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CARDBOARD CASTLES: THE FOURTH AMENDMENT'S PROTECTION OF THE HOMELESS'S MAKESHIFT SHELTERS IN PUBLIC AREAS

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I. INTRODUCTION

Conservative estimates of the homeless¹ population in the United States range from 300,000 to 600,000.² Many homeless persons construct makeshift structures from various materials, including cardboard boxes, and resort

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1. The Stewart B. McKinney Homeless Assistance Act defines a "homeless individual" to include:

- (1) an individual who lacks a fixed, regular, and adequate nighttime residence; and
- (2) an individual who has a primary nighttime residence that is—
 - (A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);
 - (B) an institution that provides a temporary residence for individuals intended to be institutionalized; or
 - (C) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

42 U.S.C. § 11302(a) (1995).

2. See CHRISTOPHER JENCKS, *THE HOMELESS v* (1994); MARTHA BURT & BARBARA COHEN, *AMERICA'S HOMELESS: NUMBERS, CHARACTERISTICS, AND PROGRAMS THAT SERVE THEM* 6 (1989). The National Coalition for the Homeless web site argues that the correct question is "How many people experience homelessness?" (visited Oct. 5, 1997) <<http://nch.ari.net/numbers.html>>.

to residing on public property.³ The homeless residing on public property, where there is less interference from private landowners, may stay for extended periods and consider their campsite a home. In addition, officials and society often acquiesce to the homeless's residing in public areas.⁴ More problematic is that police often search—without warrants—the makeshift shelters of the homeless, but the law regards a man's home as his "castle."⁵ Thus, may a homeless person challenge, under the Fourth Amendment,⁶ the police's search of his "home" or makeshift shelter⁷ located in a public area.

3. See Bob Pool, *A Farewell Walk: Officer Pounds Downtown Beat for Last Time Amid Tears, Hugs*, L.A. TIMES, Feb. 19, 1993, at A1 (reporting on homeless camp); Paul Feldman, *For Some, Home Is Where the Tent Is*, L.A. TIMES, Feb. 3, 1990, at B3 (reporting that "cardboard condominiums" fill Los Angeles City streets); Scott Harris & Penelope McMillan, *Council Votes Skid Row Hotel Rent Freeze*, L.A. TIMES, June 17, 1987, at A1 (reporting on cardboard box shanty towns on the sidewalks).

4. See Mary Curtius, *S.F. Seeks Parking for Homeless' "Homes,"* L.A. TIMES, Sept. 29, 1997, at A1; *Shelter Study Finds a Third of Homeless Men Are Veterans*, L.A. TIMES, Nov. 9, 1997, at A28; Norma Zamichow & Jodi Wilgoren, *Homeless Residents Leave Drug Camp Across From City Hall*, L.A. TIMES, Apr. 16, 1996, at A1 (reporting that county officials acknowledge that homeless persons reside on public property); Norma Zamichow, *Homeless Live, Shoot Drugs Across From L.A. City Hall*, L.A. TIMES, Apr. 15, 1996, at A1 (same); Flynn McRoberts, *City Again Sweeps Homeless Enclave*, CHI. TRIB., Feb. 2, 1995, at 3 (quoting City of Chicago official as not denying the homeless the right to live on public property); *A Home Under the Highway*, WASH. POST, Mar. 21, 1991, at A20 (arguing that the homeless deserve full Fourth Amendment protection); Jennifer Toth, *N.Y.'s 'Mole People' Shun Society in Transit Tunnels*, L.A. TIMES, Sept. 2, 1990, at A1 (reporting that New York transit authorities estimate that 5,000 homeless reside in underground tunnels); Kirsten Lee Swartz, *Hard-Luck Life in Hobo Jungle*, L.A. TIMES, July 15, 1990, at A1 (reporting that police leave alone a homeless shanty community located in a dry riverbed); Frederick M. Muir, *Police Try to Confine Skid Row Homeless to Areas by Missions*, L.A. TIMES, Feb. 10, 1989, at A1 (reporting an "unwritten truce" allowing homeless to sleep on Skid Row sidewalks and a policy "encouraging" homeless to sleep on streets near relief agencies); Frank Messina, *Homeless Aliens Drift Amid S. County*, L.A. TIMES, Dec. 30, 1989, at A1 (reporting that INS officials generally do not raid homeless illegal aliens' shelters); Louis Sahagun, *Riverside Police Raid Homeless Camp*, L.A. TIMES, Oct. 10, 1987, at A27 (reporting on homeless camp in existence several months before officials knew of it); George Ramos, *The Pit*, L.A. TIMES, Oct. 20, 1986, at A1 (reporting that a homeless cardboard box community is located "virtually on the doorstep of the Police Department"); but see Richard Marosi, *Ruling Sides With Homeless*, L.A. TIMES, Mar. 1, 1999, at A3 (reporting that Berkeley, Laguna Beach, Santa Ana, Santa Barbara, West Hollywood, and other cities have enacted "anti-camping" ordinances aimed at homeless persons on public property and pushed them from public view).

