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Privacy and the Growing Plight of the Homeless: Reconsidering the Values Underlying the Fourth Amendment

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. INTRODUCTION

In the eighteenth-century American Colonies, a male citizen had to meet certain property qualifications before he could vote in political elections.² One who qualified was sometimes called a “householder,” meaning he had the requisite size house or tract of land to gain the right of suffrage.³ To contemporary Americans, the thought of basing voting rights on one’s property seems ridiculous—we have been indoctrinated with the concept that each citizen is born with certain inalienable rights that protect him or her regardless of wealth and material success.

However, as I will illustrate in this Comment, our Fourth Amendment⁴ doctrine has not been able to fully escape this archaic entanglement with

¹ *Miller v. United States*, 357 U.S. 301, 307 (1958) (quoting from a speech by Parliament Member Pitt in the House of Commons, March 1763).

² OSCAR T. BARCK, JR. & HUGH T. LEFLER, *COLONIAL AMERICA* 245 (2d ed. 1968) (Connecticut: an estate worth forty shillings annually or forty pounds of personal property; Delaware: fifty acres of land or forty pounds of personal property; Georgia: fifty acres of land; Maryland: fifty acres of land or forty pounds of personal property; Massachusetts: an estate worth forty shillings annually or forty pounds of personal property; New Hampshire: fifty pounds of personal property; New Jersey: one hundred acres of land, or property worth fifty pounds; New York: forty pounds of personal property or land; North Carolina: fifty acres of land; Pennsylvania: fifty acres of land or fifty pounds of personal property; Rhode Island: personal property worth forty pounds or yielding fifty shillings annually; South Carolina: one hundred acres of land on which taxes were paid or a town house or lot worth sixty pounds on which taxes were paid or payment of ten shillings in taxes; Virginia: fifty acres of vacant land, twenty-five acres of cultivated land, and a house twelve feet by twelve feet or a town lot and a house twelve feet by twelve feet).

³ *Id.* at 244.

⁴ The Fourth Amendment to the United States Constitution provides:

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

property because it has evolved under the assumptions that each citizen has a "house" and that each person has some minimal access to personal property. With this assumption, the law has substantially defined the scope and application of Fourth Amendment privacy rights in terms of common law property and possessory interests. This connection would be rational, convenient, and ultimately fair in a society where each citizen could meet the minimum property requirements; however, with the increasing number and growing awareness of the homeless in the United States,⁵ the injustice of this property-based interpretation of the Fourth Amendment is becoming clear.

Under the current Supreme Court interpretation, the right of privacy under the Fourth Amendment does not apply unless the defendant had a "reasonable expectation of privacy" in the particular space or object that was searched.⁶ The threshold question in determining whether the defendant had a "reasonable expectation of privacy" usually hinges upon whether the defendant had a superior right of possession vis-a-vis the government in the space searched or the item seized, and whether the government interfered with that right by conducting the search. Stated more simply, the implicit question in most current Fourth Amendment cases to determine if a right of privacy has been violated is whether the government *trespassed* on private property to make the search or seizure.⁷ However, given the growing number of American citizens who are unable to buy or rent private property for their living space,⁸ we are increasingly denying a human right on the basis of wealth. The exclusive rights of the "householder" have become an issue once again; while a person now has the right to vote without owning property, he forfeits his right to full constitutional protection of his privacy with his inability to afford housing.

This problem is clearly brought to light in the recent case *State of Connecticut v. Mooney*.⁹ In *Mooney*, the Supreme Court of Connecticut was faced with an issue of first impression in the state: whether the Fourth

U.S. CONST. amend. IV.

⁵ Estimates vary from 300,000 to 3,000,000 as to the current number of homeless in America. See John J. DiIulio Jr., *There But for Fortune—the Homeless: Who They Are and How to Help Them*, THE NEW REPUBLIC, June 24, 1991, at 27. During 1991, requests for emergency shelter in twenty-eight major cities rose by 17%, and 15% of such requests went unmet. *More Homeless Reported*, THE FINANCIAL POST, Dec. 17, 1991, at 2. Similar figures were recently recognized by the U.S. District Court for the District of Columbia. See *Community for Creative Violence v. Unknown Agents*, 1992 U.S. Dist. LEXIS 9093 at *16 n.6 (1992) (In holding that homeless guests have a reasonable expectation of privacy in the community shelter operated by the plaintiff, the court stated, "to reject this notion would be to read millions of homeless citizens out of the text of the Fourth Amendment.").

⁶ See *infra* note 59 and accompanying text.

⁷ See *infra* notes 59–74 and accompanying text.

⁸ See *supra* note 5.

⁹ 588 A.2d 145, *cert. denied*, 112 S. Ct. 330 (1991).

Amendment protects the living space or dwelling of a homeless person residing on public land.¹⁰ The defendant in this case, David Mooney, was arrested for murder and robbery after the police were tipped off by a co-felon who had previously been arrested for involvement in the same murder and robbery.¹¹ With the defendant in custody, the police questioned his girlfriend at her place of employment, and at their request, she directed a detective to Mooney's place of abode to search for possible evidence connecting Mooney to the murder.¹²

She led him to the defendant's "home"—a secluded area under a highway bridge abutment on land owned by the Connecticut Department of Transportation.¹³ The area was not readily visible or accessible from the highway and could only be reached by crossing through heavy underbrush and down a steep embankment covered with crushed stone.¹⁴ The defendant had been living under the bridge abutment for approximately one month; he was the only person occupying this space, and he had no other home.¹⁵ The police officer found Mooney's personal belongings organized on cement support beams which he had been using as shelves.¹⁶ In an attempt to decorate his abode, Mooney had a calendar hanging on one of the cement walls.¹⁷ A nearby reservoir conveniently offered Mooney a place to bathe each morning. Indeed, Mooney had clearly taken the steps necessary to provide this area with all the essential features of a home. In order to avoid theft, he tried to avoid being seen when he entered and exited the area.¹⁸

The detective promptly conducted a search of the defendant's living space without securing a search warrant and seized his personal belongings, including a closed duffel bag and a closed cardboard box which contained items that inculpated him in the murder.¹⁹

Based on the evidence obtained in this search and seizure, Mooney was convicted for murder and robbery in the Superior Court of the Judicial District of New Haven.²⁰ The trial court, using the same "reasonable expectations" test proffered by the United States Supreme Court to determine the scope of the

¹⁰ Brief for the Appellant at 6, *Mooney* (No. 13737).

