The Forgotten Residents: Defining the Fourth Amendment House to the Detriment of the Homeless

Lindsay J. Gus
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Defining the Fourth Amendment “House”
to the Detriment of the Homeless

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The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement! ¹

I. PUBLIC AND PRIVATE MISTREATMENT OF THE HOMELESS

In March 2015, Los Angeles police officers shot and killed a homeless man who went by the name of Africa when he attempted to retreat into his tent.² Police officers had been called to investigate a robbery on Skid Row.³ When the police arrived, Africa, who had been arguing with another man, went inside of his tent. Police forcibly pulled Africa from his tent and used a stun gun on him, which resulted in an altercation leading to his death.⁴ In August 2014, Los Angeles police officers brutally beat a mentally ill homeless man named Samuel Arrington after he refused to sign a citation for violating city codes.⁵

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¹ Miller v. United States, 357 U.S. 301, 307 (1958) (quoting the 1763 speech of William Pitt, earl of Chatham, in the House of Commons).


³ Kaplan, supra note 2.

⁴ Id.

That same year, police in Albuquerque, New Mexico, shot and killed a homeless man named James Boyd when a disagreement broke out after police approached him for camping illegally. These and other incidents of police violence against the homeless could arguably have been avoided had the police officers respected the homeless individuals' right to be left alone inside of their makeshift shelters. While data on police brutality and the homeless is lacking, media coverage of these and other particularly violent incidents has led to a discussion over whether the police disproportionately target the homeless. Data suggests homeless individuals make up a larger percentage of the country's incarcerated population than they do the population at large.

Within the past few years, police misconduct has been the subject of intense public scrutiny. In addition to provoking a national debate on issues of race and policing, the focus on police misconduct has brought law enforcement's treatment of the homeless into the spotlight. According to the National Coalition for the Homeless, in 2013 police brutality accounted for six percent of nonlethal attacks on homeless people. Anti-homeless laws that prohibit lying down in public have increased in cities by 119% since 2011, which may partially explain the spike in violence against the homeless. Over the past few years,

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12 See NAT'L COAL. FOR THE HOMELESS, supra note 10, at 6 (In 1999 there were sixty-one recorded attacks on homeless people. In 2013 there were 109. Attacks fluctuate over the years, but "ha[ve] certainly not decreased in occurrence from 1999 to 2013." In addition, there were thirty
there have been numerous reported instances of police using excessive, and at times deadly, force against homeless individuals.

In addition to being especially vulnerable to police misconduct, homeless individuals are more likely to be the victims of private violence than are members of the general public. Strikingly, over the past fifteen years, nearly three times as many homeless individuals were killed in bias-motivated attacks than were individuals from all other protected classes combined. In 2013 alone, there were 109 reported acts of violence against homeless people, with eighteen resulting in death. Many more attacks went unreported.

This Comment argues that examining law enforcement’s treatment of the homeless through the lens of the Fourth Amendment offers a novel approach to reducing the incidence of police- and citizen-initiated misconduct toward them. Specifically, prohibiting warrantless searches of homeless individuals’ temporary shelters could have an impact on reducing misconduct toward them. Case law addressing searches of homes and curtilage supports treating the temporary shelters of the homeless as houses for Fourth Amendment purposes. The underlying normative values of the Fourth Amendment further support a finding that its protection of “houses” includes the makeshift shelters of the homeless.

Recognizing that the Fourth Amendment protects the homeless against warrantless searches of their shelters will reduce unnecessary encounters—which often predate violent escalations—between the homeless and law enforcement. If courts were to hold that homeless individuals are entitled to Fourth Amendment protection inside of their dwellings, a larger conversation about the way we police the homeless percent more non-lethal attacks on the homeless in 2013 than in 2012."

13 See id. at 22.
14 Various states’ laws define bias-motivated or bias-related acts differently, and there is no explicit federal definition for bias-motivated acts. See, e.g., Hate Crime Laws/Cases, CTR. FOR THE STUDY OF HATE & EXTREMISM (July 20, 2015), http://hatemonitor.csusb.edu/resources/hate Crime Law.htm [https://perma.cc/99SV-TGQZ]. Report Hate defines a “bias-motivated act” as “any incident in which an action taken by a person or group is perceived to be . . . discriminatory (bias) toward another person or group based on such characteristics as race, color, socioeconomic class, religion, national origin, ancestry, age, mental or physical disability, sexual orientation, gender, or gender identity or any situation in which inter-group tensions exist based on such group characteristics . . . . All hate crimes are considered hate and bias incidents, but not all bias incidents are considered hate crimes.” Univ. of California Santa Cruz, Definitions, REPORT HATE (2015), http://reporthate.ucsc.edu/about/definitions.html [https://perma.cc/3KNN-JUH8].
15 From 1999–2012, there were 132 homicides classified as hate crimes (based on the victim’s race, religion, sexual orientation, or ethnicity), and 375 homicides of homeless people as a result of bias-motivated attacks. NAT’L COAL. FOR THE HOMELESS, supra note 10, at 7.
16 Id. at 6.
17 Id.
would follow. Changing police tactics should reduce the incidence of private violence against the homeless as well. Dignity-centric law enforcement policies and guidelines would require police approach homeless communities with an eye toward protecting them, rather than punishing them.

This Comment begins with an overview of Fourth Amendment jurisprudence. Part II focuses on what qualifies as an unlawful search, and how the Court's analysis has changed over time. Part III presents the first major prong of the argument: the temporary shelters of the homeless are protected under the Fourth Amendment. This Part is broken up into two general sub-sections, each devoted to discrediting what I see as the major counter-arguments. First, it explains why homeless individuals' temporary shelters are not abandoned property. And second, it counters the argument that homeless individuals' dwellings are not entitled to Fourth Amendment protection because the homeless are trespassing on public or private property. Part IV addresses the second prong of the argument. This Part argues that the makeshift shelters of the homeless qualify as houses for Fourth Amendment purposes, and therefore law enforcement must obtain a warrant before conducting a search. Three arguments are presented to support the conclusion that makeshift shelters qualify as houses for constitutional purposes; they are: (1) makeshift shelters are places of intimate association, (2) Fourth Amendment "houses" include nontraditional houses, and (3) Fourth Amendment analyses consider normative values like privacy and dignity. Lastly, Part V focuses on the policy implications of providing more robust Fourth Amendment protections to the homeless.

II. A BRIEF EVOLUTION OF SEARCHES UNDER THE FOURTH AMENDMENT

The Fourth Amendment protects individuals against the unreasonable search or seizure of their "persons, houses, papers, and effects."18 This Comment focuses on searches of houses, and the meaning of "house" in the Fourth Amendment context. First, this Part provides background information on the Fourth Amendment's adoption, and second, it discusses the way in which Fourth Amendment doctrine has evolved over time, with a focus on searches of houses.

18 U.S. CONST. amend. IV.
A. The Fourth Amendment's Drafting and Protection of the Home

When the Constitution was first adopted, there was no mention of searches or seizures. The Bill of Rights, which includes the Fourth Amendment, did not come into effect until about two years after the Constitution's enactment. For years preceding the Constitution's adoption, however, there had been resistance in both England and the colonies to the Crown's use of general search warrants and writs of assistance. General warrants and writs of assistance were not identical, but both allowed officers to conduct a search without specifying the location of the search or the items or persons to be seized. In addition, writs of assistance permitted officers to search the homes and property of individuals for an almost indefinite period of time, regardless of whether they were suspected of any misconduct.

Although officials could use general warrants to search various types of property, eighteenth-century colonists were primarily angered by officials' use of general warrants and writs to physically search their homes. A number of controversies broke out during the eighteenth century in which individuals challenged the Crown's use of general warrants to search their houses. In one of these cases, merchants from Massachusetts hired attorney James Otis to contest the writs. Otis appealed to the court, arguing that the writs allowed unjustifiable intrusions into men's homes: "Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is well guarded as a prince in his castle." Though Otis's clients were merchants whose ships and

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21 See CLANCY, supra note 19.
23 Id.
24 See David E. Steinberg, The Original Understanding of Unreasonable Searches and Seizures, 56 FLA. L. REV. 1051, 1063 (2004) (explaining that the Framers intended for the Fourth Amendment to protect against unreasonable physical searches of one's home).
25 Id. at 1063–64 (discussing three major controversies of the time, each of which involved physical searches of homes pursuant to general warrants).
warehouses were also searched, Otis only challenged the searches of their dwellings. 27

John Adams was in the courtroom when Otis spoke. Otis’s speech influenced Adams’s drafting of the Massachusetts Constitution’s search and seizure provision.28 At the time, many state constitutions already incorporated a search and seizure provision banning general warrants.29 Adams’s provision included the right of a person to be secure in “his person, his house, his papers, and all his possessions.” 30 This provision later served as a model for the Fourth Amendment.31 The final version included the language “persons, houses, papers, and effects,” as well as “and no warrants shall issue.” 32 Although the language differs, the versions are consistent in their recognition of one’s house as a place worthy of protection.

It is likely courts would not have considered the makeshift shelters of the homeless to be “houses” at the time the Fourth Amendment was enacted, or during the following century. Early Americans’ dislike of general search warrants was driven in part by classist concerns.33 The Framers were troubled that middle- and upper-class Americans had to allow lowly officers to search their homes, and these concerns were sometimes expressed to the courts.34 Searches of poor homes, let alone of a homeless person’s cave or shack, would likely not have yielded the same resentment. But, that is not the case today. Fourth Amendment doctrine has evolved over the last century, and a number of courts have held the Fourth Amendment protects the shelters of the homeless.

B. The Fourth Amendment’s Analysis Over Time

Traditionally, the Fourth Amendment was implicated only if a recognizable property right had been violated.35 For example, a property right violation, like a trespass, was often a de facto Fourth Amendment violation. Olmstead v. United States36 held that the Fourth Amendment protected against unreasonable searches “of material
things—the person, the house, his papers or his effects.” In 1967, the Supreme Court effectively overturned Olmstead in Katz v. United States. In Katz, the Court held that the Fourth Amendment’s protection was not predicated on a property interest. The Court’s holding made it possible for a search to be deemed unconstitutional if it interfered with an individual’s reasonable expectation of privacy, even if there was no physical property law violation.