5. See *Maryland v. Buie*, 494 U.S. 325, 329 (1990); *Bowers v. Hardwick*, 478 U.S. 186, 208 (1986); *Pembauer v. City of Cincinnati*, 475 U.S. 469, 488 (1986) (Stevens J., concurring opinion); *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 66 (1973).

6. The Fourth Amendment expressly protects "persons, houses, papers and effects." U.S. CONST. amend. IV.

7. The makeshift nature, or poor quality, of a home should be irrelevant under Fourth Amendment law.

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

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

In other words, can a court create a castle out of cardboard?

In all but one jurisdiction,⁸ the courts, when hearing cases challenging government searches and seizures brought by homeless persons, do not consider whether the authorities' acquiescence⁹ to the presence of homeless persons in public areas transforms the homeless's expectation of privacy into one that is reasonable. The Fourth Amendment protects those expectations of privacy that are reasonable.¹⁰

This Article argues that the courts should consider whether a homeless defendant's expectation of privacy is reasonable based on government acquiescence. Part II presents the modern approach to Fourth Amendment search and seizure analysis—under *Katz v. United States*¹¹ and its progeny. Part III analyzes the Hawaii Supreme Court decision in *State v. Dias*¹² and that court's establishment of a "government-acquiescence" doctrine. Part IV examines the ruling of the California Court of Appeal in *People v. Thomas*¹³ that held that the Fourth Amendment did not protect a homeless person residing in a cardboard box on public property. Part V argues that courts should adopt the *Dias* government-acquiescence approach. That is, while hearing a homeless defendant's Fourth Amendment claim,¹⁴ courts should inquire whether the government has acquiesced to his presence on public property and transformed his expectation of privacy into one that is objectively reasonable. Part VI asserts that international human rights law may provide homeless litigants a tool for establishing greater privacy and shelter rights. Part VII concludes that the *Thomas* court erred and that the *Dias* approach is superior because the Fourth Amendment protects private human activities, not merely places.¹⁵

II. FOURTH AMENDMENT PROTECTION IN PUBLIC AREAS

A. Before the *Katz* Decision

Before the Supreme Court ruled in *Katz*, its Fourth Amendment analysis

Earl of Chatham, to Parliament in March 1763).

8. The jurisdiction is Hawaii. See *State v. Dias*, 609 P.2d 637 (Haw. 1980).

9. "Conduct from which assent may be reasonably inferred." BLACK'S LAW DICTIONARY 24 (6th ed. 1990).

10. See *infra* Part II.B.

11. 389 U.S. 347 (1967).

12. 609 P.2d 637 (Haw. 1980).

13. 38 Cal. App. 4th 1331 (1995).

14. See CAL. PENAL CODE § 1538.5 (West 1995) (suppression motion).

15. See generally Elizabeth Schultz, Note, *The Fourth Amendment Rights of the Homeless*, 60 FORDHAM L. REV. 1003 (1992); David H. Steinberg, *Constructing Homes for the Homeless? Searching for a Fourth Amendment Standard*, 41 DUKE L.J. 1508 (1992); John Early, Note, *The Legal Plight of the American Bedouin: A Narrowly Interpreted Fourth Amendment Fails to Protect the Privacy of the Homeless*, 39 WAYNE L. REV. 155 (1992); Michael D. Granston, Note, *From Private Places to Private Activities: Toward a New Fourth Amendment House for the Shelterless*, 101 YALE L.J. 1305 (1992).

relied entirely on recognized property interests and limited searches to those *areas* that were “constitutionally protected.”¹⁶ In *Olmstead v. United States*,¹⁷ the Supreme Court held that the police’s warrantless wiretapping of telephone conversations did not constitute a “search” under the Fourth Amendment.¹⁸ The Supreme Court held that the Fourth Amendment does not include speech among the interests it protected.¹⁹ Further, the Court failed to find a search because the police did not enter the defendant’s *home* or trespass on his *property*.²⁰

Later, in *Silverman v. United States*,²¹ the police inserted an electronic microphone into a wall adjoining the defendant’s home to eavesdrop on his conversations.²² The Supreme Court, in an important step away from a purely property-interest analysis of the Fourth Amendment, held the search unconstitutional.²³ Justice Douglas, in his concurring opinion, stated that courts should invalidate invasions of privacy and not limit the Fourth Amendment to trespass law.²⁴

B. *The Katz Reasonable-Expectation-of-Privacy Approach*

The decision in *Katz v. United States*²⁵ represents the present Fourth Amendment search and seizure analytical framework.²⁶ In *Katz*, police attached a listening device to the outside of a public telephone booth to eavesdrop on the defendant’s conversation and sought to use the recording as evidence at trial.²⁷ *Katz* moved to suppress, claiming that the public telephone booth constituted a “constitutionally protected area.”²⁸ The *Katz* court held that the police action constituted a search for Fourth Amendment purposes and declared that trespass law no longer determined the constitutional parameters of searches and seizures.²⁹ The Court, however, declined to frame

16. See *Silverman v. United States*, 365 U.S. 505, 512 (1961). In *Boyd v. United States*, in 1886, in its first leading Fourth Amendment case, the Supreme Court held unconstitutional a statute compelling the production of private papers. 116 U.S. 616 (1886). The Court held that the seizure of private papers violated the defendant’s right of privacy under the Fourth Amendment. *Id.* at 633.

