NOTES

Life on Streets and Trails: Fourth Amendment Rights for the Homeless and the Homeward Bound

> You shall have the same rule for the sojourner and for the native, for I am the LORD your God.
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> — *Leviticus* 24:22 [1]

I. INTRODUCTION

People who read law review articles usually have the resources to temporarily abscond from society on a whim, perhaps to the nearest trailhead, and begin a trek through the woods. Such readers, if they choose a well-maintained trail frequented by long-distance hikers, may come across a simple, three-sided cabin known as a shelter. There they might find a grimy and unwashed bunch, talking amongst themselves using jargon such as "blazes" and "trail angels."[2] Some may recognize them as "thru-hikers"[3] and wonder how long the scrawny, bearded, and overloaded travelers have been at it. But some may ask if these apparent vagabonds have not taken residence in the humble shelter out of necessity. In fact, many homeless individuals leave the urban streets for hiking trails where their appearance and drifting lifestyle are not as quickly frowned upon.

People often confuse long-distance backpackers with homeless "squatters." A visitor to the wealthy community of Kent, Connecticut, once asked a shop owner "how a town like Kent could have such a serious homeless problem," referring to the numerous Appalachian Trail hikers who walk to Kent from the wilderness for resupplying and refreshments.[4] While a benign misunderstanding may be comical, park rangers warn that failing to distinguish genuine hikers from squatters can have fatal consequences. Consider, for example, Gary Michael Hilton, an "apparently homeless" predator who "spent months migrating up and down the Appalachian Trail" before abducting and murdering a twenty-four-year-old experienced hiker, Meredith Emerson, on the Appalachian Trail at Blood Mountain in North

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1. *Leviticus* 24:22.

2. *See generally* BILL BRYSON, A WALK IN THE WOODS (1998). Bryson's account of his hike on the Appalachian Trail discusses trail life in detail.

3. "Thru-hikers" are recreational backpackers who walk the entire length of a long-distance trail. Perhaps the most popular long-distance trail in America is the Appalachian Trail, which stretches 2,180 miles from Springer Mountain, Georgia to Mt. Katahdin, Maine. *See About the Trail*, APPALACHIAN TRAIL CONSERVANCY, http://appalachiantrail.org/about-the-trail (last visited Mar. 11, 2013).

4. Christopher Percy Collier, *The Unwashed and the Upper Crust in Connecticut*, N.Y. TIMES (Aug. 28, 2008), http://travel.nytimes.com/2008/08/29/travel/escapes/29ConnHike.html?pagewanted=all.

Georgia.[5] Of course, not all homeless denizens of the backcountry are dangerous, just as some recreational hikers have their own criminal proclivities.[6] The intersection of the homeless and recreational hikers is no coincidence. On the one hand, those who have the means to live comfortably often look for ways to live more simply, even if only as a temporary escape from their complicated lives, and thus venture into the woods with just a few necessities of life.[7] On the other hand, those who have nothing except the necessities of life may make their way to the campsites and hiking trails in the backcountry because society has deemed it appropriate to sleep on the ground in the wilderness, but not in the city. In fact, about seven percent of the nation's homeless people live in rural areas.[8]

This combination produces an interesting legal result in Fourth Amendment jurisprudence. When the privileged decide to live like the homeless, they bring with them their expectations of constitutional protections, and courts generally respect these expectations as the "reasonable expectations of privacy" that society is willing to afford.[9] This suggests that homeless individuals should enjoy the de facto protection created by outdoorsmen's expectations of privacy. Even though society might not otherwise give homeless individuals the rights associated with reasonable expectations of privacy, the homeless deserve such rights because they live similarly to recreational outdoorsmen.

Thus, greater Fourth Amendment protections for the homeless may be a secondary implication of society's appreciation for outdoor

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5. Debbie Gilbert, *Safe Hiking: Trust Your Instincts*, GAINESVILLE TIMES (Jan. 21, 2008), http://www.gainesvilletimes.com/archives/2551/. Hilton later pled guilty to murdering and decapitating Emerson and was given a life sentence in lieu of the death penalty for leading police to her body. Alexis Stevens, *Gary Michael Hilton Convicted in Florida Murder Case*, ATLANTA J. CONST. (Feb. 16, 2011), http://www.ajc.com/news/gary-michael-hilton-convicted-839741.html.

6. *See, e.g.*, Katie Zezima, *Riding the Rail to the Top, and Not Amused*, N.Y. TIMES (Nov. 23, 2007), http://www.nytimes.com/2007/11/23/us/23cog.html?_r=0 (recounting eight hikers cited by federal authorities for "mooning" passengers on the Mount Washington Cog Railway, a tourist train that summits Mount Washington near the Appalachian Trail); Megan Gorey, *Police Increase Security For Trail Days*, WCYB.COM (May 18, 2012, 5:23 AM), http://www.wcyb.com/Police-Increase-Security-For-Trail-Days/-/14590664/14590314/-/cghwwe/-/index.html (discussing Damascus, Virginia police chief's plan to increase security at an annual thru-hiker gathering in the town, where "drunkenness, disorderly conduct, larceny and assault" are "common problems" and thirty-five people were arrested in 2011).

7. *See generally* BRYSON, *supra* note 2; *About the Trail*, *supra* note 3 ("People from across the globe are drawn to the A.T. for a variety of reasons: to reconnect with nature, to escape the stress of city life, to meet new people or deepen old friendships, or to experience a simpler life.").

8. *Geography of Homelessness, Part 1: Defining the Spectrum*, NAT'L ALLIANCE TO END HOMELESSNESS (July 13, 2009), http://www.endhomelessness.org/library/entry/geography-of-homelessness-part-1-defining-the-spectrum.

9. *See infra* Part III.

recreation. However, the fact that those protections are secondary raises the question of whether basing Fourth Amendment protections for one (small and marginalized) segment of society on what everyone else deems to be reasonable lends enough constitutional protection to the homeless in general. Indeed, society most likely does not deem the actions and choices of homeless people to be reasonable; this public bias may forestall any fair evaluation of homeless behavior.[10] Consider, for example, the testimony of Gary Wayne Grimes, a homeless man who claims to have been unreasonably attacked by a police dog while sleeping next to a building one night.[11] According to his complaint, one officer told the dog to "get that homeless shit bag," and another officer told Grimes, "I hope [the police dog] rip[s] your fuck[ing] arm off."[12] Grimes lost about thirty percent of his arm after passing out from blood loss and spent two weeks in a hospital and three more weeks in a medical jail cell.[13] Grimes's characterization of the police officers' attitudes toward a homeless man illustrates the attitudes and biases that could undermine homeless individuals' Fourth Amendment rights if courts only grant them according to society's understanding of reasonableness.

As a theoretical matter, the existence of such a bias would suggest that the Fourth Amendment rights enjoyed by homeless people should not be determined by society's definition of "reasonable expectations of privacy" with regard to homeless behavior. As a practical matter, however, granting the homeless greater constitutional protections because those are the same protections that society has come to expect when living like the homeless may be the path of least resistance toward guaranteeing homeless people their rights. In fact, some courts have already taken this approach.[14] This Note argues that the law's historic marginalization of Fourth Amendment rights for the homeless can be rectified under the increasing expectations of privacy brought into the wilderness by recreational outdoorsmen.

