THE CASE AGAINST CRIMINALIZING HOMELESSNESS: FUNCTIONAL BARRIERS TO SHELTERS AND HOMELESS INDIVIDUALS' LACK OF CHOICE

JOY H. KIM*

In 2018, the Ninth Circuit ruled in Martin v. City of Boise *that the city's ordinance criminalizing individuals for sleeping or camping outdoors in public space—an increasingly popular method for cities to regulate the homeless—is unconstitutional under the Eighth Amendment's Cruel and Unusual Punishments Clause.* Martin *was not the first case in which a court struck down an anti-homeless ordinance under the Eighth Amendment. However, it was the first to deem it unconstitutional for a city to punish a homeless person for sleeping outside when shelters are not "practically available," even if they technically have available beds. The court in* Martin *said the shelters at issue were not practically available because they were religiously coercive. This Note argues, however, that courts reviewing criminalization measures should consider whether shelters are practically available to homeless individuals for reasons beyond religious coercion. Many functional barriers to shelter deprive homeless individuals of a meaningful choice, and the Eighth Amendment prevents governments from punishing individuals for matters beyond their control. Courts should make individualized inquiries when considering the constitutionality of criminalization measures to assess whether individuals experiencing homelessness truly have a meaningful "choice" in sleeping outside. However, the constitutional infirmities behind criminalization measures, the highly factual inquiries required of courts to determine their constitutionality, and their exacerbation of homelessness underscore the need for cities to stop criminalizing homelessness.*

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INTRODUCTION

On a single night in January 2019, 567,715 people were experiencing homelessness[1] in the United States.[2] Of these individuals, sixty-five percent were sheltered and thirty-five percent were unsheltered.[3] These figures are likely a drastic undercount,[4] but even so, the U.S. Department of Housing and Urban Development (HUD)

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[1] Advocates who have written about this topic prefer "person experiencing homelessness" over the term "homeless person" in an effort to "emphasize that homelessness is a transitory experience and not an identifier." SUZANNE SKINNER, HOW BARRIERS OFTEN PREVENT MEANINGFUL ACCESS TO EMERGENCY SHELTER 1, n.1 (Sara K. Rankin ed., 2016). This Note sometimes uses the term "homeless person" or "homeless individual" for brevity. Though this Note does not wish to make homelessness a person's sole identifier, this Note also argues that in the vast majority of cases, being homeless is not volitional and therefore should be treated as a status under the Eighth Amendment. *See infra* Section I.B.

[2] U.S. DEP'T OF HOUS. & URBAN DEV., 2019 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 8 (2020) [hereinafter AHAR 2019], https://files.hudexchange.info/resources/documents/2019-AHAR-Part-1.pdf.

[3] *Id.* Under the U.S. Department of Housing and Urban Development's (HUD) definition, sheltered homelessness encompasses those living in emergency shelters, transitional housing programs that combine shelter with supportive services for up to twenty-four months, or safe havens that provide services for "hard-to-serve individuals." *Id.* at 2. In contrast, HUD defines unsheltered homelessness as "refer[ring] to people whose primary nighttime location is a public or private place not designated for, or ordinarily used as, a regular sleeping accommodation for people . . . ." *Id.* at 3.

said that homelessness increased in 2017 for the first time in seven years.[5] There has been a particular increase in the occurrence of unsheltered homelessness. Between 2018 and 2019 alone, there was a nine percent increase in the number of unsheltered individuals, meaning there were an additional 16,826 unsheltered individuals.[6] The increasing prevalence of unsheltered homelessness, coupled with the high occurrence of chronic homelessness,[7] has led to its rising visibility.[8]

Despite the lack of both temporary shelter and permanent housing for the skyrocketing number of unsheltered homeless people, cities increasingly have passed laws that give unsheltered individuals no choice but to violate them.[9] These "criminalization" laws may be neutral on their face, but have the effect of targeting homeless individuals by criminalizing acts associated with being homeless such as sleeping, sitting, lying, panhandling, and loitering in public spaces.[10] In

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[4] One reason for this undercount is that the counting process only captures homeless people who are visible. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, DON'T COUNT ON IT: HOW THE HUD POINT-IN-TIME COUNT UNDERESTIMATES THE HOMELESSNESS CRISIS IN AMERICA 11 (2017). And though HUD provides guidelines for Continuums of Care (COCs) to conduct their annual counts, the COCs can have drastically disparate procedures and results. *See id.* at 8, 10; Alastair Boone, *Why Can't We Get an Accurate Count of the Homeless Population?*, PAC. STANDARD (Mar. 5, 2019), https://psmag.com/social-justice/why-cant-we-count-the-homeless-population (describing how heavily publicized counts of homeless individuals tend to be unreliable).

[5] U.S. DEP'T OF HOUS. & URBAN DEV., 2017 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (2017), https://files.hudexchange.info/resources/documents/2017-AHAR-Part-1.pdf.

[6] AHAR 2019, *supra* note 2, at 9.

[7] Chronically homeless individuals as defined by HUD fall into two categories: individuals who have been "continuously homeless" for at least one year and have a disability, or individuals who have had at least four episodes of homelessness in the last three years that add up to at least twelve months of being homeless. *Id.* at 2. A disability for purposes of defining chronic homelessness entails diagnosis "with one or more of the following conditions: Substance use disorder, serious mental illness, developmental disability . . . , post-traumatic stress disorder, cognitive impairments resulting from brain injury, or chronic physical illness or disability." Homeless Emergency Assistance and Rapid Transition to Housing: Defining "Chronically Homeless," 80 Fed. Reg. 75791, 75793 (proposed Dec. 4, 2015) (to be codified at 24 C.F.R. pts. 91 & 578).

[8] *See* Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 102–03 (2019) ("In other words, chronic homelessness is the most visible category . . . because, unlike most cases of homelessness that are briefly episodic or transitional, people experiencing chronic homelessness are homeless more frequently and for longer periods of time."); *see also* AHAR 2019, *supra* note 2, at 4 (documenting that two-thirds of chronically homeless individuals were living outdoors in 2019).

[9] *See infra* notes 11–13 and accompanying text. *See generally* Terry Skolnik, *Homelessness and the Impossibility to Obey the Law*, 43 FORDHAM URB. L.J. 741 (2016) (noting the repercussions of homeless individuals' inability to comply with laws that disparately impact them).

[10] *See* Rankin, *supra* note 8, at 107 (defining criminalization as "laws that prohibit or severely restrict one's ability to engage in necessary life-sustaining activities in public, even

2019, the National Law Center on Homelessness and Poverty conducted a survey of 187 cities to illustrate the prevalence of laws criminalizing homelessness.[11] Such laws come in various forms: 37% of cities surveyed ban camping, 21% ban sleeping in public, 55% ban sitting and lying down in public, 35% ban loitering, loafing, and vagrancy, and 38% ban begging citywide.[12] And these are not stagnant trends. The existence of city-wide bans in every category previously listed has increased since 2006: City-wide bans on camping increased by 92%, sleeping by 50%, sitting and lying down by 78%, loitering, loafing, and vagrancy by 103%, and begging by 103%.[13]

Homelessness is a notable example of how local governments have entrusted too much to the police where social workers or other professionals would be better equipped, which is the thrust of the recently invigorated movement to defund the police.[14] Criminalizing homelessness is far from a constructive solution.[15] It is focused on reducing the visibility of homelessness by forcing homeless individuals out of public spaces,[16] sometimes with the threat of arrest.[17] Cities

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when that person has no reasonable alternative"); *see also* Hannah Kieschnick, Note, *A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-Homeless Ordinances*, 70 STAN. L. REV. 1569, 1574–77 (2018) (providing examples of criminalization ordinances).

[11] NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 9, 12–13 (2019) [hereinafter HOUSING NOT HANDCUFFS].

[12] *Id.* The percentage of cities banning these activities in particular public places, rather than banning them in all public places citywide, is even higher in all categories: 57% for camping, 39% for sleeping, 60% for loitering, loafing, and vagrancy, and 65% for begging. *Id.*

[13] *Id.*

[14] *See* Matt Vasilogambros, *'If the Police Aren't Needed, Let's Leave Them Out Completely*,' PEW: STATELINE (June 23, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/06/23/if-the-police-arent-needed-lets-leave-them-out-completely ("For decades, cities have asked police to manage social problems such as mass homelessness, failed schools, and mental illness . . . . But it has not worked. The resources that have swelled police departments across the country should be redirected to community-based programs.").

[15] *See, e.g.*, Rankin, *supra* note 8, at 109 n.52 (detailing the significant costs of criminalization practices); *id.* at 114–15 (describing how sweeps of homeless encampments merely displace individuals without combating homelessness).

[16] *See id.* at 103 ("By virtue of their sustained visibility in public space, chronically homeless people are the primary target of ordinances punishing homelessness. These laws, fueled by the stigma of visible poverty, function to purge chronically homeless people from public space."); *see also* Don Mitchell, *Anti-Homeless Laws and Public Space: II. Further Constitutional Issues*, 19 URB. GEOGRAPHY 98, 103 (1998) (explaining that the goal of these laws "is to create a public space free of the nuisances of homeless people . . . deflecting attention from roots and causes of homelessness into questions about 'order' and 'civility' in public spaces").

[17] Rankin, *supra* note 8, at 107–08. For example, individuals without a fixed address comprised about half of arrests in Portland, Oregon in 2017, most of which resulted from

achieve this by criminalizing sleeping and/or camping within their own borders and pushing homeless individuals to surrounding municipalities.[18] To be sure, criminalization of homelessness is not confined to formal laws. Some cities criminalize homelessness through more informal mechanisms, such as clearing homeless encampments[19] or using police to reduce the visibility of homelessness on subways.[20] These strategies are not necessarily documented in written policies or ordinances, and are thus more difficult to legally challenge. Even if a city does not have laws on the books obviously targeting the homeless, they may use other laws—such as for illegal dumping or shopping cart possession—to cite homeless individuals.[21] This Note primarily focuses on challenges to formal criminalization laws prohibiting acts clearly associated with being homeless, but generally advocates against all criminalization measures against the homeless.

Because criminalization laws have devastating consequences on individuals experiencing homelessness, including the exacerbation of homelessness and criminalization of poverty,[22] advocates have attempted to strike down these laws under the Eighth Amendment's Cruel and Unusual Punishments Clause, arguing that homelessness is a status and that individuals cannot be prosecuted for life-sustaining conduct.[23] Existing literature discusses the inherent problems with criminalization measures[24] and the extension of the Eighth

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an open warrant. PORTLAND CITY AUDITOR, POLICY REVIEW: PORTLAND POLICE BUREAU SHOULD IDENTIFY ITS ROLE IN RESPONDING TO THE CITY'S HOMELESS CRISIS 4, 7 (2019); *see also* U.C. BERKELEY LAW POLICY ADVOCACY CLINIC, CALIFORNIA'S NEW VAGRANCY LAWS 5 (2016) (finding increasing vagrancy arrests in California). Excessive police force can also ensue from homeless individuals' increased contact with police, as shown in Los Angeles, where one in three cases of police use of force in 2019 was against a homeless person. Matt Tinoco, *Why Armed Cops Are the First Responders for the Homelessness Crisis*, LAIST (June 29, 2020, 6:00 AM), https://laist.com/2020/06/29/los-angeles-police-homeless-why.php.

[18] *See* Sarah Gerry, Jones v. City of Los Angeles*: A Moral Response to One City's Attempt to Criminalize, Rather than Confront, Its Homelessness Crisis*, 42 HARV. C.R.-C.L. L. REV. 239, 239, 250–51 (2007) (discussing the impact of a Ninth Circuit decision on Los Angeles's restrictive homelessness policy).

[19] *See infra* notes 171, 224–29 and accompanying text.

[20] *See infra* note 51 and accompanying text (describing how New York City police have recently cracked down on homelessness in subways).

[21] *E.g.*, Cynthia Hubert, *Sacramento County Cleared Homeless Camps All Year. Now It Has Stopped Citing Campers*, SACRAMENTO BEE (Sept. 18, 2018, 4:27 PM), https://www.sacbee.com/news/local/homeless/article218605025.html.

[22] *See infra* Section IV.B (explaining how laws drive individuals experiencing homelessness further into poverty and involvement in the criminal justice system).

[23] *See infra* Section I.B (summarizing cases assessing whether homelessness is a status under the Eighth Amendment).

[24] *See infra* notes 234–43 and accompanying text.

Amendment status crimes doctrine to homelessness.[25] This Note will contribute to this literature by calling for a more expansive definition of "practically available" shelter that would render a criminalization ordinance unconstitutional under the Eighth Amendment after a recent Ninth Circuit case, *Martin v. City of Boise*.[26] The *Martin* court ruled that the City of Boise violated the Eighth Amendment by prosecuting individuals for "involuntarily sitting, lying and sleeping in public" when no sleeping space was "practically available in any shelter" at the time of the plaintiffs' arrests.[27]

Importantly, beds were technically available at Boise shelters when the *Martin* plaintiffs were arrested.[28] Previous cases within and outside the Ninth Circuit had relied on the unavailability of beds to find an Eighth Amendment violation, since homeless individuals have no choice but to sleep outside when shelters are full.[29] The *Martin* court broke new ground by noting that while Boise shelters technically offered beds, those beds were problematically conditioned on religious observance, rendering them not practically available. In doing so, it drew a crucial distinction between technically available beds and practically available beds.[30] Within the Ninth Circuit, *Martin* in fact has impacted how cities respond to homelessness, as some governments have stopped enforcing criminalization ordinances in response to the ruling.[31] *Martin*'s impact is also evidenced by local governments' protests against the decision; for example, cities and counties throughout the Ninth Circuit have filed amicus briefs to the U.S. Supreme Court opposing the *Martin* decision.[32] Although the

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[25] *See, e.g.*, Jamie Michael Charles, Note, *"America's Lost Cause": The Unconstitutionality of Criminalizing Our Country's Homeless Population*, 18 PUB. INT. L.J. 315, 333–35, 340–44 (2009) (arguing the unconstitutionality of criminalization ordinances under the Eighth Amendment); *see also* Kieschnick, *supra* note 10, at 1578–605 (providing an overview of the application of the Eighth Amendment to anti-homeless ordinances).

