

THE LIMITS OF NEGATIVE RIGHTS CLAIMS IN SOCIAL CHANGE LITIGATION: A DISABILITY LAW PERSPECTIVE ON GRANTS PASS

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I. INTRODUCTION

In its recent decision in *City of Grants Pass v. Johnson*,¹ the Supreme Court rejected a constitutional challenge to a municipality's punitive approach to homelessness. The Court overturned a line of cases, led by the Ninth Circuit's decision in *Martin v. City of Boise*,² that had imposed constitutional restrictions on such punitive responses.³

In this paper, I offer a disability rights perspective on *Grants Pass*. Note that I use the indefinite article. There are no doubt many perspectives from which one could view *Grants Pass* through the lens of disability. For example, given the very large proportion of homeless individuals who have disabilities,⁴ one might see the criminalization of homelessness at issue in *Grants Pass* as a descendant of the state's employment of vagrancy laws—and, before that, “ugly laws”—to criminalize manifestations of disability in public space.⁵

I want to explore a different disability-related angle on *Grants Pass*. In particular, I want to examine the case as an example of the use of litigation as a means of seeking social change. I believe we can gain some insight by comparing the litigation against the criminalization of homelessness exemplified by *Grants Pass* and *Martin* with the successive waves of litigation against institutionalization of disabled people.⁶ The early wave of deinstitutionalization litigation, brought in the 1960s and 1970s, relied heavily on negative rights theories under the Constitution—particularly the Fourteenth Amendment's Due Process Clause. The cases brought under those theories were largely successful in making it harder

1. *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024).

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

3. For discussions of the litigation spawned by *Martin*, see Mila Versteeg et al., *The New Homelessness*, 113 CALIF. L. REV. (forthcoming 2025); Rachel Cohen, *The Little-Noticed Court Decision That Changed Homelessness in America*, VOX (June 12, 2023), <https://www.vox.com/23748522/tent-encampments-martin-boise-homelessness-housing> [<https://perma.cc/S7RJ-8P85>].

4. See Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 10 (2012); Cf. Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CALIF. L. REV. 559, 567 (2021) (noting that under “[t]he federal definition of chronic homelessness” an individual must “have a documented qualifying disabling condition—such as a physical disability, untreated mental illness, or a chronic health problem—that prevents them from working”).

5. See SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* (2009); Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 917 (2019); Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1671 (2021); Rankin, *supra* note 4, at 581.

6. For an overview of the successive waves of litigation challenging the institutionalization of disabled people, see Bagenstos, *supra* note 4.

for states to commit people to institutions and in encouraging them to release people from institutions. But they provided no leverage to force states to provide services in community-based settings. The result was disinvestment in disability services, homelessness, and what is often called “transinstitutionalization”—a shift from state-operated hospitals and disability institutions to jails, prisons, and congregate privately operated facilities.

It was only after Congress adopted the Americans with Disabilities Act (ADA), and deinstitutionalization advocates began relying on disability discrimination theories, that those advocates grew effective at pushing states to provide the services needed to integrate disabled people into their communities. The Supreme Court’s 1999 decision in *Olmstead v. L.C. ex rel. Zimring*,⁷ which held that the ADA requires states to serve individuals with disabilities in the most integrated setting appropriate, was the crucial turning point. *Olmstead* created something approaching a positive right to receive services in the community.⁸ And advocates effectively used the case to provoke major expansions of community-based services in many states.⁹

Martin, *Grants Pass*, and similar homelessness anti-criminalization litigation strongly resembles the first wave of deinstitutionalization litigation. Like the early deinstitutionalization cases, the anti-criminalization cases relied on constitutional claims asserting negative rights—though here the rights were doctrinally rooted in the Eighth Amendment’s Cruel and Unusual Punishments Clause rather than the Fourteenth Amendment’s Due Process Clause. As in the early deinstitutionalization cases, the negative rights framing significantly limited the effectiveness of the doctrine in achieving the goals of the advocates who brought the cases. The plaintiffs’ victories in *Martin* and *Grants Pass* provided a basis to challenge particularly egregious practices of directly criminalizing homelessness, but they also left municipalities substantial tools to achieve effectively the same result through only slightly different means.¹⁰ That was true even before the Supreme Court shut this line of litigation down in its own *Grants Pass* decision.