17. 277 U.S. 438 (1928).

18. See *id.* at 466.

19. See *id.* at 465-66.

20. See *id.* This established the “trespass doctrine.” See *id.*

21. 365 U.S. 505 (1961).

22. See *id.* at 511.

23. See *id.* at 510-11.

24. See *id.* at 513 (Douglas, J., concurring).

25. 389 U.S. 347 (1967).

26. Forty-two years before *Katz*, the Supreme Court first stated in *Carroll v. United States* that the “Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.” 267 U.S. 132, 147 (1925).

27. See *Katz*, 389 U.S. at 348.

28. *Id.* at 349.

29. See *id.* at 353-59.

the issue as whether the public telephone booth was a "constitutionally protected area."³⁰ Holding that the "Fourth Amendment protects people, not places," the *Katz* court found that what one "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."³¹

Katz reaffirmed that a person should be free from "unreasonable searches."³² In his concurring opinion, Justice Harlan stated that the touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected expectation of privacy."³³ The *Katz* court sought to avoid a "talismanic solution to every Fourth Amendment problem,"³⁴ and established a flexible test.³⁵

C. After the *Katz* Decision

After the *Katz* decision established a framework for Fourth Amendment analysis, other courts began to interpret and develop general rules of reasonableness. Lower courts have extended Fourth Amendment protection to other public areas, including dressing rooms³⁶ and bathroom stalls.³⁷ Relevant to searches of the makeshift shelters of the homeless, courts have applied the *Katz* Fourth Amendment analysis in cases involving searches of open fields³⁸ and garbage.³⁹ If an "individual places his effects upon premises where he

30. *Id.* at 353.

31. *Id.* at 351-52.

32. *Id.*

33. *Id.* at 360-361 (Harlan, J., concurring). See also *California v. Ciraolo*, 476 U.S. 207, 211 (1986). The Supreme Court stated that the Fourth Amendment does not only protect individuals that have a common-law interest in real or personal property. See *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978). Rather, the Fourth Amendment applies to individuals having an expectation of privacy based on "understandings that are recognized and permitted by society." *Id.*

34. *Katz*, 389 U.S. at 351 n.9 (1967).

35. Courts have subdivided the "reasonable expectation of privacy" test into two prongs: the objective and subjective. See *Ciraolo*, 476 U.S. at 211. As the Supreme Court later stated, "*Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *Id.*

36. See, e.g., *State v. McDaniel*, 337 N.E.2d 173 (Ohio Ct. App. 1975).

37. See, e.g., *Kroehler v. Scott*, 391 F. Supp. 1114 (E.D. Pa. 1975).

38. In *Oliver v. United States*, police entered the defendant's enclosed and gated field that had a "No Trespassing" sign and found marijuana. 466 U.S. 170, 173 (1984). The Supreme Court held that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." *Id.* at 178. The *Oliver* court notably placed some emphasis on the type of activity done in the area searched—cultivation of crops—and distinguished it from the activities associated with the home. See *id.* at 179.

39. In *California v. Greenwood*, the Supreme Court held that when the Greenwoods placed their opaque trash bags on the curb in front of their home they "exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection." 486 U.S. 35, 40 (1988). The location of the trash bags on the curb was "particularly suited for public inspection." *Id.* at 40-41. Further, "the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the pub-

has no legitimate expectation of privacy (for example, in an abandoned shack or as a trespasser upon another's property), then he has no legitimate reasonable expectation that they will remain undisturbed upon these premises."⁴⁰

Lower state courts also have adopted differing approaches to determine the reasonableness of searching accessible areas. In *People v. Galan*,⁴¹ the California Court of Appeal held that the defendants did not have an objectively reasonable expectation of privacy inside their condominium-complex garage. The *Galan* court reasoned that the Fourth Amendment did not apply to the garage area because the garage area was "accessible to the public."⁴² Other state courts have adopted a view similar to that in *Greenwood* and *Galan*. In *State v. Cleator*,⁴³ the court convicted the juvenile defendant of residential burglary. The trial court denied Cleator's motion to suppress the evidence from a warrantless search of the tent he pitched in a wooded area located on public property.⁴⁴ The public property was not a campsite and Cleator lacked permission to pitch his tent at that location.⁴⁵ The Washington Court of Appeals affirmed, holding that Cleator did not have an objectively reasonable expectation of privacy because he could not "reasonably expect that the tent would be undisturbed."⁴⁶

On the issue of the application of the Fourth Amendment to public property, one federal court remarked, "[t]he two most relevant factors [in determining whether a person has an objectively reasonable expectation of privacy] are [1] whether the person occupying the property is a trespasser, and [2] whether the property is left in a manner readily exposed to the public."⁴⁷ The California Supreme Court has held that if an area is open to public use, "the occupant cannot claim he expected privacy from all observations of the officer who stands upon that ground."⁴⁸

lic." *Id.* at 41. The Greenwoods could not have reasonably expected that "animals, children, scavengers, snoops, and other members of the public" would not disturb their trash. *Id.* at 40. Before *Greenwood*, the *Katz* court also observed, "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351.

