]; News Release, City of San Diego, City Approves Update to Emergency Shelter Declaration, (Oct. 2, 2017), <https://www.sandiego.gov/mayor/news/releases/city-approves-update-emergency-shelter-declaration> [<https://perma.cc/M5G3-SA9H>].

242. Gary Warth, *More Homeless Arrested Following Hepatitis A Outbreak*, SAN DIEGO UNION-TRIB. (Nov. 13, 2017), <http://www.sandiegouniontribune.com/news/homelessness/sd-me-homeless-arrest-20171109-story.html> [<https://perma.cc/5M7J-UH66>] ("More than 370 people have been hospitalized and of the 20 people who have died, 11 were homeless.")

243. Susan Murphy, *San Diego Launches Campground for the Homeless*, KPBS (Oct. 9, 2017), <http://www.kpbs.org/news/2017/oct/09/san-diego-launches-homeless-campground> [<https://perma.cc/LDP5-QXEN>].

244. Gary Warth, *City-Sanctioned Homeless Camp to Open Monday*, SAN DIEGO UNION-TRIB. (Oct. 4, 2017), <http://www.sandiegouniontribune.com/news/hepatitis-crisis/sd-me-homeless-camp-20171002-story.html> [<https://perma.cc/UX67-726E>].

245. Warth, *supra* note 242.

Less than a year later, and supported by donations from San Diego business interests, the city transitioned to an “industrial-sized” tent, holding over three hundred people and seventy dogs, “evok[ing] a military installation or a refugee camp.”<sup>246</sup> Two additional large-scale tents were built. Together, all three contained seven hundred beds.<sup>247</sup> Initial reports were hopeful, suggesting the mega-tents would offer “a bed and services—from healthcare to employment assistance to showers and laundry—while people wait for a place of their own.”<sup>248</sup>

But several months later, reports indicated that people were still waiting. The lack of available exits to affordable permanent housing meant residents were stuck in these mega-tents, and the funding to sustain them was uncertain.<sup>249</sup> Faced with the prospect of evicting seven hundred unsheltered people and their pets back on to the street, in June 2019 the city council approved \$11 million to fund the three existing mega-tents and build a fourth.<sup>250</sup> Still, concerns about the economic sustainability of these mega-tents persist.<sup>251</sup>

Public attention has not focused on whether these tents have made a positive impact on residents forced to stay within them. Aside from platitudes like “a tent is still better than a street corner,”<sup>252</sup> San Diego continues to invest

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246. Kelly Davis, *San Diego Unveils Unorthodox Homelessness Solution: Big Tents*, GUARDIAN (Mar. 29, 2018), <https://www.theguardian.com/us-news/2018/mar/29/san-diego-homelessness-big-tents> [<https://perma.cc/6732-7U3U>].

247. *Id.*

248. *Id.*

249. Lisa Halverstadt, *Why the Homeless Tents Are Moving Far Fewer People into Housing than Leaders Hoped*, VOICE OF SAN DIEGO (Aug. 31, 2018), <https://www.voiceofsandiego.org/topics/government/why-the-homeless-tents-are-moving-far-fewer-people-into-housing-than-leaders-hoped/> [<https://perma.cc/D32A-VP6N>].

250. Andrew O’Reilly, *San Diego Spending Millions to Build Elaborate Tent Facilities for Homeless*, FOX NEWS (June 24, 2019), <https://www.foxnews.com/politics/san-diego-spending-millions-to-build-elaborate-tent-facility-for-homeless> [<https://perma.cc/5Z8B-JTHS>]. San Diego erected a fourth tent in November 2019. Gary Warth, *San Diego’s Fourth Large Tented Homeless Shelter Expected to Open This Week*, SAN DIEGO UNION-TRIB. (Nov. 5, 2019), <https://www.sandiegouniontribune.com/news/homelessness/story/2019-11-05/san-diegos-fourth-large-tented-homeless-shelter-expected-to-open-this-week> [<https://perma.cc/ZVA4-SCZG>].

251. See O’Reilly, *supra* note 250 (“The facilities, expected to cost the city nearly \$13.7 million in the coming fiscal year starting July 1, are being paid for with reserves in the city’s housing commission thanks to federal funds that are not expected to be renewed every year. While the shelters will be funded through next June, the future of them after that is unwritten.”). The cost of mega-tents also begs the question: Why tents and not buildings? Presumably this is because buildings would cost more, but the relative high cost of transitory tents might suggest the investment is deemed more acceptable. Tents, rather than housing, offer less comfortable and temporary accommodations, suggesting only a short-term triage and quelling some of the potential blowback from housed neighbors.

252. Davis, *supra* note 246. While it is undoubtedly true that having some shelter, even a tent, is superior to living exposed on the street, such sentiments seem disingenuous given the City’s demonstrated commitment to sweeping people from encampments regardless of limited shelter. See, e.g., Homelessness News San Diego, *Encampment Sweep*, FACEBOOK (Dec. 22, 2016), <https://www.facebook.com/watch/?v=1292428950813270> [<https://perma.cc/RS6X-MSWC>] (showing San Diego workers throwing a tent into a garbage truck); Lisa Halverstadt, *Police Ramped Up Homeless*

millions of dollars in warehousing homelessness without confirmation that its investments actually improve the lives of unsheltered people.

One of the most impactful accomplishments of these mass tents is to remove unsheltered people from public view.<sup>253</sup> During the first two years these massive tents were operating, the city reported a 6 percent drop in its homeless population and a 90 percent drop in a controversial encampment by the San Diego river.<sup>254</sup> To the casual observer, the relocation of seven hundred individuals from public locations to these segregated mass camps might even register as a solution to homelessness.

