

WHY THE HOMELESS ARE DENIED PERSONHOOD UNDER THE LAW: TOWARD CONTEXTUALIZING THE REASONABLENESS STANDARD IN SEARCH AND SEIZURE JURISPRUDENCE

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“No one is free to perform an action unless there is somewhere he is free to perform.”¹

INTRODUCTION

The homeless have questionable and variable access to legitimate private space. They live over time with little consistent unperturbed space to develop and manifest their inner identity in outward actions. They have no free space to experiment, make mistakes, or just “be” themselves, to learn or grow in a comfortable environment. Unlike the homed, the homeless lack liberty in this respect.² Physically, the homeless do not have the option to exclude others because they lack the financial capital to barricade their private sphere in a legally recognized manner. As such, their ability to materially and psychologically function as “normal” is reduced and, in turn, their ability to portray “reasonableness” to a judge or third party is lessened. The law categorizes space in a way that augments this phenomenon, rather than disrupts it; law strips the homeless of precious autonomy. In particular, the context of homelessness is not enunciated nor enforced in search and seizure jurisprudence, yielding contextual and abstracted decisions that recapitulate current power schematics, regardless of the intention of lawmakers.

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¹ Jeremy Waldron, *Essay: Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 296 (1991).

² Liberty is a central notion to personal and collective identity. We intuit “justice” as a moral standard, whereas liberty represents a more abstract freedom. The homeless lack even access to liberty through the development of the self when liberty is defined by freedom of movement, activity, and peaceful uninterrupted autonomy. Such liberty is considered almost de facto to accomplish any other goals.

Because search and seizure jurisprudence can be applied unfairly, though uniformly, it is fundamental that knowledge of social context or “on the ground” analysis be used as a starting point to construct a framework that operates to uniformly *protect* all citizens, rather than provide ostensibly uniform standards whose implications vary based on property status. The Fourth Amendment standard lacks parity when enforced. As the homeless are forced to rely on public support and protection, their ability to articulate or enunciate claims of autonomy will not be well received. A linear “reasonableness” analysis allows some commentators and judges to focus on the general applicability of law: The Fourth Amendment, for instance, currently protects “people” not “places.”³ But the legal community generally ignores the claim that law treats homeless people differently based on a divide between private and public space.⁴ A reasonable expectation standard is necessarily selective upon implementation.⁵ In a home, with a widely recognized barrier erected around one’s belongings, an individual has a powerful and historically significant claim to the property and the privacy of the property inside of those walls. We protect the privacy of the home with some of our greatest legal zeal;⁶ it represents an extreme point on the continuation of

³ Katz v. United States, 389 U.S. 347 (1967). *But see* Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 200, 200-201 (1993) (arguing that “the Court’s critics have complained vigorously about the chaotic state of search and seizure law, and have linked the confusion to the absence of any theoretical basis for these decisions.”).

⁴ See *infra* Part III.A.

⁵ See Waldron, *supra* note 1, at 308 (arguing that laws usually mention general types of actions rather than localized and contextualized actions done by specific people at specific times and places). See generally Paul Ades, *The Unconstitutionality of “Antihomeless” Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595 (1989) (arguing through an equal rights analysis that laws prohibiting sleeping and essential “home” activities in public spaces fundamentally burden the constitutional right to travel).

Such irony can only be so easily ignored if we somehow also agree, in the impartial manner of the law, that the poor have no greater need to sleep under bridges – or to defecate in alleys, panhandle on streets, or sit for a length of time on park benches. For this is what the new legal regime in American Cities is outlawing: just those behaviors that poor people, and the homeless in particular, must do in the public spaces of the city. And this regime does sit by legally (if in some ways figuratively) annihilating the only spaces the homeless have left.

Don Mitchell, *The Annihilation of Space by Law: The Roots and Implications of the Anti-Homeless Laws in the United States*, in THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE 6 (Nicholas Blomley, David Delaney & Richard T. Ford eds., 2001).

⁶ The term “houses” is specifically delineated in the Fourth Amendment: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches” U.S. CONST. amend. IV.

It is well settled that one who through no fault of his own is attacked in his home is under no duty to retreat therefrom. The oft-repeated expression that “a man’s home is his castle” reflected the belief in olden days that there were few if any safer sanctuaries than the home.

personal autonomy, interwoven with our notions of freedom, liberty, and personhood.⁷ If the government wishes to intrude upon this place, it must presumptively have reasonable cause and a warrant.⁸ If attacked in their home a home dweller may affirmatively act.⁹ This presumptive and one-dimensional analysis changes when the foundation changes: Remove the “home” property and no analytical starting point exists.¹⁰ Remove the “home” and the presumption is, arguably, reversed. Without a home, a person lacks that presumption of privacy and liberty in law. Without a home, a person is forced to affirmatively prove an expectation of privacy – exactly the opposite of the homeowner or occupant of legitimized private space. Complexity and contradiction thus color issues of law, equality, and practicality. Equal laws become unequal when no prophylactic recognizes and defends the homeless.

The following comment uses the above framework to establish a connection between personhood through property interests while intersecting search and seizure precedent into a property-based explication. Social and financial capital corresponds to the level of what, in theory, is an innate and unanimous right provided by the Constitution: protection from illegal searches and seizures.¹¹ Part I of this comment will examine theories of personhood and their connections with property rights and homelessness.¹² In this context, the home operates as the default and epitome of privacy through exclusive/inclusive property rights.¹³ Privacy is persistently based on economic worth, which provides a specious foundation for an inherent right against illegal acts. Part II

The “castle” exception, moreover, has been extended by some courts to encompass the occupant’s presence within the curtilage outside his dwelling.

United States v. Peterson, 483 F.2d 1222, 1236 (D.C. Cir. 1973) (citations omitted).

⁷ See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1981-1982) (arguing for a “personality” theory under self-development that necessarily entails autonomous spheres where people have the opportunity to express their will through physical manipulation and manifestation on the objective and concrete world). This claim may, in fact, seem rudimentary, because it is common to take homes and their accoutrements for granted. It is common to assume, as a housed person, that others are on the same or similar level.

⁸ U.S. CONST. amend. IV (requiring “no warrants shall issue, but upon probable cause . . .”).

⁹ See Peterson, *supra* note 6 (noting that without the “castle” exception, an attacked person would be forced to retreat as far as reasonably possible).

¹⁰ Hence, it is also in this analysis when general balancing of validity must occur between competing claims and accusations. If no law is on point, a social test of balancing occurs.

¹¹ U.S. CONST. amend. IV.

¹² See *infra* Part I.

¹³ See *infra* Part II.

lays the legal foundation of search and seizure laws, examining a host of different cases. Part III argues that current search and seizure law exploits or parallels property accumulation and should be more informed so as to reflect our multicultural and heterogeneous society rather than a tradition of privilege or status.¹⁴ The reasonableness standard in the context of homelessness and search and seizure jurisprudence is unworkable because it is rooted in on a dated economically reasonable standard.¹⁵ While this standard may represent an attempt to provide a wider protection against illegal search, it serves to recapitulate private property interests for a host of reasons. In the same way that *Katz* argued for a new standard because of changing and evolving times,¹⁶ so this article now argues that the standard in *Katz* actually reflects the protection of property rights (having a home) rather than the “person” and must evolve to be more inclusive of contextual social awareness.

II. PERSONHOOD AND PROPERTY: SPACE AND HOMELESSNESS

A. HEGEL AND RADIN’S THEORY OF PERSONHOOD IS DEPENDENT ON PROPERTY

Western philosophical conceptions of personality, or personhood theory, are connected to property and physical material in a myriad of ways. Having a subjective stake in some sort of tangible property is fundamental to personal development, growth, and stability.¹⁷ Elementally, humans learn, grow, and exist in different spaces, whether on playgrounds, in cars, or elsewhere. There cannot be “no space,” for humans always physically exist somewhere.¹⁸ The law, in turn,

¹⁴ See *infra* Part III. The political community ostensibly includes the homeless.

¹⁵ See Cloud, *supra* note 3, at 200-201 (The balancer’s goal is to achieve the best substantive outcome for society, after considering all factors relevant to the dispute . . . We have reached a point where balancing has become a mechanical jurisprudence . . . it has lost its ability to persuade).

¹⁶ Katz, *supra* note 3 at 352-53 (citing *Olmstead v. United States*, 277 U.S. 438 (1928) for the proposition that the said protection was from the “physical penetration” of property; the Fourth Amendment was thought to limit searches and seizures of tangible property). “Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people – and not simply ‘areas’ – against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.” Katz, 389 U.S. 347 at 353.

¹⁷ Cf. Susan D. Bennett, “No Relief but Upon the Terms of Coming into the House” – *Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter*, 104 YALE L.J. 2157 (1995) (arguing, *inter alia*, that the requirements for attaining emergency shelter for a family are hopelessly bogged down in time consuming procedure and subsequently ineffective).

¹⁸ The question can be understood in terms of our consciousness of the space we inhabit. For instance we are more familiar, and thus more comfortable, in personal spaces and sense them as less

creates “legal” and permissible spaces for such existence. It helps to define social custom through the practice of regulating activities, categorizing explicitly and implicitly what activity is allowed in what space.

