
**MASS & CASS:
CITY-SANCTIONED EIGHTH AMENDMENT RIGHTS
VIOLATIONS**

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ABSTRACT

Cities throughout the United States have responded to increasing rates of homelessness by preventing unhoused individuals from living in tent encampments when they have nowhere else to go. Some unhoused individuals have successfully challenged these city ordinances and actions by bringing 42 U.S.C. § 1983 actions under the Eighth Amendment’s “cruel and unusual punishment” provision. The City of Boston is no different than these other cities and has removed individuals’ tent encampments at the intersection of Massachusetts Avenue and Melnea Cass Boulevard multiple times under mayoral discretion since 2019, without providing sufficient shelter and housing options to these displaced individuals. This Note explores how Boston’s unhoused individuals can successfully bring Eighth Amendment claims against the City of Boston, referring to Supreme Court caselaw that discusses status crimes as well as federal district court and court of appeals opinions from across the United States that held in favor of unhoused plaintiffs.

INTRODUCTION

Homelessness has been a pervasive national issue in the United States since the 1870s.¹ However, early in U.S. history, unhoused² individuals were often young, able-bodied men who rode trains searching for jobs across the country.³ Writers like Walt Whitman and Sinclair Lewis romanticized these young men and cast their choices as an “escape from the oppression and monotony of factory work.”⁴ Today, however, unhoused individuals experience a different reception in American culture.⁵ The unhoused community no longer consists primarily of able-bodied men looking for work, but rather encompasses all

¹ NAT’L ACAD. OF SCI., ENG’G & MED., PERMANENT SUPPORTING HOUSING: EVALUATING THE EVIDENCE FOR IMPROVING HEALTH OUTCOMES AMONG PEOPLE EXPERIENCING CHRONIC HOMELESSNESS (2018).

² Throughout this Note I use the term “unhoused” rather than “homeless” because “unhoused” recognizes that all individuals deserve housing. See UNHOUSED.ORG, <https://www.unhoused.org/overview> (last visited Apr. 23, 2023).

³ NAT’L ACAD. OF SCI., ENG’G & MED., *supra* note 1, at 175.

⁴ *Id.* at 176.

⁵ Jo Phelan et al., *The Stigma of Homelessness: The Impact of the Label “Homeless” on Attitudes Toward Poor Persons*, 60 SOC. PSYCH. Q. 323, 323 (1997) (finding that homeless people suffer stigmatization by their fellow citizens); see also Benjamin Kamelhar, *The Stigma Associated with Homelessness and How It Leads to Ineffective Solutions Both In and Out of the Courtroom*, GEO. J. ON L. & POL’Y BLOG (Feb. 18, 2019), <https://www.law.georgetown.edu/poverty-journal/blog/the-stigma-associated-with-homelessness-and-how-it-leads-to-ineffective-solutions-both-in-and-out-of-the-courtroom/>. But cf. Jack Tsai et al., *Changes in Public Attitudes and Perceptions About Homelessness Between 1990 and 2016*, 60 AM. J. CMTY. PSYCH. 599, 599 (2017) (finding that between 1990 and 2016 public opinion drifted toward more compassion, government support, and liberal attitudes for people experiencing homelessness).

genders, races, and abilities, and disproportionately includes individuals of color.⁶

In the 1870s, the main issue for unhoused people was job availability.⁷ However, modern concerns span from lack of affordable housing to mental health services, substance abuse treatment, and other social services.⁸ Even temporary shelters do not have enough beds to meet the needs of unhoused individuals on a given night, and shelters across the nation sometimes have barriers to entry based on gender, age, sobriety, veteran status, or religion.⁹ Further, shelters limit the number of days that people can stay there.¹⁰ A 2020 estimate found that nationwide there were 405,502 unhoused individual adults and only 203,688 available beds on a given day, leaving at least 201,814 people unsheltered in the U.S.¹¹ The COVID-19 pandemic likely worsened the availability of shelter beds because of a greater number of evictions and capacity limitations in shelters to ensure social distancing.¹² However, there is a lack of up-to-date national homelessness data because COVID-19 has prevented complete point-in-time estimates¹³ in recent years.¹⁴

Despite extreme hardship, some unhoused individuals survive on the streets of major U.S. cities by creating community and living with other unhoused people in tent encampments.¹⁵ However, city ordinances prohibiting camping, sleeping, and physically being in public places have challenged their ability to exist in cities across the country.¹⁶ Some unhoused people have used civil

⁶ See NAT'L ACAD. OF SCI., ENG'G & MED., *supra* note 1, at 176; BEN WALKER, CITY LIFE VIDA URBANA, HOUSING JUSTICE IS THE CURE: EVICTIONS IN BOSTON'S COMMUNITIES OF COLOR DURING COVID-19 (2021).

⁷ See NAT'L ACAD. OF SCI., ENG'G & MED, *supra* note 1, at 175.

⁸ *Id.* at 176–78; see also *Why Are People Homeless?*, NAT'L COAL. FOR THE HOMELESS (June 2007), <https://www.nationalhomeless.org/publications/facts/Why.pdf>.

⁹ NAT'L ALL. TO END HOMELESSNESS, STATE OF HOMELESSNESS: 2021 EDITION, https://endhomelessness.org/wp-content/uploads/2022/09/StateOfHomelessness_2021.pdf; *Individual Shelters in Greater Boston*, MASS. COAL. FOR THE HOMELESS, <https://mahomeless.org/individual-shelters-in-greater-boston/> (last visited Apr. 23, 2023).

¹⁰ NAT'L ALL. TO END HOMELESSNESS, *supra* note 9.

¹¹ *Id.*

¹² See *id.*

¹³ Point-in-time estimates are estimates of sheltered and unsheltered unhoused individuals on a given night. *Point-in-Time Count*, CTR. FOR EVIDENCE-BASED SOLUTIONS TO HOMELESSNESS, <http://www.evidenceonhomelessness.com/factsheet/point-in-time-count/> (last visited Apr. 23, 2023).

¹⁴ See NAT'L ALL. TO END HOMELESSNESS, *supra* note 9.

¹⁵ See Mahwish Moiz, *List of Tent Cities in America*, CAUF SOC'Y (Jan. 3, 2023), <https://caufsociety.com/list-of-tent-cities-in-america/>.

¹⁶ See BOS., MASS. MUN. CODE § 16-19.1 (Am. L. Publ'g Corp. 2022), https://codelibrary.amlegal.com/codes/boston/latest/boston_ma/0-0-0-4912; BOS., MASS. MUN. CODE § 16-12.2 (Am. L. Publ'g Corp. 2022), https://codelibrary.amlegal.com/codes/boston/latest/boston_ma/0-0-0-4912.

litigation as a tool to challenge these discriminatory ordinances by bringing 42 U.S.C. § 1983 actions under the Fourth, Fifth, and Eighth Amendments. In certain instances, these plaintiffs prevailed, and federal courts have found discriminatory ordinances unconstitutional, recognizing how restrictive ordinances harm individuals who have no other place to go.¹⁷ State courts, like New York’s highest court, have also interpreted their state’s constitution to “guarantee” individuals a right to housing.¹⁸ Other states and cities have worked to expand their tent cities¹⁹ to accommodate more unhoused individuals.²⁰

Massachusetts is a “Right to Shelter”²¹ state for families but not individuals, and the City of Boston does not maintain a sufficient number of unrestricted shelter beds for its unhoused population.²² Additionally, Boston is the “epicenter of the opioid crisis and homelessness” in Massachusetts.²³ Many unhoused individuals in Boston live in tent encampments by the intersection of Massachusetts Avenue and Melnea Cass Boulevard (Mass & Cass) because of its proximity to medical and substance abuse services.²⁴ The number of people living at Mass & Cass has fluctuated, but during the COVID-19 pandemic, the unhoused Mass & Cass population reached over 150 people.²⁵ Individuals and businesses in the Mass & Cass area raised concerns with local officials about

¹⁷ See *infra* Part II.

¹⁸ See *The Callahan Legacy: Callahan v. Carey and the Legal Right to Shelter*, COAL. FOR THE HOMELESS, <https://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/the-callahan-legacy-callahan-v-carey-and-the-legal-right-to-shelter/> (last visited Apr. 23, 2023).

¹⁹ A tent city is a collection of many tents set up in one area that serve as temporary shelters for unhoused and displaced individuals. *Tent City*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/tent%20city> (last visited Apr. 23, 2023).

²⁰ Moiz, *supra* note 15.

²¹ A “Right to Shelter” state is one that requires its municipalities and itself “to provide temporary emergency shelter to every man, woman, and child who is eligible” for shelter services on any given night. Lucy Ellis, *Massachusetts Family Homelessness System—City of Ideas*, BOS. FOUND. (Feb. 2, 2017), <https://perma.cc/XUG6-KECB>.

²² See MASS. GEN. LAWS ch. 23B, § 30 (2023).

²³ Dialynn Dwyer, *Experts in Public Health, Housing, and Addiction Rebuke Boston Officials Over Actions at Mass. and Cass.*, BOSTON.COM (Oct. 26, 2021) [hereinafter Dwyer, *Experts Rebuke Boston Officials*], <https://www.boston.com/news/local-news/2021/10/26/advocates-rebuke-mass-and-cass-plans/> (referring to the intersection of Melnea Cass Boulevard & Massachusetts Avenue).

²⁴ See Katherine Sabido, *The Opioid and Homelessness Crisis at Mass. and Cass: Whose Problem Is It?*, SOUTHCOAST TODAY (Jan. 2, 2022, 4:43 PM), <https://www.southcoasttoday.com/story/news/state/2022/01/02/mass-and-cass-most-visible-example-statewide-homelessness-problem/9052577002/>.

²⁵ See Milton Valencia et al., *After Tent Encampments Are Cleared at Mass. and Cass, Need for Long-Term Solution Remains Clear*, BOS. GLOBE (Jan. 13, 2022, 9:01 PM) [hereinafter Valencia et al., *Tent Encampments*], <https://www.bostonglobe.com/2022/01/13/metro/mayor-wu-says-154-people-mass-cass-have-been-given-housing-after-wednesdays-tent-sweep/>.

increases in violence, crime, open drug use, improperly discarded needles, and human waste on public and private property in the area.²⁶ To address some of these concerns, Boston officials removed unhoused individuals' tents in the Mass & Cass area on November 2, 2021, following Acting Mayor Kim Janey's 2021 Executive Order (EO).²⁷ More recently, current Boston Mayor Michelle Wu directed city workers to remove individuals' tents in October 2022, citing a public health crisis.²⁸

The large number of unhoused people in Mass & Cass and the surrounding area results from a series of interconnected and complicated system failures. These failures necessitate comprehensive solutions including substance use reform, additional mental health support, and other social services. However, this Note will focus on whether unhoused individuals at Mass & Cass can successfully pursue an Eighth Amendment violation claim against the City of Boston. Part I of this Note defines homelessness, provides background on reasons individuals may become unhoused, and shares specific information about Boston's history of homelessness and the present-day situation at Mass & Cass. Part II identifies how Boston officials criminalize homelessness and prevent individuals from living in tent encampments. Part III presents federal case law that analyzes whether removing tent encampments violates unhoused individuals' Eighth Amendment rights. Finally, Part IV explores the challenges Mass & Cass's unhoused individuals face when bringing Eighth Amendment claims.