The promise of a temporarily erected, state-sponsored shelter over one's head is alluring. But any allure must be tempered by critical concerns that (1) the establishment of mega-camps, regardless of their conditions or impact on vulnerable people, set cities up to forcibly segregate unsheltered people from others; (2) many cities, including San Diego and others flirting with mass camps,<sup>255</sup> already host some established brick-and-mortar emergency shelters that often fail to meet basic sanitation, support, and habitability standards; and (3) no emergency-shelter intervention solves the underlying problem of homelessness like stable, permanent housing does—and the latter does so more humanely and cost-effectively.

### 1. Segregation and Confinement: Olmstead and Other Legal Challenges

State-sponsored camps primarily serve the interests of housed constituents by forcibly rounding up unsheltered people and removing them from public view. “The San Diego encampment has even been compared to an internment camp, based on the tactics of requiring a certain class of people to relocate to a

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*Arrests in Days Before Annual Homeless Count*, VOICE OF SAN DIEGO (Jan. 29, 2019), <https://www.voiceofsandiego.org/topics/news/police-ramped-up-homeless-arrests-in-days-before-annual-homeless-count/> [<https://perma.cc/Q79H-CAL4>] (reporting San Diego law enforcement ramping up sweeps and arrests just before annual count of homeless people in the jurisdiction).

253. Lisa Halverstadt, *East Village Residents Say Homelessness There Is Less Visible but in Some Ways, Far Worse*, VOICE OF SAN DIEGO (Mar. 11, 2019), <https://www.voiceofsandiego.org/topics/news/east-village-residents-say-homelessness-there-is-less-visible-but-in-some-ways-far-worse/> [<https://perma.cc/GJX5-FDRN>] (“Despite outcry and a legal challenge from advocates, police have also continued to use laws that bar blocking city sidewalks with trash bins or erecting a tent to try to keep homeless San Diegans from establishing tent villages. Those homeless San Diegans often return days later or simply move a few blocks away.”).

254. O'Reilly, *supra* note 250 (noting a 6 percent drop in San Diego's homeless population from last year and a 90 percent reduction in a “massive homeless encampment along the San Diego River” over the last two years).

255. See Matt Driscoll, *Tacoma's Tent City Isn't Going Away Despite \$1.6 Million Investment in New Shelter Beds*, NEWS TRIB. (May 8, 2019), <https://www-1.thenewstribune.com/news/local/news-columns-blogs/matt-driscoll/article230101544.html> [<https://perma.cc/6WTR-YV68>]; Will James, *Inside the Experiment that Is Tacoma's First Legal Tent City*, KNKX (Apr. 12, 2018), <https://www.knkx.org/post/inside-experiment-tacomass-first-legal-tent-city> [<https://perma.cc/Z64W-8SR7>]; Steve Kiggins, *Olympia Clearing Homeless Camp to Build Mitigation Site Downtown*, Q13 FOX (Nov. 26, 2018), <https://q13fox.com/2018/11/26/olympia-clearing-homeless-camp-to-build-mitigation-site-downtown/> [<https://perma.cc/WKA5-9QK8>].

site controlled by someone else.”<sup>256</sup> Similar warehousing proposals—such as Dignity Field in Dallas<sup>257</sup> and a viral, professionally produced video recommending Seattle move chronically homeless individuals to a former prison for sex offenders<sup>258</sup>—suggest it is necessary to detain or confine unsheltered people not because they have committed a crime, but because their very existence in public spaces presents a threat to health and safety. Unsheltered people’s confinement in mass camps is no less threatening to constitutional, civil, and human rights than their outright incarceration in jails or prisons. Forced removal to mass camps is a form of preventive confinement, rather than post-conviction confinement. In fact, some proposals, like California’s discussion of a right to shelter law, suggest unsheltered people will face potential criminal charges if they refuse to enter or if they leave a state-sponsored camp. Through such lenses, the distinction between mass shelters and jails dissipates.

Compulsory mass camps also face potential legal challenges under the Americans with Disabilities Act (ADA). These camps target people experiencing chronic homelessness, many of whom likely have qualifying disabilities.<sup>259</sup> In *Olmstead v. United States*, the U.S. Supreme Court held that the “[u]njustified isolation” of people with mental disabilities constitutes discrimination in violation of the ADA.<sup>260</sup> In *Olmstead*, the State of Georgia asked the Supreme Court “[w]hether the public services portion of the federal [ADA] compels the state to provide treatment and habilitation for mentally disabled persons in a community placement, when appropriate treatment and habilitation can also be

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256. EVANIE PARR, SEATTLE UNIV. SCH. OF L. HOMELESS RTS. ADVOC. PROJECT, IT TAKES A VILLAGE: PRACTICAL GUIDE FOR AUTHORIZED ENCAMPMENTS 36 (Sara K. Rankin ed., 2018), <https://ssrn.com/abstract=3173224> [<https://perma.cc/2C7L-GTLM>].

257. In Dallas in 2016, the Dignity Field proposal recommended removing unsheltered people to an old naval station on the far outskirts of the city. Dallas City Council rejected the plan, and opponents called it a “homeless concentration camp.” Patricia M. Chen, *Housing First and Single-Site Housing*, SOC. SCI., Apr. 2019, at 1, 5.

