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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Homelessness is a monumental crisis in many cities throughout the country. No city can arrest or sweep its way out of homelessness, but cities...
across the country increasingly attempt to do so. 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. 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. But unsheltered people have no private place to survive, so they are virtually guaranteed to violate these pervasive laws. Punishments are inescapable, ranging from incessant harassment and “move along” orders from law enforcement or private security to civil infractions or incarceration. 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. The legal and policy flaws of criminalization are well documented. Nonetheless, these punitive and counterproductive laws continue to proliferate across the country.

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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5. Id. at 107.


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.


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. 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.

While homeless rights advocates celebrated, the backlash from many city officials and media outlets was swift and fierce. Hundreds of news articles obsessed over Martin’s meaning. 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,” 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 to do something: arrest people experiencing...
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.  

But within months, the NLC’s tenor changed. As Boise lost its petition for rehearing en banc and filed a petition for writ of certiorari with the U.S. Supreme Court, 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. Boise’s Los Angeles-based law firm 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.”

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. There, lawyers explained the case, and law enforcement and city officials vented

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


frustrations. Washington’s Municipal Research & Services Center and the League of California Cities hosted trainings to advise their members about Martin and grounds for challenging it. Even the Trump administration jumped into the fray, partnering pointed criticisms of homelessness along the West Coast with threats of federal interference.

*Martin* seemed a powder keg. When the Supreme Court finally declined review without comment in December 2019, *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. *Martin* forces cities to grapple more precisely with the

23. Id.


25. *About Us, LEAGUE OF CAL. CITIES,* https://www.cacities.org/Top/About-Us [https://perma.cc/L6JP-UAI7] (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”).


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

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.

*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. 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.

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. 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. 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. 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, is brief and temporary. Most people experiencing


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. Therefore, 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. A disproportionate number of people commonly seen living on the street in sleeping bags, tents, or other makeshift shelters are chronically homeless. 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. 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. As a result, cities underinvest in nonpunitive measures for 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_NatFerrDC_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).
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].
solutions to chronic homelessness and instead rely on expensive, ineffective, and often illegal means to manage it, such as sweeps.\textsuperscript{45} 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.\textsuperscript{46} 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\textsuperscript{47} and substance use disorders\textsuperscript{48} than homeless populations generally. They are also the least likely to exit homelessness without intervention.\textsuperscript{49} 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.\textsuperscript{50} 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).\textsuperscript{51} Providing PSH to individuals with chronic patterns of homelessness is

\textsuperscript{45}. See Samir Junejo, Seattle Univ. Sch. of L. Homeless Rts. Advoc. Project, No Rest for the Weary: Why Cities Should Embrace Homeless Encampments? (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.

\textsuperscript{46}. Rankin, supra note 4, at 129.


\textsuperscript{49}. Rankin, supra note 4, at 129.

\textsuperscript{50}. See Staten, supra note 1, at 25–26.

\textsuperscript{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. PSH can lead to significant savings. 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.

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. Many communities throughout the country have ended or made significant progress toward ending chronic homelessness through PSH. More cities should follow.

But often, governing is not a logical process. 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. 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.

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.
59. See generally Rankin, supra note 1.
Studies show criminalization is expensive, counterproductive, and often illegal. And yet, cities across the country increasingly punish homelessness.

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. 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.

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. Mathematically, Boise seemed to have sufficient shelter at three shelters, offering a total of 354 beds and ninety-two overflow mats. 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. 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, and check-in deadlines, where residents had to report by a certain time of day to be admitted. Additionally, the BRM shelters exposed residents to religious messages or required them to participate in religious activities.

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. If all three shelters reported they were full, the police would refrain from citing unsheltered people for public camping. 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. _Id._ at 1036.
66. _Id._ at 1036–37.
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. 73 Accordingly, Boise police continued to issue citations. 74

After resolving preliminary questions relating to standing 75 and relief, 76 the Ninth Circuit turned to the merits. 77 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.” 78 This protection extends to “conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets.” 79 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, 80 the court concluded that BRM’s restrictions, especially the religious impositions, rendered its beds functionally inaccessible to the plaintiffs. 81 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.” 82

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. 83 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. 84 Accordingly, many

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

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 2019.86 The denial exposed fault lines in the Ninth Circuit and five justices issued a spirited dissent.87 Dissenters argued *Martin* was wrongly decided,88 created circuit splits,89 and “shackle[d] the hands” of local governments in their efforts to address homelessness, public health, and safety concerns.90 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.91 The Court approved the extension but ultimately denied the petition without comment in December 2019.92

*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.93 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.realchangenum.org/2019/04/10/appeals-court-finds-criminalizing-homelessness-unconstitutional/ (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).