In Katz, the government secretly recorded the phone conversation the defendant was having inside of a public telephone booth. The Court held that although the defendant did not have a property interest in the telephone booth, he had a recognizable privacy interest in excluding the government from listening to his conversation. Justice Harlan interpreted the Court’s ruling as establishing a twofold requirement, which has become the cornerstone of Fourth Amendment analysis today. The Katz test requires: “[F]irst 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.”

Katz’s reasonableness test is the most commonly used among courts conducting Fourth Amendment analyses today. While courts often gloss over the first prong of the test, finding that a subjective expectation of privacy is usually present, they continue to struggle to apply the test’s second prong: whether an individual’s expectation of privacy is reasonable in the eyes of society. To put it in other words, the question of “whether the government’s intrusion infringes upon the personal and societal values protected by the Fourth Amendment” continues to perplex courts. These values include concepts like privacy, dignity, and the freedom to be one’s self away from the eyes of the State.

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37 Id. at 464.
39 Id. (“[T]he reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”).
40 Id. at 353.
41 Id. at 361 (Harlan, J., concurring).
42 See Note, The Fourth Amendment’s Third Way, 120 Harv. L. Rev. 1627, 1629 (2007); see also Steinberg, supra note 24, at 1054.
43 See Wesley C. Jackson, Note, Life on Streets and Trails: Fourth Amendment Rights for the Homeless and the Homeward Bound, 66 Vand. L. Rev. 933, 941 (2013) (”Courts since Katz have emphasized the ‘reasonable expectation of privacy’ aspect of Justice Harlan’s two-pronged test and have overlooked the ‘subjective’ aspect.”); see also State v. Pruss, 181 P.3d 1231, 1234 (Idaho 2008) (“[O]ne can certainly infer that a person has a subjective expectation of privacy in his dwelling, even if it is a temporary structure like a tent, travel trailer, or the hooch in this case.”).
Lower courts and scholars alike have noted the ambiguity of the *Katz* test. The test requires courts to interpret whether society would view a particular privacy interest as reasonable; an inquiry that seems "designed for sociologists, not judges."\textsuperscript{45} Scholars have attempted to categorize the various models the Supreme Court has employed in its reasonableness analysis, but even then, there remain outliers that do not fit into any recognizable pattern.\textsuperscript{46} As Daniel Solove explains:

The reasonable expectation of privacy test isn’t merely in need of repair—it is doomed. . . . [T]he test purports to be an empirical metric of societal views on privacy. The Supreme Court, however, has never cited empirical evidence to support its conclusions about what expectations of privacy society deems to be reasonable.\textsuperscript{47}

Because of the test’s ambiguity, it is difficult to reconcile some of the Supreme Court’s Fourth Amendment opinions with one another.\textsuperscript{48}

Since *Katz*, the Supreme Court has clarified that the privacy-based test did not repudiate the earlier property-based analysis.\textsuperscript{49} Rather, the Court explained in *United States v. Jones*\textsuperscript{50} that the *Katz* test “has been added to, not substituted for, the common-law trespassory test.”\textsuperscript{51} In *Jones*, the Court held the government’s attachment of a GPS device to the defendant’s car to monitor his movements was a search under the Fourth Amendment.\textsuperscript{52} The Court explained that the government’s physical occupation of the defendant’s property constituted a trespass, which would have been prohibited under the Framers’ understanding of the Fourth Amendment.\textsuperscript{53} “[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas (‘persons, houses, papers, and effects’) it enumerates.”\textsuperscript{54} A government trespass on one of these areas

\textsuperscript{45} *The Fourth Amendment’s Third Way*, supra note 42, at 1635.

\textsuperscript{46} See CLANCY, supra note 19, at 11 (categorizing the Court’s reasonableness analysis as falling under one of five models, but noting there are “several situations that do not easily fit within any of those models”).

\textsuperscript{47} DANIEL SOLOVE, NOTHING TO HIDE 117 (2011).

\textsuperscript{48} For example, compare California v. Ciraolo, 476 U.S. 207 (1986) (holding aerial surveillance of defendant’s backyard did not violate defendant’s reasonable expectation of privacy), with *Kyllo v. United States*, 533 U.S. 27 (2001) (holding use of thermal imaging device to detect temperature inside defendant’s home violated defendant’s reasonable expectation of privacy).

\textsuperscript{49} See, e.g., CLANCY, supra note 19, at 9 (“[T]he Court now recognizes that the Amendment protects certain property interests as such, as well as possessory and liberty interests.”).

\textsuperscript{50} 132 S. Ct. 945 (2012).

\textsuperscript{51} Id. at 952.

\textsuperscript{52} Id. at 950–51.

\textsuperscript{53} Id. at 949.

\textsuperscript{54} Id. at 950.
implicates the Fourth Amendment, regardless of whether courts would find the property owner had a reasonable expectation of privacy in the invaded space. In Jones, even though the defendant did not have a privacy interest in the space under his car, he had a property interest (by virtue of owning the car—an “effect”) that the Fourth Amendment protects.

In regard to searches related to one's home, property-based protections often overlap with privacy-based protections.55 Warrantless searches of the home or its curtilage56 have been found unconstitutional both because they occur in a constitutionally protected area (houses), and because they violate the resident's reasonable expectation of privacy. Both rationales can also be used to explain why a law enforcement officer's warrantless entry into a homeless person's makeshift shelter is an unconstitutional search. When an officer enters a makeshift shelter without a warrant, he violates the homeless person's expectation of privacy and enters a constitutionally protected area—her home. Courts could hold these entries unconstitutional either by conducting a Katz analysis and finding the homeless person has a reasonable expectation of privacy in the space, or by finding the space qualifies as her home, and the right to exclude law enforcement from entering without a warrant is to be presumed.

III. INTERPRETING THE FOURTH AMENDMENT TO PROTECT THE MAKESHIFT SHELTERS OF THE HOMELESS

This Part will address the threshold question of whether the Fourth Amendment is implicated by a search of a homeless person's makeshift shelter. Just because the Fourth Amendment applies does not mean a search warrant is necessarily required before officers enter. Part IV explains why the search of a makeshift shelter should also trigger the warrant requirement. In doing so, it explains the characteristics of a makeshift that render it a house for constitutional purposes. But for now, it will suffice to understand “makeshift shelter” as the enclosed or semi-enclosed place in which a homeless person resides.

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55 See Florida v. Jardines, 133 S. Ct. 1409, 1419 (2013) (Kagan, J., dissenting) ("And so the sentiment 'my home is my own,' while originating in property law, now also denotes a common understanding—extending even beyond that law's formal protections—about an especially private sphere.").

56 Curtilage is defined as the space "harbor[ing] those intimate activities associated with domestic life and the privacies of the home." United States v. Dunn, 480 U.S. 294, 301 n.4 (1987). The Fourth Amendment treats curtilage essentially the same as a dwelling. United States v. Romero-Bustamente, 337 F.3d 1194, 1110 (9th Cir. 2003).
The two major arguments against recognizing the Fourth Amendment's application involve abandonment and trespass. It can be argued that the Fourth Amendment is not implicated because the shelters of the homeless are abandoned property, which is not covered by the Fourth Amendment. In addition, it can also be argued the Fourth Amendment does not apply because the homeless are trespassing on public or private property when occupying their makeshift shelters. This Part will refute both of those premises, and thus demonstrate why the Fourth Amendment protects the shelters of the homeless.

A. The Makeshift Shelters of the Homeless Are Not Abandoned Property

The first potential barrier to finding the Fourth Amendment's protection extends to homeless individuals' makeshift shelters is the doctrine of abandonment. This issue arises only if the person has temporarily left his or her shelter. Homeless people are required, like the rest of society, to leave their dwellings in order to find work, and to purchase food and other necessities. In addition, they must leave to fulfill other basic needs like showering or using a restroom. Aside from a few exceptional circumstances, it is well established that once abandoned, property is no longer entitled to protection under the Fourth Amendment. Courts have reached this conclusion in one of two ways. Some courts find that an individual lacks standing to sue once she abandons her property, and others hold that while she retains standing, she is no longer entitled to Fourth Amendment protection. Because a homeless person's temporary shelter, however, does not qualify as abandoned property in the context of the Fourth Amendment, the doctrine does not serve as a barrier to recognizing the Fourth Amendment applies.

The test for abandonment in the Fourth Amendment context is distinct from the test used in the property law context. In the

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59 See, e.g., United States v. Thomas, 864 F.2d 843, 846 (D.C. Cir. 1989); see also State v. Wyatt, No. 71111-3-I, 2015 WL 1816052, at *8 (Wash. Ct. App. 2015) ("The issue is not abandonment in the strict property right sense but, rather, whether the defendant in leaving the property has relinquished his or her reasonable expectation of privacy so that the search and seizure is valid."); John P. Ludington, Annotation, Search and Seizure: What Constitutes Abandonment of Real Property Within Rule That Search and Seizure of Abandoned Property Is Not Unreasonable—Modern Cases, 40 A.L.R. 381, § 2[a] (4th ed. 1985).
property law context, property may be abandoned if an individual voluntarily relinquishes legal title to it or her possessory interest in it. Federal appeals courts have rejected this approach in regard to the Fourth Amendment, "deeming that 'arcane concepts of property law do not control an individual's ability to claim Fourth Amendment protection.'" Instead, the inquiry is whether "the defendant voluntarily discarded . . . his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." As the Tenth Circuit explained in United States v. Jones, whether a person relinquishes his expectation of privacy "is a question of intent, which 'may be inferred from words spoken, acts done, and other objective facts.'" The test is similar to the Katz inquiry, in that it emphasizes the reasonableness of the individual's expectation of privacy, rather than property-law concepts.

When homeless people leave their shelters to perform basic life functions, or to simply engage in activities that are conducted outside of the home, they have not abandoned their property. Unless a homeless person verbally denies ownership of her shelter, or takes some similar action indicating intent to relinquish her privacy interest in the place, she has not abandoned it. Just as no one would suggest that an individual relinquishes her privacy interest in her home when she leaves for a week's vacation, it is implausible to suggest a homeless person abandons her shelter when she temporarily leaves.