The American dream itself is founded on the ideal of community through labor: a time when people come together, work the land, and “become” that land, subjectivising property through a continuous process of maturation and development. The concept of individual choice embedded in this assumption, at its core, forms much of the basis for the Western concept of freedom.¹⁹ Autonomous hard work also forms one basis for community because such individuals reap certain benefits (or resources) which can then be bartered in some form of organized collective trading. Likewise, individual choice is also imbedded as a fundamental assumption in our jurisprudence. To be free to develop oneself in any manner one chooses is a central supposition in economic theory. In this realm the individual can form “merit” through “hard work” and endeavor to manage his/her resource allocation to maximize earnings. Yet, economic theory falls short in deciphering the psychology of the individual in this situation. At a fundamental level, it concentrates on the ability of the rationalistic actor to make decisions about goods, but is not as interested in the development of the self as contingent with those goods. To flesh out this notion, we have to look at a different theory, personality theory. Personality theory, however, says that in order to achieve proper development, an individual needs some property rights with a minimal control over resources in the external environment.²⁰ Personality theory rests the conception of the individual within the physical environment – that is, the consciousness of such an individual develops through external manipulation of objective goods. The line between objective and

intrusive. If we are in a formal setting, or in a foreign place, we often take stock of the area by understanding it as compared with other more familiar places. The home is generally a pinnacle of personal space, and thus we “sense” it as an intrusion less than we would a more foreign space.

¹⁹ “Freedom” here refers to a negative form of freedom, whereby a person has the least possible interference with his/her “liberty” interests. Frank I. Michelman, *Possession v. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1319 (1987). See also Waldron *supra* note 1, at 297-302 (arguing that, since “[a] place is common property if part of the point of putting it under collective control is to allow anyone in society to make use of it without having to secure the permission of anybody else,” and since the homeless do not have a place governed by private property where they may be whenever they choose and thus are always at the discretion of a private property owner, the homeless “are allowed to *be* in our society only to the extent that our society is communist.”)

²⁰ Radin, *supra* note 7, at 957. It seems uncontested that, for personal psychological development, one needs a space to grow and learn. That space must be secure from unwanted intrusion, whether governmental or other. On a political level, one needs space to develop into a citizen who possesses knowledge and independence. The purpose of a communal space, where it is not allowed for any person to exclude any other person, is for a coming together and simultaneous development of the community and the individuals that are part of it. Both spaces are necessary for a successful democracy and a successful community.

subjective viewpoints is more blurred in personality theory than economic theory. The law dictates which items are available and generally follows economic theory for the broadest application.²¹

Both personhood theory and economic theory postulate that objects are closely intertwined with our personhood and our “self” conception and world-view. Yet, personhood theory says that it is essential for identity to bind up with the outside world, with material and tangible substance.²² Without such entanglement, the “I” is an abstract will. One scholar, Margaret Radin, was instrumental in connecting the notion of personality theory with the Fourth Amendment.²³ She argued for the connection between personhood and property. The concept of Hegel’s personality theory, she argued, is instrumental in elucidating a socially constructed “type” of person.²⁴ She challenged notions of how personality is constructed in both a historical context and in current experience, arguing for a re-examination of our self-perceptions.²⁵ This section concentrates on fleshing out how such conceptions differ. It first examines the traditional western conception of the individual, and then looks at Hegel’s personality theory. Finally, it argues that the dwelling is the fundamental basis of property for individual health by looking at how private property rights construct personhood.

1. THE WESTERN CONCEPT OF THE INDIVIDUAL: LOCKE AND KANT

Radin posits that the Western canon espouses two hardened viewpoints through the ideas of Locke and Kant. Locke felt that continuing self-consciousness evolved through a process of memory and relationships with people and property, but no fundamental connection between memory and the

²¹ For instance, the law does not regulate free air by deferring to the marketplace. Other resources, like timber, are regulated in such a manner. Therefore, law takes some matters as essential to life and others as less essential. While this particular distinction may reflect reality, the crux of defining what items should be had by all, and what items can be held in the marketplace, does influence personhood. Law tells us what space is communal and what space is private.

²² Radin, *supra* note 7, at 959. (Hegel suggests that property rights play an essential role in the development and self-realization of individuals. In Hegel’s world, property occupancy serves as a means by which individuals project their abstract wills onto the external world). See also David L. Rosendorf, *Comment: Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights*, 45 U. MIAMI L. REV. 701, 706-709 (1990-1991).

²³ See Radin, *supra* note 7.

²⁴ *Id.* at 958 (Radin attempts to clarify a third stand of liberal property theory – not individual autonomy or utilitarian theory – that focuses on personal embodiment or self-constitution in terms of things).

²⁵ *Id.*

material world was necessary, nor was it evident.²⁶ Locke's system bases development of the self with an ethic of work, stability, and the market.²⁷ Likewise, the Kantian conception of the self is epitomized by individual rationality; again, no necessary connection between persons and property exist, so objective relationships with "things" external to the mind are not a necessary corollary to the concept of personhood.²⁸ Kant argues that "freedom must also be proved as a property of all rational beings; it is not enough to demonstrate it from certain supposed experiences of human nature (although this is also absolutely impossible), and such a will can be demonstrated only a priori."²⁹ Kant presupposes freedom from the premise of rationality; freedom is inherent, he says, from the ability of choice.

In using the language "a priori," Kant establishes his belief that freedom is a metaphysical construct and, therefore, abstracted from physicality, without context. Freedom exists because of rationality. The development of rationality for Kant is de-emphasized. It "exists" before we can understand how it exists, or where it potentially came from. Freedom, for Kant, is the ability to think and decide, but this is a faculty of the mind without physical input. Both Kant and Locke typify western dualism: People are devised of a body and a mind; while there may be some overlap between the two, the overall construct is relational because of the separation between rational mind and natural world, entities which do not easily mix.

2. HEGEL'S THEORY OF INDIVIDUAL DEVELOPMENT THROUGH THE OUTER WORLD

Radin and Hegel begin like Kant or Locke with the assumption of a relatively abstract decision-maker, but extend development of that individual into the physical world. Freedom in this context becomes more temporal: It is the freedom to exist and develop over time, not just to exercise rationality or reasoning a priori, before experience with the world. From Radin's point of view, objective relationships with property are only possible on the "instrumental" end

²⁶ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT Ch. 5 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690).

²⁷ *Id.* at 19 (arguing that "labour of his body, and the work of his hands, we may say, are properly his . . . [T]hat labour put a distinction between them and common . . . and so they became his private right").

²⁸ IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS, 7 (Mary Gregor ed., trans., Cambridge University Press 1997) (1785) ("Autonomy of the will is the property of the will by which it is a law to itself (independently of any property of the objects of volition)"). See also Radin, *supra* note 7, at 967 (Kant exemplifies the detached view of the rational will).

²⁹ Kant, *supra* note 28, at 53.

of the continuum of property.³⁰ That is, objectivity results, if at all, from the manipulation of an object only in the sense of achieving a certain end (even then, though, one can develop a subjective state in regard to an object).

For Radin and Hegel's personality theory, the detached will is the starting point in development. A person is autonomous and maintains free will until actions occur that restrict the will.³¹ At the beginning of one's life, it seems, one is a largely theoretical incipient being.³² But through time the development of the will is crafted and shaped by external factors. Hegel and Radin thus want to localize the will in objects and the surrounding environment. According to personality theory, the individual is not an individual within either the family or community unless that individual is represented in the exterior world.³³ The mixing of oneself with one's environment operates as a base-line for growth, but it is also highly nuanced and complicated. The notion that the will is embodied in things suggests that the entity we know as a person (i.e. you or me) cannot come to exist without both differentiating itself from the physical environment and yet maintaining relationships with that environment.³⁴ We do not "know" people without also knowing the space they occupy, the clothes they wear, or other

³⁰ Radin, *supra* note 7, at 986 (arguing "thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement"). Further, she argues that "whereas the theory of personal property begins with the notion that human individuality is inseparable from object relations of some kind, Hegel makes object relations the first step on his road from abstract autonomy to full development of the individual in the context of family and state." *Id.* at 972. The person becomes a real self only by engaging in a property relationship with something external – such a relationship is the goal of the person. Hegel's theory is an occupancy theory . . . continuous occupation is necessary to maintain a property relationship between a person and any particular external thing. *Id.* at 972-74.

³¹ *Id.* at 972.

³² The "incipient" being is amorphous, occurring before the development of the psyche, identity, or notions of objectivity. Development of the self, then, seems to be contingent on space and the evolution and fusion of ones psyche with the outer world:

Rights in general positive through its form of having validity within a particular state; and this legal authority is the principle which underlies knowledge of right, i.e. the positive science of right. In terms of content, this right acquires a positive element . . . through the necessity whereby a system of legal right must contain the application of the universal concept to the particular and externally given characteristics of objects and instances – an application which no longer a matter of speculative thought and the development of the consent, but of subsumption by the understanding; through the final determinations required for making decisions in actuality.

Hegel, *infra* note 38, at 28.

³³ Hegel, *infra* note 38, at 43 (saying that the formal will as self-consciousness finds an external world outside itself as individuality returning to determinacy into itself; it is the process of translating the subjective end into objectivity through the mediation of activity and of an external means).

³⁴ Radin, *supra* note 7, at 977.

tangible physical factors that help constitute such a person. Indeed, we *know* someone only to the extent that we have interactions with that person. It is this subtle view of interaction with the external world, through multiple different contexts, that the self is articulated and created over time. The process represents a balance between exterior physical manipulation, reflection and introspection. Likewise, we “know” ourselves through a similar process. Our development as individuals is predicated on this dynamic. As such, the self can be seen as continually growing. This does not, of course, deny the notion that we operate as individuals with collected experiences from which to draw. Instead, it posits that how we learn and know the world is based, in fact, on that world.