[26] Martin v. City of Boise, 902 F.3d 1031 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019) (en banc) (internal citations omitted).

[27] *Id.* at 1048–49.

[28] *Id.* at 1041.

[29] *See infra* notes 83–84 and accompanying text.

[30] *Martin*, 902 F.3d at 1042 (acknowledging that homeless individuals may be "denied entry to a . . . facility for reasons other than shelter capacity. If so, then as a practical matter, no shelter is available").

[31] *See, e.g.*, Scott Greenstone, *How a Federal Court Ruling on Boise's Homeless Camping Ban Has Rippled Across the West*, IDAHO STATESMAN (Sept. 16, 2019, 5:00 AM), https://www.idahostatesman.com/news/local/community/boise/article235065002.html (summarizing changes in cities' practices throughout the Ninth Circuit after *Martin*).

[32] *See, e.g.*, Matt Stiles, *'Fed Up' with Homeless Camps, L.A. County Joins Case to Restore Its Right to Clear Them*, L.A. TIMES (Sept. 17, 2019, 4:56 PM), https://www.latimes.com/california/story/2019-09-17/la-county-supervisors-homeless-boise-case-amicus-brief-supreme-court-challenge (reporting that the Los Angeles County Board of Supervisors voted to file an amicus brief with the Supreme Court). For a summary of the

Supreme Court ultimately denied review,[33] it is possible that other circuits or the nation's highest court will soon grapple with the constitutionality of criminalization ordinances as both the existence of homelessness and the criminalization thereof are increasing.[34] And though *Martin* is only binding on the Ninth Circuit, the reality is that more than half of the country's unsheltered homeless population resides in California,[35] and the four states with the largest percentage of unsheltered status among homeless individuals are in the Ninth Circuit.[36] Thus, *Martin* has a widespread impact on the treatment of individuals experiencing unsheltered homelessness.

While the *Martin* court looked to factors beyond technical shelter availability to determine the constitutionality of an anti-homeless ordinance, the court claimed to have a narrow holding.[37] Moreover, attempts to strike down anti-homeless ordinances after *Martin* have been unsuccessful.[38] In light of this tension, this Note demonstrates that not all shelters are a viable choice for persons experiencing homelessness, enumerating instances in which homeless individuals are forced to choose between criminal consequences and staying in a shelter that is coercive, unhealthy, or otherwise unsafe.[39] The ultimate

"polarizing response to *Martin*," see Sara K. Rankin, Hiding Homelessness: The Transcarceration of Homelessness 1–5 (Jan. 28, 2020) (unpublished manuscript), https://ssrn.com/abstract=3499195.

[33] *City of Boise, Idaho v. Martin*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/city-of-boise-idaho-v-martin (last visited May 20, 2020).

[34] *See infra* Part IV (considering how future courts should rule on the constitutionality of anti-homeless ordinances under the Eighth Amendment).

[35] AHAR 2019, *supra* note 2, at 12. This is not to minimize the presence of homelessness in other areas of the country, but the particular concentration of unsheltered homelessness in California presents unique problems. As of 2016, California's most populous cities had an average of more than ten anti-homeless laws each. U.C. BERKELEY LAW POLICY ADVOCACY CLINIC, *supra* note 17, at 3.

[36] AHAR 2019, *supra* note 2, at 13 (listing California, Oregon, Hawaii, and Nevada as the states with the highest percentage of unsheltered status among individuals experiencing homelessness). *See also Map of the Ninth Circuit*, U.S. CTS. FOR THE NINTH CIR., https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000135 (last visited May 21, 2020).

[37] Martin v. City of Boise, 902 F.3d 1031, 1048 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019) (en banc) ("Our holding is a narrow one.").

[38] *See infra* notes 171, 224–29 and accompanying text (noting that some cities are increasingly using methods that would technically comply with *Martin*, but still criminalize homelessness).

[39] While this was true before the COVID-19 outbreak, the unhealthy conditions of many homeless shelters and the vulnerability of being unsheltered especially came to light during the pandemic. City officials rushed to move homeless people into hotels, out of shelters, and off the streets, but the vast majority of individuals still lack safe housing. *See* Sarah Holder & Kriston Capps, *No Easy Fixes as Covid-19 Hits Homeless Shelters*, CITYLAB (Apr. 17, 2020), https://www.citylab.com/equity/2020/04/homeless-shelter-coronavirus-testing-hotel-rooms-healthcare/610000 (describing the response of various cities to the COVID-19 crisis's impact on homeless individuals). High rates of homeless individuals have tested and will continue to test positive for the virus. *See* DENNIS P.

goal of this Note is to advocate for courts, when assessing the constitutionality of criminalization ordinances, to consider these ways in which shelters may not be "practically available" for some individuals, and to call on cities to stop criminalizing homelessness altogether.

Part I summarizes the status crimes doctrine under the Eighth Amendment in cases involving the criminalization of homelessness. This Part describes how *Martin* differed from prior cases by introducing the idea that the availability of shelter beds, which determines whether homeless individuals had a choice to not sleep outside, depends not on technical availability but practical availability. Next, Part II explores the context in which the *Martin* court determined that homeless individuals in Boise did not have a choice but to sleep outside—namely when they were required to meet religious requirements to stay in a shelter. Part III goes beyond the Establishment Clause issues in *Martin* and explores some of the other reasons why a shelter may not be practically available to an individual experiencing homelessness, especially those with disabilities, substance use disorders, or LGBT identities. Finally, Part IV of this Note argues courts should make individualized inquiries when assessing whether homeless individuals in a particular case truly had a choice to sleep outside. This Part also argues that criminalization ordinances should be overturned legislatively, not only because they are constitutionally and morally suspect, but also because they are costly and impractical.

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Eighth Amendment Challenges to Anti-Homeless Ordinances

The Eighth Amendment's Cruel and Unusual Punishments Clause has often been a vehicle for challenging the criminalization of

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Culhane, Dan Treglia, Kenneth Steif, Randall Kuhn & Thomas Byrne, Estimated Emergency & Observational/Quarantine Capacity Need for the U.S. Homeless Population Related to COVID-19 Exposure by County; Projected Hospitalizations; Intensive Care Units & Mortality 6, 12 (2020), https://works.bepress.com/dennis_culhane/237 (predicting that over 21,000 people experiencing homelessness—4.3% of the U.S. homeless population—could require hospitalization and over 3400 will die from COVID-19); Michael Gartland, *At Least 40 Homeless New Yorkers Have Died Because of Coronavirus*, N.Y. Daily News (Apr. 20, 2020, 4:20 PM), https://www.nydailynews.com/coronavirus/ny-coronavirus-homeless-deaths-40-20200420-nckj4fvjpjcvjehbmz7rdujbum-story.html (stating that as of April 19, 2020, 615 homeless people had tested positive in New York City); Lisa Mullins & Lynn Jolicoeur, *Testing Reveals 'Stunning' Asymptomatic Coronavirus Spread Among Boston's Homeless*, WBUR (Apr. 14, 2020), https://www.wbur.org/commonhealth/2020/04/14/coronavirus-boston-homeless-testing (finding that thirty-six percent of individuals entering a Boston homeless shelter tested positive).

homelessness.[40] In such cases, advocates argue that laws prohibiting sleeping and camping in public impermissibly criminalize the status of being homeless because homeless individuals have no choice but to sleep outdoors when there is no shelter available, which violates the Cruel and Unusual Punishments Clause.[41] Section I.A first highlights the misunderstandings government actors may have when seeking solutions to homelessness. Then, Section I.B summarizes the origins of the status doctrine and describes how certain courts treat homelessness as a status under the Eighth Amendment. Lastly, Section I.C discusses the ways in which *Martin* both reiterated the reasoning of prior decisions while also contemplating a situation in which shelter is not "practically available" to an individual arrested for sleeping outdoors even when beds were technically available.

A. Myths and Misunderstandings About Choices Available to Individuals Experiencing Homelessness

When addressing the ever-pressing crisis of homelessness, advocates must combat policymakers' and judges' false intuitions about what causes and solves homelessness. Courts and other government actors—both at the local and national levels—often have a limited understanding of the viable choices available to individuals experiencing homelessness.[42]

Some argue that if anti-homeless laws are struck down, this will lead to a "constitutional right to camp in public places," as stated by one of the attorneys appealing Boise's case to the Supreme Court.[43] Arguments like this miscomprehend the choices available to individuals experiencing homelessness and perpetuate a false narrative that people choose to sleep outside over better alternatives. Even those who purport to advocate for the homeless can perpetuate this narrative. For example, the mayor of Sacramento, California wrote an op-ed calling for the right to shelter in the state along "with the obligation to use it."[44] His view that "[l]iving on the streets should not be consid-

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[40] *See* Kieschnick, *supra* note 10, at 1578, 1582–83 (noting that federal and state courts have recognized the Eighth Amendment as a limitation on anti-homelessness measures).

[41] *See infra* notes 76–82 and accompanying text.

[42] It is particularly important to recognize the limited understanding of government officials, regardless of party affiliation, about choices available to individuals experiencing homelessness. *See infra* notes 52–54 and accompanying text.

[43] Greenstone, *supra* note 31 (quoting Theane Evangelis, one of the lead counsel that represented Boise on its appeal to the Supreme Court).

[44] Darrell Steinberg, *Building More Permanent Housing Alone Won't Solve Homelessness in California*, Opinion, L.A. TIMES (July 17, 2019, 3:15 AM), https://www.latimes.com/opinion/story/2019-07-16/op-ed-building-more-permanent-housing-alone-wont-solve-homelessness-in-california. Steinberg also opposed Sacramento's

ered a civil right"[45] misses the point that for some individuals experiencing homelessness, sleeping on the street is the only possible option for the reasons explained in Part III.

It is also worth stating that the right to shelter, while an important step in mitigating unsheltered homelessness, does not necessarily decrease the occurrence of overall homelessness. New York City, which first established a right to shelter in 1981,[46] has seen the highest levels of homelessness since the Great Depression,[47] with single adults spending an average of 429 nights in shelters.[48] As of May 25, 2020, there were 53,393 homeless individuals in New York City shelters.[49] New York City has also seen crime and health hazards at many of its shelters.[50] Moreover, the right to shelter does not necessarily mitigate the use of criminalization measures. For example, New York Governor Andrew Cuomo asked the New York Metropolitan Transportation Authority to address the "increasing problem of homelessness on the subways" as part of its Reorganization Plan, which included the addition of five hundred uniformed officers.[51]

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participation in the Supreme Court amicus brief for *Martin* and called on governments to seek humane alternatives instead. Benjamin Oreskes, *Homeless People Could Lose the Right to Sleep on Sidewalks if Western Cities Have Their Way*, L.A. TIMES (Sept. 25, 2019, 3:23 PM), https://www.latimes.com/california/story/2019-09-25/boise-homeless-encampment-amicus-brief-supreme-court-appeal-cities. This example demonstrates that those opposing criminalization measures may not understand that requiring homeless individuals to use shelters may also be problematic.

[45] Steinberg, *supra* note 44.

[46] *See* Callahan v. Carey, 909 N.E.2d 1229, 1320 (N.Y. 2009) (describing the 1981 consent decree that established a right to shelter for homeless men); Robin Herman, *Pact Requires City to Shelter Homeless Men*, N.Y. TIMES (Aug. 27, 1981), https://www.nytimes.com/1981/08/27/nyregion/pact-requires-city-to-shelter-homeless-men.html. A court extended the consent decree to homeless women in 1983. *See* Eldredge v. Koch, 469 N.Y.S.2d 744, 744 (App. Div. 1983) (holding that the consent decree's reasoning and outcome is equally applicable to homeless women's shelters).

[47] *Basic Facts About Homelessness: New York City*, COAL. FOR THE HOMELESS, https://www.coalitionforthehomeless.org/basic-facts-about-homelessness-new-york-city (last visited May 25, 2020).

[48] COAL. FOR THE HOMELESS, STATE OF THE HOMELESS, at 8 (2018).

[49] *DHS Daily Report*, N.Y.C. OPEN DATA, https://data.cityofnewyork.us/Social-Services/DHS-Daily-Report/k46n-sa2m (last visited May 27, 2020).

[50] *See* SKINNER, *supra* note 1, at 17–18 (noting the presence of numerous health hazards and instances of crime in shelters); Nathan Tempey, *Inside the Notorious Privately Run Homeless Shelter That Costs NYC Millions*, GOTHAMIST (July 14, 2015, 3:02 PM), https://gothamist.com/2015/07/14/we_always_care_about_money.php (reporting "mice and roach infestations, collapsing ceilings, fires, grimy halls, violent crime and burglaries, and lobby doors that don't lock" at a family shelter).

[51] Letter from Andrew Cuomo, N.Y. Governor, to MTA Board of Directors (July 12, 2019), https://www.governor.ny.gov/news/governor-cuomo-issues-letter-mta-board-directors-urging-them-address-part-reorganization-plan; *see also* Lauren Aratani, *'I'm Just Sleeping': Police Crack Down on Homeless in New York's Subways*, GUARDIAN (Oct. 12,

Recently, President Trump brought homelessness into the national dialogue. In July 2019, he blamed cities "run by very liberal people" for allowing homelessness to occur, stating "[t]he people there are living in hell . . . . [P]erhaps they like living that way. They can't do that. We can't ruin our cities."[52] However, it is false that "liberal" governments have been too lax in policing the homeless.[53] Both sides of the aisle are at fault for criminalizing homelessness instead of addressing its root causes. And though the President could have created a national strategy for addressing homelessness, he merely endorsed the same policing tactics that "liberal" governments have tried for years. The White House Council of Economic Advisers stated in a report that "increasing the tolerability of sleeping on the streets . . . increases homelessness," and called on the police to enforce anti-camping laws and to connect individuals to services.[54]

These examples show how decisionmakers' rhetoric about homelessness seeks to diminish the visibility of homelessness rather than address its root causes. Policing is seen as the answer to more immediate reductions in visibility. But punishing individuals experiencing homelessness for sleeping outdoors—regardless of whether shelter beds are technically available in local shelters—is often the equivalent of punishing individuals for having no choice but to sleep outdoors.[55]

2019, 2:00 AM), https://www.theguardian.com/us-news/2019/oct/12/new-york-homeless-subways-police-crackdown.