¹¹ 588 A.2d at 150.

¹² *Id.*

¹³ *Id.*

¹⁴ Brief for the Appellant at 8, *Mooney* (No. 13737).

¹⁵ *Id.* at 9.

¹⁶ 588 A.2d at 150.

¹⁷ Kevin Royer, *Discourse: The Mooney Blues: Homelessness and Constitutional Security from Unreasonable Searches*, 72 B.U. L. REV. 443, 445 (1992) (citing David Margolick, *Poverty and Privacy: Home Sweet Niche?*, N.Y. TIMES, Nov. 17, 1990 § 1, at 25).

¹⁸ 588 A.2d at 151.

¹⁹ *Id.* at 150.

²⁰ *Id.* at 145.

Fourth Amendment,²¹ held that the Fourth Amendment did not extend to Mooney's "house"—his expectation of privacy in his home was not reasonable because it was located on public property. As a result, the detective was not in error for searching the defendant's habitat without a search warrant, and the evidence he obtained as a result was admissible against the defendant.²²

Mooney appealed to the Supreme Court of Connecticut claiming, among other things, that the lower court erred in holding the Fourth Amendment inapplicable to his "home."²³ The appellant argued that the trial court's decision created, on the basis of wealth, an underclass of citizens such as the defendant who are not entitled to the same constitutional protections as their more fortunate counterparts who can afford to buy or rent a home.²⁴ If the defendant had owned the space in which he lived, or if the trial court would have defined "house" in the text of the Fourth Amendment to include shelters occupied by citizens who cannot afford to buy or rent a dwelling, then the search would have been presumptively invalid without a warrant.²⁵

The reasoning of the trial court implies that a homeless person can have no safe haven for any of his personal effects or papers other than upon his person, unless he can afford to own or lease private space. Under this theory, a homeless individual too poor to afford a storage locker automatically waives all privacy claims to his diary, letters, books, papers, or other personal effects not in his immediate possession. Such a constitutional doctrine would seriously compromise the equal protection principles laid down in the Fourteenth Amendment of the U.S. Constitution²⁶

The Supreme Court of Connecticut reversed the trial court, finding that the defendant had a "reasonable expectation" of privacy in the closed duffel bag and closed cardboard box in which the incriminating evidence was discovered.²⁷ However, having found for the defendant on this narrower ground, the court refused to address the argument that the Fourth Amendment should extend its protection of privacy to homeless individuals' living areas and "homes" located on property which they do not own.²⁸ Thus, in the state of

²¹ See *infra* note 59 and accompanying text.

²² The judicial rule which renders inadmissible any evidence acquired through the means of a search violative of the Fourth Amendment is called the "exclusionary rule."

²³ 588 A.2d at 150.

²⁴ Brief for the Appellant at 11, *Mooney* (No. 13737).

²⁵ See *infra* notes 79–80 and accompanying text.

²⁶ Brief for the Appellant at 11, *Mooney* (No. 13737).

²⁷ 588 A.2d at 152.

²⁸ *Id.* The opinion by the Court stated:

We assume for the purposes of this decision that the state is correct that the defendant's broad claim of fourth amendment protection in the area involved must fail. We

Connecticut as in every other state in our country, the increasing number of citizens who cannot afford housing²⁹ are denied the constitutional protections of privacy enjoyed by the more affluent members of our society.

This Comment will discuss the issue that the Supreme Court of Connecticut declined to decide in *Mooney*: the Fourth Amendment's inadequate protection of homeless individuals' privacy in their living spaces or "homes." Part II will trace the evolution of Fourth Amendment doctrine from its beginnings in 1886 with *Boyd v. United States*,³⁰ when privacy was intimately intertwined with private property,³¹ through the Warren Court's 1967 decisions in *Katz v. United States*³² and *Warden, Maryland Penitentiary v. Hayden*,³³ which declared that "the 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."³⁴

Part III will explore how the subsequent Burger and Rehnquist Courts have dismantled the Warren Court's privacy analysis, quickly returning us to the pre-*Katz* era and once again placing the emphasis of the Fourth Amendment on property. Specifically, this section will address how the present Court has returned us to property concepts through their skewed application of Harlan's two-prong "reasonable expectation" test, and will then focus on the present Court's narrow interpretation of the word "house" in the text of the Constitution.

Finally, Part IV will discuss a Fourth Amendment test that is based on privacy instead of property. Additionally, this section will discuss Hegel's personality theory of property and its present uses and manifestations in American law.

conclude, nonetheless, that the defendant's alternate, more narrow claim—that he had a reasonable expectation of privacy in his duffel bag and cardboard box located there—has merit.

Id.

²⁹ See *supra* note 5.

³⁰ 116 U.S. 616 (1886).

³¹ See *infra* notes 37–47 and accompanying text.

³² 389 U.S. 347 (1967).

³³ 387 U.S. 294 (1967).

³⁴ *Id.* at 304.