The defendant's actions in Jones exemplify an objective intent to abandon one's property. There, the Tenth Circuit held the defendant's satchel was abandoned for Fourth Amendment purposes because he repeatedly claimed to have no knowledge of it, and later told police it

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60 Ludington, supra note 59, at § 2[a]; see also United States v. Oswald, 783 F.2d 663, 666 (6th Cir. 1986) (citing Rakas v. Illinois, 439 U.S. 128, 123 (1978)). Property law treats chattel and real property differently. Real property cannot be abandoned but can be acquired through adverse possession.


62 Id. at *24 (quoting United States v. Edwards, 644 F.2d 1, 2 (6th Cir. 1981)).

63 707 F.2d 1169 (10th Cir. 1983).

64 Id. at 1172 (quoting United States v. Kendall, 655 F.2d 199, 202 (9th Cir. 1981)).

65 State abandonment law would likewise not serve as a barrier to recognition, as federal courts have rejected using state property law to determine whether property has been abandoned for Fourth Amendment purposes. See, e.g., Hosea, 2006 WL 314454, at *23 (citing United States v. Fulani, 368 F.3d 351, 354 (3d Cir. 2004); United States v. Ramos, 12 F.3d 1019, 1023 (11th Cir. 1994); United States v. Thomas, 864 F.2d 843, 845 (D.C. Cir. 1989); United States v. Edwards, 441 F.2d 749, 753 (6th Cir. 1971)).
was in a location that it was not. When viewed objectively, therefore, the defendant’s actions and speech did not demonstrate intent to retain a privacy interest in the satchel.

On the other hand, *Pottinger v. City of Miami* is an example of a case in which the court found homeless individuals had not abandoned their chattel property. The District Court for the Southern District of Florida held officers’ search and seizure of the defendants’ property, including bedrolls, bags, and boxes, violated their Fourth Amendment rights. The court dismissed the city’s argument that the property had been abandoned. Instead, the court explained the belongings of homeless people are readily discernable from abandoned property:

Typical possessions of homeless individuals include bedrolls, blankets, clothing, toiletry items, food and identification, and are usually contained in a plastic bag, cardboard box, suitcase or some other type of container. In addition, homeless individuals often arrange their property in a manner that suggests ownership, for example, by placing their belongings against a tree or other object or by covering them with a pillow or blanket.

Similarly, in *State v. Wyatt*, the Court of Appeals of Washington held officers’ search of the defendant’s closed containers, which he left outside of his tent on public land, was impermissible under the Fourth Amendment. The court dismissed the State’s claim that the property was abandoned. Rather, the court held that nothing in the record indicated the defendant intended to relinquish his privacy interest in the items, despite the fact that he may have been illegally occupying public land.

A similar case is *State v. Mooney*. In *Mooney*, the Connecticut Supreme Court’s abandonment analysis was not based on “where legal title rests” but “rather . . . whether the person claiming the protection of the Fourth Amendment has a legitimate expectation of privacy in the

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66 *Jones*, 707 F.2d at 1172–73.
68 *Id.* at 1570–73.
69 *Id.* at 1571.
70 *Id.*
72 *Id.* at *5–8.
73 *Id.* at *9.
74 *Id.* at *8.
invaded place." The defendant was a homeless man sleeping under a bridge abutment. While he was away from the bridge, he stored his belongings in a cardboard box and duffle bag, and took measures to conceal them. The court found the defendant demonstrated no intent to temporarily relinquish his privacy interest in the items, and therefore they were not abandoned. The 

Mooney court distinguished its ruling from that of the Supreme Court in California v. Greenwood. In Greenwood, the Supreme Court held the defendant had abandoned his trash when he left it on the curb. The 

Mooney court explained in the present case, unlike in Greenwood, "no such purpose to leave [the property] for collection by third party or to discard in any sense" existed.

Mooney, Pottinger, and Wyatt primarily focused on the defendants' personal possessions, rather than dwellings. There is not much case law involving a search of a homeless defendant's empty makeshift shelter. One such case is United States v. Ruckman. In Ruckman, the defendant made his home inside of a cave on public land. The Tenth Circuit held officers' search of the cave constitutional because the defendant was trespassing on public land. But even so, the court did not justify its ruling by finding the defendant had abandoned his shelter. Abandonment was not even mentioned.

The same rationale courts have used to find that homeless individuals do not abandon their personal belongings when they temporarily step away from them should be applied to the individuals' makeshift shelters, but with even more force. If it is readily apparent to the courts that a person has not relinquished her privacy interest in bedrolls and blankets by virtue of the way they are arranged and stored, it should be even more apparent that she has not relinquished her privacy interest in a structure resembling her house. Furthermore, tents, tarp-covered structures, and other containers that the homeless live in are often positioned next to like structures, further obviating their function as homes. In addition, these makeshift shelters are likely

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76 Id. at 158 (citations omitted) (quoting United States v. Oswald, 783 F.2d 663, 666 (6th Cir. 1986)).
77 Id. at 149.
78 Id. at 159–61.
79 Id. at 159–60.
81 Id. at 51.
82 Mooney, 588 A.2d at 160.
83 806 F.2d 1471 (10th Cir. 1986).
84 Id. at 1472.
85 For a detailed discussion on why the court's ruling is incorrect, see infra Part III.B.1.
surrounded by possessions, like bedrolls and clothing, which society has already recognized as un-abandoned.\textsuperscript{86}

B. The Trespass Doctrine Does Not Eliminate the Fourth Amendment Rights of the Homeless

Having established that the shelters of the homeless are not abandoned property, I will now address the second major counter-argument. This section will repudiate the argument that the homeless have no Fourth Amendment protection in their temporary shelters if they are trespassing on public or private land. The Model Penal Code defines criminal trespass as entering or remaining in a building or occupied structure without a license or privilege to do so, or when there is notice against trespass.\textsuperscript{87} Interestingly, one of the Model Penal Code’s defenses to prosecution for criminal trespass is that the building was abandoned.\textsuperscript{88} Conduct similar to that proscribed in the Model Penal Code is also likely to qualify as a trespass pursuant to any given state’s law.\textsuperscript{89}

This Part is broken up into two sub-sections. It will distinguish between trespasses on private versus public property. Neither trespassing on public nor private property should impede the Fourth Amendment’s recognition that homeless individuals have a privacy interest in their dwellings. There may, however, be different concerns in regard to each type of trespass.

1. Trespassing on public property does not bar the homeless from the Fourth Amendment’s protection.

Trespassing on public property should not disqualify an individual from protection under the Fourth Amendment. While numerous lower courts have held trespassing on public property eliminates the homeless population’s ability to contest searches of their dwellings,\textsuperscript{90}

\textsuperscript{86} See, \textit{e.g.}, Lavan v. City of Los Angeles, 693 F.3d 1022, 1032 (9th Cir. 2012) (holding homeless defendants’ personal possessions left on public property were not abandoned), \textit{cert. denied}, 133 S. Ct. 2855 (2013); \textit{Mooney}, 588 A.2d 145 (holding the same).

\textsuperscript{87} See \textit{MODEL PENAL CODE} § 221.2.

\textsuperscript{88} See \textit{id. at} (3)(a).


\textsuperscript{90} See, \textit{e.g.}, Amezquita v. Hernandez-Colon, 518 F.2d 8, 10 (1st Cir. 1975) (finding police did not violate privacy of homeless individuals when they “pok[ed] through the homes of some of the plaintiffs without a search warrant or judicial authorization of any kind,” because plaintiffs had no legal property interest in the land); \textit{State v. Tegland}, 344 P.3d 63, 64 (Or. Ct. App. 2015) (finding police did not violate homeless man’s privacy rights by lifting the tarp of his makeshift shelter); \textit{People v. Thomas}, 38 Cal. App. 4th 1331, 1333 (Cal. Ct. App. 1995) (finding police did not violate homeless man’s Fourth Amendment rights when they searched the box he was living in on a
illegally residing on public land does not ipso facto strip an individual of her Fourth Amendment rights. While at one point property law dominated the Fourth Amendment analysis, today, a person's expectation of privacy can trigger the Amendment's protection even without a claim to the property.

Lower courts have similarly held violations of state or local laws do not "vitiate the Fourth Amendment's protection of one's property. Were it otherwise, the government could seize and destroy any illegally parked car or unlawfully unattended dog without implicating the Fourth Amendment." Such a principle would similarly strip any camper who overstayed his camping permit of his Fourth Amendment rights.

This concept is not novel. To give just one example, a similar approach has thus far been taken in regard to the media's publication of confidential information. The Court has held publication of publicly valuable classified information cannot be enjoined—the journalists' First Amendment rights remain intact—but has left open the possibility that the journalists could be criminally prosecuted. Likewise, a homeless individual living on public or private property can be prosecuted for trespass, but her trespass should not negatively implicate her Fourth Amendment rights.

*public sidewalk; he had no reasonable expectation of privacy in his shelter because he was illegally occupying public property).  

91 See Katz v. United States, 389 U.S. 347, 351 (1967) ("[W]hat [the defendant] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.").  

92 Lavan v. City of Los Angeles, 693 F.3d 1022, 1029 (9th Cir. 2012).  

93 See United States v. Sandoval, 200 F.3d 659, 661 (9th Cir. 2000).  

94 The media has never been prosecuted for publishing confidential information. In New York Times Co. v. United States, 403 U.S. 713, 714 (1971), the Supreme Court held the newspaper's publication of classified information (known as the Pentagon Papers) could not be enjoined. However, Justice White stated in concurrence that the newspaper could be subject to criminal prosecution for publishing the information. Id. at 734; see also Alison Frankel, Journalists and the Espionage Act: Prosecution Risk Is Remote but Real, REUTERS (June 24, 2013), http://blogs.reuters.com/alison-frankel/2013/06/24/journalists-and-the-espionage-act-prosecution-risk-is-remote-but-real/ [https://perma.cc/C4H7-CSPA].  