3. HEGEL'S THEORY IS EXEMPLIFIED IN A DWELLING

Hegel's personality theory implies that a home-type structure is necessary for development. We must have an elemental space that is “ours” in a consistent way. Radin takes the idea further: “for example, in a social context a house that is owned by the person whom resides there is generally understood to tread toward the personal end of a continuum between items subjectively interwoven with identity and instrumental items.”³⁵ Some objects are used in a strictly utilitarian sense while others have more of a weighty standing in the subjective construction of our identity. “The home is affirmatively part of oneself – property for personhood – and not just the agreed-on locale for protection from outside interference.”³⁶ The home is highly important in both senses, as instrumental and highly personal.

Property rights reflect privilege and freedom, but “[b]ecause individual rights are implicitly defined by property ownership principles, the law presents many obstacles for persons trying to overcome homelessness who neither own nor control property.”³⁷ Hegel refers to the nature of property:

To have even external power over something constitutes possession, just as the particular circumstance that I make something my own out of natural need, drive, and arbitrary will is the particular interest of possession. But the circumstances that I, as free will, am an object to myself in what I possess and only become an actual will by this means constitutes the genuine and rightful element of possession, the determination of property. In relation to needs—if these are to be taken as primary—the possession of property appears as a means; but the true

³⁵ *Id.* at 987, 991 (“The home is the moral nexus between liberty, privacy, and freedom of association.”).

³⁶ *Id.* at 991.

³⁷ Rosendorf, *supra* note 22, at 702.

position is that, from the point of view of freedom, property, as the first existence of freedom, is an essential end for itself.³⁸

Because property can validate itself as non-instrumental, it also reflects and refracts identity. Property simultaneously plays an essential role in the development of the individual and in the development of the basic rights of an individual in society.

To have a home or shelter creates the perception of a more legitimate person through physicality (hygiene, clothes, storage, etc). People that are perceived as more legitimate – and are more able to appear legitimate – are given more opportunities. If psychological essentialism³⁹ holds true, the ability to have personal space represents the most minimalist and basic form of giving an individual the opportunity to be realized as a valid human. This works through providing basic physical necessities, like a phone line, or a permanent address, which aid in job acquisition, but is of equal importance is the ability to function on an everyday basis. The home provides a safe and consistent environment to sleep and eat so that these necessities do not have to be in the forefront of thinking for an individual in such a circumstance. Instead, the focus can be moved further into the future, toward potential job prospects, or providing long term care for oneself.

B. PRIVATE PROPERTY RIGHTS AND PROPERTY RULES REFLECT, RESTRICT AND CONSTRUCT PERSONHOOD

“Their homelessness consists in unfreedom.”⁴⁰

Property rules shape the space of who is allowed to be where, and when they are allowed that right.⁴¹ Property rules shape an individual’s sphere of liberty by shaping the ability to exercise autonomous, highly personal, and

³⁸ HEGEL, PHILOSOPHY OF RIGHT, Abstract Right, Section 45, 76-77.

³⁹ See generally GEORGE MURPHY, THE BIG BOOK OF CONCEPTS (saying that: Psychological essentialism holds that humans perceive the world through a lens of knowledge that resides in overconfidence and falsity. People operate and function assuming their own subjective understanding, but when questioned or pushed to explain even a rudimentary mechanism (such as a zipper) discover that they do not understand. This phenomenon works on perception of other people as well. People behave as if they understand others in terms of permanence and immutability rather than flexibility.

⁴⁰ Waldron, *supra* note 1, at 306 (emphasis added).

⁴¹ Mitchell, *supra* note 5, at 12 (“We are not speaking of murder or assault here, in which there are (near) total societal bans. Rather, we are speaking, in the most fundamental sense, of a geography in which a local prohibition (against sleeping in public say) becomes a total prohibition for some people.”).

subjective will.⁴² In land designated as common, individual members of the greater community are theoretically equally free to use the property as they wish.⁴³ But with increasingly restricted public space, a common theme emerges: Economically driven free-market systems define and justify rights exclusively in terms of control over resources.⁴⁴ Therefore, it is increasingly difficult to distinguish between human and property rights.⁴⁵ Economic theory implies that a free-market system will put all goods to their best use because the people who derive the most value give the most to obtain such goods. In that context, the homeless become nonentities with little rights for protection. Their status is viewed as neutral and natural.⁴⁶ Their status is their fault – internalized into the individual. Thus, economic theory verily subscribes to the ideal of

⁴² Gregory S. Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 733, 735 (2003) (stating that “[n]o modern Supreme Court decision has recognized a property right as fundamental for substantive due process purposes.”).

As every constitutionalist knows, things were different once. Property once enjoyed an exalted status in American constitutional law. During the notorious *Lochner* era, the Supreme Court used the Due Process Clause of the Fourteenth Amendment to protect not only liberty of contract but property interests as well. Indeed, the Court barely distinguished then between property and contract for Due Process purposes, tending to lump together all private economic interests in its aggressive attack against the activist state. The story of *Lochner*’s rise and demise is too familiar even to summarize here.

Id. at 736.

⁴³ Luke M. Milligan, *Comment: The Fourth Amendment Rights of Trespassers: Searching for the Legitimacy of the Government-Notification Doctrine*, 50 EMORY L.J. 1357 (2001). Common land here refers not to un-owned land but to land owned by a government or municipality. See also Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons From American Cities*, 66 TUL. L. REV. 631, 645-647 (1992) (claiming that American cities “maintain order . . . through punishment of the displaced poor,” and that cities have gone on arrest sweeps and campaigns); see also Waldron, *supra* note 1, at 297 (A place is common property if part of the point of putting it under collective control is to allow anyone in society to make use of it without having to secure the permission of anybody else).

⁴⁴ See generally Robin Malloy, *Equating Human Rights and Property Rights—The Need for Moral Judgment in an Economic Analysis of Law and Social Policy*, 47 OHIO ST. L.J. 163 (1986) (discussing the foundational moral philosophers and arguing that they all have a moral directive interwoven with theory).

⁴⁵ Rosendorf, *supra* note 22, at 706.

⁴⁶ *Id.* at 704-707. See also Neil Duxbury, *Law, Markets, and Valuation*, 61 BROOKLYN L. REV. 657, 660 (1995) (arguing that “[t]he problem concerns the limits of market reasoning. Some things are simply not for sale, either because they cannot be bought and sold or because there exist strong feelings that they should not be bought and sold.”).

“externalities.”⁴⁷ Yet, economic theory assumes an outside marketplace and equal levels of access to goods; this ideal does not always comport with reality.

Rather, early American society held property and wealth to be essential ingredients for the survival of liberty and truth.⁴⁸ “When privacy is viewed through the lens of Hegel’s personality theory, it is clear that the current privacy formula based almost entirely on economic concepts is not an accurate reflection of the reasons why so many societies have granted special privacy protection to their citizens’ living spaces.”⁴⁹ For the homeless, there is no sovereign place to exist. They have only public space; in fact, the only reason the homeless can sustain themselves involves a reliance on public, collective places.⁵⁰ The annihilation of space by law is, unavoidably (if still only potentially), the annihilation of people.⁵¹ The development of the self is fundamentally altered over a time frame when public goods are the sole allowance of resources. One can easily expect the homeless to find multiple different ways to acquire property that can then be excluded from other people – this will further entrench their involvement within a criminal justice system that derides loitering in public space.

The central concept of a “home” in the United States revolves around the notion of autonomous, privately owned space. This space epitomizes the American dream.⁵² Because these spaces are wholly exclusionary on the owner’s

⁴⁷ BLACK’S LAW DICTIONARY 266 (Pocket Edition 2001): “A social or monetary consequence or side effect of one’s economic activity, causing another to benefit without paying or to suffer without compensation.”

⁴⁸ Mark A. Godsey, *Privacy and the Growing Plight of the Homeless: Reconsidering the Values Underlying the Fourth Amendment*, 53 OHIO ST. L.J. 869, 874 (1992).

⁴⁹ *Id.* at 887.

⁵⁰ Mitchell *supra* note 5, at 11 (“We are creating a world in which a whole class of people simply cannot be, entirely because they have no place to be.”).

⁵¹ *Id.* at 12. *See generally* Community for Creative Non-Violence v. Unknown Agents of the United States Marshals Service, 791 F. Supp. 1, 5 (D.C. Cir. 1992) (where federal marshals made 5:30 am raid to search a 500-occupant shelter with the intent to execute arrest warrants. “For many of the Plaintiffs, their choice was between the homeless shelter and the streets. Thus, the shelter was, for them, the most private place they could possibly have gone”).

⁵²

“For most Americans, home ownership is our most important source of wealth. Home ownership is at the heart of the American Dream. It has a profound impact on inter-generational opportunity. Our Founders understood that owning secure and productive property was a key foundation to the freedom and independence necessary to responsible citizenship and the exercise of all other liberties. The federal constitution allowed states to limit the franchise to property holders, and all states did so.”

Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 607-608 (1999).

will, the home is an endemically individualized and universally recognized, piece of property; it is an essential part of both the instrumental and personal property makeup.⁵³ The idea that some people do not have homes enters public consciousness as a “problem” to be solved. Those in a homed situation will quickly forget that their home symbolizes a privilege. If one is homed, one’s mindset will not typically be conscious of their home in the sense that they have the capacity to have a home. They will worry, perhaps, about characteristics of their home (e.g. cleanliness or heating bills), but they will not often question the basic premise of their home as existent. This is natural, but also works to individualize perspective so that those without homes are not given as much credit (typically) as those with a home. Likewise, this “perspective problem” will create a chasm between the homeless and those whose job it is to judge the homeless – judges themselves, if such a level of adjudication is provided, but most likely, police officers on the street or other types of enforcement officers that work for private companies.

