

Fourth Amendment Challenges to “Camping” Ordinances: The Government Acquiescence Doctrine as a Legal Strategy to Force Legislative Solutions to Homelessness

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I. INTRODUCTION

Municipal “camping ordinances” typically regulate or prohibit camping or sleeping in parks or other public areas.¹ From a public safety perspective, such statutes safeguard public spaces from nocturnal criminal activity. Under another view, camping statutes subtextually prohibit life-sustaining activities in order to redirect a city’s homeless population away from certain public areas.

Irrespective of legislative intent, camping ordinances raise serious concerns about the constitutional rights of homeless and shelterless citizens. By proscribing the act of sleeping, city councils jeopardize homeless individuals’ rights of privacy, movement, and equal protection, whether intentionally or incidentally. Constitutional challenges to anti-camping legislation invoke the Fourth, Eighth, and Fourteenth Amendments, in addition to various judicial doctrines and precepts of criminal and constitutional law. To some extent, homeless plaintiffs have sought to invalidate anti-sleeping and vagrancy laws on these grounds.

Despite undergirding such constitutional challenges, questions remain: In what ways would the invalidation of camping ordinances help to solve the dual problems of homelessness and poverty? Should public recreational areas become de facto living spaces for the homeless? Lawyers advocating for the homeless population must rely not simply on constitutional arguments to challenge individual, isolated city ordinances. Rather, in an effort to more comprehensively address issues of poverty in U.S. cities, lawyers must examine which legal challenges to anti-sleeping and camping legislation will force legislative solutions to the problem of homelessness.

This article argues that Fourth Amendment challenges to camping

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¹ See, e.g., VANCOUVER MUN. CODE § 8.22.040 (2002). This Washington city’s ordinance provides: “It shall be unlawful for any person to camp, occupy camp facilities for purposes of habitation, or use camp paraphernalia in the following areas...: (1) any park; (2) any street; or (3) any publicly owned or maintained parking lot or other publicly owned or maintained area.”

ordinances can prompt at least some legislative efforts to solve the endemic problem of homelessness in U.S. cities. By properly employing the Supreme Court's governing judicial standard in privacy rights, courts should take account of individual cities' efforts to curb poverty when asking the following question: Does society view a homeless person's expectation of privacy as reasonable?

II. BACKGROUND: CONSTITUTIONAL CHALLENGES TO "CAMPING" ORDINANCES

A. *Camping Ordinances as Cruel and Unusual Punishment*

1. *Punishment of "Mere Status"*

The Eighth Amendment mandates that "cruel and unusual punishments [shall not be] inflicted."² Among the many judicial doctrines sprouting from this generally-worded prohibition, the United States Supreme Court has held that legislation that punishes mere status is unconstitutional.³ In *Robinson v. California*, the Court invalidated a California law that criminalized addiction to narcotics, regardless of whether or not the accused actually used narcotics or committed other crimes associated with the addiction.⁴ Under *Robinson*, statutes are unconstitutional if they punish status alone rather than punishing acts derivative of status.⁵ Courts later clarified the concept of "status" for purposes of Eighth Amendment analysis as applied to homeless individuals.⁶

Camping statutes are rarely invalidated as punitive of status alone. As demonstrated below in *Tobe v. City of Santa Ana*, because camping and anti-sleeping laws rarely mention or specifically target the homeless population, it is difficult to argue that such legislation explicitly bans the very condition of being homeless.⁷ In 1992, the city of Santa Ana, California enacted an ordinance that banned "camping" and the storage of personal property on public streets and other public areas.⁸ The statute was strictly enforced; police confiscated makeshift living materials, removed the homeless from public areas and missions, and implemented a "sweep"

² U.S. CONST. amend. VIII.

³ *Robinson v. California*, 370 U.S. 660, 667 (1962).

⁴ *Id.*; see also Robert C. McConkey III, "Camping Ordinances" and the Homeless: Constitutional and Moral Issues Raised by Ordinances Prohibiting Sleeping in Public Areas, 26 CUMB. L. REV. 633, 641 (1995-96) (placing *Robinson* as the first in a line of cases addressing criminalized status with respect to the Eighth Amendment).

⁵ *Robinson*, 370 U.S. at 666.

⁶ See *Pottinger v. City of Miami*, 810 F.Supp. 1551 (S.D. Fla. 1992).

⁷ *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995).

⁸ *Id.* at 1150; McConkey, *supra* note 4, at 633.

against homeless residents in the city's civic center.⁹ A group of Santa Ana taxpayers challenged the statute's constitutionality to bar enforcement. As a result, the California Court of Appeal held that the ordinance criminalized the involuntary status of homelessness and further constituted "a transparent manifestation of Santa Ana's policy . . . to expel the homeless."¹⁰ Thus, the law's punitive measure constituted cruel and unusual punishment under the Eighth Amendment. The Supreme Court of California reversed the decision, however, and upheld the camping ordinance because it did not facially or explicitly punish the mere status of homelessness; trespassing, storing personal property in public areas, and camping were all acts "derivative" of homelessness.¹¹ *Tobe's* distinction between "status" and "acts derivative of status" not only relied on language in *Robinson*, but parroted lower court decisions rendered just one year earlier.¹² Needless to say, challengers of camping ordinances on Eighth Amendment grounds face an uphill battle.

2. *Homelessness as Involuntary: Judicial Assessment of Legislative Efforts*

While *Robinson* and *Tobe* stand for the proposition that a locality may punish acts derivative of status, neither court addressed the more difficult issue of whether certain conduct cannot constitutionally be punished because it is, in some sense, "involuntary" or occasioned by compulsion.¹³ A federal court in Florida explored involuntary status in constitutional terms in *Pottinger v. City of Miami*.¹⁴ In *Pottinger*, homeless plaintiffs challenged a Miami ordinance that, among other provisions, made it "unlawful for any person to sleep on any of the streets, sidewalks, public places or upon the private property of another without the consent of the owner thereof."¹⁵ While the *Pottinger* court discussed several constitutional claims against the statute's numerous provisions, its treatment of the plaintiffs' Eighth Amendment claim is particularly instructive. First, the Court determined that the plaintiffs, as homeless

⁹ *Tobe*, 892 P.2d at 1151.