40. WAYNE R. LAFAVE, 5 SEARCH AND SEIZURE 151 (1987) (quoting Melvin Gutterman, *A Person Aggrieved: Standing to Suppress Illegally Seized Evidence in Transition*, 23 EMORY L.J. 111, 119 (1974)).

41. 163 Cal. App. 3d 786, 793 (1985).

42. *Id.*

43. 857 P.2d 306 (Wash. Ct. App. 1993).

44. *See id.* at 307.

45. *See id.* at 309.

46. *Id.*

47. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1571 (S.D. Fla. 1992) (citations omitted), *rev'd on other grounds*, 40 F.3d 1155 (11th Cir. 1992).

48. *Lorenzana v. Superior Court*, 9 Cal. 3d 626, 638 (1973).

D. The Approaches of Amezcuita and Ruckman

No cases prior to *People v. Thomas*⁴⁹ directly addressed whether a homeless person residing inside a cardboard box located on public property has an objectively reasonable expectation of privacy as to the interior of the box. Several courts, however, declined to find the existence of an objectively reasonable expectation of privacy in analogous situations. Two federal circuit courts of appeals analyzed situations similar to that presented in *People v. Thomas*.⁵⁰

In *Amezquita v. Colon*,⁵¹ squatters residing on public farmland owned by the Commonwealth of Puerto Rico brought a civil rights action based on a Fourth Amendment violation to enjoin the government from ousting them and seizing their property. The squatters had built houses, shacks, and sundry or makeshift structures on the public farmland.⁵² The U.S. District Court granted the squatters' injunction.⁵³ The U.S. Court of Appeals for the First Circuit, however, reversed, holding that the squatters had no valid Fourth Amendment claim because they lacked an objectively reasonable expectation of privacy on public land.⁵⁴ The First Circuit set forth its Fourth Amendment analysis for squatters on public property.

[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.⁵⁵

In *Amezquita*, the First Circuit found that the outcome in the eviction action against the squatters was "further proof that the plaintiffs could not have had any reasonable expectation of privacy."⁵⁶ Since the First Circuit decided *Amezquita*, several courts have followed its holding and, despite *Katz*, focused on the location of the area searched and whether the defendant lawfully occupied the public land.

In *United States v. Ruckman*,⁵⁷ the district court convicted a spelunking defendant for the unlawful possession of thirteen anti-personnel booby

49. 38 Cal. App. 4th 1331 (1995); *see infra* Part IV.

50. *Id.*

51. 518 F.2d 8 (1st Cir. 1975).

52. These facts appear only in the decision of the Puerto Rico District Court. *See Amezcuita v. Colon*, 378 F. Supp. 737, 740 (D.P.R. 1974), *rev'd*, 518 F.2d 8 (1st Cir. 1975).

53. *See Amezcuita*, 518 F.2d at 10.

54. *See id.* at 11.

55. *Id.* at 12 (italics in original).

56. *Id.*

57. 806 F.2d 1471 (10th Cir. 1986).

traps.⁵⁸ The district court denied the defendant's motion to suppress the evidence from a warrantless search of his "home," an isolated cave located on federal government owned land in Utah.⁵⁹ On appeal, the U.S. Court of Appeals for the Tenth Circuit affirmed the defendant's conviction, and, relying on *Amezquita*, held that the Fourth Amendment did not apply to the cave.⁶⁰ The *Ruckman* court found the defendant had no objectively reasonable expectation of privacy because he unlawfully occupied a cave which was located on federal land.⁶¹ The *Ruckman* court, following *Amezquita*, also found that the defendant had no objectively reasonable expectation of privacy because he, like a trespasser, was "subject to immediate ejection."⁶²

Judge McKay's dissent in *Ruckman*,⁶³ however, is most persuasive. First, Judge McKay asserts that the *Ruckman* majority opinion's analysis "implicitly assumes that only homes and houses are accorded Fourth Amendment protection. This is simply untrue."⁶⁴ Second, the *Ruckman* majority's assertion that the defendant's "trespasser" status dispositively negates the objective reasonableness of his expectation of privacy is flawed.⁶⁵ That is to say, "failing to have a legal property right in the invaded place does not, *ipso facto*, mean that no legitimate expectation of privacy can attach to that place."⁶⁶ Judge McKay wrote that the defendant's expectation of privacy was objectively reasonable because he lived continuously and exclusively in the cave for eight months, took normal precautions to maintain his privacy, and kept all his personal belongings therein.⁶⁷ Judge McKay found the defendant's expectation of privacy more "clear-cut" than that of a camper whose permit had expired because the camper would stay for a short period of time and return to his primary residence.⁶⁸ Judge McKay, by refraining from applying an "archaic analysis" in which property interests determine search and seizure protection, would appear to extend Fourth

58. *See id.* at 1471-72.

59. *See id.*

60. *See id.* at 1472-74.