II. PROPERTY V. PRIVACY: THE EVOLVING SCOPE OF THE FOURTH AMENDMENT FROM 1886 TO 1967

A. *Pre-Katz Analysis*

Prior to the landmark decision of *Katz v. United States*³⁵ in 1967, the Supreme Court strictly construed the scope of the Fourth Amendment—extending it only to the “areas” explicitly stated in its text: persons, houses, papers, and effects.³⁶ Thus, this language was seen as a prohibition against unreasonable government intrusions into an individual’s “person” or body, and certain tangible objects of his private property³⁷—his “house,” “papers,” and “effects” therein.³⁸ In this era, property interests were not only a primary element of search-and-seizure analysis, they were determinate. “Persons aggrieved by searches and seizures needed to prove a property interest in the place searched or item seized superior to that of the Government’s in order to gain redress”³⁹ This emphasis on possessory rights and ownership was consistent with the philosophical beliefs of the times from which *pre-Katz* analysis developed because, as evidenced by the prevalence in the Colonies of voting laws based on one’s capital worth,⁴⁰ early American society held property and wealth to be the essential ingredients for the survival of liberty and truth.

It seems that through the republic’s first century and a half, property—security of legally justified possession and material expectation—was the paradigm of the constitutionally protected private sphere. So it dramatically was during the constitutional ascendancy of ‘classical,’ ‘laissez-faire capitalist,’ or ‘substantive due process’ jurisprudence.

. . . . [S]ecurity of property holdings was considered a matter not just of private self-interest but of general political concern. Property was, to be sure, one primary mode of private liberty and self-realization, but it was more: a claim going to the heart of the prospects for successful republican self-government. In the ancient and early modern republican traditions of which the founding generation were still in some measure partaking, an unquestionably secure base of material support was viewed as indispensable if one’s independence and competence as a participant in public affairs was to be guaranteed. Material security was thought necessary to ensure the authenticity

³⁵ 389 U.S. 347 (1967).

³⁶ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 357 (1974).

³⁷ *United States v. Ruckman*, 806 F.2d 1471, 1477 (1986) (McKay, J., dissenting).

³⁸ Michael Campbell, *Defining a Fourth Amendment Search: A Critique of the Supreme Court’s Post-Katz Jurisprudence*, 61 WASH. L. REV. 191, 191 (1986).

³⁹ 806 F.2d at 1477 (McKay, J., dissenting).

⁴⁰ See *supra* note 2.

and reliability of one's politically expressed judgment regarding what course of policy would best conduce to the rights and other interests of the governed. The person whose material security became a matter of doubt or contingency . . . because the person had no property and thus depended for livelihood on the grace of others . . . would too likely act in public councils either as the tool of his patron or as the tool of his own particular, immediate, and possibly delusive material interest. . . . [T]hat person would not be reliably acting in the more systematic or longer-run interest of either national prosperity or common liberty, including the person's own. In the traditional republican dictum, that person was not 'independent' but 'corrupt.' In short, the distribution of secure property endowments was regarded as a matter of constitutive political concern, an essential factor in any scheme of popular sovereignty valued as a medium of the people's self-determination or self-protection regarding both general welfare and individual liberty.⁴¹

This philosophy manifested itself in the Supreme Court's first major interpretation of the Fourth Amendment—*Boyd v. United States*.⁴² Although this famous case liberally expanded the definition of search-and-seizure to any government action that had the effect of a search-and-seizure, the Court's idea of what this definition protected was explicitly grounded in the common-law property concepts of possession, ownership, and private property. In the majority opinion, Justice Bradley stated that any stolen object, or any property acquired by a person through a method which did not grant a legally recognized possessory interest, could be searched and seized without violating the holder's Fourth Amendment rights.⁴³ Implicit in this analysis is the idea that the privacy right in a person's home is protected from a government search if he legally owned it or obtained possession of it through some other method that the law condones and legitimizes. From this initial "ownership" distinction, the problematic roots of our current interpretation of the Fourth Amendment, in the context of the homeless, are evident.

⁴¹ Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1327-29 (1987) (citations omitted).

⁴² 116 U.S. 616 (1886).

⁴³ *Id.* at 623. See also NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 108 (1937):

In the first place, said the Court, the property which may be searched for and seized must be such that the government or other claimant is entitled to its possession, or to which the defendant is not entitled, such as stolen goods, gambling implements, counterfeit coin, etc. Search warrants may be used for these things but this is entirely different from a search for and seizure of a man's private books and papers in order to get information therein contained

Throughout the first half of the twentieth century, the language of the Court continued to espouse a deep commitment to equating Fourth Amendment application with common-law property concepts.⁴⁴ This commitment is most evident in the “trespass doctrine” that emerged with *Olmstead v. United States*.⁴⁵ *Olmstead* was convicted for a violation of the National Prohibition Act based upon evidence the government collected by tapping his telephone.

Noting that the government’s information was obtained through the insertion of wires into public telephone lines which were not located on *Olmstead*’s property, the Court held that the existence of a physical trespass⁴⁶ was always a prerequisite for establishing any violation of the Fourth Amendment.⁴⁷ Therefore, the defendant’s constitutional rights had not been violated because the government had not trespassed onto his property or other area where he had a legally recognized possessory interest.

Under the *Olmstead* and other pre-*Katz* courts, *DAVID* Mooney could never establish a violation of the Fourth Amendment in his living space. Since the government owned the land under the bridge, any police or other government agents who invaded his privacy could not be considered trespassers.

B. *Katz v. United States: A Short-Lived Privacy Analysis Free from the Traditional Reliance on Property*

With the landmark decision of *Katz v. United States*⁴⁸ in 1967, the Warren Court had apparently freed the Fourth Amendment from its historical entanglement with private property and finally placed it into the realm of individual dignity and privacy. Like *Boyd* and *Olmstead*, this case can be seen as a reflection of the property beliefs prevalent in the era.