¹⁰ McConkey, *supra* note 4, at 634 (citing *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 387 (Cal. Ct. App. 1994), *rev'd*, 892 P.2d 1145 (Cal. 1995)).

¹¹ *Tobe*, 892 P.2d at 1166, 1169.; *Robinson*, 370 U.S. at 666.

¹² See *Joyce v. San Francisco*, 846 F.Supp. 843 (N.D. Cal. 1994) (rejecting homeless plaintiffs' Eighth Amendment challenge of a San Francisco ordinance that prohibited, among other activities, camping or sleeping in public parks); See also *Powell v. Texas*, 392 U.S. 514 (1968) (upholding a public drunkenness statute against an Eighth Amendment challenge, noting that "criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior . . . has committed some actus reus), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995); In *Tobe*, the Santa Ana statute prohibited the actus reus of camping.

¹³ *Powell*, 392 U.S. at 533.

¹⁴ 810 F.Supp. 1551 (S.D. Fla. 1992).

¹⁵ *Id.* at 1560 n.11, (citing MIAMI, FLA. CODE § 37-63 (1990)).

residents of Miami, were involuntarily compelled to sleep in public: “[T]he record in the present case amply supports the plaintiffs’ claim that their homeless condition compels them to perform certain life-sustaining activities in public.”¹⁶ Moreover, the very state of homelessness was involuntary: “[H]omelessness is due to various economic, physical or psychological factors that are beyond the homeless individual’s control.”¹⁷ But most importantly, the *Pottinger* Court examined the city of Miami’s past efforts to shelter its homeless residents:

the City does not have enough shelter to house Miami’s homeless residents. Consequently, the City cannot argue persuasively that the homeless have made a deliberate choice to live in public places or that their decision to sleep in the park as opposed to some other exposed place is a volitional act . . . Avoiding public places when engaging in this otherwise innocent conduct is also impossible. . . As long as homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances . . . effectively punish them for something for which they may not be convicted under the Eighth Amendment—sleeping, eating, and other innocent conduct.¹⁸

After weighing Miami’s lack of available shelter space for the homeless, the *Pottinger* Court concluded that the city’s camping statute violated the Eighth Amendment by prohibiting “innocent conduct” that were not “volitional act[s]”.¹⁹ In the language of *Robinson* and *Tobe*, the Miami ordinance did not punish any actus reus, or “act derivative of status”; sleeping and living in public were not “acts” in the normal sense of the word, but non-volitional conditions of necessity.²⁰

It is critically important that the *Pottinger* Court considered a city’s lack of commitment to ending poverty and homelessness as a factor in adjudicating the constitutionality of its laws. This judicial method has potentially legislative effects; such a decision could motivate cities and localities to make greater efforts to solve their problems of poverty in substantive ways rather than simply criminalizing the symptoms of homelessness. As discussed *infra*, Eighth Amendment challenges are not the only area of constitutional law in which courts have assessed legislative

¹⁶ *Id.* at 1563.

¹⁷ *Id.*

¹⁸ *Id.* at 1565.

¹⁹ *Id.*

²⁰ *Id.*

efforts to end homelessness. Indeed, in Fourth Amendment jurisprudence, at least one court has factored the local provision of homeless shelters, or lack thereof, when applying governing Supreme Court precedent.²¹

B. Equal Protection Challenges to Camping Ordinances

The Equal Protection Clause of the Fourteenth Amendment prohibits any state from “deny[ing] to any person within its jurisdiction the equal protection of the laws.”²² In other words, all persons similarly situated must be treated alike under the law.²³ Despite this limitation on state law, the United States Supreme Court has firmly held that legislation is presumed to be valid and should be sustained if the classification it draws is “rationally related to a legitimate state interest.”²⁴ Camping ordinances are presumably at least rationally related to the legitimate state interests of public safety, crime prevention, and public sanitation, among others. However, if state or municipal legislation either 1) discriminates on the basis of a suspect classification, or 2) infringes upon constitutionally protected “fundamental” rights, courts will apply strict scrutiny.²⁵

1. Suspect Class

A legal classification is suspect if it is “directed to a discrete and insular minority.”²⁶ However, the Supreme Court has consistently held that classifications based on monetary wealth are not suspect and thus are not subject to judicial strict scrutiny.²⁷ The Court has also specifically concluded that poverty is not a suspect class for equal protection purposes; according to most judicial thought, homelessness and poverty do not possess the attributes that generally warrant added constitutional protection. As a class, the poor are not “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”²⁸ Thus, laws that discriminate on the basis of homelessness or poverty need not be “suitably tailored to serve a compelling state interest,”²⁹ but must only be rationally

²¹ See *infra* Part III.C.

²² U.S. CONST. amend. XIV.

²³ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

²⁴ *Id.* at 440.

²⁵ *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

²⁶ *Pottinger*, 810 F. Supp at 1578, (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938)).

²⁷ See, e.g., *Maher v. Roe*, 432 U.S. 464, 471 (1977). See also *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1269 n.36 (3rd Cir. 1992) (specifically holding that the homeless do not constitute a suspect class).

²⁸ *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

²⁹ *Cleburne*, 473 U.S. at 440.

related to a legitimate state interest.

2. *Fundamental Right to Travel*

The Supreme Court has consistently upheld the right of interstate travel as a fundamental right for equal protection purposes.³⁰ In *Shapiro v. Thompson*, the Court held that any statute that directly penalizes the exercise of the right to travel from state to state should be invalidated if it does not pass a heightened scrutiny standard³¹; thus, such laws are unconstitutional absent a showing that they are suitably tailored to serve a compelling state interest. Accordingly, the Court in *Edwards v. California* invalidated a state law that punished state residents for bringing “indigents” within California borders.³² Although *Edwards* was ultimately decided on Commerce Clause grounds, Justice Douglas’s concurrence alternatively provided the rationale for preserving the fundamental right to travel. Douglas reasoned that statutory barriers to travel violated the right to migrate; such laws “would prevent a citizen because he was poor from seeking new horizons in other states. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity.”³³ This reasoning has since been adopted by the Supreme Court at least once.³⁴ However, the Court has never addressed the issue of whether the fundamental right to travel includes intrastate movement.