[52] Nick Givas, *Exclusive: Trump Shares Plans to Combat Homelessness and Mental Illness in Interview with Tucker Carlson*, FOX NEWS (July 1, 2019), https://www.foxnews.com/politics/trump-tucker-exclusive-interview-homelessness. For factual inaccuracies in Trump's interview about homelessness, see Jill Colvin, *Trump's Claim About DC Homeless Raises Eyebrows*, AP NEWS (July 3, 2019), https://www.apnews.com/36eba40cbcd64d93921e1d75aa7e751a, and Michael D. Shear, *Trump Expresses Shock at Homelessness, 'a Phenomenon That Started Two Years Ago*,' N.Y. TIMES (July 2, 2019), https://www.nytimes.com/2019/07/02/us/politics/trump-homeless.html.

[53] *See, e.g.*, Chris Herring, *Democrats Hate Trump's Plan for Homelessness. But It's Their Plan, Too*, WASH. POST (Sept. 18, 2019, 10:33 AM), https://www.washingtonpost.com/outlook/democrats-hate-trumps-plan-for-homelessness-its-their-plan-too/2019/09/18/b3c31a5c-d98e-11e9-a688-303693fb4b0b_story.html (noting prominent Democratic politicians in California who pushed criminalization policies); *see also* PORTLAND CITY AUDITOR, *supra* note 17 at 3–7; U.C. BERKELEY LAW POLICY ADVOCACY CLINIC, *supra* note 17, at 2–7.

[54] COUNCIL OF ECON. ADVISERS, THE STATE OF HOMELESSNESS IN AMERICA 16–19 (2019) (suggesting that unsheltered homelessness increased in the 1980s due to the "decriminalization of many status crimes, such as public inebriation and vagrancy" (quoting PETER H. ROSSI, DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS 34 (1989))); *see also* Jeff Stein, *As Trump Prepares Big Push on Homelessness, White House Floats New Role for Police*, WASH. POST (Sept. 16, 2019, 7:24 PM), https://www.washingtonpost.com/business/2019/09/16/trump-prepares-big-push-homelessness-white-house-floats-new-role-police.

[55] For more examples of when government actors fail to see the functional inaccessibility of shelter, see Rankin, *supra* note 32, at 15–21.

The next Section demonstrates how punishing individuals for a matter over which they have no choice violates the Eighth Amendment.

B. Homelessness as a Status Under the Cruel and Unusual Punishments Clause

According to the Supreme Court, the Cruel and Unusual Punishments Clause "limits the kind of punishment that can be imposed on those convicted of crimes, . . . proscribes punishment grossly disproportionate to the severity of the crime, . . . [and] imposes substantive limits on what can be made criminal and punished as such."[56] Those limitations include criminalizing a person's status, which means an individual is punished not for her conduct but for the very fact of being something.[57] One example of a status crime is vagrancy, which has been used for more than six centuries to target the poor in public spaces.[58] The Supreme Court struck down a vagrancy law for vagueness in *Papachristou v. City of Jacksonville*.[59] However, much of the status crimes doctrine arises from cases involving addiction.[60]

First, the Supreme Court in *Robinson v. California* overturned a statute criminalizing addiction for violating the Eighth Amendment.[61] The Court differentiated status from conduct in that the former "is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time after he reforms."[62] But the question of whether criminalizing the act of being intoxicated in a public place criminalized the status of addiction divided the Court six years later in *Powell v. Texas*.[63] A four-justice plurality in *Powell* interpreted *Robinson* to mean that a state may not criminalize status or the act of "being," which allowed for punishing the conduct of drunkenness in public.[64] The four-justice dissent determined that criminalizing public drunkenness was an Eighth Amendment violation

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[56] Ingraham v. Wright, 430 U.S. 651, 667 (1977) (internal citations omitted).

[57] *See* Robinson v. California, 370 U.S. 660, 666–67 (1962) (striking down a law criminalizing the "status" of addiction rather than purchase, sale, possession, or other specific acts).

[58] Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 633–34 (1992).

[59] 405 U.S. 156, 162 (1972).

[60] *See* Mitchell, *supra* note 16, at 99–100 (summarizing Supreme Court jurisprudence regarding the status of addiction).

[61] 370 U.S. at 666.

[62] *Id.* at 662–63.

[63] 392 U.S. 514 (1968).

[64] *Id.* at 532–33.

under *Robinson*, as it criminalized "a condition [Powell] is powerless to change."[65]

Justice White, the decisive fifth vote for the plurality,[66] determined that Powell could have avoided public drunkenness in this particular case, and in doing so dodged the constitutional question.[67] In a footnote, he distinguished himself from the rest of the plurality in stating that the key question is not about whether public drunkenness is a status or conduct, but about "whether *volitional* acts brought about the 'condition' and whether those acts are sufficiently proximate to the 'condition'" to penalize that "condition."[68] In his separate concurrence, Justice White highlighted a situation where penalizing someone for being drunk in public *would* constitute cruel and unusual punishment—when that person is homeless, for they have no realistic choice but to live in public places.[69]

Since *Robinson* and *Powell*, advocates for the homeless have brought cases asserting homelessness as a status that cannot be criminalized under the Eighth Amendment. But courts disagree over how to reconcile *Robinson* and *Powell* and how to distinguish status from conduct.[70] More, state and federal courts are far from reaching consensus on whether homelessness constitutes a status. When it seemed possible that the Supreme Court would review *Martin*, counsel for the City of Boise highlighted that courts diverge on whether homelessness is a status.[71]

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[65] *Id.* at 567 (Fortas, J., dissenting).

[66] Some circuits consider Justice White's opinion to be controlling under the *Marks* rule while others consider it dicta. *Compare* Manning v. Caldwell, 930 F.3d 264, 280 & n.13 (4th Cir. 2019) (deeming Justice White's opinion to be decisive (quoting Marks v. United States, 430 U.S. 188 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."))), *with* United States v. Sirois, 898 F.3d 134, 138 (1st Cir. 2018) (describing Justice White's opinion as "only a concurring opinion. . . . [O]ne that has yet to gain any apparent relevant traction").

[67] *See Powell*, 392 U.S. at 552–54 (White, J., concurring); Mitchell, *supra* note 16, at 99 ("Justice White cast the ninth vote on the merits of the particular case rather than on the constitutional issues raised.").

[68] *Powell*, 392 U.S. at 550 n.2 (White, J., concurring) (emphasis added).

[69] *Id.* at 551 ("For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking."); *see also Manning*, 930 F.3d at 281, 285–86 (relying on Justice White's language to strike down a habitual drunkard statute as unconstitutionally vague).

[70] *See, e.g.*, Kieschnick, *supra* note 10, at 1582–90 (highlighting the split among courts between extending *Robinson* to conduct or limiting it to pure status). *But see* Mitchell, *supra* note 16, at 99–101 (deeming the discussion of involuntariness in *Powell* to be "irrelevant" in challenging anti-homeless laws on Eighth Amendment grounds).

[71] Reply Brief for Petitioner at 6–9, City of Boise v. Martin, No. 19-247 (Nov. 13, 2019).

Some courts have declined to treat homelessness as a status for a number of reasons. Some refuse to treat homelessness as a status because statutes criminalizing homelessness often target specific types of conduct such as sleeping, lying, or sitting.[72] One court ruled that homelessness is not a status because it is a condition that depends on the discretionary acts of others, namely the government's provision of sufficient housing.[73] In another instance, the Eleventh Circuit held that a challenged ordinance did not punish status because shelter space was available, meaning individuals could choose to sleep indoors.[74] These decisions generally emphasize that homelessness involves some level of choice and thus cannot be a status.

In contrast, courts that construe homelessness as a status tend to focus on its involuntary nature.[75] In *Jones v. City of Los Angeles*, the Ninth Circuit ruled that a municipal ordinance prohibiting sitting, lying, or sleeping at all times in all public places when no shelter was available violated the Eighth Amendment.[76] The court found that while "[h]omelessness is not an innate or immutable characteristic, nor is it a disease, such as drug addiction or alcoholism," the status of being homeless and the status of being an alcoholic were sufficiently analogous to consider homelessness a status.[77] That shelter may sometimes be available or that a person's homelessness is not permanent does not foreclose treating homelessness as a status.[78]

In particular, the involuntariness of sleep and its necessity for survival have led some courts to consider homelessness as a status when individuals have no choice but to sleep in public. The *Jones* court found that "sitting, lying, and sleeping . . . are universal and unavoidable consequences of being human."[79] In *Johnson v. City of Dallas*, a district court in Texas noted that "being does not exist without sleeping," and thus criminalizing sleeping punishes homeless individuals for a status that "forc[es] them to be in public."[80] A Florida dis-

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[72] *See* Tobe v. City of Santa Ana, 892 P.2d 1145, 1166–67 (Cal. 1995) (reversing lower court's ruling that homelessness is a status like addiction or an illness, and determining instead that the City of Santa Ana's ordinance criminalized conduct).

[73] Joyce v. City of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994).

[74] *See* Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000) (holding that the ordinance prohibiting camping on public property did not punish status in violation of the Eighth Amendment because space was available at a local shelter).

[75] *See infra* notes 78–83 and accompanying text.

[76] 444 F.3d 1118, 1136 (9th Cir. 2006), *appeal dismissed and vacated as moot upon settlement*, 505 F.3d 1006 (9th Cir. 2007).

[77] *Id.* at 1137.

[78] *Id.*; *see also supra* note 1.

[79] *Jones*, 444 F.3d at 1136.

[80] 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). *Johnson* was reversed on standing grounds.

trict court in *Pottinger v. City of Miami* included eating and sitting among a list of life-sustaining conduct that homeless individuals must undertake in public that is "inseparable from their involuntary condition of being homeless."[81]

Several scholars have also argued that courts should be more willing to find Eighth Amendment violations in statutes targeting individuals experiencing homelessness.[82] But in practice courts tend to find Eighth Amendment violations only when the facts are egregious, showing that the number of homeless individuals exceeded the number of available beds in the jurisdiction by thousands.[83] In *Jones*, the gap between homeless individuals and available beds reached almost 50,000.[84] It certainly is the case that many cities lack sufficient shelter space to accommodate the number of individuals experiencing homelessness. But even when shelters have space, or even when a city such as New York provides a right to shelter, there are a variety of reasons a person experiencing homelessness may not be able to sleep in a shelter.[85] Many of these reasons stem from shelter policies that bar certain populations based on sexual orientation or criminal records. Additionally, shelter may not be accessible to individuals with disabilities or other health conditions.

C. Martin v. City of Boise

Martin opened a door for finding a criminalization ordinance unconstitutional as applied to homeless individuals without a factual finding that the number of homeless individuals technically exceeds the number of available beds. Six plaintiffs, current or former residents of Boise, alleged that between 2007 and 2009 they were cited by Boise police for violating one or both of the following ordinances[86]: (1) Boise City Code § 9-10-02 ("Camping Ordinance"), which made it a misdemeanor to use "any of the streets, sidewalks, parks, or public places as a camping place at any time"; and (2) Boise City Code § 6-

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[81] 810 F. Supp. 1551, 1564 (S.D. Fla. 1992).

[82] *See, e.g.*, Charles, *supra* note 25, at 340–44 (arguing for an extension of the status crimes doctrine to homelessness because of its involuntariness); Kieschnick, *supra* note 10, at 1591–605 (same).

[83] *See, e.g.*, *Pottinger*, 810 F. Supp. at 1564 (stating that for 6000 individuals experiencing homelessness in Miami there were approximately 700 available shelter beds, a figure that includes 200 "program beds," for which an individual "must qualify"); *see also infra* note 84 and accompanying text.

[84] 444 F.3d at 1122. This disparity is drastic even with the fact that HUD has historically undercounted homeless populations. *See supra* note 4 and accompanying text.

[85] *See infra* Part III.

[86] Martin v. City of Boise, 902 F.3d 1031, 1035 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019) (en banc).

01-05 ("Disorderly Conduct Ordinance"), which prohibited "[o]ccupying, lodging, or sleeping in *any* building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof."[87] An amendment to the challenged Ordinances in 2014 precluded the City from enforcing them when shelters were full.[88] But even if the shelters were not at capacity, individuals could be turned away for other reasons such as exceeding stay limits or failing to participate in a mandatory religious program.[89] For example, the River of Life shelter had a seventeen-day limit for males.[90] After this limit, individuals had to either leave the shelter or enter the Discipleship Program—an "intensive, Christ-based residential recovery program."[91] Plaintiff Robert Anderson said he was required to attend chapel before dinner at the River of Life shelter.[92] Thus, he slept outside instead of staying at a shelter that did not align with his religious beliefs.[93]

In contrast to previous cases where the evidentiary record demonstrated a significant gap between the number of homeless individuals and available shelter beds,[94] the barrier here was a religious one. The *Martin* court determined that the ordinances violated the Eighth Amendment because they also violated another constitutional provision—the Establishment Clause in the First Amendment.[95] The court considered there to be no beds available on the night of plaintiff Anderson's arrest because he had to choose between enrolling in a program "antithetical to his . . . religious beliefs" or risk arrest under the ordinances.[96] The court found that Boise could not force the plain-

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87 *Id.* (emphasis added).

88 *Id.* at 1039.

89 *Id.* at 1037, 1041.

90 *Id.*

91 *Id.* at 1037.

92 *Id.* at 1038.