258. See Johnson, *supra* note 184. *But see* Letter from Heather McKimmie & Helen Gebreamlak, *supra* note 184.

259. The ADA defines “disability,” in relevant part, as “a physical or mental impairment that substantially limits one or more major life activities of such individual . . . or . . . being regarded as having such an impairment.” 42 U.S.C. § 12102(1)(a), (c) (2018). Regulations promulgated pursuant to the ADA provide additional guidance on the types of qualifying disabilities. 28 C.F.R. § 35.104 (2019). Chronic homelessness, by definition, requires the presence of a similarly impactful disability. HUD defines a disabling condition as “a diagnosable substance abuse disorder, a serious mental illness, developmental disability, or chronic physical illness or disability, including the co-occurrence of two or more of these conditions” that “[l]imits an individual’s ability to work or perform one or more activities of daily living.” OFF. OF CMTY. PLANNING & DEV. AND OFF. OF SPECIAL NEEDS ASSISTANCE PROGRAMS, *supra* note 43. Finally, a recent report from the U.S. Interagency Council on Homelessness also recognized an overlap between people covered under the *Olmstead* decision and people experiencing chronic homelessness. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, FULFILLING THE DREAM: ALIGNING EFFORTS TO IMPLEMENT OLMSTEAD AND END CHRONIC HOMELESSNESS 3 (2016), <https://www.usich.gov/tools-for-action/fulfilling-the-dream-aligning-state-efforts-to-implement-olmstead/> [<https://perma.cc/QNW4-3AZV>].

260. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999).

provided to them in a State mental institution.”<sup>261</sup> The plaintiffs, two intellectually disabled women, one diagnosed with schizophrenia and the other with a “personality disorder,” were voluntarily admitted to a hospital and then confined in a psychiatric unit.<sup>262</sup> The State’s treatment professionals determined the women could be treated in a community residential care program, which neither woman opposed.<sup>263</sup> However, they remained institutionalized.<sup>264</sup> The plaintiffs argued that Georgia’s refusal to pay for services that would enable them to live in community settings violated the integration mandate of Title II of the ADA and its implementing regulations.<sup>265</sup> The Court noted congressional ADA findings regarding the historical isolation, exclusion, and stigma imposed on people with disabilities.<sup>266</sup> The Court observed the ADA provides “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” to address this “serious and pervasive social problem.”<sup>267</sup> The Court agreed with the plaintiffs, holding that “[u]njustified isolation . . . is properly regarded as discrimination based on disability.”<sup>268</sup>

*Olmstead* provides that people with mental disabilities have a qualified right to receive state-funded support and services in the community rather than in institutions if they so prefer.<sup>269</sup> Segregation denies the benefits of community living and expresses discrimination and stigma.<sup>270</sup> Moreover, forced institutional confinement deprives people of distinctly human experiences and “everyday life activities,” such as “family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”<sup>271</sup> Thus, the

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261. *The Olmstead Case*, JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH L., <http://www.bazelon.org/the-olmstead-case/> [<https://perma.cc/PAF8-WKUP>].

262. *Olmstead*, 527 U.S. at 593. At least one of the plaintiffs also faced housing instability outside of institutional confinement. *Id.* at 605 (noting the State’s prior plan to discharge her from institutionalized care to a homeless shelter).

263. *Id.* at 603.

264. *Id.* at 593.

265. *Id.* at 594.

266. *Id.* at 588–89 (“[R]elevant to this case, Congress determined that ‘(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem; (3) discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization . . . ; (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, . . . [and] segregation . . . ’”) (quoting 42 U. S. C. § 12101(a)(2), (3), (5) (2018)) (alterations in original).

267. *Olmstead*, 527 U.S. at 588–89.

268. *Id.* at 597.

269. *Id.* at 596.

270. “[I]nstitutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.” *Id.* at 600.

271. *Id.* at 601.

ADA requires states to provide that people with disabilities live in the most integrated community settings appropriate.<sup>272</sup>

*Olmstead* invites potential legal challenges to local governments seeking to force unsheltered people into mass shelters because such actions give rise to a risk of unnecessary institutionalization.<sup>273</sup> Establishments other than official state hospitals may be considered institutions for an *Olmstead* claim. For example, in *Disability Advocates, Inc. v. Paterson*, the court found that “adult homes” in New York City that housed mentally ill and developmentally impaired persons who otherwise would be institutionalized in state psychiatric facilities qualified as institutions for ADA purposes.<sup>274</sup> The adult homes shared many of the significant features of state psychiatric hospitals, including the high number of beds, physical layout, furnishings, regimented lifestyle, lack of personal autonomy for the residents, and restricted access.<sup>275</sup> The State’s attempt to persuade the court that the adult homes were not as restrictive as psychiatric hospitals because they were in urban settings and the residents were not locked in did not rebut the evidence of isolated segregation.<sup>276</sup>

*Olmstead* claims could also apply to mass shelters which, like traditional brick-and-mortar emergency shelters, would likely impose various restrictions. For traditional emergency shelters, the level of control over residents often varies.<sup>277</sup> Most shelters impose restrictions, such as requiring residents to separate from family members,<sup>278</sup> pets,<sup>279</sup> or loved ones; others require residents to do chores, attend classes, or come and go only with specific permission or at certain times of day.<sup>280</sup> Some long-term residential recovery programs regulate

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272. *Id.* at 587. This right is qualified but must be respected when (1) “the State’s treatment professionals have determined that community placement is appropriate” for the person; (2) “the transfer from institutional care to a less restrictive setting is not opposed by the affected individual;” and (3) when “the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.” *Id.*

273. *See, e.g., V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1109 (N.D. Cal. 2009) (finding California’s contemplated change to Home Supportive Services eligibility criteria created sufficient risk of institutionalization); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1174 (N.D. Cal. 2009) (finding funding cuts to a community-based day program’s services created a new risk of institutionalization for plaintiffs); *Makin ex rel. Russell v. Hawaii*, 114 F. Supp. 2d 1017 (D. Haw. 1999) (finding disabled Medicaid recipients, who claimed that the State violated the integration mandate by denying them enrollment in the community-based waiver program that would enable them to remain at home and prevent future institutionalization, could bring *Olmstead* claims).