Because most homeless individuals have reduced access to transportation,³⁵ a fundamental rights-approach to challenging anti-sleeping ordinances is effective only if the right to travel includes intrastate travel; arguably, camping ordinances limit a homeless individual’s ability to travel within a state or locality by prohibiting life-sustaining activities in various parts of a city, rendering such areas as “off-limits.” Such state impositions, however, do not implicate the “right to migrate” referred to by Justice Douglas in *Edwards*. Not surprisingly, only one judicial decision has implied that intrastate activity is covered under the ambit of the fundamental right to travel.³⁶ In *King v. New Rochelle Municipal Housing*,

³⁰ *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986); *United States v. Guest*, 383 U.S. 745, 757 (1966).

³¹ *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

³² *Edwards v. California*, 314 U.S. 160 (1941) (invalidating a statute that punished California residents for bringing “indigents” into the state from across its borders).

³³ *Id.* at 181 (Douglas, J., concurring).

³⁴ See Paul Ades, *The Unconstitutionality of “Antihomeless” Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CALIF. L. REV. 595, 614 n.149 (1989), (citing *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982) (“[The right to travel] protect[s] persons against the erection of actual barriers to interstate movement.”)).

³⁵ *Id.* at 609.

³⁶ *King v. New Rochelle Mun. Hous.*, 442 F.2d 646, 648 (2nd Cir. 1971)

a local government agency required that families reside in Rochelle, New York, for five years before they could apply for state-subsidized housing.³⁷ The Second Circuit held that the regulation's durational residence requirement violated the plaintiffs' right to travel.³⁸ However, while some plaintiffs hailed from New York cities other than Rochelle, many of the plaintiffs in *King* were new arrivals from North Carolina; thus, it is difficult to determine whether the regulation was invalidated because it limited the right of the New York residents to travel interstate, or because it limited the right of out-of-state residents from moving to New York. Even if we assume that the *King* court subscribed to the former rationale, the case only stands for the proposition that local law may not discourage intrastate travel between cities. Most camping ordinances could only be characterized as limiting intrastate, and by extension, *intra-city*, travel.

The fundamental right to intrastate, intra-city travel is tenuous, and generally not recognized by courts. Arguments that camping ordinances unconstitutionally limit a homeless resident's fundamental right to move within a city, therefore, are likely to fail.

C. Procedural Due Process: Vagueness

The Due Process Clause of the Constitution requires that a criminal statute be clear and precise enough to give potential offenders fair notice of what type of conduct is prohibited.³⁹ Accordingly, many homeless plaintiffs have challenged camping and anti-sleeping ordinances on the ground that they are constitutionally vague. In *Kolender v. Lawson*, the Supreme Court invalidated a California statute that required loitering individuals to provide credible and reliable identification and to "account for their presence."⁴⁰ The Court agreed with plaintiffs' argument that the statutory language was too vague to enforce predictably and affirmed the long-standing judicial standard for such laws under the Fourteenth Amendment: "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."⁴¹ By requiring legislatures to clearly and precisely define criminal statutes, the Due Process Clause prevents excessive and limitless enforcement of

³⁷ *King*, F.2d at 648.

³⁸ *Id.* at 649.

³⁹ U.S. CONST. amend. XIV ("[N]or shall any State deprive any person life, liberty, or property, without due process of law."); *Lanzetta v. New Jersey*, 306 U.S. 451, 457 (1939) (defining the void-for-vagueness doctrine in invalidating a state law that used imprecise statutory terms such as "ganster").

⁴⁰ 461 U.S. 352, 357 (1983).

⁴¹ *Id.*

indefinite offences. As the *Kolender* court explained, although a statute's clarity is held to an "ordinary intelligence" standard, whether a potential offender actually knows exactly what type of conduct the law prohibits is not so important, nor is it practically possible.⁴² Rather, the Court recognized that the more important aspect of the vagueness doctrine:

is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'⁴³

Most courts have rejected void-for-vagueness claims as applied to camping or anti-sleeping ordinances. In *Tobe*, discussed *supra*, petitioners claimed that the Santa Ana ordinance's failure to define the terms "camp," "camp paraphernalia," and "temporary shelter" left open questions as to what conduct was prohibited.⁴⁴ The court dismissed this argument outright, observing that such statutory terms did not necessarily involve the specific criminal conduct of which the petitioners were accused.⁴⁵ In *Joyce*, also discussed above, homeless plaintiffs challenged a San Francisco anti-sleeping ordinance that provided: "Every person who commits any of the following acts is guilty of disorderly conduct . . . who lodges in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control thereof."⁴⁶ The plaintiffs specifically argued that the words "lodg[ing] [in] public" were unconstitutionally vague, encouraging arbitrary and discriminatory enforcement against homeless persons.⁴⁷ The *Joyce* court rejected this position for two reasons: 1) the ordinance was not facially "impermissibly vague in *all* its applications"⁴⁸

⁴² See *id.* at 358. It is doubtful that potential offenders of loitering, camping, or vagrancy laws have access to the statutory text of a locality's ordinances. For this reason, the Court concluded that theoretical notice of the crimes proscribed and limitations on arbitrary enforcement would sustain a law against a void-for-vagueness challenge.

⁴³ *Id.* at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574–75 (1974)) (affirming the due process doctrine of vagueness in voiding a state law that prohibited flag desecration).

⁴⁴ *Tobe*, 892 P.2d at 1161.

⁴⁵ See *id.* Because the *Tobe* petition was brought by demurrer, the exact conduct of the accused had not yet been determined. Accordingly, the court sidestepped the question of unconstitutional vagueness.

⁴⁶ *Joyce*, 846 F.Supp. at 862 (quoting CAL. PENAL CODE § 647(1)).

⁴⁷ *Id.* at 862–63.