61. *See id.* at 1473.

62. *Id.* at 1472. *See also Amezquita*, 518 F.2d at 11. In *State v. Cleator*, the juvenile defendant was convicted of residential burglary. 857 P.2d 306 (Wash. Ct. App. 1993). The trial court denied Cleator's motion to suppress the evidence from a warrantless search of the tent he pitched in a wooded area located on public property. *See id.* at 307. The Washington Court of Appeals affirmed, holding the search did not violate the Fourth Amendment because "[a]s a wrongful occupant of public land, Cleator had no reasonable expectation of privacy [in his tent] at the campsite because he had no right to remain on the property and could have been ejected at any time." *Id.* at 309. The *Cleator* court, however, noted that defendant's tent did not constitute his "home" because the defendant failed to challenge this finding of the trial court. *See id.* at 309 n.8.

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

64. *Id.* at 1476.

65. *See id.*

66. *Id.* at 1477.

67. *See id.* at 1478.

68. *See id.* at 1478-79.

Amendment protection to persons residing on public property.⁶⁹

E. Other Cases of Homeless on Public Property

Despite the broad language of *Katz* and an evolution away from relying on ancient property interests in defining Fourth Amendment protection, some courts still consider the location of a search in determining whether a defendant has a reasonable expectation of privacy.⁷⁰ There is an important “distinction between searches and seizures that take place on a man’s property . . . and those carried out elsewhere.”⁷¹ Warrantless seizures of weapons and contraband are valid in public places.⁷² “It is one thing to seize without a warrant property resting in an open area . . . and it is quite another thing to effect a warrantless seizure of property . . . situated on private premises”⁷³ Authorities also may arrest a suspected felon without a warrant in a public place.⁷⁴

The U.S. Court of Appeals for the Ninth Circuit reached the opposite result in a case involving a tent on a public campground because the defendant was invited and lawfully present on the public property when the police conducted the warrantless search. In *United States v. Gooch*,⁷⁵ a jury convicted the defendant of being a felon in possession of a firearm. The defendant then moved for a “judgment of acquittal” contending that the warrantless search of his tent pitched at a Washington state campground violated his Fourth Amendment rights.⁷⁶ After a post-trial suppression hearing, the court granted the defendant’s motion for a “judgment of acquittal.”⁷⁷ The government appealed, contending that the search did not violate the Fourth Amendment.⁷⁸ The *Gooch* court, however, affirmed the judgment of acquittal, holding that the search had violated the Fourth Amendment because the defendant had an objectively reasonable expectation of privacy in “a tent pitched on public campground where one is legally permitted to camp.”⁷⁹ The *Gooch* court reasoned that “. . . campers were invited to come to set up a tent” and analo-

69. *See id.* at 1477.

70. In *D’Aguanno v. Gallagher*, plaintiffs—homeless persons occupying a “campsite” on private property without the owner’s permission—brought a civil rights action against the police who had entered and destroyed their shelters. 50 F.3d 877, 878-79 (11th Cir. 1995). The U.S. Court of Appeals for the Eleventh Circuit held that there is no objectively reasonable expectation of privacy where people and their belongings are on property without the permission of the owner. *See id.* at 880.

71. *Payton v. New York*, 445 U.S. 573, 586 n.25 (1980) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971)) (internal quotation marks omitted).

72. *See id.* at 586-87.

73. *Id.* at 587 (quoting *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977)).

74. *See United States v. Watson*, 423 U.S. 411, 416-24 (1976).

75. 6 F.3d 673 (9th Cir. 1993).

76. *See id.* at 676.

77. *See id.*

78. *See id.* at 675.

79. *Id.* at 677.

gized campers at a state campground to paying guests at a private hotel for purposes of Fourth Amendment protection.⁸⁰ Because the government failed to raise the issue at the trial court, the *Gooch* court specifically avoided ruling on whether the defendant unlawfully occupied the campground by using his tent as his primary residence in violation of state law.⁸¹

Another lower federal court decision analyzed the Fourth Amendment and the homeless issue. In *Community for Creative Non-Violence (CCNV) v. Unknown Agents of the United States Marshals Service*,⁸² the court held that the 500 occupants of the CCNV homeless shelter had an objectively reasonable expectation of privacy inside the CCNV homeless shelter. The CCNV court, however, distinguished between seeking refuge in a community shelter and residing on the streets, as only the former was relatively private and akin to a "home" for Fourth Amendment analysis.⁸³ In dicta, however, the CCNV court intimated that courts should extend the Fourth Amendment to protect the "millions of homeless citizens."⁸⁴

To date, however, courts appear hesitant to extend the Fourth Amendment to all persons occupying public areas, as the judiciary asserts that it lacks the authority. Courts claim that the issues of homelessness, or shelterlessness, are "the result of legislative policy decisions."⁸⁵ The intractable problem of homelessness "should be addressed by the Legislature . . . , not the judiciary. Neither the criminal justice system nor the judiciary is equipped to resolve chronic social problems."⁸⁶ "The role of the Court [to legally judge a legislative response to homelessness] is limited structurally by the fact it may exercise only judicial power."⁸⁷

One recent California Court of Appeal decision, however, overturned a

80. *Id.* at 678.