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

8. See Mark C. Weber, *Home and Community-Based Services, Olmstead, and Positive Rights: A Preliminary Discussion*, 39 WAKE FOREST L. REV. 269 (2004).

9. See Bagenstos, *supra* note 4, at 33–37.

10. See, e.g., Rankin, *supra* note 4, at 565 (arguing that “*Martin* may have sparked at least three unintended and decidedly negative developments for unsheltered homeless people: (1) more frequent and less regulated encampment sweeps as a pipeline to confinement; (2) renewed interest in involuntary commitment, conservatorships, and forced treatment; and (3) efforts to round up unsheltered people into congregate FEMA-style tents or camps”).

I argue that homeless advocates could profitably take a lesson from deinstitutionalization litigation by framing their claims as enforcing the integration mandate under the disability discrimination laws. Although that mandate has come under increasing judicial pressure lately,¹¹ it continues to serve as an effective tool to encourage states to provide services to individuals with disabilities in their homes and communities—notably including providing housing and supportive services to disabled individuals.¹² Given the high representation of individuals with disabilities among homeless persons, a litigation strategy that relies on the disability discrimination laws can provide important leverage for homeless advocates.

My argument proceeds as follows. In Part II, I analyze the *Grants Pass* decision, including its background (Part II.A.), its holding (Part II.B.), and the social vision underlying Justice Gorsuch's Opinion of the Court (Part II.C.). In Part III, I draw out the parallel between homelessness litigation and the deinstitutionalization litigation engaged in by disability rights advocates. In Part III.A., I show how the doctrine rejected in *Grants Pass* was significantly limited by its framing as an individual negative right—and that the limitations were apparent before the Supreme Court threw out the plaintiffs' claims. In Part III.B., I show how litigation under the integration mandate offers a more promising approach. In Part IV, I offer a brief conclusion.

II. THE *GRANTS PASS* DECISION

In this section, I describe the Supreme Court's decision in *Grants Pass*. I begin with the case it overturned—the Ninth Circuit's decision in *Martin*.¹³ In Part II.A., I explain that *Martin* held that criminalizing sleeping in public places in a municipality in which the number of homeless people exceeded available shelter beds violated the Eighth Amendment's Cruel and Unusual Punishments Clause. Following *Martin*, district courts throughout the Ninth Circuit enjoined cities from arresting individuals who slept on the streets and in other public places. Given the exceptionally high political salience of the homelessness issue, and intense public concerns about urban disorder more broadly, municipalities constrained by *Martin* sought a vehicle to challenge that decision in the Supreme Court. The Court responded by granting certiorari, and

11. See, e.g., *United States v. Mississippi*, 82 F.4th 387 (5th Cir. 2023).

12. See, e.g., *Brown v. D.C.*, No. CV 10-2250 (PLF), 2024 WL 5252074 (D.D.C. Dec. 31, 2024).

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

ultimately reversing the Ninth Circuit, in *Grants Pass*.¹⁴ Part II.B. describes the Court's constitutional holding, whose bottom line was that laws criminalizing sleeping on public property permissibly punish acts and do not create a status crime in violation of the Eighth Amendment. The holding in *Grants Pass* reflected the Court's analysis of Eighth Amendment doctrine. But it also drew on a social vision. Part II.C. describes that social vision—a Tocquevillian one in which good people, working in their communities in local governments and civil society, are committed to trying to solve the difficult, “polycentric” problem of homelessness,¹⁵ and in which judges have neither the knowledge nor the legitimacy to displace these democratic efforts.

A. The Ninth Circuit's *Martin* Doctrine

Martin was brought by several homeless individuals who had previously been convicted of violating Boise's “anti-camping” and “disorderly conduct” ordinances for sleeping in the streets. They sued the city to challenge the constitutionality of applying those ordinances to people who had nowhere else to go. In a 2019 opinion, the Ninth Circuit upheld their claims. The court concluded that the Cruel and Unusual Punishments Clause “preclude[s] the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter.”¹⁶

Martin relied principally on the Warren Court decision in *Robinson v. California*.¹⁷ *Robinson* held that the Cruel and Unusual Punishments Clause prohibits the government from making it a crime to be addicted to drugs.¹⁸ Reading *Robinson* to bar the criminalization of a “status,” the

14. See Karen M. Tani, *Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 25 (2024) (observing that the Court in *Grants Pass* responded to “localities’ pleas to be able to impose criminal penalties on homeless residents occupying their public spaces,” lest “citizens in the West . . . continue to face ‘crime, fires, the reemergence of medieval diseases, environmental harm, and record levels of drug overdoses and deaths on public streets,’ [to which] their governing officials would be unable to respond effectively”).