The foregoing section laid the background for personality theory, with some implications for the homeless at a somewhat general level. Section II will lay the background for search and seizure jurisprudence with a special concentration on how trespassers are viewed in light of searches and seizures. Section III will put both section I and section II together to explicate how the current standard treats the homeless.

III. THE FOURTH AMENDMENT, SEARCH, SEIZURE AND HOMES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁵⁴

Fourth Amendment jurisprudence underwent a change in 1967 with *Katz v. United States*.⁵⁵ The new standard has two prongs. First, the defendant must have exhibited a subjective expectation of privacy; second, that expectation must

⁵³ Many homeless shelters do not allow the homeless to store things there at night. *Hibel v. 6th Judicial District of Nevada*, 2003 US Briefs 5554.

⁵⁴ U.S. CONST. amend. IV.

⁵⁵ 389 U.S. 347 (1967).

be one that society is prepared to recognize as reasonable.⁵⁶ Search and seizure law now explicitly protects people, not just places.⁵⁷ But the analysis turns on the presence or absence of physical intrusion into any given enclosure.⁵⁸ If searching a house/dwelling, the government must always overcome an inherent presumption against the validity of such a search, and courts will usually find the home protected.⁵⁹ “The physical entry of the home is the chief evil against which the Fourth Amendment is directed – at the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.”⁶⁰ But if one knowingly or intentionally exposes information or an item to the public, even in one’s own home, then that item is not protected.⁶¹ That is, courts have explicitly provided the home as the primary example of property protected from illegal searches. It is also possible that the writers of the Constitution held such views.

The *Katz* court, though, fundamentally shifted the standard of governmental searches from property intrusion to intrusion of a person.⁶² This

⁵⁶ *Id.* at 360-62. See generally Cloud, *supra* note 3, at 249-251 (explaining that the first prong of subjective expectation is nonsense; a fundamental right cannot depend on the subjective belief of one citizen. Further, it would always be in the affirmative; in practice, our courts would simply ignore the first prong, turn to the second, and conclude a privacy right in one’s home); Michael Campbell, *Comment: Defining A Fourth Amendment Search: A Critique of the Supreme Court’s Post-Katz Jurisprudence*, 61 WASH. L. REV. 191 (1986) (arguing that the pre-*Katz* approach was a more workable standard, whereas the *Katz* standard was devoid of substantial meaning). Cf. Michael D. Granston, *Note: From Private Places to Private Activities: Toward a New Fourth Amendment House for the Shelterless*, 101 YALE L.J. 1305, 1322-1323 (1992) (stating that a conception of the Fourth Amendment privacy as merely a right to non-disturbance fails to capture the full import of the Fourth Amendment’s prohibition of searches and seizures).

⁵⁷ *Katz*, 389 U.S. at 352 (stating “we have recognized that the principle object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fiction and procedural barriers rested on property concepts”).

⁵⁸ Godsey, *supra* note 48, at 877.

⁵⁹ *Payton v. New York*, 445 U.S. 573, 589 (1980). See also Cloud, *supra* note 3, at 298 (The core rule is about a warrant for every search and seizure; it is there to add teeth to the abstract principle that government should not intrude upon individuals and their activities without good reason; that intrusion must be based on facts good enough to convince a judge that it was necessary to jettison a principle favoring liberty and allow the government to proceed with a search and seizure).

⁶⁰ *Payton*, 445 U.S. at 589.

⁶¹ *Katz*, 389 U.S. at 351. This article presumes that a homeowner would not generally or normally expose items meant to stay hidden.

⁶² The previous view, elucidated in *Olmstead v. United States*, 277 U.S. 438 (1928), was of protection through physical barrier, stating: “The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and message while passing over them are not within the protection of the Fourth Amendment.” *Id.* Before *Katz*, a search was an intrusion entailing a physical trespass upon a constitutionally protected area. Cloud, *supra* note 3, at 247.

shift, while abstractly important, was also analytically simple because of the facts provided. The question in *Katz* revolved around whether an individual was protected under the Fourth Amendment while engaged in a phone call on a public phone.⁶³ The language in *Olmstead*, the previous standard setting case, specifically refers to a telephone,⁶⁴ but does not provide protection under the Fourth Amendment because an individual's purpose while telephoning is necessarily to project his voice outside of the confines of the home. While that standard seems abstruse,⁶⁵ the *Katz* court has not directly assessed the viability of comporting with a "reasonable" subjective expectation of privacy. The facts of *Katz* lend themselves to such a reasonable expectation standard because there was a physically manifested separation between the defendant and the outer world, even if temporarily.⁶⁶

It is arguable whether the *Katz* court actually changed the standard away from property and into "just" the person. After all, a person must have and exhibit a reasonable expectation of privacy. For most reasonable people, it seems, hiding something they do not wish to be discovered would provide the most apt exhibition of their personal will. The *Katz* court held good intentions: protection of those who may be on a telephone, or communicating in a nontraditional manner. It is conceivable that they thought they were furthering the previous standard, yet it also seems that such a theoretical shift was not well thought through. That is, the *Katz* court wanted to further the protection of an individual from illegal searches and seizures. What better way to do this than to denounce protection based solely on property and propel a standard that vests with the person? The Court's decision represents a somewhat Lockean or Kantian view on the person – abstracted from social circumstance. The homeless

⁶³ *Katz*, 389 U.S. at 347, 352.

⁶⁴

Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment. The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment.

Olmstead, 277 U.S. at 465-466.

⁶⁵ See generally Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1973-1974) (arguing, *inter alia*, that the subjective privacy prong is rarely determinative, and, perhaps, defective).

⁶⁶ Cloud, *supra* note 3, at 249 (arguing that this does not establish a straightforward rule whose meaning is in reference to another body of law, and it does not require decisions rest upon the values underlying the amendment).

did not emerge as a national phenomenon until nearly a decade and a half after the *Katz* decision. The court no doubt concluded that individuals can decide when they wish to hide something, and without some larger suspicion or other evidence proffered, their expectation should be respected. Yet, this line of analysis does not see elements of personhood theory – the development of the person through time and property. Using personhood theory yields a completely different outcome. Personhood theory’s main tenant is that individual will is most effectuated when a person can touch the external world. That is, to some end, intent can be read from how an individual manipulates their environment. Yet, the *Katz* court put the onus into the “person” over and above, ostensibly, his or her physical surroundings. They did this, as stated, contrary to the very strong evidence of expected privacy that was a telephone booth—an enclosed private space.

A. GOVERNMENT NOTIFICATION AND ELUCIDATION OF KATZ

1. TRESPASSERS SHOULD EXPECT NO FOURTH AMENDMENT PROTECTION

Not surprisingly, from *Katz* came a line of cases that are sometimes contradictory. In *Amezquita v. Hernandez-Colon*⁶⁷ the Fourth Amendment status of the trespassing plaintiffs was compared to a car thief.⁶⁸ *Amezquita* represents a clean application of the view in *Katz*: The plaintiffs were stripped of their Fourth Amendment protection on the basis of their status as trespassers. According to the *Amezquita* court, the government had no obligation to notify the plaintiffs/trespassers of an impending search, but could, without notice, eject the trespassers from their land.⁶⁹ Thus, there was no need to provide notification of trespass before the violation of Fourth Amendment rights. The Fourth Amendment, in some situations and locations, is presumptively dead once bad faith occupancy occurs.⁷⁰ The commonwealth need not afford [them] any procedural due process before terminating such activity.⁷¹ The *Amezquita* court

⁶⁷ *Amezquita v. Hernandez-Colon*, 518 F.2d 8 (1st Cir.1975) (squatters occupied government-owned buildings and the government was looking to destroy and raze the buildings).

⁶⁸ *Id.* at 12: “But whether a place constitutes a person’s ‘home’ for this purpose cannot be decided without any attention to its location or the means by which it was acquired; that is, whether the occupancy and construction were in bad faith is highly relevant. Where the plaintiffs had no legal right to occupy the land and build structures on it, those *faits accomplis* could give rise to no reasonable expectation of privacy even if the plaintiffs did own the resulting structures.”

⁶⁹ *Id.* at 11.

⁷⁰ *Id.*

⁷¹ *Id.*

stands for the principle that search and seizure protections do not necessarily apply during trespass because trespassers cannot reasonably believe in an inherent expectation of privacy. That is, their *physical* location, not their personal expectation, decides their status with regard to the Fourth Amendment. The status of trespasser is contingent on only one thing: occupying a space that one is not allowed to occupy. In such *space*, the *Amezquita* court says, one cannot necessarily be protected against search and seizure. This seems a somewhat different standard than the *Katz* court elucidated.