93 *Id.*

94 *See* Jones v. City of Los Angeles, 444 F.3d 1118, 1131–32 (9th Cir. 2006) (distinguishing that case from another that had "only the conclusory allegation that there was insufficient shelter" (citing Joyce v. City & County of San Francisco, 846 F. Supp. 843, 849 (N.D. Cal. 1994))), *appeal dismissed and vacated as moot upon settlement*, 505 F.3d 1006 (9th Cir. 2007); Cobine v. City of Eureka, 250 F. Supp. 3d 423, 431 (N.D. Cal. 2017) (finding the factual record to be underdeveloped as to whether homeless plaintiffs had no choice but to sleep outside); Johnson v. City of Dallas, 860 F. Supp. 344, 350 (N.D. Tex. 1994) ("For many of those homeless in Dallas, the unavailability of shelter is not a function of choice; it is not an issue of choosing to remain outdoors rather than sleep on a shelter's floor because the shelter could not provide a bed that one found suitable enough."), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995).

95 902 F.3d at 1041 (citation omitted) ("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.").

96 *Id.*

tiff to choose between sleeping outside at risk of prosecution or participating in a religious program at a local shelter.[97] Even though shelter beds were technically available at the time of plaintiffs' arrests,[98] the lack of "practically available" shelter meant that the ordinances violated the Eighth Amendment.[99]

This is not to say that *Martin* failed to follow precedent. It relied upon an evidentiary record that clearly showed homeless plaintiffs' lack of choice in sleeping outdoors. Instead of relying on quantitative evidence of the disparity between the number of homeless individuals and the number of available beds, however, the court relied on evidence that the plaintiffs lacked a meaningful choice when faced with the options of either sleeping outside at risk of prosecution or staying at a shelter where they would be required to renounce their religious beliefs.

The Ninth Circuit denied rehearing en banc.[100] But in her en banc concurrence, Judge Marsha Berzon, the panel opinion's author, again emphasized the narrowness of the court's ruling: "[T]he opinion only holds that municipal ordinances that criminalize sleeping, sitting, or lying in *all* public spaces, when *no* alternative sleeping space is available, violate the Eighth Amendment."[101] But as the opinion stands, it contemplates a situation in which an individual experiencing homelessness may have no choice but to sleep outside and face criminal punishment, even when there technically are shelter beds available. The opinion also does not allow cities in the Ninth Circuit to force individuals to choose between sleeping outside at risk of prosecution or staying in a shelter that violates their religious freedoms. In light of the fact that many cities rely on religious shelters to provide beds for individuals experiencing homelessness,[102] Part II explores what type of religious shelter might be so coercive as to be an Establishment Clause violation.

II

Religion as an Example of Shelter Inaccessibility

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of

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[97] *Id.*

[98] *Id.* There was also no known citation of a homeless individual for sleeping or camping on public property when the shelters were at capacity. *Id.* at 1039.

[99] *Id.* at 1049.

[100] Martin v. City of Boise, 920 F.3d 584, 588 (9th Cir. 2019).

[101] *Id.* at 589 (Berzon, J., concurring) (citation omitted).

[102] *See infra* Section II.A.

religion."[103] Though there were technically beds available at the time of the plaintiffs' arrests in *Martin*, the court narrowly focused on the distinction between technically available and practically available shelter beds in the context of *religious* shelters.[104] Because these beds were in shelters that mandate participation in religious programming, the court found that Boise cannot criminalize homeless individuals for sleeping outdoors when their only other option was to stay in a shelter that required participation in religious services.[105]

Section II.A surveys the role of religious institutions in providing services for individuals experiencing homelessness and local governments' dependence on them. Then, Section II.B considers what type of program might constitute impermissible religious coercion under the Establishment Clause after *Martin*, especially since many shelters are operated by religious organizations. However, Section II.C ultimately argues that criminalization measures should be overturned not only because they infringe on homeless individuals' civil liberties, but also because government interference in religious shelters is a constitutional violation in itself.

A. The Privatization of Services for Individuals Experiencing Homelessness

Religious organizations have played a vital role in providing shelter and services since homelessness became an especially prominent problem in the 1980s.[106] These organizations stepped in where government "rolled back" social safety nets, believing it was the right thing to do.[107] Indeed, one of the amicus briefs filed to the Supreme Court in support of Boise claimed that religious organizations sponsor the majority of homeless shelters in Oregon and that therefore, under *Martin*, cities would inevitably violate the Establishment Clause given the Ninth Circuit's decision.[108] According to the National Alliance to End Homelessness, faith-based organizations provided at least thirty

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103 U.S. CONST. amend. I.

104 902 F.3d at 1041; *see also supra* Section I.C.

105 902 F.3d at 1048–49.

106 *See, e.g.*, Sara Rimer, *Religious Groups Plan More Shelters for Homeless*, N.Y. TIMES, Oct. 16, 1983, at 38, https://www.nytimes.com/1983/10/16/nyregion/religious-groups-plan-more-shelters-for-homeless.html (describing religious organizations' provision of shelter and services in New York City).

107 Jason Hackworth, *Faith, Welfare, and the City: The Mobilization of Religious Organizations for Neoliberal Ends*, 31 URB. GEOGRAPHY 750, 752–53 (2010) (observing how faith-based organizations deliver services that traditionally were provisioned directly by government, rather than private, actors).

108 Brief for League of Oregon Cities as Amicus Curiae Supporting Petitioner at 4, City of Boise v. Martin, No. 19-247 (Sept. 25, 2019).

percent of emergency shelter beds nationwide in 2017.[109] The Baylor Institute for Studies of Religion found that in the same year, almost sixty percent of emergency shelter beds in eleven cities were provided by faith-based organizations.[110] Many religious shelters in the United States are known as gospel rescue missions, which integrate Christian teaching into the provision of shelter and services.[111] The Citygate Network, formerly known as the Association of Gospel Rescue Missions, has approximately three hundred members throughout North America that are "havens of hope for all who enter."[112] Citygate reports that its member organizations provide more than twenty million nights of shelter and housing and sixty-six million meals each year.[113]

This Note does not posit that shelters operated by religious organizations should not exist, nor that they should necessarily water down the religious components of their shelter services. Public shelters leave gaps that can only be filled by religious shelters. Some individuals need and want spiritual support to reintroduce stability into their lives,[114] and desire a spiritual component to shelter services.[115] There is also a crucial role for religious shelters that specifically serve members of non-Christian faiths.[116] Beyond spiritual reasons, some individ-

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[109] NAT'L ALL. TO END HOMELESSNESS, FAITH-BASED ORGANIZATIONS: FUNDAMENTAL PARTNERS IN ENDING HOMELESSNESS 1 (2017) [hereinafter FAITH-BASED ORGANIZATIONS].

[110] BYRON JOHNSON, WILLIAM H. WUBBENHORST & ALFREDA ALVAREZ, BAYLOR INST. FOR STUDIES OF RELIGION, ASSESSING THE FAITH-BASED RESPONSE TO HOMELESSNESS IN AMERICA: FINDINGS FROM ELEVEN CITIES 20 (2017).

[111] Hackworth, *supra* note 107, at 755–56; *see, e.g.*, *About*, CITYGATE NETWORK, https://www.citygatenetwork.org/agrm/About.asp (last visited May 20, 2020).

[112] CITYGATE NETWORK, *supra* note 111.

[113] *Id.*

[114] *See, e.g.*, Sarah L. DeWard & Angela M. Moe, *"Like a Prison!": Homeless Women's Narratives of Surviving Shelter*, 37 J. SOC. & SOC. WELFARE 115, 126 (2010) ("Adhering strongly to faith gave spiritual adapters much needed hope and comfort, mitigating feelings of desperation, confusion and loneliness. By purposefully adapting their circumstances to a larger spiritual lesson and purpose, they were able to reframe their shelter experience.").

[115] The Association of Gospel Rescue Missions (now the Citygate Network) found in its most recent survey of its member organizations that seventy-nine percent of individuals served "prefer spiritual emphasis in services." ASS'N GOSPEL RESCUE MISSIONS, AGRM's 2016 SNAPSHOT SURVEY HOMELESS STATISTICAL COMPARISON (2016), http://www.agrm.org/images/agrm/Documents/Snapshot/2016/2016%20yearly%20comparison%20.pdf. This figure has remained consistent since 2012. *Id.*; *see also* Hackworth, *supra* note 107, at 755–56 (describing gospel rescue missions as existing in every major city to provide meals and shelter for the homeless and as historically rejecting government funding).

[116] *See* FAITH-BASED ORGANIZATIONS, *supra* note 109, at 8 (noting the importance of a Muslim-based Housing First provider as one of only a handful of its kind). Since Christian organizations prominently run homeless shelters in the United States, this Note largely references Christian-affiliated shelters when discussing faith-based organizations. *See supra* notes 107–13 and accompanying text.

uals prefer the quality of care in private religious shelters over public shelters.[117] Some religious shelters also accept individuals who are denied admission into public shelters for past criminal convictions[118] or who have substance use disorders.[119] Religious organizations have even violated city codes[120] and have gone to court to exercise their religious duty to help the poor.[121]

But at the same time, the practices of the River of Life shelter in *Martin*—requiring attendance at chapel before meals and participation in religious programs to continue staying at the shelter—are hardly uncommon.[122] When shelters are not funded by any government entity, they are often exempt from government oversight.[123] At least one study shows that the most "openly sectarian" organizations are the least likely to request government funding.[124] For example, Chicago's largest homeless shelter is exempt from government over-

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117 One study found through interviews that "many of the homeless in New York City prefer rescue missions over government-run shelters because they are safer and quieter." Hackworth, *supra* note 107, at 757.

118 *Id.* at 758–59.

119 More than half of the organizations surveyed in the National Alliance to End Homelessness's study used a Housing First approach to remove barriers to shelters. FAITH-BASED ORGANIZATIONS, *supra* note 109, at 6. As discussed in Section III.B, *infra*, the Housing First model views housing as a treatment in itself and does not require sobriety before receiving services. *Housing First*, NAT'L ALL. TO END HOMELESSNESS (Apr. 20, 2016), https://endhomelessness.org/resource/housing-first [hereinafter *Housing First*].

120 *See, e.g.*, Hayat Norimine & Obed Manuel, *Dallas' Ban on Churches Sheltering Homeless Won't Be Lifted in Time for Winter*, DALL. MORNING NEWS (Nov. 11, 2019, 1:15 PM), https://www.dallasnews.com/news/2019/11/11/dallas-ban-on-churches-sheltering-homeless-wont-be-lifted-in-time-for-winter (describing churches and religious organizations opening their doors to shelter people in violation of city zoning restrictions).

121 *See infra* notes 158–62 and accompanying text; *see also* Susan L. Goldberg, *Gimme Shelter: Religious Provision of Shelter to the Homeless as a Protected Use Under Zoning Laws*, 30 WASH. U. J. URB. & CONTEMP. L. 75, 76 (1986) (arguing that providing shelter to those in need is a religious use of church property protected by the Free Exercise Clause).

122 *See supra* note 114 and accompanying text.

123 *See* Hackworth, *supra* note 107, at 756 (describing how some religious organizations "remain sceptical of the limitations that government [funding] places on their activities"); Diana B. Henriques, *As Exemptions Grow, Religion Outweighs Regulation*, N.Y. TIMES (Oct. 8, 2006), https://www.nytimes.com/2006/10/08/business/08religious.html (overviewing ways in which religious organizations, including homeless shelters, are exempt from government regulation); Anna Kim, *Chicago's Largest Homeless Shelter Accused of Discriminating Against People with Disabilities, but Faces Little Oversight Because It's a Church*, CHI. TRIBUNE (May 24, 2019), https://www.chicagotribune.com/news/ct-met-pacific-garden-mission-oversight-20190520-story.html (describing a Chicago shelter that does not receive public funds and is exempt from government oversight). When an organization directly receives HUD funding, it "may not engage in inherently religious activities" unless they are offered separately from the HUD-funded activities and participation in such activities is voluntary. *Frequently Asked Questions (FAQs) on Equal Treatment and the Faith-Based and Community Initiative*, HUD.GOV, https://www.hud.gov/program_offices/faith_based/faq (last accessed Aug. 5, 2020).

124 Hackworth, *supra* note 107, at 755.

sight and also from federal antidiscrimination laws as a religious organization.[125] This shelter requires attending religious services and states its mission is to "put prayer first."[126]

It is difficult to discern impermissible religious coercion when so many shelters are run by religious groups, and when not all spiritual programming rises to the level of coercion in *Martin*. Organizations vary in how much religion is integrated into programming and whether participation in a religious activity is mandatory for receiving services.[127] The shelters at issue in *Martin* seem to fall on the more coercive end of the spectrum. They engaged in a variety of religious practices, such as having "Christian messaging on the shelter's intake form and . . . Christian iconography on the shelter walls," constituting an "overall religious atmosphere."[128] But the shelters' additional program requirements were what made the Establishment Clause violation seem clear. In order to stay at the shelters for more than seventeen days, the plaintiffs had to enroll in a Discipleship Program—an "'intensive, Christ-based residential recovery program' of which '[r]eligious study is the very essence.'"[129] Participants in this program were allegedly not allowed to attend another local Catholic program "because it's . . . a different sect."[130] There was also evidence that one plaintiff was required to attend chapel before eating dinner at the shelter.[131] So, even though plaintiffs were not denied access to shelter based on lack of space, they were practically denied based on their religious beliefs. This amounted to a genuine issue of material fact as to whether homeless individuals face a credible risk of prosecution when shelter is inaccessible for reasons other than capacity.[132] As discussed below, identifying religious coercion in shelters is a highly individualized inquiry, as it often is in other contexts.[133]

*B. Identifying Religious Coercion in Shelters Post-*Martin

This Note does not dispute that many religiously affiliated shelters play a vital role in providing services and shelter to homeless indi-

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125 *See* Kim, *supra* note 123.

126 *Id.* ("[A]dvocates say people who don't have access to basic necessities aren't in much of a position to make choices, especially when city-funded shelters are frequently full.").

127 *See* Hackworth, *supra* note 107, at 758–59.

128 Martin v. City of Boise, 902 F.3d 1031, 1041 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019) (en banc).

129 *Id.* at 1037 (alteration in original).

