

When a Tent is Your Castle: Constitutional Protection Against Unreasonable Searches of Makeshift Dwellings of Unhoused Persons

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*“The poorest man may in his cottage bid defiance to all
the forces of the Crown. It may be frail; its roof may
shake; the wind may blow through it; the storm may
enter; the rain may enter; but the King of England
cannot enter—all his force dares not cross the
threshold of the ruined tenement!”¹*

INTRODUCTION

In November 2015, police entered an unauthorized homeless encampment on public property in Vancouver, Washington, pursuant to a previously unenforced public camping ban.² William Pippin, a resident of the camp, was asleep inside his makeshift dwelling—an enclosed tarp held up by poles and affixed to a fence.³ After the police officers woke him and

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1. *State v. Pippin*, 403 P.3d 907, 913 (Wash. Ct. App. 2017) (remarks attributed to William Pitt, Earl of Chatham, from a 1763 debate in Parliament).

2. Brief of Respondent at 2, *Pippin*, 403 P.3d 907 (Wash. Ct. App. 2017) (No. 48540-1-II), 2016 WL 8309691; Heidi Groover, *Is a Tarp a Home?*, STRANGER (Feb. 15, 2017) [hereinafter *Tarp a Home?*], <http://www.thestranger.com/features/2017/02/15/24868979/is-a-tarp-a-home> [https://perma.cc/N9G8-SNV3]. A homeless encampment is a group of unhoused people living outdoors in tents or other makeshift shelter, often finding a scintilla of safety and security in numbers. An unauthorized encampment is one not sanctioned by the government (if on public property) or the landowner (if on private property), and therefore vulnerable to police enforcement actions called “sweeps.” SAMIR JUNEJO, SEATTLE UNIV. SCH. OF LAW HOMELESS RIGHTS ADVOCACY PROJECT, NO REST FOR THE WEARY: WHY CITIES SHOULD EMBRACE HOMELESS ENCAMPMENTS 6 (Sara K. Rankin & Susanne Skinner eds., 2016), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1006&context=hrap>.

3. Brief of Respondent, *supra* note 2, at 2.

asked him to come out to discuss the camping ban, one officer lifted the tarp and saw Mr. Pippin in bed with a bag of what appeared to be methamphetamine next to him.⁴ Mr. Pippin was arrested and charged with possession of methamphetamine.⁵

Mr. Pippin filed a motion to suppress the contraband as the fruit of a warrantless search in violation of the Fourth Amendment of the U.S. Constitution and Article I, Section 7 of the Washington State Constitution.⁶ The trial court granted the motion, relying on *United States v. Sandoval*,⁷ where a federal court held that a similarly situated defendant had a subjective expectation of privacy even when he was engaged in illegal activity and that his expectation was objectively reasonable when he was camping on public land without permission because he was never asked to vacate.⁸ The State of Washington appealed.⁹

During the ensuing litigation, the parties argued over (among other things) whether Mr. Pippin's makeshift tent was a space protected by either the Fourth Amendment's guarantee against unreasonable searches of "houses" or the Washington State Constitution's analogue prohibiting invasion of one's "private affairs or home."¹⁰ The Court of Appeals declined to analyze whether Mr. Pippin's tent was protected by the Fourth Amendment or whether it should be considered a "home" *per se*, but it did find sufficient indicia of Mr. Pippin's "private affairs" for both the tent and its contents to come under the purview of Article I, Section 7.¹¹ In so doing, the Court of Appeals legitimized one of the most critical ways that

4. Brief of Appellant at 7, *Pippin*, 403 P.3d 907 (Wash. Ct. App. 2017) (No. 48540-1-II), 2016 WL 8309690.

5. *Id.*

6. Brief of Respondent, *supra* note 2, at 8.

7. *United States v. Sandoval*, 200 F.3d 659 (9th Cir. 2000).

8. Brief of Respondent, *supra* note 2, at 8.

9. *Pippin*, 403 P.3d at 909.

10. U.S. CONST. amend. IV; WASH. CONST. art. I, § 7; *Tarp a Home?*, *supra* note 2.

11. *Pippin*, 403 P.3d at 917. The court noted that while Article I, Section 7 provides greater protection than the federal Constitution in some areas, Washington courts may rely on the reasoning of federal courts and other jurisdictions when analyzing an issue of first impression regarding the scope of Article I, Section 7. *Id.* at 911–12. In the unpublished portion of the opinion, the court reversed the suppression order on other grounds and remanded for further proceedings. *Id.* at 917. First, it held that the warrantless search was not justified by the protective sweep exception because the officers had not yet decided whether or not to arrest Mr. Pippin for violating the public camping ordinance at the time they opened the tent. *Id.* Second, it found that the lower court had improperly applied a balancing test to determine whether an exigency exception for officer safety was satisfied, and that the factual record was insufficient to make that determination. *Id.* Finally, it held that two findings of fact were not supported by substantial evidence. *Id.* The court remanded to the trial court to assess exigent circumstances of officer safety under the proper legal standard and to enter additional findings of fact. *Id.*

people experiencing homelessness¹² strive to retain some sense of dignity and humanity: by establishing makeshift dwellings.¹³ The court also rightfully shifted its constitutional evaluation from “reasonable expectations of privacy”—based on notions of property ownership that reinforce the consequences of wealth and privilege—to a more equitable assessment of whether an individual’s “‘private affairs’ . . . have been unreasonably violated.”¹⁴

This Note will argue that all jurisdictions should follow the Washington State Court of Appeals, Division II in validating makeshift dwellings used by people experiencing homelessness as spaces protected from unwarranted police intrusions by shifting evaluations of “reasonable expectations of privacy” to a more equitable standard that appreciates the realities of economic disparity. This approach to constitutional protections against unreasonable searches and seizures is imperative to protect the rights of people experiencing homelessness, given that such individuals are regularly subjected to invasions of privacy and heightened exposure to the criminal justice system.¹⁵

Part I of this Note will explain how the lives of people experiencing extreme poverty in the United States have been intensely monitored by government agencies, such that poor people are frequently deprived of basic rights afforded to their more affluent counterparts. People in poverty are often subjected to regular invasions of privacy by virtue of their use of public benefits and other evidence of financial hardship.¹⁶ Further, poor

12. This Note will primarily refer to people experiencing homelessness using person-first language to emphasize that homelessness is a temporary experience, not an identity or status more significant than personhood. Common terminology like “the homeless” and even “homeless people” emphasize one’s current living arrangements as a person’s sole identity and can be dehumanizing. With that concern in mind, this Note will refer to “people experiencing homelessness,” “unhoused people,” and occasionally “homeless people” interchangeably when necessary for sentence flow and clarity, with the belief that readers will understand that homelessness is a transitory experience, not a sole identity.

13. Heidi Groover, *Appeals Court: People Who Live in Tents Have the Same Privacy Protections as Those in Houses*, STRANGER (Oct. 11, 2017), <http://www.thestranger.com/slog/2017/10/11/25464116/appeals-court-people-who-live-in-tents-have-the-same-privacy-protections-as-those-in-houses> [<https://perma.cc/T8JA-4G2Y>]; Jessica Prokop & Patty Hastings, *Court: Homeless Have Privacy Rights*, COLUMBIAN (Oct. 10, 2017, 9:15 PM), <http://www.columbian.com/news/2017/oct/10/court-homeless-have-privacy-rights-man-arrested-vancouver/> [<https://perma.cc/G53A-S5P7>].

14. *Pippin*, 403 P.3d at 912.

15. *See infra* Part I.

16. *See, e.g.*, WASH. ADMIN. CODE §§ 388-400-0040, 388-406-0010, 388-418-0007, 388-490-0005 (2018) (requiring applicants for Basic Food benefits to provide proof of income and expenses at the time of application and report any changes or risk losing the benefit, and to permit the Department of Social and Health Services to contact third parties and send fraud investigators on unannounced home visits to verify the recipient’s circumstances).

people are more heavily policed than affluent people,¹⁷ and in particular, basic life-sustaining activities are often criminalized for unhoused people who have no reasonable legal alternative but to engage in them outdoors or in public.¹⁸ Because poor people are subjected to more surveillance and policing than their wealthier counterparts, the Fourth Amendment—and corresponding protections arising from state constitutions—should provide a backstop to protect the spaces in which people experiencing poverty conduct their most private affairs.

