

Criminalization of Homelessness

Eric S. Tars, Legal Director, National Homelessness Law Center

Every day in America, people experiencing homelessness are threatened by law enforcement, ticketed, and even arrested for living in public spaces when they have no other alternative. Millions of individuals, families, and youth experience homelessness each year and millions more lack access to decent, stable housing they can afford. Rather than providing adequate housing options, too many communities criminalize homelessness by making it illegal for people to sit, sleep, or even eat in public places, despite the absence of adequate alternatives. These laws and policies violate constitutional, civil, and human rights, traumatize homeless individuals and negatively impact their physical and mental health, and create arrest records, fines, and fees that stand in the way of homeless people securing jobs or housing. Yet providing affordable housing and services has been repeatedly proven to cost less than criminalizing homelessness and be more effective at getting and keeping people off the streets. With COVID-19 threatening to explode the number of people experiencing unsheltered homelessness, which as always, disparately impacts Black, Indigenous, Latinx, and other People of Color (BILPOC), now, more than ever, we need a united voice for Housing, Not Handcuffs.

HISTORY

From vagrancy laws and the workhouses of pre-industrial England to legal segregation, sundown towns, and anti-Okie laws in the U.S., ordinances regulating the use of public space have long been used to exclude marginalized persons based on race, national origin, and economic class. With the advent of modern homelessness in the 1980s, rather than addressing the underlying lack of affordable housing, communities faced with increasingly visible homelessness began pushing homeless persons out of public view with laws criminalizing life-sustaining acts such as self-sheltering (“camping”), sleeping, resting, eating,

or asking for donations. Other communities have used disparate enforcement of other ordinances, such as jaywalking or littering, to harass and push homeless persons out of certain spaces. These practices gained even more traction with the trend toward “broken windows” policing in the 1990s.

From 2006-2019, the National Homelessness Law Center has tracked these laws in 187 cities and found that city-wide bans on camping have increased by 92%, on sitting or lying by 78%, on loitering by 103%, on panhandling by 103%, and on living in vehicles by 213%. Meanwhile, a 1,300% growth of homeless encampments have been reported in all 50 states. Too often homeless residents experience forced evictions or “sweeps” of the encampments, usually with little notice and no provision of alternative housing, frequently resulting in the destruction of important documents, medicines, and what little shelter the residents have.

However, recent court victories have provided advocates with new opportunities to change the conversation. These include the 2018 victory in *Martin v. Boise* in the 9th Circuit, successfully defended from Supreme Court review in 2019, which held that in the absence of adequate alternatives, it is cruel and unusual punishment under the 8th Amendment to punish someone for life-sustaining activities like sleeping, resting, or sheltering oneself. This had an immediate impact in 2020, derailing the Trump Administration’s plans to issue an executive order that would have promoted use of law enforcement to force individuals into mega-tent shelters, though the Administration continued promoting increased law enforcement approaches behind the scenes. In March 2020, Rep. Pramila Jayapal (D-WA) introduced the “Housing Is A Human Right Act,” which would have provided incentives to states to implement some of Martin’s protections. At the local level, Martin has spurred some communities to reexamine their failed criminalization approaches and take more

constructive steps. Similarly, since the 2015 *Norton v. Springfield* decision in the 7th Circuit, no panhandling ordinance challenged in court has withstood constitutional scrutiny under the 1st Amendment, and dozens of cities have repealed their ordinances, some instituting more effective day shelter and day labor programs.

In 2020, given the threat of COVID-19 spreading rapidly in congregate shelters, advocates were also able to obtain clear guidance on unsheltered homelessness from the Centers for Disease Control (CDC) stating that homeless encampments should only be removed if residents can be provided with individual housing options. However, as the COVID-induced economic crisis continues to worsen and initial aid is expiring, many communities are looking again to criminalization approaches to address their growing encampments, leading advocates to call for #HotelsNotHospitalBeds.

Similarly, as the pandemic of racism came to the forefront in 2020, so did its intersections with the criminalization of homelessness. BILPOC communities are more likely to experience homelessness, and more likely to be targeted by police for enforcement. Protests across the country raised arguments about the overpolicing of Black, Brown, and other marginalized communities and supported defunding the police and increasing other community services. In Philadelphia, Black Lives Matter protests merged completely with homeless concerns, resulting in a protest encampment that ultimately won its residents permanent housing.