2. EXCEPTION: FOURTH AMENDMENT PROTECTION WHEN TRESPASSER IS UNAWARE OF TRESPASS

In *Colorado v. Schafer* the defendant was camping on public land and his tent was searched.⁷² In *Schafer*, however, the motion to suppress evidence was affirmed.⁷³ The difference between *Amezquita* and *Schafer*, arguably, was the subjective awareness of the defendant. Did the defendant know of government ownership of the property, whether through posted signs or other means? If government notification is in effect, then the owner of the land (the government in this case) must prove that the trespasser was notified before a search can occur. The *Schafer* court provides, on one hand, a reasonable assumption that the trespasser did not know of the trespass, while the *Amezquita* court provides a straight forward presumption of invalidity concerning Fourth Amendment rights once any trespass has occurred.⁷⁴ Hence, different circuits treat similar cases differently and trespassers may or may not have Fourth Amendment protection depending on what jurisdiction they are in. Of vital importance is that *Schafer's* tent was searched, not his person. In this regard the tent represented a dwelling – a home if you will – that can be physically understood as a barrier to one's personal possessions.

Yet, one's dwelling does not always help in determining the constitutional protection one receives. In *United States v. Ruckman*⁷⁵ the defendant was living in a cave on public grounds for approximately eight months.⁷⁶ He had fastened a

⁷² *People v. Schafer*, 946 P.2d 938, 941 (Colo. 1997) (“[A] person camping in Colorado on unimproved and apparently unused land that is not fenced or posted against trespassing, and in the absence of personal notice against trespass, has a reasonable expectation of privacy in a tent used for habitation and personal effects therein.” The court goes on to say that the highest protection is afforded to one's residence; a search thereof without a warrant is presumptively unreasonable).

⁷³ *Id.* at 941.

⁷⁴ Perhaps the plaintiffs in *Amezquita* should have known, given the different contexts of the cases. But it is arguable that *Schafer* also should have surmised his presence was that of trespass.

⁷⁵ *United States v. Ruckman*, 806 F.2d 1471 (10th Cir. 1986)

⁷⁶ *Id.*

door on the entrance of the cave.⁷⁷ The *Ruckman* court sided with the *Amezquita* court, saying that because Ruckman was a trespasser on public lands, he was immediately removable and surrendered any rights and any expectation of privacy.⁷⁸ The traditional *Ruckman* rule confirms that trespassers can never have a legitimate expectation of privacy.⁷⁹ Under this standard, a dwelling can be searched, even if it is clearly a dwelling of an odd sort, without prior cause. The status of trespassing makes suspicion a per se condition that impacts the power relations of the situation.

3. PUBLIC EXPOSURE IS SUBJECTIVELY ENFORCED

In *State of Hawaii v. Dias*,⁸⁰ a police officer went for a stroll on the beach. The officer could, from a public position, observe gambling occurring within the closed space of a makeshift shelter.⁸¹ Instead of conferring with his supervisors or attempting to obtain a warrant, he rushed into the shack and arrested the occupants.⁸² The *Dias* court assumed exposure to the public, but chastised the police officer by ruling in favor of the defendants because the police officer failed to attempt to get a warrant.⁸³ Conversely, in *State of Connecticut v. Mooney*, police searched a homeless person's living space without a warrant⁸⁴ and the court found that a reasonable expectation of privacy was inclusive of the closed duffel bag and closed box, but did not apply to the living area generally.⁸⁵ Courts can choose when and how to apply the subjective reasonableness prong based largely on discretion. Because of this, the homeless should not expect to have a uniform protection against illegal searches and seizures.

⁷⁷ *Id.* at 1474. Compare dissent from Ruckman (arguing that a finding that the cave fails to qualify as a "house" does not automatically mean that no legitimate expectation of privacy can attach to the cave for Fourth Amendment purposes) with *United States v. Sandoval*, 200 F.3d 659 (9th Cir. 2000) (holding that where defendant lived on federal land in a tent surrounded by thick bushes, defendant's expectation of privacy did not turn on whether he had permission to camp there, but attached to him because the contents were clearly in his tent).

⁷⁸ *Ruckman*, 806 F.2d at 1471.

⁷⁹ *Id.*

⁸⁰ *State v. Dias*, 609 P.2d 637, 639-41 (Haw. 1980).

⁸¹ *Id.*

⁸² *Id.* at 641 (Here there was no showing of the exigency exception (the occupants of the shack were not immediately going somewhere); mere inconvenience is never a valid reason for bypassing the warrant requirement).

⁸³ *Id.* at 640.

⁸⁴ *State v. Mooney*, 588 A.2d 145 (Conn. 1991).

⁸⁵ *Id.*

Trespassing itself entails presence in a space that is not one's own, but belongs to a third party. The question is whether it may be reasonable to expect privacy while trespassing. The answer, which varies depending on what court you ask, is that different people have different conceptions of property and personhood. Some courts patrol the boundaries of private property with a firm hand – no constitutional protection when trespassing. Others, though, see a reasonable exception if one has set up their *own* private space within the property they reside. And yet other courts say it is reasonable for a trespasser to have knowledge of his or her trespass to, in essence, consent to a search. Yet another question is how legitimate one's proposed dwelling is. This question can be changed slightly: Does the searched person own the property upon which he or she constructs a dwelling?

IV. FOURTH AMENDMENT JURISPRUDENCE SHOULD BE CONTEXTUALIZED WHEN DEALING WITH A HOMELESS POPULATION

This section analyzes search and seizure jurisprudence within the purview of personhood or personality theory as applied to the homeless. While the Fourth Amendment was historically thought of in terms of protecting property,⁸⁶ the *Katz* court sought to protect “persons” through the Fourth Amendment. But the explicit protection that is extended to “houses”⁸⁷ raises the important question of how this term should apply to members of society who lack any form of residence that remotely resemble a traditional dwelling.⁸⁸ The Court, while perhaps seeking to extend Fourth Amendment protection, has not sufficiently answered the question of exactly how a normative inquiry of a reasonable expectation of privacy would proceed for the homeless.⁸⁹ “Since the homeless, like us, are real people, they need some real place to be, not just the notional reflect of a Hohfeldian power.”⁹⁰ Under the traditional *Ruckman* rule, for instance, the determinative facts in evaluating a trespasser's expectation of privacy are (1) ownership rights; and (2) lawful control of the premises searched.⁹¹ This rule

⁸⁶ Radin, *supra* note 7, at 998.

⁸⁷ Inclusive of apartments or other living situations legitimized as appropriate property.

⁸⁸ Granston, *supra* note 56, at 1306-07.

⁸⁹ Radin, *supra* note 7, at 1000.

⁹⁰ Waldron, *supra* note 1, at 322.

⁹¹ Milligan, *supra* note 43, at 1370. Milligan further argues that the government notification doctrine is devoid of meaning and goes against clear *Katz* jurisprudence, which states that a trespasser, as an illegitimate occupier of land, has no Fourth Amendment rights: “Government-notification Doctrine's

assumes that trespassers are immediately visible, and that there is a clear demarcation between those that lawfully exist and those outside of that sphere. While this justification may seem to make sense to a landowner, it is less clear when seen from the perspective of a homeless person, either on private property or when applied to communal or government-owned land. Thus it becomes important to understand how the Fourth Amendment protection plays out when applied to the homeless on a practical level. The following section first examines the ability of the homeless to have personhood under the personality theory explicated earlier and then looks at the implication for search and seizure law in this context.

A. THE HOMELESS LACK THE ESSENTIAL OPPORTUNITY OF PERSONHOOD⁹²

Homelessness is a problem for Fourth Amendment search and seizure jurisprudence. The homeless are more vulnerable to illegal searches than those with homes;⁹³ they do not have a reliable or consistent place to live. To formulate a fair and inclusive homelessness policy toward search and seizure, it is important to understand personality theory because it allows for temporal and physical development of a person that works to contextualizes experience within space – physically. The homeless do exist and must be respected with equity rather than *de facto* and *de jure* disenfranchisement. Personhood analysis, in part, helps to contextualize property and the home as interrelated and foundational to identity.⁹⁴ It helps to elucidate why the homeless deserve the same Fourth Amendment treatment as those with homes, and why the current standard disparately impacts the homeless.⁹⁵ It also exposes the class-based enforcement of the law by showing the historical roots in the assumption of

justifications are substantially under-inclusive, speculative, or contrary to modern law, and, as a result, the doctrine cannot be analytically reconciled with the Court's fourth amendment methodology." *Id.* at 1375.

⁹² *But see* Waldron, *supra* note 1, at 323:

Lack of freedom is not all there is to the nightmare of homelessness. There is also the cold, the hunger, the disease and lack of medical treatment, the danger, the beatings, the loneliness, and the shame and despair that may come from being unable to care for oneself, one's child, or a friend.

⁹³ *See supra* Part I.B.1.

⁹⁴ While there cannot be a simplified fixed equation between quantity of property and quality of development, we can posit that those with no stable property do suffer for it. The homeless person's psychological space is shrunken and changed because there can be no safety.

⁹⁵ *See supra* Part I (discussing personality theory) and accompanying notes.

property as personhood. Further, the expectation that a homeless person can comprehend and then delineate a defense to an illegal search is specious.⁹⁶

The homeless are at a disadvantage because they are consistently exposed to the public.⁹⁷ They are often visibly homeless, stigmatized because they lack hygiene capacity, clothing capacity, nourishment, normalized relations, or the ability to sit peacefully. These conditions exist, in part, because the homeless can claim little or no property as their own. Such basic property can help to augment a perceived physical stigma into something that appears more normal. The ability to have clean clothes, for example, will in most cases dramatically change the perception one has of another person. But the homeless do not blend into the scenery of a city park or a bridge underpass.⁹⁸ Psychologically, it is easier to perceive their visibility as difference, which fosters abnormally high levels of suspicion by law enforcement.