²⁶ Dialynn Dwyer, *For Years, Residents and Business Leaders Pushed for Action on Mass. and Cass. Here's What They Said About the City's Encampment Protocols*, BOSTON.COM (Nov. 19, 2021) [hereinafter Dwyer, *Leaders Pushed for Action*], <https://www.boston.com/news/local-news/2021/11/19/neighbors-businesses-encampment-protocols-mass-and-cass/>.

²⁷ *Id.*; see Mayor Kim Janey, City of Boston, Mass., An Executive Order Establishing a Coordinated Response to Public Health and Encampments in the City of Boston (Oct. 19, 2021) [hereinafter Mayor Kim Janey, Executive Order], <https://www.boston.gov/sites/default/files/file/2021/10/public-health-eo-10-19-21.pdf>; *Fact Sheet: Boston Homeless Encampment Liaison Protocol*, CITY OF BOS. (Oct. 29, 2021) [hereinafter The Protocol], <https://www.boston.gov/news/fact-sheet-boston-homeless-encampment-liaison-protocol> (providing Boston's approach to encampments and removal protocol).

²⁸ See Tori Bedford, *Sweeps of Mass. and Cass Encampments Return as Mayor Wu Faces Pushback*, GBH NEWS (Oct. 20, 2022), <https://www.wgbh.org/news/local-news/2022/10/20/sweeps-of-mass-and-cass-encampments-return-as-mayor-wu-faces-pushback>.

Shortly before this Note went to press, Mayor Wu announced a new effort to clear out the encampments, but that initiative will not be a focus of this Note. *Homeless tent encampments at 'Mass. and Cass' to come down Monday*, WBUR (May 01, 2023), <https://www.wbur.org/news/2023/05/01/tent-encampment-homeless-mass-and-cass-boston>.

I. UNHOUSED INDIVIDUALS IN THE U.S. TODAY

A. *Defining Homelessness*

The U.S. Department of Housing and Urban Development (HUD)'s definition of homelessness includes four main categories: (1) "literally homeless," which includes an "individual or family who lacks a fixed, regular, and adequate nighttime residence"; (2) "imminent risk of homelessness"; (3) "homeless" as defined by federal or other statutes; and (4) individuals fleeing or attempting to flee domestic violence.²⁹ The "literally homeless" population is further divided into two categories: "unsheltered homeless" and "sheltered homeless."³⁰ "Unsheltered homeless" are individuals who sleep in areas not "designated for that purpose," like sidewalks, trains, vehicles, or parks,³¹ whereas "sheltered homeless" are individuals who experience homelessness but sleep in emergency shelters, transitional housing, and other temporary housing options.³² Unsheltered individuals are especially vulnerable because of their exposure to weather and limited protection from violence and other dangers.³³ This Note focuses on unhoused people who are literally homeless and unsheltered.³⁴

B. *National Homelessness & Demographics*

Due to COVID-19, there have been no national point-in-time estimates³⁵ of unhoused and unsheltered individuals in the United States since January 2020.³⁶ The most recent nationwide point-in-time estimate that included unsheltered individuals found that there were a total of 580,466 people experiencing homelessness in the United States.³⁷ Of those individuals, 110,528 were

²⁹ *Homeless Definition*, HUDEXCHANGEINFO, https://files.hudexchange.info/resources/documents/HomelessDefinition_RecordkeepingRequirementsandCriteria.pdf (last visited on Apr. 23, 2023).

³⁰ *Id.*

³¹ NAT'L ALL. TO END HOMELESSNESS, *supra* note 9.

³² U.S. DEP'T OF HOUS. & URBAN DEV., THE 2021 ANNUAL HOMELESSNESS REPORT TO CONGRESS: PART 1 POINT-IN TIME ESTIMATES OF SHELTERED HOMELESSNESS 2 (Feb. 2022) [hereinafter HUD], <https://www.huduser.gov/portal/sites/default/files/pdf/2021-AHAR-Part-1.pdf>.

³³ *See id.*

³⁴ I use the term "homeless" here in reference to the HUD classifications, but throughout the rest of this Note, I use the term "unhoused." *See* UNHOUSED.ORG, *supra* note 2.

³⁵ *See Point-in-Time Count*, *supra* note 13 and accompanying text.

³⁶ NAT'L ALL. TO END HOMELESSNESS, *supra* note 9; *see also* HUD, *supra* note 32 (publishing point-in-time statistics regarding sheltered homelessness but not unsheltered homelessness).

³⁷ NAT'L ALL. TO END HOMELESSNESS, *supra* note 9. The estimate noted that 408,891 of these individuals were single people, 171,575 were part of an unhoused family, 37,252 were veterans, and 34,210 were unaccompanied or unhoused youth. *Id.* Of those unhoused, 352,211 were male, 233,578 were female, 3,161 were transgender, and 1,460 were non-binary. *Id.*

chronically unhoused,³⁸ meaning that they have been unhoused for at least one year and struggle with a physical disability, serious mental illness, or substance use disorder.³⁹

Before 2019, homelessness had been declining for eight years.⁴⁰ However, between 2019 and 2020, nationwide homelessness increased by 2%.⁴¹ Additionally, the number of unhoused individuals increased by 30% from 2015 to 2020.⁴² Homelessness is likely increasing nationally because of an increasing population, higher housing prices, stagnating wages, and increased cost of living.⁴³ Further, though COVID-19 has prevented an updated point-in-time estimate with unsheltered individuals, the pandemic likely exacerbated these issues by leading to an increase in unemployment rates and a greater number of evictions.⁴⁴ Although shelters provide temporary housing to some unhoused individuals, in December 2021 the Chief Executive Officer of the National Alliance to End Homelessness estimated that 39% of unhoused individuals were unsheltered.⁴⁵

C. Snapshot of Boston's Housing History and Present-Day Disparities

Homelessness in Boston is similarly high. On February 23, 2022, the City of Boston conducted its most recent point-in-time estimate and counted that 4,439 individuals were unhoused on that night.⁴⁶ Homelessness is a public health crisis

Additionally, though more white individuals experienced homelessness in 2020, historically, marginalized racial groups experience higher rates of homelessness. *Id.* National Alliance to End Homelessness calculated that 109 out of every 10,000 Native Hawaiians and other Pacific Islanders experience homelessness, 45 out of every 10,000 Native Americans experience homelessness, and 52 out of every 10,000 Black or African Americans experience homelessness. *Id.*

³⁸ *Id.*

³⁹ *Chronically Homeless*, NAT'L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/who-experiences-homelessness/chronically-homeless/> (last visited on Apr. 23, 2023).

⁴⁰ NAT'L ALL. TO END HOMELESSNESS, *supra* note 9.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*; Judy Woodruff et al., *What's Behind Rising Homelessness in America?*, PBS NEWSHOUR (Dec. 28, 2021), <https://www.pbs.org/newshour/show/whats-behind-rising-homelessness-in-america> (noting that the United States is about five million units short of having an adequate supply of housing overall and seven million units short of enough affordable housing for low-income households).

⁴⁴ NAT'L ALL. TO END HOMELESSNESS, *supra* note 9; *see also* HUD, *supra* note 32; Woodruff, *supra* note 43.

⁴⁵ Woodruff, *supra* note 43.

⁴⁶ *See* CITY OF BOS., 42ND ANNUAL HOMELESS CENSUS (June 9, 2022), <https://www.boston.gov/departments/housing/annual-homeless-census>. The City further found that the number of unsheltered people had decreased by fifty-one people to 119 individuals. *Id.*

in Boston because of a conglomeration of factors, including lack of available housing, decreased state funding, and the shut-down of mental health and substance abuse programs.⁴⁷

During the Great Recession from 2007 to 2009, poverty levels in Boston increased to levels that persist today.⁴⁸ From 2008 to 2015, the number of Boston-based families earning less than \$10,000 increased by 14%.⁴⁹ Worse still, Boston's housing vacancy rate fell from 5.5% in 2006 to 3.4% in 2015.⁵⁰ Over the same period, the median monthly gross rent rose approximately fifty dollars a year and more recently, Boston's rent has increased even more significantly.⁵¹ Alongside the increased cost of housing, state rental assistance decreased through the 1990s.⁵² Funding began increasing again in the early 2000s, but has yet to return to 1993 levels.⁵³ In the early 2010s, Massachusetts created additional programming to reduce the number of unsheltered, unhoused families, but single adults are not eligible.⁵⁴

In addition to fewer available units and increasing rents, Massachusetts has defunded resources for mental health support over the last fifty years.⁵⁵ When

⁴⁷ See Luc Schuster & Anise Vance, *Three Causes of Boston's Decade-Long Rise in Homelessness... And Recent Signs of Progress*, BOS. INDICATORS (May 16, 2017), <https://www.bostonindicators.org/article-pages/2017/may/homelessness-and-progress-in-boston>; Michael Rezendes et al., *State Mental Hospitals Were Closed to Give People with Mental Illness Greater Freedom But It Increased the Risk They'd Get No Care at All*, BOS. GLOBE (Aug. 28, 2016), <https://apps.bostonglobe.com/spotlight/the-desperate-and-the-dead/series/community-care/>; Helen Redmond, *Boston's "Methadone Mile" and the Wars on Drug Users, Unhoused People*, FILTER (Feb. 9, 2021), <https://filtermag.org/bostons-methadone-mile-and-the-wars-on-drug-users-unhoused-people/>.

⁴⁸ Schuster & Vance, *supra* note 47.

⁴⁹ *Id.* (the number of Boston-based families earning less than \$10,000 annually grew from 8,601 to 9,981).

⁵⁰ *Id.*

⁵¹ *Id.*; see Asher Klein, *Here's How Much the Cost of Rent in Boston Has Skyrocketed in the Last Year*, NBC10 BOS. (Aug. 26, 2022), <https://www.nbcboston.com/news/local/heres-how-much-the-cost-of-rent-in-boston-has-skyrocketed-in-the-last-year/2818820/>. Realtors found that housing prices in Boston increased 25% in one year, from July 2021 to July 2022. Klein, *supra*. Moreover, Boston rent increased 12% from 2021 to 2022 and is nearly double the national median. *Id.*

⁵² See Schuster & Vance, *supra* note 47. In 1993, state funding for rental assistance was \$128,696,845 in inflation-adjusted dollars. *Id.* In 2017, it was only \$86,531,597. *Id.*

⁵³ *Id.*

⁵⁴ See *id.* (highlighting the HomeBASE program as an effort to divert families into permanent housing instead of emergency shelters).