Part II of this Note will discuss how laws that criminalize visible poverty have been increasingly invalidated as unconstitutional. For example, the Eighth Amendment's protections against cruel and unusual punishment prohibits governments from penalizing people based on their homeless status.¹⁹ Cities may not penalize homeless people for violating public camping ordinances when the city has failed to provide adequate alternatives.²⁰ Additionally, laws that criminalize panhandling (or begging) often pose Due Process and First Amendment problems based on overbreadth, vagueness, prior restraints, and content-based restrictions that cannot survive strict scrutiny.²¹ It follows, then, that if unhoused people cannot be subjected to criminal sanctions for living outside or engaging in constitutionally protected speech while visibly poor, they should not be deprived of constitutional protections against unreasonable searches because of the same status.

17. Lindsay J. Gus, *The Forgotten Residents: Defining the Fourth Amendment "House" to the Detriment of the Homeless*, 2016 U. CHI. LEGAL F. 769, 770 (2016) (noting that homeless individuals are overrepresented in prison populations).

18. See generally NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2014) [hereinafter NO SAFE PLACE], https://www.nlchp.org/documents/No_Safe_Place [<https://perma.cc/9GMT-GCSE>] (describing laws that criminalize camping, sleeping, begging, loitering, sitting, lying down, sleeping in vehicles, sharing food, and storing belongings in public).

19. See, e.g., *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1583 (S.D. Fla. 1992) (holding that "the City's practice of arresting homeless individuals for performing inoffensive conduct in public when they have no place to go is cruel and unusual in violation of the eighth amendment" and seizure of the personal property of people experiencing homelessness violates the Fourth Amendment).

20. See *Kohr v. City of Houston*, No. 4:17-CV-1473, 2017 WL 3605238, at *2 (S.D. Tex. Aug. 22, 2017) (granting a temporary restraining order enjoining the city from enforcing its public camping ban because "[t]he evidence is conclusive that [the unsheltered plaintiffs] are involuntarily in public, harmlessly attempting to shelter themselves—an act they cannot realistically forgo, and that is integral to their status as unsheltered homeless individuals. Enforcement of the City's ban against the plaintiffs may, therefore, cause them irreparable harm by violating their Eighth Amendment right to be free from cruel and unusual punishment due to their status of 'homelessness'").

21. See generally DREW SENA & JOCELYN TILLISCH, SEATTLE UNIV. SCH. OF LAW HOMELESS RIGHTS ADVOCACY PROJECT, BEGGING FOR CHANGE: BEGGING RESTRICTIONS THROUGHOUT WASHINGTON (Sara K. Rankin & Justin Olson eds., 2018) [hereinafter BEGGING FOR CHANGE], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173191; Drew Sena, Note, *A Constitutional Critique on the Criminalization of Panhandling in Washington State*, 41 SEATTLE U. L. REV. 287 (2017).

Part III of this Note will argue that Fourth Amendment protections—whether grounded in property rights or privacy rights—both historically and currently fail to recognize the rights of people with lesser economic or social status. Fourth Amendment protections based in property rights serve people with more economic privilege to the detriment of historically disadvantaged groups, such as working-class people, people of color, and women.²² Even more recent Fourth Amendment jurisprudence, based on expectations of privacy, fails to grant protections to people who cannot afford to erect walls and put space between themselves and the rest of society.²³

Part IV of this Note will evaluate the *Pippin* court’s “private affairs” analysis as a more judicious and equitable approach to assess unreasonable searches and seizures. Given how property- and privacy-based justifications for protecting certain spheres from unreasonable invasions have been applied narrowly to preserve systems of power and privilege, Division II was correct to acknowledge that an unhoused person’s makeshift dwelling represents that person’s “private affairs” protected by the Washington State Constitution and that a person does not lose that protection by virtue of their unsheltered status.²⁴ All jurisdictions should follow Division II in recognizing the dwellings of unhoused people as spaces protected by the Fourth Amendment of the U.S. Constitution, incorporated to the states by the Fourteenth Amendment, and by corresponding provisions in state constitutions.

22. David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 MISS. L.J. 143, 192 (2002). (“[R]ich people have bigger and more comfortable homes than poor people; it is therefore much easier for rich people than for poor people to stay home when engaged in activities they wish to keep private. Granting homes more privacy than other places therefore tilts Fourth Amendment protection in favor of the rich and against the poor, who are forced to conduct much of their lives outside of their residences.”); see also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1713 (1993) (arguing that “American law has recognized a property interest in whiteness”); Marc L. Roark, *Under-Propertied Persons*, 27 CORNELL J.L. & PUB. POL’Y 1, 9 (2017) (“Property as the vehicle for identity-making activities affords owners with enhanced privacy against outside scrutiny so that they are able to expose themselves to the world on their own terms.”).

23. See Elizabeth Schutz, *The Fourth Amendment Rights of the Homeless*, 60 FORDHAM L. REV. 1003, 1020–28 (1992) (applying Fourth Amendment expectations of privacy to “temporary homes” for overnight guests, hotel patrons, squatters, and unhoused people living in makeshift homes).

24. WASH. CONST. art. I, § 7; *State v. Pippin*, 403 P.3d 907, 915 (Wash. Ct. App. 2017) (“The law is meant to apply to the real world, and the realities of homelessness dictate that dwelling places are often transient and precarious. The temporary nature of Pippin’s tent does not undermine any privacy interest. . . . Nor does the flimsy and vulnerable nature of an improvised structure leave it less worthy of privacy protections. For the homeless, those may often be the only refuge for the private in the world as it is.”) (internal citations omitted). Under the case law above, Mr. Pippin’s tent was the sort of closed-off space that typically shelters the intimate and discrete details of personal life protected by Article I, Section 7.

I. POOR PEOPLE'S LIVES ARE SIGNIFICANTLY SURVEILLED

Fourth Amendment protections for dwelling spaces must be fiercely protected because poor people otherwise face disproportionate surveillance in countless aspects of their lives. Unlike their wealthier counterparts, people experiencing poverty are often compelled to sacrifice their claims to privacy as a tradeoff to getting their basic needs met. People experiencing homelessness also face potential criminal penalties when they publicly engage in activities that are necessary for survival instead of in the privacy of a home; the ability to sleep, urinate, or defecate in the privacy of one's own home is what saves housed people from the same criminal sanctions.²⁵ Because unhoused people face this kind of constant public surveillance, the Fourth Amendment is a critical backstop to protect against invasions into their dwellings.

A. Lack of Privacy

Poor people are regularly denied privacy as a consequence of living with very limited means. For example, people who receive public benefits like welfare assistance uniformly may do so only by agreeing to disclose information about their household composition, income, and other resources at the time of application and throughout the period in which they receive benefits.²⁶ Departments of social and health services may even send fraud investigators to make unannounced visits to welfare recipients, intruding into homes to verify that a particular person's poverty is sufficient to remain eligible for a meager allowance to put food on the table.²⁷ This dynamic has been described as a legitimate "waiver of privacy," despite the fact that welfare recipients have zero bargaining power against administrative agencies on this issue and must agree to these conditions or forego the benefit altogether.²⁸ Since welfare is not considered an entitlement, recipients are understood to have waived any

25. See JUSTIN OLSON & SCOTT MACDONALD, SEATTLE UNIV. SCH. OF LAW HOMELESS RIGHTS ADVOCACY PROJECT, WASHINGTON'S WAR ON THE VISIBLY POOR: A SURVEY OF CRIMINALIZING ORDINANCES & THEIR ENFORCEMENT (Sara K. Rankin ed., 2015), <https://ssrn.com/abstract=2602318> [<https://perma.cc/E62D-RJXR>] (summarizing city ordinances in Washington State that prohibit engaging in life-sustaining activities like sitting, standing, sleeping, urinating, or defecating in public places).

26. See sources cited *supra* note 16.

27. WASH. ADMIN. CODE § 388-490-0005 (2018); Tracie McMillan, *The SNAP Gap: Benefits Aren't Enough to Keep Many Recipients Fed*, NAT'L PUB. RADIO (Mar. 3, 2016, 12:57 PM), <https://www.npr.org/sections/thesalt/2016/03/03/468955099/the-snap-gap-benefits-arent-enough-to-keep-many-recipients-fed> [<https://perma.cc/3LHL-Z5FN>].

28. Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1579 (1996) (reviewing LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994) and JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994)).

claim to privacy regarding their means and morality when they accepted public assistance.²⁹

People living in such extreme poverty that they cannot afford housing sacrifice further privacy protections when they stay in emergency homeless shelters or live on the street. Many homeless shelters are arranged as “congregate” shelters: large open rooms where numerous individuals sleep with others nearby with no private space to themselves.³⁰ Similarly, bathrooms are often shared spaces in homeless shelters, affording little to no privacy for the intimate act of bathing.³¹ Moreover, some shelters “require that homeless people consent to the search of their personal effects” as a condition of entry.³² In fact, many homeless people have listed a lack of privacy as a primary reason for not returning to a shelter.³³

While living on the streets often means an even greater lack of privacy as compared to living in a shelter, some unhoused people erect tents on city sidewalks, in alleys, under freeway overpasses, and in under-utilized green spaces.³⁴ When unhoused people live in tents—either alone, in pairs, or in larger encampments—the tents provide some greater degree of privacy over shelters. While quarters may still be incredibly close, individuals at least have one’s own space and a door to create some

29. *Id.* at 1580. Moreover, public benefit recipients effectively have no mechanism to change this radical imbalance of power because changes in public benefits administration are not subject to the notice and comment rulemaking requirements under the Administrative Procedures Act. 5 U.S.C. § 553(a)(2) (2012).

30. SUZANNE SKINNER, SEATTLE UNIV. SCH. OF LAW HOMELESS RIGHTS ADVOCACY PROJECT, SHUT OUT: HOW BARRIERS OFTEN PREVENT MEANINGFUL ACCESS TO EMERGENCY SHELTER 29 (Sara K. Rankin ed., 2016), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1004&context=hrap> [<https://perma.cc/G5LX-M8KF>].

31. *Id.*

32. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, FROM WRONGS TO RIGHTS: THE CASE FOR HOMELESS BILL OF RIGHTS LEGISLATION 9 (2014) [hereinafter FROM WRONGS TO RIGHTS], https://www.nlchp.org/documents/Wrongs_to_Rights_HBOR [<https://perma.cc/FH5G-UCNV>].

33. TAI DUNSON-STRANE & SARAH SOAKAI, UNIV. OF HAW. AT MANOA, THE EFFECT OF CITY SWEEPS AND SIT-LIE POLICIES ON HONOLULU’S HOUSELESS 20 (2015), http://blog.hawaii.edu/durp/files/2015/06/Houseless-Honolulu-Report.small_.pdf [<https://perma.cc/8VBE-4X6L>].

34. JUNEJO, *supra* note 2, at 6. Alternatively, some unhoused people use vehicles as temporary shelter, but face additional obstacles and potential traffic penalties associated with sleeping in and parking a car over extended periods of time. JESSICA SO, SCOTT MACDONALD, JUSTIN OLSON & RYAN MANSELL, SEATTLE UNIV. SCH. OF LAW HOMELESS RIGHTS ADVOCACY PROJECT, LIVING AT THE INTERSECTION: LAWS AND VEHICLE RESIDENCY (Sara K. Rankin ed., 2016) (surveying Washington State laws that criminalize vehicle residency), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776423. For a discussion of safe parking programs designed to mitigate harm to vehicle residents in Washington and California, see T. RAY IVEY & JODILYN GILLELAND, SEATTLE UNIV. SCH. OF LAW HOMELESS RIGHTS ADVOCACY PROJECT, HIDDEN IN PLAIN SIGHT: FINDING SAFE PARKING FOR VEHICLE RESIDENTS (Sara K. Rankin ed., 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173221. See also T. Ray Ivey, *The Criminalization of Vehicle Residency and the Case for Judicial Intervention Via the Washington State Homestead Act*, 42 SEATTLE U. L. REV. 243, 247 (2018).

semblance of privacy.³⁵ Yet, unhoused people are often subject to sweeps—police actions to remove homeless encampments, often resulting in the unconstitutional seizure and destruction of personal property³⁶—such that the limited privacy provided in a tent or makeshift shelter is precarious, at best.³⁷

Recognizing the dubious status of constitutional and human rights for unhoused people, American homeless advocates have called for federal, state, and local governments to establish affirmative protections for the rights of people experiencing homelessness. The National Law Center on Homelessness and Poverty, for example, has appealed to the United Nations Human Rights Council on the issue of privacy rights for unhoused people in the United States:

Article 17 of International Covenant on Civil and Political Rights (ICCPR), which the U.S. has ratified, states “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence” However, the more than 3.5 million people who experience homelessness in the United States annually are forced to exist partially or fully in the public sphere, where they “have to face a consistent suspicion and scrutiny because they are consistently visible.” . . . We call on the Special Rapporteur on the Right to Privacy to affirm that people experiencing homelessness are entitled to the same level of privacy in whatever “home” they have access to, whether it be a shanty, a tent, a tarp, or just a blanket, as a regularly housed person would expect in their home³⁸

Similarly, several states have passed “Homeless Bill of Rights” legislation enumerating a right to a “reasonable expectation of privacy regarding personal property” for people experiencing homelessness.³⁹ That advocates have made calls for such legislation is evidence that the privacy rights of people experiencing homelessness have not been sufficiently protected.

35. JUNEJO, *supra* note 2, at 13; Telephone Interview with Paul Boden, Exec. & Org. Dir., Western Reg'l Advocacy Project (Oct. 31, 2017).

36. *See* Lavan v. City of Los Angeles, 693 F.3d 1022, 1027 (9th Cir. 2012) (affirming a preliminary injunction enjoining the city's practice of seizing and destroying the belongings of homeless people during sweeps because “unabandoned property of homeless persons is not beyond the reach of the protections enshrined in the Fourth and Fourteenth Amendments”); JUNEJO, *supra* note 2, at 15–20.

37. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, VIOLATIONS OF THE RIGHT TO PRIVACY FOR PERSONS EXPERIENCING HOMELESSNESS IN THE UNITED STATES: A REPORT TO THE SPECIAL RAPPORTEUR ON THE RIGHT TO PRIVACY I (2017) [hereinafter REPORT ON RIGHT TO PRIVACY], <https://www.nlchp.org/documents/Special-Rapporteur-Right-to-Privacy> [<https://perma.cc/QQ42-C3F4>].

38. *Id.*

39. FROM WRONGS TO RIGHTS, *supra* note 32, at 10.

B. Criminalization

Perhaps more egregious than the regular invasions of privacy suffered by unhoused people is the increased criminalization of the experience of homelessness. Loitering laws that make “it a crime to wander without visible means of support” and laws that criminalize vagrancy date back to the founding of this country and beyond.⁴⁰ While criminalization laws have evolved to target different groups of “undesirable people” at different points during American history,⁴¹ they represent a pattern of controlling public space and excluding classes of people deemed undesirable to the community.⁴²

This tradition has continued today, as numerous cities and municipalities continue to criminalize life-sustaining activities⁴³ when undertaken in public by people experiencing homelessness. While laws that prohibit sitting in certain public spaces⁴⁴ are often justified as protecting the public interest by maintaining “unobstructed walkways” or promoting the economic health of the community, advocates have described these justifications as “dubious” and the laws as expensive and ineffective.⁴⁵ Similarly, laws that criminalize urination and defecation in public⁴⁶ are often justified as protecting public health and safety, but they neglect to consider the health and safety of the individuals who have no other place to relieve themselves.⁴⁷

40. Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1206 (1953); 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, 634 (1992).

41. JAVIER ORTIZ & MATTHEW DICK, SEATTLE UNIV. SCH. OF LAW HOMELESS RIGHTS ADVOCACY PROJECT, *THE WRONG SIDE OF HISTORY: A COMPARISON OF MODERN AND HISTORICAL CRIMINALIZATION LAWS 2–11* (Sara K. Rankin ed., 2015) (comparing vagrancy laws, anti-Okie laws, Jim Crow laws, ugly laws, and sundown town laws).

42. *Id.* at 12.

43. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1559 (S.D. Fla. 1992) (defining life-sustaining activities as including eating, sleeping, and sitting).

44. *See, e.g.*, SEATTLE, WASH., MUN. CODE §§ 12A.12.015, 15.48.040, 18.12.250 (2018).

45. NO SAFE PLACE, *supra* note 18, at 16.

46. *See, e.g.*, SEATTLE, WASH., MUN. CODE § 12A.10.100.