96 While the homeless can be prosecuted for trespassing, courts have held the immediate seizure and destruction of their property violates the Fourth and Fourteenth Amendment. See, e.g., Lavan v. City of Los Angeles, 693 F.3d 1022 (9th Cir. 2012); Kincaid v. City of Fresno, No. CV-06-1445 OW, 2008 WL 2038390 (E.D. Cal. 2008). Therefore, police officers could not search an individual's shelter under the guise of an immediate seizure. In the least, notice would be required.
Judge McKay's dissenting opinion in *Ruckman* perfectly explains why an individual's trespass on public property should not limit his rights under the Fourth Amendment. In *Ruckman*, the defendant made his home inside of a cave on public land. He furnished the cave with items like a bed, a stove, and a lantern, and built a wall and a door. Nonetheless, the Tenth Circuit held the defendant was not protected against a warrantless search of the cave, because he was trespassing on public property. The court held the defendant's cave was not equivalent to his house, and therefore he had no reasonable expectation of privacy in it.

The dissent's argument is more persuasive. Judge McKay first takes issue with the majority's one-sided analysis of whether the cave was the defendant's house: "Although 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." Judge McKay suggests that the cave likely qualified as the defendant's house. And even if the cave was not the defendant's house, the search was unreasonable because it violated the defendant's reasonable expectation of privacy. Judge McKay explains that the Fourth Amendment has evolved in such a way that today, "searches and seizures may be 'unreasonable' within the Fourth Amendment even though the [g]overnment asserts a superior property interest at common law." The defendant took all reasonable measures to conceal the cave and treated it like his home, and therefore surely had a recognizable privacy interest in his temporary dwelling.

Judge McKay's analysis recognizes two rationales courts can use to find that a search of a homeless person's makeshift shelter implicates the Fourth Amendment. First, courts can acknowledge that homeless individuals' dwellings are houses, and are due the same level of protection as traditional houses. Or second, courts can reach the same conclusion using a privacy-based rationale—essentially, these spaces

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97 See United States v. Ruckman, 806 F.2d 1471, 1478 (10th Cir. 1986) (McKay, J., dissenting) ("The fact that Mr. Ruckman may have violated a federal law by living in this cave (a fact not established by this record) simply does not strip him of all his constitutional rights.").
98 Id. at 1472.
99 Id. at 1475.
100 Id. at 1473.
101 Id. at 1475.
102 Id. at 1478 ("The cave was his sole living quarters in every sense, furnished with a bed and other crude furniture.").
103 Id. at 1477 ("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.").
104 Id. (citation omitted) (quoting Warden v. Hayden, 387 U.S. 294, 304 (1967)).
are protected because they are the site of the residents' intimate association and private conduct. Because the homeless have literally nowhere else to conduct these intimate activities, their expectation that they may do so inside of their dwellings is reasonable. If the resident has taken all practical measures to keep outsiders out, like the defendant in *Ruckman*, his expectation of privacy should be one society is willing to recognize as reasonable.

This reasoning can be used to explain why those courts that have held a homeless individual does not have a recognizable Fourth Amendment interest in his temporary shelter are incorrect. One example of such a case is *Mooney*. While the court held the defendant had a reasonable expectation of privacy in his personal belongings, it neglected to find he had a similar interest in the larger space he was living in. The defendant was residing under a bridge on public land. He reported that he thought of the space as his home, and treated it as such. For example, he had built shelves under the bridge, and laid his personal belongings there and in the surrounding area.

The *Mooney* court's conclusion that the defendant did not have a recognizable Fourth Amendment interest in the space under the bridge is incorrect. As explained above, the defendant took reasonable measures to make the space look like his house, and treated it as such. Recognizing the defendant had a Fourth Amendment interest in this general space is not as slippery a slope as it may seem. It would not invite just anyone to claim a swath of land as his home, and assert a Fourth Amendment interest in the space. The protection applies only to the homeless, who truly reside in the space and treat it as their home. There are also specific characteristics, explained in Part IV, that can help officers and courts identify makeshift shelters that are being used as homes. By definition, a non-homeless individual has a home that is not a spot under a public bridge or a place beneath a tree. For this person, the rights and expectations associated with the home do not attach to these public spaces. It is therefore not dangerous to recognize the defendant in *Mooney* had a Fourth Amendment interest in the space under the bridge. Surely society agrees that there is a distinction between these scenarios, and recognizes the need for protection in one

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105 This argument is expounded upon in Part IV.B.1.
106 See infra Part IV.B.1.c.
108 Id. at 149.
109 Id. at 152.
110 Id. at 150.
rather than the other. The Katz framework considers societal norms in determining when an expectation of privacy is reasonable, and considering those norms here corresponds with the Court’s existing method of analysis.

2. Trespassing on private property does not bar the homeless from the Fourth Amendment’s protection.

The Fourth Amendment should likewise apply to searches of homeless individuals’ makeshift shelters located on private property. At first blush, extending protection to those trespassing on private property may seem more problematic. There are legitimate health and safety concerns associated with trespass in abandoned buildings that might be less present in the context of public land.

There are three responses to this concern. First, as with trespass on public land, the Fourth Amendment is not the appropriate mechanism to punish an individual for trespassing on private land. The revocation of one’s Fourth Amendment rights should not be used as a deterrent to keep individuals from trespassing on private property. The Founders intended for the Fourth Amendment to be a guarantee of protection to the people, and a limit on the government’s ability to search and seize. Denying an individual her Fourth Amendment rights as punishment for violating a local or state law is completely adverse to the Amendment’s purpose. Fourth Amendment protections are not absolute, but the Court has never explicitly held that failure to comply with unrelated statutory laws warrants its limitation.

It could be argued the fleeing felon doctrine provides that when individuals break the law, the Fourth Amendment’s protection is suspended—officers are not required to obtain a warrant before entering a building in hot pursuit of a suspect. But, in the case of the fleeing felon, officers may violate the person’s constitutional rights if necessary to apprehend her, not because she has broken a law. The revocation of her constitutional rights is not punitive, but necessary, which is why the Court has been hesitant to allow such exceptions. A warrant is still required if the individual is suspected of committing only a minor offense.111

No such necessity exists in the case of a homeless person who is peacefully residing on public or private land. And therefore, limiting her Fourth Amendment rights in response to her trespass is punitive and at odds with the Amendment’s purpose. “Exceptions to the warrant

requirement are 'few in number and carefully delineated.' Violating a local or state law is not a delineated exception. In fact, the Supreme Court has held on numerous occasions that a defendant does not waive his Fourth Amendment right to be free from unreasonable searches of his home just because he is suspected of committing a crime.

Second, the doctrine of adverse possession provides that at some point, squatters can acquire legal property rights in the place they are residing. If the law is willing to recognize that squatters can acquire permanent property rights in abandoned buildings, surely they can acquire a less burdensome, temporary privacy interest in the space.

Third, there are alternative ways in which the State’s interest in maintaining the safety and structural integrity of abandoned buildings can be satisfied. Health and safety inspectors are permitted to enter private property to conduct inspections, but only after obtaining a warrant based on probable cause. And, “[w]here considerations of health and safety are involved, the facts that would justify an inference of ‘probable cause’ to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken.” The probable cause standard in regard to an administrative search is arguably less demanding than that needed to justify a criminal investigative search. For example, in Camara v. Municipal Court of City and County of San Francisco, the Supreme Court found that factors like “the passage of time, the nature of the building . . . or the condition of the entire area” might be enough to establish probable cause for an administrative inspection. This procedure would be available to inspectors seeking to conduct searches of abandoned buildings.

The State’s public health and safety concerns do not justify revoking the Fourth Amendment rights of homeless people who are residing on private property. The appropriate way to address these concerns is through administrative inspections conducted pursuant to a search warrant. Additionally, revoking the Fourth Amendment rights of the homeless as punishment for trespassing is adverse to the Amendment’s underlying values and purpose. In sum, there is no

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112 Id. at 749 (citation omitted).
113 See, e.g., Mincey v. Arizona, 437 U.S. 385 (1978) (holding search of murder suspect’s apartment and scene of the crime unreasonable without a warrant); Chimel v. California, 395 U.S. 752 (1969) (holding search of arrestee’s house that expanded beyond the immediate area of the arrest unreasonable without a warrant).
115 Id. at 538.
117 Id. at 538.
strong justification for distinguishing between searches of a homeless person's makeshift shelter located on private versus public land. Both searches implicate the Fourth Amendment.

IV. A WARRANT SHOULD BE REQUIRED TO SEARCH THE MAKESHIFT SHELTERS OF THE HOMELESS

This Part focuses on the second major prong of the argument: police officers must obtain a warrant before entering the makeshift shelters of the homeless. Having established that the search of a homeless person's makeshift shelter implicates the Fourth Amendment, the next question is how much protection the Amendment should provide that person. Just because a homeless person's makeshift shelter is protected by the Fourth Amendment does not mean a search warrant is required. A person has a privacy interest in her car, for example, but a search warrant is not always needed to search a car.\textsuperscript{118} This Part will address why a homeless person's makeshift shelter is more like her house than her car or other chattel property, and thus why a warrant is required.\textsuperscript{119}

Prior scholarship argues the Katz test, which considers the reasonableness of an individual's privacy expectations, should be reworked to protect the makeshift shelters of the homeless.\textsuperscript{120} This Comment argues such revision is unnecessary. While the Katz test can be used to find the shelters of the homeless should be treated like traditional houses,\textsuperscript{121} "Fourth Amendment rights do not rise or fall with the Katz formulation."\textsuperscript{122} Instead, makeshift shelters that resemble traditional houses or curtilage should already be protected under the existing regime. A warrant is required because these shelters are "constitutionally protected areas,"\textsuperscript{123} regardless of whether the Katz test is employed.

\hspace{1cm}\textsuperscript{118} See, e.g., California v. Carney, 471 U.S. 386, 390 (1985) ("[P]rivacy interests in an automobile are constitutionally protected; however... the ready mobility of the automobile justifies a lesser degree of protection of those interests." (citation omitted)).

\hspace{1cm}\textsuperscript{119} See, e.g., Payton v. New York, 445 U.S. 573, 586 (1980) (Searches of houses traditionally require a warrant before entering.).


\hspace{1cm}\textsuperscript{121} See infra Part IV.B (arguing homeless individuals' expectation of privacy in their dwellings is reasonable); see also Granston, supra note 120, at 1326 (arguing the Court could use a private activities standard, rather than a public exposure standard within the existing Katz framework in cases involving the makeshift shelters of the homeless).

\hspace{1cm}\textsuperscript{122} United States v. Jones, 132 S. Ct. 945, 950 (2012).