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.”94

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.95

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.96 This analysis would likely hinge on the plaintiffs’ “ability to avoid engaging in the illegal conduct in the future.”97 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.\textsuperscript{98} Shortly after \textit{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.\textsuperscript{99} The court noted the availability of shelter space and the City of Oakland’s stated commitment to find beds for the plaintiffs.\textsuperscript{100} It distinguished the facts from \textit{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].”\textsuperscript{101} Ultimately, the Northern District declined to extend \textit{Martin} to “establish a constitutional right to occupy public property indefinitely at Plaintiffs’ option.”\textsuperscript{102}

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

\textsuperscript{98} \textit{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”).


\textsuperscript{100} Id. at *5–6.

\textsuperscript{101} Id.

\textsuperscript{102} Id. at *6.


\textsuperscript{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 \textit{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/Y8R-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 attempting to stop the city from sweeping encampments on a riverbed near a stadium venue. The settlement explicitly referenced Martin three times. 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. 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. 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. 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.


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).

Similarly, Sacramento Mayor Darrell Steinberg, 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.” Instead—presumably motivated by his impression that emergency shelter must be significantly quicker and cheaper to construct—he argued California should build sufficient shelters. To further this argument, Steinberg cited to the New York right to shelter model, which stemmed from a 1979 case and has been repeatedly criticized as dangerous to the health and safety of shelter residents. Steinberg argued that California

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.”); pjfin922, 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# [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 [https://perma.cc/S8NP-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).


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 STAFEN, supra note 1.

112. See Steinberg, supra note 109.


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.  

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. 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. More than 6,500 individuals and families in Southern Nevada lack permanent housing, with 67 percent of its homeless population sleeping outside. 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. 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. 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. 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

115. Steinberg, supra note 109 (“The right to shelter must be paired with the obligation to use it.”).
117. LAS VEGAS, NEV., CODE §§ 10.86.010–.040 (2019).
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/7X5L-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,122 features an outdoor gravel lot that can accommodate some campers on mats.123 Thus, Las Vegas bets it can characterize a compulsory, boundaried outdoor area as a reasonable alternative under Martin.124

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,125 California to sweep encampments while officials distributed temporary shelter vouchers to campers.126 The court accepted this outcome even though the plaintiffs argued that existing shelters were insufficient, both in terms of potential duration and capacity.127 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.

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).


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).

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).


127. Jessica A. York (@Reporter Jess), TWITTER (Apr. 26, 2019) https://twitter.com/Reporteress/status/1121832844609744896 [https://perma.cc/KK4V-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.\(^{128}\) 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.\(^{129}\) 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,\(^ {130}\) and over the last decade, campaigns to exile unsheltered people from public spaces have reached a fever pitch.\(^ {131}\)

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,\(^ {132}\) movements against mass incarceration and debtor’s prisons appear to make many urban cities circumspect about obviously ramping up incarceration for low-level offenses.\(^ {133}\) *Martin* and other successful anti-
criminalization litigation creates additional pressure for local governments to avoid seeming like they are arresting and jailing unsheltered people for being homeless.

Instead, post-\textit{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. 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, \textit{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, \textit{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-\textit{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.

\textbf{IV. CONTEXT FOR MARTIN}

\textit{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

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 \textit{Martin} v. Boise Camping Case, supra note 91 (condemning \textit{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_5d35ee4ee4b004b6ad83ec7d?site [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. Homeless populations are disproportionately Black, brown, disabled, immigrant, refugee, and LGBTQ, suggesting the systemic nature of discrimination. Systemic social rejection and alienation across such marginalized groups correlates with the acceptability of their persecution, internment, confinement, or segregation. 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 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. For example, poorhouses emerged in England during the 17th century to confine people who were poor, disabled, elderly, or otherwise unable to work. Conditions were brutal and punitive, communicating the stigma of poverty and threatening confinement and exclusion for those suffering from it. For hundreds of years, mental asylums were a more popular repository than prisons for the mentally ill. However, around the 1950s, the tide started shifting, hitting ever higher marks of incarceration that have only recently ebbed. This transition may have started with the transfer of mentally ill individuals from confinement in asylums to local jails. The prevalence of mental illness in incarcerated populations suggests functional equivalences between asylums and incarceration as means of social control.

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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).


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.”).


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.
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.

By contrast, decarceration reflects a commitment to reduce the number of people in prisons, mental hospitals, and other institutional confines. 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. Although such programs have demonstrated success, both in terms of outcomes for unsheltered individuals and their surrounding communities, these programs remain modest in size, scope, and funding. 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, courthouses, and jails. Thus, diversion and permanent...
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. 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. American ideals such as independence and hard work nurture tendencies to blame others for their poverty. 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.