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10. But perhaps this assessment is not entirely unfounded, as forty-five percent of homeless people have reported some kind of mental health problem in the past year, and twenty-five percent of homeless individuals have a "serious" mental illness. *FAQs*, NAT'L ALLIANCE TO END HOMELESSNESS, http://www.endhomelessness.org/section/about_homelessness/faqs#health (last visited Jan. 16, 2012). Nevertheless, persons with mental illnesses are just as deserving of their Constitutional rights as anybody else.

11. Grimes v. Yoos, 298 Fed. App'x 916, 917 (11th Cir. 2008).

12. *Id.*

13. *Id.* The alleged Fourth Amendment violation in *Grimes* was one of excessive force rather than unreasonable search. Nevertheless, the case still exemplifies how prejudice against the homeless can compromise their Fourth Amendment rights.

14. *See infra* Part III.

Part II discusses the historical development of the Fourth Amendment up until the seminal case of *Katz v. United States*[15] and then examines how lower courts have come up with various theories under *Katz* to deal with the Fourth Amendment rights of homeless citizens. Part III analyzes how the specific circumstances of homelessness and outdoor recreation fare under the Court's current jurisprudence. Part IV proposes that the rights of the homeless should be increased to at least be on par with those of similarly situated outdoorsmen and suggests ways of protecting homeless individuals' interests where those circumstances do not align.

II. BACKGROUND

> 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.
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> —The Fourth Amendment[16]

While the text of the Fourth Amendment protects "persons, houses, papers, and effects," this is little comfort to someone whose home may not be considered a "house" by courts. As this Part will show, courts traditionally applied the Fourth Amendment using a trespass theory, which conflated privacy rights with property rights. *Katz v. United States*[17] broadened that application by focusing distinctly on privacy rather than property, and thus opening the door to privacy rights for the homeless.

A. Before Katz: *Property Analysis*

Before 1967, Fourth Amendment privacy violations turned on whether the government had conducted a physical trespass on one's property.[18] This precedent was set early in the nation's history in *Entick v. Carrington*, where the Supreme Court ruled, "No man can set his foot upon my ground without my license. . . . If he admits to the [trespass], he is bound to shew [sic] by way of justification that some

15. 389 U.S. 347 (1967).

16. U.S. CONST. amend. IV.

17. 389 U.S. 347 (1967).

18. *See* Olmstead v. United States, 277 U.S. 438, 466 (1928) (holding that the Fourth Amendment is not violated "against a defendant, unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure").

positive law has empowered or excused him."[19] Later, in *Boyd v. United States,* the Court held that the government could only search an area to which it had a superior property right.[20] In *Olmstead v. United States*, the Court then narrowly defined "constitutionally protected areas," or physical areas protected from unreasonable searches under the Fourth Amendment, as those areas specifically enumerated in the Constitution's text: houses, persons, papers, and effects.[21] After its decision in *Olmstead*, the Court developed a two-part property analysis to determine if the government had conducted a trespass: (1) had the government intruded upon a constitutionally protected area, and, if so, (2) was the intrusion "constitutionally permissible."[22]

The *Olmstead* test is no longer used by the courts, however, and *Silverman v. United States* illustrates how poor a fit this property analysis, on its own, is for the purposes of the Fourth Amendment.[23] In *Silverman*, police inserted a "spike mike" inside the walls of the defendant's property.[24] The Court held that the insertion of a microphone *inside* the walls of the home differentiated the case from *Olmstead*, where the officers' listening device did not penetrate the walls of the defendant's home and did not constitute a search.[25] Despite the fact that just a few inches appeared to be dispositive in the Court's Fourth Amendment analysis, it said the decision was actually "based upon the reality of an actual intrusion into a constitutionally protected area."[26] Thus, under the trespass rule, tapping a defendant's phone line outside the home would not constitute a search,[27] but inserting a listening device inside a defendant's heating duct would.[28]

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19. Entick v. Carrington, (1765) 95 Eng. Rep. 807 (K.B.).

20. *See* Boyd v. United States, 116 U.S. 616, 623 (1886) (holding that the government may only search for items to which it has a superior claim, like stolen goods and contraband).

21. *Olmstead*, 277 U.S. at 465.

22. THOMAS M. MCINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT 224 (2009).

23. 365 U.S. 505 (1961).

24. *Id.* at 506–07.

25. *Olmstead*, 277 U.S. at 465.

26. *Silverman*, 365 U.S. at 512.

27. *See Olmstead*, 277 U.S. at 456–57 (holding that a wiretap does not invade a person's constitutionally protected area).

28. *Silverman*, 365 U.S. at 511; *see also* Desist v. United States, 394 U.S. 244, 246 n.2 (1969) (finding no Fourth Amendment violation when police taped a microphone on their side of a set of doors separating two hotel rooms); Goldman v. United States, 316 U.S. 129, 131 (1942) (finding no Fourth Amendment violation where agents placed a listening device on a partition wall).

In his concurrence in *Silverman*, Justice Douglas recognized the tension between the holding of *Silverman* and cases like *Goldman v. United States*,[29] where agents placed a "detectaphone" on the other side of a partition to listen to one side of a telephone conversation in the adjoining office:

> An electronic device on the outside wall of a house is a permissible invasion of privacy according to *Goldman v. United States*, while an electronic listening device that penetrates the wall, as here, is not. Yet the invasion of privacy is as great in one case as in the other.[30]

According to Justice Douglas, the Fourth Amendment concern was not that a physical trespass had been made, but that "the privacy of the home was invaded."[31] Indeed, as new technologies made it easier for agents to know what was said or done inside a home without physically trespassing onto the property, these technologies fueled opposition to the trespass rule and its emphasis on property rights.[32]

In the same year that it decided *Katz*, the Court signaled the upcoming changes to its Fourth Amendment analysis in *Warden v. Hayden*.[33] There, the Court acknowledged that "the premise that property interests control the right of the Government to search and seize has been discredited" and "the principal object of the Fourth Amendment is the protection of privacy rather than property."[34] These dissents and apprehensions about the property analysis of the Fourth Amendment set the stage for *Katz*'s fundamental change to search-and-seizure jurisprudence.[35]

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29. *Goldman*, 316 U.S. at 131.

30. *Silverman*, 365 U.S. at 511 (Douglas, J., concurring).

31. *Id.* at 513; s*ee also* On Lee v. United States, 343 U.S. 747, 764 (1952) (Douglas, J., dissenting) (arguing for the right of privacy theory as opposed to the trespass rule).

32. *See, e.g.*, *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting) ("Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.").

33. 387 U.S. 294 (1967).

34. 387 U.S. at 304. *See generally* MCINNIS, *supra* note 22, at 223–27 (discussing how *Katz* switched Fourth Amendment analysis from a property interest to a privacy interest).

35. *See, e.g.*, Goldman v. United States, 316 U.S. 129, 139 (1942) (Murphy, J., dissenting) ("[T]he search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment.").