274. *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d 184, 223 (E.D.N.Y. 2009), *vacated by* *Disability Advocs., Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012).

275. *Id.* at 199–200.

276. *Id.* at 216.

277. *See SKINNER, supra* note 84, at 23–34.

278. *See id.* at 30.

279. *See id.* at 33.

280. *See* OFF. INSPECTOR GEN., DEP’T OF HEALTH & HUMAN SERVS., EMERGENCY SHELTERS FOR HOMELESS FAMILIES (1992), <https://oig.hhs.gov/oei/reports/oei-07-91-00400.pdf> [<https://perma.cc/HQ9R-PXDD>].

nearly every aspect of a resident's life, from their finances<sup>281</sup> to their medications.<sup>282</sup> Furthermore, residents may be required to participate in therapy, educational classes, and even bible study.<sup>283</sup> Residents may also be required to adhere to strict rules regarding curfew, visitors, and the manner in which their living space is kept.<sup>284</sup> Similarly, being forced into a mass shelter—especially under threat of potential civil or criminal consequences if one attempts to survive outside of the shelter—could be found to constitute “unjustified...isolation” or conditions that “diminish[] . . . family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”<sup>285</sup> Such restrictions, combined with data showing the transcarceratory relationships between psychiatric hospitals, shelters, and jails, could render mass shelters “institutions” under *Olmstead*.

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281. Some require participants to save 30 percent of their income every month. See *Income Savings Program for Homeless Families: Savings Account*, NYC.GOV, <https://portal.311.nyc.gov/article/?kanumber=KA-02818> [<https://perma.cc/DNS4-7YC8>].

282. Shelters often require medications to be stored with staff, who monitor, control, and administer it. See, e.g., SALVATION ARMY, EMERGENCY SHELTER OPERATIONS MANUAL 8 (2017), <http://www.salvationarmytexas.org/wp-content/uploads/2017/04/Ops-Manual-SANG.pdf> [<https://perma.cc/CED5-JPDG>] (“[A]ll medication is kept in the monitor’s desk.”); ONSLOW CMTY. OUTREACH, HOMELESS SHELTER STANDARD OPERATING PROCEDURES 5 (<https://www.onslowco.org/sites/onslowco.org/files/Shelter%20Standard%20Operating%20Procedures.pdf> [<https://perma.cc/6PCK-TEMX>] (“All prescription and over the counter medications . . . are to be given to the staff.”); *Shelter Rules*, LIGHTHOUSE SUPPORTED LIVING, <https://www.lighthouseaskatoon.org/services/housingplus/emergencysHELTER/shelterrules> [<https://perma.cc/97KG-529M>] (“All medication is to be stored at the front desk.”). But see NAT’L CTR. ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH, MODEL MEDICATION POLICY FOR DV SHELTERS (2011), <http://nationalcenterdvtraumamh.org/wp-content/uploads/2012/01/Model-Medication-Policy-for-DV-Shelters.pdf> [<https://perma.cc/GG9N-C44P>] (stressing the importance of safe storage for medication, along with client privacy and autonomy, in trauma-informed care).

283. Jean Calterone Williams, *The Politics of Homelessness in the United States*, OXFORD HANDBOOKS ONLINE (Jan. 2017), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935307.001.0001/oxfordhb-9780199935307-e-153> [<https://perma.cc/GWE8-3P3M>] (describing that family emergency shelters tend to have “requirements to participate in parenting classes, substance abuse counseling, and budgeting classes”); see also Ari Shapiro, *Why Some Homeless Choose the Streets over Shelters*, NPR (Dec. 6, 2012), <https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters> [<https://perma.cc/HX8H-NPJ5>] (illustrating that a man with a history of homelessness would not stay in shelters due to shelters’ religious messages).

284. See, e.g., Marybeth Shinn, Jessica Gibbons-Benton & Scott R. Brown, *Poverty, Homelessness, and Family Break-Up*, 94 CHILD WELFARE 105, 118 (2015) (“[S]taff in shelters and transitional housing threatened to involve protective services if parents did not comply with shelter rules . . . .”); JUSTIN PATRICK JONES, KHALIA PARISH, PETER RADU, TAYLOR SMILEY & JENNY VAN DER HYDE, A PLACE TO BE: ALTERNATIVES TO UNSANCTIONED HOMELESS ENCAMPMENTS 32 (2015), [https://gspp.berkeley.edu/assets/uploads/page/15-13160\\_-\\_Goldman\\_Student\\_Report\\_-\\_Final\\_Draft\\_-\\_May\\_11\\_2015\\_reduced\\_size.pdf.pdf](https://gspp.berkeley.edu/assets/uploads/page/15-13160_-_Goldman_Student_Report_-_Final_Draft_-_May_11_2015_reduced_size.pdf.pdf) [<https://perma.cc/3M8G-PPWJ>] (“Early wake-up times and early curfews meant that individuals were not able to get rest or conduct activities that would allow for a steady stream of income.”); Heather Knight, *A Better Model, A Better Result?*, S.F. CHRONICLE (June 29, 2019), <https://projects.sfchronicle.com/sf-homeless/shelters> [<https://perma.cc/7TN3-MBB6>] (“[T]he top three reasons [surveyed clients] had resisted going to traditional shelters were the crowded accommodations, curfews and the inability to sleep with partners.”).