47. Jerry Large, *Fear of Our Own Desperation Gets in the Way of Homelessness Solutions*, SEATTLE TIMES (May 22, 2016, updated May 23, 2016), <https://www.seattletimes.com/seattle-news/fear-of-our-own-desperation-gets-in-the-way-of-homelessness-solutions/> [https://perma.cc/JXW8-YXDW] (“We tend to blame poor people for their own poverty. . . . We associate them with criminality, we look at them through this lens of evaluating them based on their perceived impact on our public health and safety. We don’t think about their public health and safety.” (quoting Professor Sara Rankin, Director, Seattle University Homeless Rights Advocacy Project)); *see also* EVANIE PARR, SEATTLE UNIV. SCH. OF LAW HOMELESS RIGHTS ADVOCACY PROJECT, *IT TAKES A VILLAGE: PRACTICAL GUIDANCE FOR AUTHORIZED ENCAMPMENTS*, pt. I(D) (Sara K. Rankin ed., 2018) [hereinafter *IT TAKES A VILLAGE*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173224.

Moreover, recent data suggests that laws that criminalize homelessness are on the rise.⁴⁸

Since people experiencing homelessness frequently face criminal sanctions for daily survival activities, it is therefore crucial that police be restrained from invading into the privacy to which all people are constitutionally entitled—at minimum.⁴⁹ Yet, police invasions into the spaces occupied by unhoused people are a regular occurrence. Police raids or sweeps of homeless encampments are the default response to homelessness in most communities; rather than building more affordable housing and providing accessible services, cities send in their armed police force to forcibly remove poor people from their outdoor homes.⁵⁰

II. COURTS HAVE ALREADY BEGUN TO RECOGNIZE CONSTITUTIONAL PROTECTIONS AGAINST BURDENS ON UNHOUSED PEOPLE

Increasingly, courts have struck down laws that criminalize homelessness on a variety of constitutional bases. For example, in *Jones v. City of Los Angeles*, the Ninth Circuit invalidated a city ordinance that prohibited sitting, lying, or sleeping on a “street, sidewalk or other public way” (other than “while attending or viewing any parade”)⁵¹ because it

48. See OLSON & MACDONALD, *supra* note 25, at 2–3 (quantifying the increase of laws that criminalize homelessness in Washington State); NO SAFE PLACE, *supra* note 18, at 8–9; Gale Holland & Christine Zhang, *Huge Increase in Arrests of Homeless in L.A.—But Mostly for Minor Offenses*, L.A. TIMES (Feb. 4, 2018), <http://www.latimes.com/local/politics/la-me-homeless-arrests-20180204-story.html> [<https://perma.cc/8Y4K-5UZN>] (noting a significant rise in arrests of homeless people for violating Los Angeles’s “quality-of-life” laws—restricting sleeping on the sidewalk, living in a car or low-level drug possession, for example—that police enforce against homeless people, usually with a citation and for “failure to appear in court for an unpaid citation”).

49. This point is particularly salient in the context of criminal law because the Constitution protects all persons, even those suspected of serious crimes. One of the protections afforded under the Constitution is the right to avoid unreasonable police invasions, particularly into the home; but when police search the homes of unhoused people, “the ‘illegal’ conduct is often merely violating a city ordinance,” and the scope of the invasion is therefore wildly disproportionate to the severity of the illegal conduct. E-mail from Breanne Schuster, Staff Attorney, ACLU, Wash. Found., to author (Aug. 23, 2018) (on file with author).

50. Kevin Fagan, *SF Mayor Vows that Clearing Homeless Tents from the Mission Just a Start*, S.F. CHRONICLE (Apr. 25, 2018), <https://www.sfchronicle.com/bayarea/article/SF-mayor-vows-that-clearing-homeless-tents-from-12864999.php> [<https://perma.cc/29XS-2BLH>] (increased enforcement of public camping prohibitions paired with increased counseling, despite an insufficient number of shelter beds in San Francisco, California); Shay McAlister, *Groups Outraged After Homeless Camp Torn Down, Personal Items Destroyed*, WHAS11 (Oct. 30, 2017, updated Oct. 31, 2017), <https://www.whas11.com/article/news/local/groups-outraged-after-homeless-camp-torn-down-personal-items-destroyed/417-487329789> [<https://perma.cc/R5HU-U3JY>] (encampment bulldozed, tents and food removed and destroyed in Louisville, Kentucky); Peyton Yager, *Police Raid Homeless Camp*, KNWA (Aug. 6, 2018, updated Aug. 10, 2018), <https://www.nwahomepage.com/news/knwa/police-raid-homeless-camp/1350064790> [<https://perma.cc/Z92A-5W9M>] (police raid of a homeless encampment at University of Arkansas).

51. L.A., CAL., MUN. CODE § 41.18(d) (2018).

violated the Eighth Amendment rights of the unhoused residents of that city's "Skid Row."⁵² The court recognized that the number of unhoused people in the county astronomically exceeded the number of available shelter beds⁵³ and that the unhoused plaintiffs had "no access to private spaces" and were "unable to stay off the streets" to comply with the ordinance.⁵⁴ Without deciding that homelessness was a cognizable status for the purposes of the Eighth Amendment *per se*, the court held that "involuntariness of the act or condition the City criminalizes is the critical factor delineating a constitutionally cognizable status" and that the utter lack of available shelter rendered the plaintiffs' presence in public involuntary.⁵⁵ More recently, in *Martin v. City of Boise*, the Ninth Circuit affirmed the principle in *Jones*, reasoning that a similar ordinance in Boise, Idaho, violated the Eighth Amendment by imposing "criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter."⁵⁶ Notably, the *Martin* court acknowledged the consequence of shelter services with mandatory religious focuses as a functional barrier to access, which creates a First Amendment problem as well.⁵⁷ Similarly, the U.S. District Court for the Southern District of Texas granted a temporary restraining order enjoining the city of Houston from enforcing its public camping ban as it violated the Eighth Amendment as applied to unhoused individuals "involuntarily in public, harmlessly attempting to shelter themselves."⁵⁸

52. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006), *vacated due to settlement*, 505 F.3d 1006 (9th Cir. 2007).

53. *Id.* at 1122.

54. *Id.* at 1136.

55. *Id.* at 1132 ("The City could not expressly criminalize the status of homelessness by making it a crime to be homeless without violating the Eighth Amendment, nor can it criminalize acts that are an integral aspect of that status. Because there is substantial and undisputed evidence that the number of homeless persons in Los Angeles far exceeds the number of available shelter beds at all times, including on the nights of their arrest or citation, Los Angeles has encroached upon Appellants' Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless.").

56. *Martin v. City of Boise*, No. 15-35845, 2018 WL 4201159, at *13 (9th Cir. Sept. 4, 2018).

57. *Id.* at *7 ("A city cannot, via the threat of prosecution, coerce an individual to attend religion-based treatment programs consistently with the Establishment Clause of the First Amendment.") (citing *Inouye v. Kemna*, 504 F.3d 705, 712–13 (9th Cir. 2007)); *see also* SKINNER, *supra* note 30, at 10–12; IT TAKES A VILLAGE, *supra* note 47, at 4 (citing requirements to participate in religious activities as one reason some individuals avoid shelters).