130 *Id.* at 1041 (alteration in original).

131 *Id.*

132 *Id.* at 1041–42.

133 *See infra* notes 148–49 and accompanying text.

viduals.[134] In fact, there is a history of churches and religious organizations successfully claiming that local government restrictions on providing services to homeless individuals impermissibly suppress their expression of faith.[135] Not only do faith groups provide necessary services and shelter to people experiencing homelessness, but they have a constitutional right to do so.[136]

But in light of the increasing criminalization of homelessness and the government's expansive reliance on religious shelters,[137] it is quite likely that homeless individuals will have to choose between being arrested or staying at a shelter where they feel coerced into religious activity. Under the Establishment Clause, the government cannot coerce individuals to participate in religious programs,[138] regardless of how effective those programs are at achieving their desired outcomes.[139]

In the context of the criminal justice system, courts have mainly explored Establishment Clause issues in drug and alcohol treatment programs offered in prisons as the only alternative to harsher criminal penalties.[140] Most of these programs are connected in some way to Alcoholics Anonymous (AA) or Narcotics Anonymous (NA). Even though AA and NA are not formally religious programs,[141] courts have found Establishment Clause violations where the government

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134 *See supra* notes 114–21 and accompanying text.

135 *See infra* note 157 and accompanying text.

136 *See infra* Section II.C.

137 *See* FAITH-BASED ORGANIZATIONS, *supra* note 109, at 1 (noting that faith-based organizations provide about thirty percent of emergency shelter beds nationally); Hackworth, *supra* note 107, at 753–57 (stating that government funding of religious charities has become more acceptable over time and that such organizations have "filled the vacuum" created by cutbacks to the welfare state).

138 *See* Lee v. Weisman, 505 U.S. 577, 592 (1992) ("A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion . . . or other matters of opinion or force citizens to confess by word or act their faith therein.").

139 *See* Inouye v. Kemna, 504 F.3d 705, 714 & n.10 (9th Cir. 2007) (finding compelled participation in religion-based drug programs to be unconstitutional, even where the programs seemed fairly effective).

140 *See, e.g.*, Kerr v. Farrey, 95 F.3d 472, 480 (7th Cir. 1996) (comparing the lack of other options for required rehabilitation in *Warner v. Orange Cty. Dep't of Probation*, 870 F. Supp. 69 (S.D.N.Y. 1994), *aff'd*, 173 F.3d 120 (2d Cir. 1999), to the variety of options available in addition to Alcoholics Anonymous (AA) in *O'Connor v. California*, 855 F. Supp. 303 (C.D. Cal. 1994)).

141 In determining whether AA "should be considered 'religion or its exercise,'" the *Warner* court noted that at first glance, AA may not seem like a religious program. 870 F. Supp. at 72. However, factual findings led the court to conclude "that the A.A. meetings plaintiff attended were the *functional equivalent* of religious exercise." *Id.* (emphasis added).

compels participation in them due to their religious "components."[142] These courts assumed that the "God" referenced in the twelve steps was a monotheistic deity that was "fundamentally based on a religious concept of a Higher Power."[143] The AA and NA cases reveal that determining whether a program has substantial religious components is a highly factual inquiry. It seems that the Establishment Clause inquiry turns on the plaintiff's particular experience with the AA/NA program. Courts have found a violation where the plaintiff's participation in AA and/or NA is a condition of parole,[144] probation,[145] or expanded visitation rights.[146]

The *Martin* court was the first federal appellate court to discuss the Establishment Clause in the homeless shelter context.[147] The court clearly believed the requirement to enter the Discipleship Program to stay at the shelter amounted to religious coercion. But it is less clear whether the "overall religious atmosphere" of the shelter alone would rise to impermissible coercion.[148] In the NA context, the Ninth Circuit has found that the mere recitation of "the words 'under God' in the Pledge of Allegiance, or other incidental references," usually do not amount to coercion.[149]

But even if a shelter does not require individuals to enter a specific program like the Discipleship Program, what should courts make of more "passive" acts such as sitting through a prayer or chapel service? In *Lee v. Weisman*, the Supreme Court found that requiring high school students to sit through prayers and religious ceremonies at a graduation violated the Establishment Clause, as it impermissibly

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142 *Inouye*, 504 F.3d at 714 n.9.

143 *Kerr*, 95 F.3d at 480; *see also Warner*, 870 F. Supp. at 72 (citing that plaintiff was told at AA meetings that he could not overcome his addiction without letting God into his life and that most meetings closed with a recitation of the Lord's Prayer). The twelve steps of AA require participants to acknowledge that "a [greater] Power [can] restore [them] to sanity," to "turn [their] will and . . . lives over to the care of God," to admit wrongs to God, and to seek "through prayer and meditation to improve [their] conscious contact with God." ALCOHOLICS ANONYMOUS, THE TWELVE STEPS OF ALCOHOLICS ANONYMOUS (2016), https://www.aa.org/assets/en_US/smf-121_en.pdf. The twelve steps of Narcotics Anonymous are identical but replace "alcohol" with "addiction." NARCOTICS ANONYMOUS, INSTITUTIONAL GROUP GUIDE 2 (1998), https://www.na.org/admin/include/spaw2/uploads/pdf/handbooks/IGG.pdf.

144 *See Inouye*, 504 F.3d at 709–10.

145 *See, e.g.*, *Warner*, 870 F. Supp. at 70, 73 (finding an Establishment Clause violation where atheist plaintiff's participation in AA was a probationary obligation).

146 Griffin v. Coughlin, 673 N.E.2d 98, 99 (N.Y. 1996) (holding that participation in a program modeled after the religious components of AA cannot be a condition for an atheist or agnostic inmate to qualify for expanded family visitation rights).

147 *See supra* notes 94–99 and accompanying text.

148 *Id.*

149 Kerr v. Farrey, 95 F.3d 472, 480 (7th Cir. 1996).

imposed peer pressure on vulnerable minors.[150] Though not every state-imposed religious message that causes offense is a violation,[151] it may be impermissible to put pressure on vulnerable people to conform to a religious message, even when that pressure is not a legal penalty.[152]

If the existence of coercion depends on the degree of choice and the nature of the pressure, then even a prayer during a meal at a homeless shelter may be coercion when the alternative is sleeping outside at risk of prosecution. That kind of pressure is much more severe than the pressure contemplated in the high school prayer cases. Therefore, even in cases where persons experiencing homelessness are not required to affirmatively participate in a religious training program or attend a church service, even passively sitting through a prayer might be considered coercion. Again, this becomes an individualized inquiry.[153] Whether a violation exists depends on the retaliation a homeless person might fear in the specific context. Does the person fear losing a meal and a bed as a result of not sitting through the prayer? The answer may more often than not be yes, especially if the person's alternative is to sleep outside at the risk of criminal prosecution.

C. The Need to Overturn Criminalization Measures to Protect the Free Exercise of Religion

Some might argue that coercion in religious shelters should be addressed through greater government regulation. But this type of oversight triggers issues related to another First Amendment provision—the Free Exercise Clause.[154] Even in cases where the government seeks to *expand* the population served by the religious

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150 505 U.S. 577, 592–93 (1992).

151 *Id.* at 597.

152 *See id.* at 595 (stating that high school students did not reasonably have a choice to skip the religious ceremony intertwined in their high school graduation); *cf.* Tanford v. Brand, 104 F.3d 982, 985–86 (7th Cir. 1997) (finding no constitutional violation where college students can leave the prayer portion of a graduation ceremony without much embarrassment).

153 *See* Rex Ahdar, *Regulating Religious Coercion*, 8 STAN. J. C.R. & C.L. 215, 240 (2012) (suggesting a more subjective, individualized assessment in religious coercion cases because they often involve members of religious minorities or dissenters).

154 U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ."). The tension here between the Free Exercise and Establishment Clauses of the First Amendment is a recurring theme. *See* Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) ("[T]he two Clauses . . . often exert conflicting pressures."); Derek H. Davis, *Resolving Not to Resolve the Tension Between the Establishment and Free Exercise Clauses*, 38 J. CHURCH & ST. 245 (1996) (discussing the clash between the two Clauses).

organization, the organization can still argue that the government is impermissibly suppressing religious expression.

Privately funded shelters, such as religious shelters, have provided and will continue to provide crucial services to individuals experiencing homelessness. But these shelters cannot be the primary means of filling gaps in this nation's social safety net. Moreover, the government's reliance on religious shelters is problematic when it penalizes homeless people for sleeping outside instead of staying in one of these shelters. Even if a shelter does not receive any government funding, Establishment Clause issues arise when the government criminalizes the decision to sleep outside rather than entering a religious shelter.[155] Municipal governments should not force individuals to make this choice between criminal punishment and religious participation. Decriminalization would not only protect the constitutional rights of individuals experiencing homelessness, but would also protect private religious organizations from the imposition of requirements as a result of state entanglement.[156]

Therefore, it is also in the best interest of religious institutions for governments to end the criminalization of homelessness. If governments continue to use penal measures to address homelessness while still relying heavily on religious organizations to provide shelter beds, governments may try to impose regulations on these organizations in order to avoid an Establishment Clause violation. But by increasing oversight of religious shelters, governments may in turn violate the Free Exercise Clause.[157] Organizations may believe that integrating prayer or religious services into their provision of services is a religious mandate that would be unconstitutionally suppressed by greater government oversight.

Historically, the government has targeted religious organizations in order to indirectly regulate individuals experiencing homelessness.

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[155] *See* Martin v. City of Boise, 902 F.3d 1031, 1040–42 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019) (en banc).

[156] *See infra* notes 157–62 and accompanying text.

[157] *See infra* notes 158–61 and accompanying text. Some organizations refused to accept food from the U.S. Department of Agriculture (USDA) in 2016 after it published a rule prohibiting recipient organizations from mandating homeless persons' participation in religious activities. Christian Alexandersen, *No Prayer, No Meal: Shelters Turning Away Government Food Due to New Worship Rules*, PENN LIVE (Oct. 26, 2016), https://www.pennlive.com/news/2016/10/no_prayer_no_food_shelters_tur.html. Though the organizations did not formally challenge the government's attempt to regulate religious practices in these shelters, this is an example of separation of church and state concerns in the regulation of religious shelters. One of the organizations that refused USDA assistance in response to the rule did not even require individuals to pray or attend religious services; it simply refused assistance on the principle that the government should not regulate "matters of faith." *Id.* (quoting Bethesda Mission Executive Director Chuck Wingate).

Some of these organizations argued in court that the government was impermissibly regulating their religious expression under the Free Exercise Clause.[158] Some of these challenges involved regulations that churches alleged restricted their right to serve homeless individuals, such as permit schemes for serving food in parks,[159] building permits,[160] and zoning restrictions.[161] At least one church has also sued a city for confiscating the property of homeless individuals who were invited to sleep on the church property.[162]

Religious organizations should be able to freely exercise their religious tenets by serving and sheltering the poor,[163] but some of these organizations may also believe it is their right to integrate religious programming into the provision of services as the exercise of their religious mandate to evangelize. Section II.B demonstrated that while some shelters engage in objectively coercive practices, regardless of whether the Establishment Clause is invoked by the government's involvement, it is not easy to distinguish when a religious shelter becomes coercive.[164] So, when the government does get involved by forcing individuals to enter religious shelters under threat of arrest, the inquiry becomes even more complicated. The Establishment Clause issue highlighted in *Martin* underscores just one of many reasons that criminalization measures have questionable benefits and tremendous costs.[165] It also illustrates the importance of individualized inquiries into whether an individual experiencing homelessness had a meaningful choice when forced to choose between

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158 *See generally* Goldberg, *supra* note 121, at 84–87 (summarizing the Judeo-Christian obligation to provide charity and shelter the homeless).

159 First Vagabonds Church of God v. City of Orlando, 610 F.3d 1274, 1285–86 (11th Cir. 2010) (finding no Free Exercise Clause violation where an ordinance as applied to a church required it to obtain permits for serving meals to homeless individuals in city parks), *reinstated in part by* 638 F.3d 756 (11th Cir. 2011); *see also* Big Hart Ministries Ass'n v. City of Dallas, No. 3:07-CV-0216-P, 2011 U.S. Dist. LEXIS 128443, at *8–9 (N.D. Tex. Nov. 4, 2011) (involving a religious organization's violations of a food safety ordinance while serving homeless individuals).

160 Family Life Church v. City of Elgin, 561 F. Supp. 2d 978, 986–88 (N.D. Ill. 2008).

161 Stuart Circle Par. v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1236 (E.D. Va. 1996) (holding that zoning restrictions unconstitutionally prevented churches from exercising a "central tenet" of their religion by feeding the poor); Brief for Petitioner at 5, Pac. Beach United Methodist Church v. City of San Diego, 2008 WL 7257242 (S.D. Cal. Jan. 11, 2008) (No. 3.07-cv-02305-LAB-NLS) (asserting that a zoning ordinance prohibiting the operation of "homeless day centers" in residential areas impermissibly restrained plaintiff's religious exercise); Sarah Ritter, *Citing Freedom of Religion, JoCo Church Sues City for Not Letting It Shelter Homeless*, KAN. CITY STAR (Nov. 26, 2019, 2:36 PM), https://www.kansascity.com/news/local/article237787869.html.

162 Fifth Ave. Presbyterian Church v. City of New York, 177 F. App'x 198 (2d Cir. 2006).

163 *See supra* note 153 and accompanying text.

164 *See supra* Section II.B.

165 *See infra* Part IV.

staying in shelter and illegally sleeping outside. Part IV later argues that courts should make an individualized inquiry when assessing the constitutionality of criminalization ordinances in light of the many other functional barriers to shelter that are first discussed in Part III.