285. *Olmstead v. L. C. ex rel. Zimring*, 527 U.S. 581, 600–01 (1999).

Still, *Olmstead* was not an unbridled call for deinstitutionalization and may present obstacles to litigators hoping to use it when challenging mass shelters. The Court recognized that, for a limited group of people, institutionalized settings might be necessary.<sup>286</sup> Moreover, the Court took care to clarify that its holding did not obligate the government to provide specific or immediate community treatment for all plaintiffs.<sup>287</sup> Instead, *Olmstead* provided a qualified right to community placement under certain circumstances.<sup>288</sup> Finally, *Olmstead* leaves space for officials to invoke a “fundamental-alteration defense,” alleging the government is unable to reasonably accommodate a plaintiff.<sup>289</sup> However, such defenses are rarely successful.<sup>290</sup> While *Olmstead* should be understood through such important limitations, compelled mass shelters have not yet been tested in court, subjecting cities to the looming threat of litigation.

Advocates may find significant support for challenges to mass shelters, not only under *Olmstead* but also under other constitutional grounds.<sup>291</sup> For example, advocates could argue that compelled mass shelters impinge upon a fundamental right, such as the right to travel. Fundamental rights are those “‘implicit in the concept of ordered liberty’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”<sup>292</sup> Advocates could argue that compelled mass shelters impact homeless individuals’ ability to travel through a city or municipality, and that violations of one’s right to travel may trigger strict scrutiny.<sup>293</sup> Some courts have found the right to travel is implicated where state

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286. *Id.* at 601–02. Indeed, this limited need is the driver behind involuntary commitment laws, which are subject to the criticisms. *See supra* Part V.B.

287. *Olmstead*, 527 U.S. at 602.

288. *See supra* note 273 and accompanying text.

289. “The reasonable-modifications regulation speaks of ‘reasonable modifications’ to avoid discrimination, and allows States to resist modifications that entail a ‘fundamenta[l] alter[ation]’ of the States’ services and programs.” *Olmstead*, 527 U.S. at 603 (alteration in original). For more on the potential scope of a fundamental alteration defense, see generally Jefferson D.E. Smith & Steve P. Calandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After Olmstead v. L.C.*, 24 HARV. J. L. & PUB. POL’Y 695 (2001).

290. *See The Olmstead Case*, *supra* note 261 (“Governments are rarely able to establish such a defense. On the other hand, the Court indicated that an effective state plan for achieving community integration of people with disabilities could demonstrate its progress in complying with *Olmstead*.”).

291. In addition to borrowing from disability cases, homeless rights advocates can look to challenges to immigration detention camps as inspiration for challenging compelled mass shelters. *See, e.g.*, Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2141 (2017) (examining “compelling humanitarian and financial reasons . . . and several legal arguments under the Constitution, Rehabilitation Act, and international human rights law for requiring greater consideration of alternatives to detention”).

292. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969)).

293. Although the U.S. Supreme Court has not recognized a right to intrastate travel, the Second, Third, and Sixth Circuits have. *See King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 647–48 (2d Cir. 1971) (concluding “[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state”); *Johnson v. City of Cincinnati*, 310 F.3d 484, 495 (6th Cir. 2002) (recognizing a right to

action prevents homeless people “from performing their daily life activities such as eating, sitting, and resting in public places . . . .”<sup>294</sup> Courts reach this conclusion because laws that prohibit people experiencing homelessness from engaging in life-sustaining activities affect migration. Such laws place homeless people in the untenable position of choosing between “being arrested for violating the law or [] leaving the jurisdiction altogether.”<sup>295</sup> If mass shelters are compelled in the context of laws that essentially force unsheltered people from public spaces, the right to travel may be implicated.

Mass shelters demonstrate both the allure and the problem of transcarceration. In the context of *Martin* and the Eighth Amendment, mass shelters might provide an alternative space within a jurisdiction where homeless people may perform life-sustaining activities. Thus, mass shelters might appear technically to comply with *Martin*. However, the threat of compulsory attendance that forcibly channels unsheltered people to mass shelters sits uncomfortably with *Martin*’s warning not to punish unsheltered people for “the unavoidable consequences” of being human and homeless. Compulsory enrollment in a mass shelter—with its attendant threats to liberty and privacy, its infliction of stigma and the burdens of segregation, its restrictions on the right to travel, and its potential for negative personal outcomes for any resident—could amount to punishment.

## 2. *The Disturbing Precedent of Forcing Marginalized People into Poor, Segregated Conditions*

Moreover, compulsory mass shelters are not the reasonable alternatives contemplated in *Martin*. Instead, they may amount to forced ghettos or detention centers with poor conditions. American history is replete with examples where already vulnerable and marginalized groups, such as refugees, people of color, and poor people, are rounded up and forced into boundaried spaces, only to endure punishing conditions there. For example, when the public interest is implicated, governments can impose forced quarantines that would otherwise violate civil and constitutional rights.<sup>296</sup> “Throughout United States history . . .

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travel locally through public spaces and roadways); *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990) (same). *But see Wright v. City of Jackson*, 506 F.2d 900, 901–02 (5th Cir. 1975) (finding no fundamental right to intrastate travel).

294. *Johnson v. Bd. of Police Comm’rs*, 351 F. Supp. 2d 929, 949 (E.D. Mo. 2004); *see also Pottinger v. City of Miami*, 810 F. Supp. 1551, 1580 (S.D. Fla. 1992) (“[T]he City’s enforcement of laws that prevent homeless individuals who have no place to go from sleeping, lying down, eating and performing other harmless life-sustaining activities burdens their right to travel.”).