\hspace{1cm}\textsuperscript{123} See, e.g., Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) (citation omitted) (internal quotation marks omitted).
This Part presents three arguments in support of including the shelters of the homeless in the constitutionally protected area of the home. To begin, this Part will present a more thorough discussion of the heightened level of protection houses receive under the Fourth Amendment. Next, it will present three arguments as to why the makeshift shelters of the homeless are also due a heightened level of protection. These are: (1) houses are places where the resident's expectation of privacy is high and where intimate activities occur, (2) houses have been interpreted to include nontraditional houses, and (3) the Amendment's normative values of dignity and privacy support including makeshift shelters in Fourth Amendment "houses." This final argument also includes a discussion of cases that have treated the shelters of the homeless as houses for Fourth Amendment search purposes.

A. The History of the Fourth Amendment's Core Protection of Houses

Since the Fourth Amendment's adoption, courts have framed its preeminent attribute as protecting the right of an individual to be free from an unlawful search or seizure in his or her home. From Otis's speech to eighteenth century Americans' overwhelming dissatisfaction with general search warrants, it is clear that the sanctity of the home has been of utmost importance to Americans: "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." Arguably more so than the other categories of protected property, "[t]he home has a special status as a protected place, even when the owner is not present." For this reason,

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124 The Supreme Court considers these factors (whether an area is the site of intimate association and whether an individual has an expectation of privacy in a place) when conducting Fourth Amendment analyses. See, e.g., United States v. Dunn, 480 U.S. 294, 300 (1987) ("We identified the central component of [the curtilage] inquiry as whether the area harbors the "intimate activity associated with the "sanctity of a man's home and the privacies of life."" (quoting Oliver v. United States, 466 U.S. 170, 180 (1984) (internal citation omitted)).

125 See, e.g., United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) (The home is "ordinarily afforded the most stringent Fourth Amendment protection.""); Silverman v. United States, 365 U.S. 505, 511 (1961) ("At 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."); Boyd v. United States, 116 U.S. 616, 630 (1886) ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property.").


128 CLANCY, supra note 19, at 6 (citing Kyllo v. United States, 533 U.S. 27 (2001); Alderman v. United States, 394 U.S. 165, 176 (1969)); see also Boyd, 116 U.S. at 630 (A warrantless search of a man's home "is the invasion of his indefeasible right of personal security, personal liberty[,] and
warrantless searches inside of the home are presumptively unreasonable.\footnote{See Payton, 445 U.S. at 586.}

Drawing from the history behind the Fourth Amendment's adoption, Professor David Steinberg writes that the Framers intended the Fourth Amendment to "proscribe only a single, discrete activity—
physical searches of houses pursuant to a general warrant, or no
warrant at all."\footnote{Steinberg, supra note 24, at 1063.} This is because in the years leading up to the Amendment's adoption, the colonists were primarily concerned with unlawful searches of the home.\footnote{See id. at 1063.} This concern has not faded. Modern
search and seizure jurisprudence often refers to the sanctity of the
home: "[W]hen it comes to the Fourth Amendment, the home is first
among equals. At the Amendment's 'very core' stands 'the right of a
man to retreat into his own home and there be free from unreasonable
governmental intrusion.'"\footnote{See, e.g., Payton, 445 U.S. at 601 (Powell J., concurring) ("[N]either history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.").}

Searches related to the home are given the highest level of
cause, even in extreme circumstances. For example, the warrantless
search of a house was held unconstitutional even after it had been
ravaged by fire.\footnote{United States v. Parr, 716 F.2d 796, 810 (11th Cir. 1983).} Non-physically-invasive searches, like the use of a
drug-sniffing dog on an individual's porch, are likewise
unconstitutional.\footnote{Jardines, 133 S. Ct. at 1417–18.}

Courts' analyses do not always hinge on the occupant's expectation
of privacy (the Katz test). Katz opened the door for lower courts to find
a search unconstitutional for privacy-related reasons,\footnote{See, e.g., Stephanie M. Stern, Article, The Inviolable Home: Housing Exceptionalism in the Fourth Amendment, 95 CORNELL L. REV. 905, 939 (2010) (citing Segura v. United States, 468 U.S. 796, 810 (1984)); see also Richard G. Wilkins, Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis, 40 VAND. L. REV. 1077, 1111–12 (1987) ("Before Katz, the home was protected simply because it was the home. . . . After Katz, the home is a protected locale, not only by virtue of its explicit mention in the language of the [F]ourth [A]mendment, but also (and perhaps primarily) because of the human activities innately associated with it.").} but traditional
The home is still considered a constitutionally protected sphere in its own right. Under both the privacy- and property-based analyses, courts often refer to the underlying values of the Fourth Amendment, like privacy and dignity, when discussing the heightened protection afforded dwellings. Further, the interior of one’s home deserves the highest level of Fourth Amendment protection.

B. Makeshift Shelters Are Houses for Fourth Amendment Purposes

Given the Fourth Amendment’s original purpose was to safeguard the home from unreasonable searches, if nothing else, individuals should be free from government intrusion inside their homes. Although they are nontraditional houses, the makeshift shelters of the homeless function as their houses, and should be treated as such. This means a search warrant is required prior to law enforcement’s entry. This section will contain three major arguments to support this contention. Again, these are: (1) houses are places of intimate association and privacy, (2) the Fourth Amendment protects nontraditional houses, and (3) the Amendment’s normative values support including even temporary shelters within the definition of “houses.”

1. Fourth Amendment houses are places where intimate activities associated with domestic life occur.

The Supreme Court has never provided a formal definition for “houses” in the context of the Fourth Amendment. One author suggests that Katz implies that houses for Fourth Amendment purposes are areas where an individual has a reasonable expectation of privacy—where she is “excluded from public scrutiny.” Because “Fourth

138 See, e.g., Jardines, 133 S. Ct. at 1419 (Kagan, J., concurring).
139 See, e.g., United States v. Jones, 132 S. Ct. 945, 951 (2012) (“[W]e [do not] believe that Katz, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home.” (quoting Alderman v. United States, 394 U.S. 165, 180 (1969))).
140 See, e.g., Dow Chemical Co. v. United States, 476 U.S. 227, 236 (1986) (citation omitted) (An individual “plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of... covered buildings, and it is equally clear that expectation is one society is prepared to observe.”); Stern, supra note 137, at 950–51 (arguing that the Fourth Amendment too stringently protects the home and its curtilage, but conceding that heightened Fourth Amendment protection is appropriate for the interior rooms of the home, because of their relation to substantive privacy rights and intimate association).
141 See Steinberg, supra note 24, at 1053.
142 Granston, supra note 120, at 1308.
Amendment rights do not rise or fall with the Katz formulation,"143 however, “houses” cannot be limited to those spaces where an individual has a reasonable expectation of privacy. But, privacy should be considered in defining a house for Fourth Amendment purposes. In addition, two areas we may look at to inform our definition of “houses” are federal statutes that define a “dwelling,” and the Supreme Court’s definition of curtilage.

a. Defining a “house” or “dwelling”

Samuel Johnson’s “A Dictionary of the English Language,” published in 1792, defines “house,” in relevant part, as “a place wherein a man lives; a place of human abode.”144 Webster’s Dictionary defines a “house” as “a building that serves as living quarters for one or a few families.”145 These definitions are not especially helpful, but at the same time do not bar the inclusion of a homeless person’s makeshift shelter. “House” and “dwelling” are closely related. Courts often use the terms interchangeably, and the definition of one can be used to inform that of the other. Black’s Law Dictionary defines “dwelling” as a “house or other structure in which a person or persons live” or a “[s]tructure used as place of habitation.”146 According to the Ninth Circuit: “The common legal meaning of dwelling, as reflected in numerous sources, includes at least two elements: that it be a structure, and that it be used as a residence.”147 The court cited a number of federal statutes in support of this definition. For example, the Fair Housing Act states: “Dwelling’ means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families[.]”148 The Code of Federal Regulations relating to Native American veterans defines “dwelling” as “a building designed primarily for use as a home, consisting of one residential unit only and not containing any business unit.”149 The Equal Credit Opportunity Act states: “Dwelling means a residential structure that contains one to four units, whether or not that structure is attached to real property.

147 United States v. Romer-Bustamente, 337 F.3d 1104, 1109 (9th Cir. 2003).
149 38 C.F.R. § 36.4501.
The term includes, but is not limited to, an individual condominium or cooperative unit and a mobile or other manufactured home.\textsuperscript{150}

None of these definitions require specific physical features in order to qualify as a dwelling. The Equal Credit Opportunity Act does not even require the structure be “attached to real property.” Congress seems to have found it sufficient that for a place to qualify as a dwelling, it serve as a residence for at least one family. A homeless person’s makeshift shelter meets this definition, as it is the place she lives. But, of course, not every place a person decides to live qualifies as a house for Fourth Amendment purposes. In determining what does qualify as a house, and therefore which makeshift shelters should be treated equivalently to houses, it is helpful to look at how courts have defined “curtilage.”

\textbf{b. Defining “curtilage”}

Curtilage is the space “harbor[ing] those intimate activities associated with domestic life and the privacies of the home.”\textsuperscript{151} “At common law, the curtilage is the area to which extends the intimate activity associated with the ‘sanctity of a man’s home . . . ’ and therefore has been considered part of the home itself for Fourth Amendment purposes.”\textsuperscript{152} Curtilage has been held to include crawl spaces beneath a house,\textsuperscript{153} an enclosed backyard,\textsuperscript{154} and a front porch,\textsuperscript{155} among other areas.

In \textit{United States v. Dunn},\textsuperscript{156} the Court presented four factors to consider in determining what qualifies as curtilage: (1) “the proximity of the area claimed to be curtilage to the home,” (2) “whether the area is included within an enclosure surrounding the home,” (3) “the nature of the uses to which the area is put, and” (4) “the steps taken by the resident to protect the area from observation by people passing by.”\textsuperscript{157} These factors are not dispositive in resolving all curtilage questions, but “are useful analytical tools” to determine “whether the area in

\textsuperscript{150} 12 C.F.R. § 202.13(a)(2) (emphasis added).
\textsuperscript{151} United States v. Dunn, 480 U.S. 294, 301 n.4 (1987).
\textsuperscript{152} Oliver v. United States, 466 U.S. 170, 180 (1984) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).
\textsuperscript{153} See United States v. Pacheco-Ruiz, 549 F.2d 1204, 1207 (9th Cir. 1976).
\textsuperscript{154} See United States v. Romero-Bustamente, 337 F.3d 1104, 1110 (9th Cir. 2003).
\textsuperscript{156} 480 U.S. 294 (1987).
\textsuperscript{157} Id. at 301.
question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection."  