In *Katz*, the defendant had been convicted for illegal bookmaking based on evidence confiscated by F.B.I. agents who recorded an incriminating phone call that the defendant made from a public phone booth.⁴⁹ The agents recorded the conversation by placing eavesdropping equipment on the outside of the

⁴⁴ See *infra* notes 45–47 and note 74 and accompanying text.

⁴⁵ 277 U.S. 438 (1928).

⁴⁶ The term “trespass” implies the existence of private property or a legal possessory interest in this context. Black’s Law Dictionary defines trespass as: “An unlawful interference with one’s person, property, or rights.” BLACK’S LAW DICTIONARY 1502 (6th ed. 1990).

⁴⁷ 277 U.S. at 460–65 (The Court noted that although evidence of a trespass is always required, such evidence was not determinative of a violation. Thus, a government trespass onto one’s land may not be a violation under the “open fields” doctrine, which denied application of the Fourth Amendment to open fields on one’s property.).

⁴⁸ 389 U.S. 347 (1967).

⁴⁹ *Id.* at 348.

telephone booth.⁵⁰ Under traditional Fourth Amendment analysis, Katz would not have had a basis for claiming a constitutional violation of his privacy because the evidence was seized on public land and no trespass of his property had taken place.⁵¹ The Court, however, was unwilling to allow such government behavior to withstand constitutional scrutiny, and in overturning eighty years of Fourth Amendment doctrine, Justice Stewart stated:

“[T]he premise that property interests control the right of the Government to search and seize has been discredited.” . . . [O]nce it is recognized that the Fourth Amendment protects people—and not simply “areas”—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of *Olmstead* . . . have been so eroded by our subsequent decisions that the “trespass” doctrine there enunciated can no longer be regarded as controlling.⁵²

More specifically, the Court held that what a person knowingly and intentionally exposes to the public, even in his own home, is not protected by the Fourth Amendment⁵³—“[b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”⁵⁴ With these words, the Court achieved a general expansion of privacy protection

⁵⁰ *Id.*

⁵¹ Barbara R. Edwards, *The Supreme Court's Treatment of Open Fields: A Comment on Oliver and Thornton*, 12 FLA. ST. U. L. REV. 637, 650 (1984).

⁵² 389 U.S. at 353 (citations omitted).

⁵³ *Id.* at 361. In his concurrence, Harlan stated that objects which one exposes to the public are not protected “because no intention to keep them to himself has been exhibited.” This language gave birth to the “plain-view” doctrine. This doctrine has played a role in denying Fourth Amendment protection to homeless individuals when their personal belongings are open to observation by the public. See generally Peter Mancini, *Discourse: Mooney and Privacy: Some Tough Questions*, 72 B.U. L. REV. 425 (1992) (arguing that the plain-view doctrine nullifies homeless persons’ claims to Fourth Amendment protection). However, it is clear after examining the language in Harlan’s opinion that the plain-view doctrine does not logically apply to homeless individuals. The plain-view doctrine is simply a tool for analyzing the “subjective expectation” prong of the *Katz* test: if one exposes his personal belongings to the public, then he must not intend or desire to keep them private. However, this assumes that one has an alternative to exposing one’s confidences to the public—that one has a private shelter. Obviously, homeless individuals may not always intend and desire to expose their belongings to passersby when they have no private place to store them. The exposure of a homeless person’s confidences reflects the lack of an alternative rather than a conscious choice to reveal his private belongings. Thus, the basic assumption underlying the plain-view doctrine is flawed in regards to the homeless, and its application is equally illogical.

⁵⁴ *Id.* at 351.

under the Fourth Amendment, and it appeared that future analysis under that Amendment would focus on the individual's privacy expectations, privacy needs, and his efforts to seclude others.

If the issue in *State of Connecticut v. Mooney* had presented itself to the Warren Court in the 1967 Term, it is conceivable that the Court would have extended privacy protection to such homeless individuals as David Mooney. Focusing on the language, "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected," we can realize this possibility. While David Mooney's "house" was accessible to the public, it was clear that he "sought to preserve his particular habitat and its contents as private."⁵⁵ His home was not readily visible or accessible from the highway and could only be reached by crossing through heavy underbrush and down a steep embankment covered with crushed stone.⁵⁶ He had the exclusive use and quiet enjoyment of the area,⁵⁷ and his living space was "secreted in a manner intended to hide it from the view of those very few individuals who might happen to wander by."⁵⁸

In subsequent interpretations of *Katz*, however, a newly comprised Court began narrowing instead of nurturing Justice Stewart's opinion, and while continuing to disguise itself in the "privacy" language of *Katz*, the Court essentially returned the focus of the Fourth Amendment to its traditional property orientation.

III. THE POST-KATZ MODERN VIEW: A PSUEDO-ABANDONMENT OF PROPERTY RELIANCE

A. The Two-Prong "Reasonable Expectation of Privacy" Test

The test laid down by Justice Harlan in his concurring opinion in *Katz* soon became adopted as the modern "privacy test." Harlan, intending to mold the ideas of the majority into a workable formula, proposed a two-prong inquiry. In order for Fourth Amendment protection to attach, the defendant must have "exhibited an actual (subjective) expectation of privacy and, second, . . . that expectation [must] be one that society is prepared to recognize as 'reasonable.'"⁵⁹ This two-fold requirement was subsequently adopted by the Court and has remained the cornerstone in privacy analysis to the present day.

The Burger and Rehnquist Courts have repeatedly assured us that they have "repudiated the notion that 'arcane distinctions developed in

⁵⁵ Brief for the Appellant at 7, *Mooney* (No. 13737).