295. *Pottinger*, 810 F. Supp. at 1580.

296. Arman Azad, *Innocently Detained: A Legal Analysis of United States Quarantine*, COLUM. UNDERGRADUATE L. REV. (Sept. 1, 2016), <http://blogs.cuit.columbia.edu/culr/2016/09/01/innocently-detained-a-legal-analysis-of-united-states-quarantine/> [<https://perma.cc/XX7T-CVV4>] (outlining the legality of mandated quarantines); *see also Eugene Kontorovich, Constitutional Challenge to Quarantine Unlikely to Succeed*, WASH. POST (Oct. 27, 2014),

state and local authorities have used such quarantine powers in questionable ways, at times using their police powers as a means of discriminating against groups of people on the basis of their race or ethnicity.”<sup>297</sup> Aside from the use of social isolation as stigma and punishment, physical segregation often results in the creation of subpar to dangerous conditions for those isolated.<sup>298</sup> Current problems evident in jails and prisons, migrant refugee camps, inpatient commitment facilities like psychiatric hospitals, and typical brick-and-mortar shelters demonstrate grounds for such concerns about transcarceratory plans for people experiencing homelessness.

The criminal justice system is linked to race and poverty.<sup>299</sup> Incarceration is an obvious form of punishment, but plaintiffs have also successfully challenged filthy, cramped, and inhumane prison conditions as cruel and unusual punishment.<sup>300</sup> Suicide is the leading cause of death in northwest jails<sup>301</sup> and is a significant problem throughout the country. This problem is compounded by persistent institutional failures to adequately protect inmates.<sup>302</sup> Overcrowding,

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<https://www.washingtonpost.com/news/voikh-conspiracy/wp/2014/10/27/constitutional-challenge-to-quarantine-unlikely-to-succeed/> [<https://perma.cc/J3KR-2UHA>] (discussing a legal challenge from “the nurse forcibly quarantined by New Jersey upon her return from West Africa,” who claimed her forced confinement violated her Due Process rights but noting “one’s normal rights to bodily integrity are suspended by a general and serious public need, especially of an epidemiological variety”).

297. Azad, *supra* note 296; see also Martin Cetron, Susan Maloney, Ram Koppaka & Patricia Simone, *Isolation and Quarantine: Containment Strategies for SARS 2003*, in LEARNING FROM SARS: PREPARING FOR THE NEXT DISEASE OUTBREAK: WORKSHOP SUMMARY 71, 72 (Stacy Knobler et al. eds., 2004), <https://www.ncbi.nlm.nih.gov/books/NBK92450> [<https://perma.cc/D6DN-WX2A>] (noting marginalized groups were “targeted for quarantine” as a tool of stigma).

298. Japanese internment camps, infamous for poor conditions, are just one historical example of the connections between fear, stigma, discrimination, segregation, and punishment. See ANN HEINRICH, THE JAPANESE AMERICAN INTERNMENT: INNOCENCE, GUILT, AND WARTIME JUSTICE 45–54 (2011).

299. See Rankin, *supra* note 4, at 101 (discussing intersectionality of race, homelessness, and the criminal justice system).

300. See Jonathan Ben-Menachem, *County Failures, Not State Reforms, Are Killing People in California Jails*, APPEAL (July 16, 2019), <https://theappeal.org/county-failures-not-state-reforms-are-killing-people-in-california-jails/#.XS-ILDrz3b2.twitter> [<https://perma.cc/GS79-DC2E>] (“In May 2011, the Supreme Court upheld a lower court’s ruling in [*Brown v. Plata*] and ruled that conditions in California’s prisons constituted cruel and unusual punishment . . . . On June 20, Sacramento County settled a federal civil rights lawsuit brought by Mays and five other named plaintiffs alleging that it ‘knowingly created and perpetuated overcrowded and understaffed jails.’ The lawsuit also claimed that the jail failed to provide adequate medical or mental health care and subjected many incarcerated people to ‘harsh, prolonged, and undue isolation . . . in dark, cramped, filthy cells for 23 1/2 hours or more per day.’”).

301. Conrad Wilson, *Booked and Buried: Suicide Is the Leading Cause of Death in Northwest Jails*, NW. PUB. BROAD. (Apr. 4, 2019), <https://www.nwpb.org/2019/04/04/booked-and-buried-suicide-is-the-leading-cause-of-death-in-northwest-jails/> [<https://perma.cc/46EZ-HEM7>].

302. Associated Press, *Many US Jails Fail to Stop Inmate Suicides, Investigation Reveals*, USA TODAY (June 18, 2019), <https://www.usatoday.com/story/news/2019/06/18/inmate-suicide-us-jails-fail-stop-deaths-investigation-reveals/1486534001/> [<https://perma.cc/W46Y-TT6G>].

poor sanitation, contaminated food, and intolerable temperatures are common experiences for inmates.<sup>303</sup>

Similarly horrific conditions persist at U.S. migrant camps. Reports of forced family separations, masses of people layered on top of each other, rotten food, intolerable temperatures, inadequate water, disease, abuse, and death are shocking, but not unusual.<sup>304</sup> International human rights advocates are appalled at such conditions,<sup>305</sup> but such confinement, segregation, and maltreatment are common features of efforts to contain people perceived as threats to public safety or health.<sup>306</sup>

Institutions such as psychiatric hospitals and other inpatient commitment facilities are also commonly associated with abuse, neglect, and unsanitary conditions.<sup>307</sup> Often, such institutions are woefully underfunded and understaffed.<sup>308</sup> Even increased investments in psychiatric hospitals can be

303. See, e.g., ACLU, *Prisoners' Rights: Cruel, Inhuman, and Degrading Conditions* <https://www.aclu.org/issues/prisoners-rights/cruel-inhuman-and-degrading-conditions> [<https://perma.cc/X6HR-5ZS7>] (linking to blogs, videos, press releases, features, court cases, and reports regarding terrible conditions for prisoners).