In sum, curtilage is a zone in which intimate activities occur, and the resident has taken steps to enclose the space and protect it from the observation of others. Spaces meeting these requirements and in close proximity to the home are considered part of the "dwelling" for Fourth Amendment purposes. The same rationale courts use to determine that a space qualifies as curtilage could be used to define a makeshift shelter deserving of similar protection. A "makeshift shelter" protected by the Fourth Amendment would thus be a place in which: (1) a person lives, (2) that she has taken steps to protect from observation, (3) that she has taken measures to enclose, and (4) in which intimate activities routine to the home occur. As a starting point, courts could look to these factors to determine whether a particular structure qualifies as a "makeshift shelter" for Fourth Amendment purposes.

c. The intimate activities approach

Lastly, a bit more can be said about the "nature of the uses to which the area is put" prong of the curtilage test. In regard to this prong, the Court has expressed concern over protecting areas where "intimate activities associated with domestic life and the privacies of the home" occur. These concerns are especially salient when it comes to the makeshift shelters of the homeless. Professor Stephanie Stern argues that areas where private activities and intimate association take place should be the focus of Fourth Amendment analysis related to houses. She suggests that searches in the home that threaten the inhabitants' intimate association should be given the utmost protection, while those that are less intrusive, for example, collecting data on the heat inside of a house, should be given less. This suggestion is in line with evidence that the Fourth Amendment uses the home as a proxy for protecting the intimate activities that so often occur there.

158 Id.
159 See Romero-Bustamente, 337 F.3d at 1110.
160 As an aside, there would be no concern that a homeless person living on a public sidewalk could claim the sidewalk as curtilage. Just as a person residing in a house in the middle of an open field cannot claim the surrounding land is part of her dwelling, a homeless person who has not taken measures to enclose the surrounding area, conduct intimate activities there, and shield the space from observers could not claim the space was curtilage. Cf. Oliver v. United States, 466 U.S. 170, 179 (1984) ("Open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance.").
162 See Stern, supra note 137, at 920.
163 See id. at 943–45.
164 See, e.g., Segura v. United States, 468 U.S. 796, 810 (1984) ("But the home is sacred in
The Fourth Amendment’s protection against unreasonable searches should unquestionably apply to the inside of a homeless person’s shelter. For poorer individuals who do not have the luxury of a multi-room house, the one room they have, or the space inside their tent, is the bedroom, the family room, and the kitchen. The space is arguably more tied to its inhabitants’ intimate activities than are the houses of wealthier individuals, because it is virtually the only place these individuals have to conduct such exercises. While someone living in a three-bedroom house may not have her private conversations in the home’s entryway, the likelihood that a family living in a one-room house would do so is much higher. Individuals with lower socioeconomic statuses spend more time in public than the wealthy, and have fewer private spaces to engage in intimate association. Wealthier individuals, by virtue of their socioeconomic status, are more likely to own cars, rent hotel rooms, and be able to afford the luxury that privacy has come to be. A homeless individual’s one-room shelter may be the only place intimate activities can take place, which cuts in favor of providing the homeless with heightened protection against warrantless searches of their dwellings, or in the very least, protection equal to that which wealthier individuals receive.

Gregory Townsend similarly argues courts should “focus more on the nature of the activity conducted at the place which police search, not the mere location” when conducting Fourth Amendment analyses. Townsend argues courts should apply the Supreme Court of Hawaii’s “government acquiescence” doctrine from State v. Dias, holding that a homeless person’s expectation of privacy is reasonable when the government has acquiesced to her residing on public land. This Comment takes Townsend’s argument a step further, arguing the homeless have a reasonable expectation of privacy in their temporary

Fourth Amendment terms not primarily because of the occupants’ possessory interests in the premises, but because of their privacy interests in the activities that take place within.”).

See, e.g., Stern, supra note 137, at 923.

See William J. Stuntz, The Distribution of Fourth Amendment Privacy, 67 GEO. WASH. L. REV. 1265, 1272 (1998–99) (“[I]f [the] goal [of police searches] is to protect against the harm of being observed, it will give most of its protection to people who can afford lives that allow limited observation. That excludes the urban poor.”).

A current circuit split exists in which five circuit courts have held tenants do not have a reasonable expectation of privacy in the common areas of their buildings, further limiting the number of areas in which the poor can expect privacy. See Orin Kerr, Use of a Drug-sniffing Dog at an Apartment Door Is a ‘Search,’ 7th Circuit Holds, WASH. POST (Apr. 13, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/13/use-of-a-drug-sniffing-dog-at-an-apartment-door-is-a-search-7th-circuit-holds/ [https://perma.cc/F2AK-ZMU8].

Townsend, supra note 120, at 239.

609 P.2d 637 (Haw. 1980).

Id. at 225.
shelters on public or private land, and with or without government acquiescence. Law enforcement’s position toward the homeless should not alter the Fourth Amendment’s application to searches of their dwellings. Rather, if their dwellings resemble areas that are already considered houses for Fourth Amendment purposes—those meeting the abovementioned curtilage factors—they should always be protected against warrantless searches.

2. “Houses” include nontraditional houses, both lavish and impoverished.

Houses are protected under the Fourth Amendment, regardless of their appearance, value, or location. The Katz privacy-based test did not eliminate the Fourth Amendment’s protection of certain spheres of physical property—“constitutionally protected areas.” History instructs us that the house and its curtilage have always been two of these areas. The Court has not hesitated to strike down a number of non-physically invasive searches because they took place in the protected sphere of the home. If a dog-sniff on the porch and the use of a thermal imaging device outside of the house are unconstitutional searches, surely physically entering a homeless person’s dwelling is prohibited. Exceptions to the warrant requirement exist when exigent circumstances are present. Poverty, however, is not an exception. To the contrary, multiple courts have held the Fourth Amendment’s protection applies to all houses, independent of their appearance or apparent value.

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171 But cf. David Reichbach, Comment, The Home Not the Homeless: What the Fourth Amendment Has Historically Protected and Where the Law is Going After Jones, 47 U.S.F. L. REV. 377 (2012) (arguing the Katz test unintentionally favors the wealthy and those who can afford to purchase security features for their homes, and disadvantages the homeless and the urban poor).


173 See id.


175 See, e.g., Payton v. New York, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").

176 Poverty is not meant to be an exception to the warrant requirement. William Stuntz explains however, that in practice the Fourth Amendment disproportionately favors the wealthy to the detriment of the urban poor. It favors those who can afford greater privacy protections, and who perform more activities out of the eye of the public. See Stuntz, supra note 166.

177 See, e.g., United States v. Ross, 456 U.S. 798, 822 (1982) ("[A] constitutional distinction between 'worthy' and 'unworthy' containers would be improper["]);

LaDuke v. Nelson, 762 F.2d 1318, 1326 n.11 (9th Cir. 1985) ("[T]he Fourth Amendment does not permit [the government] to differentiate on a per se basis in the privacy accorded different stocks of housing.");

United States v. Vurgess, No. CR408-085, 2008 WL 438930, at *8 (S.D. Ga. Aug. 20, 2008) ("But the simple fact that some homes are better constructed or maintained than others . . . in no way diminishes the sanctity of the dwelling or affords an officer any greater right to thrust himself across the
For example, in *United States v. Vurgess*, the District Court for the Southern District of Georgia held that police conducted an unconstitutional search when they entered the defendant’s home without a warrant or probable cause. The court held the Fourth Amendment’s protection against warrantless searches applies equally to mansions and shacks:

A home built as a fortress and surrounded by a security perimeter patrolled by guards is obviously more secure, and in a sense more ‘private,’ than is a thin-walled shack located along a public thoroughfare. But as to neither property can a law enforcement officer conduct a warrantless search without the resident’s consent or some exigency requiring urgent action.

In *United States v. Barajas-Avalos*, the Ninth Circuit held officers had not violated the defendant’s Fourth Amendment rights when they peered through the window of his travel trailer from an open field or when they searched the surrounding area. The court, however, distinguished this search from a hypothetical search of the interior of a home, emphasizing, “[T]here is no Fourth Amendment rule that provides for protection only for traditionally constructed houses.” Because there was no evidence the trailer was being used as either a permanent or temporary home, the surrounding area did not qualify as curtilage. Had the trailer been used as the defendant’s home, and had the search been of its interior, it likely would have been held unconstitutional. The court stated, “a person has a right to privacy in his dwelling house, or temporary sleeping quarters, whether in a hotel room, a trailer, or in a tent in a public area, or on government land not open to the public for overnight camping.”

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threshold of the home.”); State v. Pruss, 181 P.3d 1231, 1234 (Idaho 2008) (“The respect for the sanctity of the home does not depend upon whether it is a mansion or hut, or whether it is a permanent or a temporary structure.”); WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.3(b) (4th ed. 2015) (“Fourth Amendment protection ... [against a warrantless search] extends even to ‘occupants of flimsily constructed dwellings with unobstructed windows or other openings directly on public lands, streets, or sidewalks, who failed to lock their doors to bar entrance.’” (citing *United States v. Moss*, 963 F.2d 673 (4th Cir. 1992))).

179 Id. at *8.
180 377 F.3d 1040 (9th Cir. 2004).
181 Id. at 1055–56.
182 Id. at 1057–58.
183 Id. at 1055–56 (internal quotation marks omitted).
184 Id. at 1057–58.
185 Id. at 1055.
California v. Carney also dealt with the search of a motor home. As in Barajas-Avalos, the Supreme Court in Carney held the trailer was not being used as the defendant's home, and thus was not a house in the Fourth Amendment context. The automobile exception to the warrant requirement applied to the motor home, because it was being used as an automobile. In addition, society expects a lesser degree of privacy in automobiles, because they are subject to constant regulation, and can be driven miles away before the police can secure a warrant.