⁵⁶ *Id.* at 8.

⁵⁷ *Id.* at 9.

⁵⁸ *Id.* at 8.

⁵⁹ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

property . . . law' ought to control our Fourth Amendment inquiry."⁶⁰ Despite these assurances, their subsequent decisions have virtually returned us to property-based doctrine. While cloaking their analysis in the modern *Katz* test, the Court has narrowed the test to the point where its protection often equates with property rights.⁶¹ In other words, when deciding whether a particular defendant has "an actual expectation of privacy that society is prepared to recognize," the Court has delineated ownership and trespass as primary and often controlling factors. If a defendant does not have a superior possessory interest vis-a-vis the government in the area searched or item seized, or if no trespass has occurred, the Court will probably conclude that he has no "actual expectation of privacy" or that his actual expectation is not "one that society is prepared to recognize as reasonable."⁶²

A case that clearly highlights the problem with this property-based interpretation of the modern "reasonable-expectation" test in the context of homelessness is *United States v. Ruckman*.⁶³ The defendant in this case, Ruckman, was living in a natural cave on Bureau of Land Management property,⁶⁴ and had a warrant issued against him for failure to appear in

⁶⁰ *United States v. Salvucci*, 448 U.S. 83, 91 (1980).

⁶¹ Other common factors in modern Fourth Amendment cases include the degree of intrusiveness and the custom of the community. See Elizabeth Schutz, Note, *The Fourth Amendment Rights of the Homeless*, 60 *FORDHAM L. REV.* 1003 (1992). However, in cases involving the homeless on public property, the determinative factor, either explicitly or implicitly, has been ownership.

⁶² See *infra* notes 63-74 and accompanying text. Two recent Supreme Court cases illustrate the Court's reliance on the "trespass" theory. First, in *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), the government obtained evidence by flying an airplane over the defendant's property and taking photographs with an electronic device that allowed objects one-half inch in diameter to be visible. In holding that Fourth Amendment interests were not violated, the Court seemed to focus on the fact that the airspace above the defendant's land was not his property, thus no trespass occurred. See Seth H. Ruzi, Note, *Reviving the Trespass-Based Search Analysis Under the Open View Doctrine: Dow Chemical v. United States*, 63 *N.Y.U. L. REV.* 191, 228 (1988) ("While couched in *Katz* terminology, the *Dow* majority's analysis effectively overruled the *Katz* standard and reverted to a physical trespass inquiry.").

Likewise, in *California v. Ciraolo*, 476 U.S. 207 (1986), the police used a private airplane to fly over the defendant's property to locate marijuana growing in his backyard. Even though the defendant had placed a ten-foot wall around his yard to shield it from passersby, the Court held that no Fourth Amendment violation had occurred given the lack of a trespass by the police. See Schutz, *supra* note 61, at 1013 ("Justice Burger, writing for the majority, reintroduced the notion of trespass into the Court's view of the Fourth Amendment by emphasizing that the police had made their observations from within the public navigable airspace and that they did so 'in a physically nonintrusive manner.'") (citations omitted).

⁶³ 806 F.2d 1471 (1986).

⁶⁴ *Id.* at 1474 (McKay, J., dissenting).

Washington County, Utah, for a misdemeanor charge.⁶⁵ After learning where Ruckman lived, “six heavily armed officers, [including] local sheriff’s officers and federal law enforcement officers”⁶⁶ proceeded to the site where they found a cave that “had wood and other articles placed in its opening so as to form some kind of living quarters. There was a wooden door that was closed but not locked and no one was in the vicinity.”⁶⁷ Ruckman had installed the “rudimentary comforts of home” inside the cave, including a bed, camp stove, and lantern.⁶⁸ Without a search warrant, the officers searched the cave and seized three weapons which Ruckman possessed in violation of a federal law.⁶⁹ Approximately one hour later, Ruckman returned to his cave and was arrested. Eight days later, with Ruckman incarcerated, local authorities returned to his home, without a warrant, “in an effort to clean it out and remove all this stuff that was in there, the door and everything else.”⁷⁰

In applying the *Katz* two-prong test, the Court focused on the second branch: whether Ruckman’s expectation of privacy was one that society is prepared to recognize. The majority found that his expectation was not reasonable “in light of the fact that he could be ousted by [government] authorities from the place he was occupying at any time.”⁷¹ In other words, because the government owned the land and could oust the trespassing defendant at any time, the Court concluded that he had no reasonable expectation of privacy in his habitat and personal items. Again, in evaluating the defendant’s “reasonableness” the Court emphasized the superior possessory rights of the government and the common-law property concepts of trespass and “ouster.” The majority simply confused ouster with privacy—two completely different concepts if privacy is viewed as independent from property rights. For example, a plethora of scenarios exist where a homeless person

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* (citation omitted).

⁶⁸ *Id.* at 1475.

⁶⁹ *Id.* at 1474.

⁷⁰ *Id.* at 1475 (citation omitted).