⁵⁵ See Rezendes et al., *supra* note 47; Samantha Raphelson, *How The Loss of U.S. Psychiatric Hospitals Led to a Mental Health Crisis*, NPR (Nov. 30, 2017), <https://www.npr.org/2017/11/30/567477160/how-the-loss-of-u-s-psychiatric-hospitals-led-to-a-mental-health-crisis>. In the 1950s and 1960s, the government shut down long-term, state-run mental health facilities, but did not invest similar amounts of money into community treatment programs. See Rezendes et al., *supra* note 47. From 1953 to 2015, Massachusetts

coupled with various system failures, this lack of care leads many individuals who need mental health services to experience homelessness.⁵⁶ In 2016, among the estimated 1,500 chronically unhoused individual cases that the Massachusetts Housing & Shelter Alliance assessed, 85% involved mental health issues and approximately 50% involved substance use disorder.⁵⁷ Since 2008, Massachusetts has consistently had among the highest numbers of opioid-related deaths in the country, with more than double the national average in 2016.⁵⁸ These challenges are especially evident at Mass & Cass where a large concentration of unsheltered individuals live in Boston.

1. Mass & Cass's History

During a spike in the opioid crisis in October 2014, the City of Boston's largest homeless shelter with substance abuse treatment—the Andrew House Detoxification Center on Long Island (Long Island treatment center)—closed, resulting in the loss of more than one hundred beds for unhoused individuals with substance use disorder.⁵⁹ After the treatment center closed, then-Mayor Marty Walsh implemented the Continuity of Operations Plan to “ensure that all needs of the clients who utilize the programs at Long Island [were] met while the Bridge [was] closed” and that “the City and partners [] maintained an equal, or greater, number of beds for our homeless and recovery guests.”⁶⁰ The city spent millions of dollars to renovate the Southampton Street building to create the Southampton Street Shelter and provide needed temporary housing.⁶¹ Despite these efforts, hundreds of unhoused individuals were pushed to the streets.⁶² Additionally, the City of Boston never replaced the detox services that

reduced the number of “state-funded inpatient psychiatric beds by more than ninety-seven percent.” *Id.* Additionally, as the Department of Mental Health significantly decreased inpatient care spending, it failed to increase outpatient treatment spending. *Id.* (showing that though inpatient care decreased from \$52 to \$23 per capita in inflation-adjusted spending from 1994 to 2014, outpatient care spending only increased from \$72 to \$75 per capita in inflation-adjusted spending).

⁵⁶ See Rezendes et al., *supra* note 47.

⁵⁷ Maria Cramer et al., *Everyone Wants to Help David. But Nothing Seems to Work. And the Mentally Ill Homeless Man Gets Arrested Again and Again.*, BOS. GLOBE (Dec. 8, 2016), <https://apps.bostonglobe.com/spotlight/the-desperate-and-the-dead/series/homelessness/>.

⁵⁸ Sabido, *supra* note 24.

⁵⁹ WBUR Newsroom, *A Year After Long Island Bridge Closure, Advocates Call For Replacement of Lost Recovery Beds*, WBUR (Oct. 8, 2015), <https://www.wbur.org/news/2015/10/08/a-year-after-long-island-bridge-closure-advocates-call-for-replacement-of-lost-recovery-beds>.

⁶⁰ Ruth McCambridge, *Bridge Closing in Boston Evicts Nonprofits and Homeless en Masse*, NPQ (Dec. 2, 2014), <https://nonprofitquarterly.org/bridge-closing-in-boston-evicts-nonprofits-and-homeless-en-masse/>.

⁶¹ WBUR Newsroom, *supra* note 59 (highlighting that the Southampton Street shelter provides 400 emergency shelter beds).

⁶² See *id.*; McCambridge, *supra* note 60.

the Long Island treatment center provided.⁶³ As a result, many of the displaced unsheltered individuals settled around Mass & Cass because of the proximity to recovery services.⁶⁴

Unhoused encampments have been a fixture in the Mass & Cass area since the closure of the Long Island treatment center in 2014.⁶⁵ Mass & Cass—sometimes known as “Methadone Mile” or “Recovery Road”—sits at the intersection of four increasingly gentrified⁶⁶ Boston neighborhoods: Roxbury, Dorchester, the South End, and South Boston.⁶⁷ It is also near two methadone clinics—the Boston Comprehensive Treatment Center and Health Care Resource Centers Boston—and the Boston Medical Center, which is known as Boston’s “safety-net” hospital.⁶⁸ Because a large percentage of unhoused individuals living at Mass & Cass experience substance use disorder, locals have named Mass & Cass the “epicenter of the opioid epidemic and homelessness crisis” in Massachusetts.⁶⁹

2. Limits on Boston Shelter Beds

The City of Boston advertises nine shelters in the Boston area that provide temporary beds to unhoused individuals.⁷⁰ These shelters, however, list various gender, veteran status, and age requirements, as well as limits on whether an

⁶³ McCambridge, *supra* note 60.

⁶⁴ Shirley Leung et al., *Is Long Island the Answer to Mass. and Cass?*, BOS. GLOBE (Sept. 3, 2022, 4:01 PM), <https://www.bostonglobe.com/2022/09/03/business/is-long-island-answer-mass-cass/>; Dialynn Dwyer, *Debate Erupted in the South End Over the City’s Approach to the Opioid Crisis. Here’s What You Need to Know.*, BOSTON.COM (Aug. 9, 2019) [hereinafter Dwyer, *Debate Erupted*], <https://www.boston.com/news/local-news/2019/08/09/operation-clean-sweep-south-end-boston/>.

⁶⁵ Chris Dew, *Boston Struggles to Resolve Crisis at Mass. and Cass*, BOS. POL. REV. (Nov. 10, 2021), <https://www.bostonpoliticalreview.org/post/boston-struggles-to-resolve-crisis-at-mass-and-cass>; *see also* Redmond, *supra* note 47.

⁶⁶ *See* Redmond, *supra* note 47. For the purposes of this Note, “gentrified” means that a neighborhood’s rent and living costs have increased because wealthier buyers and renters have moved in, often displacing current residents because of increased costs. *Gentrification*, DICTIONARY.COM, <https://www.dictionary.com/browse/gentrification> (last visited Apr. 23, 2023).

⁶⁷ Redmond, *supra* note 47.

⁶⁸ *Id.*

⁶⁹ Dwyer, *Experts Rebuke Boston Officials*, *supra* note 23; *see* Cramer et al., *supra* note 57.

⁷⁰ *Services for the Homeless*, CITY OF BOS., <https://www.boston.gov/departments/neighborhood-development/services-homeless> (last visited Apr. 23, 2023) (listing Southampton Shelter, Woods Mullen Shelter, Pine Street Inn (Men’s Inn), Pine Street Inn (Women’s Inn), Boston Night Center, New England Center and Home for Veterans, Bridge Over Troubled Waters, Y2Y, and Massachusetts Emergency Family Shelter).

unhoused person can “drop-in” to the shelter.⁷¹ Additionally, some shelters require sobriety and curfew adherence and will not accept individuals with a criminal record or a history of a long hospitalization.⁷² More recently, COVID-19 complicated shelter services even more.⁷³ Many shelters reduced their capacities to maintain social distancing and reduce the COVID-19 outbreak because unhoused individuals are at a higher risk of contracting COVID-19 inside shelters.⁷⁴

II. STATE ACTION AND BOSTON’S REMOVAL OF INDIVIDUALS AT MASS & CASS

The City of Boston has multiple legal mechanisms to remove unhoused individuals from public property such as its municipal code and its mayor’s power to issue emergency executive orders. Since 2019, Boston mayors have authorized multiple “sweeps” of the Mass & Cass area, destroying unhoused individuals’ tents without providing all individuals with alternative shelter.⁷⁵

A. *Boston City Ordinances*

The City of Boston also has a municipal code that prohibits unhoused individuals from using public spaces.: Chapter 16-19.1, Use of Public Grounds and Chapter 16-12.2, Loitering.⁷⁶ In Chapter 16-19.1, Use of Public Grounds, the municipal code says that:

⁷¹ *Id.* (noting that Boston Night Center is an “overnight drop in shelter” for men and women but with no beds, and that the Y2Y is for individuals 18–24 years old).

⁷² See *Individual Shelters in Greater Boston*, *supra* note 9; *Find Help: Staying at Pine Street*, PINE ST. INN, <https://www.pinestreetinn.org/find-help-guest> (last visited Apr. 23, 2023).

⁷³ See Redmond, *supra* note 47.

⁷⁴ See Jack Tsai & Michal Wilson, *COVID-19: A Potential Public Health Problem for Homeless Populations*, 5 LANCET PUB. HEALTH e186 (Mar. 11, 2020), [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30053-0/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30053-0/fulltext); see also Jim O’Connell, *COVID-19 and Homelessness in Boston: Thoughts from the Initial Surge*, HARV. MED. SCH. PRIMARY CARE REV. (June 30, 2020), <http://info.primarycare.hms.harvard.edu/review/covid-homelessness-boston>; James Join & David Shaw, *Homeless Advocates Discuss Impact of COVID-19 on Local Homeless Population*, HARV. CRIMSON (Oct. 29, 2020), <https://www.thecrimson.com/article/2020/10/29/boston-homeless-population-coronavirus-fall/>. Some shelters, like Rosie’s Place, tried to minimize the spread of COVID-19 by decreasing turnover and increasing the permitted number of consecutive overnight stays for clients. Hannah Reale, *Boston’s Homeless Services See New Reach Under Pandemic-Induced Changes*, GBH NEWS (Oct. 19, 2021), <https://www.wgbh.org/news/local-news/2021/10/19/bostons-homeless-services-see-new-reach-under-pandemic-induced-changes>.

⁷⁵ See *infra* Section II.B.

⁷⁶ BOS., MASS. MUN. CODE §§ 16-19.1, 16-12.2 (Am. L. Publ’g Corp. 2022), https://codelibrary.amlegal.com/codes/boston/latest/boston_ma/0-0-0-4912.

