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INTRODUCTION

Calculations of the number of homeless people in the United States range from 250,000 or 350,000[1] up to 3 or 4 million.[2] While there might be debate regarding the exact number of the homeless population, few would disagree that the homeless problem has reached crisis proportions. During the period from 1988 to 1989 alone, the number of homeless increased by an average of eighteen percent across forty-six cities surveyed by the Partnership for the Homeless.[3] Moreover, the 1990 United States Conference of Mayors found that requests for emergency shelter in cities across America increased an average of twenty-four percent in 1990.[4]

Although the number of emergency and transitional shelter beds for the homeless has increased in most of the cities surveyed, these increases have not nearly met the demand.[5] On average, the cities surveyed in 1989 by the Partnership for the Homeless were unable to meet the needs for shelter for thirty-seven percent of their homeless populations.[6] And, while eighty percent of the cities and localities surveyed expected an increase in the number of homeless, only one-half expected to increase their emergency shelter or transitional accommodations.[7]

The living accommodations of the homeless cover a wide spectrum of situations, ranging from shelters to public buildings (including train or bus stations, airports, and building lobbies) and abandoned structures.[8] Many homeless people live outdoors in public areas such as sidewalks,

1. These are estimates from a 1984 study by the U.S. Department of Housing and Urban Development ("HUD"). *See* J. Kozol, Rachel and Her Children 9 (1988); *Homelessness in the United States: Background and Federal Response—A Briefing Paper For Congressional Candidates*, Practising Law Institute, Dec. 1, 1988, *available in* Westlaw, PLI Database, at *2 n.1 [hereinafter *Briefing Paper*]. The Reagan Administration commissioned this study in response to estimates by several different organizations that the homeless population had reached nearly 3 million. *See Briefing Paper, supra*, at *2 n.1. This estimate was later discredited by a House subcommittee that found that the methodology was flawed and that HUD intentionally attempted to keep these numbers low. *See id.*; J. Kozol, *supra*, at 9.

2. This is the estimate by Coalition for the Homeless, an advocacy group. *See* J. Kozol, *supra* note 1, at 9; *Briefing Paper, supra* note 1, at 2 n.1; National Coalition for the Homeless, *Homelessness in America: A Summary* 1 [hereinafter *National Coalition*].

3. *See* Partnership for the Homeless, *Moving Forward: A Status Report on Homelessness in America* 4 (1989) [hereinafter *Moving Forward*]. The survey found that a lack of affordable housing for low-income households was the primary cause of homelessness for 60% of those surveyed. *See id.* at 18; *National Coalition, supra* note 2, at 2.

4. *See U.S. Conference of Mayors News Conference*, Fed. News Serv., Dec. 19, 1990, *available in* LEXIS, Nexis library, Majpap file [hereinafter *U.S. Conference*].

5. *See Moving Forward, supra* note 3, at 14.

6. *See id.* In 1988 and 1989, this percentage reached as high as 90% in Dallas and 80% in Chicago. *See id.*

7. *See id.* at 19.

8. *See* P. Rossi, Down and Out in America 88 (1989).

parks, under bridges and viaducts.[9] Some live alone, while others live in homeless communities or encampments of makeshift homes.[10] Congregating in such groups helps the homeless protect their persons and their belongings.[11] Moreover, these makeshift encampments often function as microcosms of traditional communities because the inhabitants are expected to abide by certain rules and to respect the privacy of each other's "homes."[12] Indeed, because the homeless often feel safer in their own makeshift communities, many prefer these encampments to government-sponsored shelters.[13]

Official treatment of the homeless often differs substantially from actual treatment of the homeless. For instance, some localities have enacted ordinances that prohibit sleeping outdoors in public places.[14] Such laws are directed primarily at the homeless and are designed to drive them out of those municipalities.[15] Moreover, while local authorities in some communities almost never tolerate the presence of makeshift homes of the homeless[16] and have enacted laws to prevent the homeless from camping out in certain areas, makeshift encampments are nonetheless tolerated by the police in some locales.[17] In some cities, tolerance of the

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9. *See id.*

10. *See, e.g.*, Morgan, *In the Shadow of Skyscrapers Grows a Shantytown Society*, N.Y. Times, Oct. 20, 1991, at A1, col. 2 (noting that dozens of homeless encampments exist in New York City); Toth, *N.Y City's 'Mole People' Shun Society in Transit Tunnels*, L.A. Times, Sept. 2, 1990, at A1, col. 1 (describing homeless 'mole people' who live in communities in underground subway tunnels); Swartz, *Hard-Luck Life in Hobo Jungle*, L.A. Times, July 15, 1990, at B1, col. 2 (discussing makeshift camp along Ventura River bottom known as "Hobo Jungle"); McDonnell, *Migrant Camp Rising Again From Ashes of Disastrous Fire*, L.A. Times, Dec. 26, 1989, at A3, col. 1 (reporting on encampment of migrant workers squatting on private land); Sahagun, *'River-Bottom' People: Dirt, Debate, Dilemma*, L.A. Times, Oct. 6, 1987, § 1, at 3, col. 1 (reporting on 17 homeless men and women who live in makeshift community on the banks of the Santa Ana River).

11. *See* Ades, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Places as a Violation of the Right to Travel*, 77 Calif. L. Rev. 595, 599 (1989).

12. *See, e.g.*, Morgan, *supra* note 10, at A28, col. 1 (reporting that the homeless make their own rules at campsites, including no stealing or drugs); Sahagun, *supra* note 10, § 1, at 3, col. 1 (noting that the homeless community has "formed a self-governing tribe" by voting and performing guard duty).

13. *See* Morgan, *supra* note 10, at A1 col. 2.

14. *See* Ades, *supra* note 11, at 595-96 & nn.5-10; Oreskes and Toner, *The Homeless at the Heart of Poverty and Policy*, N.Y. Times, Jan. 29, 1989, § V, at 5, col. 1.

15. *See* Ades, *supra* note 11, at 596.

16. *See* Kurtzman, *City to Keep Destroying Property*, L.A. Times, July 2, 1988, § II, at 1, col. 5 (describing the Mayor of Santa Ana's vows to keep destroying the makeshift homes of the homeless).

17. *See, e.g.*, Sahagun, *supra* note 10, § 1, at 3, col. 1 (noting that the police and County Sheriff's Department had taken a "hands-off approach" to the makeshift encampment of the "river-bottom" people); Bowman, *Homelessness in a County of Big Homes*, San Fran. Chron., Oct. 19, 1990, at A30, col. 1 (reporting that police tolerate a homeless encampment in San Rafael because the inhabitants "have not caused any problems"); Greene, *Squatters Break into Sunnydale Apartments*, San Fran. Chron., Nov. 13, 1989, at A3, col. 1 (reporting San Francisco police do not take action against homeless squatters in vacant apartments).

homeless depends on the area in which the homeless encampments are located,[18] and often the authorities act to remove these encampments only after years of toleration.[19] Other municipalities have gone so far as to sanction homeless encampments.[20] Finally, even in areas where the local authorities enforce a policy of tearing down encampments, the inhabitants of homeless communities are often able to hide their existence for years.[21]

The growing homeless population in America has given rise to a heightened awareness of the legal issues that face the homeless in particular—issues that have previously been unanticipated or ignored. For instance, police sweeps of homeless encampments have led at least one commentator to argue that the fourth amendment right to be free from unreasonable searches and seizures is implicated by these sweeps,[22] although as yet courts have decided only a few cases involving the fourth amendment rights of the homeless.[23] In addition, a recent case involving

18. *See, e.g.*, Morgan, *supra* note 10, at A1, col. 2 (reporting homeless advocate's claim that New York City administration tears down only shanties that are "too visible"); Muir, *Police Try to Confine Skid Row Homeless to Areas by Missions*, L.A. Times, Feb. 10, 1989, § II, at 1, col. 4 (reporting that Los Angeles police try to keep homeless people on sidewalks near missions, instead of letting them roam freely in downtown district).

19. *See* Sandalow, *Homeless Ousted at Civic Center*, San Fran. Chron., July 7, 1990, at A1, col. 1 (reporting on a police sweep of a homeless encampment in a public plaza that had existed for three years).

20. *See, e.g.*, Feldman, *For Some, Home is Where the Tent Is*, L.A. Times, Feb. 3, 1990, at B3, col. 1 (reporting that the Los Angeles police condone a circus tent housing nearly 100 homeless); *Atlantans Build Huts for Homeless*, Chi. Tribune, July 23, 1989, at 1J, col. 1 [hereinafter *Atlantans Build Huts*] (Mayor of Atlanta pledged grant to group of architects who illegally build huts for homeless on government and private property); Bishop, *Tent Cities Becoming the Front Lines*, N.Y. Times, Sept. 11, 1989, at A14, col. 3 (reporting that officials in Phoenix sanctioned a homeless encampment in a railroad switching yard); Muir, *No Place Like Home*, L.A. Times, Sept. 25, 1988, § 2, at 1, col.1 (again describing the Los Angeles police as supporting an experimental homeless camp for three months).

21. *See, e.g.*, Sneiderman, *Lost Souls Lose*, Jan. 17, 1991, L.A. Times, at B1, col. 2 (reporting that "City of Lost Souls" encampment of homeless people existed on government property for five years before discovery by government officials); *A Hermit in Boston Loses Bed and Bower*, N.Y. Times, July 16, 1987, at A20, col. 1 (reporting that police removed makeshift home of hermit who had lived on public land for 18 years).

22. *See* Pillsbury, *The Homeless Are Not Stateless: Their Poverty Challenges Our Fidelity to Equality of Law*, L.A. Times, July 3, 1988, § V, at 5, col. 1.

23. *See, e.g.*, United States v. Ruckman, 806 F.2d 1471, 1473 (10th Cir. 1986) (finding that man living in natural cave on government land was not protected under the fourth amendment); Amezquita v. Hernandez-Colon, 518 F.2d 8, 12 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976) (holding that squatters on government land were not entitled to fourth amendment protection in their makeshift huts); State v. Dias, 62 Haw. 52, 55, 609 P.2d 637, 639-40 (1980) (finding that squatters on public land were protected under the fourth amendment in their makeshift shacks); *see also infra* notes 153-219 (discussing these and other cases regarding fourth amendment rights in makeshift homes). For other recent cases involving the rights of the homeless, see Hanley, *Suing, a Homeless Man Refuses to Yield*, N.Y. Times, Oct. 10, 1991, at B1, col. 1 (reporting on homeless man suing city officials for harassment); Curriden, *Homeless Privacy Rights: Court Requires Warrant for Search of Duffel Bag Hidden Under Bridge*, 77 A.B.A. J. 33 (July 1991)

the search of a homeless man's makeshift home located under a highway, *State v. Mooney*,[24] generated much discussion on the fourth amendment rights of the homeless.[25] In light of these current circumstances, it is an appropriate time to evaluate the relationship of the fourth amendment to the homeless and, specifically, to determine whether such people are protected by the fourth amendment in their "homes."