⁴⁸ *Id.* at 862 (quoting *Village of Hoffman Estates v. Flipside Hoffman Estates*, 455 U.S. 489, 495 (1982) (emphasis added)).

and 2) the City of San Francisco introduced evidence that police in fact enforced the statute narrowly.⁴⁹

Even if homeless plaintiffs could theoretically sustain vagueness challenges against camping ordinances, city councils could easily mitigate the effects of such lawsuits by simply rewording municipal ordinances. Because cities and localities might tinker with legislation to avoid constitutional hurdles, homeless plaintiffs could face the problem of mootness or experience years in litigation with little result. Other constitutional challenges to camping ordinances provide clearer inroads by which homeless plaintiffs can force legislative solutions to problems associated with poverty.⁵⁰

III. FOURTH AMENDMENT CHALLENGES TO CAMPING ORDINANCES: AN UNEXPLORED OPTION

The Fourth Amendment mandates that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”⁵¹ While some courts characterize the amendment as conferring a general right to privacy, the United States Supreme Court has interpreted this constitutional text to protect “individual privacy against certain kinds of governmental intrusion. [But] its protections go further, and often have nothing to do with privacy at all.”⁵² Federal, state, or local statutes may be challenged or invalidated if they violate Fourth Amendment rights facially or in application. Fourth Amendment challenges to anti-sleeping ordinances provide a unique opportunity to force legislative solutions. Properly applied, the Supreme Court’s governing standard in *Katz v. United States* should consider a city or locality’s efforts to solve problems of poverty and homelessness in evaluating the constitutionality of its anti-homeless legislation.

Municipal ordinances that sanction the destruction, removal, or gathering of homeless residents’ personal property or makeshift homes constitute a “meaningful interference with an individual’s possessory interest in that property.”⁵³ Furthermore, such seizures undoubtedly have more than a “de minimus” impact on the property interests of the homeless, whose makeshift residences are partially or completely

⁴⁹ *Id.* at 862. The court cited a San Francisco police memorandum communicating to officers that “the mere lying or sleeping on or in a bedroll of and in itself does not constitute a violation.” *Id.* at 863.

⁵⁰ Note, however, that in one recent decision, a Washington Superior Court judge invalidated a Vancouver camping ordinance as unconstitutionally vague. The judge concluded that the statute’s failure to define “camping” created a “hammer for police to regulate homelessness.” Holley Gilbert, *Judge Voids Camping Ordinance*, THE OREGONIAN, Nov, 1, 2005, at C04.

⁵¹ U.S. CONST. amend. IV.

⁵² *Katz v. United States*, 389 U.S. 347, 350 (1967).

⁵³ *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

destroyed by the government intrusion.⁵⁴ However, the more difficult issue is whether a homeless individual has a legitimate expectation of privacy when his property is searched, seized, or destroyed in a public area.⁵⁵

A. Katz and the Reasonable Expectation of Privacy Doctrine

In *Katz v. United States*, the United States Supreme Court first recognized that Fourth Amendment protection against unreasonable searches and seizures could extend beyond traditional concepts of constitutionally protected “private” areas.⁵⁶ In *Katz*, the defendant was convicted of transmitting wagering information in a telephone booth in violation of a federal statute.⁵⁷ At trial, the Government introduced evidence of the defendant’s telephone conversations, which were recorded by an electronic listening device attached to the booth by FBI agents.⁵⁸ The defendant appealed his conviction, arguing that the recordings were obtained in violation of his Fourth Amendment right to be “secure in [his] person[] . . . against unreasonable searches and seizures.”⁵⁹ Sidestepping the issue of whether the telephone booth was itself a constitutionally protected “private” area, the Court of Appeals for the Ninth Circuit concluded that the Government had not violated the Fourth Amendment because the FBI affected “no physical entrance into the area occupied by the [defendant].”⁶⁰ Importantly, both the Government and counsel for *Katz* still viewed the constitutional battleground as a fight over whether a telephone booth was a private area protected by the Fourth Amendment.

The Supreme Court wholly disagreed with this characterization of the right to privacy. Writing for the majority, Justice Stewart noted that the parties’:

effort to decide whether or not a given ‘area,’ viewed in the abstract, is ‘constitutionally protected,’ deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But *what he seeks to preserve as private*, even

⁵⁴ *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1571 (S.D. Fla. 1992) (citing *United States v. Jacobsen*, 466 U.S. at 125).

⁵⁵ See *Katz*, 389 U.S. at 350.

⁵⁶ *Id.* at 352–53.

⁵⁷ *Id.* at 348.

⁵⁸ *Id.*

⁵⁹ U.S. CONST. amend. IV.

⁶⁰ *Katz*, 389 U.S. at 348–49.

in an area accessible to the public, may be constitutionally protected.⁶¹

The Court’s conception of the Fourth Amendment defined the limits of the right to the privacy in the eye of the beholder. Thus, public areas were potentially subject to Fourth Amendment protection if a person sought to preserve privacy within such places. Indeed, the Court concluded that “[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.”⁶² Under this rationale, the *Katz* court reversed the Court of Appeals, holding that the defendant’s Fourth Amendment right to privacy in a public telephone booth prevented the recorded conversations from being admitted at trial.⁶³

The expansion of the right to privacy under *Katz* is considerable. In fact, the Court noted that the right to privacy was a⁶⁴ misnomer for the Fourth Amendment’s protections. The Court concluded that “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’ That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.”⁶⁵ Although the majority never explained how Fourth Amendment protections could extend to matters totally unrelated to privacy, Justice Harlan’s concurrence may give some indication. Harlan makes concrete the majority’s “eye of the beholder” concept to formulate a two-pronged constitutional test based upon a person’s subjective expectation of privacy:

[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’ Thus, a man’s home is, for most purposes, a place where he expects privacy, but objects, activities, and statements that he exposes to the ‘plain view’ of outsiders are not ‘protected’ because *no intention to keep them to himself is exhibited*.⁶⁶

⁶¹ *Id.* at 351 (emphasis added). Note that Justice Stewart acknowledged that, in prior decisions, the Supreme Court had discussed the Fourth Amendment in terms of constitutionally protected areas, but that the Court “never suggested that [the] concept [could] serve as a talismanic solution to every Fourth Amendment problem.” *Id.* at 351 n. 9.

⁶² *Id.* at 359.

⁶³ *Id.*

⁶⁴ *Id.* at 350–51.

⁶⁵ *Id.* at 350.

