

THE WILD, WILD WEST: THE RIGHT OF THE UNHOUSED TO PRIVACY IN THEIR ENCAMPMENTS

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“A sane, decent, civilized society must provide some . . . oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man’s castle.”¹

ABSTRACT

The issue of what, if any, protection the Fourth Amendment and its state counterparts give to the home that is not a house recently surfaced in three decisions of panels of the Washington, Oregon, and California courts of appeals, which reached conflicting decisions on nearly identical facts. Descriptively, this Article argues that property-law concepts continue to play an outsized role in judicial determinations of the reasonableness of individuals’ expectations of privacy in particular areas. As a result, courts have a hierarchy of Fourth Amendment protection, with the “home” at its center. Conversely, courts tend to find that trespassers categorically lack constitutional privacy protection on the lands on which they trespass, often relying on assumption-of-risk logic. The court opinions discussing the sanctity of the “home” and the peril of the trespasser contemplate only brick-and-mortar structures occupied by individuals with either a deed or a lease to the premises.

Normatively, this Article argues that the binary opposition of resident versus trespasser is an outdated one that fails to recognize the modern problem of the long-term unhoused and the ambiguous legal status of their permanent encampments. Local anti-camping and trespassing ordinances have, in effect, become the new vagrancy laws, criminalizing a status rather than a voluntary behavior in any meaningful sense. Courts should recognize the dwellings of the unhoused as homes and grant them corresponding Fourth Amendment protection. Both societal norms and understandings about camping and makeshift dwellings and international human-rights norms support the recognition of a constitutional right to privacy of the unhoused in their homes. Courts’ failure to

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1. *Silverman v. United States*, 365 U.S. 505, 512 n.4 (1961) (quoting *United States v. On Lee*, 193 F.2d 306, 315–16 (2d Cir. 1951) (dissenting opinion)).

grant such recognition stems from longstanding and nefarious prejudices against the unhoused.

INTRODUCTION

The Fourth Amendment to the United States Constitution places limitations on the police's ability to engage in "searches" and "seizures" without judicial oversight and a certain level of suspicion (typically, probable cause).² Most state constitutions have analogues to the federal Fourth Amendment, which their state supreme courts tend to interpret similarly to the Supreme Court's interpretation of the Fourth Amendment.³

The framework for assessing whether an investigatory technique is a *search*, and therefore subject to the requirements of the Fourth Amendment, is the reasonable-expectation-of-privacy test first announced in Justice Harlan's concurring opinion in the landmark case of *Katz v. United States*: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"⁴

Katz involved the surreptitious recording of Katz's conversations that he made in a public phone booth.⁵ In rejecting the government's argument that the Fourth Amendment did not protect Katz's activities in a public phone booth in which he had no property rights, the Court explained that the Fourth Amendment "protects people, not places."⁶

2. The Fourth Amendment guarantees that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

3. See, e.g., Carrie Leonetti, *Independent and Adequate: Maryland's State Exclusionary Rule for Illegally Obtained Evidence*, 38 U. BALT. L. REV. 231, 232 (2009); Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653, 655, 661-62 (1987); see also JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES, 1-4 n.11 (Mathew Bender et al. eds., 4th ed. 2006) ("A generation of overreliance by law professors, judges, and attorneys on the federal doctrines that grew out of Warren Court decisions left state constitutional law in a condition of near atrophy in most states."); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 878 (1976) ("During the activist Warren years, it was easy for state courts, especially in criminal cases, to fall into the drowsy habit of looking no further than federal constitutional law."); Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125, 150 (1969); see generally Michigan v. Long, 463 U.S. 1032, 1044 (1983); Delaware v. Prouse, 440 U.S. 648, 652 (1979).

4. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

5. *Id.* at 348.

6. *Id.* at 351.

A. *The Sanctity of the “Home”*

Advocates for the unhoused increasingly reject the use of the antiquated term “homeless,” arguing that people who live in makeshift shelters, typically on public lands, may not have houses, but nonetheless have homes.⁷ This semantic distinction between a house and a home, and its recognition that one can have the latter without the former, is important not just for urban advocacy but also for constitutional law.

The *Katz* test is a bimodal one: a police activity is either a search (and therefore restricted by the Fourth Amendment) or not a search (and therefore not governed by the Fourth Amendment at all).⁸ Since *Katz*, courts and commentators have wrestled with the following question: If the Fourth Amendment protects people, not places, then what is the role of property rights (most importantly, the right to exclude others and the limitation of that right by consent, license, or invitation) in determining the scope of that protection? The short (and fairly unhelpful) answer is that property rights are neither dispositive nor irrelevant in determining whether the Fourth Amendment protects a particular place or activity.

Courts and commentators tend to treat the *Katz* test as a rejection of the Court’s prior practice of using property-rights concepts, including trespass, to determine the line between searches and non-searches.⁹ Nonetheless, in practice, courts, including the Supreme Court, still tend to have a hierarchy of Fourth Amendment protection, with the “home” at its center. Stephanie Stern has documented the manner in which “the ideal of the inviolate home” has dominated Fourth Amendment jurisprudence.¹⁰ For example, in *South Dakota v. Opperman*, in upholding the constitutionality of warrantless inventory searches of impounded automobiles, the Supreme Court explained:

This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are “effects” and thus within the reach of the Fourth Amendment, . . . warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not.¹¹

7. See Peter Lee, *Operation Sack Lunch, Homeless or Unhoused?*, INSIDE OSL (Jan. 14, 2014), <http://blog.oslserves.org/?p=38>.

8. See Carrie Leonetti, *Motive and Suspicion: Florida v. Jardines and the Constitutional Right to Protection from Suspicionless Dagnet Searches*, 14 OHIO ST. J. CRIM. L. 247, 249–50 (2016).

9. See *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (“[A]rcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control . . . the protection of the Fourth Amendment”); *Warden v. Hayden*, 387 U.S. 294, 304 (1967) (“The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be ‘unreasonable’ within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.”).

10. See Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905 (2010).

11. *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976) (citing *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973)).

In *Payton v. New York*, in discussing the requirement that arresting a suspect at home requires both an arrest warrant to seize the suspect and a search warrant to enter the suspect's home, the Court explained:

The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: “The right of the people to be secure in their . . . houses . . . shall not be violated.” That language unequivocally establishes the proposition that “[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” . . . In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.¹²

In *Illinois v. McArthur*, dissenting from the majority opinion upholding the warrantless detention of McArthur to keep him from entering his residence while the police secured a search warrant to search it for marijuana, Justice Stevens pleaded for “plac[ing] a higher value on the sanctity of the ordinary citizen's home . . . — whether the home be a humble cottage, a secondhand trailer, or a stately mansion.”¹³ The “home” shares the same sacred status when state courts analyze the legality of searches under their state constitutions.¹⁴

This Article focuses on a different aspect of the exceptional treatment of the home under the Fourth Amendment—namely, that the court opinions discussing the sanctity of the “home” contemplate brick-and-mortar structures occupied by individuals with either a deed or a lease to the premises.¹⁵ Even cases recognizing constitutional privacy rights in hotel rooms, motel rooms, and campsites tend to emphasize the short-term rental agreement between the hotel or campground's proprietor and its guest.¹⁶

12. *Payton v. New York*, 445 U.S. 573, 589–90 (1980) (internal citations omitted).

13. *Illinois v. McArthur*, 531 U.S. 326, 340 (2001) (Stevens, J., dissenting).

14. *See, e.g.*, *State v. Louis*, 672 P.2d 708, 710 (Or. 1983) (“[L]iving quarters . . . are the quintessential domain protected by the constitutional guarantee against warrantless searches.”).

15. *See, e.g.*, *State v. Tanner*, 745 P.2d 757, 762 (Or. 1987) (“Residence in a house is uniformly deemed to be a sufficient basis for concluding that the violation of the privacy of the house violated the residents' privacy interests.”).

16. *Compare* *United States v. Parizo*, 514 F.2d 52, 55 (2d Cir. 1975) (holding that Parizo's reasonable expectation of privacy in his motel room dissipated when his rental period lapsed because he lost his “proprietary interest” in the premises), *and* *United States v. Kitchens*, 114 F.3d 29, 32 (4th Cir. 1997) (holding that hotel guests that stayed in their room past check-out time lost their legitimate expectation of privacy in the room and, therefore, did not have standing to object to police officers' warrantless entry into the room and subsequent search), *with* *State v. Wolf*, 317 P.3d 377, 384 (Or. App. 2013) (holding that Wolf had a legal right to possess a firearm in his temporary residence in a campground because his campsite was lawfully rented).