This Note explores the rights of homeless persons to be free from warrantless searches and seizures under the fourth amendment. After arguing that homeless persons do have this right under certain circumstances, this Note proposes a test to determine when this protection is appropriate. Part I provides a brief background on the history of fourth amendment jurisprudence and the genesis of the meaning of "search." This Part will show how the fourth amendment doctrine has evolved historically from protecting solely rights based on property interests, to protecting reasonable expectations of privacy as set out by the Supreme Court in the landmark case of *Katz v. United States*.[26] This Part also discusses the ambiguity inherent in the *Katz* test, as well as the subsequent refinement of that test in later cases. Part II explores the cases that have focused on the fourth amendment rights of both homeless and non-homeless people in makeshift or temporary homes. This Part then critiques the reasoning behind these cases in light of *Katz* and the Supreme Court's subsequent fourth amendment jurisprudence. Part III then proposes a test, based on *Katz* and its progeny, for determining whether the fourth amendment protects a homeless person. This Part suggests that there cannot be a categorical rule regarding the fourth amendment rights of the homeless; instead, this Part argues that the test should be an ad hoc standard, and sets out factors that courts should use to determine whether the homeless are protected by the fourth amendment. Finally, this Note concludes that the fourth amendment rights of the homeless will often be influenced by the treatment of the homeless by the community in which they are located.

I. GENESIS OF FOURTH AMENDMENT ANALYSIS: THE MEANING OF "SEARCH" UNDER *KATZ*

A. *Early Fourth Amendment Analysis*

The fourth amendment provides: "The right of the people to be secure

(reporting on federal ruling in Miami "that police sweeps of homeless belongings were in contempt of an earlier injunction").

24. 218 Conn. 85, 588 A.2d 145, *cert. denied*, 112 S. Ct. 330 (1991). For a discussion of this case, see *infra* notes 186-202 and accompanying text.

25. *See A Home Under the Highway*, Wash. Post, Mar. 21, 1991, at A20, col. 1; Kennedy, *Legal Issue: Is Homeless Man's 'Home' a Castle?*, Boston Globe, Jan. 13, 1991, at 29, col. 2; *A Homeless Person's Cave is His or Her Castle*, N.Y. Times, Dec. 4, 1990, at A30, col. 4 (letter from Deborah A. Geier, Assistant Professor of Law, Cleveland State University, to the Editor of the N.Y. Times); Calve, *Does the Fourth Amendment Protect the Homeless?*, N.J.L.J., Oct. 18, 1990, at 9, col. 1.

26. 389 U.S. 347 (1967).

in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[27] With this language, the fourth amendment requires law enforcement activities to be reasonable only if they are "searches" or "seizures."[28] The Supreme Court, however, has never fully resolved the question of what constitutes a search.[29]

In early fourth amendment analysis, the Court based its inquiry entirely on property interests,[30] and recognized police activity as a search only if the government physically trespassed on a "constitutionally protected" area,[31] such as a home.[32] Accordingly, in 1924, the Supreme Court in *Hester v. United States*[33] held that no search occurred when government agents trespassed on land near the defendant's house, because such "open fields" were not constitutionally protected areas.[34] Likewise, in *Olmstead v. United States*,[35] the Court held that a government wiretap of the defendant's telephone was not a search within the fourth amendment because the activity did not constitute a trespass.[36]

Ultimately, however, the centrality of property and possessory interests in fourth amendment analysis began to erode, beginning with the Court's statement in *Silverman v. United States*[37] that "Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of . . . real property law."[38] In *Warden v. Hayden*[39], the Court further discredited the importance of property rights in fourth amendment analysis, and acknowledged that "the principal object of the Fourth Amend-

27. U.S. Const. amend. IV. In addition, the fourth amendment provides that: "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.*

28. *See* 1 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 2.1, at 299 (2d ed. 1987).

29. *See id.* § 2.1(a), at 302.

30. For a discussion of the history of the fourth amendment, see generally N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937).

31. *See* Silverman v. United States, 365 U.S. 505, 512 (1961); W. LaFave, *supra* note 28, § 2.1(a), at 302-03. "Constitutionally protected" areas were considered to be those specified by the fourth amendment: "persons" (including bodies and clothing); "houses" (including apartments and business offices); "papers;" and "effects" (such as automobiles). *See id.* at 303.

32. The Supreme Court has traditionally regarded the home as a constitutionally protected area, and "accorded [it] the full range of Fourth Amendment protections." Lewis v. United States, 385 U.S. 206, 211 (1966); *see Silverman*, 365 U.S. at 511; *see also* Payton v. New York, 445 U.S. 573, 601 (1980) (noting the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic"). This regard for the sanctity of the home dates back to the early landmark case of Boyd v. United States, 116 U.S. 616, 626-30 (1886).

33. 265 U.S. 57 (1924).

34. *See id.* at 59.

35. 277 U.S. 438 (1928).

36. *See id.* at 466.

37. 365 U.S. 505 (1961).

38. *Id.* at 511.

39. 387 U.S. 294 (1967).

ment is the protection of privacy rather than property. . . ."[40] Finally, with the landmark case of *Katz v. United States*,[41] the Court completely eradicated its reliance on property or possessory interests in its fourth amendment analysis,[42] and extended fourth amendment protections to unreasonable invasions of privacy.[43]

B. *Reformulation of Fourth Amendment Analysis Under* Katz*: The "Reasonable Expectation of Privacy" Test*

Katz is widely recognized as a watershed in fourth amendment jurisprudence.[44] In *Katz*, government agents had wiretapped the defendant's conversation at a public telephone booth and used this recording as evidence at trial. Katz objected, claiming that the booth was a "constitutionally protected area."[45]

The Court held that the government's wiretapping did constitute a "search and seizure" within the meaning of the fourth amendment.[46] The Court, however, declined to frame the issue on whether the phone booth was a "constitutionally protected area," and rejected the government's contention that there was no fourth amendment violation because the surveillance method used did not physically penetrate the telephone booth.[47] Rather, recognizing that "the Fourth Amendment protects people, not places," the Court in *Katz* held that "[w]hat a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected."[48]

With this formulation, the *Katz* court rejected the trespass-based test and placed the focus of fourth amendment analysis on the *interest* claimed by the individual, rather than on the *means* used by the government.[49] Thus, under *Katz*, any government activity that intrudes on an interest protected by the fourth amendment is considered a search, re-

40. *Id.* at 304. The Court further stated, "[s]earches and seizures may be 'unreasonable' within the Fourth Amendment even though the Government asserts a superior property interest at common law," thus recognizing that "[the Court has] increasingly discarded fictional and procedural barriers [that] rested on property concepts." *Id.*

41. 389 U.S. 347 (1967).

42. Nevertheless, some commentators have noted that since *Katz* the Court has returned to a property-based analysis. *See infra* notes 140-47 and accompanying text.

43. *See* W. LaFave, *supra* note 28, § 2.1(b), at 306-07; Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 382-83 (1974); Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 Am. Crim. L. Rev. 257, 267 (1984).

44. *See* Amsterdam, *supra* note 43, at 382; W. LaFave, *supra* note 28, § 2.1(a), at 303.

45. *Katz*, 389 U.S. at 349.

46. *See id.* at 353.

47. *See id.*

48. *Id.* at 351-52 (emphasis added). According to the *Katz* Court, whether the government has violated an individual's rights under the fourth amendment depends on whether it has "violated the privacy upon which [the individual] justifiably relied." *Id.* at 353.

49. *See* Amsterdam, *supra* note 43, at 383.

gardless of whether a trespass has occurred.[50]

In his *Katz* concurrence, Justice Harlan suggested a two-part test to replace the outmoded property interest test. This test—"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' "[51]—is widely recognized as the touchstone of fourth amendment analysis.[52] Courts have interpreted the first prong of the test to mean that the person claiming a fourth amendment violation must have *manifested* an expectation that his conduct will be private.[53] Thus, this prong is treated as an objective, rather than a subjective, condition.[54] As for the second prong of the *Katz* test, the Court has interpreted this to mean that an expectation will be considered reasonable if it is based on "understandings that are recognized and permitted by society."[55] The Court, however, has found that "no single factor invariably will be determinative" in this analysis.[56] Nevertheless, factors the Court has considered in assessing whether an individual's fourth amendment right has been violated include: whether the individual "took *normal* precautions to maintain his privacy—that is, precautions customarily taken by those seeking privacy";[57] the "intention of the Framers of the Fourth Amend-

50. *See id.*

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

52. *See* California v. Ciraolo, 476 U.S. 207, 211 (1986); Smith v. Maryland, 442 U.S. 735, 739 (1979); Note, *Protecting Privacy Under the Fourth Amendment*, 91 Yale L.J. 313, 316 (1981) [hereinafter *Protecting Privacy*].

53. *See Smith*, 442 U.S. at 740; United States v. Taborda, 635 F.2d 131, 137 (2d Cir. 1980).

54. *See Taborda*, 635 F.2d at 137. This prong, however, has proved to be relatively unimportant in determining the outcome of the cases. *See* Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 Ind. L.J. 549, 560 & n.50 (1990); *see also* Florida v. Riley, 488 U.S. 445, 450-51 (1989) (expectation of privacy was not reasonable even though defendant had manifested a subjective expectation of privacy); California v. Ciraolo, 476 U.S. 207, 211, 215 (1986) (same); Oliver v. United States, 466 U.S. 170, 182-83 (1984) (expectation of privacy was not legitimate although petitioners had built fences and put "No Trespassing" signs around their property).

Indeed, Justice Harlan later expressed misgivings about the subjective element of this formulation in his oft-quoted dissent in United States v. White: "The analysis must, in my view, transcend the search for subjective expectations or legal attributions of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of the laws that translate into rules the customs and values of the past and present." 401 U.S. 745, 786 (1971) (Harlan, J., dissenting); *see also* Amsterdam, *supra* note 43, at 384 ("An actual, subjective expectation of privacy obviously has no place . . . in a theory of what the fourth amendment protects.").

55. Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978); *see also* United States v. Taborda, 635 F.2d 131, 138 (2d Cir. 1980) (requiring that "the action occur in a place in which society is prepared, because of its code of values and its notions of custom and civility, to give deference to a manifested expectation of privacy").

56. *Rakas*, 439 U.S. at 152 (Powell, J., concurring); *see* Oliver v. United States, 466 U.S. 170, 177 (1984).