⁶⁶ *Id.* at 361 (Harlan, J., concurring) (emphasis added).

Justice Harlan's test identifies a constitutionally protected right to privacy when: 1) the individual manifests a subjective expectation of privacy, and 2) society is willing to recognize such an expectation as reasonable.⁶⁷ Harlan's concurrence has become a prevailing standard in Fourth Amendment jurisprudence,⁶⁸ although it failed to address several issues in the test's application. Courts were left with little guidance on the following questions: Should "society" be defined locally or federally? Does a society-approved reasonable expectation of privacy protect activities even if they are in "plain view"? And perhaps most importantly, how do courts evaluate whether a society has accepted an expectation of privacy as reasonable? How does a society manifest its recognition, or lack thereof, of individual expectations of the right to privacy?

B. Post-Katz: Legal Right to Occupy vs. Reasonable Expectation of Privacy

In the years following *Katz*, courts applied Harlan's two-pronged test in cases where individuals asserted privacy rights in public places. In doing so, lower courts were forced to classify certain expectations of privacy as reasonable or unreasonable in light of society's recognition thereof. These cases begin to answer the question of how courts appraise a society or locality's endorsement of an individual expectation of privacy.

1. Expectations of Privacy in Public Areas

Lower courts first extended Fourth Amendment protection to public areas such as dressing rooms and bathroom stalls in *State v. McDaniel* and *Kroehler v. Scott*,⁶⁹ respectively. However, these decisions shed little light on the function of Justice Harlan's test's second prong. The *McDaniel* court held that defendant shoplifters "had a reasonable expectation of privacy or freedom from intrusion under the constitutional prohibitions of unreasonable searches" under the Fourth Amendment⁷⁰; however, the court did not examine whether society viewed that expectation as reasonable. Admittedly, the pervasive existence of private dressing rooms in retail stores suggests that society views an expectation of privacy therein as reasonable, but the court never undertook such an analysis. In *Kroehler*,

⁶⁷ *California v. Cialo*, 476 U.S. 207, 211 (1986) (citing *Katz v. United States*, 389 U.S. 347, (1967) (Harlan, J., concurring).

⁶⁸ See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 137 (1978); *Cnty. for Creative Non-Violence v. Unknown Agents of the U.S. Marshals Service*, 791 F. Supp. 1, 5-6 (D.C. 1992); *Amezquita v. Colon*, 518 F.2d 8, 10-11 (1st Cir. 1975); *State v. Cleator*, 857 P.2d 306, 308-309 (Wash. Ct. App. 1993).

⁶⁹ *State v. McDaniel*, 337 N.E.2d 173 (Ohio Ct. App. 1975); *Kroehler v. Scott*, 391 F.Supp. 1114 (E.D. Pa. 1975). See Gregory Townsend, *Cardboard Castles: The Fourth Amendment's Protection of the Homeless's Makeshift Shelters in Public Areas*, 35 CAL. W. L. REV. 223, 227-228 (1999).

⁷⁰ *McDaniel*, 337 N.E. 2d at 178.

the court found that a defendant's expectation of privacy in a bathroom stall was reasonable; such an expectation was generated by the private activity typically associated with a bathroom.⁷¹ However, the opinion never explicitly undertook *Katz's* second-prong analysis. The *Kroehler* court never mentioned society's recognition of expectations of privacy.

Perhaps the *McDaniel* and *Kroehler* courts never applied *Katz's* second prong because bathrooms and dressing rooms so obviously created a widely-accepted expectation of privacy. However, *Katz's* second prong became critically important when courts began to apply Fourth Amendment analysis to cases in which homeless defendants challenged unreasonable searches and seizures of their makeshift living space. Cases involving temporary houses, boxes, or shacks on public property raised questions and provoked assumptions about Fourth Amendment jurisprudence: Could an individual have a reasonable expectation of privacy in a makeshift home on public lands? In dicta, *Katz* undeniably affirmed the long-standing principle that an individual's expectation of privacy was reasonable when he or she was "at home,"⁷² but did not extensively define this concept.

The question of whether such Fourth Amendment protection could extend to makeshift "homes" called for a more rigorous examination of the *Katz* test. The first prong was easy for a homeless litigant to satisfy; any homeless individual could assert a subjective expectation of privacy in a self-built home or structure commandeered for living space. Justice Harlan's second prong analysis, however, raised problematic concerns. Whether society viewed a homeless person's expectation of privacy in a makeshift home on public property as reasonable, legal, or socially desirable raised contentious issues in the dual problems of homelessness and poverty more generally.

2. *Illegal Occupation Theory*

Several courts have treated homeless defendants' lack of legal right to occupy public or private property as dispositive in denying their privacy rights under the Fourth Amendment.⁷³ In such cases, local trespassing law often operates to render unreasonable an intruding homeless individual's expectation of privacy. In *Amezquita v. Colon*, the Land Authority of the

⁷¹ *Kroehler*, 391 F.Supp. at n.4.

⁷² *Katz*, 389 U.S. at 359. Note that an individual's expectation of privacy at home may not be reasonable if he or she knowingly exposed himself to the public while in his home. For example, if a homeowner shouted his confession from his open front doorway, the right to privacy may not protect such an admission. See *id.* at 351, citing *Lewis v. United States*, 385 U.S. 206, 210–11 (1966). Still, "the home is accorded the full range of Fourth Amendment protections." *Lewis*, 385 U.S. at 211.

⁷³ See, e.g., *Amezquita v. Colon*, 518 F.2d 8, 9 (1st Cir. 1975); *United States v. Ruckman*, 806 F.2d 1471, 1472 (10th Cir. 1986).