304. See Masha Gessen, *The Unimaginable Reality of American Concentration Camps*, NEW YORKER (June 21, 2019), <https://www.newyorker.com/news/our-columnists/the-unimaginable-reality-of-american-concentration-camps> [<https://perma.cc/XD5K-WRBT>]; Jonathan M. Katz, *Op-Ed: Call Immigrant Detention Centers What They Really Are: Concentration Camps*, L.A. TIMES (June 9, 2019), <https://www.latimes.com/opinion/op-ed/la-oe-katz-immigrant-concentration-camps-20190609-story.html> [<https://perma.cc/V7PM-JUFS>]; *In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells*, HUM. RTS. WATCH (Feb. 28, 2018), <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells#NoDHSDeaths> [<https://perma.cc/X7GA-B649>].

305. UN's Bachelet 'Appalled' by US Migrant Detention Camp Conditions, AL JAZEERA (July 8, 2019) <https://www.aljazeera.com/news/2019/07/bachelet-appalled-migrant-detention-camp-conditions-190709045836454.html> [<https://perma.cc/9PY7-KC69>].

306. Andrea Pitzer, *How the Trump Administration's Border Camps Fit into the History of Concentration Camps*, GQ (June 18, 2019), <https://www.gq.com/story/us-border-concentration-camps> [<https://perma.cc/3B62-CSJV>].

307. Smith & Calandrillo, *supra* note 289, at 703 (“Instances of abuse and neglect have been documented regarding institutional care. Residents and their families complain of unsanitary conditions, abuse by residents, and neglect by caregivers.” (footnote omitted)).

308. See, e.g., NEW SOLUTIONS, INC., ORGANIZATIONAL REVIEW & ASSESSMENT AT STATE PSYCHIATRIC HOSPITALS 4, 9 (2018), <https://www.state.nj.us/health/integratedhealth/documents/NJHCFFA-ExecutiveAssessment.pdf> [<https://perma.cc/7T69-ZZBE>] (stating that the budget does not keep “pace with the [h]ospitals’ long-term operational and capital funding needs” and recognizing “unbalanced staffing among the four Psychiatric Hospitals”); DEP’T CHILDREN & FAMS., STATE OF FLA. AUDITOR GEN., OVERSIGHT AND ADMINISTRATION OF STATE MENTAL HEALTH TREATMENT FACILITIES 12 (2017), [https://flauditor.gov/pages/pdf\\_files/2017-205.pdf](https://flauditor.gov/pages/pdf_files/2017-205.pdf) [<https://perma.cc/4S6S-UZAG>] (finding that facilities lacked standards for determining minimum staffing coverage and stating that more than half of observed shifts were understaffed); Letter from William J. Evans, Sedor, Wendlandt, Evans & Filippi, LLC, to Jahna Lindemith, Att’y Gen., State of Alaska, re: Non-Confidential Public Report of Alaska Psychiatric Institute Investigation 3 (Sep. 7, 2018), [http://dhss.alaska.gov/News/Documents/press/2018/20180912\\_EvansReport.pdf](http://dhss.alaska.gov/News/Documents/press/2018/20180912_EvansReport.pdf) [<https://perma.cc/24N4-9X79>] (reporting that some shifts and days have “bare minimum of coverage”);

associated with increased risks of “serious harm, injury and death” for patients.<sup>309</sup> Institutional confinement can also degrade long-term prospects for patients. “Even for those who do not suffer egregious neglect, life in large institutions often leads to a degree of institutional dependence, which manifests in a loss of social and vocational competencies and atrophy of the ability to live outside the institution.”<sup>310</sup> In other words, temporary segregation can beget persistent segregation.

Many existing emergency shelters also present clear dangers to residents. Cities have been known to build unsafe, shoddily constructed shelters.<sup>311</sup> Some residents endure living in squalid conditions and are subjected to systematic sexual and physical abuse and disability-based discrimination.<sup>312</sup> “There is also mounting evidence that shelter environments are actually harmful to [physical] health and mental health and increase the risk of mortality. Research confirms that residential crowding—the hallmark of shelter living—leads to social withdrawal, psychological distress, and mental illness.”<sup>313</sup> Thus, mass shelters are often inappropriate for many people experiencing chronic homelessness, whose physical and mental health can be at greater risk in congregate settings. Many current emergency shelters do not comply with health and safety standards under municipal, state, and federal law.<sup>314</sup> Cities do not currently ensure existing shelters are reliably safe, sanitary, and fit for people experiencing chronic homelessness, so advocates have no reason to believe that mass FEMA-style camps—bigger, cheaper, temporary versions of the same thing—would be different.

The bottom line is that warehousing and segregating already vulnerable people presents a real threat of significant harm. Although mass shelters suggest a “quick fix,” no compelling case demonstrates they are worth the diversion of time, money, and effort from proven solutions to homelessness. Mass shelters should never be a city’s preferred strategy, especially in light of incontrovertible evidence that supportive housing is the most humane and cost-effective response to unsheltered homelessness.<sup>315</sup>

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Andy Marso, *Employees Sound off on Staffing Problems at Larned Hospital*, KCUR NPR (Apr. 18, 2016), <https://www.kcur.org/post/employees-sound-staffing-problems-larned-hospital#stream/0> [<https://perma.cc/6AM2-HRCK>] (detailing personal accounts of understaffing in psychiatric hospitals).