57. *Rakas*, 439 U.S. at 152 (Powell, J., concurring) (emphasis added); *see* Rawlings v. Kentucky, 448 U.S. 98, 105 (1980); Katz v. United States, 389 U.S. 347, 352 (1967).

ment";[58] the way an individual has used a location;[59] and "our societal understanding that certain areas deserve the most scrupulous protection from government invasion."[60]

The *Katz* two-pronged test has come to be called the "reasonable expectation of privacy" test.[61] Because of the difficulty in defining the meaning of a "reasonable expectation of privacy," however, the *Katz* test has been subject to criticism by many commentators.[62] Professor Am-

58. Oliver v. United States, 466 U.S. 170, 178 (1984); *see Rakas*, 439 U.S. at 153 (Powell, J., concurring).

59. *See* Rakas v. Illinois, 439 U.S. 128, 153 (1978) (Powell, J., concurring); *see also Oliver*, 466 U.S. at 179 (expectation of privacy in "open fields" is not one society would consider reasonable as area is not the "setting for . . . intimate activities").

60. *Oliver*, 466 U.S. at 178.

61. *See* Terry v. Ohio, 392 U.S. 1, 9 (1968); Wasserstrom, *supra* note 43, at 268. The Court has subsequently used the terms "legitimate" and "justifiable" interchangeably with "reasonable." *See* Smith v. Maryland, 442 U.S. 735, 740; Note, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-Katz Jurisprudence*, 61 Wash. L. Rev. 191, 195 & n.27 (1986) [hereinafter *Defining a Search*].

Commentators have remarked that making an assessment based on whether an expectation is "reasonable" makes the question a tautology—that is, courts will find that the fourth amendment protects an individual only if he exhibits a reasonable expectation of privacy, but society, represented by the courts, will only find an expectation of privacy to be reasonable if it is protected by the fourth amendment. *See* Mickenberg, *Fourth Amendment Standing After* Rakas v. Illinois*: From Property to Privacy and Back*, 16 New Eng. L. Rev. 197, 209-10 (1981). Thus, the question becomes a value judgment. *See* Amsterdam, *supra* note 43, at 385, 403. As Professor Amsterdam has observed, the inquiry "is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." *Id.* at 403.

62. *See, e.g.*, Mickenberg, *supra* note 61, at 383-85 (arguing that the characterization of the *Katz* decision as the "reasonable expectation of privacy" test goes against the meaning of *Katz*); Wasserstrom, *supra* note 43, at 270-71 & n.78 (without further explanation, there is no justifiable way to decide what makes an expectation of privacy "reasonable"); Wilkins, *Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis*, 40 Vand. L. Rev. 1077, 1088 & n.50, 1090 & n.56 (1987) (*Katz* test is difficult for courts to apply and results in inconsistent application by the lower courts); *Protecting Privacy*, *supra* note 52, at 327 ("reasonable expectation of privacy formula has become a manipulable and restrictive analytical tool").

As a result, some have proposed alternate standards for fourth amendment analysis. *See, e.g.*, Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 Syracuse L. Rev. 647, 650-51 (1988) (arguing that a " 'value-dominated model' " of the fourth amendment—which focuses on the privacy interests invaded—rather than a " 'means model' "—which focuses on the manner in which the government intruded—should be used); Katz, *supra* note 54, at 581 (proposing recognition of an intermediate category of searches, described as "intrusions"); Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 Minn. L. Rev. 583, 627 (1989) (proposing a test in which courts look at degree of public exposure, not mere fact or possibility of public exposure); Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 Hastings L.J. 645, 698 (1985) (arguing that the inquiry should focus on "what informational privacy people *need* to enjoy guaranteed rights and interests," rather than what privacy people *expect*); *Defining a Search*, *supra* note 61, at 207-11 (arguing that "social norms of privacy" should serve as a standard for defining fourth amendment searches).

sterdam, on the other hand, has observed that the *Katz* decision, in rejecting prior formulas as being unable to act as a "talismanic solution to every Fourth Amendment problem,"[63] was precisely intended to "resist captivation in any formula."[64]

C. *Post-*Katz*: A Further View of the "Reasonable Expectation of Privacy" Test*

Katz is generally recognized as an expansion of fourth amendment protections.[65] Nevertheless, this expansive view of fourth amendment protection, as articulated by the Warren Court in *Katz*, has been subsequently narrowed.[66] Indeed, some commentators have argued that *Katz* itself provided a means for narrowing the scope of fourth amendment protection by allowing the Court to deny such protection based on a lack of "reasonableness" or "legitimacy."[67] The Court, however, continues to use *Katz* as the lodestar in its fourth amendment analysis.

In its application of the fourth amendment to post-*Katz* cases involving open fields, aerial surveillance, and garbage, the Court emphasized a number of factors that currently play a significant role in its interpretation of the *Katz* "reasonable expectation of privacy" test. In particular, the Court has reintroduced such factors as reference to a "place" and the degree of physical intrusiveness of the government surveillance—factors that many thought *Katz* had effectively eradicated—into its fourth amendment analysis. Most importantly, the Court has introduced the social practice of the community in question as a factor to be considered when determining whether an expectation of privacy is one that society would regard as reasonable.

1. The "Open Fields" Doctrine

Although *Katz* eradicated the notion of "constitutionally protected areas," the Court made clear in *Oliver v. United States*[68] that reference to a "place" still played a role in fourth amendment doctrine.[69]

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63. Katz v. United States, 389 U.S. 347, 351 n.9 (1967).

64. Amsterdam, *supra* note 43, at 385.

65. *See id.*

66. *See* Wasserstrom, *supra* note 43, at 269; Yackle, *The Burger Court and the Fourth Amendment*, 26 U. Kan. L. Rev. 335, 362-63 (1978); Note, *Defining a Search*, *supra* note 61, at 191-92; Note, *A Reconsideration of the* Katz *Expectation of Privacy Test*, 76 Mich. L. Rev. 154, 154 & n.5 (1977) [hereinafter *Reconsideration of Katz*]; *see also infra* notes 68-152 and accompanying text (discussing post-*Katz* cases).

67. *See* Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. Crim. L. & Criminology 1105, 1126 (1989); Katz, *supra* note 54, at 564; Wasserstrom, *supra* note 43, at 271-72.

68. 466 U.S. 170 (1984).

69. After *Katz*, many courts assumed that the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), had been overruled *sub silentio*. *See* W. LaFave, *supra* note 28, § 2.4(a), at 426. Nevertheless, although the Court in *Oliver* purported to follow the standard set out in *Katz*, at least one commentator has argued that *Oliver* marked a re-emergence of fourth amendment analysis based on property distinctions by holding

Oliver involved two similar consolidated cases in which the police, after receiving tips that the petitioners were growing marijuana, investigated their land despite the existence of "No Trespassing" signs.[70] Although the petitioners had thus taken steps to manifest their expectation of privacy, the Court reaffirmed *Hester v. United States*[71] and held that "open fields" were not protected within the ambit of the fourth amendment because an expectation of privacy in an open field is not one that society is willing to regard as reasonable.[72] The Court reasoned that "open fields do not provide the setting for those intimate activities that the [fourth] Amendment is intended to shelter from government interference or surveillance."[73]

2. The Aerial Surveillance Cases

Like *Oliver*, a group of decisions known as the "aerial surveillance cases" resulted in a further narrowing of fourth amendment protection.[74] In these three cases—*California v. Ciraolo*,[75] *Dow Chemical Co. v. United States*,[76] and *Florida v. Riley*[77]—a divided Court wrestled with the issue of when the fourth amendment prohibits aerial surveillance. The Court, relying on factors such as physical intrusiveness, used the language of *Katz* to move farther away from its original spirit.[78] Significantly, these cases demonstrate the use of social custom in the Court's fourth amendment analysis.

In *California v. Ciraolo*,[79] the Court held that the petitioner's fourth amendment rights were not violated by a warrantless naked-eye aerial observation made by police flying over the defendant's backyard.[80] In *Ciraolo*, the police arrived at the defendant's backyard on a tip that he

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that "open fields" are constitutionally unprotected areas. *See* Note, Florida v. Riley: *The Emerging Standard for Aerial Surveillance of the Curtilage*, 43 Vand. L. Rev. 275, 283-84 (1990) [hereinafter *Emerging Standard*].

70. *See Oliver*, 466 U.S. at 173-75.

71. 265 U.S. 57 (1924); *see supra* notes 33-34 and accompanying text.

72. *See Oliver*, 466 U.S. at 178-79.

73. *Id.* The dissent in *Oliver*, written by Justice Marshall and joined by Justices Brennan and Stevens, noted that in *Katz* the Court "repudiated the proposition that the Fourth Amendment applies only to a limited set of locales or kinds or property," and thus criticized the majority's holding as being "inconsistent with this line of cases." *Id.* at 187-88 (Marshall, J., dissenting). To some, the rationale of the dissenters in *Oliver* is closer to the spirit of the *Katz* standard. *See* W. LaFave, *supra* note 28, § 2.4(a), at 428.

Subsequent use of the "open fields" doctrine has not been restricted to land suitable for pasture. *See generally id.* § 2.4(a), at 425 (noting that "open fields" doctrine has been applied to wooded areas, vacant lots in urban areas, open beaches, and open waters).

74. *See* Gutterman, *supra* note 62, at 712; Note, Florida v. Riley: *The Descent of Fourth Amendment Protections in Aerial Surveillance Cases*, 17 Hastings Const. L.Q. 725, 726 (1990) [hereinafter *Descent*].

75. 476 U.S. 207 (1986).

76. 476 U.S. 227 (1986).

77. 488 U.S. 445 (1989).

78. *See* Gutterman, *supra* note 62, at 712-17.

79. 476 U.S. 207 (1986).

80. *See id.* at 215.

grew marijuana there, but were unable to see into the yard because it was enclosed by fences. Nevertheless, the officers were able to identify the plants by later flying over the defendant's backyard at an altitude of 1000 feet.[81] On the basis of this observation, the police were able to obtain a search warrant for Ciraolo's property that subsequently led to the seizure of seventy-three marijuana plants.[82]

In a 5-4 decision, the Supreme Court held that the warrantless aerial surveillance of the yard from an altitude of 1000 feet was valid under the fourth amendment.[83] As in *Oliver*, the Court found that the defendant had manifested a subjective expectation of privacy, thus fulfilling the first prong of the *Katz* test. But because this expectation was not one society would regard as "reasonable," the Court held that the defendant failed the second prong of the test.[84] Chief 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[85] and that they did so "in a physically nonintrusive manner."[86] In addition, Chief Justice Burger noted that Ciraolo had plainly risked public exposure since airflight is routine and any member of the public could have looked down and seen the backyard.[87]

In the companion case to *Ciraolo*, *Dow Chemical Co. v. United States*,[88] the Supreme Court held that the Environmental Protection Agency's warrantless aerial surveillance of Dow's 2000-acre manufacturing complex, using a precision aerial camera, was not a search under the fourth amendment.[89] Dow had installed "elaborate" security measures to prevent the public from viewing the facility at the ground level.[90] In

81. *See id.* at 209.

82. *See id.* at 209-10.