B. The Katz *Decision and Reasonable Expectations of Privacy*

The Court's decision in *Katz v. United States* remains the anchor of Fourth Amendment search-and-seizure jurisprudence.[36] In *Katz*, the Supreme Court broadened Fourth Amendment protections to include individuals who have a legitimate expectation of privacy from unreasonable government searches.[37] *Katz*'s facts are unsurprisingly similar to the prior cases involving privacy and the government's use of electronic surveillance: the FBI had attached an electronic recording device to the outside of a public phone booth from which the defendant was having phone conversations that incriminated him in transmitting wagers by wire across state lines.[38] Basing its argument on the trespass doctrine, the government contended that the statements made over the phone were admissible at trial because there was no physical trespass or penetration into the phone booth.[39] While this theory would have carried the day under the trespass doctrine,[40] Justice Stewart, writing for the Court, instead took the opportunity to conclude that "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[41] Instead, the Court determined that the FBI's actions had violated the defendant's justifiable privacy interest in using the phone booth.[42] The Court put it more simply when it coined the oft-repeated principle that "the Fourth Amendment protects people, not places."[43]

While the majority opinion clearly announced the switch from the trespass doctrine to a privacy standard in its Fourth Amendment analysis, the actual test that lower courts now use comes from Justice

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36. 389 U.S. 347 (1967).

37. *Id.*

38. *Id.* at 348.

39. *Id.* at 358.

40. *See id.* ("It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry . . . ."); *cf.* Katz v. United States, 369 F.2d 130, 134 (9th Cir. 1966) (holding that the Fourth Amendment had not been violated because the police had not physically entered the area occupied by the defendant).

41. *Katz*, 389 U.S. at 353.

42. *Id.*

43. *Id.* at 351; *see also, e.g.*, Minnesota v. Olsen, 495 U.S. 91, 96 n.5 (1990) (stating that a home need not be permanent to provide defendant a reasonable expectation of privacy); Segura v. United States, 468 U.S. 796, 810 (1983) (stating that a home is protected under the Fourth Amendment "not primarily because of the occupants' *possessory* interests in the premises, but because of their *privacy* interests in the activities that take place within" (emphasis added)); United States v. Chadwick, 433 U.S. 1, 7 (1977) ("[T]he Fourth Amendment protects people, not places; more particularly, it protects people from unreasonable government intrusions into their reasonable expectations of privacy.").

Harlan's concurring opinion.[44] In his two-pronged "reasonable expectation of privacy" test, Justice Harlan required "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.' "[45] By dispensing with *Olmstead*'s property analysis, Justice Harlan's concurrence broadened Fourth Amendment protections to include not just "constitutionally protected places," but also conversations and other information communicated under a reasonable expectation of privacy.[46]

C. Fourth Amendment Analysis After Katz

Katz signaled a sea change in Fourth Amendment analysis; its central holding that "the Fourth Amendment protects people, not places"[47] is now firmly set in Fourth Amendment jurisprudence. However, the privacy analysis introduced in *Katz* has continued to evolve as courts clarify and adjust it. Some of these particular refinements and applications are relevant to the circumstances of homeless individuals and long-distance backpackers, including dismissing the subjectivity prong, changing the open-fields doctrine, and applying *Katz* to closed containers and abandonment.

Courts since *Katz* have emphasized the "reasonable expectation of privacy" aspect of Justice Harlan's two-pronged test and have overlooked the "subjective" aspect. In *Smith v. Maryland*, the Court discussed the difficulty of the subjectivity prong, noting that the government could preempt any expectation by announcing that "all homes henceforth would be subject to warrantless entry."[48] Furthermore, a foreign refugee might assume that the government would naturally be monitoring his phone conversations and that a normative inquiry would be more appropriate in such situations.[49] Justice Harlan himself discounted the value of the subjectivity requirement in *United States v. White*: "The analysis must, in my

44. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

45. *Id.*

46. *See* MCINNIS, *supra* note 22, at 225 (discussing the effect of *Katz* on communicated information).

47. *Katz*, 389 U.S. at 353.

48. Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979).

49. *Id.*; *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974) ("[A subjective expectation of privacy] can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.").

view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present."[50] Thus, courts today evaluate the reasonableness of a defendant's expectation of privacy according to those expectations of privacy that society will find reasonable.[51] The jurisprudence of what constitutes a reasonable expectation of privacy has been further developed in cases involving open fields, containers, and abandoned property.

1. Open Fields

Prior to *Katz*, courts had reviewed searches of open fields under *Hester v. United States*.[52] The Court in *Hester* held that officers could validly search, without a warrant, the contents of a jug that proved to hold moonshine whiskey despite the fact that the jug was found in a field owned by the defendant's father.[53] The Court reasoned that the Fourth Amendment protected people in their "persons, houses, papers and effects" but that open fields were not protected.[54] *Katz*, in its decision that the Fourth Amendment "protects people, not places,"[55] could have changed the open-fields doctrine for a person who had a reasonable expectation of privacy in the field. However, only Justice Harlan's concurrence labels expectations of privacy "in the open" as unreasonable, while the majority opinion does not discuss the matter.[56]

Despite *Katz*'s inconclusive holding as to open fields, the Court maintained its exclusion of open fields from Fourth Amendment protection when the issue came up in *Oliver v. United States*,[57] but it did so by reinterpreting *Hester*'s textual interpretation of the Constitution under *Katz*'s "legitimate expectation of privacy"

50. 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

51. *See, e.g.*, California v. Greenwood, 486 U.S. 35, 39–40 (1988) ("An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable.").

52. 265 U.S. 57 (1924).

53. *Id.* at 58–59.

54. *Id.* at 59.

55. Katz v. United States, 389 U.S. 347, 351 (1967).

56. *Id.* at 361 (Harlan, J., concurring) ("[C]onversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable."); *see also* MCINNIS, *supra* note 22, at 228 (noting that Justice Harlan did not believe *Katz* changed the open fields doctrine).

57. 466 U.S. 170 (1984).

standard.[58] In *Oliver*, the Court held, "[T]he rule of *Hester v. United States* . . . that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."[59] The exception for "curtilage"—the area immediately surrounding the home—has been duly protected, even though what constitutes curtilage is not precisely defined. The Court later offered some clarification in *United States v. Dunn*[60] by proposing four factors to determine whether or not certain land was curtilage: (1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) "the steps taken by the resident to protect the area from observation by people passing by."[61] However, these factors have not led to a consistent delineation between curtilage and open fields in the lower courts.[62]

2. Containers

When not at home, individuals may want to keep some of their personal effects private by placing them in various types of containers. For people without homes (or, for those temporarily foregoing the use of a home, such as recreational backpackers), containers may be the only means of privacy available. According to the Court: "[A container] denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment [of a car], as well as luggage, boxes, bags, clothing, and the like."[63]

The post-*Katz* closed-container doctrine first emerged in *United States v. Chadwick*.[64] In *Chadwick*, the Court held that the defendants had manifested a reasonable expectation of privacy when they placed their belongings in a locked container:

> By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than

58. *Id.* at 178.

59. *Id.*

60. 480 U.S. 294 (1987).

61. *Id.* at 301.

62. *See, e.g.*, MCINNIS, *supra* note 22, at 229–30 (noting that the standards require a case-by-case analysis); Vanessa Rownaghi, Comment, *Driving into Unreasonableness: The Driveway, the Curtilage, and Reasonable Expectations of Privacy*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1165, 1176 (2003) (recognizing the uncertainty that results from such a case-by-case analysis).

63. New York v. Belton, 453 U.S. 454, 460 n.4 (1981).

64. 433 U.S. 1 (1977).