III
The Lack of Choice for Individuals Experiencing Homelessness—Even When Shelter Is "Available"

Though *Martin* was a victory for advocates, it was only a small step in combatting the criminalization of homelessness. Even if there are available beds in local shelters that do not involve religious coercion, those shelters are not necessarily the viable alternative Judge Berzon described.[166] The next step in protecting the rights of homeless individuals is to ensure that courts and government officials understand when shelter is not *practically* available even when it is *technically* available, beyond the religious coercion context in *Martin*. To be sure, indoor emergency shelters should always be provided as an option, as they can provide shelter from harsh weather conditions,[167] connect individuals to services,[168] and shield vulnerable populations such as domestic violence victims and children.[169] This Note does not seek to diminish the many benefits that shelters can provide to people experiencing homelessness. But the mere availability of shelter beds does not make criminalization laws any less cruel.

Martin opened a door for courts to consider more than the mere technical availability of shelter beds, no matter what type of shelter these beds are in. But *Martin* only contemplates situations where there are no beds available in local shelters or where the only available beds are in a shelter that imposes coercive religious requirements. Since *Martin*, several lower courts have not found Eighth Amendment violations in cases brought by homeless advocates.[170]

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166 *See* Rankin, *supra* note 8, at 124–25 ("[M]any cities lack sufficient shelter, not only due to an insufficient number of beds, but also due to the functional inaccessibility of existing shelter."). For an overview of the ways in which shelter may be inaccessible to homeless persons, see generally Skinner, *supra* note 1.

167 Homeless individuals are "particularly vulnerable" to suffer from hypo or hyperthermia due to prolonged exposure to extreme weather conditions. Brodie Ramin & Tomislav Svboda, *Health of the Homeless and Climate Change*, 86 J. Urb. Health 654, 655–56 (2009).

168 *Housing and Shelter*, Substance Abuse & Mental Health Servs. Admin., https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/housing-shelter (last visited May 21, 2020).

169 *Safe Horizon Domestic Violence Shelters*, Safe Horizons, https://www.safehorizon.org/domestic-violence-shelters (last visited May 21, 2020).

170 *See infra* notes 224–29 and accompanying text.

Part of this may be due to the increasing frequency of homeless encampment sweeps after *Martin* and other measures that do not involve enacting a formal law.[171]

Beyond the specific Establishment Clause issue presented in *Martin*, this Part provides a broader overview of the reasons a person might not be able to stay in a shelter even if there are beds available. Because the presence of an Eighth Amendment violation turns on whether shelter is "practically available,"[172] this Part seeks to emphasize other factors courts should consider when making this determination. Some of these examples also implicate constitutional or statutory obligations similar to the Establishment Clause issue triggered in *Martin*.

A. Individuals with Disabilities and Medical Conditions

Individuals may not have the choice to stay in a shelter if it does not accommodate their disabilities or would exacerbate their health problems.[173] Shelters are often inaccessible to individuals with disabilities,[174] but are still considered a viable alternative by police when they arrest individuals with disabilities for sleeping outside.[175] The

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[171] *See* HOUSING NOT HANDCUFFS, *supra* note 11, at 40–41 (spotlighting constructive alternative policies to homelessness, including those without formal legislation); NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, TENT CITY, USA: THE GROWTH OF AMERICA'S HOMELESS ENCAMPMENTS AND HOW COMMUNITIES ARE RESPONDING 21 (2017) [hereinafter TENT CITY] (citing a 1342% increase in the number of homeless encampments reported in the last decade); Rankin, *supra* note 32, at 30–34 (detailing the increased frequency of encampment sweeps post *Martin*); *infra* notes 226–29 and accompanying text.

[172] Martin v. City of Boise, 902 F.3d 1031, 1049 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019) (en banc).

[173] For an overview of how criminalization measures exacerbate homeless individuals' medical conditions, see HOUSING NOT HANDCUFFS, *supra* note 11, at 67–70.

[174] *See, e.g.*, *Notice of Proposed Settlement of Class Action Concerning Access to Shelter for Individuals with Disabilities in the New York City Department of Homeless Services (DHS) Shelter System*, N.Y.C. DEP'T OF HOMELESS SERVS. (June 27, 2017), https://www1.nyc.gov/assets/dhs/downloads/pdf/notice-of-butler-settlement-english.pdf (showing that New York City's Department of Homeless Services would make reasonable accommodations to increase availability in shelters for people with disabilities, but only after a class action was brought against the City); Kim, *supra* note 123 (describing "unclear" rules about whether only "ambulatory" individuals are permitted at the largest shelter in Chicago); Nikita Stewart, *As Shelter Population Surges, Housing for Disabled Comes Up Short*, N.Y. TIMES (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/nyregion/as-residents-surge-in-new-york-shelters-housing-for-disabled-comes-up-short.html (illustrating the inaccessibility of many shelters for disabled individuals experiencing homelessness in New York City).

[175] *See* Glover v. City of Laguna Beach, No. SACV 15-01332 AG (DFMx), 2017 U.S. Dist. LEXIS 167501, at *5 (C.D. Cal. June 23, 2017) ("Plaintiffs argue that disabled, homeless people are 'left with the difficult choice of subjecting themselves to the intolerable conditions of the [emergency shelter], or intolerable treatment by [police]' under Defendants' homelessness policy.").

criminalization of homeless people with disabilities may be easier to challenge under the Fair Housing Act or the Americans with Disabilities Act,[176] but cases where homeless individuals have health concerns that do not formally qualify as a disability may be more difficult.

Shelters can prompt health problems or worsen existing ones. To start, individuals experiencing homelessness tend to have compromised immune systems, which place them at a higher risk of contracting infectious diseases.[177] Infectious diseases such as tuberculosis are more likely to be transmitted in overcrowded shelters.[178] Considering that homeless individuals face many more health risks than the general population,[179] criminalization measures that force people to stay in a shelter may prevent them from a more life-sustaining alternative, which may be sleeping outdoors in the absence of permanent housing.

Another consideration for decisionmakers when enacting and enforcing criminalization ordinances is the need for homeless individuals to rest, both during the day and at night. Otherwise healthy individuals can develop a variety of health problems due to lack of sleep.[180] A study of homeless individuals with chronic pain in Toronto showed that poor sleeping conditions, stress of shelter life, lack of safe storage mechanisms for medications, and inability to rest during the

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176 The Fair Housing Act prohibits housing discrimination nationwide on the basis of disability, including in shelters. *See* Daniel Weinberg, *The Housing Rights of Homeless Persons with Disabilities*, COOPER SQUARE COMMITTEE (Aug. 5, 2010), https://coopersquare.org/resources/resources-for-tenants-with-disabilities/homeless. The Americans with Disabilities Act prohibits discrimination on the basis of disability in places of public accommodation, which would also include emergency shelters. *Id.*

177 Ramin & Svboda, *supra* note 167, at 657–58. Homeless persons' increased susceptibility to disease became even more evident during the COVID-19 outbreak. CULHANE ET AL., *supra* note 39, at 2–3; *see also supra* note 39 and accompanying text (summarizing the devastating impact of COVID-19 on the homeless population).

178 Michelle Moffa, Ryan Cronk, Donald Fejfar, Sarah Dancausse, Leslie Acosta Padilla & Jamie Bartram, *A Systematic Scoping Review of Environmental Health Conditions and Hygiene Behaviors in Homeless Shelters*, 222 INT'L J. HYGIENE & ENVTL. HEALTH 335, 342 (2019).

179 For example, the average estimated life expectancy of chronically homeless individuals is forty-two to fifty-two years. Rebecca S. Bernstein, Linda N. Meurer, Ellen J. Plumb & Jeffrey L. Jackson, *Diabetes and Hypertension Prevalence in Homeless Adults in the United States: A Systematic Review and Meta-Analysis*, 105 AM. J. PUB. HEALTH e46, e46 (2015). Moreover, homeless adults are up to five times more likely to be admitted to the hospital than the general population. *Id.* at e47.

180 *See, e.g.*, *Sleep Deprivation Leads to Schizophrenia-Like Symptoms in Healthy Adults, Study*, U. HERALD (July 9, 2014, 6:34 AM), https://www.universityherald.com/articles/10309/20140709/sleep-schizophrenia-symptoms-healthy-adults-bonn-germany.htm (describing the study's findings on the links between sleep deprivation and psychosis, light sensitivity, and severe attention deficits).

day were the greatest barriers to pain management.[181] For individuals experiencing homelessness, especially those with preexisting medical conditions, getting adequate sleep is among the greatest challenges.

Many shelters are only open at nighttime and require people to leave early in the morning.[182] So even those who sleep in shelters at night may need to rest under the shade of a tent or in their car during the day, especially if they have trouble sleeping in crowded shelters or need to rest for medical reasons.[183] Both during the day and at night, individuals should not be criminalized for simply resting or sitting in public.

Several courts reviewing criminalization ordinances have emphasized the life-sustaining act of sleep when viewing homelessness as a status similar to a medical condition.[184] This Note focuses on the example of individuals with disabilities and health conditions to demonstrate a particularly urgent situation in which it is cruel and unusual to punish someone for resting outside. Decisionmakers should consider how individuals with disabilities and other health conditions may truly have no choice but to rest outdoors, even if local shelters technically have space.

B. Individuals with Mental Illness and Substance Use Disorders

Furthermore, overcrowded and noisy shelters may not be a feasible option for those with mental health conditions or substance use disorders.[185] HUD reports that in 2018, approximately twenty percent

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[181] Stephen W. Hwang, Emma Wilkins, Catharine Chambers, Eileen Estrabillo, Jon Berends & Anna MacDonald, *Chronic Pain Among Homeless Persons: Characteristics, Treatment, and Barriers to Management*, 12 BMC FAM. PRAC. 6 (2011).

[182] *See* Hanna Brooks Olsen, *Homelessness and the Impossibility of a Good Night's Sleep*, ATLANTIC (Aug. 14, 2014), https://www.theatlantic.com/health/archive/2014/08/homelessness-and-the-impossibility-of-a-good-nights-sleep/375671.

[183] *Id.*

[184] *See supra* notes 76–81 and accompanying text; *see also infra* note 195 and accompanying text. It is less clear how courts treat ordinances that criminalize camping, such as the act of setting up a tent or tarp, as opposed to sleeping. Kieschnick, *supra* note 10, at 1604–05 (noting that treating a homeless person's act of setting up a tent as conduct and sleeping as status "would mean a person experiencing homelessness during a hurricane or harsh winter could sleep outside on the bare ground but not under a tarp"). But Hannah Kieschnick notes how this distinction should not obviate an Eighth Amendment violation for any individual. *Id.* at 1605.

[185] This Section groups together the discussion of mental health and substance use because much of the existing literature and treatment models group these categories of challenges facing individuals experiencing homelessness. *See* NAT'L COAL. FOR THE HOMELESS, SUBSTANCE ABUSE AND HOMELESSNESS 2 (2009) (describing the co-occurrence of substance abuse and mental illness among individuals experiencing homelessness). Though this Section discusses these conditions together, many homeless individuals may experience one condition without the other.

of the homeless population had a severe mental illness.[186] Individuals experiencing homelessness witness and experience violence at higher rates than the general population, which leads to further trauma.[187] Individuals prone to outbursts may be kicked out of shelters for being a disturbance to others.[188] Individuals with post-traumatic stress disorder are often unable to stay in shelters due to the nature of their condition.[189] Furthermore, many mental health disorders also involve lower-quality sleep or other sleep disorders that are exacerbated by shelter conditions.[190] For individuals with mental illness, shelter may not be available because of requirements or complaints from other shelter residents. But sometimes, these individuals may choose to not go to shelter because they know they cannot get adequate rest there, or because staying in a shelter will exacerbate their mental health conditions.[191] Sleeping around strangers would make anyone anxious, especially those with preexisting mental illness.[192] Government actors should take this into consideration before criminalizing the act of sleeping or being outdoors while homeless.

Shelters may also have requirements barring those who use substances, even in extreme weather conditions.[193] But according to the 2018 HUD annual point in time count, approximately fifteen percent of homeless persons were reported to have chronic substance use dis-

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186 U.S. DEP'T OF HOUS. & URBAN DEV., HUD 2018 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS HOMELESS POPULATIONS AND SUBPOPULATIONS (2018) [hereinafter 2018 HUD PIT COUNT] (listing the results from HUD's annual point in time (PIT) count). Other studies report up to thirty to forty percent. Adam M. Lippert & Barrett A. Lee, *Stress, Coping, and Mental Health Differences Among Homeless People*, 85 SOC. INQUIRY 343, 344 (2015).

187 *See* Molly Meinbresse, Lauren Brinkley-Rubinstein, Amy Grassette, Joseph Benson, Carol Hall, Reginald Hamilton, Marianne Malott & Darlene Jenkins, *Exploring the Experiences of Violence Among Individuals Who Are Homeless Using a Consumer-Led Approach*, 29 VIOLENCE & VICTIMS 122, 125–26 (2014) (stating that sixty-two percent of homeless respondents reported witnessing an attack and forty-nine percent reported being the victim of an attack).

188 *See* Susie Steimle, *Mother and Son Kicked Out of Homeless Shelter for Mental Health Outburst*, KPIX (Nov. 13, 2019, 11:21 PM), https://sanfrancisco.cbslocal.com/2019/11/13/mother-and-son-kicked-out-of-homeless-shelter-for-mental-health-outburst.

189 HOUSING NOT HANDCUFFS, *supra* note 11, at 34.

190 *See generally* Andrew D. Krystal, *Psychiatric Disorders and Sleep*, 30 NEUROLOGIC CLINICS 1389 (2012) (describing the relationship between sleep deprivation and various psychiatric conditions).

191 HOUSING NOT HANDCUFFS, *supra* note 11, at 70 ("[P]eople with schizophrenia experience paranoia particularly in large groups of people, and paranoia, anxiety, hallucinations, and hypervigilance related to post-traumatic stress disorder may make it difficult for people to cope with the noisy and crowded conditions in shelters.").

192 *See id.* (noting the stressful environment of shelters).