B. *The Peril of the Trespasser*

Katz's famous admonition—people, not places—notwithstanding, property-law concepts still play an outsized role in judicial determinations of the reasonableness of individuals' expectations of privacy in particular areas.¹⁷ Common factors on which courts rely include whether an individual has a possessory interest in the area searched or item seized, whether an individual has a right to exclude others from a place, and whether an individual was "legitimately" in a particular place when a putative search or seizure occurred.¹⁸ The result is often a continuum of reasonableness: Individuals in places where they have a legal right to exclude others (e.g., homeowners and renters) have the most reasonable expectation of privacy;¹⁹ individuals in places where they are legally permitted to be but from which they have no right to exclude others (e.g., tenants in the common areas of hotels and apartment buildings, citizens in secluded-but-public places like parks) have weaker expectations of privacy, with courts sometimes deeming them reasonable and other times refusing to do so on the basis of other factors like societal customs and understandings;²⁰ trespassers have the least objectively reasonable expectation of privacy. As a result, courts tend to find that trespassers categorically lack constitutional privacy protection on the lands on which they trespass,²¹ often relying on assumption-of-risk logic.²²

C. *When "Home" is a Trespass*

The binary opposition of resident versus trespasser is an outdated one. It fails to recognize the modern problem of the long-term unhoused and the ambiguous legal status of their permanent encampments. More than one-third of American cities have global bans on camping, making camping anywhere inside of their territorial

17. See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809–27 (2004) (discussing the persistence of property concepts in determining the scope of Fourth Amendment protection).

18. See *People v. Nishi*, 143 Cal. Rptr. 3d 882, 889 (Ct. App. 2012).

19. See, e.g., *United States v. Taborda*, 635 F.2d 131, 138 (2d Cir. 1980) (“[T]he very fact that a person is in his own home raises a reasonable inference that he intends to have privacy, and if that inference is borne out by his actions, society is prepared to respect his privacy.”).

20. See, e.g., *California v. Greenwood*, 486 U.S. 35, 37 (1988) (holding that Greenwood lacked a reasonable expectation of privacy in his garbage that he left at the curb for collection); *United States v. Roberts*, 747 F.2d 537, 542–43 (9th Cir. 1994) (respondent lacked a reasonable expectation of privacy in the walkway to his front door); *Espinoza v. State*, 454 S.E.2d 765, 758 (Ga. 1995) (finding Espinoza had a reasonable expectation of privacy in the grounds of his duplex building while acknowledging that its curtilage analysis was “more complicated when the residence is an apartment in a multi-family dwelling”).

21. See, e.g., *United States v. Gutierrez-Casada*, 553 F. Supp. 2d 1259, 1270 (D. Kan. 2008) (explaining that Gutierrez could not have a reasonable expectation of privacy in premises on which he was “wrongfully present”); *State v. Pokini*, 367 P.2d 499, 509 (Haw. 1961) (“[A] trespasser who places his property where it has no right to be has no right of privacy as to that property.”).

22. See, e.g., *Gov't of Virgin Islands v. Gereau*, 502 F.2d 914, 926–27 (3d Cir. 1974) (“[A]s a general matter, a trespasser must be deemed to assume the risk that the owner of the property will consent to its search.”).

limits a trespass.²³ Even more cities have prohibitions against sitting or lying in public areas, loitering, panhandling, public intoxication, and public urination.²⁴ Terry Skolnik has documented “how difficult—and sometimes impossible—it can be for homeless people to obey the law on a consistent basis, compared to those with access to housing.”²⁵ In effect, local anti-camping and trespassing ordinances have become the new vagrancy laws, criminalizing status rather than voluntary behavior in any meaningful sense.

Enforcement of these anti-unhoused laws empowers local governments to use criminal trespass and loitering violations as shortcuts to eviscerate the rights of the unhoused.²⁶ For example, Katherine Beckett and Steve Herbert have documented the return of “banishment” programs as a tool of social control of urban homelessness, with an increasing number of local governments empowering the police to create “zones of exclusion” from which they can ban unwanted trespassers or even all non-residents as way to clear city streets of the unwanted.²⁷ Officers are also

23. See NAT'L COAL. FOR THE HOMELESS, *SWEPT AWAY: REPORTING ON THE ENCAMPMENT CLOSURE CRISIS 2* (2016) [hereinafter “NAT'L COAL., ENCAMPMENT CLOSURE”].

24. See NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *HOMES NOT HANDCUFFS* 10–11 (2009). Katherine Beckett and Steve Herbert have documented the ways that the unhoused disproportionately bear the burden of laws criminalizing various outdoor behaviors, especially mere presence in urban spaces. See KATHERINE BECKETT & STEVE HERBERT, *BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA* 14–16, 15 n.54 (2009).

25. Terry Skolnik, *Homelessness and the Impossibility to Obey the Law*, 43 *FORDHAM URB. L.J.* 741, 742 (2016).

26. See generally Maria Foscarinis, *Downward Spiral: Homelessness & Its Criminalization*, 14 *YALE L. & POL'Y REV.* 1 (1996) (focusing on the rights of unhoused individuals in their homes under the Fourth Amendment and state constitutional analogues). See, e.g., *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006) (holding that a municipal ordinance prohibiting sitting, lying, or sleeping on any street or sidewalk violated the Eighth Amendment when it was applied to the unhoused overnight in a city with an insufficient number of shelter beds), *vacated at the request of the parties after settlement on remand*, 505 F.3d 1006 (9th Cir. 2007); *Hershey v. City of Clearwater*, 834 F.2d 937, 941–42 (11th Cir. 1987) (holding that a municipal ordinance prohibiting sleeping in a motor vehicle was unconstitutionally vague and overbroad); *Streetwatch v. Nat'l R.R. Passenger Corp.*, 875 F. Supp. 1055, 1059 (S.D.N.Y. 1995) (holding that Amtrak's policy of arresting or ejecting persons who appeared to be unhoused or loitering in the public areas of Penn Station in the absence of evidence that the individuals had committed crimes was void for vagueness and violated their right to free travel under the Due Process Clause of the Fifth Amendment); *State v. Penley*, 276 So. 2d 180, 181 (Fla. App 2d. Dist. 1973) (holding that a municipal ordinance forbidding sleeping “in any street, park, wharf or other public place” was unconstitutionally void for vagueness); Michael F. Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 *PENN. L. REV.* 758 (1963); Matthew D. Borrelli, *Banishment: The Constitutional and Public Policy Arguments Against this Revived Ancient Punishment*, 36 *SUFFOLK L. REV.* 470 (2003); Dorothy Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 *J. CRIM. L. & CRIMINOLOGY* 775 (1999); Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition under the First Amendment*, 24 *N.E. J. CRIM. & CIVIL CONFINEMENT* 455 (1998); Robin Yeaman, *Constitutional Attacks on Vagrancy Laws*, 20 *STAN. L. REV.* 782, 790 (1968); cf. *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (holding that a municipal gang-congregation ordinance that prohibited loitering was void for vagueness and overbroad in violation of the Due Process Clause of the Fourteenth Amendment because it failed to establish sufficient guidelines to restrict police enforcement or to provide clear notice to ordinary citizens of what constituted the prohibited conduct); Matthew Mickle Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions against Urban Street Gangs*, 51 *STAN. L. REV.* 409 (1999); Christopher S. Yoo, *The Constitutionality of Enjoining Street Gangs as Public Nuisances*, 89 *N.W. L. REV.* 212 (1994).

27. BECKETT & HERBERT, *supra* note 24, at 8. See Jurgen von Mahs, *The Sociospatial Exclusion of Single Homeless People in Berlin and Los Angeles*, 48 *AMER. BEHAV. SCIENTIST* 928 (2005); see also DON MITCHELL, *THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE* (2003).

empowered to issue “[o]ff-limits orders” to remain out of these exclusion zones in lieu of arrest, and courts increasingly impose banishment as a condition of a supervisory sentence given in lieu of imprisonment.²⁸

In the United States, the problem of pervasive homelessness is disproportionately a Western one—likely fueled by the combination of mild weather, an acute lack of affordable housing, and progressive local governments.²⁹ For example, in California, of the estimated 115,738 people experiencing homelessness each night, 73,699, or 63.7%, are unsheltered, which is more than twice the national average.³⁰ This has given rise to a Western question of constitutional law: What, if any, protection do the Fourth Amendment and its state counterparts give to the home that is not a house? The United States Supreme Court has never taken on this question, but the issue recently surfaced in three decisions of panels of the Washington, Oregon, and California courts of appeals, which reached conflicting decisions on nearly identical facts.

Khiara Bridges has written about the lack of privacy for the poor in another context—that of poor women seeking public health-care and other Government services—noting: “To be poor is to be subject to invasions of privacy that we might understand as demonstrations of the danger of government power without limits.”³¹ I have previously argued that the Court should embrace a broader concept of the “property rights” that the Fourth Amendment protects as means of reigning in high-tech surveillance.³² I have also previously written about courts’ failure to take into consideration the fact that a majority of Americans now live in apartments in densely packed urban areas rather than on large, rural estates, in its Fourth Amendment “curtilage” jurisprudence and that this failure penalizes the urban poor.³³ This Article makes a similar point with regard to courts’ heavy emphasis on the formal property rights of individuals in their homes to the detriment of this country’s growing unhoused population.