People do not want to be confronted with the sight of the homeless – it is uncomfortable for the well-off to be reminded of the human price that is paid for a social structure like theirs – and they are willing to deprive those people of their last opportunity to sleep in order to protect themselves from this discomfort.⁹⁹

Instead of subjective equivocation around the standpoint of reasonableness, search and seizure law must specifically consider those marginalized by inadequate finances. A presumption reversal would constitute a start toward equal standards. The standard should make the government affirmatively prove the reasonableness of a search whether in a household or not.¹⁰⁰ Those that have sub-par protection are precisely the people that have the least access to defending that protection and are less likely to be convincing or persuasive.

⁹⁶ *Infra* Part III.B.

⁹⁷ Katz stands for the protection against illegal search and seizure except when items are exposed to the public. *Katz*, 389 U.S. 347. *But see Mooney, supra* note 84 (where a duffel bag that was closed was protected against illegal search). *Contra Ruckman, supra* note 75 (trespassers void all protection). If one court finds that a duffel bag should be protected while a different court posits that a closed space on public land is not protected, a clear standard does not emerge forthright.

⁹⁸ *See Michelman, supra* note 19, at 1319 (To the extent that our society is communist, our society will accommodate the homeless. If there is public space with no limitations, the homeless are allowed some minimal dignity).

⁹⁹ Waldron, *supra* note 1 at 314. “Certainly there would be an uproar if an ordinance was passed making it an offense to pray in the subway, or to pass one’s time there in a political debate . . .” *Id.* at 319

¹⁰⁰ *See infra* note 12.

1. THE HOME IS THE ESSENTIAL ELEMENT IN BOTH PERSONALITY THEORY AND ECONOMIC THEORY

Although a narrow economic analysis has been somewhat triumphant over a structural analysis, it can implicitly deny the essentialness of personality theory to the ideals of this country. An economic theory of rights must be balanced with a personality theory to incorporate human liberty as a concrete ability to control some property in a non-superficial manner. Historically, the home has consistently been recognized as this place. Without it, laws that restrict public spaces at night, or restrict loitering, are not neutral. The home epitomizes privacy (through property).¹⁰¹ The home represents a space where an individual can exist with uninterrupted relaxation or the unperturbed exploration of the self.¹⁰² In short, the individual is allowed to experiment and develop psychologically in the home because it is bordered from the outer world – it is a private place.¹⁰³ It is a safe place. Physical and mental development mandates external manipulability.¹⁰⁴ Only with this possibility can people learn, grow, relax, communicate and develop.¹⁰⁵ The home provides this consistent space, where we do not have to answer to others in an immediate sense, and where we do not have to move to or from on a daily basis.

When the home is nonexistent there may be substitutes, but none that provide the full panoply of subjective and objective entitlements. And yet, the ability to have a home is based on one's financial status.¹⁰⁶ Homes cost money.¹⁰⁷

¹⁰¹ The home may take many forms – house, apartment, townhouse, or condo – but it must be a legally and financially recognized area where the owner/resident has a private space. Certain places may operate as a home (see Part III.B for this discussion). It is important to note that this article concerns lawful activity within the home. It assumes a normal activity within the law (not “strange activity”), and assumes that this activity does not infringe on another person's legal or natural rights. See Payton, *supra* note 59 (an inherent presumption of privacy attaches to the home).

¹⁰² “The highest protection is afforded to one's residence; a search thereof without warrant is presumptively unreasonable.” Schafer, *supra* note 72 at 942.

¹⁰³ See generally Part I.B (explicating the theoretical and pragmatic background for the home as a central subjective and objective piece of property following from personality theory).

¹⁰⁴ See Radin, *supra* note 7, at 987.

¹⁰⁵ *Id.*

¹⁰⁶ “To contemporary Americans, the thought of basing voting rights on one's property seems ridiculous – we have been indoctrinated with the concept that each citizen is born with certain inalienable rights that protects him or her regardless of wealth and material success.” Godsey, *supra* note 48, at 869. Personhood as developed with property is stronger than subjective preference. Radin, *supra* note 7, at 961.

¹⁰⁷ The issue of housing as a right or entitlement is beyond the scope of this article. The issue of the importance of homes is vital, however, to understand search and seizure discrepancies and personality development.

The ability to develop the self, though, should not be intermingled with the amount of money one possesses. Regardless, if we accept that homes and the development of the self can rely, in part, on the resources that the self possesses, we can also view the home on an operational, less philosophical, level. Pragmatically, it offers a place to cook, clothe, make love, exercise and sleep.¹⁰⁸ Based on a utilitarian theory, it has multiple and essential uses; its utility as a whole is perhaps the highest one could find, on par with clothing and shelter. The home itself does not provide food, or make one's ability to sleep incur, instead it is even more vital: The home is the space where these activities recapitulate themselves. We worry about that space, lock it up, paint it different colors, and fuss with its particulars. It is subjective space, but objectively essential to life. "When one of us – the housed – find ourselves unexpectedly in the grips of diarrhea, for example, the question is only one of timing, not at all of having no place to take care of our needs."¹⁰⁹ The home is so basic to our everyday lives that we do not live with a conscious recognition that it exists.

2. HOMELESSNESS FORCES RELIANCE ON PUBLIC GOODS

To be homeless is to force sole reliance on public (or publicly available) facilities. Brushing one's teeth, preparing food (if possible), sleeping, and all other essential activities must be performed in a pseudo-public setting (e.g. bathroom activities in a public library's bathroom). Thus, if the home is removed from calculation in everyday activity, it alters survival patterns, decreases luxury, and retards maturation over time. The immediacy of being homed is much more important than other activities that could proceed relatively seamlessly with a home. Further, gaining meaningful employment, having friends, a car, hobbies, and other activities that are largely seen as fundamental to normal life must take a back seat to the uncontested fact of homelessness. The objectives of the homeless person must cycle around the locale of shelter for that evening. The homeless have less of an opportunity to defend themselves against illegal searches because they lack the essentials for the perception of legitimacy. Objectively, they lack the physical strength, moral rigor, or social capital that others have access to. Personally, they lack the access to the foundation for personhood. Existentially, most stability is removed and pure survival replaces what could be minimal shelter and protection.¹¹⁰

¹⁰⁸ *But see* Duxbury, *supra* note 46, at 660 (some things cannot be bought and sold).

¹⁰⁹ Mitchell, *supra* note 5, at 11.

¹¹⁰ *See generally* Simon, *supra* note 43 at 646-647 (arguing that municipal ordinances frequently drive the homeless from public space).

3. ECONOMIC THEORY EMBEDS RESPONSIBILITY IN THE INDIVIDUAL AND IS NOT CONCERNED WITH PUBLIC GOODS AS COMMUNAL

Economic theory aids the perception that natural hierarchy exists. Once that perception is created, a self-fulfilling prophecy can recapitulate or reconstruct itself perpetually.¹¹¹ Economic theory posits, assuming enough resources, that goods will fall where they are most efficient.¹¹² Because some have more property than others, this theorem may be falsely interpreted to construe current property holdings as, in fact, the most efficient. However, property and monetary allocation were never on an “even” level; there was never a time where everyone held equal amounts of money or the potential to access capital. Property accumulation has always been skewed to those with property.¹¹³ Problematically, when we view liberty through this lens, wealth consistently provides greater latitude of freedom, or a wider circle of liberty. Wealth garners more wealth over time. But at a fundamental level, liberty must be understood as affirmative as well as negative. Those with more resources have the ability to gain more basic protections, like side airbags, nutritional meals, and other various products. Further, those with a home have the presumption of freedom within the home.¹¹⁴ Those with no home must prove that their activities garnered a reasonable expectation of privacy in order to prove illegal search.¹¹⁵

The home represents both the pinnacle of property essential for a personality theory, and a strongly utilitarian and economic tool that fosters competitiveness and validity in the market system. It is simultaneously essential as an instrument and as a highly subjective piece of property necessary to create certain spheres of liberty. Without it, the homeless are disadvantaged on a personal existential level, but are also taken out of the “fair” game for market forces – their very stability to compete is vacant. They cannot act in an “individual” manner in the same way that a homed person can choose to act.

B. PERSONHOOD ALLOWANCE: THE HOMELESS ARE IN THE MOST DIRE SITUATION IN COMMUNAL SPACE

The legal community generally ignores the claim that law treats homeless people differently based on a divide between homeless or homed, or more

¹¹¹ See also *supra* note 39 (stating that this cycle occurs because of others’ perception of the homeless as well as the subjective reflection of the homeless person on their own conditions and self-worth).

¹¹² But see Molloy *supra* note 44 (arguing that economic theory has a foundation of moralism).

¹¹³ KARL MARX AND FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO (David McLellan, ed. 1992)(1888).

¹¹⁴ Payton, *supra* note 56, at 589.

¹¹⁵ Katz, *supra* note 55, at 351.

broadly, between public and private space in search and seizure law. The homeless are not freed from obstruction when operating within a “liberty” interest. Their liberty interest, though, is regulated to public space. Many laws prohibit normal activities that occur in public.¹¹⁶ These laws transform general applicability into discrimination and necessarily affect some more than others.¹¹⁷ When one lives in an acceptable dwelling, the government must affirmatively prove a valid reason to search.¹¹⁸ This is transformed and eroded when the individual is taken out of an acceptable home, when their life is predicated on public space. The homeless must rely on their own recognizance to establish a subjective expectation of privacy that is reasonable.¹¹⁹ With a home, that expectation is already in place.¹²⁰ “Since the Shelterless have no option but to live their daily lives in the public domain, the public seclusion is an invalid measure of their expectation of privacy.”¹²¹ A homeless person’s freedom consists solely of actions that he or she can perform in a public area. Because of this, at the very least, communal spaces should ostensibly accommodate activities that typically come with a home, rather than regulate activities like sleeping.