The holding in Carney does not implicate the definition of a house under the Fourth Amendment, or exclude the shelters of the homeless from that definition. To avoid interpreting the case as importing a naked class-based distinction into the Fourth Amendment's protection of houses, it must be read as a case about vehicles and not houses. While the evolution of Fourth Amendment jurisprudence may reflect a "[r]omantic characterization of the home as a refuge from the corruption and danger of urban life," the Fourth Amendment forecloses blatant distinctions between worthy and unworthy houses. If Carney were read as a case about houses, it would establish a rule affording less Fourth Amendment protection to houses of lower socioeconomic statuses.

Clarifying that homeless individuals' shacks, tents, and other shelters are included within Fourth Amendment "houses" would provide owners of other nontraditional houses with greater protection as well. Houses that are built into nature, for example, or houses that are especially small or plain looking would benefit from a rule

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187 Id. at 393–94.
188 Id. at 393; see generally Carroll v. United States, 267 U.S. 132, 155–56 (1925) (explaining the automobile exception: officers may search a vehicle without obtaining a warrant if there is probable cause to believe the vehicle is transporting contraband).
189 Carney, 471 U.S. at 392.
190 Id. at 390–91.
191 Stern, supra note 137, at 919.
192 See, e.g., United States v. Ross, 456 U.S. 798, 822 (1982); Stoner v. California, 376 U.S. 483, 490 (1964) (citations omitted) ("No less than a tenant of a house ... a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures.").
requiring officers to obtain a warrant before searching any structure resembling a person's home. These houses may be more susceptible to warrantless entries than traditional-looking houses, because law enforcement might assume they are uninhabited.

On the other hand, police officers would likely assume that a structure built into the side of a mountain, visibly equipped with features like electricity and security cameras, was a house and could not be entered without a warrant. Why then should the presumption be any different when the dwelling appears more impoverished, but is still a house nonetheless? To protect all residents of nontraditional homes, rich or poor, homeless or not, a warrant should be required prior to law enforcement's search.

3. Normative values of dignity and privacy provide for a broad interpretation of "houses."

Cases that have affirmed that warrantless searches of homeless individuals' temporary shelters are unconstitutional searches should be followed. These courts have recognized that a house is a house, and the poorest home is entitled to the same protection as the wealthiest.195 Again, few courts have tackled the issue of a homeless person's Fourth Amendment rights in her temporary shelter. Slightly more have addressed the rights of the homeless in their personal possessions.

In *Lavan v. City of Los Angeles*,196 the police seized and disposed of the personal possessions, including temporary shelters, of a group of homeless individuals living on Skid Row.197 The *Lavan* court's analysis focused on the individuals' possessory rights to the property, because the relevant question was of a seizure not a search. The court perfectly explained in dicta, however, why the individuals were also likely protected against a warrantless search of their possessions, including their houses, based on their reasonable expectations of privacy.198 The Ninth Circuit first quoted *Silverman v. United States*199: "A man can still control a small part of his environment, his house . . . . A sane, decent, civilized society must provide some such oasis, some shelter . . . ."

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195 See, e.g., Oliver v. United States, 466 U.S. 170, 179 (1984) (citation omitted) ("Fourth Amendment protection . . . extends even to occupants of flimsily constructed dwellings with unobstructed windows or other openings directly on public lands, streets, or sidewalks, who failed to lock their doors to bar entrance.").
196 693 F.3d 1022 (9th Cir. 2012), cert. denied, 133 S. Ct. 2855 (2013).
197 *Id.* at 1025.
198 *Id.* at 1028 n.6.
from public scrutiny . . . some inviolate place which is a man's castle.” 200

The court then concluded,

As our sane, decent, civilized society has failed to afford more of an oasis, shelter, or castle for the homeless of Skid Row than their [mobile shelters], it is in keeping with the Fourth Amendment's 'very core' for the same society to recognize as reasonable homeless persons' expectation that their [mobile shelters] are not beyond the reach of the Fourth Amendment. 201

The court's reasoning draws on the Fourth Amendment's underlying values of protecting one's dignity and privacy, as well as the second-prong of the Katz reasonableness test. The court's dicta also suggest a potential necessity defense for the homeless: Society has failed to provide adequate housing and job opportunities for the homeless, and so with literally no other safe place to live, they are forced to reside on public property. 202

Cases related specifically to the temporary shelters of the homeless have largely cropped up in state courts. The Supreme Court of Idaho's opinion in State v. Pruss 203 is instructive on the way in which courts can interpret the Fourth Amendment to protect the rights of the homeless. Despite the defendant's nontraditional shelter and presence on public land, the court focused on the underlying values of the Fourth Amendment and its equal application to all structures. 204 The defendant was suspected of burglarizing local homes. 205 He resided in a "hooch"—a structure created with tree limbs and tarp—in the forest, and was arrested after exiting his hooch. 206 The court held the defendant had a reasonable expectation of privacy in his hooch, despite its presence on public land. 207

The Pruss court's conclusion was based on a number of factors. The court did not go so far as to refer to the hooch as the defendant's home, but held the Fourth Amendment does not discriminate against different types of structures: "If the travel trailer is protected against government intrusion, then so is the tent." 208

200 Lavan, 693 F.3d at 1028 n.6 (quoting Silverman, 365 U.S. at 511 n.4).
201 Id.
202 Cf. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, supra note 95, at 6 (explaining the lack of affordable public housing is one of the reasons many people are forced to live in public places).
203 181 P.3d 1231 (Idaho 2008).
204 Id. at 1234–35.
205 Id. at 1232.
206 Id. at 1233.
207 Id. at 1236.
208 Id. at 1235.
In *Dias*, the Supreme Court of Hawaii also held police officers’ warrantless search of a homeless person’s temporary shelter was unconstitutional.\(^{209}\) There, police officers peered through an open flap of a homeless person’s makeshift shelter, and observed what they believed to be illegal gambling activity.\(^{210}\) The plain view doctrine allowed officers to look through the opening, but did not allow them to enter the shelter without a warrant.\(^{211}\) The shelter was situated among other homeless shelters, and the government had not previously instructed the defendants to move. The court held “although no tenancy under property concepts was thereby created . . . this long acquiescence by the government has given rise to a reasonable expectation of privacy on the part of the defendants, at least with respect to the interior of the building itself.”\(^{212}\)

In addition to the government’s acquiescence, the court considered, “traditional notions of fair play and justice” in finding that the defendants’ expectation of privacy was reasonable.\(^{213}\) As in *Pruss*, the *Dias* court’s analysis could have been simplified by the presumption that structures closely resembling a home are entitled to the highest level of protection under the Fourth Amendment. The court ultimately comes to this conclusion, relying on both the Fourth Amendment’s underlying values and the individuals’ reasonable expectations of privacy.

While opinions like *Pruss* and *Dias* are not perfect, they are a step in the right direction and should serve as guidance for other courts addressing similar issues. Going forward, courts should have no trouble finding that the temporary shelters of the homeless do in fact qualify as “houses” under the Fourth Amendment. The meaningful similarities between a homeless person’s shelter and a traditional house push in favor of including these dwellings within the purview of Fourth Amendment “houses.”

The Framers could not have predicted the types of searches that occur today.\(^{214}\) New technology, like drones, thermal imaging devices, and GPS monitoring have forced the Court to apply the Fourth Amendment in ways never before imagined. An unreasonable search

\(^{209}\) State v. Dias, 609 P.2d 637 (Haw. 1980).
\(^{210}\) Id. at 640.
\(^{211}\) Id.
\(^{212}\) Id.
\(^{213}\) Id.
\(^{214}\) Cf. Riley v. California, 134 S. Ct. 2473, 2494–95 (2014) (The fact that cellphones were not around at the time of the Founding does not make them “any less worthy of the protection for which the Founders fought.”).
includes using a GPS device to monitor an individual’s movements,\textsuperscript{215} and using a plane to survey his backyard.\textsuperscript{216} An unreasonable search of one’s house includes using thermal imaging to detect the temperature inside,\textsuperscript{217} or a dog to identify the smells radiating from within.\textsuperscript{218} Similarly, society has evolved in terms of the importance we give to concepts like human rights, and it is gradually evolving in terms of the way we think about the problem of homelessness.\textsuperscript{219}

Research and technology should, and do, shape the way the Constitution is applied.\textsuperscript{220} For example, just last year, the Court declared that under the Fourteenth Amendment, same-sex couples have a place within the doctrine of marriage.\textsuperscript{221} The Court was explicit: There is not a right to same-sex marriage; there is a right to marriage, to which same-sex couples are entitled.\textsuperscript{222} A similar rationale can be used to include the shelters of the homeless in the Fourth Amendment’s category of “houses.” There is no need for a new class of property protection. The Fourth Amendment has always protected houses, and to the utmost degree, and it is time that the makeshift shelters of the homeless are included within the meaning of “houses.”

Changes in the way we think about homelessness, including the role society plays in failing to provide an adequate amount of affordable housing, should shape the way we think about the temporary shelters of the homeless. Because these individuals have literally no place else to live—due in part to society’s failure—is it right to demean them by excluding them from the privacy and dignity the Fourth Amendment provides?

\textsuperscript{216} California v. Ciraolo, 476 U.S. 207, 210 (1986).
\textsuperscript{217} See Kyllo v. United States, 533 U.S. 27, 35–40 (2001) (holding the warrantless use of a thermal imaging device to detect temperature inside the home violated the Fourth Amendment).
\textsuperscript{218} See Florida v. Jardines, 133 S. Ct. 1409, 1414–15 (2013) (holding use of drug-sniff dog on defendant’s porch to detect marijuana was an unconstitutional search).
\textsuperscript{220} See Miller v. Alabama, 132 S. Ct. 2455, 2466–68 (2012), as an example of an instance in which the Court relied on new research and societal understandings to disrupt the status quo. In Miller, the Court held that society now has a better understanding of how children develop, rendering mandatory life without parole sentences for juveniles unconstitutional.
\textsuperscript{222} Id. at 2602.
V. CHANGING POLICE TACTICS TO PROTECT THE RIGHTS OF THE HOMELESS

This Part will discuss a few of the policy implications of recognizing that the homeless are entitled to broader Fourth Amendment protection. First, it will anticipate a change in the way law enforcement treats the homeless, with a shift toward a more dignity-centric approach. Next, it will explain why providing the homeless with greater protection against unlawful searches will not detract from their protection against private acts of violence.