81. *See id.* at 678-79.

82. 791 F. Supp. 1 (D.D.C. 1992).

83. *See id.* at 6.

84. *Id.* (citing *Granston*, *supra* note 15, at 1312, 1320-21).

85. *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1092 n.12 (1995).

86. *Id.*

87. *Joyce v. City and County of San Francisco*, 846 F. Supp. 843, 864 (N.D. Cal. 1994). *See also County of Contra Costa v. Humore*, 45 Cal. App. 4th 1335 (1996) (affirming a permanent injunction barring the use of private property to tent homeless persons due to violation of zoning and public nuisance).

Courts have held that a person may not, without authorization, use public lands primarily for residential purposes. *United States v. Allen*, 578 F.2d 236, 236 (9th Cir. 1978). In *Church v. City of Huntsville*, homeless plaintiffs brought a civil rights action against the city for various constitutional violations. 30 F.3d 1332 (11th Cir. 1994). The Eleventh Circuit stated that the "Constitution does not confer [to homeless persons] the right to trespass on public lands." *Id.* at 1345. *See also Tobe*, 9 Cal. 4th at 1102 (holding that a city ordinance prohibiting any person from camping and/or storing personal possessions on public streets and other public property does not infringe the constitutional right to travel); *Joyce*, 846 F. Supp. at 853-64 (denying a class of homeless persons' request for a preliminary injunction challenging a city program which targeted the homeless's violations of certain ordinances on: (1) Eighth Amendment; (2) equal protection; (3) right to travel; (4) due process; and (5) Fourth Amendment grounds).

homeless man's conviction for "camping" in a public area, ruling that the homeless may have no legal alternative to camping on public property.⁸⁸ The *Eichorn* court held that the homeless are entitled to a necessity defense to public-area, "anti-camping" ordinances when there is no available shelter in which to sleep and economic forces are primarily to blame.⁸⁹

The homeless litigants above are not asking courts for shelter per se, but merely asserting their Fourth Amendment rights. Insofar as the homeless assert constitutional rights, the courts do have the authority to enforce such rights and powers of equity, to administer justice according to fairness.

III. THE *STATE v. DIAS* APPROACH: THE GOVERNMENT-ACQUIESCENCE DOCTRINE

To date, only the Hawaii Supreme Court has asserted that a defendant challenging a warrantless search may have an objectively reasonable expectation of privacy based on government acquiescence to the defendant's presence in the public area searched.⁹⁰ In doing so, the *State v. Dias* court established the "government-acquiescence" doctrine.

A. *Facts of Dias*

In *Dias*, the Hawaii Supreme Court addressed the issue of whether the Fourth Amendment protects squatters on public property.⁹¹ In *Dias*, a police officer, without a warrant, approached a shack built on stilts and attached to the side of an old bus.⁹² The shack was located on Sand Island, which was state-owned public property, in an area known as "Squatters' Row."⁹³ Through a three-inch gap between two doors, the officer saw evidence of illegal gambling.⁹⁴ The officer entered and arrested the defendants.⁹⁵ The trial court granted defendants' motion to suppress the officer's testimony in its entirety, and the state appealed.⁹⁶

88. See *In re Eichorn*, 69 Cal. App. 4th 382, 391 (1998); see also Marosi, *supra* note 4.

89. See *Eichorn*, 69 Cal. App. 4th at 390. The *Eichorn* court found that "sleep is a physiological need, not an option for humans." *Id.* at 389. *Eichorn*'s trial was delayed several years pending the California Supreme Court's ruling whether the Santa Ana city ordinance at issue was facially valid under the U.S. Constitution. See also *Tobe*, 9 Cal. 4th at 1102; *supra* note 87.

90. See *State v. Dias*, 609 P.2d 637 (Haw. 1980).

91. See *id.*

92. See *id.*

93. See *id.*

94. See *id.* at 639.

95. See *id.*

96. See *id.*

B. Government-Acquiescence Doctrine

The Hawaii Supreme Court affirmed the suppression order in part and reversed in part. The court held that the Fourth Amendment applied to the interior of the shack because "Squatters' Row" had "been allowed to exist by sufferance of the State for a considerable period of time."⁹⁷ This "long acquiescence by the government has given rise to a reasonable expectation of privacy on the part of the defendants, at least with respect to the interior of the building itself."⁹⁸ The *Dias* court, however, reversed the suppression order because the Fourth Amendment did not protect that which the defendants had done in plain view, or knowingly exposed to anyone who happened to stand outside the shack by failing to cover the gap between the doors.⁹⁹

Thus, the *Dias* court found that government acquiescence can create an objectively reasonable expectation of privacy. Under this rule, a defendant may suppress evidence from a warrantless search of public property. The *Dias* court, however, did not indicate how long a period of time the government must acquiesce or what acts or omissions would amount to government acquiescence under the Fourth Amendment.