58. *Kohr v. City of Houston*, No. 4:17-CV-1473, 2017 WL 3605238, at *2 (S.D. Tex. Aug. 22, 2017) ("The evidence is conclusive that they are involuntarily in public, harmlessly attempting to shelter themselves—an act they cannot realistically forgo, and that is integral to their status as unsheltered homeless individuals. Enforcement of the City's ban against the plaintiffs may, therefore, cause them irreparable harm by violating their Eighth Amendment right to be free from cruel and unusual punishment due to their status of 'homelessness.'"), *order dissolved*, No. 4:17-CV-1473, 2017 WL 6619336 (S.D. Tex. Dec. 28, 2017), *appeal dismissed*, No. 18-20129, 2018 WL 4172710 (5th Cir. Aug. 7, 2018)). Advocates and scholars have also critiqued laws that criminalize "aggressive" begging

Courts have also begun to recognize the rights of unhoused people to be free from unreasonable *seizures* under the Fourth Amendment. For example, in *Lavan v. City of Los Angeles*, the Ninth Circuit affirmed that the city violated the Fourth Amendment rights of unhoused plaintiffs when it seized and immediately destroyed their personal property. The personal property included “personal identification documents, birth certificates, medications, family memorabilia, toiletries, cell phones, sleeping bags and blankets”⁵⁹ that the individuals “temporarily left on public sidewalks while [they] attended to necessary tasks such as eating, showering, and using restrooms,”⁶⁰ which the city employees knew to be unabandoned.⁶¹ Yet, other courts have held that proper notice and other procedural safeguards might avoid a constitutional violation when government officials seize the belongings of unhoused people residing in public.⁶²

III. COURTS MUST RECOGNIZE CONSTITUTIONAL PROTECTIONS AGAINST SEARCHES AND SEIZURES FOR PEOPLE EXPERIENCING HOMELESSNESS

Traditional approaches to Fourth Amendment protections based on property rights and reasonable expectations of privacy fail to adequately address the realities of the lives of poor people and, in fact, reinforce systemic inequality. Although modern Fourth Amendment jurisprudence focuses on the reasonable expectations of privacy test announced in *Katz*

as based on unfounded fears of visibly poor people and unlikely to pass constitutional muster. *See* BEGGING FOR CHANGE, *supra* note 21; Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4 (2016); Drew Sena, Note, *A Constitutional Critique on the Criminalization of Panhandling in Washington State*, 41 SEATTLE U. L. REV. 287 (2017).

59. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1025 (9th Cir. 2012).

60. *Id.* at 1024.

61. *Id.* at 1025.

62. *Hooper v. City of Seattle*, No. C17-0077RSM, 2017 WL 591112, at *7 (W.D. Wash. Feb. 14, 2017) (denying the plaintiffs’ motion for a Temporary Restraining Order and for class certification). *But see* Casey Jaywork, *Homeless Go to Court Over Destruction of Property During Sweeps*, SEATTLE WEEKLY (Sept. 8, 2017), <http://www.seattleweekly.com/news/homeless-go-to-court-over-destruction-of-property-during-sweeps/> [<https://perma.cc/G4UQ-L8RK>] (Plaintiff’s attorney Todd Williams argued that despite assurances to the contrary, city evictions are “inconsistent and unpredictable.” Referring to the city rules that ostensibly govern encampment evictions, Williams said, “The city is using their vagueness to drive a truck through the loopholes.”) *See also* Associated Press, *Sweeps of Homeless Camps in Washington State Violated Rights, Judge Rules*, N.Y. TIMES (Sept. 17, 2016), <https://www.nytimes.com/2016/09/18/us/sweeps-of-homeless-camps-in-washington-state-violated-rights-judge-rules.html> [<https://perma.cc/UA8G-Q7ZD>] (“Some campers had left to eat meals at a local shelter, then returned to find the work crews seizing their property and refusing to give it back. One homeless person, Terry Ellis, left a backpack at a bus stop while he offered to help a woman whose car had broken down. Even though he was within sight when the work crew arrived, the crew took it, ignoring his explanation for why he had left it there, Mr. Ellis said in court filings. Inside the backpack, he said, were new clothes he had been given so he could apply for a job.”).

v. United States,⁶³ courts have held that “[a]t 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 governmental intrusion.’”⁶⁴ However, individuals’ abilities to reap the benefit of the “sanctity of the home”⁶⁵ is relative to their abilities to engage in private activities inside the home rather than outside of it.⁶⁶ This Part reveals the flaws inherent to established theories of Fourth Amendment protections against unreasonable searches, whether grounded in theories of property rights or in reasonable expectations of privacy when applied to dwellings used by people experiencing poverty. Further, this Part acknowledges the superior “private affairs” analysis in *Pippin* that more sensibly, realistically, and humanely considers privacy interests held by unhoused people.

A. Property Rights

Because the notion of privacy embraced in *Katz* centralizes one’s ability to sequester certain kinds of activities or information away from the eyes of outsiders (as in the traditional home), it is unsurprising that people with significant resources are best positioned to exercise the Fourth Amendment’s guarantee. Professor William Stuntz urges that

[i]t would be foolish, perhaps reprehensible, for a society with patterns of criminal punishment [that disproportionately affect poor people and people of color] *not* to worry a great deal about the distributive effects of the rules and practices of its criminal justice system. . . . [W]e should worry about Fourth Amendment law, and in particular the way that law defines and protects privacy. Fourth Amendment law makes wealthier suspects better off than they otherwise would be, and may make poorer suspects worse off. And Fourth Amendment law heightens the tendency of the police to target the kinds of drug markets that prevail in poor black neighborhoods.⁶⁷

Fourth Amendment law reinforces this stratification not only because “[r]ich people have more access to those spaces than poor people,” but also because the relative costs of policing tactics make this distribution rational:

63. *Katz v. United States*, 389 U.S. 347, 361 (1967) (“My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”).

64. *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

65. *Id.* at 28.

66. See Sklansky, *supra* note 22.

67. William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266 (1999).

When the Fourth Amendment limits the use of a police tactic like house searches, it does two things: it raises the cost of using that tactic, and it lowers the relative cost of using other tactics that might be substitutes. Different kinds of crimes require different kinds of police tactics to ferret them out. Raising the cost of some tactics and lowering the cost of others thus means raising the cost of investigating some kinds of crimes and lowering the cost of investigating others. Different crimes are committed by different classes of criminals. As it happens, the kinds of crimes wealthier people tend to commit require greater invasions of privacy by the police to catch perpetrators. By raising the cost of the tactics that most intrude on privacy, Fourth Amendment law lowers the cost of other tactics, and those are the tactics that are most useful in uncovering the crimes of the poor.⁶⁸

As a result of this rational cost-benefit analysis, police searches that intrude on poor people are easily justified by the Fourth Amendment.

For instance, the Supreme Court of the United States has found Fourth Amendment violations in scenarios where police use sense-enhancing tools to gather information about activities within the home without actually crossing the threshold of a house, whereas inexpensive, low-tech investigation of a homeless encampment might not run afoul of the Fourth Amendment by the same reasoning, despite revealing just as intimate information.⁶⁹ In *Florida v. Jardines*, the Court held that police committed an impermissible invasion by bringing a drug-sniffing dog onto the front porch of a house.⁷⁰ Relying on common law notions of an implicit license for a “visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave,” the Court held that canine forensic investigation fell far outside that common decency that “is generally managed without incident by the Nation’s Girl Scouts and trick-or-treaters.”⁷¹ There, the physical intrusion onto private property was sufficient to establish an unreasonable warrantless search, and it was Mr. Jardines’ ownership of his home and porch that protected him from the search. Similarly, in *Kyllo v. United States*, police engaged in an unreasonable search when they used thermal-imaging technology to detect marijuana grow-lamps inside an apartment building from a vantage point across the street.⁷² Although the police never

68. *Id.* at 1266–67 (emphasis in original).

69. Notably, the late Justice Antonin Scalia authored the majority opinions in both *Kyllo* and *Jardines*. Those interested in the development of Fourth Amendment jurisprudence should consider how the Court’s changing composition affects the viability of arguments for a more expansive reading of that Amendment’s protections following his death in 2016.

70. *Florida v. Jardines*, 569 U.S. 1, 11–12 (2013).

71. *Id.* at 8.

72. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

even approached the home themselves, they nevertheless conducted a warrantless search because they gathered “information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area.’”⁷³

In both cases, the Court relied on concepts of privacy associated with the traditional home that permit a person to shield their private activities from the eyes of the outside world. But a person who has no shelter except for a tent erected on public property has no grounds to object to a person lingering too long on the equivalent of their front porch, and police can detect heat or smell through the canvas walls of a tent without the aid of sense-enhancing technology. Because police need not resort to high-tech sense-enhancing tools to learn similar information about the activities occurring indoors when a tent is a home, officers have an incentive to pursue inexpensive investigative tactics against poor people who do not enjoy the property rights their wealthier counterparts rely on to prevent such searches.

B. Reasonable Expectations of Privacy

Similarly, the reasonable expectations of privacy test announced in *Katz* is frequently rendered meaningless when applied to people experiencing homelessness.⁷⁴ Several courts have ruled that people living in tents have no reasonable expectations of privacy because the individual had no legal right to camp at a particular location or because the common law curtilage framework does not support a legitimate privacy interest when camping.⁷⁵ These cases demonstrate the fatal flaw in traditional Fourth Amendment jurisprudence in failing to deliver justice to economically disadvantaged people. The court in *Pippin*, on the other hand, rightfully focused its “private affairs” inquiry on the privacy interest itself (rather than on whether one can reasonably expect it to be respected) in arriving at a sensible and humane holding.⁷⁶

73. *Id.* at 34.