> one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause.[65]

The Court concluded that Fourth Amendment privacy expectations exist beyond the four walls of one's home in most instances.[66] In a later case, the Court clarified that the privacy interest in closed containers is not limited to types of containers traditionally used to transport one's personal effects, but includes virtually any container conceivable: "[N]o court, no constable, no citizen, can sensibly be asked to distinguish the relative 'privacy interests' in a closed suitcase, briefcase, portfolio, duffel bag, or box."[67]

3. Abandoned Property

While property outside of the home concealed within a container is protected under the container doctrine, abandoned property is not.[68] As with the container doctrine, the abandonment doctrine presents a unique challenge to homeless individuals or recreational outdoorsman who may want to temporarily leave their possessions in a public space.[69] While the open-fields doctrine, as discussed in *Hester v. United States*, has since evolved,[70] the Court's analysis of the abandonment doctrine remains good law.[71] Because the moonshine jugs were seized only after the defendant dropped them in flight, they were not constitutionally protected.[72] The Court came to this conclusion because "[t]he defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned."[73]

Additionally, searches of trash also raise abandonment issues. Perhaps the most seminal case regarding trash searches is *California*

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65. *Id.* at 11.

66. *Id.* at 9–10 ("Just as the Fourth Amendment 'protects people, not places,' the protections a judicial warrant offers against erroneous governmental intrusions are effective whether applied in or out of the home.").

67. Robbins v. California, 453 U.S. 420, 427 (1981).

68. For an in-depth discussion on abandonment, see generally THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 141–50 (2008).

69. *See, e.g.*, State v. Mooney, 588 A.2d 145, 150 (Conn. 1991) (analyzing a search of a homeless man's belongings he had left under a bridge abutment).

70. *See supra* notes 53–63 and accompanying text.

71. *See, e.g.*, Florida v. White, 526 U.S. 559, 567 (1999) (Souter, J., concurring) (approving of citation to *Hester*); Rios v. United States, 364 U.S. 253, 262 n.6 (1960) (acknowledging *Hester* in abandonment analysis).

72. Hester v. United States, 265 U.S. 57, 58 (1924).

73. *Id.*

v. Greenwood, where police obtained, from a garbage collector, bags of the defendant's trash that contained evidence indicating narcotics use.[74] The Court held that, because the bags were outside the curtilage of his property and he intended to discard them, the defendant had no reasonable expectation of privacy in the bags:

> It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. . . . Accordingly, having deposited [his] garbage in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, [defendant] could have had no reasonable expectation of privacy in any inculpatory items that [he] discarded.[75]

By asserting that they had a reasonable expectation of privacy in their garbage because it was in an opaque bag, the defendants in *Greenwood* attempted to appeal to the container doctrine in order to establish their expectation of privacy.[76] The Court, however, rejected this assertion in holding that there is no reasonable expectation of privacy in garbage one has left on the street to be picked up by a third party.[77] This holding as to abandoned property also implicates the container doctrine and illustrates one of the narrowing effects *Katz* had on Fourth Amendment jurisprudence: by changing the focus of the analysis from what was being protected (formerly the container) and instead focusing on the reasonableness of the defendant's expectation of privacy (as informed by his decision to abandon the property), courts can use *Katz* to determine that there is a reasonable expectation of privacy in some types of containers (such as double-locked footlockers[78]) but not others (such as opaque trash bags[79]) based on the defendant's treatment of that container.

Furthermore, determining which types of behaviors actually demonstrate an objective expectation of privacy in abandonment cases can be a difficult task both for police, who have to make such determinations on the spot,[80] and for courts.[81] The D.C. Circuit

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74. California v. Greenwood, 486 U.S. 35, 37–38 (1988).

75. *Id.* at 40–41 (citations omitted) (internal quotation marks omitted); *see also* Abel v. United States, 362 U.S. 217, 241 (1960) (holding that police may search objects placed in a hotel waste basket after defendant has checked out of the room).

76. *See Greenwood*, 486 U.S. at 39 (recognizing that defendants asserted a reasonable expectation of privacy in the searched trash).

77. *Id.* at 40–41.

78. *Chadwick*, 433 U.S. at 1.

79. *Greenwood*, 486 U.S. at 39.

80. While abandonment, as it pertains to reasonable expectations of privacy, is certainly clear when a defendant throws something away, the Court has also delineated when certain actions do not constitute abandonment. For instance, in *Smith v. Ohio*, the Court held that an individual had not abandoned a brown paper bag, and that the police improperly searched that bag, when the individual placed the bag on top of his vehicle before talking with a police officer

illustrated this difficulty and offered its own abandonment methodology in *United States v. Thomas*.[82] In *Thomas,* the court distinguished abandonment in the property context from abandonment for search-and-seizure purposes:

> To determine whether there is abandonment in the Fourth Amendment sense, the district court must focus on the intent of the person who is alleged to have abandoned the place or object. The test is an objective one, and intent may be inferred from "words spoken, acts done, and other objective facts."[83]

Applied to the facts in *Thomas*, where the defendant dropped a gym bag and fled upon seeing a police officer, the court held that the defendant objectively abandoned his gym bag because he intentionally dropped it and ran away.[84] The *Thomas* test may clarify some points of abandonment law, but the area is still not perfectly clear. For example, applying the *Thomas* test to the facts of *Hester*,[85] courts will have to determine whether open fields are public places for purposes of the *Thomas* test. Indeed, the distinction could prove relevant for individuals who live in or spend recreational time in open fields.

D. The Emergence of Societal Customs

As the preceding discussion has shown, many of the post-*Katz* search-and-seizure cases have evaluated warrantless searches under "societal customs." Because *Katz* requires courts to evaluate expectations of privacy according to the expectations that society deems reasonable, the approach overlooks situations where *individuals* may have very good reasons for expecting privacy despite *society's* assumptions and customs to the contrary. For instance, the Court in *Greenwood* grounded its holding in the fact that "it is

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and then tried to keep the officer from looking in the bag. 494 U.S. 541, 541–44 (1990) (per curiam).

81. *See* CLANCY, *supra* note 68, at 143–44 (discussing differing judicial approaches to abandonment). Particularly, Clancy discusses the varying approaches courts have taken in determining what constitutes abandonment for purposes of the Fourth Amendment, including an analysis of the defendant's intentions (e.g., *Duncan v. State*, 378 A.2d 1108 (Md. 1977)), an analysis of whether "the party has relinquished any reasonable expectation of privacy" (e.g., *City of St. Paul v. Vaughn*, 237 N.W.2d 365, 370–71 (Minn. 1975)), an objective analysis based on the totality of the circumstances, or some mixture of these methods. CLANCY, *supra* note 68, at 143–44.

82. 864 F.2d 843 (D.C. Cir. 1989).

83. *Id.* at 846 (citation omitted).

84. *Id.* at 846 n.5 ("The legal significance of Thomas' acts is not altered by the fact that he might have intended to retrieve the bag later. His ability to do so would depend on the fortuity that other persons with access to the public hallway would not disturb his bag while it lay there unattended.").