15. The *Grants Pass* Court did not use this term, which was made famous in the legal literature by Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978). But Justice Gorsuch's opinion for the Court resonates strongly with Fuller's analysis.

16. *Martin*, 920 F.3d at 615.

17. *Robinson v. California*, 370 U.S. 660 (1962).

18. See *id.* at 666 (“[W]e deal with a statute which makes the ‘status’ of narcotic addiction a criminal offense, for which the offender may be prosecuted ‘at any time before he reforms.’ California has said that a person can be continuously guilty of this offense,

Ninth Circuit held that the Boise ordinances, as applied to homeless individuals without another place to sleep, criminalized the status of homelessness in violation of the Constitution: “just as the state may not criminalize the state of being homeless in public places, the state may not criminalize conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets.”¹⁹ *Martin* emphasized that its holding was “a narrow one”:

We hold only that so long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters, the jurisdiction cannot prosecute homeless individuals for involuntarily sitting, lying, and sleeping in public. That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.²⁰

But that “narrow” holding was still too broad for many judges and public officials. Dissenting from denial of rehearing en banc in *Martin*, Judge Milan Smith called the court’s ruling a “misguided” one that “badly misconstrued not one or two, but three areas of binding Supreme Court precedent, and crafted a holding that has begun wreaking havoc on local governments, residents, and businesses throughout our circuit.”²¹ When the City of Boise sought certiorari from the Supreme Court, supporters of the City’s petition filed twenty amicus briefs—a truly unusually large number. But the Supreme Court denied certiorari, likely owing to the lack of a circuit conflict.²²

B. The Supreme Court’s Ruling in Grants Pass

Over the next few years, however, public homelessness became a major political issue, particularly in large West Coast cities—cities that

whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.”); *id.* at 667 (“We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.”).

19. *Martin*, 920 F.3d at 617 (cleaned up).

20. *Id.*

21. *Id.* at 590 (Milan Smith, J., dissenting from denial of rehearing en banc).

22. *City of Boise, Idaho v. Martin*, 140 S. Ct. 674 (2019).

happened to be in the Ninth Circuit.²³ And those cities increasingly saw the *Martin* doctrine, and a set of district court decisions implementing that decision across the circuit, as a major obstacle to taking their desired actions to get homeless people off of their streets.²⁴ When the Ninth Circuit relied on *Martin* to hold that the City of Grants Pass, Oregon, “cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go,”²⁵ the Supreme Court took the opportunity to jump in. The Court granted the City’s petition for certiorari and reversed in a 6–3 vote.

Justice Gorsuch wrote for the majority. He began by stating that the Cruel and Unusual Punishments Clause “focuses on the question what method or kind of punishment a government may impose after a criminal conviction, not on the question whether a government may criminalize particular behavior in the first place or how it may go about securing a conviction for that offense.”²⁶ Although he did not quite *hold* that the Clause was limited to this area of “focus[],” he did note forebodingly that the punishments the City imposed for violation of its anti-camping ordinances—fines, orders prohibiting camping in public parks, and jail terms—are common and hardly cruel and unusual in themselves.²⁷ Gorsuch then suggested that any constitutional concern with criminalizing “status” would find its home in the Fifth Amendment’s Due Process Clause rather than the Eighth Amendment’s Cruel and Unusual Punishments Clause.²⁸

But Gorsuch recognized that “no one has asked us to reconsider *Robinson*.”²⁹ He concluded that “[p]ublic camping ordinances like those before us are nothing like the law at issue in *Robinson*.”³⁰ The camping

23. See, e.g., Marisa Kendall, *One Issue Trump and Newsom Agree On? Homeless Encampments*, CAL. MATTERS (Nov. 8, 2024), <https://calmatters.org/housing/homelessness/2024/11/trump-agenda-homelessness/> [<https://perma.cc/3GFY-MKZT>].