Many argue that criminalization is necessary because some people resist services or shelter, which explains why they are homeless. 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.

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. Even if there is capacity, there is no guarantee that

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://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. 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. 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. 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. 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.

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. Successful services

families-seeking-emergency-shelter-grows-longer/2223705002/ (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/ (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.


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

165. See generally STATEN, supra note 1.
require sustained and regular participation. 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.167 This process is “akin to treating burn victims who are still on fire.”168 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.169

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


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.\textsuperscript{170}

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.\textsuperscript{171} 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.\textsuperscript{172}

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

\textsuperscript{170.} See, e.g., Steinberg, supra note 109.  
\textsuperscript{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).  
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, just as homelessness along the West Coast appears to be worsening. 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. West Coast cities may announce new investments and strategies, but severe affordable housing shortages persist, service providers remain overstretched and underfunded, and the...
growing visibility of unsheltered homelessness continues to spark palpable anger from housed constituents.\textsuperscript{181}

The backlash to \textit{Martin} often featured environmental and public health crises at its core. Boise’s lawyers publicly announced that \textit{Martin} posed a threat to public health and safety;\textsuperscript{182} the Trump administration repeatedly threatened to intervene in California’s homelessness crisis due to the purported environmental issues it posed;\textsuperscript{183} local media mused that homelessness was a plague rotting cities from the inside out.\textsuperscript{184} 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.\textsuperscript{185} 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.\textsuperscript{186}

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


\textsuperscript{182} \textit{Gibson Dunn, supra} note 21.

\textsuperscript{183} \textit{See} \textit{Fessler & Zialcita, supra} note 27.


\textsuperscript{185} \textit{Rankin, supra} note 4, at 104–06.

\textsuperscript{186} \textit{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. From this perspective, unsheltered people are often perceived as threats to public health and safety, justifying their removal from public spaces. 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.

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

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.


Despite being unable to deliver on its harm mitigation goals, Seattle’s rates of encampment sweeps doubled from 2017 to 2018,\footnote{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.} and early 2019 rates skyrocketed another 75 percent over the prior year.\footnote{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].} At the same time, Seattle acknowledged sweeps were peaking despite the persistent lack of sufficient...
Media reports and advocates 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.

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. 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. A city official later publicly acknowledged that sweeps rarely involve efforts to improve outcomes for encampment residents.

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


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


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-cities-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 afoot of precedent finding similar sweep practices to be inhumane and unlawful.204

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.205 Predictably, acceptance rates for services and shelter are low, due in large part to encampment residents’ learned experience that such offers are often meaningless.206 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.207 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.208

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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).


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 (@ericacbarnett), TWITTER (July 22, 2019), https://twitter.com/ericacbarnett/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.\footnote{JUNEJO, supra note 45, at 17.} Instead of improving homelessness, sweeps destroy property and disrupt fragile communities, often leaving unsheltered people more likely to remain homeless.\footnote{Id. at 17–19.} 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.\footnote{Id.}

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.\footnote{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).} Instead, post-\textit{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.

\textbf{B. Confinement as Mental and Behavioral Health: Involuntary Commitment and Conservatorship}

A second post-\textit{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\footnote{Dan Werb, A. Kamarulzaman, M.C. Meacham, C. Rafful, B. Fischer, S.A. Srathdee & E. Wood, \textit{The Effectiveness of Compulsory Drug Treatment: A Systematic Review}, 28 Int’l J. Drug Pol’y 1, 8 (2016).} and incarceration is expensive, ineffective, and counterproductive
to housing stability and community integration goals. 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. 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. 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. 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. 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).


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).


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 I, 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.219

Supporters frame these efforts as compassionate.220 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.221 But even if some people do not know they are sick, cities lack proof that involuntary commitment or coerced treatment works.222 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.223 Solitary confinement, abuse, and worsening mental and physical health outcomes often follow.224 As with homeless services and emergency shelters generally, involuntary commitment programs are underfunded,

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

224. Id. at 613–17.
understaffed, and overstressed. Recidivism is a significant problem, especially when patients suffer from a history of homelessness. While voluntary outpatient programs—which retain greater levels of patient independence and community integration—are also underfunded, they have been successful. 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. 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. 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.

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

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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”).


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.”).

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. 231 They should provide plans for sustained funding, accountability, and transparency to ensure these interventions are humane, effective, and fiscally sound. 232 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. 233 West Coast cities are experimenting with partnering a “right to shelter” in giant FEMA-style tents or similar mass shelters

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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”).

with a legal obligation to use it. 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 suffer from mental or behavioral health challenges that can be worsened by congregate living. 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.

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? 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/ ("[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.").


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.
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? 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. 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. 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. A third-party nonprofit managed the site and shuttled residents to off-site services and treatment. 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.