[n]o person shall, in or upon the Common, Public Garden, or other public grounds of the City, Walk, stand, or sit upon the grass, or upon any land, . . . or stand or lie upon a bench or sleep thereon, except that the Mayor may from time to time by proclamation and order permit, walking, standing, and lying upon . . . grassed land of the Common . . . or the grassed land of any other public grounds or any other designated part thereof . . . for such days or parts of such days as he shall specify.⁷⁷

This municipal code prevents any individual from standing, sitting, or sleeping on grass or land within the Boston Common, Public Garden, or other any public grounds, unless the Mayor of Boston permits it.⁷⁸ Chapter 16-12.2, Loitering is similarly prohibitive, reading: “[n]o person shall saunter or loiter in a street in such a manner as to obstruct or endanger travelers or in a manner likely to cause a breach of the peace or incite to riot.”⁷⁹ “Loitering” means to “be dilatory, delay, linger, saunter, and to idle.”⁸⁰ Therefore, this municipal code prohibits an individual from “lingering in a public area without a purpose.”⁸¹

Both sections of the municipal code prevent unhoused individuals’ use of, and presence in, public spaces.⁸² These types of laws became more prevalent across the United States in the 1980s and 1990s as part of “public safety” and “crime reduction” efforts.⁸³ They allow police officers to disperse individuals or groups of people who are engaging in “activities” that the municipal codes prohibit, and they permit the police officers to arrest these individuals if they do not comply.⁸⁴ As a result, Boston officials have statutory authority to remove and likely arrest unhoused individuals who are living on the street in noncompliance with these municipal codes.⁸⁵

B. Mayor-Supervised Tent Encampment Clearings

At various times throughout the last seven years, the City of Boston has destroyed the tent encampments and removed unhoused individuals’ belongings from Mass & Cass.⁸⁶ One incident in August 2019 was called Operation Clean Sweep (the Sweep).⁸⁷ The Boston Police Department initiated the Sweep because a Suffolk County corrections officer was assaulted in the Mass & Cass

⁷⁷ § 16-19.1.

⁷⁸ *See id.*

⁷⁹ § 16-12.2.

⁸⁰ *Loiter*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/loiter> (last updated June 2020).

⁸¹ *Id.*; *see* § 16-12.2.

⁸² *See* §§ 16-12.2, 16-19.1.

⁸³ Eileen Divringi, *Public Safety or Social Exclusion? Constitutional Challenges to the Enforcement of Loitering Ordinances*, 8 DEPAUL J. SOC. JUST. 1, 1 (2014).

⁸⁴ *Id.*; *see also* § 16-12.2.

⁸⁵ *See infra* Section II.B.

⁸⁶ *See infra* notes 110–119 and accompanying text.

⁸⁷ Dwyer, *Debate Erupted*, *supra* note 64.

area.⁸⁸ The Sweep ended with the arrest of thirty-four individuals and the destruction of individuals' tents and belongings.⁸⁹ The police said that they pursued the Sweep to "address ongoing community concerns in the general area of Massachusetts Avenue and Southampton Street in Roxbury."⁹⁰ John Boyle, a police spokesperson, cited a 41% increase in violent crime in a year, including forty-five aggravated assaults in the Mass & Cass area in 2018.⁹¹ Former Mayor Walsh added that the Sweep was "aimed at addressing this crisis in a way that prioritizes both public safety for everyone and the compassion needed for those suffering with addiction."⁹²

In contrast to the city's public statements, activists and advocates who work with unhoused individuals at Mass & Cass saw a different situation during the Sweep.⁹³ They reported seeing approximately fifteen state and Boston police officers ordering people to leave.⁹⁴ They also saw the police officers throw unhoused individuals' personal belongings into trash trucks, including an individual's wheelchair after his partner tried to plead with the police to get it back.⁹⁵ After the Sweep, activists and state politicians condemned the Boston Police Department for their actions.⁹⁶ Further, individuals in surrounding neighborhoods expressed concern that the Sweep only moved unhoused individuals into different neighborhoods and did not actually address the underlying problems of lack of housing and shelter beds.⁹⁷ Despite public outrage after the Sweep, the City of Boston continued to remove unhoused individuals from Mass & Cass without providing them with viable shelter alternatives.

1. Fall 2021 "Sweep"

Once again, in October and November 2021, Boston officials began to "clean up" the Mass & Cass area.⁹⁸ On October 19, 2021, Kim Janey, Boston's Acting Mayor, established a "Coordinated Response to Public Health and Encampments" in Boston.⁹⁹ The underlying Executive Order declared that tents

⁸⁸ *Id.*

⁸⁹ *Id.* The state charged arrested individuals with drug possession, assault, and outstanding warrants from other cities and states. *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See id.*; *see also* Dwyer, *Experts Rebuke Boston Officials*, *supra* note 23.

⁹⁴ *See* Dwyer, *Debate Erupted*, *supra* note 64.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Dwyer, *Experts Rebuke Boston Officials*, *supra* note 23.

⁹⁹ Mayor Kim Janey, Executive Order, *supra* note 27, at 1.

and other temporary shelters in Mass & Cass threatened the safety and health of individuals living in and around them.¹⁰⁰

Although former Acting Mayor Janey cited public health concerns in her EO, her primary focus appeared to be establishing clear and clean streets and allowing the Boston Police Department to increase violence control “to enforce all laws related to drug trafficking, human trafficking, disorderly conduct, and trespassing.”¹⁰¹ The EO highlighted that the Boston Police Department arrested individuals for distributing and trafficking drugs, committing assaults, and having illegal firearms at Mass & Cass.¹⁰² The EO further stated that the City of Boston will address this “public health crisis” by prioritizing enforcement of existing laws and exercising existing powers to prevent individuals from placing and maintaining these encampments.¹⁰³ However, the EO also says that this enforcement will not “criminalize” the status of unsheltered individuals, individuals with substance use disorder, or individuals with mental illness.¹⁰⁴

Instead of criminalizing their statuses, the EO explains that the city will follow the Boston Homeless Encampment Liaison Protocol (the Protocol).¹⁰⁵ The Protocol includes providing appropriate notice to unhoused individuals about when they need to remove their tents, offering alternative shelters, as well as substance abuse and mental health services.¹⁰⁶ However, the EO stated that if an individual refused to remove their tent, they could be charged with “disorderly conduct” and are “subject to the existing laws of the Commonwealth of Massachusetts.”¹⁰⁷

The American Civil Liberties Union of Massachusetts (ACLU), substance abuse medical professionals, housing advocates, and public health leaders expressed concerns about the removal procedures and plan.¹⁰⁸ These advocates suggested that instead of removing individuals and their belongings from the encampments, the City of Boston should consider meeting the unhoused individuals’ “basic needs” by providing them with bathrooms, access to clean water, and showers at the encampment sites at Mass & Cass.¹⁰⁹ Dr. Sarah Wakeman, Medical Director for Substance Use Disorder at Mass General Brigham, also shared concerns about compulsory substance abuse treatment, citing studies that found that involuntary substance abuse treatment in

¹⁰⁰ *Id.* The EO cited concerns that these encampments blocked sidewalks and streets, lacked clean water and hygiene facilities, were sites of sexual violence and other violence, produced a lot of trash, attracted rodents, and caused infectious disease outbreaks. *Id.*

¹⁰¹ *Id.* at 2–4.

¹⁰² *Id.* at 2.

¹⁰³ *Id.* at 3.

¹⁰⁴ *Id.*

¹⁰⁵ Mayor Kim Janey, Executive Order, *supra* note 27, at 3.

¹⁰⁶ The Protocol, *supra* note 27.

¹⁰⁷ Mayor Kim Janey, Executive Order, *supra* note 27, at 4.

¹⁰⁸ Dwyer, *Experts Rebuke Boston Officials*, *supra* note 23.

¹⁰⁹ *Id.*

Massachusetts showed higher rates of fatal overdose afterwards.¹¹⁰ Rather, Dr. Wakeman suggested that individuals at Mass & Cass needed immediate access to “non-congregate shelters” like hotels or motels, longer-term access to low-threshold housing, and “voluntary, welcoming, and evidence-based” substance abuse treatment.¹¹¹

2. January 2022 “Sweep”

More recently, Boston’s current Mayor Michelle Wu oversaw the destruction of unhoused encampments at Mass & Cass in January 2022.¹¹² Similar to Acting Mayor Janey, Mayor Wu stated that the tent encampments were unsafe for residents because of the unsanitary conditions, and the cold winter days and nights.¹¹³ Mayor Wu represented that the City of Boston would remove individuals from Mass & Cass using a “public health approach” and she promised to connect each unhoused individual with a shelter, or temporary or permanent housing before taking down their tent shelters.¹¹⁴ Unlike some of the earlier sweeps of the area, Mayor Wu made an effort to increase shelter beds before removing individuals from Mass & Cass.¹¹⁵

¹¹⁰ *Id.*

¹¹¹ *Id.*; Low-threshold housing is a “housing first” model that provides housing and services to individuals experiencing substance use and mental illness. *DPH RFR for Low-Threshold Permanent Housing and Support Services*, W. MASS. NETWORK TO END HOMELESSNESS (May 7, 2021), <https://www.westernmasshousingfirst.org/resources/2021/dph-rfr-for-low-threshold-permanent-housing-and-support-services/>.

¹¹² See Valencia et al., *Tent Encampments*, *supra* note 25. Although Mayor Wu initially halted Mayor Janey’s clean-up efforts when she first entered office in mid-November, 2021, Mayor Wu similarly set a goal of removing the tents by January 12, 2022. Karen Anderson, *Boston Mayor Michelle Wu Sets Goal to Clear Encampment Near ‘Mass & Cass’ by Jan. 12*, WCVB (Dec. 15, 2021), <https://www.wcvb.com/article/boston-mayor-goal-to-clear-homeless-encampment-near-mass-and-cass-by-jan-12/38529988#>.

¹¹³ See Valencia et al., *Tent Encampments*, *supra* note 25.

¹¹⁴ Milton Valencia et al., *At Mass. and Cass, Word Is Spreading: The Tents Are Coming Down and Housing Is Available*, BOS. GLOBE (Jan. 8, 2022, 4:47 PM) [hereinafter Valencia et al., *Word Is Spreading*], <https://www.bostonglobe.com/2022/01/08/metro/mass-cass-word-clean-up-housing-has-begun-spread/>. However, some homelessness advocates said that the process was just another “police sweep of the neighborhood.” See Deborah Becker, *As City Clears Tents From ‘Mass. and Cass,’ Some Say They Still Have Nowhere to Go*, WBUR (Jan. 13, 2022), <https://www.wbur.org/news/2022/01/12/boston-mass-cass-homelessness-tents-clearing-out>. Others in Boston, such as the Newmarket Business Association, sided with Mayor Wu, brushing aside homelessness advocates’ concerns. *Id.* The Business Association supported the early 2022 sweep to decrease crime and improve business opportunities in the area, calling the destruction of unhoused encampments “like Christmas and Fourth of July all together” for business owners. *Id.*

¹¹⁵ See Valencia et al., *Tent Encampments*, *supra* note 25.