ISSUE SUMMARY

The growing affordable housing gap and shrinking social safety net have left millions of people homeless or at-risk, and most American cities have fewer emergency shelter beds than people who need shelter. Despite this lack of affordable housing and shelter space, many cities have chosen to criminally or civilly punish people living on the street for doing what any human being must do to survive, like sleeping, resting, and eating – activities we all do every day and take for granted. BILPOC communities;

mentally and physically disabled persons; and lesbian, gay, bisexual, transgender, and queer/questioning youth and adults, who are already disproportionately affected by homelessness, are most likely to be further marginalized by criminalization.

Criminalization policies are ineffective and, in fact, make homelessness harder to exit. Because people experiencing homelessness are not on the street by choice but because they lack choices, criminal and civil punishment serves no constructive purpose. Instead, arrests, unaffordable tickets, and the collateral consequences of criminal convictions make it more difficult for people to exit homelessness and get back on their feet. Criminalization of homelessness might mean that individuals experiencing homelessness are taken to jail, where they may remain for weeks if they cannot pay their bail or fines, perhaps losing custody of their children, property and/or employment in the process. Once released, they could have criminal records that make it more difficult to get or keep a job, housing, or public benefits. Moreover, fines and court fees associated with resolving a criminalization case can amount to hundreds, or even thousands, of dollars. Without the resources to pay, homeless people may be subject to additional jail time.

Criminalization is the most expensive and least effective way of addressing homelessness and wastes scarce public resources on policies that do not work. A growing body of research comparing the cost of homelessness, including the cost of criminalization, with the cost of providing housing to homeless people shows that ending homelessness through housing is the most affordable option in the long run. Indeed, the provision of housing using a Housing First model, which focuses on providing people with quick, low-barrier access to housing followed by any needed services to maintain housing stability, is cheaper and more effective than all other strategies for addressing homelessness. For example, a study in Charlotte, NC, found that the city saved \$2.4 million over the course of a year after creating a Housing First facility, as

tenants spent 1,050 fewer nights in jail and 292 fewer days in the hospital and had 648 fewer visits to emergency rooms. With state and local budgets stretched to their limit and the threat of additional federal cuts on the horizon, rational, cost-effective policies are needed, not ineffective measures that waste precious taxpayer dollars.

PROGRAM SUMMARIES

In response to the growing cost data and advocacy at the international and domestic levels, many federal agencies have taken an increasingly strong stance against criminalization of homelessness, but these programs are under threat.

U.S. Interagency Council on Homelessness

In 2012, the U.S. Interagency Council on Homelessness (USICH) issued Searching out Solutions: Constructive Alternatives to the Criminalization of Homelessness, stating that in addition to raising constitutional issues, criminalization of homelessness may violate international human rights law, and provided numerous alternative practices. In 2015, the USICH issued guidance on Ending Homelessness for Persons Living in Encampments, providing a checklist of steps for communities to constructively address homeless encampments without criminalization and added several case studies of positive practices in 2017. The USICH coordinated Home, Together, the 2018 Federal Strategic Plan to End Homelessness, listing reducing criminalization among the top strategic priorities in ending homelessness. However, in December 2019, the Trump Administration named Robert Marbut as the new Executive Director of the agency, a man with a history of promoting heavy enforcement of laws criminalizing homelessness in order to drive people experiencing homelessness into jail-like shelter facilities. In October 2020, USICH issued a new strategic plan, which provides lip service to anti-criminalization, but continues to maintain a role for law enforcement in pushing people into services.

U.S. Department of Justice

In 2015, DOJ filed a statement of interest brief stating that “Criminally prosecuting those individuals for something as innocent as sleeping, when they have no safe, legal place to go, violates their constitutional rights.” DOJ’s Office of Community Oriented Policing Services dedicated its December 2015 newsletter to reducing criminalization, stating, “Arresting people for performing basic life-sustaining activities like sleeping in public takes law enforcement professionals away from what they are trained to do: fight crime.” DOJ also issued a letter on the impact of excessive fines and fees for poor persons that also is useful in addressing criminalization practices. DOJ’s Office for Access to Justice commented on a proposed ordinance in Seattle that would create constructive procedures for dealing with homeless encampments.