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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 centers, 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).


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, “evoking a military installation or a refugee camp.” Two additional large-scale tents were built. Together, all three contained seven hundred beds. 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.”

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. 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. Still, concerns about the economic sustainability of these mega-tents persist.

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,” San Diego continues to invest


247. Id.

248. Id.


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.253 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.254 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,255 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

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).

Similar warehousing proposals—such as Dignity Field in Dallas—and a viral, professionally produced video recommending Seattle move chronically homeless individuals to a former prison for sex offenders—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. 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. In Olmstead, the State of Georgia asked the Supreme Court “whether 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


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 McKinnie & 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).

provided to them in a State mental institution.”261 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.262 The State’s treatment professionals determined the women could be treated in a community residential care program, which neither woman opposed.263 However, they remained institutionalized.264 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.265 The Court noted congressional ADA findings regarding the historical isolation, exclusion, and stigma imposed on people with disabilities.266 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.”267 The Court agreed with the plaintiffs, holding that “[u]njustified isolation . . . is properly regarded as discrimination based on disability.”268

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.269 Segregation denies the benefits of community living and expresses discrimination and stigma.270 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.”271 Thus, the

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.272

*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.273 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.274 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.275 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.276

*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.277 Most shelters impose restrictions, such as requiring residents to separate from family members,278 pets,279 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.280 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).


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.

nearly every aspect of a resident’s life, from their finances to their medications. Furthermore, residents may be required to participate in therapy, educational classes, and even bible study. Residents may also be required to adhere to strict rules regarding curfew, visitors, and the manner in which their living space is kept. 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.” Such restrictions, combined with data showing the transcarceratory relationships between psychiatric hospitals, shelters, and jails, could render mass shelters “institutions” under Olmstead.


Still, \textit{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.\footnote{Id. at 601–02. Indeed, this limited need is the driver behind involuntary commitment laws, which are subject to the criticisms. \textit{See supra} Part V.B.} 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.\footnote{\textit{Olmstead}, 527 U.S. at 602.} Instead, \textit{Olmstead} provided a qualified right to community placement under certain circumstances.\footnote{See supra note 273 and accompanying text.} Finally, \textit{Olmstead} leaves space for officials to invoke a “fundamental-alteration defense,” alleging the government is unable to reasonably accommodate a plaintiff.\footnote{“The reasonable-modifications regulation speaks of ‘reasonable modifications’ to avoid discrimination, and allows States to resist modifications that entail a ‘fundamental[al] alter[ation]’ of the States’ services and programs.” \textit{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, \textit{Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After \textit{Olmstead} v. L.C.}, 24 HARV. J. L. & PUB. POL’Y 695 (2001).} However, such defenses are rarely successful.\footnote{See \textit{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 \textit{Olmstead}.”).} While \textit{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 \textit{Olmstead} but also under other constitutional grounds.\footnote{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. \textit{See, e.g.}, Fatma E. Marouf, \textit{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”).} 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.’”\footnote{Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937), \textit{overruled by} Benton v. Maryland, 395 U.S. 784 (1969)).} 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.\footnote{Although the U.S. Supreme Court has not recognized a right to intrastate travel, the Second, Third, and Sixth Circuits have. \textit{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 prece[pt 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 travel as a fundamental right).} Some courts have found the right to travel is implicated where state
action prevents homeless people “from performing their daily life activities such as eating, sitting, and resting in public places . . . .” 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.” 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.

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.”).


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.” 297 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. 298 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. 299 Incarceration is an obvious form of punishment, but plaintiffs have also successfully challenged filthy, cramped, and inhumane prison conditions as cruel and unusual punishment. 300 Suicide is the leading cause of death in northwest jails 301 and is a significant problem throughout the country. This problem is compounded by persistent institutional failures to adequately protect inmates. 302 Overcrowding,
poor sanitation, contaminated food, and intolerable temperatures are common experiences for inmates.303

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.304 International human rights advocates are appalled at such conditions,305 but such confinement, segregation, and maltreatment are common features of efforts to contain people perceived as threats to public safety or health.306

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

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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)).
associated with increased risks of “serious harm, injury and death” for patients. 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.” 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. Some residents endure living in squalid conditions and are subjected to systematic sexual and physical abuse and disability-based discrimination. “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.” 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. 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.

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 (detailing personal accounts of understaffing in psychiatric hospitals).


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.

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, Martin took pains to explain the limits of its holding, emphasizing that cities still retain broad discretion to address homelessness. 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.”

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

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 n.8. (9th Cir. 2019), cert denied, 140 S. Ct. 674 (mem.) (2019).

318. Martin v. City of Boise, 902 F.3d 584, 617 n.8. (9th Cir. 2019) 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?319

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.320 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.321 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.

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).