85. 265 U.S. 57, 57–58 (1924) (discussing a man who dropped a jug of moonshine when running from police in his father's open field).

common knowledge that plastic garbage bags left on . . . a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public,"[86] but it completely rejected the argument that the defendant had a reasonable expectation of privacy based on California state law.[87] The Court stated, "Respondent's argument is no less than a suggestion that concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment. We do not accept this submission."[88]

Even if the Court was correct not to let state privacy laws determine the outcome of the case on their own, the existence of those laws should at least have informed its analysis of what society was willing to accept as a legitimate expectation of privacy.[89] The existence of the law is, presumably, a legitimate measure of what expectations of privacy are reasonable.[90] However, the Court has rejected any standard for determining societal expectations of privacy, and in doing so has left itself as the sole arbiter of such expectations. As some researchers have stated:

> [T]he Court has never attempted to determine in any systematic way how "society" might objectively view privacy rights in a particular search and seizure context, even though the rationale of *Katz* explicitly rests on such societal judgments. *Katz*, therefore, invites scrutiny of the legitimacy of judicial decision-making by premising its application on an appeal to "objective," societal beliefs concerning the reasonability of privacy expectations while leaving the determination to judges. But *reasonable expectations* "are those supported by larger society or representative of the expectations held by larger society."[91]

Of course, Justice Scalia said as much himself in his concurrence in *Minnesota v. Carter*:

> In my view, the only thing the past three decades have established about the *Katz* test . . . is that, unsurprisingly, those actual (subjective) expectations of privacy that

86. California v. Greenwood, 486 U.S. 35, 40 (1988).

87. *Id.* at 43.

88. *Id.* at 44.

89. *But see* Henry F. Fradella et al., *Quantifying* Katz*: Empirically Measuring "Reasonable Expectations of Privacy" in the Fourth Amendment Context*, 38 AM. J. CRIM. L. 289, 357 (2011) (discussing empirical research that suggests that, in the study conducted, 55.1 percent of participants agreed with the Court's finding in *California v. Greenwood*, with only 26.6 percent disagreeing).

90. However, this particular law was the result of a California Supreme Court decision and not a product of the democratic process. *Greenwood*, 486 U.S. at 43.

91. Fradella, *supra* note 89, at 293 (quoting Jacquelyn Burkell, *Deciding for Ourselves: Some Thoughts on the Psychology of Assessing Reasonable Expectations of Privacy*, 50 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 307, 308 (2008)); *see also* CLANCY, *supra* note 68, at 67 ("[L]ittle has been said by the Court that has endured as a reliable measure of the reasonableness of a privacy expectation.").

> society is prepared to recognize as reasonable, bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.[92]

Both these statements suggest that, on one level, the Court's standardless *Katz* approach for determining reasonable expectations of privacy is flawed because society's actual expectations of privacy do not determine what type of behavior accounts for such an expectation. However, the *Katz* approach may be flawed on a second level in that society may not fully consider what expectations of privacy might be reasonable for its marginalized members. It goes without saying that most of the Supreme Court Justices, along with many other state and federal judges, have never been homeless. But even if the Justices did determine reasonable expectations of privacy based on societal standards, most of society has not been homeless either[93] and, thus, may not consider the living conditions of many of the nation's homeless individuals to be reasonable.

It is outside the scope of this Note to argue for an alternative to the *Katz* approach with respect to homeless individuals, as such arguments have been made elsewhere.[94] However, the remainder of this Note shows that courts should focus on the commonalities between homeless individuals and the rest of society under *Katz*'s societal "reasonable expectation of privacy" test in order to create more protection for the homeless. As societal customs about outdoor recreation become more aligned with homeless ways of life, courts should be able to more easily find reasonable expectations of privacy in tents, cardboard boxes, and the like.

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92. Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (citations omitted) (internal quotation marks omitted).

93. On any given night, an estimated 633,782 people in the United States experience homelessness. *Snapshot of Homelessness*, NAT'L ALLIANCE TO END HOMELESSNESS, http://www.endhomelessness.org/section/about_homelessness/snapshot_of_homelessness (last visited Jan. 20, 2013).

94. *See, e.g.*, Elizabeth Schutz, Note, *The Fourth Amendment Rights of the Homeless*, 60 FORDHAM L. REV. 1003, 1033 (1992) ("Where the public in the community at issue has respected the privacy of the homeless for all other purposes or has tolerated the presence of homeless in certain areas because it is expedient for them to do so, courts should find that the expectation of privacy claimed by the homeless is one society would consider reasonable."); Justin Stec, Comment, *Why the Homeless Are Denied Personhood Under the Law: Toward Contextualizing the Reasonableness Standard in Search and Seizure Jurisprudence*, 3 RUTGERS J.L. & URB. POL'Y 321, 346 (2006) ("The homeless do not comport to a reasonableness standard, which generally centers on the mean, but exist[] in the fragmented margin."); David H. Steinberg, Note, *Constructing Homes for the Homeless? Searching for a Fourth Amendment Standard*, 41 DUKE L.J. 1508, 1547 (1992) ("It is a sad but true fact that those who cannot shut out the world will be subject to its prying eyes. But to create two standards of Fourth Amendment protection in order to rectify the 'injustice' of homelessness is to ignore the greater principles encompassed by the Fourth Amendment.").

E. Switchbacks?[95] United States v. Jones *and the Return of Property Analysis*

Before exploring how *Katz* has shaped legal doctrines applicable to the homeless, it is important to discuss the Court's latest pronouncements on the Fourth Amendment in *United States v. Jones*.[96] In *Jones*, the Court would not accept *Katz*'s "reasonable expectation of privacy" test as the only analysis applicable to the government's tracking of a defendant's vehicle with GPS technology, and the Court reanimated the dormant trespass doctrine to determine that a trespass on one's property "for the purpose of obtaining information" constitutes a search.[97] In doing so, the Court noted that *Katz*'s formulation did not replace the prior common law trespass analysis, but merely broadened the protection of the Fourth Amendment.[98]

Justice Scalia wrote for the majority. Three Justices, however, joined Justice Alito's concurring opinion, where he argued that the proper analysis was whether "respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove."[99] In any event, Scalia's opinion had the fifth vote, but what exactly that means for *Katz* and the Fourth Amendment is less than clear.[100] Because *Jones*'s effect on search-and-seizure jurisprudence is not yet settled, and because the doctrines analyzing the Fourth Amendment rights of homeless people are founded on *Katz*'s "reasonable expectation of privacy" test, the remainder of this Note focuses primarily on how the *Katz* test can be used for—or against—homeless individuals subject to government searches.

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95. A "switch back" is a "turn that takes the hiker 180 degrees in the op[p]osite direction," usually to allow the trail to zig-zag up a mountain at an easier inclination as opposed to a straight (and steep) path right over the top. *Trail Slang for the Appalachian Trail*, WHITEBLAZE, http://www.whiteblaze.net/forum/content.php?217-Trail-Slang-for-the-Appalachian-Trail (last visited Jan. 22, 2012).

96. 132 S. Ct. 945 (2012).

97. *Id.* at 949–50.

98. *Id.* at 952 ("[T]he *Katz* reasonable-expectation-of-privacy test has been added to, not *substituted for*, the common-law trespassory test." (emphasis added)).

99. *Id.* at 958 (Alito, J., concurring).

100. Orin Kerr, *Why* United States v. Jones *Is Subject to So Many Different Interpretations*, VOLOKH CONSPIRACY (Jan. 30, 2012, 4:59 PM), http://volokh.com/2012/01/30/why-united-states-v-jones-is-subject-to-so-many-different-interpretations/ ("If anything is clear from the Supreme Court's decision . . . in *United States v. Jones*, it's that not very much is clear from the Supreme Court's decision in *United States v. Jones*.").