24. See *City of Grants Pass v. Johnson*, 603 U.S. 520, 534 (2024) (“As Judge Smith put it, ‘[i]f one picks up a map of the western United States and points to a city that appears on it, there is a good chance that city has already faced’ a judicial injunction based on *Martin* or the threat of one ‘in the few short years since [the Ninth Circuit] initiated its *Martin* experiment.’”) (quoting *Johnson v. City of Grants Pass*, 72 F.4th 868, 940 (9th Cir. 2023) (Milan Smith, J., dissenting from denial of rehearing en banc)).

25. *Grants Pass*, 72 F.4th at 896 (9th Cir. 2023), *rev’d*, 603 U.S. 520 (2024).

26. *Grants Pass*, 603 U.S. at 542–43 (cleaned up).

27. See *id.*

28. See *id.* at 544.

29. *Id.* at 546.

30. *Id.*

ordinances, he determined, criminalize acts rather than a “mere status”: “Grants Pass forbids actions like ‘occupy[ing] a campsite’ on public property ‘for the purpose of maintaining a temporary place to live.’”³¹ And, he said, the ordinances apply equally to someone who “is homeless, a backpacker on vacation passing through town, or a student who abandons his dorm room to camp out in protest on the lawn of a municipal building.”³² As a result, they do not criminalize the status of homelessness; they criminalize certain actions that homeless or non-homeless people might undertake. And a state’s decision to criminalize particular acts, he concluded, cannot violate the Eighth Amendment.

C. The Social Vision of Grants Pass

Justice Gorsuch’s majority opinion rests on more than mere parsing of the constitutional text and prior cases. It also relies on a particular social vision.³³ That vision is broadly Tocquevillian—it starts from the premise that people working together in their own communities, through local government and civil society organizations, are in the best position to address difficult, multifaceted social problems. And it sees homelessness as just such a problem—one in which the local *demos* is actively engaged. The following paragraph towards the end of Gorsuch’s opinion, which quotes Tocqueville, encapsulates the point:

Homelessness is complex. Its causes are many. So may be the public policy responses required to address it. At bottom, the question this case presents is whether the Eighth Amendment grants federal judges primary responsibility for assessing those causes and devising those responses. It does not. Almost 200 years ago, a visitor to this country remarked upon the “extreme skill with which the inhabitants of the United States succeed in proposing a common object to the exertions of a great many men, and in getting them voluntarily to pursue it.” 2 A. de Tocqueville, *Democracy in America* 129 (H. Reeve transl. 1961). If the multitude of amicus briefs before us proves one thing, it is that the American people are still at it. Through their voluntary associations and charities, their elected representatives and appointed officials, their police officers and mental health professionals, they display that same energy and skill today in

31. *Id.* (quoting GRANTS PASS, OR., MUN. CODE §§ 5.61.030, 5.61.010 (2024)).

32. *Grants Pass*, 603 U.S. at 546–47.

33. I draw the concept of “social vision” from HENRY J. STEINER, *MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS: A STUDY OF TORT ACCIDENT LAW* (1987).

their efforts to address the complexities of the homelessness challenge facing the most vulnerable among us.³⁴

Earlier in his opinion, Gorsuch highlighted the role of civil society in addressing homelessness. He said, “[a]s they have throughout the Nation’s history, charitable organizations serve as the backbone of the emergency shelter system in this country, accounting for roughly 40 percent of the country’s shelter beds for single adults on a given night.”³⁵ And he noted that “[m]any private organizations, city officials, and States have worked, as well, to increase the availability of affordable housing in order to provide more permanent shelter for those in need,” but that they had concluded that additional tactics were necessary as well.³⁶

In short, Gorsuch saw particular communities, and their governments and local charitable organizations, as attempting in good faith to solve a difficult problem with significant tradeoffs. And he saw judges as “removed from realities on the ground” and interfering with local experimentation and democracy.³⁷ In his final substantive sentence, Gorsuch declared: “The Constitution’s Eighth Amendment serves many important functions, but it does not authorize federal judges to wrest those rights and responsibilities from the American people and in their place dictate this Nation’s homelessness policy.”³⁸

On one reading, the social vision expressed in Justice Gorsuch’s majority opinion is fully sufficient to dispose of the plaintiff’s constitutional claim. If homelessness is a difficult and multifaceted policy problem, one that can likely be solved only by a mix of service provision and enforcement of conduct rules—all of which requires the cooperation and coordination of multiple agencies in and out of government—then it would not be appropriate for the courts to step in at a single point in the process and enjoin one aspect of the complex response to that problem. That is particularly so where the courts would be intervening on the basis of an individualistic constitutional doctrine like the Eighth Amendment’s Cruel and Unusual Punishments Clause.