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

75. *See infra* discussion accompanying notes 77–115.

76. *State v. Pippin*, 403 P.3d 907, 912 (Wash. Ct. App. 2017) (“Unlike the Fourth Amendment, where a search occurs if the government intrudes upon a subjective and reasonable expectation of privacy . . . the inquiry under article I, section 7 focuses on protecting ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.’ Instead of examining whether an individual’s expectation of privacy is reasonable, ‘the focus is whether the “private affairs” of an individual have been unreasonably violated.’”) (internal citations omitted).

C. Unlawful Presence

In most cases upholding warrantless searches or seizures for individuals living in tents, courts have relied on the fact of unlawful presence on public land as a bar to reasonable expectations of privacy. Courts reason that “a trespasser who places his property where it has no right to be has no right of privacy as to that property” because the trespasser himself has no right to remain there.⁷⁷ As a trespasser is “subject to immediate ejection,”⁷⁸ the individual cannot “impute to himself the wrong done to the owner or occupant of the premises by the illegal search.”⁷⁹

For example, in *State v. Cleator*, an appellate court found that Mr. Cleator had no reasonable expectation of privacy inside a tent erected on public land without permission “because he had no right to remain on the property and could have been ejected at any time.”⁸⁰ Police recovered several stolen items from Mr. Cleator’s tent, which the State used as evidence against Mr. Cleator in a residential burglary trial.⁸¹ Mr. Cleator appealed his conviction, in part, on the basis that the trial court improperly admitted the items as evidence because the officers seized the items without a warrant.⁸² The appellate court acknowledged that Mr. Cleator *did* have a legitimate expectation of privacy limited to his personal belongings but not for the tent or for the stolen items.⁸³ The difference, the court reasoned, was that neither the stolen items nor the tent belonged to Mr. Cleator, and the tent was “a temporary, unsecured shelter . . . wrongfully erected on public property which was not a campsite.”⁸⁴ The court also noted that “[n]o case has been cited nor has our research disclosed any authority indicating that our citizens have ever held unlimited privacy rights to property they wrongfully occupied.”⁸⁵

The Tenth Circuit applied a similar rationale in *U.S. v. Ruckman*, finding no reasonable expectation of privacy in a cave on public land

77. *Amezquita v. Hernandez-Colon*, 518 F.2d 8, 11 (1st Cir. 1975) (quoting *State v. Pokini*, 367 P.2d 499, 509 (Haw. 1961)).

78. Wesley C. Jackson, *Life on Streets and Trails: Fourth Amendment Rights for the Homeless and the Homeward Bound*, 66 VAND. L. REV. 933, 952 (2013).

79. *Pokini*, 367 P.2d at 510.

80. *State v. Cleator*, 857 P.2d 306, 309 (Wash. Ct. App. 1993).

81. *Id.* at 307–08.

82. *Id.* at 308. In order to deter unlawful police conduct, courts apply the “exclusionary rule” that “all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in . . . court.” *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Thus, defendants often appeal convictions based on unlawful searches and seizures to prevent evidence obtained during the search or seizure from being used to support the charge.

83. *Cleator*, 857 P.2d at 309.

84. *Id.*

85. *Id.*

despite indicia of a “home.”⁸⁶ Although Mr. Ruckman had lived in the cave continuously for approximately eight months prior to the search and had attempted to enclose the opening of the cave,⁸⁷ the court rejected the argument that the cave had become Mr. Ruckman’s home, holding that he was subject to immediate ejection and that “the cave could hardly be considered a permanent residence.”⁸⁸ While Mr. Ruckman may have subjectively considered the cave his home, the court held that such an expectation of privacy is not one society is prepared to accept as reasonable because a person “may not use public lands primarily for residential purposes.”⁸⁹ The court found the cave on public land analogous to “open fields,” noting that such places do not warrant the same privacy protections because they “usually are accessible to the public and the police in ways that a home, an office or commercial structure would not be.”⁹⁰ The court also noted that Mr. Ruckman could possibly obtain a privacy protection by the property-based adverse possession theory. However, even under that theory, because he was subject to expulsion, he had no such right.⁹¹

On the other hand, resolving questions of privacy based on a technical status of trespass “can lead to absurd results.”⁹² For example, consider the following hypothetical: two individuals, each with a valid camping permit, set up tents on plots next to each other in a national park. Camper A has a permit for a one-night stay, and Camper B has a permit for a two-night stay. Each camper has a fully enclosed tent and stores some personal belongings in their tents. Under *Ruckman*, if Camper A overstays his permit by one minute, he could be instantaneously stripped of his privacy rights although his campsite is indistinguishable from Camper B’s, apart from the date on the permit.⁹³ Some courts have explicitly rejected this sort of line drawing. In fact, the *Sandoval* court recognized this arbitrary effect by holding that camping unlawfully does not *per se* remove all privacy protections inside a tent.⁹⁴ *Sandoval* demonstrates that some courts acknowledge that a mechanical application of unlawful presence

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

87. *Id.*

88. *Id.* at 1473.

89. *Id.* (quoting *United States v. Allen*, 578 F.2d 236, 237–38 (9th Cir. 1978)).

90. *Id.*; *Oliver v. United States*, 466 U.S. 170, 179 (1984).

91. *Ruckman*, 806 F.2d at 1472.

92. *Id.* at 1476 (McKay, J., dissenting).

93. *See United States v. Sandoval*, 200 F.3d 659, 661 (9th Cir. 2000) (“[W]e do not believe the reasonableness of [a person’s] expectation of privacy turns on whether he had permission to camp on public land.”).

94. *Id.* at 661 (noting that whether Mr. Sandoval was legally permitted to be on the land was a fact not settled by the lower court).

may produce unjust results, and a thorough, fact-specific analysis may be more appropriate when determining reasonable expectations of privacy.

D. Curtilage

Because a significant number of unhoused people are considered “unsheltered” (living on the street, in abandoned buildings, in vehicles, or in tents—as opposed to emergency shelters or transitional housing),⁹⁵ curtilage analysis for people living outdoors often fails in ways not typical of more traditional residences. Courts have defined curtilage as “the land immediately surrounding and associated with the home” sufficiently connected to the “intimate activity” of the home to warrant the same Fourth Amendment protections as within the home itself.⁹⁶ In contrast, courts have defined “open fields” as publicly accessible lands. In assessing whether a particular area should be considered “curtilage,” courts engage in a fact-specific analysis of four significant factors:

the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.⁹⁷

In the same vein as their application of unlawful presence, courts have declined to find curtilage protections for areas surrounding an unlawful campsite based on diminished expectations of privacy within an unpermitted enclosure (as opposed to lawful residences). For example, in *State v. Pentecost*, the court distinguished the area surrounding a trespasser’s campsite from the curtilage of a residence on the basis of unlawful presence, concluding that curtilage of a residence is granted a higher expectation of privacy because a tenant or homeowner has a power to exclude.⁹⁸ While Mr. Pentecost may have had a limited expectation of privacy inside his tent, he enjoyed no such protection regarding the items outside his tent by virtue of his status as a trespasser.⁹⁹

95. ALL HOME, SEATTLE/KING COUNTY POINT-IN-TIME COUNT OF PERSONS EXPERIENCING HOMELESSNESS 8 (2017), <http://allhomekc.org/wp-content/uploads/2016/11/2017-King-PIT-Count-Comprehensive-Report-FINAL-DRAFT-5.31.17.pdf> [<https://perma.cc/CEW4-UZP9>] (“On the night of the 2017 Point-in-Time Count in Seattle/King County, there were 11,643 people experiencing homelessness. . . . Forty-seven percent (47%) of the population was unsheltered, living on the street, in parks, encampments, vehicles, or other places not meant for human habitation.”).

96. *Oliver v. United States*, 466 U.S. 170, 180 (1984).

97. *United States v. Dunn*, 480 U.S. 294, 301 (1987).

98. *State v. Pentecost*, 825 P.2d 365, 367 (Wash. Ct. App. 1992).