83. *See id.* at 210. Originally, the trial court had denied a motion to suppress the evidence and Ciraolo was convicted. *See id.* The California Court of Appeal then reversed, holding that the warrantless search violated Ciraolo's fourth amendment rights. *See id.*

84. *See id.* at 213-14.

85. *See id.* at 213. Justice Powell, joined in dissent by Justices Brennan, Marshall, and Blackmun, criticized the majority's reliance on the fact that members of the public may fly in planes over the backyard. *See id.* at 223 (Powell, J., dissenting). Powell noted that the risk that a member of the public flying overhead would actually be able to observe such activities was "virtually nonexistent" and "too trivial to protect against." *Id.* at 223-24. In this same vein, the majority's approach has been criticized as ignoring the "normative element of the 'reasonable expectation' standard." *See The Supreme Court, 1985 Term - Leading Cases*, 100 Harv. L. Rev. 100, 142 (1986) [hereinafter *1985 Leading Cases*].

86. California v. Ciraolo, 476 U.S. 207, 213 (1986).

87. *See id.* at 214-15.

88. 476 U.S. 227 (1986).

89. *See id.* at 239.

90. *See id.* at 229. These security measures included an eight-foot high fence surrounding the entire complex; monitoring by security guards and closed-circuit televisions; motion detectors; and strict policies prohibiting the taking of photographs without management approval. *See id.* at 241 (Powell, J., dissenting).

addition, Dow had taken precautions to protect the complex from aerial surveillance.[91] The Environmental Protection Agency, after having been denied permission to visit Dow, hired a private aerial photographer with a sophisticated aerial camera to take photographs of the Dow complex without first obtaining a search warrant.[92]

Despite these security measures, Chief Justice Burger, again writing for the majority, held that the 2,000 acres of the industrial complex were more analogous to unprotectable "open fields" than to the curtilage of a home, which is entitled to fourth amendment protection.[93] Moreover, the Court found that "the Government has 'greater latitude to conduct warrantless inspections of commercial property,' because 'the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home.' "[94] Chief Justice Burger reasoned that "[t]he intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant," and thus the area in question was more like an unprotectable open field than curtilage.[95] Lastly, the Court relied on the fact that, because the photographs did not reveal "intimate activities," their use was not proscribed by the fourth amendment.[96]

Finally, in *Florida v. Riley*,[97] a sheriff went to Riley's mobile home to investigate a tip that Riley was growing marijuana on his property.[98] The sheriff, however, was unable to view the contents of a greenhouse that was located ten to twenty feet behind the mobile home.[99] A wire fence posted with a "DO NOT ENTER" sign surrounded both the mobile home and the greenhouse.[100] The sheriff then obtained a helicopter and circled over the defendant's property at an altitude of approximately

91. *See id.* at 241.

92. *See id.* at 242.

93. *See id.* at 239.

94. *Id.* at 237-38 (quoting Donovan v. Dewey, 452 U.S. 594, 598-99 (1981)).

95. *Id.* at 236.

96. *See id.* The Court, however, noted in dicta that surveillance by equipment not widely available to the public might violate the fourth amendment. *See id.* at 238-39.

Justice Powell, in a dissent joined by Justices Brennan, Marshall and Blackmun, criticized the majority for "ignor[ing] the heart of the *Katz* standard" by basing its holding on the government's failure to trespass, instead of focusing on the petitioner's privacy interests. *Id.* at 247.

The decisions in both *Ciraolo* and *Dow* have been widely criticized. As one commentator has stated, "[c]onsidered together, the *Ciraolo* and *Dow* decisions demonstrate the Court's eagerness to undercut the reasonable expectation [of privacy] standard set out in *Katz*." *1985 Leading Cases*, *supra* note 85, at 143; *see also Descent*, *supra* note 74, at 738 ("*Ciraolo* and *Dow* opened the door to further restriction of fourth amendment protection by tying the level of fourth amendment protection to the definition of lawful . . . viewing locations.").

97. 488 U.S. 445 (1989) (plurality opinion).

98. *See id.* at 448.

99. *See id.*

100. *See id.*

400 feet.[101]

Justice White, writing for the plurality, held that police surveillance by a helicopter at an altitude of 400 feet did not violate the fourth amendment.[102] Although the plurality initially found that Riley had manifested a subjective expectation of privacy—thus fulfilling the first prong of the *Katz* test[103]—it also found that this expectation was not one that society would regard as reasonable because the helicopter was within navigable airspace and thus the greenhouse could have been observed by any member of the public legally flying over it.[104] Citing *Ciraolo*, the plurality reasoned that " 'private and commercial flight [by helicopter] in the public airways is routine' in this country."[105] The Court took note of the lack of evidence that helicopter flights at such altitudes are so rare that Riley could have reasonably believed he would not have been observed.[106] Furthermore, the Court stressed that "there is no indication that such flights are unheard of in Pasco County, Florida," where Riley's property was located,[107] and noted in dictum that aerial surveillance will not necessarily "always pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law."[108] This is significant because, in so finding, the Court made clear that if Riley had brought forth evidence showing that flights at such altitudes were rare in the country or in the county, his expectation of privacy might have been considered reasonable, despite the legality of the flights. Finally, the plurality also reiterated the *Ciraolo* Court's reasoning—that "the home and its curtilage are not necessarily protected from inspection that involves no physical invasion"[109]—and concluded that no intimate details of the home were observed and that "there was no undue noise, and no wind, dust, or threat of injury."[110]

Justice O'Connor, in her concurrence, agreed with the plurality that Riley's expectation of privacy was not one that society would regard as reasonable.[111] She disagreed, however, with the plurality's emphasis on police compliance with Federal Aviation Authority regulations in determining whether the defendant's fourth amendment rights had been violated.[112] Justice O'Connor argued that the relevant inquiry should not be whether " '[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet,' "[113] but

101. *See id.*
102. *See id.* at 451-52.
103. *See id.* at 449.
104. *See id.* at 450-51.
105. *Id.* at 450 (quoting California v. Ciraolo, 476 U.S. 207, 215 (1986)).
106. *See id.* at 451-52.
107. *Id.* at 450.
108. *Id.* at 451.
109. *Id.* at 449.
110. *Id.* at 452.
111. *See id.* at 452 (O'Connor, J., concurring).
112. *See id.*
113. *Id.* at 455 (quoting plurality at 451).

whether the public *actually does* travel overhead at that altitude with such regularity that Riley's expectation of privacy was not one that society would recognize as " 'reasonable.' "[114] Justice O'Connor concluded that, if the public rarely travels overhead at such altitudes, Riley could not have " 'knowingly expose[d]' his greenhouse to the public view."[115] The standard enunciated by Justice O'Connor, and agreed to by the four dissenting Justices,[116] has been recognized as superior to the analysis put forth by the plurality in *Riley* because it is closer to the *Katz* rationale.[117] One commentator has termed this standard the "frequency standard" because the "linchpin of this analysis is the frequency of nongovernmental flights at the altitude in question."[118]

Although the plurality relied on the legality of the police officer's vantage point, it is important to recognize that *all* the Justices in *Riley* discuss the frequency of flights at a certain altitude as an important factor.[119] Thus, actual societal practice—such as the regularity with which the public flies overhead—is a significant factor in the Court's analysis. In fact, at least one commentator contends that if, in a similar situation, a defendant could prove the rarity of flights at the altitude in question, the Court would probably find that the fourth amendment had been violated.[120] Ultimately, however, the Court in *Riley* created confusion by relying on the government's presence in legally navigable air-

114. *Id.* at 454 (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Similarly, Justice Brennan, joined in dissent by Justices Marshall and Stevens, reiterated that the plurality's reliance on the fact that the helicopter was within an altitude allowed by the FAA was misplaced, and stressed that this emphasis "ignores the very essence of *Katz*." *Id.* at 457 (Brennan, J., dissenting). Justice Brennan argued that the correct inquiry was not whether the police observed the property from a vantage point where they had a legal right to be, but whether such observation was "so commonplace" that Riley's expectation could not be deemed reasonable. *See id.* at 460.

Justice Blackmun, in a separate dissent, agreed that the fact that the helicopter was flying within legal altitudes should not determine whether an expectation of privacy is "reasonable," and noted the importance that a majority of the Court (Justice O'Connor and the four dissenting Justices) agreed on this analysis. *See id.* at 467 (Blackmun, J., dissenting).

115. *Id.* at 455.

116. *See supra* note 114.

117. *See Emerging Standard*, *supra* note 69, at 291.

118. *Id.* at 292.

119. The plurality noted the significance of the lack of evidence proving flights at such altitudes are "sufficiently rare." Florida v. Riley, 488 U.S. 445, 451 (1989). Justice O'Connor posed the question in terms of whether there was a "sufficient regularity" of flights at that altitude. *Id.* at 454 (O'Connor, J., concurring). Justice Brennan (joined by two Justices) formulated the issue as whether observation of the area by the general public was "so commonplace" that the expectation could not be considered reasonable. *Id.* at 460 (Brennan, J., dissenting). Finally, Justice Blackmun noted the rarity of helicopter flights at an altitude of 400 feet. *See id.* at 467 (Blackmun, J., dissenting).

120. *See* Fee, *Narrowing the Protection of the Fourth Amendment*, 1989 Ann. Surv. Am. L. 371, 396. Indeed, the Colorado Court of Appeals in People v. Pollock, 796 P.2d 63 (Colo. Ct. App. 1990), found that a warrantless aerial surveillance of the defendant's backyard violated the fourth amendment after he introduced evidence on the infrequency of flights at the altitude in question. *See id.* at 64-65.

space, and then retreating from this position by noting that the aerial surveillance within legal limits "will [not] always pass muster under the Fourth Amendment."[121] The courts have not yet resolved this issue.[122]

3. The Fourth Amendment and Garbage

In *California v. Greenwood*,[123] the Court found that an expectation of privacy in garbage bags left for collection outside the curtilage of the home was unreasonable.[124] With this holding, the Court also emphasized the important role that social custom plays in determining whether an expectation of privacy is one society would consider as reasonable.

The police in *Greenwood*, following a tip that Greenwood might be involved in drug trafficking, conducted a surveillance of Greenwood's house.[125] After three months of observation, the police asked Greenwood's regular garbage collector to turn over the garbage to police officers, who then inspected it without a warrant.[126] Upon inspection of the garbage, the police discovered narcotics, and they subsequently arrested Greenwood and another occupant of the house.[127] After the defendants were out on bail, the police again obtained Greenwood's garbage from the trash collector without a warrant. Finding more evidence of narcotics, the police arrested Greenwood a second time.[128]

The Supreme Court held that the police did not violate the defendant's fourth amendment rights.[129] Justice White, writing for the majority, reasoned that the defendants had "exposed their garbage to the public," thus making their expectation of privacy unreasonable.[130] First, the Court found that, because the defendants had "placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through [it]," they had no rea-

121. *Riley*, 488 U.S. at 451.