U.S. Department of Housing & Urban Development

In 2015, HUD inserted a new question into its application for the \$2 billion Continuum of Care (CoC) funding stream, giving local governments and providers higher scores and potentially increased funding if they demonstrate that they are preventing the criminalization of homelessness. In 2016, this question was updated with increased points and more specific steps CoCs could take, which have remained in subsequent years. Although the Trump Administration sought freedom to remove these incentives, HUD funding authorizations have statutorily required the agency to retain the funding criteria of the 2018 application.

U.S. Department of Education

In 2016, the Department of Education issued guidance on homeless students, reminding school personnel that they have to work outside the school building to remove barriers to homeless students’ success in school, including working with state legislatures and local governments to address the criminalization of homelessness.

FORECAST FOR 2021

With the Supreme Court victory in *Martin v. Boise*, advocates are looking to try to push the decision as far as it can go to help turn communities from criminalization to housing solutions. However, a backlash is also brewing, with communities looking to find loopholes in constitutional compliance, and deep concern for what a rapid growth in COVID-induced homelessness may bring. Advocates should help legislators look for opportunities to include incentives or requirements for non-criminalization in legislation. Rep. Jayapal is likely to reintroduce the “[Housing is a Human Right Act](#),” anti-criminalization provisions may be included in the “[George Floyd Justice in Policing Act](#),” and an infrastructure funding bill could require applicants to provide housing for any homeless persons living under bridges displaced by the project. The U.S. must also respond to recommendations from the United Nations’ [Universal Periodic Review](#) against criminalizing poverty and law enforcement’s disparate impact on communities of color. Joining the thousands of national and local organizations and individuals, including the Law Center and NLIHC, in the [Housing Not Handcuffs](#) Campaign is an effective step to ensure advocates remain up to date on current activity.

WHAT TO SAY TO LEGISLATORS

The Housing Not Handcuffs Campaign has developed [Model Policies](#) for local, state, and federal governments that emphasize 1) shortening homelessness by stopping its criminalization, 2) preventing homelessness by strengthening housing protections and eliminating unjust evictions, and 3) ending homelessness by increasing access to and availability of affordable housing. The Campaign also has [model one-pagers](#) and [Six Ideas for Talking About Housing Not Handcuffs](#) that may be useful in framing conversations with legislators, including a sample script:

Value: Together, we have the opportunity—and responsibility—to do better for the worst off amongst us. Everyone can agree that it does

not make any sense to arrest people for being homeless. And we can also all agree that we don’t want to see people sleeping on the sidewalks.

Problem: But instead of solving homelessness, we have expensive policies that make it worse. Unfortunately, too many places in this country are ignoring data/common sense and are using handcuffs rather than housing to address homelessness. But when anyone experiencing homelessness faces criminal punishment for simply trying to survive on the streets, these criminal records only make it more difficult to hold a job and regain housing. Not only do these policies make homelessness harder to solve, they also cost MORE taxpayer dollars than the policies that actually work.

Solution: But there is a better way. We’ve seen in city after city that where they change their laws and policies to reduce their reliance on law enforcement and instead invest in affordable, supportive housing, it gets homeless people off the streets far more effectively, and, as it turns out, far more cheaply than endlessly cycling people through courts, jails, and back onto the streets. It increases public safety when police cars, jails, and courts aren’t clogged with people being arrested simply for trying to survive. It increases public health when people are able to get services and are housed, rather than forced to the margins.

Action: If you want to see an end to homelessness in your community, join our campaign for Housing Not Handcuffs, learn more about the best practices that are working around the country, and call for an end to criminalization and more support for housing so we can all enjoy a community where no one has to sleep on the streets or beg for their daily needs.

Recent court victories also provide an opportunity for local elected officials to shift some political pressure from themselves to the courts. When constituents come to them complaining of visible homelessness, they can now say “look, the courts have told us we can’t just criminalize people living on the streets, but if you work with me, we can find creative solutions that will be a win-win

for everyone.”

FOR MORE INFORMATION

National Homelessness Law Center, 202-638-2535, email@nlchp.org, www.nlchp.org.

Housing Not Handcuffs Campaign, <http://www.housingnohandcuffs.org>.