III. APPLYING *KATZ*: DOCTRINES APPLICABLE TO THE HOMELESS

If courts are to translate the expectations of privacy found in recreational outdoorsmanship into rights for homeless individuals, they will only be able to do so where homeless individuals are similarly situated to outdoorsmen. In doing so, courts will have to evaluate issues such as trespass in order to determine if a homeless person was validly residing where he was found. They will also have to look at the specific nature of the "home" the person has constructed for himself. This Part evaluates the case law as it pertains to trespassers and makeshift homes. It then considers the broader implications of recreation as a vehicle for expanding homeless rights and examines how different courts have already used recreation as a policy consideration in favor of homeless individuals' Fourth Amendment claims.

A. Going Stealth:[101] Trespassing and Its Consequences

Formerly, the test for determining whether or not someone had a privacy interest in a place was whether the person was "legitimately on premises."[102] The legitimate-presence test was derived to forestall the use of private property concepts, such as licensee and invitee, from a Fourth Amendment search analysis, such that "anyone legitimately on premises where a search occurs may challenge its legality by way of motion to suppress."[103] Even though *Katz* effectively redefined "search" in terms of legitimate expectations of privacy, the legitimate-presence test was not overruled until *Rakas v. Illinois*.[104]

In *Rakas*, the defendants attempted to suppress introduction of a sawed-off rifle and shells that police found in the glove compartment and under the front seat of the vehicle in which they were passengers.[105] The Court overruled the legitimate-presence test, stating that the "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the

101. In Appalachian Trail parlance, "stealthing" or "going stealth" refers to camping illegally on public or private land, especially on parts of the trail that are not designated camping sites or shelters. WHITEBLAZE, *supra* note 95.

102. Jones v. United States, 362 U.S. 257, 264, 267 (1960). The procedural vehicle through which a "legitimate presence" created a Fourth Amendment protection for an individual was that such a person would satisfy the standing requirement on a Fourth Amendment challenge.

103. *Id.* at 266–67.

104. 439 U.S. 128, 148 (1978).

105. *Id.* at 129–30.

Amendment has a legitimate expectation of privacy in the invaded place."[106] However, in a footnote, the Court noted that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[107] Unfortunately for the passenger-defendants, this meant that, because they had not asserted a property interest in either the vehicle (because they were passengers) or the rifle and shells (because, obviously, that would not have been a good defense against the armed robbery conviction the defendants were trying to overturn),[108] they had no legitimate expectation of privacy in those items and thus had no standing to challenge their search or seizure.[109]

Since *Katz* and *Rakas* established the standards for analyzing legitimate expectations of privacy as they relate to property interests, two distinct theories have arisen concerning the Fourth Amendment rights of trespassers. The majority of circuit courts follow the rule developed by the First Circuit in *Amezquita v. Hernandez-Colon* and by the Tenth Circuit in *United States v. Ruckman*—that trespassers' expectations of privacy are per se illegitimate.[110] In contrast, the government-notification doctrine, or government-acquiescence doctrine, (adopted by the Ninth Circuit in *State v. Diaz*) allows trespassers to have a legitimate expectation of privacy while trespassing on government land so long as the trespassers have not been warned.[111] Of course, these two theories have implications both for the homeless and for recreational outdoorsmen. For the homeless, they are oftentimes trespassing or otherwise improperly residing wherever they settle, and more often than not their residence is on government property. For outdoorsmen, high demand for wilderness coupled with low supply has made trespass on government property fairly common.[112] This Section discusses these two theories.

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106. *Id.* at 143.

107. *Id.* at 143 n.12.

108. *Id.* at 129.

109. *Id.* at 148.

110. Amezquita v. Hernandez-Colon, 518 F.2d 8, 11 (1st Cir. 1975) (holding that squatters on government-owned property do not have a reasonable expectation of privacy on that property, as they can be immediately ejected); *see* United States v. Ruckman, 806 F.2d 1471, 1471 (10th Cir. 1986) (holding that the Fourth Amendment did not protect defendant's privacy interest in the natural cave on public land where he was living when arrested); *infra* Part III.A.1.

111. State v. Dias, 609 P.2d 637, 640 (Haw. 1980) (holding that squatters on government-owned property *do* have a reasonable expectation of privacy on that property where the government has "acquiesced" its right to eject the squatters); *see infra* Part III.A.2.

112. *See* Luke M. Milligan, *The Fourth Amendment Rights of Trespassers: Searching for the Legitimacy of the Government-Notification Doctrine*, 50 EMORY L.J. 1357, 1388 (2001)

1. The *Amezquita-Ruckman* Rule: No Legitimate Expectation of Privacy for Trespassers

Under the traditional *Amezquita-Ruckman* rule, a trespasser has no legitimate expectation of privacy by virtue of the fact that the individual is subject to immediate ejectment from the area.[113] In *Amezquita*, squatters established a community on government-owned property.[114] The Land Authority later brought suit in the Superior Court of Puerto Rico seeking an injunction to evict the squatters and later commenced a "cleaning operation" where Land Authority employees used bulldozers to tear down structures in the community they determined were uninhabited.[115] According to the First Circuit, the destruction of the squatters' homes did not violate the Fourth Amendment because, based on the facts that they were trespassing and that Commonwealth officials had twice asked them to depart voluntarily, any claim of a reasonable expectation of privacy on the land was "ludicrous."[116] Additionally, the court noted that the outcome of the eviction action against the squatters also established their lack of a legitimate expectation of privacy:

> [W]hether a place constitutes a person's "home" for this purpose cannot be decided without any attention to its location or the means by which it was acquired; that is, whether the occupancy and construction were in bad 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.[117]

In *United States v. Ruckman*,[118] the Tenth Circuit relied on *Amezquita* to determine that an individual did not have a legitimate expectation of privacy in a cave located on federal land.[119] Ruckman had been living in the cave for several months and had even fashioned a door in an attempt to enclose the cave.[120] Despite his attempts to exclude others from the cave, authorities searched the cave in Ruckman's absence, without a warrant, and found several weapons.[121]

(discussing, though ultimately arguing against, outdoor recreation trespass as a justification for the government-notification doctrine).

113. *See Amezquita*, 518 F.2d at 11 ("[A] trespasser who places his property where it has no right to be has no right of privacy as to that property." (quoting State v. Pokini, 45 Haw. 295, 315 (1961))).

114. *Id.*

115. *Id.*

116. *Id.* at 11.

117. *Id.* at 12.

118. 806 F.2d 1471, 1471 (10th Cir. 1986).

119. *Id.* at 1472.