28. BECKETT & HERBERT, *supra* note 24, at 9.

29. See Pam Fessler, *Homeless Population Rises, Driven By West Coast Affordable-Housing Crisis*, NAT’L PUB. RADIO, Dec. 6, 2017, <https://www.npr.org/2017/12/06/568605069/homeless-population-rises-driven-by-west-coast-affordable-housing-crisis>; Jim Smith, *West Coast Homeless Crisis Spreading*, WOODLAND DAILY DEMOCRAT, Dec. 6, 2017, <http://www.dailydemocrat.com/article/NI/20171206/NEWS/171209906>; Amy Taxin & Geoff Mulvihill, *Empathy Questioned as West Coast Cities Fight Homelessness*, LAS VEGAS REV.-J., Dec. 30, 2017, <https://www.reviewjournal.com/news/nation-and-world/empathy-questioned-as-west-coast-cities-fight-homelessness/>; Christopher Weber & Geoff Mulvihill, *US Homeless Count Rises, Pushed by Crisis on the West Coast*, BUS. INSIDER, Dec. 6, 2017, <http://www.businessinsider.com/ap-us-homeless-count-rises-pushed-by-crisis-on-the-west-coast-2017-12>.

30. See NAT’L COAL., *ENCAMPMENT CLOSURE*, *supra* note 23, at 6.

31. KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 5 (2018).

32. See Carrie Leonetti, *A Grand Compromise for the Fourth Amendment*, 12 MD. J. BUS. & TECH. L. 1 (2016) [hereinafter “Leonetti, *Grand Compromise*”].

33. See Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 GEO. MASON U. CIV. RTS. L.J. 297 (2005), reprinted in *THE FOURTH AMENDMENT: SEARCHES AND SEIZURES: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE* (Cynthia Lee ed. 2011).

Section I describes a recent decision by the Washington Court of Appeals, *State v. Pippin*, in which the court held that an unhoused individual's tent, in which he lived, and its contents were constitutionally protected from warrantless invasion by the police.³⁴ Section II describes contrasting decisions by the California and Oregon courts of appeals, with facts that are indistinguishable from those of *Pippin*, in which the courts reached precisely the opposite conclusion, holding that unhoused individuals lacked constitutional privacy protections in their makeshift dwellings.

Section III describes decisions by other courts facing variations of the same larger constitutional question: Whether, and under what circumstances, unhoused individuals have a reasonable expectation of privacy in their dwellings and personal property. It presents a taxonomy of factors that courts use in answering that question. It notes that certain factors: when the trespass occurs on federal lands, when the trespasser had prior notice of possible ejection, or when courts can characterize the dwelling and/or personal possessions as abandoned, courts are likely to reject a claim that an expectation of privacy is reasonable. Conversely, when the trespasser lacked notice or when courts can characterize the property at issue as a closed container, they are likely to find an expectation of privacy therein to be reasonable.

Section IV argues that courts should recognize the dwellings of the unhoused as homes and grant them corresponding Fourth Amendment protection. It argues that both societal norms and understandings about camping and makeshift dwellings and international human-rights norms support the recognition of a constitutional right to privacy of the unhoused in their homes. It also argues that courts' failure to grant such recognition stems from longstanding and nefarious prejudices against the unhoused.

Finally, this article concludes that courts that fail to recognize the reasonableness of the privacy expectations of the unhoused in their homes are mistaken both doctrinally and normatively. Their doctrinal mistake is affording too much significance to property law concepts like trespass, whose talismanic significance the *Katz* test was meant to end. Their normative mistake is their lack of human decency and compassion in conditioning any modicum of privacy on its holder's ability to pay a mortgage or rent.

I. WASHINGTON: HOME IS WHERE THE TARP IS

The Washington Court of Appeals recently announced a decision recognizing the privacy rights of individuals whose homes are not brick-and-mortar houses. In October 2017, in *State v. Pippin*, a panel of the Washington Court of Appeals was asked to review the order of a trial court in Vancouver suppressing evidence seized from William Pippin's tent. Pippin lived in his tent as part of an encampment of approximately one hundred unhoused campsites in downtown Vancouver.³⁵

34. *State v. Pippin*, 403 P.3d 907, 909 (Wash. App. 2017).

35. *See id.* at 910.

Pippin's tent was constructed out of a tarp draped between the guard rail of a public road and a chain-link fence that was on private property.³⁶ The tarp was opaque and hung in a way that shielded its interior from view.³⁷

After a lull in enforcement, the City of Vancouver decided to resume enforcing a city ordinance that prohibited camping on public property between 6:30 a.m. and 9:30 p.m.³⁸ As part of the renewed enforcement campaign, police officers affixed written notices to the tents of residents of Pippin's encampment, including Pippin's, notifying the residents to remove their camps each morning.³⁹ A few days later, officers returned to Pippin's campsite, which Pippin had not removed, to warn and/or arrest him for his violation of the ordinance.⁴⁰

The officers approached Pippin's tent, knocked and announced their presence, and asked Pippin to come out of the tent so that they could talk to him about the ordinance.⁴¹ Pippin said that he would be out in a moment, but, before he emerged, the officers heard "movement under the tarp" and became concerned that Pippin might have a weapon.⁴² The officers lifted the tarp to see inside and saw Pippin sitting on his bed next to a bag of methamphetamine.⁴³

The State charged Pippin with possession of methamphetamine, and he moved to suppress the evidence on the ground that the officers' lifting the flap of his tarp and looking inside was an unconstitutional search under the Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington Constitution.⁴⁴ The Washington Court of Appeals agreed with Pippin, holding that his tent and its contents were protected from warrantless invasion by the Washington Constitution.⁴⁵ The court emphasized the characteristics that Pippin's tent shared with a traditional dwelling: "sleeping under the comfort of a roof and enclosure," "separation and refuge from the eyes of the world," and a "space to

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

42. *Id.*

43. *See id.*

44. *See id.* at 911. Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Washington Supreme Court has announced a different and often broader test for determining violations of the state constitution than the *Katz* test for the Fourth Amendment—whether "the 'private affairs' of an individual have been unreasonably violated." *State v. Boland*, 800 P.2d 1112, 1116 (Wash. 1990). However, its analysis of that issue with regard to the privacy of unhoused encampments is not meaningfully different for the purpose of this Article. For example, like under the Fourth Amendment, under the Washington Constitution, dwellings have the most protection. *See State v. Ferrier*, 960 P.2d 927, 928 (Wash. 1998); *State v. Young*, 867 P.2d 593, 599 (Wash. 1994); *State v. Chrisman*, 676 P.2d 419, 423 (Wash. 1984). Or, to put it another way: although the tests for Article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution are different, that is only so because the courts of last resort that have crafted different tests. It is not the result of some obvious textual or historical difference between them.

45. *See Pippin*, 403 P.3d at 909.

exercise autonomy over the personal.”⁴⁶ The court also emphasized the “intimate and personal” nature of the information that the police intrusion into Pippin’s tent exposed.⁴⁷ The court acknowledged “the realities of homelessness,” which dictated “that dwelling places are often transient,” “precarious,” “flimsy,” and “vulnerable” and gave Pippin no other way to protect his intimate information.⁴⁸ The court specifically rejected the State’s assertion that the technicalities of trespass deprived Pippin’s tent of constitutional privacy protection or the assumption-of-risk argument that implicitly undergirded it.⁴⁹ The court noted: “[T]o call homelessness voluntary, and thus unworthy of basic privacy protections is to walk blind among the realities among us. Worse, such an argument would strip those on the street of the protections given the rest of us directly because of their poverty. Our constitution means something better.”⁵⁰

II. OREGON AND CALIFORNIA: HOUSELESS HEADS AND UNFED SIDES, LOOP’D AND WINDOWED RAGGEDNESS

Unfortunately, the empathy of the Washington Court of Appeals stands in stark contrast to the callousness of the Oregon and California appellate courts. In 1996, in *People v. Thomas*, the California Court of Appeal reviewed the trial court’s denial of Major Thomas’s motion to suppress evidence found in a warrantless search of the cardboard box in which he lived.⁵¹ Los Angeles Police Department officers were investigating a recent burglary of a clothing store when they observed a group of men on a street corner examining clothing matching the description of the items that had been stolen.⁵² Thomas’s makeshift cardboard residence was located on the same corner, where it obstructed four feet of the ten-foot-wide sidewalk.⁵³ Thomas’s home was a four-foot-by-twelve-foot structure made of wooden pallets and heavy cardboard propped against the wall of a building.⁵⁴ The officers knocked on the box, identified themselves, waited ten seconds, then lifted a corner of the box and peered in, discovering Thomas asleep with a plastic bag of clothes later matching the stolen items.⁵⁵ The clothes were later identified as some of those taken in the burglary.⁵⁶ When Thomas admitted knowing that the clothes were stolen, he was charged with receiving stolen property.⁵⁷

46. *Id.* at 915.

47. *See id.* at 916.

48. *Id.* at 915–17.

49. *See id.* at 915–16.

50. *Id.* at 917.

51. *People v. Thomas*, 45 Cal. Rptr. 2d 610 (Cal. Ct. App. 1996).

52. *See id.* at 611.

53. *See id.* at 612.