99. *Id.* at 366–67 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)) (Mr. Pentecost’s argument failed the second prong of the *Katz* test because society does not generally recognize a trespasser’s expectation of privacy as justified.).

Similarly, in *People v. Nishi*, a California court found no expectation of privacy over items underneath a tarp outside Mr. Nishi's tent, which he occupied without a proper permit.¹⁰⁰ The *Nishi* court considered many factors when determining that Mr. Nishi did not have an expectation of privacy, but it stated that “[t]he most significant, and ultimately controlling, factor in the case before us is that defendant was not lawfully or legitimately on the premises where the search was conducted.”¹⁰¹ Again, the court acknowledged that a tent on a public campground is analogous to a “house, apartment, or hotel room” in terms of the activities and purposes for which the inside space is used, like sleeping and storing valuables, whereas “the remainder of [Mr. Nishi’s] unauthorized, undeveloped campsite was a dispersed, ill-defined site, exposed and open to public view”—unlike the curtilage spaces associated with traditional homes.¹⁰² Mr. Nishi had no lawful presence or possessory interest in the premises, and he had little to no “subjective expectation that it would remain free from governmental invasion” because officers had repeatedly evicted him from camping in the area in the recent past.¹⁰³ Moreover, Mr. Nishi “had no authorization to camp within or otherwise occupy the public land,” so he was not “legitimately on the premises” nor had he any right to exclude others.¹⁰⁴ Because the evidence seized was located outside the tent, the court did not reach the specific issue of whether Mr. Nishi was entitled to any reasonable expectation of privacy inside the tent but suggested that, as in *Ruckman*, Mr. Nishi’s status as a trespasser would negate any expectation of privacy.¹⁰⁵

So, what are we to make of the courts’ concessions that unhoused people do enjoy *some* degree of privacy, limited to their own personal belongings inside enclosed spaces? It appears that the fact of unlawful presence merely lessens the potency of the privacy protections typically afforded to one’s home but does not eliminate all protection. In fact, courts have acknowledged some privacy protections for particular spaces, focusing their analyses on whether the defendants could assert a legitimate

100. *People v. Nishi*, 143 Cal. Rptr. 3d 882, 890 (Cal. Ct. App. 2012) (failing to address whether the defendant’s homeless status afforded any weight to his expectation of privacy). While the land Mr. Nishi occupied was in fact available for camping with a permit, Mr. Nishi did not have the necessary permit and had apparently been cited for “illegal camping” and evicted from other areas of the preserve on multiple prior occasions. *Id.* at 889. The court found the fact of his knowing violation of the permit requirement significant in its conclusion that he was afforded no privacy right regarding the area outside his tent. *Id.* at 890 (relying on *People v. Thomas*, 45 Cal. Rptr. 2d 610, 611–13 (Cal. Ct. App. 1995)).

101. *Id.* at 889.

102. *Id.* at 890.

103. *Id.* at 889–90.

104. *Id.*

105. *Id.* at 890.

privacy claim to a less-enclosed space.¹⁰⁶ In the tent curtilage cases, courts seem to conclude there is no expectation of privacy based on the combination of (1) the tent's unlawful presence and (2) the lack of efforts taken by the resident to protect the area from observation, which is a factor in determining whether a space is considered curtilage to a home.¹⁰⁷

These distinctions lack merit when applied to the context of unhoused people publicly camping in urban areas for two reasons. First, several jurisdictions have recognized that lawfulness tests fall short of any notions of fairness when people are forced to live outside due to necessity.¹⁰⁸ Also, local laws and ordinances that prohibit basic activities necessary to survival¹⁰⁹ may fail to pass constitutional muster because they disproportionately burden homeless people based on status.¹¹⁰

Second, curtilage analysis utterly fails when applied to the context of urban camping. The court in *United States v. Basher* applied the four factors¹¹¹ relevant to determining whether an area is a curtilage and afforded Mr. Basher the same level of protection against warrantless searches and seizures.¹¹² There, the court found that Mr. Basher had no reasonable expectation of privacy in the campsite, including the area outside the tent, because the area was “a dispersed, or undeveloped camping area . . . visible from the developed camping area where the officers had stayed the previous night.”¹¹³

Taken in turn, the four curtilage factors upset the traditional analysis when applied to the context of urban camping. The first factor of proximity

106. *Id.* at 890 (items covered by a tarp outside the tent); *State v. Cleator*, 857 P.2d 306, 309 (Wash. Ct. App. 1993) (personal belongings versus stolen items inside a tent); *State v. Pentecost*, 825 P.2d 365, 367 (Wash. Ct. App. 1992) (items inside a tent versus unenclosed items outside the tent). Other than personal belongings as compared to stolen items, the courts do not draw these distinctions based on relative lawfulness; rather, the courts appear to apply the curtilage analysis independent from the lawfulness analysis.

107. *United States v. Basher*, 629 F.3d 1161, 1169 (9th Cir. 2011) (citing *United States v. Dunn*, 480 U.S. 294, 301 (1987)).

108. *See, e.g., Jones v. City of Los Angeles*, 444 F.3d 1118, 1132 (9th Cir. 2006) (“The City could not expressly criminalize the status of homelessness by making it a crime to be homeless without violating the Eighth Amendment, nor can it criminalize acts that are an integral aspect of that status.”), *vacated due to settlement*, 505 F.3d 1006 (9th Cir. 2007); *see also Kohr v. City of Houston*, No. 4:17-CV-1473, 2017 WL 3605238 (S.D. Tex. Aug. 22, 2017).

109. Examples of activities that are necessary for survival include, but are not limited to, sitting, sleeping, and urinating. *See Jones*, 444 F.3d at 1132.

110. *See id.*

111. *Basher*, 629 F.3d at 1169 (citing *Dunn*, 480 U.S. at 301) (“[1] proximity of the area [claimed to be curtilage] to the home, [2] the nature of the uses to which the area is put, [3] whether the area is included in an enclosure around the home, and [4] the steps taken by the resident to protect the area from observation”).

112. *Id.*

113. *Id.* (noting that “[w]hile [the curtilage] factors can be employed with reasonable certainty in the urban residential environment, the analysis does not necessarily carry over to most camping contexts”).

typically supports a finding of curtilage for spaces closer to the home (with decreasing likelihood of such a finding the further this space is from the actual home). However, urban spaces are, by definition, closer in proximity to each other than more suburban or rural dwellings. In theory, it should be easier to make a finding of curtilage in the area surrounding a tent in a city because the surrounding space is likely to be rather limited and nearby.

The second factor—the nature of the use—is likely outside of the control of a homeless person because urban campers often live on land owned by a city or a religious entity.¹¹⁴ The resident of the tent likely has very little, if any, control over the use to which the area is put. If urban campers have no control over the area around the “home,” they also likely have no agency over the third factor—installing additional enclosures surrounding the purported curtilage area—nor are they likely to be able to afford materials for additional enclosures.¹¹⁵ Similarly, the fourth factor—protecting the area from observation—will also be unsatisfied because it is likely that urban campers lack the authority or resources necessary to do so.

IV. COURTS SHOULD RECOGNIZE MAKESHIFT DWELLINGS OF UNHOUSED PEOPLE AS “PRIVATE AFFAIRS” WORTHY OF CONSTITUTIONAL PROTECTIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES

The Washington State Constitution provides broader protections against warrantless searches and seizures than the United States Constitution, particularly in the context of the home.¹¹⁶ In defining the scope of “private affairs” under Article 1, Section 7 of the Washington State Constitution, Washington courts consider three factors: “(1) the historical protections afforded to the privacy interest, (2) the nature of

114. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, TENT CITY USA: THE GROWTH OF AMERICA’S HOMELESS ENCAMPMENTS AND HOW COMMUNITIES ARE RESPONDING 12 (2017), https://www.nlchp.org/Tent_City_USA_2017 [<https://perma.cc/5QSS-3XX6>].

115. One exception to this general observation would be an authorized homeless encampment, which often includes a surrounding fence. *See IT TAKES A VILLAGE*, *supra* note 47. Given that such encampments are typically home to dozens of individuals who claim their own tents or tiny homes, the surrounding fence encloses the entire community, rather than one individual’s living space, and may be more aptly compared to a gated residential community where the gate provides some degree of protection and privacy against outside visitors, but such protection is not specific to individual dwellings.