Commonwealth of Puerto Rico attempted to evict squatters from its government land; when the eviction effort failed, the Authority and several police officers used bulldozers to destroy a makeshift structure erected by the squatters on the land.⁷⁴ The squatters obtained an injunction to stop the destructive action in progress, arguing that the razing of their makeshift homes constituted a governmental intrusion in violation of their right to be free from illegal searches and seizures.⁷⁵ On appeal, however, the court rejected the squatters' claim outright, holding that they possessed no objectively reasonable expectation of privacy because they enjoyed no legal right to occupy the land:

Nothing in the record suggests that the squatters' entry upon the land was sanctioned in any way by the Commonwealth. The plaintiffs knew they had no colorable claim to occupy the land; in fact, they had been asked twice by Commonwealth officials to depart voluntarily. That fact alone makes ludicrous any claim that they had a reasonable expectation of privacy. . . . The conduct in which they have engaged is criminal under Puerto Rico law Where the [squatters] had no legal right to occupy the land and build structures on it, [these actions] could give rise to no reasonable expectation of privacy.⁷⁶

Puerto Rican criminal law expressly forbade trespassing and building structures on private property.⁷⁷ According to the court, erecting and living in structures without the permission of the government could not give rise to an expectation of privacy that society views as reasonable.⁷⁸ The legal right to occupy a living space was necessary to trigger Fourth Amendment rights over that space.

In light of the squatter's lack of legal right to occupy the Authority's government land, the *Amezquita* court viewed the fact that the structures were built as "homes" as immaterial. Acknowledging that "without question, the home is accorded the full range of Fourth Amendment protections,"⁷⁹ the court distinguished between legal residences and makeshift homes constructed in contravention to local law.⁸⁰ "Whether a place constitutes a person's 'home' for [Fourth Amendment] purposes

⁷⁴ *Amezquita*, 518 F.2d at 8–9.

⁷⁵ *Id.* at 10.

⁷⁶ *Id.* at 11–13.

⁷⁷ *Id.* at 13 (citing 33 L.P.R.A. § 1442 (1972)).

⁷⁸ *Id.* at 10–12.

⁷⁹ *Id.* at 12 (citing *Lewis v. United States*, 385 U.S. 206, 211 (1966)).

⁸⁰ *Id.* at 12.

cannot be decided without any attention to its location or the means by which it was acquired; that is, whether the occupancy and construction were in bad faith is highly relevant”.⁸¹ Thus, *Amezquita* stands for the proposition that, applying the language of *Katz*, a homeless individual’s expectation of freedom from governmental intrusion is unreasonable when he or she lives in a makeshift home on private or public property. Although the court never explicitly mentions “society” in connection with privacy rights, *Amezquita* implicitly demonstrates that a statute, as an ostensible reflection of the legislated will of the people, may serve as evidence of a society’s recognition—or lack thereof—of certain expectations of privacy. In a sense, the *Amezquita* court did apply *Katz*’s second prong, even if subtextually (and incorrectly, as argued *infra*).

Some cases have achieved similar outcomes by applying different Fourth Amendment principles. In *United States v. Ruckman*, the court held that a spelunker who lived in a natural cave for eight months had no reasonable expectation of privacy as a trespasser on federal lands.⁸² The rationale underlying such a decision, however, sharply contrasted with that of *Amezquita*; the *Ruckman* court decided the case on seemingly narrow grounds. Rather than finding the appellee’s lack of possessory right to the cave to be dispositive, the court examined whether the cave could actually be characterized as Ruckman’s residence. Indeed, the court found persuasive the fact that Ruckman’s counsel described him as “just camping out there for an extended period of time.”⁸³ The majority further concluded: “[T]he issue is whether the cave comes within the ambit of the Fourth Amendment’s prohibition of unreasonable searches of ‘houses’.”⁸⁴ It is critically important that the majority tied the right to privacy to the “house” rather than to Ruckman’s expectations of privacy. The court did *not* hold that society failed to recognize Ruckman’s expectation of privacy in a cave as reasonable; rather, the court reasoned that the Fourth Amendment did not protect him against searches and seizures because his conception of the cave as his house was unjustified.⁸⁵ Presumably then, if Ruckman had justifiably viewed the cave as his house, his rights of privacy would have been upheld. This shift in judicial approach, even if a legal outlier, provides an opening in Fourth Amendment jurisprudence for homeless litigants. Under *Ruckman*, a homeless individual could potentially prevent governmental intrusion upon his makeshift living space if he demonstrated that it served as his actual “house.”

Admittedly, the appellee’s lack of possessory rights to the land was not

⁸¹ *Id.*, 518 F.2d at 12.

⁸² *United States v. Ruckman*, 806 F.2d 1471, 1472 (10th Cir. 1986).

⁸³ *Id.* at 1472–73.

⁸⁴ *Id.* at 1472 (emphasis added).

⁸⁵ *Id.* at 1472–73.

irrelevant in *Ruckman*. However, the dissent gave the issue comprehensive treatment, while the majority simply noted that Ruckman's actions were in violation of trespass law.⁸⁶ The dissent in *Ruckman* presented a clear indictment of the rule advanced in *Amezquita*: A lack of a legal right to occupy necessarily deprives an individual of Fourth Amendment privacy rights.⁸⁷ The dissent argued that search-and-seizure jurisprudence is unconcerned with notions of property ownership and possession: "[t]he principal object of the Fourth Amendment is the protection of privacy rather than property, and [we] have increasingly discarded fictional and procedural barriers rested on property concepts."⁸⁸ Reminding the majority of Supreme Court's language in *Katz*, the dissent concluded that unlawful possession of an area does not *automatically* render defendants subject to warrantless searches and seizures; an inquiry into the defendant's reasonable expectations must be undertaken:

Katz held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. In other words, *failing to have a legal property right in the invaded place does not, ipso facto, mean that no legitimate expectation of privacy can attach to that place.*⁸⁹

Yet despite the *Ruckman* dissenting opinion's forceful reminder of Supreme Court precedent and Fourth Amendment principles, modern case law generally subscribed to a pure illegal occupation theory.⁹⁰ Indeed, such cases uphold the notion that Fourth Amendment rights are at their lowest ebb when an individual violates the law, even if such a violation is concomitant with homeless status. In the California case *People v. Thomas*, for example, a homeless defendant challenged the constitutionality of a police search of her cardboard box, which had been prepared as a living space.⁹¹ Applying the two-pronged test from *Katz*, the

⁸⁶ *Id.*

⁸⁷ *Amezquita*, 518 F.2d at 11–12.

⁸⁸ *Ruckman*, 806 F. 2d. at 1477 (citing *Warden v. Hayden*, 387 U.S. 294, 304 (1967)).