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.*

Thomas subsequently moved to suppress the stolen clothing, along with his admissions that its discovery prompted, on the ground that the warrantless search of his residence violated his Fourth Amendment right to be secure from unreasonable searches.⁵⁸ The Court of Appeal rejected his claim, reasoning:

Where, as here, an individual “resides” in a temporary shelter on public property . . . in violation of a law which expressly prohibits what he is doing, he does *not* have an objectively reasonable expectation of privacy In short, a person who occupies a temporary shelter on public property without permission and in violation of an ordinance prohibiting sidewalk blockages is a trespasser without a reasonable expectation that his shelter will remain undisturbed.⁵⁹

For the Court of Appeal, the “transient” nature of Thomas’s residence was dispositive, even though he had lived in it and slept in it nightly for more than a year at the time of the warrantless search,⁶⁰ admonishing: “[I]t borders on the absurd to suggest the police should have to get a warrant before searching a transient’s temporary shelter. By the time the warrant issued, the odds are the shelter would be long gone.”⁶¹

A different division of the California Court of Appeal reached a similar conclusion in *People v. Nishi*.⁶² Charles Nishi had a history of sending deranged, threatening letters and emails to government officials; a sheriff’s deputy located, arrested, and transported him to a local psychiatric facility.⁶³ While Nishi was in custody, the deputy searched his campsite, without a warrant, and discovered boxes of shotgun shells under a tarp next to his tent.⁶⁴ Nishi’s tent had been erected on state land, in a preserve where camping was prohibited without a permit, and Nishi did not have authorization to camp there.⁶⁵

Rejecting Nishi’s motion to suppress the shells at his subsequent trial, the California Court of Appeal held that he lacked a reasonable expectation of privacy in his campsite.⁶⁶ For the court, the fact that Nishi’s campsite “was not lawfully or legitimately on the premises where the search was conducted” was dispositive.⁶⁷

More recently, in 2015, in *State v. Tegland*, a three-judge panel of the Oregon Court of Appeals reviewed a trial court’s denial of Gregory Tegland’s motion to suppress evidence that the police found after lifting a tarp that was part of Tegland’s sidewalk home.⁶⁸ Tegland had built his shelter out of a grocery cart,

58. *See id.*

59. *Id.* at 613 (emphasis in original) (internal citations omitted).

60. *See id.* at 612.

61. *Id.* at 613 n.2.

62. *People v. Nishi*, 143 Cal. Rptr. 3d 882 (Cal. Ct. App. 2012).

63. *See id.* at 887–88.

64. *See id.* at 888.

65. *See id.* at 889.

66. *See id.* at 891.

67. *Id.* at 889.

68. *State v. Tegland*, 344 P.3d 63, 64 (Or. App. 2015).

wooden pallet, and multiple tarps in the recessed alcove entrance of a private business building in Portland.⁶⁹ The tarps covered the top and sides of his shelter and were attached to the building to enclose completely the interior.⁷⁰ The shelter extended out onto the public sidewalk approximately two feet, which was about one-quarter the width of the sidewalk.⁷¹

One morning, Portland police officers on patrol, who had previously warned Tegland to remove his shelter, observed the shelter again blocking part of the sidewalk.⁷² They approached the shelter but could not see inside it, so they lifted one of the tarps and saw Tegland with a methamphetamine pipe and lighter.⁷³ They arrested Tegland for violating the Portland City Code by erecting a structure on a public right of way.⁷⁴ The officers searched Tegland incident to that arrest and discovered additional evidence that allowed the State also to charge him with possession of methamphetamine.⁷⁵

The question that the Oregon Court of Appeals had to address under its state constitution was “whether, in lifting the tarp to the structure, revealing its interior, [the officers] invaded a constitutionally protected privacy interest.”⁷⁶ In rejecting Tegland’s argument that his home should receive the same constitutional protection of a brick-and-mortar house, the Oregon Court of Appeals explained, “[although] the fact that the referent space was someone’s residence is highly significant, it is not *per se* dispositive. Rather, the touchstone . . . is whether the space is ‘a place that *legitimately* can be deemed private.’”⁷⁷ For the Oregon court, the fact that Tegland’s residence was an illegal one, subject to immediate removal, foreclosed any constitutional protection of his privacy inside of it.⁷⁸ The court reached a similar conclusion when addressing the constitutionality of the police officers’ actions under the Fourth Amendment to the United States Constitution—namely, that Tegland’s home’s trespass on public land precluded any constitutional protection.⁷⁹

Naturally, there are subtle distinctions between the factual contexts of *Pippin* and *Thomas, Nishi* and *Tegland*. In *Pippin*, there had been a lull in enforcement of the previous Vancouver municipal ordinance and the newly adopted ordinance provision was limited to daytime hours, but concepts of acquiescence and

69. *See id.* at 65.

70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. *Id.* at 66. This inquiry, like the federal *Katz* inquiry, is a binary one: if the officers did not invade a privacy interest in lifting Tegland’s tarp, then no search occurred, and the state constitution was not implicated. *See id.*

77. *Id.* (emphasis in original).

78. *See id.* at 67.

79. *See id.* (“[A] person has no ‘reasonable expectation of privacy’ in a temporary structure illegally built on public land, where the person knows that the structure is there without permission and the governmental entity that controls the space has not in some manner acquiesced to the temporary structure.”).

forfeiture (or lack thereof) did not play a dispositive role in the outcomes of the respective cases. Instead, the quintessential fact that Thomas's, Nishi's, and Tegland's homes were "illegal" and subject to immediate removal was the factor that foreclosed any claim of constitutional protection for the California and Oregon courts.⁸⁰

III. OTHER JURISDICTIONS

It turns out that the fundamental disagreement between the Washington and California and Oregon courts of appeals, respectively, is only the tip of an even messier doctrinal iceberg. When addressing the reasonableness of the expectations of privacy of the unhoused—both the temporary tent dweller and the longer-term resident of an unhoused encampment—courts have wrestled with a hodgepodge of contradictory factors: whether the dwelling was trespassory (as opposed to, at least implicitly, authorized), the identity of the victim of the trespass (federal government, local government, private property owner), whether the trespasser had notice of the trespass and the nature of the notice, and arcane concepts of abandonment. Courts have also differed about whether to treat the makeshift dwelling itself the same as or different from containers discovered inside or around it.

A. Federal Lands

Federal courts have tended to side with the California and Oregon courts of appeals when trespassing on federal lands is involved. For example, the United States Court of Appeals for the Tenth Circuit reached a similar conclusion as the California and Oregon courts in 1986, in *United States v. Ruckman*.⁸¹ Frank Ruckman lived in a natural cave in a remote enclave of federal land in Utah.⁸² Ruckman had lived exclusively in the cave for approximately eight months prior to his arrest and had attempted to enclose the cave with a wooden entrance wall with a closed door, which was constructed out of boards and other materials.⁸³ Ruckman kept all of his personal belongings in the cave and had also installed a bed, camp stove, and lantern in the cave.⁸⁴ State and federal agents went to the cave to arrest him on a state warrant after he had failed to appear on a

80. See Thomas, 45 Cal. Rptr. 2d at 613 ("Thomas's box was on the public sidewalk without the permission of the City, in violation of [the municipal ordinance]. For this reason, Thomas was subject to immediate ejection ... and the trial court's finding that Thomas had no objectively reasonable expectation of privacy was clearly correct."); Tegland, 344 P.3d at 69 ("[W]here erecting a structure in the public space is illegal and the person has been so informed . . . , there is no 'reasonable expectation of privacy' associated with the space."). Vancouver, Washington, is basically, a suburb of Portland, Oregon, so the conflicting decisions in *Pippin* and *Tegland* have meant, in practice, that unhoused individuals in a single metropolitan area have different rights (or the lack thereof), depending upon on which side of the Columbia River they have pitched their tents.

81. 806 F.2d 1471 (10th Cir. 1986).

82. See *id.* at 1472.

83. See *id.* at 1472; *id.* at 1474, 1478 (McKay, J., dissenting).

84. See *id.* at 1475, 1478 (McKay, J., dissenting).

misdeemeanor charge in state court.⁸⁵ Eight days after Ruckman's arrest, while he was incarcerated, federal Bureau of Land Management ("BLM") agents returned to the cave to "clean it out" and remove Ruckman's belongings.⁸⁶ In the process, they discovered and seized thirteen lethal booby traps in the cave.⁸⁷ Ruckman was subsequently charged in federal court with their illegal possession.⁸⁸ Affirming the district court's denial of Ruckman's motion to suppress the explosive devices, the Tenth Circuit concluded that Ruckman's cave was not a "house" and therefore not "subject to the protection of the Fourth Amendment."⁸⁹ The court explained: "The Fourth Amendment itself proscribes, inter alia, an unreasonable search of 'houses.' . . . The fact that Ruckman may have subjectively deemed the cave to be his 'castle' is not decisive of the present problem."⁹⁰

Like in the California and Oregon courts of appeals, the trespassory nature of Ruckman's residence, which subjected him to the prospect of immediate ejection, was also central to the Tenth Circuit's analysis, which concluded: "Ruckman's subjective expectation of privacy is not reasonable in light of the fact that he could be ousted by BLM authorities from the place he was occupying at any time."⁹¹ The Tenth Circuit's analysis departed that from that of the California and Oregon courts of appeals, however, in its extensive reliance on the plenary authority of the federal government to regulate federal lands under Article IV of the Constitution.⁹²

B. Notice

Some courts have found a constitutional right to privacy in trespassory temporary dwelling when, unlike Pippin and Tegland, the resident of the dwelling lacked

85. *See id.* at 1472.