116. *State v. Groom*, 947 P.2d 240, 244 (Wash. 1997) (“Article I, section 7 is more protective of the home than is the Fourth Amendment, and the cases reflect the heightened constitutional protection afforded the home under the state constitution.”); *see* Justice Charles W. Johnson & Justice Debra L. Stephens, *Survey of Washington Search and Seizure Law: 2013 Update*, 36 Seattle U. L. Rev. 1581, 1588 (2013) (update forthcoming 2019).

information potentially revealed from the intrusion, and (3) the implications of recognizing or not recognizing the asserted privacy interest.”¹¹⁷ The *Pippin* court engaged in this judicious and realistic analysis to conclude that both Mr. Pippin’s possessions and makeshift tent were constitutionally protected from unreasonable searches.¹¹⁸

Under the first factor, the court noted that while there may not have been any historical protections specifically afforded to unhoused people in makeshift shelters, historical protection of the home as well as relatively recent developments in Washington State Supreme Court jurisprudence and the state legislature “guide[] the trajectory of [its] article I, section 7 analysis.”¹¹⁹ In 1998, the Washington State Supreme Court held that “the closer officers come to intrusion into a dwelling, the greater the constitutional protection”¹²⁰ and that the principle of protecting the home against government invasions has historical roots that predate the founding of this country.¹²¹ More recently, the state legislature passed the Homelessness Housing and Assistance Act, creating a “homeless client management information system” to collect and maintain data about homeless individuals for use by service providers, but the Act requires informed consent from the unhoused individual prior to collecting such information.¹²² The *Pippin* court saw this Act as “convey[ing] a general respect for the privacy of homeless individuals’ personal information.”¹²³

Next, the *Pippin* court turned to the second factor noting that, absent dispositive historical protections, “the most important inquiry is whether the challenged action potentially reveals intimate details of a person’s life.”¹²⁴ Here, the court transcended the limitations of traditional Fourth Amendment inquiry to the broader Article I, Section 7 analysis to include personal information. It noted that Article I, Section 7 protects the “intimate details of a person’s life,” such as “beliefs or associations, whether familial, political, religious, or sexual, as well as . . . intimate or personally embarrassing information.”¹²⁵

117. *State v. Pippin*, 403 P.3d 907, 913 (Wash. Ct. App. 2017).

118. *Id.* at 917.

119. *Id.* at 913–14.

120. *Id.* at 913 (quoting *State v. Ferrier*, 960 P.2d 927, 931 (Wash. 1998)). In fact, Washington State goes even further in protecting against government intrusions into the home: it is a gross misdemeanor “for any police officer or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided.” WASH. REV. CODE § 10.79.040 (2018).

121. *Pippin*, 403 P.3d at 913; see also *supra* text accompanying note 1.

122. WASH. REV. CODE § 43.185C.180.

123. *Pippin*, 403 P.3d at 914.

124. *Id.*

125. *Id.* at 913–14; see also *State v. Jorden*, 156 P.3d 893, 897–98 (Wash. 2007) (holding that information contained in a hotel registry is a private affair under the state constitution because it “reveals intimate details of one’s life”).

The *Pippin* court also expanded the traditional definition of a home to include personal information and items, concluding that a home is “the type of property that secures an individual’s most personal possessions and conduct.”¹²⁶ In conducting its analysis, the court examined the similarities and differences between Mr. Pippin’s tent and a dwelling. Noting that the Supreme Court clearly ruled that “an individual can have a privacy interest in a place other than a traditional home and . . . society must allow some place where individuals are free from unreasonable searches,”¹²⁷ and also noting that other courts had recognized “zones of privacy for homeless individuals by finding that their closed baggage and containers are protected because it would reveal their personal matters,”¹²⁸ the court reasoned that:

the more Pippin’s tent served as a refuge or retreat from the outside world, the more it could be the repository of objects or information showing his familial, political, religious, or sexual associations or beliefs, and the more it could contain objects intimately connected with his person, then the more his tent and the belongings within should be considered part of his private affairs under article I, section 7.¹²⁹

Because Mr. Pippin’s tent afforded him “one of the most fundamental activities which most individuals enjoy in private—sleeping under the comfort of a roof and enclosure” and “a modicum of separation and refuge from the eyes of the world: a shred of space to exercise autonomy over the personal”—the court held that “Pippin’s tent was the sort of closed-off space that typically shelters the intimate and discrete details of personal life protected by article I, section 7.”¹³⁰

Finally, the *Pippin* court turned to the third factor. In analyzing the implications of recognizing a privacy interest here, the court considered “the nature and extent to which police learned about a person’s personal contacts and associations as a result of the government conduct.”¹³¹ Because the most important factor in this inquiry is personal information,

126. *Pippin*, 403 P.3d at 914.

127. *Id.*

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. *A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man’s castle.*

Id. (quoting *Silverman v. United States*, 365 U.S. 505, 512 n.4 (1961)).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 916.

the court focused on whether police conduct would expose intimate information. The court noted that this analysis turns on “the extent to which the subject matter is voluntarily exposed to the public . . . and consideration of the purpose served by the State’s action.”¹³²

Importantly, the court rejected the argument that Mr. Pippin had “voluntarily” exposed his personal details by camping in public.¹³³ Here, the court relied on the findings of the Homelessness Housing and Assistance Act, listing myriad causes of homelessness.¹³⁴ The court concluded that

[a]gainst this backdrop, to call homelessness voluntary, and thus unworthy of basic privacy protections is to walk blind among the realities around us. Worse, such an argument would strip those on the street of the protections given the rest of us directly because of their poverty. Our constitution means something better.¹³⁵

The court further noted that even though the police had a legitimate purpose in enforcing public camping regulations, it was “only a feather in the balance against ensuring the privacy of the intimate and personal details that lie at the heart of article I, section 7.”¹³⁶

The court’s assessment of whether Mr. Pippin’s tent should be protected against unreasonable searches and seizures was not based on “whether an individual’s expectation of privacy is reasonable,” but rather focused on “whether the ‘private affairs’ of an individual have been unreasonably violated.”¹³⁷ This shift away from an “objective” reasonableness standard to focus instead on privacy and personal information more adequately responds to the lives of people experiencing homelessness:

The law is meant to apply to the real world, and the realities of homelessness dictate that dwelling places are often transient and precarious. The temporary nature of Pippin’s tent does not undermine any privacy interest. Nor does the flimsy and vulnerable nature of an improvised structure leave it less worthy of privacy protections. For the homeless, those may often be the only refuge for the private in the world as it is.¹³⁸

132. *Id.* (citing *State v. McKinney*, 60 P.3d 46, 50–51 (Wash. 2002)).

133. *Id.*

134. WASH. REV. CODE § 43.185C.005 (2018); *Pippin*, 403 P.3d at 916.

135. *Pippin*, 403 P.3d at 917.

136. *Id.*

137. *Id.* at 912.

138. *Id.* at 915 (internal citations omitted).

CONCLUSION

People experiencing homelessness are overly criminalized and consistently deprived of the privacy protections that housed people enjoy. All jurisdictions should embrace the court's position in *Pippin*, finding constitutional protections for unhoused people living in tents, either by bolstering individual rights under state constitutions¹³⁹ or by remodeling objective reasonable tests under federal constitutional law to better reflect our evolving society's understandings of privacy.¹⁴⁰ Unhoused people are owed at least a modicum of respect in the form of legal rights to privacy in the spaces that function as their homes. Traditional Fourth Amendment jurisprudence fails to adequately protect unhoused people against government invasions, and constitutional protection should not turn on a person's wealth and privilege. The Washington State Constitution leaves room for a more judicious and equitable analysis of privacy in one's "private affairs" that can contemplate the reality of homelessness while preserving the animating values of limiting unreasonable government intrusions.¹⁴¹ The Washington State Court of Appeals, Division II employed a reasonable and humane analysis of Mr. Pippin's makeshift dwelling before arriving at the conclusion that it was a protected space, and all jurisdictions should follow suit.

139. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 499–500 (1977) (collecting cases where state courts have rejected Fourth Amendment jurisprudence in favor of more protective state constitutional provisions).

140. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (holding that a person has a reasonable expectation of privacy in cell-site location information and police must obtain a warrant prior to collecting location information from third-party wireless carriers).

141. WASH. CONST. art. I, § 7.