122. The lower courts' post-*Riley* decisions illustrate this confusion. *Compare* United States v. Penny-Feeney, 773 F. Supp. 220, 227 (D. Haw. 1991) (citing *Riley* for proposition that no violation of fourth amendment occurs when police view illegal activity from where they have a legal right to be); United States v. Boger, 755 F. Supp. 333, 339 (E.D. Wash. 1990) (same) *and* State v. Lange, 158 Wis. 2d 609, 622, 463 N.W.2d 390, 395 (Wis. Ct. App. 1990) (same) *with* United States v. Hendrickson, 940 F.2d 320, 323 (8th Cir.) (citing *Riley* for proposition that there was no fourth amendment search because air travel is routine), *cert. denied*, 112 S. Ct. 610 (1991); People v. Pollock, 796 P.2d 63, 64 (Colo. Ct. App. 1990) (finding aerial surveillance violated fourth amendment because of proof of infrequency of such flights) *and* State v. Venet, 103 Or. App. 363, 366, 797 P.2d 1055, 1056 (1990) (whether police were flying above or below legal navigable airspace is irrelevant to fourth amendment analysis), *cert. denied*, 112 S. Ct. 191 (1991). *See also* People v. McKim, 214 Cal. App. 3d 766, 771, 263 Cal. Rptr. 21, 24 (Cal. Ct. App. 1989) (finding the "dust has not entirely settled on the issue of helicopter aerial surveillance").

123. 486 U.S. 35 (1988).

124. *See id.* at 40-41.

125. *See id.* at 37.

126. *See id.*

127. *See id.* at 38.

128. *See id.*

129. *See id.* at 39-44.

130. *Id.* at 40.

sonable expectation of privacy in the items left out for collection.[131] Second, the Court emphasized that "[i]t is common knowledge that plastic garbage bags left on . . . a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public,"[132] and thus held that the defendants' expectation of privacy was not reasonable because the "evidence of criminal activity . . . could have been observed by any member of the public."[133] Finally, the majority rejected Greenwood's argument that his expectation of privacy should be deemed reasonable because California state law recognized a right to privacy in one's garbage.[134] Justice White emphasized that whether an expectation of privacy is reasonable is not dependent on state law, but on "our *societal* understanding that certain areas deserve the most scrupulous protection from government invasion."[135]

D. *Summary of Post-Katz Cases*

Although the Supreme Court has often adopted a restrictive approach in its post-*Katz* jurisprudence,[136] the Court's analysis underlying these cases demonstrates that the scope of fourth amendment protection remains broader than it was in the pre-*Katz* era. In particular, a number of factors evident in these cases play an important role in the Court's fourth amendment jurisprudence. These factors include: (1) reference to the "place" in which the activity occurred;[137] (2) the degree of intrusiveness

131. *Id.*

132. *Id.* at 40 (footnotes omitted). In his dissent, Justice Brennan, joined by Justice Marshall, acknowledged the occurrence of isolated intrusions into garbage bags, but observed that

> [t]he mere *possibility* that unwelcome meddlers *might* open and rummage through the containers does not negate the expectation of privacy in their contents any more than the possibility of a burglary negates an expectation of privacy in the home; or the possibility that an operator will listen in on a telephone conversation negates an expectation of privacy in the words spoken on the telephone.

Id. at 54 (Brennan, J., dissenting).

133. *Id.* at 41.

134. *See id.* at 43.

135. *Id.* at 43 (emphasis added by Court in *Greenwood*) (quoting Oliver v. United States, 466 U.S. 170, 178 (1984)).

The *Greenwood* decision has been criticized by commentators on numerous grounds. *See, e.g.*, Fee, *supra* note 120, at 381 (noting four errors in the *Greenwood* Court's reasoning); *The Supreme Court—Leading Cases*, 102 Harv. L. Rev. 143, 195 (1988) ("[t]he questionable use of precedent to support this result promises to exacerbate the confusion in the Court's fourth amendment jurisprudence"); Serr, *supra* note 62, at 623 (*Greenwood* decision "unnecessarily drew an absolute line between full fourth amendment protection and no fourth amendment protection."); Note, California v. Greenwood: *A Proposed Compromise to the Exploitation of the Objective Expectation of Privacy*, 38 Buffalo L. Rev. 647, 667 (1990) (proposing a test for garbage that would "reflect the level of privacy which is expected in a particular area by members of our society").

136. *See Wasserstrom*, *supra* note 43, at 269; Yackle, *supra* note 66, at 362-63; *Defining a Search*, *supra* note 61, at 191; Serr, *supra* note 62, at 587; *Reconsideration of Katz*, *supra* note 66, at 154 & n.5.

137. *See Oliver*, 466 U.S. at 179 (referring to "open fields"); Dow Chem. Co. v. United

of the surveillance;[138] and (3) the custom of the community.[139]

The Court, in these recent cases, continually refers to the "place" in which the surveillance occurred.[140] Although this reference to a place may signify a return to the pre-*Katz* era of a trespass-based analysis,[141] it is possible to reconcile this trend with the *Katz* rationale. In keeping with the spirit of *Katz*, the Court has found that certain places deserve fourth amendment protection because of the privacy—not property—interests associated with those places.[142] Thus, the Court refers to "place" simply as one factor in making the larger determination of whether the expectation of privacy is reasonable.[143] Accordingly, the Court has established a hierarchy in which certain places, because of their association with intimate activities, will more likely be accorded a reasonable expectation of privacy.[144]

States, 476 U.S. 227, 236 (1986) (distinguishing between "industrial curtilage" and "curtilage of a dwelling").

138. *See* Florida v. Riley, 488 U.S. 445, 449 (1989) ("the home and its curtilage are not necessarily protected from inspection that involves no physical invasion"); California v. Ciraolo, 476 U.S. 207, 213 (1986) (noting that police activity took place in a "physically nonintrusive manner").

139. *See infra* notes 148-51 and accompanying text.

140. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 179 (1984) (referring to "open fields"); Dow Chem. Co. v. United States, 476 U.S. 227, 237 (1986) (referring to "commercial property").

141. *See, e.g.*, Gutterman, *supra* note 62, at 712 (court returned to the notion of trespass in *Dow* and *Ciraolo*); 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").

142. *See* United States v. Segura, 468 U.S. 796, 810 (1984) (Court noted that "the home is sacred in Fourth Amendment terms not primarily because of the occupants' *possessory* interests in the premises, but because of their *privacy* interests in the activities that take place within") (emphasis in original). In so doing, the analysis remained within the boundaries of *Katz*. *See* Wilkins, *supra* note 62, at 1111-12; *see also Katz*, 389 U.S. at 361 (Harlan, J., concurring) (observing that fourth amendment determination "requires reference to a 'place' "). Thus, as one commentator has noted, "[a]fter *Katz*, the home is a protected locale, not only by virtue of its explicit mention in the language of the fourth amendment, but also (and perhaps primarily) because of the human activities innately associated with it." Wilkins, *supra* note 62, at 1111-12.

143. *See* Wilkins, *supra* note 62, at 1109-14. Even where the Court refers to property rights in its analysis, this continues to be but one factor in the determination. One commentator has argued that the Court has continued to increase its reliance on property interests after *Katz*, culminating in Rakas v. Illinois, 439 U.S. 128 (1978). *See* Mickenberg, *supra* note 61, at 198. In *Rakas*, the Court held that the petitioners, who "asserted neither a property nor a possessory interest in the automobile [searched], nor an interest in the property seized," did not have a legitimate expectation of privacy. *Rakas*, 439 U.S. at 148. Even so, the Court specifically stated that property rights, though an important factor, would not be dispositive of the analysis. *See id.* at 143 n.12. Thus, property rights are still considered under the *Katz* analysis, although they are not determinative. *See* Mickenberg, *supra* note 61, at 209. Despite this, many lower courts have used *Rakas* to support their findings that a trespasser can not have rights under the fourth amendment because they do not have property rights in the place in question. *See* United States v. Pitt, 717 F.2d 1334, 1337-38 (11th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984); United States v. Sanchez, 635 F.2d 47, 64 (2d Cir. 1980).

144. *See* Wilkins, *supra* note 62, at 1113; *see also* United States v. Dunn, 480 U.S. 294,

In addition, the Court appears to have reintroduced the factor of physical intrusiveness into its analysis.[145] Some observers have argued that this, like the Court's reference to "place,"[146] signifies a return to a property-based analysis. Like the Court's use of "place," however, the recent trend of referring to the degree of physical intrusiveness may be viewed as a factor that was not eliminated by *Katz*, but merely relegated to a less important role in making the fourth amendment determination.[147]

Finally, more recent decisions as *Florida v. Riley*[148] and *California v. Greenwood*[149] suggest that the Court places great emphasis on societal customs—rather than mere legality—in determining whether an expectation of privacy is one society would regard as reasonable. A majority of the Court in *Riley* found that the actual frequency of the flights by the public, not just the legality of the government viewpoint, was a significant factor in its analysis.[150] Likewise, in *Greenwood*, the Court purported to base its holding on actual societal customs—the "common knowledge" that people often rummage through the trash—rather than on the state law that recognizes a right to privacy in one's garbage.[151]

In sum, the factors emphasized in these cases are useful in determining the current state of *Katz*'s "reasonable expectation of privacy" standard that has proved to be troublesome to courts and commentators alike.[152] Nevertheless, in the specific context of the rights of the homeless, the lower courts, as further discussed below, are often deficient in their application of the "reasonable expectation of privacy" standard to makeshift or temporary homes, going farther than required under the Supreme Court's post-*Katz* jurisprudence, and placing undue emphasis on the trespass factor in their analyses.

II. THE EXPECTATION OF PRIVACY IN A MAKESHIFT HOME

A. *Temporary Homes*

The Supreme Court has recognized that "[a]t the very core [of the fourth amendment] stands the right of a man to retreat into his own

302 (1986) (finding that a barn which is not inhabited has a lesser expectation of privacy); Dow Chem. Co. v. United States, 476 U.S. 227, 237-38 (1986) (finding an expectation of privacy in commercial property differs from that in a home); California v. Carney, 471 U.S. 386, 393 (1985) (finding that a mobile home has a lesser expectation of privacy than a traditional home).

145. *See, e.g.*, California v. Ciraolo, 476 U.S. 207, 213 (1986) (noting the police obtained evidence "in a physically nonintrusive manner"); *Dow*, 476 U.S. at 237 (noting issue in case was "aerial observation . . . *without* physical entry"); Florida v. Riley, 488 U.S. 445, 452 (1989) (finding that "there was no undue noise, and no wind, dust, or threat of injury.").

146. *See supra* note 137 and accompanying text.

147. *See* Wilkins, *supra* note 62, at 1114-21.

148. 488 U.S. 445 (1989).

149. 486 U.S. 35 (1988).