86. *Id.* at 1472; *see id.* at 1475 (McKay, J., dissenting).

87. *See id.* at 1471–72.

88. *See id.*

89. *Id.* at 1472.

90. *Id.* at 1473.

91. *Id.* *But see id.* at 1475 (McKay, J., dissenting) ("[A]lthough phrasing the issue as whether the cave constitutes a 'house,' much of the court's reasoning immediately following fails to analyze the characteristics of a 'house,' but rather focuses on the fact that Mr. Ruckman was a 'trespasser' on federal lands and, as such, could not have a reasonable expectation of privacy in his wilderness home.").

92. *See id.* at 1473; *see generally* U.S. CONST. art. IV, § 3, cl. 2. To give an example of the absurd result of extending this reasoning—namely, that the government's plenary power over federal lands is dispositive as to whether an individual could have an expectation of privacy in a dwelling on them—there are large pockets of private land within even national parks. *See* Robinson Meyer, *The Private Islands Inside National Parks*, ATLANTIC, Sept. 17, 2015, <https://www.theatlantic.com/technology/archive/2015/09/swiss-cheese-national-park/405865/> ("many of the country's most famous national parks are swiss-cheesed with private holdings"). It is hard to imagine a court accepting the argument, however, that their location within the government's parks renders their expectations of privacy in them unreasonable. As the United States Court of Appeals for the Ninth Circuit explained, when recognizing the reasonableness of the expectation of privacy in a tent in a state campground: "A guest in Yellowstone Lodge, a hotel on government park land, would have no less reasonable an expectation of privacy in his hotel room than a guest in a private hotel, and the same logic would extend to a campsite when the opportunity is extended to spend the night." *United States v. Gooch*, 6 F.3d 673, 678 (9th Cir. 1993).

notice of the trespass. This is because many courts have found a lack of notice that a dwelling is trespassory to be a crucial factor in finding a right to privacy in an encampment, such that they have agreed with the Washington Court of Appeals when there is a lack of notice to the trespasser but applying reasoning that suggests that they might side with the California and Oregon courts of appeals in the converse situation, if no-trespassing signs were visible or personal notice of trespass had been given to the dweller. Other courts have explicitly found notice of trespass conclusively to dispose of a Fourth Amendment claim in a trespassory dwelling.

For example, in *People v. Schafer*, the Colorado Supreme Court held that Scott Schafer had a reasonable expectation of privacy in his tent and personal effects therein on vacant land behind a restaurant.⁹³ An armed robbery occurred at a convenience store in Cortez, Colorado.⁹⁴ When the police responded, they were informed that a “transient” was camping in a tent behind a restaurant about a half a mile away.⁹⁵ The officers located the tent on vacant land with several dirt tracks through it that was littered with garbage and broken glass.⁹⁶ The land was privately owned, but it was publicly accessible, had no fences or signs prohibiting entry, and was a common local teen party locale.⁹⁷ Schafer had erected his two-person tent on the lot and was living in it temporarily as he “pass[ed] through the area.”⁹⁸ The tent was secured “in a closed position” when the police discovered it.⁹⁹ “One of the officers opened the flaps and zipper and entered the tent,” finding “clothes, a bed roll, and a backpack.” The officer opened the backpack and found Schafer’s name on an envelope inside an address book.¹⁰⁰ They recorded his name and subsequently used it to put his photograph in an identification array for the clerk of the store that was robbed. The clerk identified Schafer as the robber based on that photograph.¹⁰¹ In Schafer’s subsequent prosecution for aggravated robbery, the State also used the discovery of Schafer’s name on the belongings in the tent as “circumstantial evidence that Schafer was in town at the time of the robbery.”¹⁰² Finding that the warrantless search of Schafer’s tent and belongings was unconstitutional, the Colorado Supreme Court held that “a person camping in Colorado on unimproved and apparently unused land that is not fenced or posted against trespassing, and in the absence of personal notice against trespass, has a reasonable expectation of privacy in a tent used for habitation and personal effects therein.”¹⁰³ The holding, however, was based in part on the precise dictates of the Colorado trespassing statutes, which

93. *People v. Schafer*, 946 P.2d 938, 940 (Colo. 1997).

94. *See id.*

95. *Id.*

96. *See id.*

97. *See id.* at 940, 944.

98. *Id.* at 940 n.1.

99. *Id.* at 945.

100. *Id.* at 940, 944.

101. *See id.* at 941, 944.

102. *Id.* at 944 (internal quotations omitted).

103. *Id.* at 941.

grant “license and privilege” for individuals to enter and remain on private land unless they have notice that they are trespassing thereon.¹⁰⁴

Similarly, the United States Court of Appeals for the Ninth Circuit agreed with the Colorado Supreme Court and reached precisely the opposite conclusion as the Tenth Circuit in *Ruckman*—namely, that the supremacy of federal authority over federal lands was irrelevant to the question of whether even a trespasser had a reasonable expectation of privacy in a temporary dwelling on federal land. In *United States v. Sandoval*, the Ninth Circuit reversed the district court’s denial of Rodrigo Sandoval’s motion to suppress evidence obtained during the warrantless search of his tent.¹⁰⁵ State and federal drug-enforcement agents raided a marijuana grow on federal land managed by BLM.¹⁰⁶ During the raid, they discovered a makeshift tent, which was opaque and closed on all four sides.¹⁰⁷ They entered the tent, without a search warrant, and discovered a medicine bottle with Sandoval’s name on it.¹⁰⁸ According to the Ninth Circuit, it was “unclear whether Sandoval” was trespassing on BLM land at the time.¹⁰⁹ Nonetheless, the court concluded that the reasonableness of Sandoval’s expectation of privacy in his tent did not turn on whether his encampment was authorized.¹¹⁰ In doing so, the Ninth Circuit expressly noted that Sandoval “was never instructed to vacate or risk eviction,”¹¹¹ suggesting that the court would go at least as far as the Colorado Supreme Court in requiring notice of trespass before it undercut an individual’s reasonable expectation of privacy in a trespassory dwelling, although the court did not expressly state that even actual notice of trespass would necessarily have been sufficient to vitiate Sandoval’s privacy interest in his dwelling.

On the other hand, in *Amezquita v. Hernandez-Colon*, the First Circuit held that a pending eviction action in a local court completely foreclosed any Fourth Amendment claim that a group of squatters might have in their settlement on public land.¹¹² Pedro Amezquita was part of a squatter community called Villa Pangola, which occupied part of a farm owned by the Puerto Rican government.¹¹³ After failing to convince the squatters to leave voluntarily, the Puerto Rican government sought an injunction in the local superior court to evict the squatters.¹¹⁴ While the action was pending, but before the trial court had ruled on the lawsuit, the government bulldozed the uninhabited structures in the commune.¹¹⁵

104. *Id.* at 942.

105. *United States v. Sandoval*, 200 F.3d 659, 660–61 (9th Cir. 2000).

106. *Id.* at 660.

107. *See id.*

108. *See id.*

109. *Id.* at 660–61.

110. *Id.* at 661.

111. *Id.*

112. 518 F.2d 8, 10–11 (1st Cir. 1975).

113. *See id.* at 9.

114. *See id.*

115. *See id.*

Amezquita and several other squatters filed a civil-rights suit alleging, *inter alia*, that the government's removal of their residences violated their Fourth Amendment rights.¹¹⁶ While the civil-rights suit was pending, the local court entered an ejectment order directing the squatters to evacuate the land and remove their structures.¹¹⁷ For the First Circuit, the fact that the squatters "had been asked twice by Commonwealth officials to depart voluntarily . . . alone ma[de] ludicrous any claim that they had a reasonable expectation of privacy" in their dwellings.¹¹⁸ Similarly, the California Court of Appeal in *Nishi*, in finding that Nishi lacked a reasonable expectation of privacy in his campsite, emphasized his "awareness that he was illicitly occupying the premises without consent or permission," noting that he had previously been cited for "illegal camping" and evicted from other prior campsites.¹¹⁹

Similarly, in *Love v. City of Chicago*, a group of unhoused plaintiffs sued the City of Chicago, alleging that the city's policy and practice of seizing and destroying the personal property of the unhoused during routine cleaning sweeps of off-street sections of the city violated, *inter alia*, their Fourth Amendment rights.¹²⁰ In rejecting the plaintiffs' claims, the United States District Court for the Northern District of Illinois found that the city had given adequate notice to the unhoused individuals in those areas by posting signs and giving oral notice prior to the sweeps.¹²¹

C. Containers

Other courts have attempted to bend the Supreme Court's existing closed-container jurisprudence to answer the question of the reasonableness of an unhoused individual's expectation of privacy in either the makeshift dwelling itself or the containers inside it or even containers outside of the dwelling. In *State v. Wyatt*, a different panel of the Washington Court of Appeals found that a warrantless search of Dennis Wyatt's belongings outside of his tent in a city park was unconstitutional.¹²² The Kent Police Department received a tip that an unhoused man named "Dennis" was stealing railroad wiring and cooking methamphetamine near his tent camp in a city park.¹²³ Officers recognized "Dennis" as Wyatt from their previous contacts with him.¹²⁴ Wyatt had been camping at the site for approximately three weeks.¹²⁵ The next day, two officers went to Wyatt's campsite in the park, notified

116. *See id.*

117. *See id.* at 10.