309. Daniel Gilbert, *Public Crisis, Private Toll: How a Company’s Push to Expand Psychiatric Care Brought Peril*, SEATTLE TIMES (Aug. 25, 2019), <http://projects.seattletimes.com/2019/public-crisis-private-toll-part1/> [<https://perma.cc/T9CX-U3N2>] (reporting risks that Washington State’s expanded investment in psychiatric hospitals will continue to “routinely fail[] vulnerable patients . . .”).

310. Smith & Calandrillo, *supra* note 289, at 703–04 (footnote omitted).

311. See generally DEVANTHERY & GARROW, *supra* note 163 (detailing unsafe and unsanitary living conditions and patterns of discrimination and abuse at three homeless shelters in Southern California).

312. *Id.* at 12–41.

313. *Id.* at 8.

314. See, e.g., *id.* at 14.

315. STATEN, *supra* note 1, at 25–26.

## CONCLUSION

*Martin*'s interpretation of the Eighth Amendment is hardly radical. Aside from following clear federal precedent prohibiting states from punishing citizens for circumstances they cannot control,<sup>316</sup> *Martin* took pains to explain the limits of its holding, emphasizing that cities still retain broad discretion to address homelessness.<sup>317</sup> Ultimately, *Martin* clarified that the arbiter for the constitutionality of a city's actions is whether those actions punish homeless people for the "unavoidable consequences of being human."<sup>318</sup>

No city should want to advocate for the right to punish already vulnerable people for circumstances they cannot control. And yet, the fevered reaction to *Martin*, evident in public outcry and condemnation from city officials all the way up to the White House, signals the grip of America's commitment to punishing and hiding homelessness.

Traditional methods, such as incarceration and other criminal justice interventions, remain popular. But post-*Martin*, criminalization appears to be evolving into new ways to confine and segregate unsheltered people. Instead of jails, cities are turning to sweeps, involuntary commitment, and compulsory mass shelters or zones to restrict the movement, integration, and visibility of unsheltered people. *Martin* marks the beginning of a new era to transcarcerate homelessness.

Ultimately, this observation suggests a systemic critique: *Martin* cannot stem the atavistic impulse to hide homelessness. No judicial decision can. Instead, *Martin* appears to be forcing a system redesign that persists in exiling people experiencing homelessness. Even as some cities seek to minimize incarceration, they are actively imagining new and creative techniques to push unsheltered people out of sight and out of mind. Homeless rights advocates must craft a post-*Martin* decarceral framework to respond to cities' renewed efforts to persecute, confine, and segregate unsheltered people within their boundaries.

So far, *Martin* is a missed opportunity. It presents constitutional guidelines that should inspire cities to prioritize bold, nonpunitive solutions. Contemporary

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316. See *supra* Part II, for a discussion of *Martin*'s review of precedent. Moreover, *Martin* is consistent with recent decisions in other jurisdictions. The Fourth Circuit favorably cited to *Martin* in its en banc reversal of a panel opinion on a so-called habitual drunkard statute that was largely used to criminalize homeless alcoholics. *Manning v. Caldwell*, 930 F.3d 264, 268 (4th Cir. 2019). In *Pottinger v. City of Miami*, the Southern District of Florida held, in part, that enforcement of an anti-sleeping ordinance was cruel and unusual punishment when the city had insufficient shelter beds. 810 F. Supp. 1551, 1564 (S.D. Fla. 1992). When the Eleventh Circuit later upheld an anti-camping ordinance, it distinguished the facts from *Pottinger* because shelter beds were available on the night the defendant was cited. The panel also stressed that the outcome would have been different had no reasonable alternatives existed. *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000).

317. See *Martin v. Boise*, 920 F.3d 584, 617, 617 n.8. (9th Cir. 2019), *cert denied*, 140 S. Ct. 674 (mem.) (2019).

318. *Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018) *superseded by* *Martin v. Boise*, 920 F.3d 584, 617, 617 n.8. (9th Cir. 2019) (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006) *vacated by* *Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2007)).

narratives of homelessness as a crisis should be reframed from the perspective of unsheltered people. What might our laws and policies look like if we understood homelessness as a crisis because it harms unsheltered people? What if we focused on ending the suffering of unsheltered people, rather than focusing on the quickest ways to remove them from view? What if we chose proximity and integration, rather than obscurity and segregation, to facilitate progress?<sup>319</sup>

Rather than transcarcerating unsheltered people, cities should be pursuing nonpunitive and supportive ways to integrate them into the community. All human beings need community to survive and thrive. The devastating socioeconomic health indicators of homelessness are well established: homelessness negatively impacts physical, psychological, behavioral, and emotional health, as well as mortality and morbidity, in significant ways.<sup>320</sup> But studies also show that deprivation of social connection is more predictive of early death than many other common factors such as environmental pollution or physical inactivity.<sup>321</sup> On an essential—even if non-legal—level, the need for connection, community, and a place to belong is also an unavoidable consequence of being human. Failure to recognize this fundamental need has implications far more profound than failing *Martin*.

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319. See Rankin, *supra* note 1, at 53 (discussing the role of proximity in solving homelessness).

320. See Rankin, *supra* note 4, at 105–06 (surveying some of these indicators).

321. See Julianne Holt-Lunstad, Timothy B. Smith & J. Bradley Layton, *Social Relationships and Mortality Risk: A Meta-analytic Review*, PLOS, July 2010, at 14. <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1000316> [<https://perma.cc/4Y5R-WKE3>].