150. *See supra* note 119 and accompanying text.

151. *See supra* notes 132-35 and accompanying text.

152. *See supra* note 62 and accompanying text.

home and there be free from unreasonable governmental intrusion."[153] This high regard for the sanctity of the home does not derive from common-law property rights in the premises; instead, it is based on the privacy interests that are normally associated with the activities that take place in the home.[154]

For this reason, fourth amendment protection does not merely extend to occupants of permanent residences; indeed, the Supreme Court has extended this protection to temporary homes as well. For instance, the Court has long recognized that a guest in a hotel has a constitutional right to be free from unreasonable searches and seizures "[n]o less than the tenant of a house,"[155] as does a tenant of a rooming house.[156] Likewise, the Court recently held in *Minnesota v. Olson*[157] that overnight guests have a reasonable expectation of privacy in another's home, "despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household."[158] Consistent with its other recent decisions that have looked to social practice,[159] the Court in *Olson* emphasized that "[s]taying overnight is a longstanding social custom" and noted that society regarded this function as "valuable."[160]

Similarly, lower courts have recognized that the protection of the fourth amendment applies to such temporary homes as college dormitories and fraternity houses,[161] and even to a "home" whose structure itself is not permanent. For example, some courts have recognized a reasonable expectation of privacy in such transient homes as tents.[162] Thus, in *Kelley v. State*, the Georgia Court of Appeals found that the defendant was entitled to fourth amendment protection in the tent in which he lived because

153. Silverman v. United States, 365 U.S. 505, 511 (1961).

154. *See* Segura v. United States, 468 U.S. 796, 810 (1984).

155. Stoner v. California, 376 U.S. 483, 490 (1964).

156. *See* McDonald v. United States, 335 U.S. 451, 454 (1948).

157. 495 U.S. 91 (1990).

158. *Id.* at 99.

159. *See supra* notes 74-152 and accompanying text.

160. 495 U.S. at 98.

161. *See, e.g.*, Reardon v. Wroan, 811 F.2d 1025 (7th Cir. 1987) (fraternity house); Morale v. Grigel, 422 F. Supp. 988 (D.C.N.H. 1976) (dormitory room).

162. *See* Kelley v. State, 146 Ga. App. 179, 182-83, 245 S.E.2d 872, 874-75 (1978); State v. Clark, 1982 WL 6502, at *2 (Ohio App. July 9, 1982); *see also* Olson v. State, 166 Ga. App. 104, 106, 303 S.E.2d 309, 311 (1983) (noting in dicta that "an inhabited tent constitutes a 'dwelling' " for fourth amendment purposes), *cert. denied*, 467 U.S. 1209 (1984). This regard for the sanctity of the home regardless of the permanence of its structure echoes the belief rooted in English common law. Most often quoted in this regard is William Pitt, Earl of Chatham, in his remarks to Parliament in 1763:

> 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!

Miller v. United States, 357 U.S. 301, 307 (1958) (quoting William Pitt).

> the tent-dweller is no less protected from unreasonable government intrusions merely because his dwelling . . . place, whether flimsy or firm, permanent or transient, is its inhabitant's unquestionable zone of privacy under the Fourth Amendment, for in his dwelling a citizen unquestionably is entitled to a reasonable expectation of privacy.[163]

Thus, by focusing their inquiry on the privacy interest at stake rather than on the property interest, courts have expanded upon the traditional view that an individual is entitled to fourth amendment protection in his home. Courts now recognize that a reasonable expectation of privacy may exist in a variety of settings—including, but not limited to, a traditional home.

B. *Squatters*

Although some lower courts recognize that transient "homes" are protected under the fourth amendment, other courts have not expanded this view to include the individuals living on public property. These courts have, in general, based their holdings on the individual's lack of property rights in the area in question.

For example, in *Amezquita v. Hernandez-Colon*,[164] the First Circuit held that squatters on public land in Puerto Rico had no reasonable expectation of privacy because they were trespassers and had no legal right to occupy the land or to build edifices upon it.[165] In addition, the *Amezquita* court noted that, because the Commonwealth of Puerto Rico had twice requested that the plaintiffs leave the area, the squatters had no colorable claim to occupy the land, and hence any expectation of privacy could not have been reasonable.[166]

Likewise, the Court of Appeals for the Tenth Circuit denied extending fourth amendment protection to a temporary "home" in *United States v. Ruckman*.[167] In *Ruckman*, the defendant's "home" was a cave located on land owned by the United States and overseen by the Bureau of Land

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163. *Kelley*, 146 Ga. App. at 182-83, 245 S.E.2d at 874-75.

164. 518 F.2d 8 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976).

165. *See id.* at 12. The plaintiffs were members of a squatters' community located on property owned by the Land Authority of the Commonwealth of Puerto Rico. *See id.* at 9. When the Land Authority threatened to destroy their "homes," they brought a class action suit to enjoin the government from doing so, and additionally sought damages. *See id.* at 9-10.

The district court held for the squatters, finding that the plaintiffs' privacy was invaded by "the practice on the part of some of the defendants of looking into and poking through the homes of some of the plaintiffs without a search warrant or judicial authorization of any kind before ordering the bulldozers to destroy some of the unoccupied structures." Amezquita v. Colon, 378 F.Supp. 737, 744 (D.P.R. 1974), *rev'd*, Amezquita v. Hernandez-Colon, 518 F.2d 8 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976). On appeal, however, the First Circuit reversed, holding that because the squatters were not legally entitled to occupy the land and build edifices on it, they could have no reasonable expectation of privacy. *See Amezquita*, 518 F.2d at 12.

166. *See id.* at 11.

167. 806 F.2d 1471 (10th Cir. 1986).

Management ("BLM").[168] The cave served as Ruckman's home for eight months; he had built a makeshift "door" on the entrance and furnished it with a bed and other furniture.[169] The local authorities, furthermore, were aware that Ruckman was living in the cave area.[170] After Ruckman was arrested for failure to answer a misdemeanor charge, BLM and local authorities returned to the cave without a warrant to "clean it out" and found firearms that formed the basis for the case.[171]

The Tenth Circuit reasoned that although the defendant might have satisfied the first prong of the *Katz* test—a manifested expectation of privacy—the second prong of the test was not fulfilled because he was a trespasser on public land.[172] The court reasoned that the "open fields" cases were relevant because open fields are more accessible to the public and police than other structures, such as a home or office.[173] In a strongly worded dissent, Judge McKay criticized the majority in *Ruckman* for "reverting to discredited notions and obsolete fourth amendment analysis."[174] According to Judge McKay, by finding Ruckman's status as a trespasser to be dispositive of his fourth amendment rights, the majority wrongly relied on legal property interests that the Supreme Court had rejected as a basis for fourth amendment analysis since *Katz*.[175] Instead, the dissent argued, Ruckman had a reasonable expectation of privacy because he "lived [in the cave] continuously for eight months [and h]e 'took normal precautions to maintain his privacy.' "[176] Furthermore, the dissent noted that finding an expectation of privacy to be reasonable did not preclude the government from removing the defendant from the cave, as he was not entitled to live there; it only precluded the government from searching his dwelling without a search warrant.[177]

In contrast, the Supreme Court of Hawaii found that property rights were not controlling in assessing whether squatters on public land were protected by the fourth amendment. In *State v. Dias*,[178] police without a warrant had seized evidence of illegal gambling from a shack on "Squatters' Row," located on property owned by the State of Hawaii.[179] The Supreme Court of Hawaii held that the evidence seized from within the shacks should be suppressed, but that the observations made by the po-

168. *See id.* at 1472.
169. *See id.*
170. *See id.*
171. *See id.*
172. *See id.* at 1472-73.
173. *See id.* at 1473.
174. *Id.* at 1478 (McKay, J., dissenting).
175. *See id.* at 1477.
176. *Id.* at 1478 (quoting Rawlings v. Kentucky, 448 U.S. 98, 105 (1980)).
177. *See id.*
178. 62 Haw. 52, 609 P.2d 637 (1980).
179. *See id.* at 53-54, 609 P.2d at 639. The trial court granted the defendants' motion to suppress the evidence seized there. *See id.*

lice from outside the shack were not protected by the fourth amendment.[180] The court in *Dias* distinguished *Amezquita v. Hernandez-Colon*,[181] noting that in *Dias* the government had allowed the squatters to remain on the government land for a considerable period of time, and that "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, at least with respect to the interior of the building itself."[182] Nevertheless, because the defendants' shacks were located on public property to which they did not have exclusive rights, the court found that aural and visual observations made from outside the shacks were admissible, as the defendants could not reasonably expect that members of the public would not approach the shacks.[183]

Other state courts have rejected the fourth amendment claims of squatters in abandoned houses based upon the squatters' lack of rights against other people wanting to enter the house.[184] Even these courts, however, have implied that a *de facto*—rather than a legal—right to exclude others may be sufficient to establish an expectation of privacy as reasonable.[185]

C. *Within the Makeshift Home*

Finally, one court has dealt with the issue of a homeless man living on public property by defining the scope of fourth amendment protection within the makeshift home itself. In *State v. Mooney*,[186] the Connecticut Supreme Court recognized that a homeless person had a legitimate expectation of privacy in a duffel bag and cardboard box that were located within his makeshift home, in an area underneath a highway overpass.[187] The *Mooney* court declined, however, to decide whether the defendant's broad claim of an expectation of privacy in the area underneath the bridge was reasonable. Instead, it decided the case on the narrower issue of whether Mooney had a reasonable expectation of privacy in the con-

180. *See id.* at 56, 609 P.2d at 640.

181. 518 F.2d 8 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976); *see supra* notes 164-66 and accompanying text.

182. State v. Dias, 62 Haw. 52, 55, 609 P.2d 637, 640 (1980).

183. *See id.* at 56, 609 P.2d at 640.

184. *See* Commonwealth v. Cameron, 385 Pa. Super. Ct. 492, 498, 561 A.2d 783, 786 (1989); Morris v. State, 521 So. 2d 1364, 1366 (Ala. Crim. App. 1987). *But see* Cotton v. United States, 371 F.2d 385, 391 (9th Cir. 1967) (noting in dictum that the Supreme Court would probably not deny fourth amendment rights to a squatter who has taken "actual possession" of the premises).

185. *See, e.g., Cameron*, 385 Pa. Super. Ct. at 498, 561 A.2d at 786 ("there must be some legal or de facto right to control the area in question"); *Morris*, 521 So. 2d at 1366 (finding no reasonable expectation of privacy because squatter had no right to and *did not try* to exclude others from abandoned house).

186. 218 Conn. 85, 588 A.2d 145, *cert. denied*, 112 S. Ct. 330 (1991).