Mayor Wu contracted with Roundhouse and EnVision Hotels to provide unhoused people with additional shelter and housing options.¹¹⁶ Although the shelter services at Roundhouse Hotel are considered low-threshold housing, substance use is not tolerated.¹¹⁷ Instead, Boston Medical Center staff support individuals in accessing substance abuse treatment.¹¹⁸ The city also set up pop-up cabins on the Shattuck Hospital campus.¹¹⁹ However, the City of Boston only housed ten individuals from Mass & Cass in these cottages.¹²⁰ Mayor Wu reported that 154 people were placed in temporary housing by January 12, 2022, when the sweep occurred.¹²¹

Notwithstanding these efforts, temporary housing and shelter options were insufficient to meet existing shelter needs.¹²² The City of Boston did not know the exact number of unhoused individuals living in encampments at Mass & Cass.¹²³ The ACLU believed that approximately 350 people lived in about 150 tents in the area.¹²⁴ However, an early 2022 census said that 145 people were living in the tents and approximately 100 people had been placed in shelters or housing.¹²⁵ Ultimately, Mayor Wu did not fulfill her promise to provide all individuals with temporary housing before removing the tent encampments.¹²⁶

Even though Mayor Wu acknowledged that some individuals remained unhoused after the destruction of their tents, on the night of January 12, 2022, Boston police patrolled the Mass & Cass area and prevented unhoused

¹¹⁶ See Dialynn Dwyer, *Mayor Wu: 83 People from Mass. and Cass Placed in Housing with Space for More as Deadline for Tent Clearing Approaches*, BOSTON.COM (Jan. 10, 2022) [hereinafter Dwyer, *83 People*], <https://www.boston.com/news/local-news/2022/01/10/michelle-wu-update-housing-mass-and-cass/>.

¹¹⁷ *Id.*; Valencia et al., *Word Is Spreading*, *supra* note 114.

¹¹⁸ Dwyer, *83 People*, *supra* note 116; Valencia et al., *Word Is Spreading*, *supra* note 114.

¹¹⁹ See Valencia et al., *Tent Encampments*, *supra* note 25.

¹²⁰ See Karen Anderson & Kevin Rothstein, *Exclusive Look at New Housing for People Who Lived at Mass & Cass in Boston*, WCVB (Jan. 12, 2022, 7:24 PM), <https://www.wcvb.com/article/5-investigates-new-cottages-former-mass-and-cass-residents/38750568#>.

¹²¹ Becker, *supra* note 114.

¹²² *See id.*

¹²³ Compare Becker, *supra* note 114, with Assoc. Press, *ACLU Sues Boston Over Decision to Evict Homeless From Camp*, U.S. NEWS & WORLD REP. (Nov. 5, 2021), <https://www.usnews.com/news/best-states/massachusetts/articles/2021-11-05/aclu-sues-boston-over-decision-to-evict-homeless-from-camp>.

¹²⁴ See Assoc. Press, *supra* note 123.

¹²⁵ Becker, *supra* note 114.

¹²⁶ *See id.* After January 12, 2022, some unsheltered individuals at Mass & Cass stated that they wanted to move to a shelter or temporary housing but had not been connected to housing resources yet. *Id.* One unhoused individual shared that he had been living in the tent encampment for six months and after his tent was destroyed had nowhere to go. *Id.* Additionally, he was unable to find his personal belongings. *Id.*

individuals from setting up new tents.¹²⁷ Moreover, on January 13, 2022, officials said that about forty people were walking around the Mass & Cass area and police continued to patrol the area to ensure that individuals did not set up tents.¹²⁸ Mayor Wu also stated plainly that if unhoused people tried to come back to Mass & Cass and refuse services, authorities would remove their tents.¹²⁹

3. The “Warm Weather Plan” & Subsequent Sweeps

Mayor Wu has continued to prevent unhoused individuals from setting-up tents at Mass & Cass, but has not yet provided sufficient shelter beds. Mayor Wu’s Warm Weather Plan (WWP) provided a proposal for how to prevent unhoused individuals from continuing to use Mass & Cass as an “open air drug market” during the summer of 2022.¹³⁰ Mayor Wu stated that the city would not open up the engagement center on Atkinson Street as a space for unhoused individuals to spend time during the day.¹³¹ Part of Mayor Wu’s plan included opening more engagement centers for unhoused individuals in other Boston neighborhoods and “trucking” these individuals from Mass & Cass to those services.¹³² In addition to increasing services outside of Mass & Cass, the plan also involved increasing police presence at Mass & Cass and subsequently, arrests.¹³³

After the summer, under Mayor Wu’s guidance, Boston officials again cleaned up nearly ninety tents in the Mass & Cass area in October 2022.¹³⁴ Afterwards, Mayor Wu stated that the number of unhoused individuals at Mass & Cass decreased from 262 individuals in the fall of 2021 to 173 in October 2022.¹³⁵ This highlights the great disparity between the number of unhoused individuals in January 2022 and the housing and shelter placements that Mayor Wu provided prior to the January 12, 2022 sweep.¹³⁶ Although Mayor Wu has implemented plans to prevent unhoused individuals from setting-up tents in Mass & Cass, unhoused individuals have persisted to create shelters when they

¹²⁷ *Id.*; see Valencia et al., *Tent Encampments*, *supra* note 25.

¹²⁸ *Id.*

¹²⁹ Sean Philip Cotter, *Boston Hooks Up 154 Homeless with Housing, but Crowds Remain at Mass and Cass*, BOS. HERALD (Jan. 13, 2022, 7:42 PM), <https://www.bostonherald.com/2022/01/13/boston-hooks-up-154-homeless-with-housing-but-crowds-remain-at-mass-and-cass/>.

¹³⁰ See Sean Philip Cotter, *Michelle Wu Rolls Out Boston ‘Warm-Weather Plan’ for Mass and Cass*, BOS. HERALD (May 24, 2022) [hereinafter Cotter, *Warm-Weather Plan*], <https://www.bostonherald.com/2022/05/24/michelle-wu-rolls-out-boston-warm-weather-plan-for-mass-and-cass/>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Bedford, *supra* note 28.

¹³⁵ *Id.*

¹³⁶ See *id.*; see also *supra* Sections I.C.2, II.B.2.

have no other options.¹³⁷ Mayor Wu herself has recognized that housing availability remains insufficient to meet the needs of unhoused individuals in Boston.¹³⁸ In October 2022, Mayor Wu said that the City of Boston had moved seventy-two individuals into permanent supportive housing since the January 2022 sweep.¹³⁹ However, Mayor Wu also stated that her administration is making efforts to increase the housing availability from 200 units to the thousands needed.¹⁴⁰

In summary, Massachusetts and Boston have not invested sufficient resources to support unhoused individuals' shelter and housing options. Additionally, they have not provided adequate mental health and substance use disorder resources and other programs for unhoused individuals, especially during the COVID-19 pandemic. As a result, unhoused individuals have needed to live outside in tent encampments, particularly in parts of Boston where resources are centralized, like in the Mass & Cass area. Part III demonstrates that cities like Boston can violate the Eighth Amendment by criminalizing individuals living in tent encampments, especially when these individuals have nowhere else to go.

III. THE EIGHTH AMENDMENT'S LIMITATIONS IN PROTECTING UNHOUSED INDIVIDUALS

The Eighth Amendment prohibits the state from inflicting "cruel and unusual punishments" on its citizens.¹⁴¹ In *Robinson v. California*, the Supreme Court held that state action violates the Eighth Amendment when it makes an individual's involuntary "status" a criminal offense.¹⁴² The Court overturned Robinson's conviction, holding that imprisoning individuals who have substance use disorder inflicted "cruel and unusual punishment" upon them and that the state cannot punish individuals simply due to their "status" of experiencing addiction.¹⁴³ The Court compared substance use disorder to mental illness, leprosy, or having sexually transmitted diseases, and stated that individuals would likely find criminalizing the aforementioned diseases as cruel and unusual punishment.¹⁴⁴

Just six years later, the Supreme Court narrowed *Robinson* in *Powell v. Texas*.¹⁴⁵ The Supreme Court clarified that the Eighth Amendment's protection of an individual's status did not expand to undesirable behaviors, like public drunkenness. Thus, the Court rejected Mr. Powell's argument that being in

¹³⁷ See Bedford, *supra* note 28.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ U.S. CONST. amend. VIII.

¹⁴² See 370 U.S. 660, 667 (1962). In *Robinson*, a jury had convicted a man under a California statute that criminalized addiction to narcotics. *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ 392 U.S. 514, 532 (1968).

public while drunk was an involuntary act because Powell experienced “chronic alcoholism.”¹⁴⁶ The Supreme Court affirmed Mr. Powell’s conviction and expressed concerns that finding Mr. Powell’s behavior involuntary could lead to preventing the state from convicting a person for murder if the individual had a “compulsion to kill.”¹⁴⁷ The Court stated its intention to leave it to the states to decide whether to criminalize public drunkenness because medical understanding at the time about individuals experiencing alcoholism did not provide enough information on whether these individuals could “control their performance.”¹⁴⁸

After *Powell*, courts have struggled to distinguish between what constitutes “status” crimes versus “undesirable behavior” in public spaces.¹⁴⁹ Therefore, the courts have also grappled with whether states can punish involuntary conduct that is linked to status.¹⁵⁰ Still, unhoused individuals throughout the nation have successfully used the prohibition on status crimes to challenge ordinances and city behavior that criminalize their unhoused status.¹⁵¹

A. Ninth Circuit Cases

Three cases in the Court of Appeals for the Ninth Circuit, *Jones v. City of Los Angeles*, *Martin v. City of Boise*, and *Johnson v. City of Grants Pass*, illustrate how unhoused individuals have challenged city action as unconstitutional under the Eighth Amendment. These cases also demonstrate the development of case law that protects unhoused individuals from cities that try to remove them from public spaces.

1. *Jones v. City of Los Angeles*

In *Jones v. City of Los Angeles*, the Ninth Circuit considered whether unhoused plaintiffs had standing to bring an Eighth Amendment claim. Specifically, the court considered whether the Eighth Amendment could apply outside of post-conviction scenarios, or whether plaintiffs only suffer a “cognizable harm” if they are convicted or “face an imminent threat of future conviction.”¹⁵² The Ninth Circuit clarified that, under the Supreme Court case *Ingraham v. Wright*, plaintiffs need only to be “subject[ed] to the criminal process” after violating a statute to have standing to bring an Eighth Amendment claim.¹⁵³ Plaintiffs experience a direct injury if they are arrested or deprived of

¹⁴⁶ *Id.* Police officers arrested Mr. Powell for violating a Texas law that prohibited drunkenness in a public space and Powell’s attorney argued that the Texas statute criminalized Mr. Powell’s status in violation of the Eighth Amendment. *Id.* at 517.