118. *Id.* at 11.

119. *People v. Nishi*, 143 Cal. Rptr. 3d 882, 889 (Cal. Ct. App. 2012).

120. *Love v. City of Chicago*, No. 96 C 0396, 1998 WL 60804 (N.D. Ill. Feb. 6, 1998).

121. *Id.* at *11.

122. *State v. Wyatt*, 2015 WL 1816052, at *1 (Wash. App. Div. 1, 2015).

123. *Id.*

124. *Id.*

125. *Id.* at *2.

him that it was illegal to camp in the park, and gave him twenty-four hours to gather his belongings and leave.¹²⁶ Wyatt admitted that the tent was his, but disclaimed ownership of the rest of the belongings in the campsite.¹²⁷

Forty-five minutes later, when the officers saw Wyatt leave the campsite, they returned to the vacant camp.¹²⁸ The officers did not touch Wyatt's tent, but they looked under a tarp that was located about ten feet away from it, discovering a zipped-up bag inside a bucket, under the tarp.¹²⁹ They also found and opened a blue, soft-sided cooler outside of the tent.¹³⁰ Together, the bucket and the cooler contained the components of a methamphetamine lab, including a bottle with a tube sticking out of it and muriatic acid.¹³¹ When Wyatt was later arrested, he admitted to cooking methamphetamine at the campsite.¹³²

Prior to his trial on charges of manufacturing methamphetamine, Wyatt moved to suppress the physical evidence from his campsite and his inculpatory statements to the officers on state and federal constitutional grounds.¹³³ The trial court granted the motion as to the evidence obtained from within Wyatt's tent, but denied it as to the evidence discovered in the closed containers found outside of the tent and Wyatt's subsequent admissions.¹³⁴

Applying its state constitution and reversing the part of the trial court's decision refusing to submit the evidence seized outside of Wyatt's tent, the Washington Court of Appeals reasoned:

Wyatt's items were in closed containers in close proximity to a residence. While the residence here was admittedly temporary, that did not diminish the private nature of Wyatt's containers. . . . Wyatt did not discard his belongings.

* * *

Wyatt's closed containers, stored in his sequestered campsite near his tent . . . constitutes a private affair . . .¹³⁵

With regard to the reasonableness of Wyatt's expectation of privacy under the Fourth Amendment to the United States Constitution, the court emphasized the fact that the methamphetamine paraphernalia was found in closed containers, concluding that "the privacy protections traditionally afforded to containers . . . dictates that he has a reasonable expectation of privacy in the black bag and blue container at his campsite. . . . [T]here are no 'worthy' and 'unworthy' containers."¹³⁶

126. *Id.* at *1.

127. *Id.*

128. *Id.*

129. *Id.* at *1-2.

130. *Id.* at *1.

131. *Id.* at *1-2.

132. *Id.* at *2.

133. *Id.*

134. *Id.*

135. *Id.* at *4.

136. *Id.* at *7.

In order to reach its decision that Wyatt had a cognizable privacy interest in his belongings, the *Wyatt* panel had to work very hard (and somewhat unpersuasively) to distinguish two of its earlier adverse reported decisions, one of which had reached the opposite conclusion of the not-yet-decided *Pippin*. In *State v. Cleator*, the court had earlier held that Lance Cleator lacked a reasonable expectation of privacy inside his tent because he was “wrongfully occup[ying] public land by living in a tent erected on public property” that “was not a campsite” without “permission to erect a tent in that location.”¹³⁷ Even more on point was the case on which *Cleator* was based, *State v. Pentecost*, in which the court had held that Pentecost lacked a reasonable expectation of privacy in his belongings located in the area surrounding his tent.¹³⁸ *Pentecost* had suggested, *in dicta*, that Pentecost might have had “a limited expectation of privacy, if any, in *only* his tent.”¹³⁹ Together, *Pentecost* and *Cleator* seemed to stand for the proposition, as the trial court below in *Wyatt* had found, that Wyatt had a reasonable expectation of privacy in neither his tent nor his personal belongings located outside of it.¹⁴⁰ Citing *United States v. Ross*, the *Wyatt* court distinguished *Pentecost* and *Cleator* on the ground that neither had specifically involved closed containers, either inside the tent (*Cleator*) or outside (*Pentecost*).¹⁴¹ In *Ross*, however, the United States Supreme Court acknowledged that the level of protection afforded to a closed container and its contents would vary according to the setting.¹⁴² Perhaps analogously, in *Thomas*, in reaching its holding that Thomas lacked a reasonable expectation of privacy in his makeshift dwelling, the California Court of Appeal specifically rejected his contention that the box was a “container” for Fourth Amendment purposes “because it was not closed on all sides and because it was not a[] . . . repository for personal effects”¹⁴³

D. Abandonment

Some courts have also treated the issue of whether searched items had been “abandoned” by their owner as a crucial factor in determining whether their owner possessed a reasonable expectation of privacy in them. In *Wyatt*, for example, the panel of the Washington Court of Appeals rejected the State’s assertion that Wyatt had abandoned his personal belongings in his campsite by disclaiming their

137. *State v. Cleator*, 857 P.2d 306, 308–09 (Wash. App. 1993). In *Cleator*, the officer raised the opaque flap of Cleator’s tent, looked through the zipped mosquito mesh, observed the proceeds of a recent residential burglary, unzipped the mesh, and seized the burglarized items, without a warrant. *See id.* at 307. The *Cleator* court concluded: “As a wrongful occupant of public land, Cleator had no reasonable expectation of privacy at his campsite because he had no right to remain on the property and could have been ejected at any time.” *Id.* at 309; *see Wyatt*, 2015 WL 1816052, at *6–7.

138. *State v. Pentecost*, 825 P.2d 365, 366–67 (Wash. App. 1992).

139. *Id.* at 366.

140. *See Wyatt*, 2015 WL 1816052, at *5.

141. *See id.*, at *6–7.

142. *United States v. Ross*, 456 U.S. 798, 822–23 (1978).

143. *People v. Thomas*, 45 Cal. Rptr. 2d 610, 613 (Ct. App. 1995).

ownership, even though he had explicitly told the searching officers that the belongings were not his and left them unattended in the campsite that he had been ordered to vacate.¹⁴⁴ The effort that the court took to find, under the facts and circumstances of the case, that Wyatt's actions were insufficient to constitute a voluntary abandonment of the items suggests that a contrary finding (that Wyatt had abandoned the seized items) would have been sufficient to render their search and seizure constitutional.¹⁴⁵ Conversely, in *Love*, the district court reasoned that the property that the City of Chicago had seized and destroyed had been abandoned by the unhoused plaintiffs, thereby extinguishing their Fourth Amendment rights in it.¹⁴⁶

IV. THE HOMES OF THE UNHOUSED

While the reasonable-expectation-of-privacy test sounds like it establishes a descriptive standard, it actually involves a normative determination of the societal value of the area or activity that the suspect is attempting to keep private—whether the manifested expectation of privacy is one that society is willing to recognize as reasonable.¹⁴⁷ Courts and commentators have extensively critiqued the resulting malleability of the *Katz* test.¹⁴⁸

Perhaps one of the reasons that courts still tend to focus on property rights in determining the scope of Fourth Amendment protection under *Katz*, this near-consensus of scholarly condemnation notwithstanding, is that property rights serve as a limiting constraint on an otherwise subjective exercise of discretion. The perceived benefit of using property rights to determine the normative reasonableness of an expectation of privacy is that the reasonableness determination can be made with reference to a pre-existing, external set of norms.¹⁴⁹ Abandoning a rigid trespass framework, however, does not have to mean abandoning all guiding principles in the determination.

A. Societal Norms & Understandings

Although the reasonableness of an expectation of privacy is often determined with at least some reference to property-law concepts, common societal

144. See *Wyatt*, 2015 WL 1816052, at *8-9.

145. See *id.* at *20–21.

146. *Love*, 1998 WL 60804, at *26.

147. See *California v. Ciraolo*, 476 U.S. 207, 211 (1986). The analogous privacy tests under state constitutions are similarly normative in nature. See, e.g., *State v. Surge*, 156 P.3d 208, 211 (Wash. 2007) (describing the test for when an individual's private affairs have been unreasonably invaded under the Washington constitution as focusing on whether the individual "should be entitled to hold" the privacy interest at issue without governmental interference).