C. Applicability in the Ninth Circuit Under Zimmerman

It appears that the U.S. Court of Appeals for the Ninth Circuit adopted the holding of *Dias*. In *Zimmerman v. Bishop Estate*,¹⁰⁰ police arrested a squatter and her house guest for trespassing in a shack on private property in Hawaii.¹⁰¹ The guest brought a civil rights action against the landowner and various public officials.¹⁰² The Ninth Circuit, relying on *Dias*, stated that "[a] landlord's acquiescence to the trespass for a 'considerable period of time,' . . . can give rise to an expectation of privacy."¹⁰³ The *Zimmerman* court's reliance on *Dias* indicates the validity of the government-acquiescence doctrine in the Ninth Circuit.¹⁰⁴ This sets the stage for the California Court of Appeal decision in *People v. Thomas*.

97. *See id.*

98. *See id.*

99. *See id.* at 640.

100. 25 F.3d 784 (9th Cir. 1994).

101. *See id.* at 787-88.

102. *See id.*

103. *Id.* The *Zimmerman* court, however, found no evidence that the landowner had acquiesced to the unlawful occupation of private land, and, therefore, the guest had no objectively reasonable expectation of privacy. *See id.*

104. On this note, the California courts, however, need not follow lower federal court decisions and, thus, need not follow the Ninth Circuit. *See, e.g.,* *People v. Zapien*, 4 Cal. 4th 929, 989 (1993); *Raven v. Deukmejian*, 52 Cal. 3d 336, 352 (1990); *People v. Bradley*, 1 Cal. 3d 80, 86 (1969).

IV. *PEOPLE v. THOMAS*

This Part first explains the facts of *People v. Thomas*,¹⁰⁵ then turns to the California Court of Appeal's holding.

A. *Facts of Thomas*

From February 1993 through July 1994, Mr. Major Lee Thomas (Thomas), a homeless man, continuously resided in a wood and cardboard box structure (box) which resembled a refrigerator box laying on its side.¹⁰⁶ Thomas placed the box on a public sidewalk in downtown Los Angeles.¹⁰⁷ Thomas built his box to preserve his privacy, and referred to the box as his "home."¹⁰⁸ When Thomas was inside the closed box, he could not see out, nor could someone on the street see inside it.¹⁰⁹ Thomas kept all of his personal property inside his box.¹¹⁰ Thomas did not necessarily sleep alone in his box.¹¹¹

The box had no locks.¹¹² Thomas did not pay rent, nor any taxes, nor did he have a permit to build the box.¹¹³ The box was not hooked up to any utilities.¹¹⁴ The box was located on the sidewalk, possibly obstructing the sidewalk in violation of the City of Los Angeles Municipal Code (LAMC),¹¹⁵ and

105. 38 Cal. App. 4th 1331 (1995). Justice Miriam A. Vogel wrote the opinion for the Court of Appeal. *See id.* Citations to the Clerk's Transcript (CT) refer to the preliminary hearing at the municipal court. Citations to the Reporter's Transcript (RT) refer to the California Penal Code section 1538.5 motion at the superior court (copies on file with author).

106. *See Thomas*, 38 Cal. App. 4th at 1333. Thomas built his four-sided box from four four-by-six wooden pallets and heavy cardboard. *Id.*; RT 5. He stood the pallets up on their edges, formed what from above resembled an open bracket, and pushed this formation against the wall of an adjacent private building to form an enclosure. *See Thomas*, 38 Cal. App. 4th at 1333; RT 6-8. Using heavy cardboard, he covered the pallets and made a roof. *See RT 5, 7.* He covered the sidewalk with long sponges. *See RT 10.* He entered and exited the box by moving the pallet on the left end of the box. *See RT 9.* A police officer estimated that the box measured 6 feet by 3 feet by 3 feet. *See CT 62.* Thomas estimated that his box measured 12 feet (two pallets) long and 4 feet wide, the distance that the box protruded onto the sidewalk. *See Thomas*, 38 Cal. App. 4th at 1333; RT 6, 11.

107. Thomas resided on the east side of Towne Street, 40 yards south of 4th Street. *See Thomas*, 38 Cal. App. 4th at 1333; CT 58; RT 5, 10-11.

108. *See RT 7-8, 16.*

109. *See RT 8-9, 40-41.*

110. *See RT 17.*

111. *See Thomas*, 38 Cal. App. 4th at 1333; CT 59-60; RT 30-31.

112. *See Thomas*, 38 Cal. App. 4th at 1333.

113. *See id.*

114. *See id.*

115. In *Thomas*, the municipal and superior courts failed to rule expressly whether Thomas violated LAMC section 41.18(a). *See id.* LAMC section 41.18(a) reads: "[n]o person shall stand in or upon any street, sidewalk or other public way open for pedestrian travel or otherwise occupy any portion thereof in such a manner as to annoy or molest any pedestrian thereon or so as to obstruct or unreasonably interfere with free passage of pedestrians." LAMC § 41.18(a). Subdivision (d) of the same code reads: "[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way." *Id.* at (d).

city officials had not expressly authorized Thomas to reside at this location.¹¹⁶ There is no record of the extent to which police left Thomas alone.