⁷¹ *Id.* at 1473. The majority opinion stated:

The government’s authority over federal lands has been clearly stated by the Supreme Court. “[T]he power over the public land thus entrusted to Congress is without limitations.” This power derives from the Constitution. Article IV, § 3, cl. 2 of the Constitution provides that “the Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.” A necessary ancillary to this regulatory power over lands within the public domain is the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights. . . .

could be “ousted” from a certain area or living space without necessarily surrendering or waiving his privacy rights in his personal possessions located there. The most obvious of these is for him simply to take his personal possessions with him when he is ousted from the area. The majority view was summed up in the last paragraph:

[W]hether a place constitutes a person’s “home” for this purpose cannot be decided without any attention to its location or the means by which it was acquired; that is, whether the occupancy and construction were in bad faith⁷² is highly relevant. Where the plaintiffs had no legal right to occupy the land and build structures on it, those facts accomplis could give rise to no reasonable expectation of privacy even if the [defendant] did own the resulting structures.⁷³

In dissent, Judge McKay pointed out the archaic reasoning of the majority’s opinion:

[T]he court takes a giant step backward in Fourth Amendment analysis when it hinges its determination of whether Mr. Ruckman had a legitimate expectation of privacy in his dwelling on whether or not he was a “trespasser.” In the early days of fourth amendment doctrine, property interests were not only a central tenet of search and seizure analysis, they were determinative. . . . [N]o fourth amendment violation was deemed to occur without a trespass by the Government upon property of the defendant—a rule better known as “the trespass doctrine.” However, as our society evolved, the emphasis of the protection we enjoy from unreasonable governmental searches and seizures also evolved. Nearly twenty years ago, [in 1967,] the Supreme Court recognized this evolution . . . [by stating,] “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.”⁷⁴

From the majority’s analysis in *Ruckman*, it is apparent why David Mooney was denied constitutional privacy protection for his home in *State of Connecticut v. Mooney*. Our Fourth Amendment doctrine is still entangled with property, for the simple distinction remains that if Mooney could have afforded to own or rent a home in 1991, then the Fourth Amendment would have protected this living space.

⁷² The Court must not intend to imply that a homeless person acts in bad faith by trying to provide himself with shelter. The meaning intended must be that Ruckman had no right to occupy the land.

⁷³ 806 F.2d at 1474 (McKay, J., dissenting) (citation omitted).

⁷⁴ *Id.* at 1476.

B. Interpretation of "House" in the Text of the Fourth Amendment: The Implicit Requirement for Property Ownership

When courts apply the Fourth Amendment, "persons, houses, papers, and effects" enjoy special protection because they fall explicitly within the language of the Amendment.⁷⁵ For example, when the prosecution is using evidence discovered during a warrantless search of a defendant's "house," the government must always overcome an inherent presumption against the validity of such a search, and courts will usually find the home protected per se without even discussing the defendant's reasonable expectations and other relevant legal applications.⁷⁶ This special regard for the privacy of one's "house" is deeply rooted in the values of Anglo-American history,⁷⁷ and was of primary concern for the drafter's of the Constitution, having fresh in their minds the Writs of Assistance, Quartering Acts, and other measures taken by the Crown which robbed the Colonists of privacy in their homes.⁷⁸

However, implicit in our Fourth Amendment jurisprudence, and perhaps largely unnoticed, is the narrow definition of the word "house" which defines the Amendment's scope in terms of common-law ownership distinctions. While *Webster's New World Dictionary* defines "house" simply as a "place that provides shelter [and] living space" and "any place where something is thought of as living [or] resting,"⁷⁹ our Fourth Amendment interpretation effectively adds the requirement that the inhabitant live in the shelter as the owner, renter, or legal borrower.⁸⁰ Thus, David Mooney's living space under the bridge abutment, while meeting the Webster's definition of "house," did not fit the legal definition because he did not own it. Therefore, it did not fall into the textual presumption of protection.

This problem was illustrated in *United States v. Ruckman*,⁸¹ where the Tenth Circuit held that the textual meaning of "house" did not extend to the defendant's cave because it was located on government-owned land.⁸²

The Fourth Amendment itself proscribes, inter alia, an unreasonable search of "houses." Without belaboring the matter, we decline to hold that the instant case comes within the ambit of the Fourth Amendment. The fact that Ruckman

⁷⁵ *Payton v. New York*, 445 U.S. 573, 586 (1980).

⁷⁶ *Id.*

⁷⁷ See *infra* notes 98-105 and accompanying text.

⁷⁸ LASSON, *supra* note 43, at 516.

⁷⁹ WEBSTER'S NEW WORLD DICTIONARY 680 (2d college ed. 1984).

⁸⁰ See generally *United States v. Ruckman*, 806 F.2d 1471, 1473 (1986).

⁸¹ 806 F.2d 1471 (1986).

⁸² *Id.* at 1473.

may have subjectively deemed the cave to be his "castle" is not decisive of the present problem.⁸³

In dissent, Judge McKay argued:

That Mr. Ruckman lived in the cave for eight months, constructed a wall and door to the cave with wooden boards and other material, and installed the rudimentary comforts of home (including a bed, camp stove, and lantern) is not enough, says the court, to raise the fourth amendment priority that has always attached to one's residence Moreover, 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 and, as such, could not have a reasonable expectation of privacy in his wilderness home.⁸⁴

This ownership definition of "house," apparent in both the *Ruckman* and *Mooney* cases, has gone largely unnoticed because it historically made good sense: the overwhelming custom in the United States since its beginning has been for each person to acquire interest in his living space through a legally recognized method, usually purchasing. Once one acquired his home in such a manner, it was reasonable to assume that his private articles would be kept on his private property where they would be provided the greatest protection from intrusion by outsiders. Thus, in a scheme where almost everyone in society owns some minimal amount of private property, land ownership is the simplest and fairest method of determining where one's privacy rights exist—it ensures that everyone is entitled to at least one haven from the rest of the world.

This one-dimensional, "ownership" interpretation of the word "house" was not problematic in eras when almost all of our citizens *did* own homes and personal property. Indeed, at the time the drafters chose the words of the Fourth Amendment, "[t]he right of the people to be secure in their persons, houses, papers, and effects," land and building materials were so plentiful on the frontier, and the economy was expanding so rapidly, that any citizen could obtain a small farm and a log cabin with relative ease.⁸⁵ However, to pretend that this application of a human right is fair and equitable in modern society is to ignore the unprecedented and continually growing number of people in America who cannot afford to live on private property.⁸⁶

⁸³ *Id.*

⁸⁴ *Id.* at 1475 (McKay, J., dissenting) (citation omitted).