1. THE HOMELESS STAND ON WEAKENED GROUND

The issue of communal space also cuts into the notion of participatory and representative democracy: To develop personhood in democracy is essential to be part of the civic system and be valued as an equal member. If cities regulate

¹¹⁶ See generally Simon, *supra* note 43 (arguing that when cities regulate public space, they regulate the lives of the homeless).

¹¹⁷ See generally *supra* Part II.

¹¹⁸ *Katz*, 389 U.S. at 351.

¹¹⁹

Typically, homeless individuals lack a legal address, a place to bathe, access to transportation or telephones, and often suffer from poor health. These factors make it difficult for the homeless obtain and keep a job. Additionally, the lack of legal address and transportation make it virtually impossible for the homeless to vote, rendering them politically powerless as a group.

Christine L. Bella & David L. Lopez, *Note: Quality of Life—At what price?: Constitutional Challenges to Laws Adversely Impacting the Homeless*, 10 ST. JOHN’S J.L. COMM. 89, 119-20 (1994).

¹²⁰ The purpose of the Fourth Amendment, then, is not to protect privacy per se, but to protect against governmental encroachment on socially defined privacy rights. See Campbell, *supra* note 56, at 209 (arguing that there should be a social norm of privacy standard where activities are protected if they are private activities generally).

¹²¹ Granston, *supra* note 56, at 1307. The shelterless have no enclave of privacy in which to withdraw to conduct their private affairs and activities. *Id.* Further, when homeless people are visible, many people avoid the area. Mitchell, *supra* note 5, at 10.

communal spaces, the effect can be to erode the possibility of living on a needs-based level. The homeless cannot develop psychologically with no home, nor participate effectively in a democracy, nor sleep, eat, or defecate in private. They literally have nowhere to go. Their position is vulnerable and compromised. They are more visible, and therefore more suspicious.¹²² They are not able to politically organize. Practically, there are fewer obstacles to an illegal search of their persons. In their subjective reality, a constitutional framework is ineffably transparent, largely invisible and toothless. It means nothing on the ground. The homeless do not comport to a reasonableness standard, which generally centers on the mean, but exists in the fragmented margin. Because the burden of proof automatically shifts with the shift of shelter status, because the shelterless are less able to protect themselves, and because of decreased functionality, it is crucial to equally protect this vulnerable group against illegal searches.¹²³ Equal protection against illegal searches and seizures does not necessarily make the homeless a suspect class.¹²⁴ It does, however, mean that special precautions should be incorporated into normal procedure.¹²⁵

The homeless are in a precarious situation that largely works against their most basic needs. Since they have no private space, they are forced to rely on charity organizations, shelters, and communal space, to live. If we allow the homeless to exist, are we then allowing them to act as free agents in public places?¹²⁶ If we do not allow this agency, it is imperative that we reformulate the reasonableness prong to accommodate possible illegal searches.¹²⁷

C. CURRENT SEARCH AND SEIZURE LAW EXPLOITS THE INHERENT VULNERABILITY IN HOMELESSNESS¹²⁸

¹²² Visible negative stigma is reluctantly categorizing.

¹²³ See *infra* Part IV.A (arguing that physicality of property still drives Fourth Amendment law verses).

¹²⁴ The conversation on constitutional scrutiny is not directly within the scope of this article.

¹²⁵ Those precautions are not directly within the scope of this article. But there are a number of structural and mechanistic changes that could occur.

¹²⁶ Waldron, *supra* note 1 at 305.

¹²⁷ *Katz*, 389 U.S. at 351.

¹²⁸ “A definition of search based upon the reasonableness of an expectation that information will remain private is inevitably arbitrary.” Campbell, *supra* note 56.

1. THE KATZ STANDARD DOES NOT CURRENTLY ACKNOWLEDGE A CONTEXT LIKE PERSONALITY THEORY

The *Katz* standard¹²⁹ provides the seed for a comprehensive inquiry, but this inquiry has not been accomplished or taken seriously. While it is difficult to measure the total number of homeless persons in this country, most estimates place the number of homeless people on any given day at between 500,000 and 750,000 and the number of homeless people throughout the year at anywhere between 1.5 million and 3.75 million.¹³⁰ If we allow the homeless to exist, are we then allowing them to act as free agents in public places?¹³¹ If the homeless are allowed to exist, they should have correlative basic rights to every other citizen. Law must provide for human emotive issues, such as dignity and development, while being widely applicable to all those possibly affected by illegalities.¹³²

Current law and law enforcement must reflect our multicultural and heterogeneous society by acknowledging disparities in wealth. The homeless should be protected with equal veracity.¹³³ A subjective expectation is never hard to prove.¹³⁴ However, defining the contours of reasonableness when a homeless person's personal space is searched may prove an entrenched impossibility. After all, how would a reasonable person act without a home, a private area to keep personal belongings, or food and a bed for the evening? These factors would necessitate certain unreasonableness. A perceived right to privacy could never be legitimized by this standard as applied. This standard could not possibly be reached by a removed judicial authority.¹³⁵ Therefore, the same presumption

¹²⁹ "My understanding is that there is twofold requirement: first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361-62 (Harlan, J., concurring).

¹³⁰ Ann M. Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 HOUS. L. REV. 211, 268, n.527 (2003).

¹³¹ Waldron, *supra* note 1, at 305.

¹³² Cf. Rosendorf, *supra* note 22, at 706-09 (some degree of negative freedom involves the ability to change the external world with one's internal will).

¹³³ A search should not be just about the secrecy of information but properly defined as an INTEREST IN BEING LEFT ALONE [*emphasis added*]; it should be defined as conduct of the government, rather than reference to information uncovered by that conduct. Campbell, *supra* note 56, at 194.

¹³⁴ Amsterdam, *supra* note 65 (arguing that the subjective intent of privacy can be a detrimental standard).

¹³⁵ See generally JUDGE ROBERT C. COATES, A STREET IS NOT A HOME; SOLVING AMERICA'S HOMELESS DILEMMA (1990) (the judge voluntarily becomes homeless for a period of time to experience homelessness).

should attach to the homeless and their living space as attaches to homes themselves regardless of trespass or violated municipal ordinance.¹³⁶

2. SEARCH AND SEIZURE RIGHTS ARE PERSISTENTLY BASED ON PHYSICALITY¹³⁷

The *Katz* test provides for an expectation of privacy when privacy stakes are “reasonable” and when subjectively believed by the defendant. The *Katz* test reflects a personhood theory that revolves around the ideal of private property and a market analysis. It envisions the law as a regulation on free markets, or free actions, but this does not provide for a fundamentally minimal standard to those that have little or no economic interests through property. Buildings are allocated privately and thus trespassers can be seen immediately.¹³⁸ But in communal spaces, there are technically no trespassers, only those that break social custom to perform private or uncouth actions. *Katz* was decided in 1967, approximately 10 years before large numbers of mentally ill people were deinstitutionalized, and before a national consciousness of homelessness came to the fore in the 1980s.¹³⁹

The standard in *Katz* cannot be formulated in a clear manner like the previous property standard, which concentrated on a physical barrier.¹⁴⁰ Under the *Katz* standard, an objectively reasonable privacy interest would *always* vest with the physicality of a house.¹⁴¹ If a homeless person on government land is subject to immediate search with no probable cause, integrity within the standard is lacking. Even considering the government notification doctrine, it is highly likely that a homeless person would *know* and understand that they are on government/public/city property. *The homeless must trespass.* In an urban

¹³⁶ The idea of a “private activities” standard is elucidated by Godsey, *supra* note 48, and is a step in the right direction. Godsey maintains that a house encompasses private activities and that those activities should likewise be protected when done in public.

¹³⁷ Godsey, *supra* note 48, at 869-70.

¹³⁸ Milligan, *supra* note 43, at 1377.

¹³⁹ RICHARD H. ROPERS, *THE INVISIBLE HOMELESS; A NEW URBAN ECOLOGY*, introduction (1988). “Research indicates that the new urban homeless of the 1980s are a diverse population that includes women, children, adolescents, single men, and families. The new urban homeless of the 1980s constitute an underclass . . .” *Id.* at 28-29.

¹⁴⁰ *Olmstead*, 277 U.S. 438.

¹⁴¹

This emphasis on public exposure demonstrates that *Katz*’s shift from property to privacy interest has not reduced the courts’ adherence to formulaic Fourth Amendment solutions. Rather, the primary effect of *Katz* has largely been to replace one formula with another. In the context of the Fourth Amendment’s protection of places, this has meant a shift from trespass to public exposure as a talisman of Fourth Amendment houses. Granston, *supra* note 56, at 1311.

setting there is less confusion than there might be on a hiking trail or campsite. Survival by the homeless dictates trespass, whether by breaking curfew or by finding a safe place to sleep in a restricted area under an embankment. Many homeless people will doubtless understand that they trespass routinely and thus it will always be *reasonable* to assume that they know it generally.