¹⁴⁷ *Id.* at 534.

¹⁴⁸ *Id.* at 535.

¹⁴⁹ See *infra* Section IV.B.2.

¹⁵⁰ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992).

¹⁵¹ See *id.*

¹⁵² 444 F.3d 1118, 1127 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

¹⁵³ *Id.* at 1131.

their liberty or their property.¹⁵⁴ Therefore, the court found that in *Jones*, the city's fining, arresting, imprisoning, taking property, and/or prosecuting the unhoused individuals for "involuntarily" violating the ordinance was sufficient to establish their standing.¹⁵⁵ Finally, the court held that:

[b]ecause there is substantial and undisputed evidence that the number of homeless persons in Los Angeles far exceeded the number of available shelter beds at all times, including on the nights of their arrest or citation, Los Angeles encroached upon the Appellants' Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless.¹⁵⁶

Citing *Powell*, the Ninth Circuit further acknowledged that "the state cannot punish a person for certain conditions, either arising from his own acts or contracted involuntarily, or acts that he is powerless to avoid."¹⁵⁷ Still, the Ninth Circuit clarified that the Eighth Amendment did not prevent the state from criminalizing avoidable conduct like panhandling or obstructing public travel.¹⁵⁸

2. *Martin v. City of Boise*

In *Martin v. City of Boise*, unhoused individuals brought an action under 42 U.S.C. § 1983 alleging that the city's public camping ordinance was unconstitutional under the Eighth Amendment.¹⁵⁹ The plaintiff-appellants alleged that between 2007 and 2009, Boise police cited them for violating one or both of two city ordinances: Boise City Code § 9-10-02, a "camping" ordinance, and Boise City Code § 6-01-05, a "disorderly conduct" ordinance.¹⁶⁰ The camping ordinance banned "the use of public property as a temporary or permanent place of dwelling, lodging, or residence."¹⁶¹ And the disorderly conduct ordinance banned "[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."¹⁶²

To determine whether the unhoused appellants had viable Eighth Amendment claims, the Ninth Circuit looked at the number of unhoused individuals in Boise and the available shelter beds.¹⁶³ It found that the shelters had limited capacity and enforced various restrictions, including religious ones, that might prevent

¹⁵⁴ *Id.* at 1129.

¹⁵⁵ *Id.* at 1131.

¹⁵⁶ *Id.* at 1132.

¹⁵⁷ *Id.* at 1133 (citing *Powell v. Texas*, 392 U.S. 514, 567 (1968)).

¹⁵⁸ *Id.* at 1137.

¹⁵⁹ 902 F.3d 1031, 1035 (9th Cir. 2018), *amended and reh'g denied*, 920 F.3d 584 (9th Cir. 2019).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (quoting BOISE, IDAHO CITY CODE § 9-10-02) (internal quotations omitted).

¹⁶² *Id.* (quoting BOISE, IDAHO CITY CODE § 6-01-05) (internal quotations omitted).

¹⁶³ *Id.* at 1036.

unhoused individuals from staying there.¹⁶⁴ The Ninth Circuit held that the Eighth Amendment's prohibition on cruel and unusual punishment prohibits a city from prosecuting people criminally for sleeping on public property when they do not have a home or a shelter to go to.¹⁶⁵ However, the court declined to require the city to provide enough shelter for all unhoused individuals, or anyone who wished to be on the streets at any time.¹⁶⁶ The court clarified that the Eighth Amendment only prohibited the city from arresting individuals for being in public if there is a larger number of unhoused people than available beds.¹⁶⁷

3. *Johnson v. City of Grants Pass*

In the recent Ninth Circuit case *Johnson v. City of Grants Pass*, unhoused individuals brought a class action against the City of Grants Pass, challenging the constitutionality of five city ordinances that prohibited the use of a blanket, pillow, or cardboard box for the protection from the elements while sleeping within the city's limits.¹⁶⁸ The court interpreted *Martin* to hold that the government could not prosecute unhoused people for sleeping in public if there were a greater number of unhoused people than there are available shelter beds.¹⁶⁹ The Ninth Circuit focused on the city's anti-camping ordinance and looked at whether it violated the Eighth Amendment.¹⁷⁰ Because Eighth Amendment claims usually involve criminal charges, the city argued that citing individuals under the anti-camping ordinance could not be cruel and unusual punishment because the citations are civil and, therefore, are not punishment under the Eighth Amendment.¹⁷¹ The court conceded that Eighth Amendment claims usually involve criminal charges, but outlined the connection between the city's civil citations and criminal enforcement.¹⁷² The ordinances allowed the city to exclude individuals from the city if they violated the ordinances multiple times.¹⁷³ Once the unhoused individuals received an exclusion order, the city could then criminally prosecute them for trespassing if the city found

¹⁶⁴ *See id.* (noting that one shelter frequently had to turn unhoused people away because of limited capacity and the other two shelters that were run by a Christian nonprofit organization would eventually require that unhoused individuals participate in a "Discipleship Program" and also required them to stay at the shelter for a number of consecutive nights).

¹⁶⁵ *Id.* at 1035.

¹⁶⁶ *Id.* at 1048.

¹⁶⁷ *Id.*

¹⁶⁸ 50 F.4th 787, 787 (9th Cir. 2022).

¹⁶⁹ *Id.* (noting that the Ninth Circuit stated that shelters with a "mandatory religious focus" could not be counted as a shelter with available beds).

¹⁷⁰ *Id.* at 806.

¹⁷¹ *Id.*

¹⁷² *Id.* at 807 (citing *Martin*, 902 F.3d at 1035) (noting that in *Martin*, the unhoused individual violated a criminal ordinance and that the *Martin* opinion focused on the "criminal nature" of the charges).

¹⁷³ *Id.* at 792.

them on public property.¹⁷⁴ The Ninth Circuit held that imposing steps before criminalizing an individual's status "does not cure the anti-camping ordinances' Eighth Amendment infirmity."¹⁷⁵

The city also argued that *Martin* did not apply because the city amended its ordinance to allow unhoused individuals to sleep in city parks.¹⁷⁶ This amended ordinance, however, still prevented unhoused individuals from using "bedding, sleeping bag, or other material used for bedding purposes."¹⁷⁷ Therefore, the Ninth Circuit held that the amended ordinance still violated the Eighth Amendment because it prevented unhoused people from "taking necessary minimal measures to keep themselves warm and dry while sleeping where there are no alternative forms of shelter available."¹⁷⁸ However, the Ninth Circuit did not decide whether the city ordinance's prohibition of stoves, fires, or structures violated the Eighth Amendment.¹⁷⁹

B. District Court Cases

United States district courts have also considered whether prohibiting individuals from engaging in "inoffensive" behavior and erecting structures in public violated the Eighth Amendment.

1. *Pottinger v. City of Miami*

In *Pottinger v. City of Miami*, plaintiffs filed a class action on behalf of themselves and approximately 6,000 other unhoused individuals living in Miami.¹⁸⁰ Their complaint alleged that the City of Miami harassed and interfered with their "basic activities of daily life" in public spaces by arresting them under city ordinances and Florida statutes.¹⁸¹ These basic activities included eating and sleeping when they had nowhere else to do it.¹⁸² The plaintiffs contended that the arrests, although rarely resulting in criminal charges, violated their rights under the U.S. and Florida Constitutions.¹⁸³ The plaintiffs did not seek to enjoin these ordinances and statutes in their entirety.¹⁸⁴ Instead, they wanted to prevent the city from arresting them for engaging in

¹⁷⁴ *Id.* at 795.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 808. After the Ninth Circuit decided *Martin*, the City of Grants Pass amended its anti-camping ordinance to "make it clear that those without shelter could engage in the involuntary acts of sleeping or resting in the City's Parks." *Id.* at 795.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ 810 F. Supp. 1551, 1553–54 (S.D. Fla. 1992).

¹⁸¹ *Id.* at 1554.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

“inoffensive conduct” like sleeping or bathing.¹⁸⁵ Ultimately, the district court agreed that injunctive relief was warranted because: (1) the plaintiffs showed that the City of Miami had a “pattern and practice of arresting homeless people for the purpose of driving them from public areas”; (2) this practice of arresting individuals for “harmless, involuntary conduct” violated the Eighth Amendment because it is “cruel and unusual”; and (3) the arrests violated the plaintiffs’ due process rights, among others.¹⁸⁶

The court also distinguished *Robinson* from *Powell*.¹⁸⁷ The court noted that although *Powell* suggests that the state can inflict criminal penalties on an individual if they engage in conduct that society has an interest in preventing, *Powell* did not encounter the “plight of the homeless plaintiffs” where “they have no realistic choice but to live in public places.”¹⁸⁸ Taking a comprehensive view, the court further recognized that, “[i]n addition to problems of social isolation, illness and unemployment, homelessness is exacerbated by the unavailability of many forms of government assistance.”¹⁸⁹

Similar to *Jones* and *Martin*, the *Pottinger* court also considered the number of available beds.¹⁹⁰ The local shelters had approximately 700 beds.¹⁹¹ But, around 200 of these beds had conditions attached to them, and approximately 6,000 individuals were unhoused at the time of the trial.¹⁹² The court acknowledged that, for unhoused individuals, “[a]voiding public places when engaging in . . . otherwise innocent conduct [such as eating, sleeping, etc.] is . . . impossible.”¹⁹³

2. *Anderson v. City of Portland*

In *Anderson v. City of Portland*, unhoused individuals living in an encampment brought a class action lawsuit under § 1983, alleging that Portland’s “no-camping” and “temporary structure” ordinances criminalized their unhoused status, in violation of the Eighth Amendment.¹⁹⁴ One relevant Portland City Code made it unlawful “for any person to camp in or upon any public property or public right of way” unless the Portland City Codes or the mayor authorized it.¹⁹⁵ Another code made it illegal “to erect, install, place, leave, or set up any type of permanent or temporary fixture or structure of any

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1554.

¹⁸⁷ *Id.* at 1563.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1564.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ No. 08-1447-AA, 2009 WL 2386056, at *1 (D. Or. July 31, 2009).