187. *See id.* at 98, 588 A.2d at 154. In reaching this conclusion, the court reversed the trial court's denial of Mooney's motion to suppress the evidence. *See id.* at 87, 588 A.2d at 149.

tents of his duffel bag and box.[188]

The defendant in *Mooney* was a murder and robbery suspect who had lived for approximately one month underneath a highway bridge abutment on land owned by the Connecticut state department of transportation.[189] Mooney was the only person to occupy that space during the time he lived there.[190] When he left the area, Mooney hid his belongings so that they could not be seen from the bottom of the embankment.[191] The police went to Mooney's "home" without a search warrant, where they found his belongings, including the duffel bag and cardboard box that they later searched.[192] The state argued that Mooney was not protected by the fourth amendment because: (1) the area searched was in effect an open field; (2) the defendant was a trespasser on public land; and (3) the defendant's expectation of privacy could not have been reasonable because it was an area accessible to the public.[193] The court rejected all of these arguments, noting that although "property left by persons in open fields or public places may not command fourth amendment protection," open fields cases such as *Oliver* were distinguishable from the instant case because it involved closed containers.[194] Moreover, the Connecticut Supreme Court, citing the dissent in *Ruckman*, noted that the defendant's status as a trespasser may be considered as a factor in determining whether an individual has a reasonable expectation of privacy, but it is not dispositive of the issue.[195]

The *Mooney* court also found that *California v. Greenwood*[196] did not control the case.[197] The court noted that "leaving one's property in an area 'readily accessible to animals, children, scavengers, snoops, and other members of the public' may render one's expectation of privacy less than reasonable."[198] But the court distinguished the instant case because Mooney had not expressly left his belongings for collection or disposal by

188. *See id.* at 94, 588 A.2d at 152.
189. *See id.* at 90-91, 588 A.2d at 150-51.
190. *See id.* at 92, 588 A.2d at 151.
191. *See id.*
192. *See id.* at 90, 588 A.2d at 150.
193. *See id.* at 93, 588 A.2d at 152.
194. *Id.* at 99-100, 588 A.2d at 155.
195. *See id.* at 97, 588 A.2d at 153-54. In addition, the court looked to the line of abandonment cases and distinguished them from the instant situation where a homeless defendant lived in a secluded area that the police were aware he regarded as his home. *See id.* at 107-09, 588 A.2d at 158-59. The test for abandonment, according to the court in *Mooney*, is whether "the owner or possessor may fairly be deemed as a matter of law to have relinquished his expectation of privacy in the object in question." *Id.* at 108, 588 A.2d at 159. The court reasoned that the defendant did not manifest an intent to relinquish an expectation of privacy in his belongings, because of his efforts to "shield those [belongings] from the gaze of others when he left them in the bridge abutment area during the day." *Id.* at 109, 588 A.2d at 159-60.
196. 486 U.S. 35 (1988).
197. State v. Mooney, 218 Conn. 85, 109, 588 A.2d 145, 160, *cert. denied*, 112 S. Ct. 330 (1991).
198. *Id.* at 96, 588 A.2d at 153 (quoting California v. Greenwood, 486 U.S. 35, 40 (1988) (footnotes omitted)).

a third party, as had the defendants in *Greenwood*.[199] In its decision, the *Mooney* court gave weight to the police's knowledge, at the time of the search, that the defendant regarded the area as his home;[200] the court also noted that a failure to recognize such an expectation of privacy as reasonable would result in an unequal application of the laws to the rich and the poor.[201] Finally, the *Mooney* court recognized that, although a property right to exclude others affords an individual a legitimate expectation of privacy, "one need not have an 'untrammeled power to admit and exclude' in order to claim the protection of the fourth amendment."[202]

Thus, although the Supreme Court has recognized that the home is accorded full fourth amendment protection because of the strong privacy—not property—interests associated with it, lower courts have not consistently followed this lead. While some have recognized a legitimate fourth amendment right in such a makeshift place as a tent,[203] other courts, such as the Tenth Circuit in *United States v. Ruckman*,[204] have focused solely on the property interests involved.

D. *Analysis of Homeless Cases*

In general, the lower courts' application of the fourth amendment to transient homes has been inconsistent and deficient. While some courts focus exclusively on the property rights of the individual in question, other courts only consider this as one factor in making the determination.

The analysis used by the majority in *United States v. Ruckman*,[205] finding that the defendant's status as a trespasser was dispositive of his fourth amendment rights, is inconsistent with the Supreme Court's fourth amendment jurisprudence. First, by focusing on the defendants' status as trespassers, the Tenth Circuit ignored the rejection of a property-based analysis as prescribed by the Court in *Katz*.[206] Indeed, as the dissent in *Ruckman* noted,

> 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. If it did . . . *Katz* would be nonsensical, for fourth amendment protection would then, indeed, turn on a property right in the invaded

199. *See id.* at 110, 588 A.2d at 160.

200. *See id.* at 111, 588 A.2d at 160.

201. *See id.* at 112, 588 A.2d at 161.

202. *Id.* at 95-96, 588 A.2d at 153 (quoting Minnesota v. Olson, 495 U.S. 91, 99 (1990) (overnight guest has reasonable expectation of privacy in host's home)); *see also* Chapman v. United States, 365 U.S. 610, 618 (1961) (warrantless search of tenant's home violated fourth amendment even though landlord can enter house for certain purposes).

203. *See supra* notes 162-63 and accompanying text.

204. 806 F.2d 1471 (10th Cir. 1986).

205. *Id.*

206. *See supra* notes 44-52 and accompanying text.

place.[207]

The Supreme Court has continued to reaffirm the principle that property rights may be a factor to be considered, but are not controlling in fourth amendment analysis. In *Rakas v. Illinois*,[208] the Court recognized that while

> one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude [,] [e]xpectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest.[209]

Second, the *Ruckman* majority's reliance on the "open fields" doctrine is misplaced.[210] In *Oliver v. United States*,[211] the Court held that "an individual may not legitimately demand privacy for activities conducted out of doors in fields," reasoning that an individual does not have an expectation of privacy in an open field because "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance."[212] In contrast, in *Ruckman*, the defendant's activities did not take place out of doors, but in an enclosed cave. Additionally, because this cave had been the defendant's home for eight months, was furnished with a bed and other necessities, and was fully enclosed by the defendant's home-made door,[213] it did provide the "setting for those intimate activities" usually associated with a home.

Moreover, lack of a legal right to exclude others should not *per se* bar

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207. *Ruckman*, 806 F.2d at 1477 (McKay, J., dissenting).

208. 439 U.S. 128 (1978).

209. *Id.* at 143-44 n.12; *see also* United States v. Salvucci, 448 U.S. 83, 91 (1980) ("While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of this Court's inquiry.") (citation omitted).

Some lower court decisions holding that a trespasser can not have a reasonable expectation of privacy have based this finding on the Court's statement in *Rakas* that one whose presence is "wrongful" has an expectation of privacy that society is not "prepared to recognize as 'reasonable.' " *Rakas*, 439 U.S. at 144 n.12; *see* United States v. Pitt, 717 F.2d 1334, 1337-38 (11th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984); United States v. Sanchez, 635 F.2d 47, 64 (2d Cir. 1980). "Wrongful presence," however, was illustrated by the Court in *Rakas* by the examples of an individual in a stolen car or "[a] burglar plying his trade in a summer cabin during the off season." *Rakas*, 439 U.S. at 141 n.9, 143 n.12. Surely these examples are distinguishable from the presence of a trespasser or squatter living in an abandoned building with the knowledge or acquiescence of the owner. Furthermore, one of the cases relied on by the majority in *Ruckman*, *People v. Sumlin*, merely held that the casual guest of an employee of a squatter in a city-owned building did not have a reasonable expectation of privacy there. *See* 105 Misc. 2d 134, 138, 431 N.Y.S.2d 967, 969-70 (Sup. Ct. 1980). The court, however, did recognize that the squatter himself might have an expectation of privacy that is reasonable. *See id.* at 138 n.4, 431 N.Y.S.2d at 970 n.4.

210. *See* United States v. Ruckman, 806 F.2d 1471, 1473 (10th Cir. 1986).

211. 466 U.S. 170 (1984).

212. *Id.* at 178, 179 (Powell, J., concurring).

213. *See Ruckman*, 806 F.2d at 1478 (McKay, J., dissenting).

squatters from claiming rights under the fourth amendment. Although some courts have denied fourth amendment rights to squatters because they do not have the legal right to exclude others,[214] the Supreme Court in *Minnesota v. Olson* held that an "untrammeled power to admit and exclude" is not a requisite for fourth amendment protection.[215]

Thus, of the cases decided to date, the best approach to analyzing the fourth amendment rights of the homeless is the one taken by the Supreme Court of Hawaii in *State v. Dias*.[216] Unlike the Tenth Circuit in *Ruckman*, the *Dias* court did not find the squatters' status as trespassers dispositive of the fourth amendment issue, but instead found it to be only one factor to be considered in light of the surrounding circumstances. Hence, although the defendants in *Dias* were trespassers, the court found that because the government had allowed the squatters to stay on the government land for a period of time, their presence was not "wrongful"[217] and their expectation of privacy within the shack was legitimate.[218] Even so, the reasoning in *Dias* remains unsatisfactory. By failing to consider the nature of the place investigated,[219] the court in *Dias* ignored a significant element of the Supreme Court's fourth amendment jurisprudence.

Finally, the approach taken by the Supreme Court of Connecticut in *State v. Mooney*,[220] finding that closed containers within a makeshift home were within the ambit of the fourth amendment, is useful for determining the scope of fourth amendment protection *within* the makeshift home itself.[221] The court, however, by declining to decide whether Mooney had a reasonable expectation of privacy within the actual makeshift home, did not go far enough in its analysis. As suggested below, courts should instead look beyond the makeshift aspect of the "home" and determine whether the factors that comprise a "reasonable expectation of privacy" are to be found in the makeshift home at issue.

III. PROPOSED STANDARD FOR FOURTH AMENDMENT PROTECTION OF THE HOMELESS

Because the homeless live in a wide variety of settings, there can be no appropriate *per se* rule regarding their fourth amendment rights. Instead, the proper analysis must focus on the particular factual situation of each case. Just as there is a continuum in the cases regarding what constitutes a "reasonable expectation of privacy," so too does the wide spectrum of homeless situations demand such an analysis.

214. *See supra* notes 184-85 and accompanying text.
215. 495 U.S. 91, 99 (1990).
216. 62 Haw. 52, 609 P.2d 637 (1980); *see supra* notes 178-83 and accompanying text.
217. *See supra* note 209 (discussing "wrongful presence").
218. *See Dias*, 62 Haw. at 55, 609 P.2d at 640.
219. *See supra* notes 140-44 and accompanying text.
220. 218 Conn. 85, 588 A.2d 145, *cert. denied*, 112 S. Ct. 330 (1991).
221. *See supra* notes 186-202 and accompanying text.