⁸⁹ *Id.* (citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (emphasis added)).

⁹⁰ *But see* *State v. Mooney*, 588 A.2d 145, 153–54 (quoting *United States v. Ruckman*, 806 F.2d at 1476 (McKay, J., dissenting): “[F]actors such as whether the [party asserting the privacy right] was a trespasser and whether the place involved was public ‘are, of course, relevant guides, but should not be undertaken mechanistically. They are not ends in themselves; they merely aid in evaluating the ultimate question in all fourth amendment cases—whether the defendant had a legitimate expectation of privacy, in the eyes of our society, in the area searched.”).

⁹¹ *People v. Thomas*, 38 Cal. App. 4th 1331, 1333 (1995).

Thomas court implicitly conceded that the defendant had a subjective expectation of privacy while living in a makeshift cardboard home. However, the court held that such an expectation was not objectively reasonable—or recognized by society as reasonable—because the defendant had no legal authority to live on the public property in question; his temporary residence violated the Los Angeles Municipal Code.⁹² “Where, as here, an individual ‘resides’ in a temporary shelter without a permit or permission and in violation of a law which expressly prohibits what he is doing, he does *not* have an objectively reasonable expectation of privacy.”⁹³ Beyond simply stating the illegal occupation theory espoused in *Amezquita*, the *Thomas* court did not explain its underlying rationale. The court did not examine whether the law was widely enforced, or whether Los Angeles “society” stood so firmly behind its trespassing ordinances that a homeless trespasser’s expectations of privacy while residing in his cardboard box could not be viewed as reasonable.

Despite the scant constitutional explanation in *Thomas* and the irregularities of the *Ruckman* opinion, the above cases stand for the proposition that, under *Katz*’s second prong, a society does not recognize expectations of privacy that contradict local property or trespass law as reasonable. When a locality legally prohibits occupation of a particular space, courts generally find that a homeless individual’s expectation of privacy in a home erected on such space is objectively unreasonable and therefore unprotected by the Fourth Amendment.

3. Reasonable Expectations of Privacy in Homeless Shelters

Some courts have shed light on privacy rights questions for the trespassing homeless, or “street” homeless, by distinguishing such legal claims from those of shelter residents. Indeed, the same constitutional arguments advanced to protect shelter residents against unreasonable searches and seizures can be employed to give privacy rights to street homeless. In *Community for Creative Non-Violence v. Unknown Agents of the United States Marshal Services*, ten to twenty federal marshals raided a Washington, D.C. emergency overnight homeless shelter, woke up nearly 500 sleeping homeless residents (many at gunpoint), and checked each resident against a photograph of a suspected fugitive.⁹⁴ A class of homeless plaintiffs brought suit for injunctive relief from such conduct in the future. Recognizing the “necessity that the rights secured by our Constitution apply with equal force to this growing [homeless

⁹² *Id.*

⁹³ *Id.* at 1334 (emphasis in original).

⁹⁴ *Comty. for Creative Non-Violence v. Unknown Agents of the U.S. Marshals Serv.*, 791 F.Supp. 1, 3–4 (D.C. Cir. 1992).

population],”⁹⁵ the *CCNV* court held that persons who stay at homeless shelters enjoy the freedom from unreasonable government intrusions as granted by the Fourth Amendment.⁹⁶ Needless to say, the court failed to address related issues, such as whether a homeless person forfeits such privacy rights when he leaves the shelter, either voluntarily or involuntarily.

In applying the second prong of Justice Harlan’s test in *Katz*, the *CCNV* court characterized shelter residents’ expectations of privacy as objectively reasonable because, “the shelter was, to them, the most private place they could possibly have gone—the place most akin to their ‘home’.”⁹⁷ Importantly, the court anchored this observation with a public policy concern:

[The] expectation of privacy [in a shelter] is a reasonable one. To reject this notion would be to read millions of homeless citizens out of the text of the Fourth Amendment . . . Thus, the Constitution does not contemplate a society in which millions of citizens have no place where they can go in order to avail themselves of the protections provided by the Fourth Amendment.⁹⁸

Although the *CCNV* holding is limited to privacy rights for shelter residents, the court’s above concern that homeless citizens could potentially be “read out” of the Fourth Amendment⁹⁹ applies to street homeless as well, as discussed in this Article’s conclusion.¹⁰⁰ Although the privacy rights of individuals residing in homeless shelters are now largely uncontested, the judicial reasoning in *CCNV* should be extended to grant homeless individuals living on the streets Fourth Amendment protection.

C. Katz’s Second Prong Revisited: the Government Acquiescence Doctrine

Whether society views a “street” homeless citizen’s expectation of privacy—and expectation of freedom from warrantless searches—as reasonable is an inquiry that most courts have not considered carefully. As demonstrated above, many courts immediately dispose of *Katz*’s second prong by employing the following reasoning: a society that chooses to legally prohibit trespassing on private property must not view a

⁹⁵ *Id.* at 5.

⁹⁶ *Id.* at 5–6.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 5–6.

¹⁰⁰ *See infra* Section IV.

trespasser's expectation of privacy as reasonable. At least one court, however, found this logical step too simplistic for a proper application of Fourth Amendment rights to homeless citizens. The *State v. Dias* court evaluated society's view of reasonable expectations of privacy in light of additional considerations; most importantly, the court considered a local government's acquiescence to the presence of the homeless trespasser in its judicial calculus.¹⁰¹

In *State v. Dias*, a group of homeless citizens established a makeshift residence in a structure built on stilts in an area of Hawaii known as "Squatter's Row."¹⁰² Squatter's Row was situated on Sand Island, property exclusively owned by the State of Hawaii; thus, the homeless citizens lived in makeshift shelters in violation of Hawaii law.¹⁰³ Upon hearing spoken words associated with gambling near the shelter, a police officer entered without prior announcement and arrested the homeless defendants on gambling charges.¹⁰⁴ The homeless defendants challenged the constitutionality of the search and seizure under the Fourth Amendment, arguing that they possessed a subjectively and objectively reasonable expectation of privacy in Squatter's Row.