¹⁹⁵ *Id.* (quoting PORTLAND, OR. CITY CODE § 14A.50.020(B)) (internal quotations omitted).

material(s) in or upon non-park public property or public right-of-way without a permit or other authorization from the [c]ity.”¹⁹⁶

The city argued that the codes did not subject plaintiffs to cruel and unusual punishment.¹⁹⁷ First, the city contended that violating a temporary structure ordinance is not a crime because the city does not punish individuals with fines or imprisonment, but rather through abatement.¹⁹⁸ The city also asserted that the ordinances “criminalize conduct rather than status.”¹⁹⁹ The district court found that the city’s enforcement of the ordinances “criminalize[d] [unhoused individuals] for being homeless and engaging in the involuntary and innocent conduct of sleeping on public property.”²⁰⁰ The court found that the city could fine unhoused individuals \$500 or imprison them for up to six months for erecting a temporary structure on private property.²⁰¹ Therefore, the district court denied the city’s motion to dismiss with respect to the plaintiffs’ Eighth Amendment claim because it required more development of the facts.²⁰²

IV. HAVE BOSTON OFFICIALS VIOLATED UNHOUSED INDIVIDUALS’ EIGHTH AMENDMENT RIGHTS?

A. *ACLU Litigation in November 2021*

In November 2021, the ACLU sued the City of Boston in response to the city’s decision to declare “addiction” and “homelessness” a public health emergency and “clean-up” the area around Mass & Cass.²⁰³ The class action lawsuit includes three named plaintiffs—Ronald Geddes, AC, and RAR—but applies to all unhoused individuals around Mass & Cass.²⁰⁴ These three named plaintiffs illustrate the challenges that many unhoused individuals at Mass & Cass experience. Mr. Geddes, Ms. AC, and Mr. RAR each lived at Mass & Cass for over a year.²⁰⁵ They became unhoused for a variety of reasons, including losing their jobs, having difficulty securing employment because of limited English proficiency and criminal records, and experiencing substance use disorder and mental health challenges.²⁰⁶ Additionally, staying in congregate

¹⁹⁶ *Id.* (quoting PORTLAND, OR. CITY CODE § 14A.50.050(A)) (internal quotations omitted).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at *3.

²⁰⁰ *Id.* at *7.

²⁰¹ *Id.* at *3.

²⁰² *Id.* at *7.

²⁰³ See Assoc. Press, *supra* note 123; Complaint at 4, *Geddes v. City of Boston*, SJ-2021-0408, 2021 WL 5441085, at *1 (Mass. Nov. 10, 2021).

²⁰⁴ *Geddes*, 2021 WL 5441085, at *1.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 4–5.

shelters was not a viable option for them.²⁰⁷ For two plaintiffs, staying in a congregate shelter setting exacerbated their post-traumatic stress disorder.²⁰⁸ One plaintiff could not safely stay in a congregate shelter during the pandemic because they are immunocompromised.²⁰⁹ Thus, for individuals like Mr. Geddes, Ms. AC, and Mr. RAR, living in tent encampments at Mass & Cass was their best option.²¹⁰ Carol Rose, the Executive Director of the ACLU in Massachusetts, called the Mayor's plan "harmful" and "unconstitutional" because it forced individuals to leave the encampment with no safe alternative place to sleep and disconnected them from accessible medical care.²¹¹ Therefore, the plaintiffs alleged that the Mayor's EO violated their Eighth Amendment rights.²¹² As a remedy, they sought a temporary restraining order and a preliminary injunction enjoining enforcement of certain portions of the EO.²¹³

Before the Massachusetts Supreme Judicial Court (SJC), the City of Boston and the plaintiffs offered distinct accounts of the situation at Mass & Cass.²¹⁴ The SJC acknowledged the "dire circumstances" the plaintiffs faced because they could not reside in congregate care spaces while waiting for placement in temporary shelters, treatment facilities, or longer-term housing options.²¹⁵ However, the SJC noted that the EO only prohibited unhoused individuals from erecting tents at Mass & Cass, not in other parts of Boston.²¹⁶ The SJC also contemplated whether *Robinson v. California*, *Powell v. Texas*, or *Martin v. City of Boise* applied to the case.²¹⁷ Ultimately, the SJC remanded the case to the superior court to develop a factual record to address the relationship between the number of shelter beds and the number of unsheltered individuals, the tent removal processes that the City of Boston implemented, and the handling of the unhoused individuals' items, among other factual inquiries.²¹⁸ When this Note

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Complaint, *supra* note 203, at 4..

²¹¹ Dialynn Dwyer, *ACLU Files Lawsuit to Stop City from Continuing 'Large-Scale Evictions' at Mass. and Cass*, BOSTON.COM (Nov. 5, 2021), <https://www.boston.com/news/local-news/2021/11/05/aclu-massachusetts-files-lawsuit-mass-and-cass/>.

²¹² Complaint, *supra* note 203, at 2.

²¹³ *Geddes v. City of Boston*, SJ-2021-0408, 2021 WL 5441085, at *1 (Mass. Nov. 10, 2021).

²¹⁴ *See id.* at *1.

²¹⁵ *Id.*

²¹⁶ *Id.* at *1.

²¹⁷ *Id.*; *see supra* Part III.

²¹⁸ *Geddes*, 2021 WL 5441085, at *1. The specific questions the SJC posed were: (1) the ratio of shelter beds to individuals who need them; (2) the current process of enforcement when beds are not available; (3) solutions offered and processes followed; (4) whether there have been threats of arrests or arrests for disorderly conduct; (5) the types of notice and the

went to press, there had been no further litigation on this matter, despite the recent sweep of Mass & Cass in October 2022 and related ongoing challenges.

B. *Can Unhoused Individuals at Mass & Cass Assert Violations of Their Eighth Amendment Rights?*

1. Ratio of Available Beds to Unhoused People

Unhoused individuals' experiences at Mass & Cass mirror unhoused individuals' experiences in the aforementioned district court and Ninth Circuit cases. Just as in Miami, Boise, Great Falls, and Portland, unhoused individuals in the Mass & Cass area did not and still do not have viable places to go on a given night.²¹⁹ The City of Boston has destroyed tents at Mass & Cass since 2019 without ensuring shelter or other housing options were available to unhoused people there.²²⁰ More recently, Mayor Wu has created additional shelters and temporary housing.²²¹ However, even with these efforts, the City of Boston has not established sufficient temporary housing and shelter beds.²²² In October 2022, Mayor Wu admitted that the city has not created enough shelter space to meet the needs of all unsheltered individuals.²²³

Furthermore, as in the City of Boise, the majority of Boston's current shelters have threshold conditions, further limiting the number of available shelter beds.²²⁴ As previously mentioned, shelters throughout Boston have sobriety, gender, age, length of stay, and veteran status requirements that do not account for unhoused individuals' diverse needs.²²⁵ For example, many unhoused individuals would benefit from low-threshold options because they suffer from substance use disorder.²²⁶ As advocates for the unhoused argue, compulsory

timing of notice; (6) the handling of storage and disposal of belongings, including the amount of belongings that can be stored; (7) the eligibility requirements imposed by shelters; (8) whether the EO provisions have been imposed outside of Mass & Cass; (9) whether the blocks in Mass & Cass that have been cleared of tents are available to individuals who are unable to live in congregate settings and have not received shelter beds that meet their needs; and (10) the progress of development for low-threshold housing and single-unit housing. *Id.*

²¹⁹ See *Individual Shelters in Greater Boston*, *supra* note 9 (noting that Betty's Place Boston YMCA requires that clients are sober for six months before application, Rosie's Place requires that women are sober and adhere to a 9 PM curfew, at Santa Maria women must be sober, adhere to a 10 PM curfew and that shelter is only open from 7 PM–8 AM).

²²⁰ See *supra* Section II.B.

²²¹ See *supra* Section II.B.2–II.B.3.

²²² See Bedford, *supra* note 28.

²²³ See *id.* (Mayor Wu noted that seventy-four unsheltered individuals lived at Mass & Cass in October 2022 and that Boston needed to continue their efforts to make beds available).

²²⁴ See *Martin v. City of Boise*, 902 F.3d 1031, 1036 (9th Cir. 2018); *Services for the Homeless*, *supra* note 70.

²²⁵ See *Individual Shelters in Greater Boston*, *supra* note 9.

²²⁶ See *id.*

substance abuse treatment may actually cause higher rates of fatal overdoses.²²⁷ Therefore, to meet these unhoused individuals' needs, the City of Boston should provide shelter first and then provide individuals with the option for substance abuse treatment. In any case, as illustrated through Mr. Geddes, Ms. AC, and Mr. RAR's experiences, congregate shelters are not always safe shelter options for unhoused individuals, especially during the COVID-19 pandemic.²²⁸ Thus, similar to the cities in the aforementioned district court and Ninth Circuit cases, the City of Boston is preventing unhoused individuals from sleeping in public spaces when they have nowhere else to go.²²⁹ In order for Mayor Wu to truly implement a public health approach in the removal of tent encampments in Mass & Cass, she should focus on building additional low-threshold shelter and individual housing options before removing tents from Mass & Cass.

2. Undesirable Behavior and Drug Use

Unhoused individuals at Mass & Cass face additional challenges to bringing Eighth Amendment claims. As *Powell* established after *Robinson*, although the Eighth Amendment prohibits cities from criminalizing status, cities can criminalize individuals' undesirable, public behavior.²³⁰ As Boston mayors have expressed, Mass & Cass has become an "open air drug market."²³¹ Many individuals from the Long Island treatment center landed at Mass & Cass because of its proximity to substance abuse services.²³² Additionally, because they have nowhere else to go, most substance abusers at Mass & Cass use illegal substances out in the open.²³³ Residents in the area have consistently complained about the number of discarded needles around Mass & Cass, as well as increasing violence.²³⁴ Therefore, unhoused individuals at Mass & Cass do engage in societally undesirable behavior that the City of Boston has an interest in preventing.

²²⁷ Dwyer, *Experts Rebuke Boston Officials*, *supra* note 23; *see also* Stacey McKenna, *Research Increasingly Suggests Compulsory Drug Abstinence Programs Are Associated With Increased Risk of Drug Overdose, but Their Relationship to HIV Risk Is Less Clear*, R ST. INST. (Aug. 17, 2021) (citing Anh T. Vo et al., *Assessing HIV and Overdose Risks for People Who Use Drugs Exposed to Compulsory Drug Abstinence Programs (CDAP): A Systematic Review and Meta-Analysis*, 96 INT'L J. DRUG POL'Y, Oct. 2021, <https://www.rstreet.org/commentary/research-increasingly-suggests-compulsory-drug-abstinence-programs-are-associated-with-increased-risk-for-drug-overdose-but-their-relationship-to-hiv-risk-is-less-clear/>).

²²⁸ *See supra* Section IV.A.

²²⁹ *See supra* Section II.B; Part III.

²³⁰ *Powell v. Texas*, 392 U.S. 514, 533–34 (1968).