If courts were to recognize that a warrantless search of a homeless person's makeshift shelter is unconstitutional, police tactics would have to change. Any evidence seized in the course of a warrantless search would be subject to exclusion, and officers who conducted the search with knowledge of its unconstitutionality could be subject to suit. These changes could contribute to a nationwide discussion about the way in which we police the homeless. A more dignity-centric method of policing the homeless should result in fewer violent confrontations between the homeless and law enforcement, without hindering law enforcements' incentives to protect the homeless from private attacks.

A. Improving Police Interactions with the Homeless through Dignity-Centric Policies

If lower courts were to strike down warrantless searches of homeless individuals' makeshift shelters as unconstitutional, law enforcement would have to take notice. To generate awareness of the shift, housing and homeless rights attorneys could bring litigation challenging the now prohibited searches. They could also ensure homeless individuals were informed of their right to be free from government intrusion into their shelters, and to deny officers entry without a warrant. On the side of law enforcement, police tactics would have to change. Trainings and formal policy revisions would be necessary to educate officers on how to approach the homeless. These

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223. As long as officers are aware that a warrant is required before searching a homeless person's shelter, the exclusionary rule would likely apply. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. . . . [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." Herring v. United States, 555 U.S. 135, 144 (2009).

224. In 2012 the U.S. Interagency Council on Homelessness issued a report stating revised trainings and policies for the police are necessary to improve homelessness in America. Cities in a number of states, including Minnesota, Colorado, Florida, and Oregon have already created programs that educate police officers on how to interact with the homeless. See U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, supra note 95, at 25.
policies should be dignity-centric, and include information on why officers must obtain a warrant before searching a homeless person’s residence. In this way, the warrant requirement is the first step in developing a more dignity-focused method of policing.

Applying the warrant requirement to the shelters of the homeless would not impede police officers’ investigative abilities. Officers can still enter a homeless person’s makeshift shelter, just as they can any house, after obtaining a warrant. As Justice Jackson expressed in Johnson v. United States, the Fourth Amendment does not “den[y] law enforcement the support of the usual inferences which reasonable men draw from evidence.” But rather, “require[s] that those inferences be drawn by a neutral and detached magistrate[,] . . . [A] search without a warrant would reduce the Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers.”

Officers may also enter the shelters of the homeless without a warrant pursuant to exigent circumstances. These include in pursuit of a fleeing felon, to prevent the imminent destruction of evidence, to assist an injured person, or in other emergency situations.

A new policy regarding the way in which police enter a homeless person’s shelter is not radical. The change would come at a particularly appropriate time, and fit in smoothly with new policies on the rights of the homeless that exist in a number of cities. Three states—Illinois, Connecticut, and Rhode Island—recently enacted legislation to protect the rights of the homeless. These laws address a homeless person’s right to privacy in his or her property. The laws are somewhat vague

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225 A dignity-centric approach to search policies is in line with the Fourth Amendment’s concern for dignity. John Castiglione argues that dignity is as much a founding principle of the Fourth Amendment as privacy, but has been under-emphasized by most courts. He suggests in addition to weighing an individual’s privacy interest against law enforcement’s need for a particular search, courts should weigh the interest of law enforcement against the individual’s reasonable expectation of dignity. See John D. Castiglione, Article, Human Dignity Under the Fourth Amendment, 2008 Wis. L. Rev. 655 (2008).


227 333 U.S. 10 (1948).

228 Id. at 13–14.


232 See, e.g., Michigan v. Tyler, 436 U.S. 499, 504–08 (1978) (Warrantless entry onto private property was permissible to fight a fire and investigate its cause.).


234 See, e.g., Bill of Rights for the Homeless Act, 775 ILL. COMP. STAT. 45 / 10(a)(7) (2013) ("A
in terms of the type of property they protect, and leave open the possibility that makeshift shelters are included. Similar “Right to Rest” laws are being considered in California; Delaware; Baltimore, Maryland; Minnesota; Missouri; Oregon; Puerto Rico; Tennessee; Vermont; and Madison, Wisconsin. In addition, in December 2015, Massachusetts unanimously recommended a homeless bill of rights that would prohibit discrimination based on housing status.

This type of protective legislation is needed to counteract legislation criminalizing homelessness. In the past two years, the U.S. Department of Justice (DOJ), the Department of Housing and Urban Development (HUD), and other government agencies have criticized local laws that criminalize “acts of living.” In 2015 HUD changed its funding application guidelines to disadvantage cities that had not taken direct measures to combat the criminalization of homelessness. Recognizing homeless individuals have a Fourth Amendment interest in their shelters, equivalent to that of other homeowners, is in line with DOJ and HUD’s approaches. Police

person experiencing homelessness has... the right to a reasonable expectation of privacy in his or her personal property to the same extent as personal property in a permanent residence.

Minneapolis passed a homeless bill of rights in March 2015, but the bill is not yet law. The law would provide, among other things, homeless encampments be given fifteen days' notice before they are disbanded. See Bryce Covert, City Passes Innovative ‘Homeless Bill of Rights’, THINK PROGRESS (Mar. 5, 2015, 10:15 AM), http://thinkprogress.org/economy/2015/03/05/3630141/indianapolis-homeless-bill-of-rights/ [http://perma.cc/2FJY-EERB].


See cf. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, supra note 95, at 7 (arguing criminalization of homelessness is ineffective and does nothing to solve the underlying problem of homelessness, and can often make matters worse).

For example, on its website, HUD states, “Although individuals experiencing homelessness should be afforded the same dignity, compassion, and support provided to others, criminalization policies further marginalize men and women who are experiencing homelessness, fuel inflammatory attitudes, and may even unduly restrict constitutionally protected liberties and violate our international human rights obligations.” U.S. Dept of Housing and Urban Dev., Alternatives to Criminalizing Homelessness, HOMELESSNESS ASSISTANCE MAIN (2014), https://www.hudexchange.info/homelessness-assistance/alternatives-to-criminalizing-homelessness/ [http://perma.cc/7X9L-QRG3].


The U.S. Interagency Council on Homelessness specifically mentions the Fourth Amendment as a way for the homeless to challenge criminalization policies that allow unreasonable searches and seizures of their property. See U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, supra note 95, at 8.
tactics that treat the homeless with respect would also support the overhaul of policies that view the homeless as second-class citizens.

One of the general principles behind the warrant requirement is that it takes some of the discretion involved in a search out of the hands of the police.242 This requirement would prevent some of the most unreasonable searches of a homeless person's shelter from taking place—those in which a warrant is denied. These searches might have otherwise occurred for a number of reasons, including a mistaken suspicion or bias. Because these searches would have been unreasonable had they occurred, they likely would have provoked a more violent reaction on the part of the homeless person than would a legitimate search. In eliminating this category of searches, the warrant requirement would reduce the number of unnecessary and potentially violent encounters between the homeless and police.

Further, the warrant requirement often comes with a mandate that officers knock and announce their presence before entering a dwelling.243 Announcement has a number of similar benefits. It is likely to decrease the potential for violence, enhance the resident's privacy protection, and help to prevent the destruction of property.244 Announcement helps prevent violent reactions on the part of the resident, as well as responses by the officers.245 In addition, history suggests that one of the concerns leading to the announcement rule was the fear that the home would be destroyed.246 This fear is especially applicable to the homeless, because their homes are often flimsy and poorly built.247 Requiring officers obtain a warrant and take all related measures before conducting a search should lead to a decline in the number of potentially violent and destructive encounters between the homeless and the police.

244 See id. at 140–42.
245 See, e.g., id. at 140; Mendez v. County of Los Angeles, 815 F.3d 1178, 1193 (9th Cir. 2016) (“[A]n announcement that police were entering the shack would almost certainly have ensured that Mendez was not holding his BB gun when the officers opened the door. Had this procedure been followed, the Mendezes would not have been shot.”).
246 See Announcement in Police Entries, supra note 243, at 142.
B. Dignity-Centric Policies Should Prevent a Rise In Private Violence Against the Homeless

One worry is that more robust Fourth Amendment protections for the homeless will raise the cost of policing areas in which many homeless people reside. Assuming a warrant is now required, officers might want to minimize their chances of accidentally conducting an illegal search, and so avoid areas with heavy homeless populations. Officers who continue to patrol homeless encampments despite this new warrant requirement do so at a higher cost than before.

A higher cost of policing could render homeless populations more susceptible to private acts of violence. Homeless individuals are already more susceptible to private violence than the average citizen, and an additional lack of police protection could have serious consequences for the group’s safety. To prevent such an effect, the trainings and revised policies discussed above are necessary. Policies that instruct officers not to enter a homeless person’s shelter without a warrant imply the homeless population is to be treated with a greater sense of respect and dignity than before. They are to be treated the same way under the law and by the police as the rest of society. This shift in how officers think about the homeless, coupled with homeless bills of rights and similar legislation, should mitigate any inclination police officers might have to avoid policing homeless encampments.

In addition to educating officers about the new search-related guidelines, trainings of police officers should incorporate information about dignity and respect. If police officers were required to monitor homeless encampments as if they were patrolling wealthy suburban neighborhoods, there should be no reason that providing the residents with greater Fourth Amendment protection would hinder the police’s ability to protect them.

VI. CONCLUSION

Recognizing a warrant is required prior to searching a homeless individual’s makeshift shelter is in accordance with the Fourth Amendment’s history and values. Homeless individuals’ temporary shelters are not abandoned property, and their presence on public or private land does not preclude protection under the Fourth Amendment. These shelters serve functions identical to those of traditional houses, and should be treated as such under the Constitution.

248 See NAT'L COAL. FOR THE HOMELESS, supra note 10, at 22.
Our society is in the midst of a national discussion on policing and the need to revise law enforcement tactics. The time is ripe for a widespread conversation on the way we police the homeless. It is easy to overlook the homeless population because they are a marginalized group. But, as the data shows, the homeless experience a disproportionate number of the abusive police practices that much of society has been pushing to change. As law enforcement agencies across the country adopt new procedures and training programs for officers, we need to make sure that policies requiring that police officers treat the homeless with dignity and respect are included.