34. *Grants Pass*, 603 U.S. at 560.

35. *Id.* at 531 (cleaned up).

36. *Id.*

37. *See id.* at 556.

38. *Id.* at 560.

III. PARALLELS WITH DEINSTITUTIONALIZATION LITIGATION—AND LESSONS WE CAN LEARN

My goal in this paper is not to defend the *Grants Pass* decision, or even to assess the Court's analysis of the Eighth Amendment question. On those points, my sympathies lie with Justice Sotomayor's terrific dissent.³⁹ Rather, my goal is to highlight the strong resemblance between the litigation that resulted in *Grants Pass* and the first wave of deinstitutionalization litigation. When we look at cases like *Grants Pass* through the lens of the history of deinstitutionalization litigation, I submit, we can gain a better understanding of why the Eighth Amendment approach was always likely to be extremely limited in addressing punitive approaches to homelessness. And we can see the opportunity to engage different litigation strategies—strategies relying on the post-*Olmstead* wave of deinstitutionalization cases—that may provide greater traction in obtaining the services necessary to address homelessness in a non-punitive manner.

A. Constitutional Negative Rights Claims in Homelessness and Deinstitutionalization Litigation

Although the cases *Grants Pass* exemplifies were brought as institutional reform litigation—and they led to substantial changes in policy across the Western United States while the Ninth Circuit's *Martin* rule was in effect—the claims in those cases rested on a constitutional doctrine that provides negative rights to individuals. The Eighth Amendment's Cruel and Unusual Punishments Clause provides individuals with a shield against unduly harsh government action. It does not guarantee any particular positive action on the part of the state. Nor does it say anything in particular about policy decisions that might affect large numbers of people. The Cruel and Unusual Punishments Clause thus would not appear to be a fruitful tool for ensuring that states and localities

39. Justice Sotomayor ably encapsulated her argument in the first paragraph of her dissenting opinion:

Sleep is a biological necessity, not a crime. For some people, sleeping outside is their only option. The City of Grants Pass jails and fines those people for sleeping anywhere in public at any time, including in their cars, if they use as little as a blanket to keep warm or a rolled-up shirt as a pillow. For people with no access to shelter, that punishes them for being homeless. That is unconscionable and unconstitutional. Punishing people for their status is "cruel and unusual" under the Eighth Amendment.

Id. at 563–64 (Sotomayor, J., dissenting).

provide housing and other services necessary to keep people from becoming homeless.

In this way, the *Martin* wave of homelessness litigation strongly resembled the first wave of deinstitutionalization litigation that crested in the 1970s. Those cases, too, relied heavily on negative rights claims brought under the Constitution—though the deinstitutionalization cases looked mainly to causes of action under the Due Process Clause rather than the Cruel and Unusual Punishments Clause. Advocates in those cases “pursued two lines of due process doctrine: (1) a line of procedural limitations on involuntary commitment and treatment; and (2) a line of substantive guarantees of treatment for people confined to state institutions.”⁴⁰

Like the *Martin* wave of litigation, the early deinstitutionalization cases experienced substantial initial successes. But those successes soon confronted important limits. Under either theory, the plaintiff would not receive constitutional protection unless the state affirmatively acted to restrain an individual’s liberty. Individuals received procedural due process protection only if the state sought to confine them involuntarily to an institution. As a result, the procedural due process theory could not protect them if they made a choice to enter an institution because the state had not provided any alternative. That theory “could keep states from committing people to mental hospitals, but it provided no resources for obtaining necessary mental health services in the community.”⁴¹ The substantive right-to-treatment theory, too, ultimately rested on “a quid pro quo—if states were to confine people for care and treatment, . . . they were bound to actually provide that treatment.”⁴² Because the right to treatment “still was conditioned on state commitment or custody,”⁴³ it could not stop a state from simply disinvesting in services for people with disabilities—both in and out of institutions. And that was largely what happened—resulting in part in an earlier iteration of the homelessness problem that came to the Court in *Grants Pass*.⁴⁴

Even before the Supreme Court overturned the *Martin* doctrine in *Grants Pass*, the limitations of that doctrine were becoming apparent. As Professor Wright describes, those limitations, like the limitations of the theories on which the early deinstitutionalization cases rested, stemmed

40. Bagenstos, *supra* note 4, at 22.

41. *Id.* at 24.