²³¹ Cotter, *Warm-Weather Plan*, *supra* note 130.

²³² *See Redmond*, *supra* note 47.

²³³ Dwyer, *Leaders Pushed for Action*, *supra* note 26.

²³⁴ *Id.*

However, *Powell* does not require states and cities to criminalize undesirable public behavior linked to status—rather, *Powell* held that was up to the states to decide.²³⁵ The Court recognized the medical knowledge on substance abuse was lacking in 1968.²³⁶ In contrast, medical knowledge is not lacking today.²³⁷ Health care professionals define “drug addiction” and “substance use disorder” as “an inability to control the use of a legal or illegal drug or medicine.”²³⁸ Thus, when unhoused individuals are using substances at Mass & Cass, they are still engaging in involuntary behavior.²³⁹ Although federal case law so far has cast public drug use as “offensive behavior,” Massachusetts and Boston can take a different approach and prioritize unhoused individuals’ need for shelter on a given night over its condemnation of open drug use.²⁴⁰

Further, the City of Boston’s removal of tents from Mass & Cass does not just prevent unhoused individuals from using illegal substances in public, but also prevents unhoused individuals from meeting their basic needs when they have no other options. Unhoused individuals’ public substance use does not discount their need to sleep, bathe, or generally exist in public.²⁴¹ As the district court in *Pottinger* noted, *Powell* did not consider the “plight of the homeless plaintiffs” who have nowhere else to go.²⁴² Similar to *Johnson*, the City of Boston is preventing unhoused individuals from taking “minimal measures” to keep themselves warm and safe during Boston’s unpredictable weather when removing their tents.²⁴³ Although the Ninth Circuit in *Johnson* did not decide whether the city ordinance’s prohibition of structures violated the Eighth Amendment, tents would likely constitute “minimal measures” for warmth in Boston’s cold winter nights.²⁴⁴ Therefore, the City of Boston should refrain from removing people and their tents when they have no other safe shelter or housing options.

²³⁵ *Id.* at 536.

²³⁶ *Id.*

²³⁷ *See generally* NEIL LEVY, ADDICTION AND SELF-CONTROL: PERSPECTIVES FROM PHILOSOPHY, PSYCHOLOGY, AND NEUROSCIENCE (2014); Alan Leshner, *Addiction Is a Brain Disease, and It Matters*, 278 SCIENCE 45 (1997).

²³⁸ *Drug addiction (substance use disorder)*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/drug-addiction/symptoms-causes/syc-20365112> (last visited Apr. 23, 2023).

²³⁹ *See id.*; *Robinson v. California*, 370 U.S. 660, 667 (1962).

²⁴⁰ *See supra* Part III.

²⁴¹ *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992).

²⁴² *Id.*

²⁴³ *Johnson v. City of Grants Pass*, 50 F.4th 787, 808 (9th Cir. 2022).

²⁴⁴ *Id.* at 808–09 (noting that the record does not show whether these items are necessary to provide the “most rudimentary precautions”).

3. Criminalization? City Ordinances, Executive Orders, and Policing

Unhoused individuals at Mass & Cass face an additional challenge in establishing that the City of Boston's actions constitute cruel and unusual punishment under the Eighth Amendment. As the Ninth Circuit analyzed in *Jones*, the Supreme Court held that to bring an Eighth Amendment violation claim, the plaintiff needs to show that they were "subject[] to the criminal process for violating the statute," such as by a fine, arrest, deprivation of liberty, or property.²⁴⁵ Therefore, in *Martin*, *Pottinger*, and *Anderson*, the courts' analysis emphasized that the police either cited, fined or could fine, or arrested or could arrest unhoused individuals for living in public spaces.²⁴⁶ In Boston, however, the municipal code and the EO do not appear to fine individuals for living unhoused, nor do they allow individuals at Mass & Cass to be arrested simply for being there.²⁴⁷ The EO explicitly states that it will not criminalize unsheltered individuals but instead will offer them services and shelter options.²⁴⁸ Further, the aforementioned Boston ordinances are civil and do not include any fines.²⁴⁹ The City of Boston likely wrote its ordinances and the EO to carefully tread the line so as to not violate unhoused individuals' constitutional rights. Even so, the city is achieving the same result—removing unhoused individuals from public spaces when they have nowhere else to go.

The SJC acknowledged that the EO only prohibited unhoused individuals from erecting tents at Mass & Cass, but not in other parts of Boston.²⁵⁰ Thus, according to the SJC, unlike in *Pottinger* and *Anderson* where unhoused individuals could not erect tents in other parts of the city, unhoused individuals in Boston can erect tent encampments elsewhere in Boston.²⁵¹ However, the SJC did not account for other laws that prevent unhoused individuals from

²⁴⁵ *Jones v. City of Los Angeles*, 444 F.3d 1118, 1129 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

²⁴⁶ *Martin v. City of Boise*, 902 F.3d 1051 (9th Cir. 2018), *amended and reh'g denied*, 920 F.3d 584 (9th Cir. 2019); *Anderson v. City of Portland*, No. 08-1447-AA, 2009 WL 2386056, at *3 (D. Or. July 31, 2009); *Pottinger*, 810 F. Supp. at 1564.

²⁴⁷ Compare BOS., MASS., CODE §§ 16-12.2, 16-19.1 (2022); Mayor Kim Janey, Executive Order, *supra* note 27, with *Martin*, 902 F.3d at 1031 (holding that the Eighth Amendment's prohibition on cruel and unusual punishment prohibits a city from prosecuting individuals criminally for sleeping on public property when they do not have a home or a shelter to go to), *Anderson*, 2009 WL 2386056, at *3 (holding that plaintiffs alleged past and potential future injuries because the city could fine plaintiffs or imprison them up to six months for creating a temporary structure), and *Pottinger*, 810 F. Supp. at 1564 (holding that the city's "pattern and practice" of arresting plaintiffs for harmless public behavior violated the Eighth Amendment).

²⁴⁸ Mayor Kim Janey, Executive Order, *supra* note 27.

²⁴⁹ See §§ 16-12.2, 16-19.1.

²⁵⁰ *Geddes v. City of Boston*, SJ-2021-0408, 2021 WL 5441085, at *1 (Mass. Nov. 10, 2021).

²⁵¹ See *id.*; *Anderson*, 2009 WL 2386056, at *7; *Pottinger*, 810 F. Supp. at 1559.

setting up temporary shelters in other parts of Boston.²⁵² In practice, the City of Boston’s municipal code prohibits individuals from being or loitering in any public place at any time.²⁵³ Therefore, the municipal code authorizes the police and other government officials to prevent unhoused individuals from erecting tents in any public area in Boston and ultimately arrest them if they do not comply.²⁵⁴

Additionally, on its face, the EO appears consistent with *Powell*, which permits arrests for “disorderly conduct” or offensive and unwanted behavior.²⁵⁵ However, applying the Ninth Circuit’s analysis in *Johnson*, the EO might result in criminalizing unhoused individuals’ presence at Mass & Cass. The Ninth Circuit in *Johnson* pushed the limits of *Ingraham* and provided an opening to unhoused individuals at Mass & Cass.²⁵⁶ The *Johnson* court held that civil ordinances could still violate the Eighth Amendment if their enforcement ultimately resulted in the arrests of unhoused individuals.²⁵⁷ In *Johnson*, if individuals violated the ordinance twice, the city could issue an exclusion order against them.²⁵⁸ If the individuals violated the exclusion order, the city could arrest them for trespassing.²⁵⁹ Here, the EO permits involuntary commitment “[a]s a last resort” and states that the police may arrest individuals for “disorderly conduct.”²⁶⁰ In Massachusetts, disorderly conduct includes creating “a hazardous or offensive condition that serves no legitimate purpose.”²⁶¹ The EO explicitly states that if an individual refuses to remove a tent, officials could consider their behavior “disorderly conduct.”²⁶² Additionally, under Mayor Wu’s direction, the increase in police presence at Mass & Cass illustrates the likelihood that the City of Boston may arrest individuals for erecting tents.²⁶³ Rather than sending social workers to connect unhoused individuals to resources and safe places to sleep after the January 12, 2022 tent removal, Boston police patrolled the Mass & Cass area and prevented unhoused individuals from setting up new tents.²⁶⁴ Further, the underlying EO demonstrates that the city’s primary concern is not the safety of the unhoused individuals but rather crime

²⁵² *Geddes*, 2021 WL 5441085, at *1.

²⁵³ *See id.*; §§ 16-12.2, 16-19.1.

²⁵⁴ *See* §§ 16-12.2, 16-19.1.

²⁵⁵ *See Powell v. Texas*, 392 U.S. 515 (1968); Mayor Kim Janey, Executive Order, *supra* note 27.

²⁵⁶ *See Johnson v. City of Grants Pass*, 50 F.4th 792, 813 (9th Cir. 2022).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 808.

²⁵⁹ *Id.*

²⁶⁰ Mayor Kim Janey, Executive Order, *supra* note 27.

²⁶¹ MASS. GEN. LAWS ch. 272, § 53(b) (2023).

²⁶² Mayor Kim Janey, Executive Order, *supra* note 27.

²⁶³ Cotter, *Warm-Weather Plan*, *supra* note 130.

²⁶⁴ *Id.*; *see Valencia et al., Tent Encampments*, *supra* note 24.

reduction.²⁶⁵ Therefore, similar to the unhoused individuals in *Johnson*, unhoused individuals' presence in public spaces may lead to their arrests.²⁶⁶ Thus, unhoused individuals at Mass & Cass may still have a successful Eighth Amendment violation claim.

CONCLUSION

After the lower court develops the factual record, the SJC in *Geddes* should hold that the Boston mayors' removal of unhoused individuals from Mass & Cass violates their Eighth Amendment rights, especially because these "sweeps" are ongoing. However, legal recourse alone will not solve unhoused individuals' challenges. Social stigma about unhoused people pervades the U.S. and influences how cities relegate resources and the way courts respond to unhoused individuals' legal claims.²⁶⁷ Therefore, cities like Boston need to invest in low-threshold shelters, temporary housing, affordable housing options, and community-based mental health and substance abuse services, as well as community education to reduce stigma. Perhaps even more importantly, these cities need to listen to what unhoused individuals want and need, and embrace trying out new solutions like bringing clean water and other resources to tent encampments instead of dismantling them. Ultimately, the City of Boston should protect unhoused people and prevent its officials from violating their legal rights before cases like *Geddes* even enter the court system.

²⁶⁵ Mayor Kim Janey, Executive Order, *supra* note 27, at 2, 4.

²⁶⁶ See *Johnson v. City of Grants Pass*, 50 F.4th 792, 792 (9th Cir. 2022).

²⁶⁷ Kamelhar, *supra* note 5.