193 *See* SKINNER, *supra* note 1, at 19–23 (noting that "homeless individuals with substance abuse problems are frequently barred from emergency shelters, as many require sobriety to access their services").

orders.[194] As *Robinson* stated, "addiction is . . . apparently an illness which may be contracted innocently or involuntarily."[195] Just as the *Robinson* Court prohibited criminalizing addiction, courts should not allow cities to criminalize individuals for sleeping outside if existing shelters in that city bar individuals with substance use disorders.

Despite how difficult it is for individuals to combat substance use disorders, and the need for stable shelter to do so, that disorder may be the very reason they are denied shelter—either because of formal shelter requirements barring substance use, or because shelter is not a conducive environment to those with substance use disorder. The significant hurdles individuals face in shelter when dealing with substance use disorder led to the development of the Housing First approach.[196] This model is an alternative to shelter and prioritizes permanent housing before addressing individuals' substance use issues (among other obstacles) under the belief that housing itself is a treatment.[197] There is evidence that Housing First treatment is more effective than treatment offered in conjunction with temporary housing (i.e. shelter).[198] Part of this may be due to the structure and control of a shelter environment, in contrast to the independence and privacy that comes with permanent housing.[199] The success of the Housing First model points to the shortcomings of temporary shelter for individuals with substance use disorder. Unfortunately, the permanent supportive housing needed for a Housing First model is limited in availability and takes time and money initially to develop,[200] though

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194 2018 HUD PIT COUNT, *supra* note 186.

195 Robinson v. California, 370 U.S. 660, 667 (1962).

196 *Housing First*, *supra* note 119.

197 *Id.*

198 *See* NAT'L ACADS. OF SCIS., ENG'G & MED., PERMANENT SUPPORTIVE HOUSING: EVALUATING THE EVIDENCE FOR IMPROVING HEALTH OUTCOMES AMONG PEOPLE EXPERIENCING CHRONIC HOMELESSNESS 48–50 (2018) (reviewing multiple studies to conclude that "supportive housing improves the housing status of individuals suffering from homelessness, mental illness, and substance abuse"); Deborah K. Padgett, Victoria Stanhope, Ben F. Henwood & Ana Stefancic, *Substance Use Outcomes Among Homeless Clients with Serious Mental Illness: Comparing Housing First with Treatment First Programs*, 47 COMMUNITY MENTAL HEALTH J. 227 (2011) (finding that individuals in Housing First programs had lower rates of substance use and dropped out of the program less frequently than individuals in more traditional treatment first programs).

199 *See* Deborah K. Padgett, Leyla Gulcur & Sam Tsemberis, *Housing First Services for People Who Are Homeless with Co-occurring Serious Mental Illness and Substance*, 16 RES. ON SOC. WORK PRAC. 74, 75 (2006) (describing the tradeoffs and difficulties facing individuals who are in temporary shelter with treatment models).

200 AHAR 2019, *supra* note 2, at ii.

there is ample evidence that permanent supportive housing is ultimately much cheaper for cities than temporary shelters.[201]

C. LGBT Individuals

LGBT discrimination is an incredibly significant barrier that courts should consider in determining the constitutionality of criminalization measures. For example, one survey found that seventy percent of transgender respondents who stayed in a shelter reported being mistreated because of their transgender status.[202] LGBT individuals also disproportionately make up the homeless youth population and are often unaccompanied by adults, making them especially vulnerable to unsheltered homelessness and the juvenile justice system.[203]

The recent Trump Administration proposal to add a HUD rule to allow shelters to turn away transgender individuals highlighted discrimination against transgender individuals on a national level.[204] This policy would only exacerbate existing barriers for transgender people to obtain housing and shelter. A transgender person is nearly four times less likely to own a home than a member of the general population.[205] One survey found that seventy percent of transgender respondents reported some form of mistreatment in a shelter in the past year due to their gender identity.[206] This mistreatment came in various forms, from being forced to dress as the wrong gender to continue staying at the shelter, being kicked out of a shelter after their trans-

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201 NAT'L ACADS. OF SCIS., ENG'G & MED., *supra* note 198, at 58–80 (analyzing in great detail other studies on the cost effectiveness of permanent supportive housing); HOUSING NOT HANDCUFFS, *supra* note 11, at 86–87. There is actually evidence that in New York City, properties in close proximity to supportive housing increase in value compared to other properties in the same neighborhood. FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, THE IMPACT OF SUPPORTIVE HOUSING ON SURROUNDING NEIGHBORHOODS: EVIDENCE FROM NEW YORK CITY 6–7 (2008). Housing First programs are increasingly the preferred method of housing homeless individuals with substance use disorder rather than temporary shelters. HUD reports that 144,000 more permanent supportive housing (PSH) beds were added in 2019. AHAR 2019, *supra* note 2, at 4. PSH programs can also serve individuals or families with disabilities, which is a requirement for federal funding for those programs. *Id.* at 80; *see also* NAT'L ACADS. OF SCIS., ENG'G & MED., *supra* note 198, at 44–48 (describing the physical health benefits of permanent supportive housing).

202 SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 13 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

203 *See infra* notes 209–14 and accompanying text.

204 *See* Revised Requirements Under Community Planning and Development Housing Programs, 24 C.F.R. § 5 (proposed Spring 2019), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53.

205 *See* JAMES ET AL., *supra* note 202, at 176.

206 *Id.*

gender status was discovered, or being verbally, physically, and sexually attacked for being transgender.[207] Another survey of shelters found that only thirty percent were willing to house transgender women with other women, and thirteen percent said they would house transgender women in isolation or with other men.[208] When individuals are penalized for not staying in shelter that is deemed "available," they may lack the ability to stay in such a shelter either because of the discrimination they will face if they enter the shelter or because the shelter may turn them away in the first place.

Furthermore, homeless youth are disproportionately LGBT compared to the general population.[209] LGBT youth also tend to experience homelessness for a longer time than their non-LGBT peers.[210] Many of them are homeless because they were rejected or abused by their family.[211] Many will end up in the juvenile justice system, and among youth entering the juvenile justice system, LGBT youth are twice as likely to have experienced homelessness.[212] LGBT youth frequently avoid shelters out of fear of being turned into the police, their family, or child services.[213] This is not an unfounded fear, as some shelters require youth to report to police before being admitted.[214] Thus, LGBT individuals face functional and formal barriers to shelter that further highlight the involuntariness of sleeping outside.

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[207] *Id.*

[208] CAITLIN ROONEY, LAURA E. DURSO & SHARITA GRUBERG, CTR. FOR AM. PROGRESS, DISCRIMINATION AGAINST TRANSGENDER WOMEN SEEKING ACCESS TO HOMELESS SHELTERS 2 (2016), https://cdn.americanprogress.org/wp-content/uploads/2016/01/06113001/HomelessTransgender.pdf.

[209] *See* ANDREW CRAY, KATIE MILLER & LAURA E. DURSO, CTR. FOR AM. PROGRESS, SEEKING SHELTER: THE EXPERIENCES AND UNMET NEEDS OF LGBT HOMELESS YOUTH 4–5 (2013) (stating that surveys show between nine to forty-five percent of homeless youth are LGBT).

[210] *Id.* at 8.

[211] According to the Williams Institute, 46% of surveyed LGBT homeless youth ran away from home because of family rejection of sexual orientation or gender identity, 43% were forced out by their parents because of their sexual orientation or gender identity, and 32% experienced physical, emotional, or sexual abuse at home. LAURA E. DURSO & GARY J. GATES, WILLIAMS INST., SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICE PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS 4 (2012).

[212] Angela Irvine, *"We've Had Three of Them": Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System*, 19 COLUM. J. GENDER & L. 675, 689 (2010).

[213] MICHAEL PERGAMIT, MICHELLE ERNST, JENNIFER BENOIT-BRYAN & JOEL KESSEL, NAT'L RUNAWAY SWITCHBOARD, WHY THEY RUN: AN IN-DEPTH LOOK AT AMERICA'S RUNAWAY YOUTH 14 (2010), https://www.1800runaway.org/wp-content/uploads/2015/05/Why_They_Run_Report.pdf.

[214] *Id.* at 12.

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These examples highlight just a few instances in which individuals experiencing homelessness lack meaningful choice in whether to sleep or camp outside, even if there are technically beds available in local shelters. In other instances, a shelter may accept an individual, but shelter policies or requirements may lead an individual to choose not to enter. In addition to the religious requirements at issue in *Martin*, individuals often have to separate from family[215] and pets[216] in order to enter. This Note urges courts to consider some of the other ways in which shelter may not be "practically available" to a person experiencing homelessness when determining the constitutionality of criminalization measures.

IV
The Cost of Criminalization

Criminalizing homelessness has clear moral and constitutional implications, but it also is incredibly costly. The ideal solution would be for cities to stop criminalizing homelessness. But given that criminalization is an increasingly popular municipal government response to homelessness,[217] it is also important that judges consider the lack of choices available to homeless individuals when assessing the constitutionality of criminalization measures. Furthermore, cities may have a political preference to litigate and be forced to overturn criminalization laws than to initiate the repeal themselves. Thus, Section IV.A first calls on courts to protect the rights of individuals experiencing homelessness by considering the various ways in which an alternative to sleeping in public may not be available. Then, Section IV.B argues why legislatures and city officials ultimately should end criminalization of homelessness as a practical matter.

A. The Judicial Role in Ending Criminalization

It is clear that in the wake of *Martin* cities feared that courts would overturn their criminalization laws, especially because of the Establishment Clause implications of cities' reliance on religious shel-

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215 Couples and families may have to separate if they are designated for a specific gender. Greg C. Cheyne, *Facially Discriminatory Admissions Policies in Homeless Shelters and the Fair Housing Act*, 2009 U. Chi. Legal F. 459, 462–70 (describing the prevalence and effect of facially discriminatory policies in homeless shelters).

216 Ruby Aliment, Homeless Rights Advocacy Project, No Pets Allowed: Discrimination, Homelessness, and Pet Ownership (Sara Rankin & Kaya Lurie eds., 2016) (summarizing the challenges faced by people experiencing homelessness who own pets).

217 *See supra* notes 11–13 and accompanying text.

ters.[218] The thorny constitutional issues that arise from criminalizing homelessness when the only available shelter beds are in religious shelters were discussed in Part II, which also argues that cities worried about complying with *Martin* should simply repeal criminalization measures to avoid constitutional infirmities and costly litigation. But as discussed in Part III, there are many factual circumstances in which a homeless person may not have practical access to a shelter beyond religious coercion. This means that as criminalization measures are litigated after *Martin*, courts should make very particular factual inquiries into whether a homeless plaintiff was truly deprived of choice when they were punished for sleeping or resting in public space. Not only does this inquiry require assessing the gap between the number of homeless individuals and the number of available shelter beds,[219] but it also requires analysis of why even seemingly available beds may not be practically available to a plaintiff given their factual circumstances.

It is understandable that courts may not feel equipped to make this individualized determination. But when a constitutional right is implicated as it was in *Martin*, courts have greater institutional competence to strike down criminalization ordinances. And while it is in the purview of legislatures and city councils to address homelessness by providing more affordable housing and services, the reality is that governments have turned more to criminalization measures than to providing housing and services.[220] Thus, courts need sufficient understanding about the choices available to particular individuals bringing cases against local governments. Courts throughout the country, including the Supreme Court should it ever grant certiorari on this issue,[221] should reimagine what choice means to an individual experiencing homelessness. Homeless people do not necessarily have a meaningful choice to sleep in a shelter simply because beds are available at a shelter in the jurisdiction.

Some might argue against such an individualized inquiry and such a heavy reliance on the factual circumstances in each case.[222] While this is understandable, the reality is that courts in these cases already

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[218] *See* Brief for League of Oregon Cities, *supra* note 108, at 4 (expressing concern that most shelters in the Ninth Circuit would be impermissibly religious in nature after *Martin*).

[219] *See supra* note 94.

[220] *See supra* notes 11–13 and accompanying text.

[221] *See supra* notes 32–33.

[222] *See* Kieschnick, *supra* note 10, at 1595–96 (cautioning "generally . . . against a more detailed factual inquiry into the voluntariness of a particular plaintiff's conduct in place of this simple number-of-beds-versus-number-of-homeless inquiry" in light of the fact that the Supreme Court said the "substantive limit of the Eighth Amendment is 'to be applied sparingly'" (quoting Ingraham v. Wright, 430 U.S. 651, 667 (1977))).

scrutinize the factual circumstances to assess whether plaintiffs meaningfully lacked choice.[223] Such scrutiny is not only a reality, but also a necessity to ensure that constitutional rights are not being violated. It was necessary to look at the particular facts in *Martin* to discover that plaintiffs were being punished for refusing to attend a religious service in exchange for shelter, which violates the Establishment Clause. Plaintiffs experiencing the barriers to shelter summarized in Part III might be more able to bring claims if courts conducted an individualized analysis.

Furthermore, there will always be new practices that criminalize homelessness more informally after laws are formally struck down in court. There is some evidence that *Martin* simply led local governments in the Ninth Circuit to find other ways to reduce the visibility of homelessness through more informal practices, such as encampment sweeps,[224] mass sheltering, and involuntary treatment for mental health.[225] Encampment sweeps, in particular, are trickier to attack constitutionally under *Martin* because even though such sweeps are supervised by law enforcement, courts do not consider this to be criminal enforcement under Eighth Amendment jurisprudence if there is no threat of arrest.[226] Courts also tend to uphold encampment sweeps when cities contend that they provided notice to homeless individuals and connected them to services during and after the sweep.[227] Furthermore, *Jones* and *Martin* involved municipal ordinances that pro-

[223] *See* Miralle v. City of Oakland, No. 18-cv-06823-HSG, 2018 U.S. Dist. LEXIS 201778, at *3 (N.D. Cal. Nov. 28, 2018) (stating that plaintiffs are able to find shelter outside the area of the encampment); *supra* note 94.

[224] *See supra* note 171 and accompanying text.

[225] Rankin, *supra* note 32, at 30–43.

[226] *See Miralle*, 2018 U.S. Dist. LEXIS 201778, at *3 (noting plaintiffs' failure to show they could not obtain shelter outside the encampment at issue and stating that "Martin does not establish a constitutional right to occupy public property indefinitely at Plaintiffs' option") (citations omitted).