148. See Leonetti, *Grand Compromise*, *supra* note 32, at 2, 2 nn.4, 5.

149. Of course, property-rights inquiries are not necessarily terribly limiting in practice. See, e.g., *Florida v. Jardines*, 569 U.S. 1, 9 (2013) (holding that the implied license to enter created by a front walkway did not extend to police conducting a "canine forensic examination" (dog sniff) of the front door of Jardines's house based on social customs).

understandings and norms are also a touchstone of the inquiry.¹⁵⁰ Basic societal norms around the privacy of the home and the dignity of its residents militate in favor of constitutionalizing the privacy expectations of the unhoused in their homes. Frank Michelman has identified “personal ‘space’” as a condition of freedom.¹⁵¹ Skolnik has noted how the failure to recognize the inability of the unhoused not to trespass in the administration of the criminal law “undermines the legitimacy of holding people accountable for their behavior through punishment, disregards their dignity and autonomy, and undermines the law.”¹⁵²

Unfortunately, many of the courts that have found expectations of privacy for the unhoused to be reasonable have done so more because of a romanticized notion of nomadic life rather than a recognition of the necessity of privacy as an essential element of human dignity. For example, some of the courts that have shown more compassion toward the unhoused have done so because they seem to view tents and outdoor habitation as uniquely Western customs. As the Colorado Supreme Court explained: “Tents have long served humans as a form of habitation in . . . the West.”¹⁵³ This longstanding Western culture of living outdoors, for some courts, renders the expectation of privacy in a tent or other makeshift habitation reasonable. Similarly, the Idaho Supreme Court recognized constitutional privacy rights in “illegal” campsites because of its state’s “longstanding custom” of “[u]tilizing public lands for outdoor recreational activities.”¹⁵⁴ The Colorado Supreme Court recognized Schafer’s reasonable expectation of privacy in his tent based, in part, on tents long utilization “as temporary or longer term habitation in Colorado and the West.”¹⁵⁵ The court explained: “Because wind, hail, rain, or snow may strike without warning any day of the year, particularly in the mountains, the typical and prudent outdoor habitation in Colorado for overnight or extended stay is the tent.”¹⁵⁶

B. *International Human Rights Norms*

In the context of the rights of the unhoused, customary international law also provides an independence source of norms for the determination of the reasonableness of the expectation of privacy in a makeshift dwelling. Unlike typical American constitutional-law jurisprudence, international human-rights law

150. *People v. Nishi*, 143 Cal. Rptr. 3d 882, 889 (Cal. Ct. App. 2012); *see also* *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *United States v. Dodds*, 946 F.2d 726, 728 (10th Cir. 1991).

151. Frank Michelman, *The Supreme Court 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 33 (1986).

152. Skolnik, *supra* note 25, at 742.

153. *People v. Schafer*, 946 P.2d 938, 942–43 (Colo. 1997).

154. *State v. Pruss*, 181 P.3d 1231, 1235 (Idaho 2008).

155. *Schafer*, 946 P.2d at 942.

156. *Id.* at 942–43 (footnote omitted).

encompasses economic and social rights, in addition to civil and political ones.¹⁵⁷ These rights include the right to secure housing.¹⁵⁸

The international human-rights law that is relevant to the question of the rights of the unhoused is codified in multilateral treaties, most notably the United Nations (“U.N.”) Universal Declaration of Human Rights (“UDHR”) and the U.N. International Covenant on Economic, Social, and Cultural Rights (“ICESCR”).¹⁵⁹ The UDHR declares general rights to social security, human dignity, and standards of living, including housing.¹⁶⁰ The ICESCR specifically guarantees a universal right to housing.¹⁶¹

Typically, these rights are invoked in litigation, public-policy discussions, and law-reform commentary surrounding the right to *be housed*, in the context of the acute shortage of safe, secure, and affordable housing options in the United States and advocacy around the obligation of jurisdictions to address the problem of homelessness.¹⁶² Few commentators or advocates, however, have focused on the privacy implications of living outdoors itself. Nonetheless, customary international law specifically recognizes the human right to security of tenure in makeshift housing and the freedom from forced evictions.¹⁶³

The U.N. Committee on Economic, Social and Cultural Rights defines “homelessness” as lacking housing that affords the right to live in security, peace, and dignity.¹⁶⁴ It dictates that, under international human-rights norms, all individuals

157. See Art. 11, International Covenant on Economic, Social, and Cultural Rights, S. Exec. Doc. D, 95-2 (1978) [hereinafter “ICESCR”]; G.A. Res. 217 (III), Art. 23, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter “UDHR”] (“Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”); Art. 25, UDHR (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability. . .”).

158. See Art. 25, UDHR, *supra* note 157.

159. The United States is a signatory to the UDHR but not to the ICESCR. While the rights guaranteed in the ICESCR are more directly relevant to the question of privacy in makeshift dwellings, its application to the United States can nonetheless be accomplished by reference to the norms that it establishes as evidence of cultural norms that support the objective and normative reasonableness of an expectation of privacy in a makeshift dwelling.

160. See Art. 25, UDHR, *supra* note 157.

161. See Art. 11, ICESCR, *supra* note 157.

162. See, e.g., John Bartlett, “*Step by Step the Longest March Can Be Won*”: *The Struggle to Define Housing as a Human Right*, 17 PUB. INT. L. REP. 277 (2012); Maria Foscarinis, *Advocating for the Human Right to Housing*, 30 N.Y.U. REV. L. & SOC. CHANGE 447, 448–49 (2006); Maria Foscarinis et al., *The Human Right to Housing: Making the Case in U.S. Advocacy*, 38 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 97, 97–98 (2004); Marc-Olivier Herman, *Fighting Homelessness: Can International Human Rights Law Make a Difference?*, 2 GEO. J. ON FIGHTING POVERTY 59, 69, 73 (1994); Katherine Barrett Wiik, *Justice for America’s Homeless Children: Cultivating a Child’s Right to Shelter in the United States*, 35 WM. MITCHELL L. REV. 875, 915–27 (2009).

163. See U.N. Committee on Economic, Social and Cultural Rights (“CESCR”), General Comment No. 7: The Right to Adequate Housing: Forced Evictions, U.N. Doc. E/1998/22, Annex IV (1997), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 45 (2003).

164. See U.N. CESCR, General Comment No. 4: The Right to Adequate Housing, U.N. Doc. E/1992/23, Annex III at 114 (1992), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

should possess a degree of security in their tenure of residence that guarantees them “legal protection against forced eviction, harassment, and other threats,” irrelevant of the legality of their occupation of property.¹⁶⁵

The criminalization of makeshift unhoused encampments also violates international norms regarding equality. The rights protected under the UDHR encompass a principle of non-discrimination that includes “property” as a prohibited ground for discrimination,¹⁶⁶ which has been construed more broadly as a principle against wealth discrimination.¹⁶⁷ Because the unhoused are increasingly unable to avoid living in a state of trespass, the violation of their homes is not only an affront to their dignity, but an act of discrimination, as well. As Skolnik explains: “Because the homeless are constantly in the jurisdiction where these laws are enforced, it may be impossible for them to avoid a selective or discretionary enforcement of the laws against them, even though people with access to housing would not have comparable difficulty.”¹⁶⁸ The right to privacy of the unhoused in their makeshift homes, therefore, is part of both the “inherent dignity” and the “equal and inalienable rights” that international law confers equally upon all people.¹⁶⁹

C. *Not-So Implicit Bias Against the Unhoused*

The subjective, normative nature of the *Katz* reasonable-expectation-of-privacy test has sometimes allowed individual judges’ contempt for the unhoused to shine through where they have opined on the reasonableness of their expectations of privacy. Cases attempting to determine the constitutional limitations that may surround searches of the homes of the unhoused often feature sarcastic quotation marks around the words “home” and “residence,” particularly in courts not inclined to recognize unhoused encampments as worthy of Fourth Amendment protection.¹⁷⁰ In *Amezquita*, the First Circuit blithely analogized the squatter community to car thieves¹⁷¹ and described, without reflection, its residency on public land as being “in bad faith.”¹⁷² Similarly, the California Court of Appeal

165. *Id.*

166. See UDHR, *supra* note 157, at Art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, *property*, birth or other status.”) (emphasis added).

167. See Gillian MacNaughton, *Untangling Equality and Non-Discrimination to Promote the Right to Health Care for All*, 11 HEALTH & HUM. RTS. INT’L J. 47, 49 (2009).

168. Skolnik, *supra* note 25, at 744.

169. UDHR, *supra* note 157.

170. See *United States v. Ruckman*, 806 F.2d 1471, 1472–73 (10th Cir. 1986) (“[T]he ‘home’ which was searched by authorities was a ‘cave’ . . . The Fourth Amendment itself proscribes . . . an unreasonable search of ‘houses.’ . . . The fact that Ruckman may have subjectively deemed the cave to be his ‘castle’ is not decisive . . .”); *People v. Thomas*, 45 Cal. Rptr. 2d 610, 611–13 (Ct. App. 1995) (consistently describing Thomas’s cardboard box as his “residence”); *State v. Tegland*, 344 P.3d 63, 65 (Or. Ct. App. 2015) (“The trial court . . . determin[ed] that the structure was defendant’s ‘residence’ . . .”).