42. *Id.* at 25.

43. *Id.* at 28.

44. *See id.* at 21 (arguing that in the 1970s and 1980s “the coalition of deinstitutionalization advocates and fiscal conservatives largely achieved their goal of closing and downsizing institutions [but] that deinstitutionalization advocates were less successful in achieving their goal of developing community services”).

from the doctrine's reliance on a purely negative right: "*Martin* disclaims any obligation on the part of any government to provide any housing on any terms, let alone any constitutional right to housing. Rather, the *Martin* court's holding is merely that otherwise nonculpable homelessness cannot be punished consistent with the prohibition against cruel and unusual punishment."⁴⁵

The negative rights structure of the *Martin* doctrine put pressure on the question whether homeless individuals lacked the "option of sleeping indoors"—the key question on which an individual's entitlement to protection under that doctrine would turn.⁴⁶ If shelter beds were in some sense available in the municipality, but a homeless individual deemed them unsafe, inadequate, subject to intolerable behavioral conditions, or otherwise inappropriate, the protection afforded the individual would be uncertain at best.⁴⁷ More fundamentally, *Martin* took for granted that the government could force people to choose between homeless shelters, jail, or exile from the community.⁴⁸ The result was to encourage municipalities to involuntarily commit homeless individuals to psychiatric and other facilities and to otherwise engage in "transcarceration."⁴⁹

When lawyers and movements litigate for social change, they rely on the tools that are at hand. It is essentially inevitable that those tools will have limitations. And that is especially true when advocates for disempowered or outcast groups are seeking to overturn popular policies. I do not criticize the lawyers in *Martin*, *Grants Pass*, and the other

45. R. George Wright, *Homelessness, Criminal Responsibility, and the Pathologies of Policy: Triangulating on A Constitutional Right to Housing*, 93 ST. JOHN'S L. REV. 427, 436–37 (2019) (footnotes omitted).

46. *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 674 (2019).

47. See Jamelia N. Morgan, *Policing Marginality in Public Space*, 81 OHIO ST. L.J. 1045, 1059–60 (2020).

48. See Ben A. McJunkin, *The Negative Right to Shelter*, 111 CALIF. L. REV. 127, 162–63 (2023).

49. See Rankin, *supra* note 4, at 590 ("[C]ities are embracing transcarceration post-*Martin*, forcibly confining unsheltered people through (1) more frequent and less regulated encampment sweeps; (2) more robust paths to involuntary commitment, conservatorships, and forced treatments; and (3) increased efforts to round unsheltered people into congregate FEMA-style tents or camps. Each of these developments promise to reduce the visibility of homelessness, but none promises to protect unsheltered people from being punished for the 'unavoidable consequences of being human.'"); see also Carl Wu, *Out of Sight, Out of Mind: Removing Unhoused People by Proxy of Mental Illness*, 26 U. PA. J.L. & SOC. CHANGE 333, 343–44 (2023) (noting that California responded in part to *Martin* by "enact[ing] the Community Assistance, Recovery and Empowerment ('CARE') Act, a state-wide apparatus of courts that, via petition, enroll individuals with mental illness in court-ordered treatment plans, with threats of hospitalization and conservatorship if one fails to abide by its terms").

homelessness cases for relying on doctrinal tools that have limitations.⁵⁰ But I do think that the limitations of the Cruel and Unusual Punishments doctrine articulated in *Martin* were apparent from the beginning. And the social vision of Justice Gorsuch's *Grants Pass* majority helps to explain why.

Homelessness is a systemic issue across many jurisdictions. The basic causes do not flow from homeless individuals but from broader structural factors: "At the individual level, the immediate trigger may be a health issue or loss of work, but these factors mask the more critical systemic cause: a fundamental lack of affordable housing."⁵¹ As a leading treatment explains, "Homelessness is a Housing Problem."⁵²

Against this problem, the individual negative rights claims asserted in the *Martin* line of cases seems at once to demand too much and too little. They seem to demand too much of public officials in local communities, responding to their Tocquevillian electorates, who feel the need to address their constituents' concerns about public order right now. To say that any effective response to those concerns must wait until all of the communities in a region or housing market can coordinate to provide sufficient affordable housing (or effectively encourage private parties to provide sufficient affordable housing) feels untenable politically.