⁸⁵ MAX SAVELLE & ROBERT MIDDLEKAUFF, A HISTORY OF COLONIAL AMERICA 462 (1966) (Even indentured servants were given a tract of land upon termination of their contracts.); see also BARCK AND LEFLER, *supra* note 2, at 245 (stating that land was cheap and "easy to acquire" in Colonial America).

⁸⁶ See *supra* note 5.

IV. A FOURTH AMENDMENT RECOGNIZING PERSONAL INTERESTS IN PROPERTY

Given the recognizable shortcomings of the contemporary Fourth Amendment analysis which hinges its outcome primarily on possessory rights, it is necessary to search for other concepts to complement present applications.

A. The Personality Theory

One such theory that could be helpful in Fourth Amendment analysis is Hegel's personality theory of property rights.⁸⁷ In Hegel's philosophy, tangible objects serve as a means for individuals to project their abstract wills into the external world. These objects, or personal possessions, help to define the individual and play an essential role in the psychological development of all human beings. For a person to achieve proper self-realization, he must have some control over resources in the external environment so that he can "deposit" his abstract person into items that reflect his personality in a concrete and comprehensible way. These objects become closely bound up with the individual and become extremely important for the individual to constitute himself as a continuing personal entity in the world.

Not all objects that a person possesses attain this important personal status, such as objects that are held for purely instrumental reasons. Such items are usually exchangeable with other goods of equal value on the market. The perfect example of such a fungible object is money.⁸⁸

A dollar is worth no more than what one chooses to buy with it, and one dollar bill is as good as another. Other examples are [jewelry] in the hands of the jeweler, the automobile in the hands of the dealer, the land in the hands of the developer, or the apartment in the hands of the commercial landlord.⁸⁹

Personal objects, on the other hand, are ones that an individual feels are almost part of himself. Common examples include a wedding ring, an heirloom, or a portrait. However, the universal archetype of a personal object that an individual needs for self-realization, is the home.⁹⁰

Thus, the personality theory complements the economic rationale for protecting the intimacy one develops with his worldly possessions and

⁸⁷ See generally G. HEGEL, PHILOSOPHY OF RIGHT (T.M. Knox Trans.) (photo. reprint 1945) (1942).

⁸⁸ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 960 (1982).

⁸⁹ *Id.*

⁹⁰ *Id.* at 978, 991. See *infra* notes 93-98 and accompanying text.

surroundings—humans need to maintain a strong relationship with certain objects because they help to define our abstract persons in a concrete manner.

B. *Manifestations of the Personality Theory in American Law*

Although Hegel's personality theory has never been explicitly recognized in American law, it has manifested itself implicitly in many areas. Professor Margaret Jane Radin explored this manifestation in her article entitled *Property and Personhood*.⁹¹ According to Radin, the area in which Hegel's philosophy has had the most influence is in the law of landlord and tenant.⁹² Modern courts have increasingly viewed these issues as more intimately connected to the personhood of the tenant than to the property interest of the landlord as tenants' rights have dramatically increased in recent decades.⁹³ First, the trend of condemning the practice of retaliatory eviction and towards courts granting permanent tenure to tenants during good behavior—sometimes in violation of the terms of the lease—is a good example of the personality interests winning over property interests. Rulings of this type suggest that tenants should be allowed to become emotionally attached to their living spaces and that the law should encourage them to do so.

[This judgment is] based on two assumptions. First, that in today's society a tenant makes an apartment her home in the sense of a sanctuary needed for personhood. Second, that the old rule, under which the landlord could evict a tenant without cause at the expiration of the tenancy . . . may be seen as a way station along the path toward making the landlord's reversion conditional, because it is fungible, and the leasehold permanent (though defeasible), because it is personal.⁹⁴

Also, such concepts as adverse possession⁹⁵ and the implied warranty of habitability⁹⁶ have aspects of the personality theory. The theory of adverse

⁹¹ *Id.* at 960.

⁹² *Id.* at 992.

⁹³ *Id.* at 993.

⁹⁴ *Id.* at 995.

⁹⁵

A method of acquisition of title to real property by possession for a statutory period under certain conditions. . . . In order to establish title [by adverse possession], there must be proof of nonpermissive use which is actual, open, notorious, exclusive and adverse for the statutorily prescribed period. State statutes differ with respect to the required length of possession from an upper limit of 20 years to a lower one of 5 years

BLACK'S LAW DICTIONARY 53 (6th ed. 1990).

possession not only recognizes that an inhabitant becomes intimately intertwined with his land over a period of time but rewards him for doing so. The implied warranty of habitability, which requires landlords to maintain all of their leased living spaces in a habitable condition, recognizes that every human needs a sufficiently clean and accommodative living space in order to satisfy basic dignity and personal interests. In other words, the rule suggests that "private law should cease allowing some people's fungible property rights to deprive other people of important opportunities for personhood."⁹⁷

Ironically, the most visible manifestation of personality interests has been in the law's recognition that each individual needs one place where he can go to be left alone and escape from the world—the need for privacy in one's living quarters.⁹⁸ This respect for the special tie that exists between one's self and his living space has been a universal theme through most ages and cultures. According to biblical law, a creditor was not allowed to enter a debtor's dwelling to collect a debt, but was required to wait outside for the pledge to be brought forth.⁹⁹ Likewise, the high regard for the sanctity of one's home was reflected in the Codes of Hammurabi which provide, "If a man makes a breach into a house, one shall kill him in front of the breach, and bury him in it."¹⁰⁰ Cicero expressed the Roman idea in one of his orations, "What is more inviolable, what better defended by religion than the house of the citizen This place of refuge is so sacred to all men, that to be dragged from thence is unlawful."¹⁰¹