120. *Id.*

121. *Id.*

Ruckman returned during the search and was arrested.[122] According to the court, Ruckman was "a trespasser on federal lands and subject to immediate ejectment. . . . Ruckman's subjective expectation of privacy [was] not reasonable in light of the fact that he could be ousted by [Bureau of Land Management] authorities from the place he was occupying at any time."[123]

While the majority in *Ruckman* offered a clear application of what is now known as the *Amezquita-Ruckman* analysis, the dissent offered a critical opinion of the theory that some commentators have deemed the "most persuasive."[124] Judge McKay opened his dissent with a policy argument, warning that the court's holding would negatively impact wilderness vacationers:

> The majority's opinion is a threat to those who fish in the Wind River mountains, those who enjoy survivalist expeditions, and those senior citizens in their recreational vehicles in Bryce Canyon National Park who hold "Golden Eagle" or "Golden Age" Passports. Under the majority's sweeping language, they could be found at any time to be "trespassing" on federal lands and be stripped of any legitimate expectation of privacy in their temporary dwellings, since those dwellings fail to constitute "houses." The majority, in effect, holds that the right of anyone who is on public lands to be free from warrantless searches turns on whether they have overstayed their permit.[125]

Judge McKay saw two separate grounds for the majority's decision and found both "fundamentally flawed."[126] First, the dissent noted that the majority's holding—that a cave is not protected by the Fourth Amendment because it is not a house—"implicitly assumes that only homes and houses are accorded fourth amendment protection."[127] According to Judge McKay, this does not fit with the holding in *Rakas* that "a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place."[128] Second, he argued that "trespasser" status is not dispositive in Fourth Amendment analysis, comparing Ruckman to "a camper whose 'Golden Eagle Passport' . . . has expired but yet who nevertheless remains on federal land an extra day."[129] Furthermore,

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122. *Id.*

123. *Id.* at 1472–73.

124. *See, e.g.*, Gregory Townsend, *Cardboard Castles: The Fourth Amendment's Protection of the Homeless's Makeshift Shelters in Public Areas*, 35 CAL. W. L. REV. 223, 230 (1999) (arguing that courts should adopt the government-acquiescence doctrine instead of relying on *Amezquita-Ruckman*).

125. *Ruckman*, 806 F.2d at 1474 (McKay, J., dissenting).

126. *Id.* at 1475.

127. *Id.* at 1476.

128. *Id.* (quoting Rakas v. Illinois, 439 U.S. 128, 142 (1978)).

129. *Id.*

Judge McKay found Ruckman's subjective expectation of privacy to be objectively reasonable because he took precautions to maintain his privacy by constructing a door, furnished the cave to make it livable, and lived in the cave for about eight months.[130] In short, Judge McKay rejected the Tenth Circuit's use of property analysis in determining what constitutes a reasonable expectation of privacy.[131]

The *Amezquita-Ruckman* analysis is the majority rule for evaluating the Fourth Amendment rights of trespassers—only the Ninth Circuit and a handful of state courts do not follow it.[132] Some commentators have commended the theory as consistent with *Katz* and the Fourth Amendment, while criticizing other approaches (such as the government-notification doctrine) as lacking justification.[133] Others, however, have endorsed the government-notification doctrine as a rule that offers more protection to homeless individuals.[134]

2. The Government-Notification Doctrine

The Hawaii Supreme Court, on facts similar to those in *Amezquita*, upheld the Fourth Amendment rights of squatters based on the fact that the State had allowed the squatters' community to exist "for a considerable period of time" before a warrantless search occurred.[135] In *State v. Dias*, a police officer went to "Squatters' Row" on a tip that illegal gambling was taking place inside of a makeshift structure built out of stilts and held up against the side of a bus.[136] Upon approaching the structure, the officer heard noises he associated with illegal gambling, looked inside the structure through a doorway to see defendants participating in illegal gambling, entered the structure without prior announcement, and arrested the defendants.[137]

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130. *Id.* at 1478.

131. *Id.* at 1477.

132. Milligan, *supra* note 112, at 1360.

133. *See, e.g.*, *id.* at 1391 ("While the *Amezquita-Ruckman* rule-based theory is well-defined by judicial opinions and legal commentary, the government-notification opinions are generally vague and conclusory."). Notably, however, Milligan does not even address the criticisms of the *Amezquita-Ruckman* approach in Judge McKay's dissent to the *Ruckman* opinion.

134. *See, e.g.*, Townsend, *supra* note 124, at 239 ("The decision[s] . . . in . . . *Amezquita* and *Ruckman* are flawed because they: (1) decide that a defendant's expectation of privacy is not objectively reasonable based solely on the location of the search; and (2) ignore the nature of the private human activity occurring at the scene.").

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

136. *Id.* at 639.

137. *Id.*

In its decision to suppress the arrests, the court recognized the applicability of the *Amezquita-Ruckman* doctrine but noted that "there are other circumstances here which impel us to reach a different result."[138] Particularly, because the state government had allowed Squatters' Row to exist on its property for a "considerable period of time," the court noted that the State's acquiescence gave rise "to a reasonable expectation of privacy on the part of the defendants, at least with respect to the interior of the building itself. This, we think is consistent not only with reason but also with our traditional notions of fair play and justice."[139]

While the court in *Dias* did not indicate how long the government would have to acquiesce to give squatters a reasonable expectation of privacy in their dwellings on government property, it did provide a framework for trespassers to potentially avoid a finding of per se illegitimacy under *Amezquita-Ruckman*. The Ninth Circuit officially adopted *Dias*'s government-acquiescence doctrine (as discussed in Judge McKay's dissent in *Ruckman*) in *United States v. Sandoval*.[140] In *Sandoval*, federal agents found the defendant's tent in a field of marijuana located on land held by the Bureau of Land Management.[141] The agents searched the enclosed tent and found a medicine bottle labeled with Sandoval's name; the bottle was not visible from outside of the tent.[142] Sandoval filed a motion to suppress the bottle, on the theory that the agents had entered his tent in violation of the Fourth Amendment.[143]

After finding that Sandoval had manifested a subjective expectation of privacy in his tent,[144] the Ninth Circuit determined that his expectation of privacy was also objectively reasonable despite the fact that Sandoval was trespassing on government land.[145] In fact, the court discussed the two approaches debated in *Ruckman* and concluded that Judge McKay's dissent in that case was "more persuasive,"[146] while also highlighting Judge McKay's concern for recreational policy: "Such a distinction would mean that a camper who

138. *Id.* at 640.

139. *Id.*

140. 200 F.3d 659, 661 (9th Cir. 2000).

141. *Id.* at 660.

142. *Id.*

143. *Id.*

144. *Id.* (noting the "virtually impenetrable" vegetation in the area, the fully enclosed tent, and the fact that "a person who lacked a subjective expectation of privacy would likely not leave [a prescription medicine bottle] lying around").

145. *Id.* at 660–61.

146. *Id.* at 661 n.4.

overstayed his permit in a public campground would lose his Fourth Amendment rights, while his neighbor, whose permit had not expired, would retain those rights."[147]

B. Recreational Policy at Work: State v. Pruss

Despite the fact that the majority of jurisdictions follow the *Amezquita-Ruckman* doctrine, some state court cases demonstrate that respecting the Fourth Amendment rights of outdoorsmen has undermined that doctrine as applied to the homeless. One illustrative example is the Idaho Supreme Court case *State v. Pruss*.[148]

In the summer of 2005, the sheriff's department in Clearwater County, Idaho, received reports of property damage to logging equipment and public utilities caused by a high-powered rifle and a handgun.[149] Confidential informants told the sheriff deputies that David Pruss, the alleged vandal, was planning to lure in law enforcement officers with his delinquencies in order to ambush them.[150] The informants also told the police that Pruss was residing in a "hooch" in the wilderness.[151]

In order to find Pruss and his hooch, police put a transmitter in a coffee can in a home where Pruss had been suspected of stealing coffee before.[152] This strategy worked, and police tracked the signal to a wooded ravine near the site of the vandalism.[153] There they discovered Pruss's hooch, which consisted of a camouflaged frame of small trees over a backpacking tent.[154] Hearing Pruss inside his hooch,

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147. *Id.* at 661.