On the flip side, *Martin*'s individual negative rights claims seem to demand too little, because all they do is prevent cities from prosecuting people who have no choice but to live on the streets. They do not do anything to require cities, the state, or anyone else to provide the housing

50. There are, of course, big questions here about the role of litigation, legal advocacy, and elite advocacy in general in organizing disempowered people and promoting their power and interests. These questions are widely discussed in a variety of places in the legal and legal-adjacent literatures. See, e.g., I. Bennett Capers, *Reading Michigan v. Bryant, "Reading" Justice Sotomayor*, 123 YALE L.J. FORUM 427, 434 (2014) (noting the "recurring theme in Critical Race Theory . . . of dismantling the master's house using the master's tools"); see also Margo Schlanger, *Stealth Advocacy Can (Sometimes) Change the World*, 113 MICH. L. REV. 897 (2015) (discussing several strands of this debate); Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713 (2011) (discussing and updating the Critical Legal Studies critique of rights). I have occasionally contributed to this literature myself. See, e.g., Samuel R. Bagenstos, *Litigation for the People*, DISSENT, Fall 2020. Doing so here would take me far beyond the scope of this paper, however.

51. Jonathan Bertulis-Fernandes, *Progressive Property Theory and the Wicked Problem of Homelessness: The Case for A National Right to Shelter*, 64 B.C. L. REV. 1681, 1683 (2023).

52. GREGG COLBURN & CLAYTON PAGE ALDERN, *HOMELESSNESS IS A HOUSING PROBLEM: HOW STRUCTURAL FACTORS EXPLAIN U.S. PATTERNS* (2022) (arguing that homelessness in the U.S. is primarily driven by structural housing market conditions, such as housing supply shortages and rental costs, rather than individual factors like mental illness or substance abuse).

that is necessary to address the problem of homelessness. There is thus a substantial mismatch between the doctrinal tools on which advocates relied in *Martin* and *Grants Pass* and the problem they were seeking to address.

B. A Shift Toward a (More) Affirmative Right?

As the limits to the first wave of deinstitutionalization litigation became apparent, disability rights advocates moved beyond constitutional negative rights claims. They increasingly emphasized the “most integrated setting” requirement imposed by federal disability discrimination statutes—notably the Americans with Disabilities Act and the Rehabilitation Act.⁵³ That requirement, as elaborated in the Supreme Court’s *Olmstead* decision and subsequent cases, provided substantial traction—not just in preventing institutionalization but in promoting states’ implementation of robust community-based services.⁵⁴

The “most integrated setting” requirement imposed under the ADA and the Rehabilitation Act has a crucial feature that sets it apart from individual negative rights claims. Rather than being focused on preventing some particular negative treatment of some particular individual, the integration requirement is pitched at a higher level of government decision-making—the level of program administration. The regulations establishing the integration requirement provide that a state must “administer” its services in the most integrated setting appropriate.⁵⁵ And the Supreme Court’s *Olmstead* decision, the leading case implementing that requirement, explicitly required courts to attend to how states allocate resources across “a large and diverse population of persons with . . . disabilities.”⁵⁶

Relying on this aspect of the integration mandate, advocates have generated a new wave of deinstitutionalization litigation—one that has avoided many of the significant limitations of the earlier cases. Notably, they have employed the integration mandate not just to bar the door to

53. See 28 C.F.R. § 35.130(d) (1991) (regulation implementing Title II of the Americans with Disabilities Act) (“A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”); see also 45 C.F.R. § 84.76(b) (1977) (regulation implementing Section 504 of the Rehabilitation Act) (“A recipient shall administer a program or activity in the most integrated setting appropriate to the needs of a qualified person with a disability.”).

54. See Bagenstos, *supra* note 4, at 31–40 (2012); see also Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding “We the People”: The Disability Rights Cases*, 104 COLUM. L. REV. 49, 56–59 (2004) (discussing *Olmstead* as social change litigation).

55. 28 C.F.R. § 35.130(d); 45 C.F.R. § 84.76(b).

56. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 604 (1999).

involuntary commitment but also “to obtain high-quality community services for people with disabilities, precisely because the state’s failure to provide such services will predictably lead many individuals to become institutionalized, whether in state facilities or private nursing homes.”⁵⁷ Litigation following *Olmstead* has resulted in consent decrees and settlements under which states have committed to expand housing, outpatient treatment, crisis services, and even integrated employment opportunities for individuals with a variety of disabilities.⁵⁸

Litigation under *Olmstead* might well help overcome the limitations of *Martin*’s negative rights theory in addressing homelessness.⁵⁹ Indeed, existing *Olmstead* litigation—although generally brought by self-styled disability advocates rather than by self-styled homeless advocates—has already proved an important force in addressing homelessness. Much of that litigation targets individuals with serious mental illness—a major focus in the controversies over homelessness policy. And the remedies in that litigation have often required states to expand permanent supportive housing, increase the number of housing vouchers they provide, or otherwise ensure that people in the target population have a decent and appropriate place to live.⁶⁰ If advocates turn to *Olmstead* theories after *Grants Pass*, they may find those theories prove helpful in expanding the availability of accessible, affordable, and appropriate housing—and that they avoid leaving homeless people with the choice of accepting inappropriate shelter beds or subjecting themselves to incarceration or involuntary commitment.

Indeed, the updated Rehabilitation Act regulations issued in 2024 by the Department of Health and Human Services may strengthen the ability to use *Olmstead* as a tool to address systemic problems of homelessness. Those regulations include a new provision that elaborates on the integration requirement applied in *Olmstead*.⁶¹ Drawing on post-*Olmstead* cases, the new integration provision describes a number of specific circumstances that violate the general integration mandate.⁶² Among these circumstances is the “[f]ailure to provide community-based services that

57. Bagenstos, *supra* note 4, at 34.

58. *Id.* at 34–37.

59. For earlier recognitions that disability discrimination litigation—including *Olmstead* litigation—might be a useful way of getting beyond *Martin*, see Jess Hallam, *Mental Health Disabilities and the Criminalization of Homelessness: Challenging Municipal Sit-Lie Ordinances As Disparate Impact Discrimination Under the Americans with Disabilities Act of 1990*, 45 N.Y.U. REV. L. & SOC. CHANGE 632, 666–67 (2022); Rankin, *supra* note 4, at 605–06.

60. See Bagenstos, *supra* note 4, at 35, 35 n.179.

61. 45 C.F.R. § 84.76 (1977).

62. *Id.* § 84.76(d).

results in institutionalization or serious risk of institutionalization”—a failure that could include “planning, service system design, funding, or service implementation practices that result in institutionalization or serious risk of institutionalization.”⁶³ Although a recent Fifth Circuit decision calls into question the availability of “risk of institutionalization” claims under *Olmstead*,⁶⁴ and the State of Texas has challenged that aspect of the new Rehabilitation Act regulation,⁶⁵ *Olmstead* claims likely remain a promising tool in this area.

IV. CONCLUSION

In this paper, I have sought to derive lessons for homelessness litigation from the related set of cases attacking institutionalization of disabled persons. As I have shown, the *Martin v. City of Boise* doctrine was already pressing against significant limitations even before the Supreme Court overturned it in *Grants Pass*. That is in large part because the *Martin* doctrine rested on individual negative rights claims. Those claims could prevent the government (in some cases) from jailing homeless people for being homeless, but they could not address the broader homelessness problem, nor could they effectively prevent the state from coercing homeless people into inappropriate facilities.

Disability rights advocates experienced very similar results when they relied on individual negative rights claims in the first wave of deinstitutionalization litigation. Litigators in the disability rights movement eventually turned to claims under the integration mandate of the ADA and the Rehabilitation Act—and they experienced far more success in using that litigation to prod states to provide robust and appropriate services for individuals with disabilities in the community. Although all social change litigation is under pressure these days—and litigation under the integration mandate is no exception—the disability discrimination laws provide a tool that may assist advocates for homeless people in moving beyond *Grants Pass*.

63. *Id.* § 84.76(d)(4).

64. *See* *United States v. Mississippi*, 82 F.4th 387, 396 (5th Cir. 2023) (concluding that “the *Olmstead* decision supplies no basis for an at-risk claim like that litigated en masse in this case” but distinguishing prior cases in which courts upheld at-risk claims where the risk of needless institutionalization was “susceptible of quantification and, indeed, generalization”).

65. *See* Complaint, *Texas v. Becerra*, No. 5:24-cv-00225 (N.D. Tex. Sept. 26, 2024).