This Part proposes a test to determine whether a particular homeless individual has a reasonable expectation of privacy. Based on the Supreme Court's fourth amendment jurisprudence discussed above, the proposed standard suggests that courts should consider the following four factors in making the determination of whether a homeless person has a reasonable expectation of privacy in a particular place: (1) the treatment of the homeless by society in that locale; (2) whether the homeless person took "normal precautions" under the circumstances to maintain his privacy; (3) the uses to which the place in question was put, including whether the area searched was used as a "home"; and (4) whether the government conducted the search in a physically non-intrusive manner.

A. *Custom and Practice in Community*

In determining whether an expectation of privacy is one that society would consider "reasonable," courts look to whether this expectation is based on "understandings that are recognized and permitted by society."[222] While courts may use laws as a guide in determining what society would consider as reasonable, they are not constrained by the scope of these laws. The Supreme Court demonstrated this in *California v. Greenwood*,[223] where, although the applicable state law recognized a right to privacy in one's garbage, the Court found that the countervailing social practice of rummaging through garbage made the expectation of privacy unreasonable.[224] Similarly, in *Florida v. Riley*,[225] a majority of the court emphasized that although the police made their observations from legal navigable airspace, the actual frequency of flights over the petitioner's backyard played an important role in assessing whether that person had an expectation that society would regard as reasonable.[226] Because the Court has thus recognized that local custom supersedes law in a determination of what society would regard as reasonable, courts assessing the fourth amendment rights of the homeless must look beyond whether the homeless individual in question had a legal right to be in his or her location, and focus instead on the actual custom and practice of treating the homeless by the community in question.

Therefore, in determining whether an expectation of privacy is one society would regard as reasonable, courts should focus on the social custom of treating the homeless in the community in question. Just as the

222. Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978); *see also* Katz v. United States, 389 U.S. 347, 352 (1967) (person occupying a public telephone booth "assume[s] that the words he utters into the mouthpiece will not be broadcast to the world"); *supra* notes 55-60 and accompanying text (discussing second prong of the *Katz* test).

223. 486 U.S. 35 (1988).

224. For a discussion of the *Greenwood* decision, see *supra* notes 123-35 and accompanying text.

225. 488 U.S. 445 (1989).

226. *See supra* notes 105-07, 114-20 and accompanying text.

Court in *Minnesota v. Olson*[227] held that the "longstanding social custom" of allowing people to stay overnight in one's home renders an overnight guest's expectation of privacy reasonable,[228] so too does a community's practice of allowing the homeless to live on public streets demonstrate that those homeless people's expectation of privacy is one that society would consider reasonable.

In many communities, members of the public implicitly recognize the privacy of the homeless.[229] Some members of the public do so by ignoring the homeless and letting them continue to live in their makeshift homes undisturbed, while others recognize their right to live on the streets by bringing them food or actually assisting them in building their homes.[230] Furthermore, in some localities, the authorities either tacitly or explicitly condone the existence of homeless "abodes" by making no effort to "sweep" the homeless despite anti-homeless laws, or by setting aside certain areas in which the homeless may reside.[231] If society respects the privacy of the homeless in these makeshift shelters, it must also respect their privacy in the context of a criminal investigation. Thus, in communities where the public at large respects the privacy of the homeless—despite the existence of laws denying the homeless these rights—courts must find that a homeless person's expectation of privacy is one society would consider reasonable.

On the other end of the spectrum, in some communities the police make every effort to regularly "sweep" the public areas of its homeless and their makeshift homes.[232] In addition, the local authorities will sometimes warn the homeless squatting on public land that their presence there is wrongful and will not be tolerated.[233] In communities such as these, an expectation of privacy in any makeshift home should—and would likely—be found to be unreasonable.

In between these two extremes, of course, lies a variety of ways in which the homeless may be treated by the community. For instance, some homeless may be able to occupy the same locale for years, not because the local authorities or members of the public condone their presence, but because they have remained undiscovered. Courts should analyze the circumstances of each particular case to ascertain where it falls along the spectrum of possibilities. In addition, the factors de-

227. 495 U.S. 91 (1990).

228. *Id.* at 98.

229. *See supra* notes 17-20 and accompanying text.

230. *See, e.g., Atlantans Build Huts, supra* note 20 (discussing architects who build huts for homeless on public and private property); Wilgoren, *Reaching Out to the Homeless*, Wash. Post, June 28, 1990, at M1, col. 1 (reporting on group of Washington, D.C. residents who regularly dispense food and clothing to homeless in their makeshift homes).

231. *See supra* notes 17-21, 178-83 and accompanying text.

232. *See supra* note 16 and accompanying text.

233. *See supra* notes 164-66 and accompanying text.

scribed below should help guide courts faced with cases involving the homeless.

B. *Normal Precautions*

Precautions taken by an individual need only be "normal" in order to merit fourth amendment protection.[234] Moreover, requiring impenetrable security in order to fall within the scope of the fourth amendment would tend to deny this constitutional right to a whole class of people. The homeless are, by definition, without a "home," and those homeless who live in makeshift "homes" are in no position to outfit their homes with foolproof security measures. Thus, compelling such impenetrable security measures would mean, in effect, that homeless individuals as a class would be per se barred from having any fourth amendment rights in their makeshift homes.

Instead, courts should look at whether the inhabitant of the makeshift abode took normal precautions under the circumstances to maintain his privacy. Although these makeshift homes might not be completely inviolable, some are more accessible to the public than are others.[235] Courts should consider such factors including, but not limited to, whether the individual claiming fourth amendment protection made efforts to shield the inside of the "home" from public view, whether the home was in an area not well-travelled by the general public, and whether the makeshift home was part of a community of makeshift homes in which the occupants looked out for each other's belongings.[236] Where these security measures are taken, courts should lean toward greater fourth amendment protection.

C. *The Uses to Which the Place is Put*

In its fourth amendment jurisprudence, the Supreme Court continually uses the "place" in which the activity occurred as an index in determining whether individuals could expect to have privacy.[237] A continuum appears in the cases with the home at one end (garnering the highest amount of fourth amendment protection) and "open field" at the other end (receiving no fourth amendment protection).[238] The Court determines where on the continuum a certain place is located by focusing on its connection to " 'strong concepts of intimacy, personal autonomy and privacy associated with the home.' "[239]

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234. *See supra* note 57 accompanying text.

235. *See supra* notes 11-13 and accompanying text (describing safety advantages of some homeless abodes).

236. *See supra* notes 11-13 and accompanying text.

237. *See supra* notes 137-44 and accompanying text (discussing the Court's reference to "place" in recent cases).

238. *See* Wilkins, *supra* note 62, at 1112.

239. *Id.* at 1113 (quoting Dow Chem. Co. v. United States, 749 F.2d 307, 314 (6th Cir. 1984), *aff'd*, 476 U.S. 227 (1986)); *see also supra* note 144 and accompanying text (dis-

Accordingly, courts should take into consideration the uses to which the homeless person has put the locality in question. Thus, if a particular place is used as a "home" by an individual, the court should weigh this factor in favor of finding that the expectation of privacy is reasonable. Although there is no consitutional right to shelter, society often recognizes the right of the homeless to find shelter for themselves in public places. Where a homeless person uses his makeshift shelter as a home, society would be more likely to find this expectation of privacy reasonable.

If, on the other hand, the homeless individual is using the location for purposes other than as a home, society would be less likely to find a reasonable expectation of privacy. Although society recognizes as reasonable the use of a location for shelter, society is less likely to find other uses of areas by the homeless to be reasonable. For example, where an individual is using an abandoned storefront *solely* for the purpose of selling drugs, society would not find this expectation of privacy to be reasonable. Thus, only by taking "use" into account can courts accurately determine whether the expectation of privacy is reasonable.

D. *Physically Non-intrusive Manner*

Although *Katz* eradicated the need for a trespass in order to find a fourth amendment violation, the Supreme Court has recently noted that the degree of physical intrusiveness of the investigation is a factor to be considered.[240] Thus, whether the police use intrusive means to obtain the evidence should also be considered by the courts. For instance, if the police see or hear evidence without entering the makeshift abode, this should weigh against the finding of a fourth amendment violation.[241] On the other hand, if the police obtain the evidence at issue by intruding in any way *into* the homeless individual's makeshift home, courts should be more likely to find that the fourth amendment rights of that individual have been violated.

CONCLUSION

Since *Katz*, the determination of whether an individual's fourth amendment rights have been violated does not depend on the property rights of that person. Instead, the Supreme Court looks to a variety of factors when deciding whether the expectation of privacy is one that society would regard as reasonable. Lower courts, however, when applying the *Katz* "reasonable expectation of privacy" test to homeless people,

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cussing the Court's holding that a mobile home merits less fourth amendment protection than does a traditional home in California v. Carney, 471 U.S. 386 (1985)).

240. *See* Florida v. Riley, 488 U.S. 445, 451-52 (1989).

241. *See, e.g.*, State v. Dias, 62 Haw. 52, 56, 609 P.2d 637, 640 (1980) (holding that evidence obtained by police standing outside the squatters huts did not violate the fourth amendment).

often overlook some of these factors and focus, instead, on the property rights of the individual.

In the spirit of both *Katz* and the Supreme Court's more recent fourth amendment jurisprudence, the fourth amendment rights of a homeless individual should not turn on his or her status as a homeless person lacking property rights in the invaded place. Rather, courts must look at a number of indicators to determine whether a particular homeless person has an expectation of privacy that society would regard as reasonable.

Of particular relevance to the homeless is the treatment of them by the community in question. The Supreme Court has emphasized the importance of local custom in its recent decisions and, because the treatment of the homeless varies widely from community to community, courts must look to actual custom in the given locality to ascertain whether the expectation of privacy claimed by the homeless person is "reasonable." Where the public in the community at issue has respected the privacy of the homeless for all other purposes or has tolerated the presence of homeless in certain areas because it is expedient for them to do so, courts should find that the expectation of privacy claimed by the homeless is one society would consider reasonable. Put simply, if a community condones the presence of the homeless on public streets for some purposes, it would be grossly unjust for it to subsequently claim that the homeless have no expectation of privacy for investigatory purposes.

The number of homeless in the United States is large and growing. To deny fourth amendment protection to the homeless across the board would deprive a whole class of citizens of a basic constitutional right. Instead, courts should be flexible in their approach to this issue and recognize that the treatment of the homeless by their communities plays an important part in assessing the fourth amendment rights of the homeless.

Finally, it must be conceded that recognizing a fourth amendment right in a homeless person's makeshift home is not necessarily beneficial to the homeless population in the long run. In some ways, by finding that this right does exist, courts are acknowledging society's tacit acceptance of the continual daily existence of the homeless on our streets. Ultimately, the only solution to the crisis of homelessness is to find housing and jobs for those in need. Until then, however, courts must recognize that the homeless' lack of a traditional "home" does not necessarily exclude them from the protection of the fourth amendment, and should consider the factors set forth above in making their determinations.