Under *Katz*, activities and belongings cannot be protected if exposed to the public view. For the homeless to acquire the same level of constitutional protection, they must find a nonvisible, yet public, location. Despite language that protects “persons” and not solely property, the person is more protected when he/she can point to a physical barrier as a manifestation of a reasonable expectation of privacy. Even in *Katz* itself, the belief of privacy was evidenced by the defendant enclosing himself in a telephone booth. *Katz* does less to change the standard than to incorporate technological advancement.¹⁴²

This is compounded when one thinks of the protection afforded a trespasser. Where, exactly, would a person be protected from illegal search and seizure if not on government land?¹⁴³ The 10th Circuit said that *Ruckman* did not maintain a legitimate expectation of privacy because he was a trespasser on public land.¹⁴⁴ Other possible spaces are smaller municipal parks, river ways, and communal space. If the homeless are not allowed to have a home in any of these places because the activities of the home are regulated, they are not allowed to exist with stability and security in any sense.

Because the homeless are regulated to transience with little protection from unlawful search, it is likely that they would adopt a mentality of self-sustenance, further alienation, and possibly rely on drugs and alcohol to live from day to day. They may be forced to erect makeshift “shacks,” abandon old buildings as squatters, steal food, property, clothing, and other essentials. If homes provide even minimal stability to develop psychologically, then homelessness fragments that stability.

When law enforcement officers are in charge of disseminating reasonableness on the fly and in a public space, those decisions will necessarily be arbitrary. The search of a house must be done by warrant, which provides a safeguard or check to government action.¹⁴⁵ Practically, the homeless will be an easier target and are more likely to exhibit activities that would arouse suspicion because, partly, of stigma and psychological essentialism, but also because it is easier to stop a homeless person than to gain a warrant. As a police officer, it is easier to defend an illegal search against a homeless person. The perceived

¹⁴² *Katz*, 389 U.S. at 351.

¹⁴³ *Ruckman*, *supra* note 75. (Ruckman had been living in a cave on public land for months).

¹⁴⁴ *Id.*, (where the belongings of a trespassing marijuana farmer were protected).

¹⁴⁵ With minor exceptions (in flight). Peterson, *supra* note 5.

illegitimacy of the homeless will affect judicial opinion, and the perceived validity of a police officer will enforce dominance anyone deviating from the norm.

D. THE REASONABLENESS PRONG IN KATZ MUST BE APPLIED DIFFERENTLY TO THE HOMELESS

Asking a homeless person to exhibit a subjectively reasonable intent to privacy is tantamount to asking the impossible when even caves¹⁴⁶ are searched, and when notification¹⁴⁷ of illegitimacy is the only procedural safeguard to condoned search. When a cave with a door does not evidence a privacy expectation, capricious standards are in force. Indeed, the cave provided a lesser protection than privately owned property – a tent. Reasonableness standards do not take into account extreme physical hardship. It makes no sense to ask what a reasonable person would do in a grossly severe situation, perhaps where he/she has broken limbs, is potentially physically and mentally sick, and has been physically assaulted or tortured. By sweeping away the presumption of validity in a home, search and seizure laws also sweep away the inherent inquiry of reasonableness when applied to the homeless. The home – any physical structure – can provide a grounded analytic stability because it represents an individual's desire to be separated, to have autonomy. Yet, the greatest protection the homeless are afforded is an opportunity to prove that they were in fact not trespassing. This offer amounts, in some sense, to an “I didn't know” defense and will not likely be taken seriously.

1. PERSONALITY THEORY DICTATES THE IMPORTANCE OF PRIVACY INTERESTS

It is fundamentally difficult to fathom the prospect of judicial enforcement of a right to shelter.¹⁴⁸ But what a potential searchee seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.¹⁴⁹ These statements are inherently in tension. Because homes cannot practically or politically be supplied to everyone in our current political system, privacy rights and the courts must balance this lack of structural equality. But “due to the

¹⁴⁶ Ruckman, *supra*, note 75. (A cave was affixed with a door. All the normal items of a home were in the cave).

¹⁴⁷ Sandoval, *supra* note 77 (A tent was pitched in a field. Here, the evidence was suppressed because it was reasonable that someone that would keep his items in a tent would have a subjective expectation to privacy. The tenet of the tent was harvesting marijuana.).

¹⁴⁸ See generally Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y 17 (1992) (arguing that it would be a departure of the welfare state and erode motivational ends to request such a requirement).

¹⁴⁹ Godsey, *supra* note 48, at 877.

amorphous nature of the *Katz* methodology, lower courts have struggled for thirty-five years to interpret the Fourth Amendment consistently.”¹⁵⁰ The Government Notification Doctrine, while a minority, conflicts with the notion that a trespasser has invalidated his or her Fourth Amendment rights.¹⁵¹ Courts should inquire whether the government has acquiesced to his/her presence on public property and transformed his expectation of privacy into one that is objectively reasonable.¹⁵² It is in these dire conditions, when no stability exists, either physically or existentially, that privacy rights take on a new meaning, not just with illegal searches of the house. We process an illegal search of a house as abhorrent precisely because it is understood as an extension of its owner. With a homeless search, however, it is easy to belittle the person if we attach quality to property. In this context, privacy and the expectation of such privacy can be the last vital measure of both a practical safeguard to illegal search and seizure and also a last vestige of human dignity. If privacy interests are vitally important for propertied persons, they are even more vital for non-propertied persons. By changing the standard to make the government affirmatively prove that the search was reasonable, the homeless may be searched less, thereby retaining a modicum of dignity.

2. THE HOMELESS HAVE NO NOTICE AND LITTLE AGENCY TO MOUNT A DEFENSE

Finally, legal standards are practically inaccessible to the homeless on an everyday basis. The homeless are less likely to enforce their rights and less likely to be taken seriously if they make this attempt because the opportunity cost of doing so is too high. The *Katz* standard itself is unworkable when the burden lies on a homeless person to explain himself/herself to establish a reasonably subjective expectation of privacy. When compared with the presumption that homeowners get – where the government usually must affirmatively prove probable cause – enforcement of a constitutional right is disparately realized between the two groups.

The homeless are searched individually. They will necessarily have a smaller voice before, during, and after any search. If they are searched illegally, they must produce evidence to prove that their possessory instinct in that item or space was valid and that they held such a belief at the time of the search. Further, they must affirmatively prove that their expectation was reasonable. When the

¹⁵⁰ Richard G. Wilkins, *Defining the “Reasonable Expectation of Privacy”*: An Emerging Tripartite Analysis, 40 VAND. L. REV. 1077 (1987).

¹⁵¹ See generally Part II.A (explaining government notification doctrine). But see Milligan, *supra* note 43 (arguing that the government justification doctrine is wrong and has no support).

¹⁵² Gregory Townsend, *Cardboard Castles: The Fourth Amendment’s Protection of the Homeless’s Makeshift Shelters in Public Areas*, 35 CAL. W. L. REV. 223, 225 (1999).

housed are searched, the house serves as an affirmation of separation and a larger private place. Items are harder to see if they are inside of a house. Homeless people are treated with disrespect in this regard and the *Katz* standard must be more accommodating by putting the burden on the government to prove a legitimate search. Because the homeless have little access to counsel, are more visible, and rely on public space, and because enforcement officers know these things, the situation is ripe for impropriety. Even assuming a legitimate search, the homeless are always on display – in some sense they are always trespassers. Enforcement officers know that trespassers have lessened protections. Social pressure to rid the homeless because of their unsightliness adds to the power dynamic of the situation.

V. CONCLUSION

Property jurisprudence combined with societal ideals have rendered search and seizure laws under *Katz* ineffective and unrepresentative. The *Katz* standard must be recapitulated and recontextualized to understand current levels of homelessness. The wording in *Katz* holds the key: “[B]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”¹⁵³ The remainder involves education and awareness of human dignity, self-worth and equity.¹⁵⁴ Personality theory provides a framework to think about current search and seizure jurisprudence. It allows for the notion of development of the will and self through time. In some sense, the premise is simple: People need a safe and resilient place to live. People need to have a home of some sort. The premise seems obvious. Yet, some people exist daily with no sense of home. Personality theory says that people need interaction with the outer world to develop; it posits a continuum between objects of sincere subjectivity and objective instrumentalism. The home resides in the sphere of subjectivity and instrumentalism as a priority of both. Economic theory may postulate that items reside on a more instrumental level, but both economic theory and personality theory hold a reliance on property as endemic to existence.

¹⁵³ 389 U.S. at 351.

¹⁵⁴

That is, conduct by the government that violates a social norm of privacy should be deemed a search and be subject, therefore, to judicial oversight under the Fourth Amendment. Conversely, conduct by the government that does not violate a social norm of privacy should not be deemed a search and should be subject to judicial control only through legislation or other, more general, provisions of the constitution.

Campbell, *supra* note 56, at 207.

Our world is based on property in a myriad of ways, ranging from shopping malls, to automobiles, to coffee mugs. Our personal lives are dependent on property. When a large chunk of that property is removed, when one becomes homeless, it changes the entire equation. They can no longer be thought to exist privately, but must rely on public space to survive. They can no longer go home at night and put away personal belongings. Their only claim on the items they possess is an affirmation that they possess those items. Juxtaposed by basic physiological needs, the homeless begin to lack the resources to manifest that willingness to affirm their ownership over property. The homeless have to face a consistent suspicion and scrutiny because they are consistently visible. Enforcement officers use their discretion to search and seize property from the homeless. Yet, if the same officers wish to search a home, probable cause is needed in a more bureaucratic manner. Thus, the vulnerability and visibility of the homeless subjects them to a lesser standard than the housed. A partial resolution to this problem is to change a perception of illegitimacy by contextualizing “reasonableness” for the homeless. The current reasonable expectation has no bearing for the homeless and must be affirmatively understood with context, not pretext.