The *Dias* court first acknowledged that, under *Katz*'s second prong, homeless defendants could be foreclosed from asserting privacy claims under the Fourth Amendment when society viewed their expectation of privacy as unreasonable.¹⁰⁵ However, in the facts at bar, the lack of legal right to occupy Squatter's Row under Hawaii law was not dispositive. Rather, the *Dias* court took a hard, careful look at extra-statutory evidence when evaluating whether an expectation of privacy was objectively reasonable in society's view. Specifically, the court examined whether Hawaii's prohibition of squatters was actually or frequently enforced:

[w]e have taken judicial notice of the fact that 'Squatter's Row' on Sand Island has been allowed to exist by sufferance of the State for a considerable period of time. *And although no tenancy under property concepts was thereby created*, we think that this long acquiescence by the government has given rise to a reasonable expectation of privacy on the part of the defendants . . . This, we think is consistent not only with reason but also with our traditional notions of fair play and justice."¹⁰⁶

¹⁰¹ *State v. Dias*, 609 P.2d 637, 640 (Haw. 1980).

¹⁰² *Dias*, 609 P.2d at 639.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 639–40.

¹⁰⁶ *Id.* at 640.

Despite the fact that the homeless squatters possessed no legal right to their living space—that they occupied the space in direct contravention to Hawaii law—*Dias* held that the society must have viewed expectations of privacy in Squatter’s Row as reasonable because it has tacitly allowed the area to exist as a makeshift neighborhood.¹⁰⁷ Thus, wherever government or society implicitly allows its citizens to establish residency, Fourth Amendment rights should apply. This reasoning is consistent with traditional principles in Fourth Amendment jurisprudence that rights of privacy extend to “houses.”¹⁰⁸

IV. CONCLUSION

Illegal occupation theory is problematic for both constitutional and public policy reasons. The Supreme Court has long interpreted the Fourth Amendment to protect “people, not places”¹⁰⁹; conceptions of property ownership should not operate to defeat a fundamental right granted to individuals. Privacy rights are “right[s] of the people” to be secure in their persons and houses against unreasonable searches and seizures.¹¹⁰ This is not to say that local conceptions of property law and trespassing should be wholly irrelevant. Rather, such factors should be weighed against the well-established notion that privacy rights attach to the individual, irrespective of where she resides. As Justice McKay observed in his dissent in *United States v. Ruckman*: Factors such as whether the [party asserting the privacy right] was a trespasser and whether the place involved was public “are, of course, relevant guides, but should not be undertaken mechanistically.”¹¹¹ These factors are not ends in themselves; they merely aid courts in answering the fundamental constitutional questions they are required to address under *Katz v. United States*: “whether the defendant had a legitimate expectation of privacy, in the eyes of our society, in the area searched.”¹¹²

In this inquiry, most courts have erroneously assumed that “the eyes of society” are reflected by its laws alone. For example, the *Amezquita* court found that Puerto Rico’s criminal trespassing laws proved that Puerto Rican society viewed its homeless as undeserving of privacy in public areas.¹¹³ Similarly, the *Thomas* court found that a Los Angeles criminal

¹⁰⁷ *Id.*

¹⁰⁸ See *United States v. Ruckman*, 806 F.2d 1471, 1472 (10th Cir. 1986).

¹⁰⁹ *Katz*, 389 U.S. at 351.

¹¹⁰ U.S. CONST. amend IV.

¹¹¹ *Ruckman*, 806 F.2d at 1476 (McKay, J., dissenting).

¹¹² *Id.*

¹¹³ See *Amezquita*, 518 F.2d at 11–12.

law proved that L.A. society viewed its homeless as undeserving of the fundamental right of privacy while trespassing on public or private property.¹¹⁴ These hasty conclusions do not strike at the real inquiry posed by *Katz*: an examination of "society's" view—not simply a cursory glance at the face of an enacted statute. In fact, the degree to which a law is enforced would seem a more accurate barometer of society's sentiment toward the restriction than the statutory language on the books.

Any true analysis of society's views on expectations of privacy is complicated and multi-faceted. Any such inquiry should include a multitude of *extra-textual* factors, including: public statements by city officials, enforcement of local statutes, and the municipal government's acquiescence of failure to enforce local statutes. In *State v. Dias*, despite the fact that Squatter's Row was technically an illegal settlement, the Hawaii government's acquiescence to the problem of homelessness—the fact that they had not provided enough shelter space for the homeless—was a dispositive indicator that a homeless person's expectation of privacy in Squatter's Row had been viewed by Hawaii society as reasonable for years. Homeless individuals must have a reasonable expectation of privacy in areas where society forces them to live; a locality's lack of shelter space amounts to a tacit acceptance of such expectations as reasonable.

If courts factored a city's shelter space when applying *Katz*'s second prong, camping ordinances in virtually every major city would be invalidated. In 2004, 32% of emergency shelter requests by homeless families went unmet; 81% of cities surveyed turned away homeless families from shelters due to a lack of resources.¹¹⁵ Thus, establishing a living space on the streets is frequently a homeless individual's only option. Just as the *CCNV* court characterized homeless shelters to uphold Fourth Amendment rights, the streets are "the most private place they could possibly [go]."¹¹⁶ Indeed, in a City where homeless shelters are scant or nonexistent, homeless "citizens have no place they can go to avail themselves of the protection provided by the Fourth Amendment."¹¹⁷

City councils and local governments must begin to take the difficult legislative steps toward ending poverty and homelessness. When faced with the constitutional failure of quick-fix, "cleansing" mechanisms such as camping and anti-sleeping statutes, legislatures will be motivated to take more thorough steps to cure the problems of poverty, lest they face an electorate discontent with the criminal problems, aesthetic unpleasantries,

¹¹⁴ See *Thomas*, 38 Cal. App. 4th at 3–4.

¹¹⁵ "A Status Report on Hunger and Homelessness: a 27-City Survey," U.S. Conference of Mayors, December 2004.

¹¹⁶ See *Cnty. for Creative Non-Violence*, 791 F.Supp. at 6.

¹¹⁷ *Id.*

and moral inequities associated with homelessness. Proper judicial adherence to *Katz v. United States* and application of Fourth Amendment principles should render camping ordinances unconstitutional, motivating local governments to begin this essential effort.