[227] *See id.* at *5–6 (refusing to find Eighth Amendment violation where the city gave notice of encampment sweep and offered temporary shelter). However, it is not necessarily true that notice is given and services are offered when individuals are evicted from public encampments. In fact, the National Law Center on Homelessness and Poverty found that only eleven percent of surveyed cities had formal notice requirements for clearing encampments. TENT CITY, *supra* note 171, at 28.

hibited sleeping in *all* public places,[228] whereas encampment sweeps usually target a specific public place within a city.[229]

Some may also argue that cities are left in a bind because it is costly and time intensive to build affordable housing and zoning laws restrict development.[230] Criminalization measures are portrayed as the immediate, even if temporary, solution to the nation's homelessness crisis.[231] So if we are to wait for cities to step away from criminalization and towards more constructive solutions, courts throughout the country need to be prepared to make individualized inquiries into whether individuals penalized for resting in public space had a meaningful and practical choice to sleep elsewhere, even if shelter beds were technically available.

B. The Legislative Role in Ending Criminalization

However, the costliness of litigation,[232] the necessity of individualized inquiries, and the biases judges bring into individual decisions[233] ultimately point to the need for municipalities to seek solutions other than criminalization. Though courts should be quick to

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[228] *See* Martin v. City of Boise, 902 F.3d 1031, 1049 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019) (en banc) (involving two ordinances that prohibited sleeping in "*any* building, structure or place . . . without permission" and using "any of the streets, sidewalks, parks or public places as a camping place at any time") (citations omitted); Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006) ("[S]o long as there is a greater number of homeless individuals in Los Angeles than the number of available beds, the City may not enforce section 41.18(d) at all times and places throughout the City against homeless individuals . . . ."), *appeal dismissed and vacated as moot upon settlement*, 505 F.3d 1006 (9th Cir. 2007).

[229] *See Miralle*, 2018 U.S. Dist. LEXIS 201778, at *3 (stating that plaintiffs are able to find shelter outside the area of the encampment).

[230] *See* Sarah Holder & Kriston Capps, *The Push for Denser Zoning Is Here to Stay*, CityLab (May 21, 2019), https://www.citylab.com/equity/2019/05/residential-zoning-affordable-housing-upzoning-real-estate/588310 (describing the political controversy around upzoning as a solution to increase affordable housing and address homelessness).

[231] *See* Patt Morrison, *Column: The Supreme Court Could Soon Decide How the American West Deals with Homelessness*, L.A. Times (July 31, 2019, 3:00 AM), https://www.latimes.com/opinion/story/2019-07-30/patt-morrison-theane-evangelis-boise-homeless-los-angeles ("It really ties the hands of states and cities and counties as they're trying to address these issues by taking ordinances that every city has in some form or another historically off the table and creating a constitutional bar to enforcement of those ordinances.") (quoting Theane Evangelis, one of the lead counsel that represented Boise on its appeal to the Supreme Court in *Martin*).

[232] For example, the city of Boise paid its lawyers $75,000 to write the brief requesting certiorari from the Supreme Court and would have paid an additional $225,000 had the Court taken the case. Hayley Harding, *Boise Begins to Ask U.S. Supreme Court to Hear Its Appeal in Homeless Camping Case*, Idaho Statesman (June 3, 2019, 3:21 PM), https://www.idahostatesman.com/news/local/community/boise/article231131103.html.

[233] *See supra* Section I.A.

strike down these laws as unconstitutional, the laws should not be enacted and enforced in the first place.

Criminalization measures ultimately exacerbate homelessness by forcing individuals into the criminal justice system. Homeless people are eleven times more likely to be arrested than the general population.[234] Some law enforcement officers have even expressed that policing the homeless is not a viable solution to homelessness.[235] Even a civil infraction can "mutate" into a criminal consequence such as a misdemeanor or bench warrant, which often leads to greater financial burdens and ineligibility to access shelter, food, and other services.[236]

Therefore, criminalizing homelessness is counterproductive because it makes targeted individuals more likely to remain homeless. The revolving door between homelessness and prison makes it less likely for an individual to access temporary shelter, permanent housing, employment, and government benefits if they have any history with law enforcement.[237] Even aside from direct discrimination, the housing application process and shelter entry disparately impact formerly incarcerated individuals because of how disconnected they have been from the community, with no government identification or past utility bills to give to potential landlords.[238]

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[234] HOUSING NOT HANDCUFFS, *supra* note 11, at 50, 71.

[235] *See* Anita Chabria, *Trump Wants California Cops to Evict Homeless People. They Don't Want That 'Dirty' Job*, L.A. TIMES (Feb. 6, 2020, 5:00 AM), https://www.latimes.com/homeless-housing/story/2020-02-06/homeless-police-trump-santa-rosa-clear-encampment (citing officers' concerns that they lack the social work training to be on the "front lines" of addressing homelessness); Jake Lilly, *Op-Ed: As a Prosecutor, I Believe Denver Should Stop Criminalizing Homelessness*, WESTWORD (May 5, 2019, 6:55 AM), https://www.westword.com/news/prosecutor-jake-lilly-argues-in-favor-of-denvers-initiative-300-11332945 ("It is tempting to call the police about homeless people occupying parks or sidewalks, because if police take them away, the caller will not see the consequences and it keeps us from having to address the underlying problems inherent with poverty.").

[236] Rankin, *supra* note 8, at 107–08.

[237] *See* HOUSING NOT HANDCUFFS, *supra* note 11, at 64 (describing the collateral consequences of criminalizing homelessness); Stephen Metraux, Caterina G. Roman & Richard S. Cho, *Incarceration and Homelessness*, *in* TOWARD UNDERSTANDING HOMELESSNESS: THE 2007 NATIONAL SYMPOSIUM ON HOMELESSNESS RESEARCH 9-6–9-11 (Deborah Dennis, Gretchen Locke & Jill Khadduri eds., 2007) (illustrating the barriers to housing and employment faced by formerly incarcerated individuals); Margot B. Kushel, Judith A. Hahn, Jennifer L. Evans, David R. Bangsberg & Andrew R. Moss, *Revolving Doors: Imprisonment Among the Homeless and Marginally Housed Population*, 95 AM. J. PUB. HEALTH 1747, 1747 (2005) (stating the overrepresentation of both formerly incarcerated individuals among the homeless population, and of individuals who were homeless at the time of arrest in the prison population); Rankin, *supra* note 8, at 101–02 (detailing statistics that demonstrate homeless people's frequent interaction with the penal system).

[238] NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, PHOTO IDENTIFICATION BARRIERS FACED BY HOMELESS PERSONS: THE IMPACT OF SEPTEMBER 11, at 14 (2004) (finding that fifty-four percent of the clients of surveyed service providers were denied

In addition to being ineffective and inhumane, criminalization measures are exorbitantly expensive.[239] For example, San Francisco spent $20.6 million sanctioning homeless people under anti-homeless laws, including the arrest of 125 individuals, in 2015.[240] A study estimated that six Colorado cities spent more than five million dollars enforcing fourteen anti-homeless ordinances between 2010 and 2014.[241] Another study estimated that Seattle and Spokane, Washington spent at least $3.7 million on enforcing their criminalization ordinances over a five year period.[242] And if these criminalization measures lead to the incarceration of homeless individuals, it costs the cities even more money.[243]

So how should cities address homelessness? The greatest need is for more affordable housing, including access to more affordable housing subsidies.[244] There should be protections for tenants at risk of becoming homeless,[245] and also permanent supportive housing for individuals with mental illness, disabilities, or substance use disorders who have already experienced homelessness and need wraparound services in addition to housing.[246] The recent movement to defund the

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housing or shelter services due to lack of identification); Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release*, 3 CRIMINOLOGY & PUB. POL'Y 139, 154 (2004) (describing difficulties in obtaining government identification for formerly incarcerated individuals); Teresa Wiltz, *Without ID, Homeless Trapped in Vicious Cycle*, PEW: STATELINE (May 15, 2017), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/05/15/without-id-homeless-trapped-in-vicious-cycle (summarizing the various barriers homeless individuals face in obtaining identification and receiving services without identification).

[239] *See, e.g.*, HOUSING NOT HANDCUFFS, *supra* note 11, at 71–74 (describing the taxpayer costs of chronic homelessness); Rankin, *supra* note 8, at 109 n.52 (detailing the expensive cost of criminalization practices).

[240] S.F. BUDGET & LEGISLATIVE ANALYST'S OFFICE, POLICY ANALYSIS REPORT: HOMELESSNESS AND THE COST OF QUALITY OF LIFE LAWS 1–2 (2016), https://sfbos.org/sites/default/files/FileCenter/Documents/56045-Budget%20and%20Legislative%20Analyst%20Report.Homelessness%20and%20Cost%20of%20Quality%20of%20Life%20Laws.Final.pdf.

[241] RACHEL A. ADCOCK ET AL., HOMELESS ADVOCACY POLICY PROJECT, TOO HIGH A PRICE: WHAT CRIMINALIZING HOMELESSNESS COSTS COLORADO 25, 37 (Rebecca Butler-Dines et al. eds., 2016).

[242] JOSHUA HOWARD & DAVID TRAN, HOMELESS RIGHTS ADVOCACY PROJECT, AT WHAT COST: THE MINIMUM COST OF CRIMINALIZING HOMELESSNESS IN SEATTLE AND SPOKANE 5 (Sara K. Rankin ed., 2015).

[243] For the high costs of local incarceration, see generally CHRISTIAN HENRICHSON, JOSHUA RINALDI & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF JAILS: MEASURING THE TAXPAYER COST OF LOCAL INCARCERATION (2015).

[244] HOUSING NOT HANDCUFFS, *supra* note 11, at 87–89.

[245] *See generally* TRISTIA BAUMAN & MICHAEL SANTOS, NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, PROTECT TENANTS, PREVENT HOMELESSNESS (2018) (reporting various policies that protect renters and thereby prevent homelessness).

[246] *See* HOUSING NOT HANDCUFFS, *supra* note 11, at 65, 86 (citing research showing that supportive housing, which is permanent housing for formerly homeless individuals in

police has already led some cities to decriminalize their response to homelessness and give more responsibility to social workers.[247] Shifting laws and funds away from the police and to other government agencies that would more productively address homelessness would ultimately save government funds and disentangle homeless individuals from the criminal justice system.[248]

Although this Note advocates for judges to deeply assess the lack of choices available to individuals experiencing homelessness, policymakers must also move away from the narrative that homeless people choose to be homeless instead of in a stable home, to sleep in public over healthier and safer alternatives. Criminalization laws are blatantly counterproductive. But as cities seek alternatives to addressing homelessness, they must keep in mind this lack of choice in order to avoid policies and informal practices that on their face seem to serve the homeless, but in practice rob them of their dignity.[249]

Conclusion

The *Martin* court's discussion of what constitutes choice for a person experiencing homelessness when it comes to coerced religious expression is a step in the right direction for the conversation surrounding the constitutionality of anti-homeless ordinances. But it is only a step. The reality is that individuals experiencing homelessness face many barriers to shelter other than coerced religious expres-

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conjunction with other services, reduces recidivism rates); Adam Shrier, Erica Jackson, Mary Wilson & Nomin Ujiyediin, *Many Inmates Move from Prison to Shelters, Despite Efforts to Get Them Homes*, CityLimits (Jan. 17, 2017), https://citylimits.org/2017/01/17/many-inmates-move-from-prison-to-shelters-despite-efforts-to-get-them-homes (summarizing arguments for supportive housing as a solution to the revolving door between prison and homelessness in New York City).

[247] *See* Marisa Kendall, *How 'Defunding' the Police Could Reframe the Bay Area's Homelessness Crisis*, Mercury News (July 20, 2020, 1:32 PM), https://www.mercurynews.com/2020/07/20/how-defunding-the-police-could-reframe-the-bay-areas-homelessness-crisis (listing proposals by Oakland, San Francisco, Berkeley, and San Jose to shift funds and responsibility away from police and to other community programs regarding homelessness); Tinoco, *supra* note 17 (describing a petition that calls on the Los Angeles Homeless Services Authority to cease partnering with the City's Police Department and the County Sheriff's Department); Vasilogambros, *supra* note 14 (noting that Denver, Albuquerque, and Austin recently involved more mental health and social workers in responding to homelessness rather than primarily relying on police).

[248] *See supra* notes 239–43 and accompanying text (describing the financial ramifications of criminalizing homelessness).

[249] *See, e.g.*, *supra* note 44 and accompanying text (discussing how the mayor of Sacramento advocates for a right to shelter but also an "obligation to use it"); *supra* note 51 and accompanying text (citing New York governor's plan to reduce the visibility of homeless people on subways by connecting them to services while also using police to address quality of life issues).

sion.[250] The Establishment Clause issue presented in *Martin* is just one example of when shelter is not practically available to individuals experiencing homelessness, even when beds are technically available. A person's gender identity, disability, or experience with substance use are additional examples of factors that may make shelter practically inaccessible. To simply say that it is no longer an Eighth Amendment violation to prosecute someone for sleeping outside because there were beds available in a shelter undermines constitutional conceptions of autonomy and dignity.

Not only do courts need to reconsider the meaning of choice to an individual experiencing homelessness when considering the legality of criminalization ordinances, but cities also must stop creating these laws and repeal existing ones. Enforcing these laws is counterproductive, as it brings more homeless individuals into the criminal justice system and thereby drives people further into homelessness.[251] Courts should acknowledge the involuntariness of sleeping outside for an individual experiencing homelessness, even if shelters appear to be available in that jurisdiction. Ultimately, homelessness must be addressed not through criminalization, but through solutions that are focused on more than merely reducing the visibility of homelessness.[252]

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[250] *See supra* Part III.

[251] *See supra* notes 15, 234–38 and accompanying text.

[252] *See supra* notes 8–16 and accompanying text (describing the increased visibility of homeless people in cities and summarizing how cities use criminal statutes to attempt to reduce their visibility).