171. See *Amezquita v. Hernandez-Colon*, 518 F.2d 8, 11 (1st Cir. 1975).

172. *Id.* at 12.

described Nishi's campsite on public land as being "without authority and in bad faith."¹⁷³

Of course, these biases against the unhoused are unsurprising. Other scholars have documented the way that the moral construction of poverty in the United States presupposes that the poor are morally and behaviorally inferior.¹⁷⁴ Beckett and Herbert have documented how society has defined "those who occupy public space" primarily in terms of "disorder," rather than as "full-standing members of the body politic."¹⁷⁵ They hypothesize: "Strongly negative portrayals in political and media discourse . . . have shaped reactions to persons who appear to be homeless."¹⁷⁶

Neuroscience studies have also documented the profound prejudices that Americans collectively hold against the unhoused, viewing them even as less than human. For example, in one study, neuroscientists Lasana Harris and Susan Fiske sought to study the activity of test subjects' medial prefrontal cortexes ("mPFCs") using functional magnetic resonance imaging ("fMRI").¹⁷⁷ The mPFC is the part of the brain that activates (i.e., shows heightened electrical activity when viewed in an fMRI scan) when it recognizes an image as that of a human being. Because of that, neuroscientists tend to interpret the failure of the mPFC to activate when looking at a human image as a sign of dehumanization.¹⁷⁸ The study compared the mPFC activity of test subjects when they viewed middle-class individuals and when they viewed unhoused individuals.¹⁷⁹ The test subjects' mPFC regions consistently activated when they viewed the middle-class individuals, but consistently failed fully to activate when they viewed the unhoused individuals.¹⁸⁰ In other words, the test subjects viewed the unhoused people as less human than the other people that they viewed.

These prejudices are not always conscious; sometimes they result from stereotypes and biases that most people harbor without realizing it.¹⁸¹ Nonetheless, these biases have concrete impacts on the treatment of the unhoused in society. For example, unhoused individuals are regularly the victims of hate crimes arising from these profound prejudices against them.¹⁸² There is no reason to think that judges would somehow be immune from these biases.¹⁸³

173. *People v. Nishi*, 143 Cal. Rptr. 3d 882, 891 (Ct. App. 2012).

174. BRIDGES, *supra* note 31, at 12.

175. BECKETT & HERBERT, *supra* note 24, at 20. *See generally* HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963).

176. BECKETT & HERBERT, *supra* note 24, at 21.

177. *See* Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Responses to Extreme Out-Groups*, 17 *PSYCHOL. SCI.* 847, 847–54 (2006).

178. *See id.*

179. *See id.*

180. *See id.*

181. *See id.*

182. *See No Safe Street: A Survey of Hate Crimes and Violence Committed Against Homeless People in 2014 & 2015*, NAT'L COAL. FOR THE HOMELESS (July, 2016).

183. *See* Wes Daniels, "Derelicts," *Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 *BUFF. L. REV.* 687 (1997).

These prejudices against the unhoused are part of a larger cultural belief system, centered around the foundational neoliberal emphasis on concepts of free will and individual choice—the belief that the unhoused have simply eschewed civilization or are shiftless and idle—whose fallaciousness is belied by the reality of the unhoused.¹⁸⁴ This is part of the process of “informal disenfranchisement” that Bridges describes, through which “a group that has been formally bestowed with a right is stripped of that very right” through processes that courts bless as constitutional.¹⁸⁵ This shift in the cultural belief system about the poor has coincided with and was a subset of the larger neoliberal cultural shift that included the denigration of public-welfare programs and their recipients, the (de-)moralization of substance abuse and addiction, the celebration of gentrification of urban areas, the deinstitutionalization of individuals suffering from serious mental illnesses, and the rise of the war on drugs and “broken windows” policing.¹⁸⁶ As the Western Regional Advocacy Project explains: “[T]he negative stereotyping of homeless individuals . . . [has] fed the tendency to respond to mass homelessness with inadequate policies that fail to address systemic causes [of homelessness]. . . .”¹⁸⁷

CONCLUSION

Recognizing the reasonableness of an expectation of privacy in a makeshift dwelling is significant for both normative and doctrinal reasons. Doctrinally, the interpretations of the Fourth Amendment by the First and Tenth Circuits as well as the California and Oregon courts of appeals place too much emphasis on property rights. The Tenth Circuit’s reasoning in *Ruckman* is exemplary when the court protested, rather defensively, that “[w]hile it has been often stated, the Fourth Amendment protects people, not places, any determination of just what protection is to be given requires, in a given case, some reference to a place. And the place is this instance was on federal (BLM) land.”¹⁸⁸ These analyses are inconsistent with *Katz*’s rejection of trespass as a talisman of Fourth Amendment protection (“people, not places”).¹⁸⁹ For example, in *Warden v. Hayden*, the Court admonished:

184. See BECKETT & HERBERT, *supra* note 24, at 25–27, 34 (explaining how “structural dynamics,” especially rising unemployment and declining wages; affordable housing stock; and public-welfare programs, rather than voluntary choices to “take to the streets,” underlie the surge in “visible homelessness” over the past several decades); Jennifer Wolch & Michael Dear, *Understanding Homelessness: From Global to Local*, in CITIES AND SOCIETY 147, 148 (Nancy Kleniewski ed., 2005) (“Reduced to its essentials, homelessness is an expression and extension of poverty in the United States. Simply stated, personal income has declined to such an extent that people can no longer afford to purchase or rent a home.”).

185. BRIDGES, *supra* note 31, at 13. Informal disenfranchisement requires that the laws and practices that act to strip a subset of individuals of their rights be judicially sanctioned as legal and constitutional. *See id.*

186. See BECKETT & HERBERT, *supra* note 24, at 28–32.

187. *Without Housing: Decades of Federal Housing Cutbacks, Massive Homelessness and Policy Failures (Update 2010)*, W. REG’L. ADVOC. PROJECT 17 (2010), <https://wrphome.org/wp-content/uploads/2008/09/2010%20Update%20Without%20Housing.pdf>.

188. *United States v. Ruckman*, 806 F.2d 1471, 1473 (10th Cir. 1986) (internal citations omitted).

189. *Katz v. United States*, 389 U.S. 347, 351–52 (1967).

The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be “unreasonable” within the Fourth Amendment even though the Government asserts a superior property interest at common law. . . . [T]he principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.¹⁹⁰

They are also inconsistent with the Court’s post-*Katz* jurisprudence. For example, in *Rakas v. Illinois*, the Court explained that “arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, out not to control” the application of the Fourth Amendment, concluding: “*Katz* held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the place invaded but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.”¹⁹¹ In *Rakas*, the Court reiterated: “Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest.”¹⁹²

More fundamentally, the legal analyses employed by the First and Tenth Circuits and the California and Oregon courts of appeal, and the conclusions that they drive, are insensitive to the realities of this country’s burgeoning population of long-term unhoused: individuals with homes but not houses. For example, in *Amezquita*, the Tenth Circuit breezily announced: “‘Without question, the home is accorded the full range of Fourth Amendment protections.’ But whether a place constitutes a person’s ‘home’ for this purpose cannot be decided without any attention to its location or the means by which it was acquired”¹⁹³

This type of pronouncement is breathtaking in its lack of sensitivity to the options available (or not) to the unhoused. “[T]here is no city in the United States that has enough year-round shelter capacity for its entire unhoused population of men, women, families, and unaccompanied youth.”¹⁹⁴ The shelter spaces that do exist often are not safe, even in comparison to the street.¹⁹⁵ The lack of safe, available shelter space leaves many unhoused individuals with no choice but to live on city streets.¹⁹⁶ As the National Coalition for the Homeless explains: “[M]any residents of encampments are there for the simple reason that there is no other place for them to find shelter in their communities.”¹⁹⁷

190. *Warden v. Hayden*, 387 U.S. 294, 304 (1967).

191. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

192. *Id.* at 144 n.12.

193. *Amezquita v. Hernandez-Colon*, 518 F.2d 8, 12 (1st Cir. 1975) (quoting *Lewis v. United States*, 385 U.S. 206, 211 (1966)).

194. NAT’L COAL., ENCAMPMENT CLOSURE, *supra* note 23, at 4.

195. See Benjamin Weiser, *Nakesha’s Demons*, N.Y. TIMES, March 4, 2018, at A1.

196. See NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 24, at 8.

197. NAT’L COAL., ENCAMPMENT CLOSURE, *supra* note 23, at 4.

The sanctity of the home and its immediate surroundings enjoys special solicitude in Fourth Amendment jurisprudence, and its privacy should not come at the cost of a down payment or a monthly rent check. As the Colorado Supreme Court made clear: “Whether of short or longer term duration, one’s occupation of a tent is entitled to equivalent protection from unreasonable government intrusion as that afforded to homes or hotel rooms.”¹⁹⁸ Courts should therefore recognize the dwellings of the unhoused as homes entitled to the same constitutional protection as brick-and-mortar houses by recognizing the objective reasonableness of the privacy expectations of their residents.

198. *People v. Schafer*, 946 P.2d 938, 944 (Colo. 1997).