This idea that human dignity requires special privacy protection for one's home is deeply rooted in American culture and law, as expressed by the cliché, "a man's home is his castle."¹⁰² This theme is consistently reflected by American courts, as evidenced by *Stanley v. Georgia*, an obscenity case which mixed the First Amendment with privacy and sanctity-of-the-home reasoning to hold that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."¹⁰³ Indeed, the Supreme Court has explained that the drafters of the Constitution were not only influenced by the desire to

⁹⁶ This warranty imposes a duty on landlords to offer and maintain the premises in a habitable condition. Although legislation of the 1960s and 1970s has provided the major thrust towards recognition of this duty, the most dramatic shift has been in the judicial recognition beginning with *Pines v. Persson*, 111 N.W.2d 409 (1961). ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 313 (1984).

⁹⁷ Radin, *supra* note 88, at 996.

⁹⁸ *Id.* at 992.

⁹⁹ LASSON, *supra* note 43, at 14.

¹⁰⁰ *Id.* at n.6.

¹⁰¹ *Id.* at 15 (citation omitted).

¹⁰² Radin, *supra* note 88, at 996.

¹⁰³ 394 U.S. 557, 565 (1969).

protect their property, but were equally moved by these personal privacy concerns when drafting the Fourth Amendment:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.¹⁰⁴

This idea was most directly expressed in the 1980 case *Payton v. New York*, when the Court stated, “[T]he physical entry of the home is the chief evil against which the Fourth Amendment is directed. . . . 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 government intrusion.”¹⁰⁵

When privacy is viewed through the lens of Hegel's personality theory, it is clear that the current privacy formula based almost entirely on economic concepts is not an accurate reflection of the reasons why so many societies have granted special privacy protection to their citizens' living spaces. An individual does not desire privacy in a living area merely because he owns it. Likewise, numerous cultures throughout history have not afforded special protection for the home simply because it had been purchased by someone at some time. Implicit in our very notion of humanity lies the idea that each person needs a place to extrapolate her internal self into the external world. Privacy in one's living space, almost like the nesting ritual of many animals, is necessary for a self-realizing individual to develop her own identity and self worth in a chaotic and intrusive environment.

C. *A Fourth Amendment Test Recognizing Personality Interests*

Curing the inadequacy of our Fourth Amendment jurisprudence in regards to homelessness should not require much more than recognizing it—in fact, recognizing the problem seems to be the primary hurdle. When asking, “Did the defendant have a reasonable expectation of privacy in his living area that society is prepared to recognize?” the analysis should not stop at, “Did he have a legal possessory interest?” unless the answer is “Yes.” If the answer is “No,” the further questions asked should be, “Was the area his abode?” and “Did the defendant take affirmative steps to demonstrate to the world that this area is his private sanctuary where he could be left alone?” This two-prong

¹⁰⁴ *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

¹⁰⁵ 445 U.S. 573, 589 (1980).

analysis would take into consideration not only the economic factors but the personal and human factors as well. More specifically, the first prong would resemble the current Fourth Amendment test, with the second prong allowing individuals a second chance to gain protection by affirmatively establishing a personal interest in a "home."

Likewise, when defining the word "house" in the text of the Fourth Amendment, the law should recognize that the word has a much deeper meaning than the words of ownership on the deed or title registry. A better definition would acknowledge the historical importance and human dignity values associated with basic privacy rights and would be more congruent with *Webster's* definition, recognizing that David Mooney's privacy concerns in his sole living space can be just as deep and important as the privacy concerns of a wealthier counterpart in his empty vacation home.¹⁰⁶

With this application, property-owning citizens will not be able to avoid reasonable police searches by claiming that their living space or house is wherever they happen to be standing when approached, because the fact that they own a home elsewhere will easily rebut such a statement. Similarly, homeless individuals would not be given absolute immunity from police searches and seizures, but would have the burden of establishing a personality interest—instead of a property interest—in a "home" that they have treated as their haven from the world and made reasonable efforts to make it such.

In summary, to accommodate our citizens without a legally recognized possessory interest in land, the current Fourth Amendment test and procedure would not have to be drastically altered. A test that used property interest as merely a factor instead of the main ingredient, and also recognized the legitimate personality claim that each person has for the privacy of his living space, would provide a more realistic basis for determining privacy rights and, ultimately, would provide justice to more citizens.

V. CONCLUSION

Because we have forgotten the sources and personal values behind our privacy needs, our Fourth Amendment protection has become unconscionably restrictive. The problem is not that some have more than others; it is that those without are being denied full constitutional protection because they cannot afford it. Human beings throughout history have not desired their living spaces to be private sanctuaries merely because they purchased their living space, but because the various complexities and intricacies of maintaining a human

¹⁰⁶ In fact, Mooney argued, to no avail, that his "relationship to his habitat was extremely personal; that it was not sporadic, irregular, or inconsequential; and that he maintained the area and the items within it in a private manner right up to the time of the search." Brief for the Appellant at 8, *Mooney* (No. 13737).

identity in this world require that individuals have some private space—some private haven to manifest their abstract will and personality as their “home.” In defining the breadth of our law and the word “house” in the text of the Fourth Amendment around ownership and economic concepts while ignoring the personal and human concepts, we have skewed reality to adopt the most convenient method for determining privacy rights. However, to continue to deny constitutional privacy to the living areas of the growing number of citizens like David Mooney is no less than to deny the value of human dignity.

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