148. 145 Idaho 623, 624 (2008).

149. *Id.*

150. *Id.* at 625.

151. *Id.* ("For simplicity, the word "hooch" will be used to refer to both the tent and the wooden structure."). The court uses the word "hooch," here, to mean a makeshift shelter in the wilderness. MERRIAM WEBSTER defines "hooch" as "alcoholic liquor especially when inferior or illicitly made or obtained." *Hooch*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/hooch (last visited Jan. 24, 2012). The reader should take note not to confuse "hooch" in this context with its possible use in describing other pivotal Fourth Amendment cases. *See supra* Part II.C.ii (discussing *Hester v. United States*, where the court ruled that police could validly seize the discarded jug of hooch, in part because it lay in open fields, and in part because it had been abandoned). Adding to the confusion is the parallel legal standing of both "hooch" as alcohol and "hooch" as a make-shift home: both are illicit, both are of an inferior quality, and perhaps the legalization of both is long overdue.

152. *Pruss*, 145 Idaho at 625.

153. *Id.*

154. *Id.* ("[Police] found a frame structure camouflaged with tree branches that was about six feet square and three to five feet high. The frame was made of sections of limbs or small trees that were lashed together. The frame was covered by a plastic blue tarp, which was then covered

the deputies announced themselves and told him to come out.[155] When he did not, they fired tear gas into the hooch.[156] Pruss then crawled out and police talked him to the ground, at which point he allegedly tried to reenter the hooch, where police could see a high-powered rifle through the door.[157] After transporting Pruss out of the wilderness, officers conducted a search of the hooch without a warrant.[158] Pruss later filed a motion to suppress any evidence found during the search, arguing that it violated the U.S. and Idaho Constitutions.[159]

Initially, the court stated, "[T]he respect for the sanctity of the home does not depend upon whether it is a mansion or a hut, or whether it is a permanent or a temporary structure."[160] While the protection of homeless individuals is often a secondary effect of the concern for individuals who enjoy the wilderness recreationally, the Idaho Supreme Court demonstrated explicit concern for the underprivileged in *Pruss*. However, the lurking policy argument in favor of protecting outdoor recreation quickly followed the court's eloquent considerations of constitutional equity:

> Throughout our State's history, its citizens have engaged in various types of outdoor recreational activities on public lands. Idaho's first game laws were enacted by the Territorial Legislature in 1864. Idaho's state park system will celebrate its centennial this year. While engaging in outdoor recreational activities on public lands, our citizens often use various types of portable shelters such as backpacking tents, wall tents, tent trailers, and travel trailers. The central purpose of constitutional protection against unreasonable searches and seizures forecloses any distinction between such types of shelters. . . . Utilizing public lands for outdoor recreational activities is a longstanding custom in this state that is recognized as valuable to society.[161]

While "respect for the sanctity of the home" carries some weight in the *Pruss* decision,[162] it is outdoor recreation that appears to be the motivating factor behind the court's finding of a reasonable expectation of privacy, largely because society values outdoor recreation more than it values the sanctity of a homeless man's

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by the tree boughs. A backpacking tent was erected inside the wooden frame, which extended a few feet beyond the front of the tent to form a small vestibule.").

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* It should be noted that the court analyzed the issue under both the U.S. Constitution and the Idaho Constitution, but that the Idaho Supreme Court "has at times construed the provisions of [its] constitution to grant greater protection than that afforded under the United States Supreme Court's interpretation of the federal Constitution." *Id.* at 626.

160. *Id.* at 626.

161. *Id.* at 626–27.

162. *Id.* at 626.

shelter.[163] Thus, while *Katz* may have marginalized homeless defendants in the past,[164] courts can use recreation as a means to find a reasonable expectation of privacy and establish rights for the homeless, at least in situations similar enough to those that non-homeless recreationalists might seek out during a trip to the wilderness.

IV. CONCLUSION

Determining the Fourth Amendment rights of homeless individuals according to how the more affluent members of society spend their leisure time might initially seem a bit distasteful, if not callous. However, this outcome is not surprising given *Katz*'s lack of a clear standard for establishing legitimate expectations of privacy. *Katz* lets society determine homeless individuals' Fourth Amendment rights based on expectations it accepts as "reasonable." Society, however, inevitably rejects those on the fringe as "unreasonable," rendering the Amendment a constitutional anomaly that no longer safeguards minority interests against the majority.[165] Or perhaps, as Justice Scalia has suggested, the Court has granted itself (and other judges) the power to determine these rights.[166]

Despite the less-than-noble justifications that some judges invoke when protecting homeless individuals' rights,[167] courts should seize the opportunity to utilize a popular social policy argument for the sake of a socially unpopular class of individuals. This Note does not mean to suggest that those judges who have extended Fourth Amendment rights to the homeless via a recreational-policy rationale have ignoble motivations. After all, they could put forth these arguments with a primary desire to promote social justice and with the practical understanding that some arguments will achieve the goal quicker than others; if there is no nail gun in the judicial toolbox,

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163. *See id.* at 627.

164. *See* Stec, *supra* note 94, at 324 ("In the same way that *Katz* argued for a new standard because of changing and evolving times, 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.").

165. *See id.* at 321–24.

166. Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring); *see also supra* note 93 and accompanying text. *But cf.* Robbins v. California, 453 U.S. 420, 427 (1981) ("And as the disparate results in the decided cases indicate, no court, no constable, no citizen, can sensibly be asked to distinguish the relative 'privacy interests' in a closed suitcase, briefcase, portfolio, duffel bag, or box.").

167. Remember, Judge McKay argued for the defendant in *Ruckman* not for the sake of the unfortunate cave-dweller, but for the sake of the Golden Eagle passport traveler. United States v. Ruckman, 806 F.2d 1471, 1474 (1986) (McKay, J., dissenting).

perhaps duct tape can get the job done. Furthermore, courts are faced with the unfortunate fact that almost all Fourth Amendment cases deal with the procedural suppression of evidence that tends to prove a defendant factually guilty of a crime. Perhaps in this light, reframing the issue as one of promoting Fourth Amendment rights for citizens at large is a more convincing way to broaden the Fourth Amendment protections than suggesting a criminal defendant should not face incriminating evidence.

Enter the hiker, the rock-climber, car camper, hunter, spelunker, or any other sort of outdoor recreationalist. Historically, society has not valued the presence or challenges facing homeless individuals. But society's value for outdoor recreation is growing, and these values can influence the expectations of privacy that individuals bring with them when they sleep in the wilderness without a traditional "home." While society might not present judges with any indication that it values homeless people's rights or expectations of privacy, it does provide judges with at least this backdoor method to provide Fourth Amendment rights to an otherwise marginalized group of citizens. Perhaps if more courts adopt this method, the following comments attributed to William Pitt and endorsed by the Court will once again ring true in our nation:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement![168]

Wesley C. Jackson∗

168. Miller v. United States, 357 U.S. 301, 307 (1958). Interestingly, as in *Hester v. United States*, Pitt's comments addressed the issue of home searches for illicit alcohol. *Id.* (discussing how Pitt addressed Parliament concerning searches incident to the enforcement of an excise on cider); *see also supra* note 154 (discussing the word "hooch" as a legal term of art).

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