At the location where Thomas resided, employees of the City of Los Angeles Bureau of Street Maintenance (LABSM) cleaned the streets and sidewalks five days a week.¹¹⁷ On at least one previous occasion, seven months earlier, LABSM cleared the sidewalks and removed structures, including Thomas's box.¹¹⁸ Thomas watched as a LABSM truck hauled away "everything belonging to everyone."¹¹⁹ Despite having lost his box and the possessions it contained, Thomas built a second identical box at the same location.¹²⁰

On July 17, 1994, at or around 4 a.m., Los Angeles police officers were driving an unmarked police car on patrol when they observed six or seven persons near the location of Thomas's box.¹²¹ The officers saw three or four individuals, including Thomas, examining neatly folded denim clothing.¹²²

On that same morning between 4:30 and 5:30 a.m., several police officers responded to a burglary call and went to a nearby clothing manufacturing business known as Lucy's Fashions.¹²³ A witness stated that he had observed three men burglarize Lucy's Fashions.¹²⁴ The witness stated that one of the burglars climbed a fire escape, removed boxes and clear plastic bags full of clothes through a second story window, and threw the goods to the two other men waiting on the sidewalk below.¹²⁵

Police officers later returned to the "homeless campsite" to look for suspects, witnesses, and stolen property.¹²⁶ The officers approached the particular area where earlier they had seen some people, including Thomas, examining the neatly folded denim clothing.¹²⁷ At the homeless campsite, the officers observed several dozen people sleeping on the ground.¹²⁸ Some were

On appeal, Thomas contended that section 41.18 violates the constitutional prohibition against cruel and unusual punishment. *See Thomas*, 38 Cal. App. 4th at 1333 n.1. The California Court of Appeal, however, rejected this contention (1) because Thomas raised it for the first time in his reply brief; and "(2) because such a constitutional attack requires a showing that 'punishment under the ordinance, in all its possible applications, is cruel, unusual, or both.'" *Id.* (citing *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1111 (1995) (Werdegar, J., concurring)).

116. *See* RT 90.

117. *See* RT 13.

118. *See Thomas*, 38 Cal. App. 4th at 1333-34.

119. RT 14.

120. *See Thomas*, 38 Cal. App. 4th at 1334; RT 15.

121. *See Thomas*, 38 Cal. App. 4th at 1333; CT 37-38, 55-57; RT 28, 33-34.

122. *See id.*

123. *See id.* at 1332-33; CT 4-5.

124. *See Thomas*, 38 Cal. App. 4th at 1333; CT 5-9.

125. *See Thomas*, 38 Cal. App. 4th at 1333; CT 5-9.

126. *See* RT 37, 39.

127. *See id.* at 30; CT 37-38.

128. *See Thomas*, 38 Cal. App. 4th at 1333; RT 29.

sleeping underneath blankets or some other cover.¹²⁹ Others were sleeping in boxes, or in some other makeshift structures.¹³⁰

Without a search warrant, police officers searched several makeshift shelters or boxes on the sidewalk.¹³¹ One officer knocked on Thomas's box and loudly said "police," but there was no response.¹³² The officer lifted the lid or roof of the box six or more inches.¹³³ The officers looked inside and saw Thomas and a woman sleeping.¹³⁴ On the floor between Thomas and the woman, the officer observed a clear bag containing denim clothing similar to that which the officers had seen at Lucy's Fashions.¹³⁵ The officer reached into the box and removed the bag; he then asked Thomas and the woman to exit the box.¹³⁶ The officers arrested Thomas and seized the bag of clothes.¹³⁷

The Los Angeles County District Attorney filed felony criminal charges (an information) on August 15, 1994, charging Major Lee Thomas with receiving stolen property.¹³⁸ The municipal court denied Thomas's California Penal Code section 1538.5 motion to suppress evidence.¹³⁹ Thomas pled no contest¹⁴⁰ and the Superior Court convicted and sentenced him.¹⁴¹

B. California Court of Appeal Holding

Thomas appealed.¹⁴² The California Court of Appeal, Second District, Division I, upheld the search of Thomas's box and affirmed his conviction.¹⁴³

Thomas contended that the police violated his Fourth Amendment rights when they invaded his home.¹⁴⁴ Alternatively, Thomas contended that the

129. *See id.*

130. *See id.*

131. *See* RT 40, 90.

132. *See Thomas*, 38 Cal. App. 4th at 1333; RT 30, 41.

133. *See Thomas*, 38 Cal. App. 4th at 1333; RT 30, 42-43.

134. *See Thomas*, 38 Cal. App. 4th at 1333; CT 59-60; RT 30-31.

135. *See Thomas*, 38 Cal. App. 4th at 1333; CT 39, 59; RT 31.

136. *See Thomas*, 38 Cal. App. 4th at 1333; RT 43-44.

137. *See* CT 39; RT 89-90. The assistant manager of Lucy's Fashions later identified the seized boxes and clear plastic bags containing clothes as belonging to Lucy's Fashions. *See Thomas*, 38 Cal. App. 4th at 1333; CT 6, 9, 12-13.

138. In violation of Penal Code section 496, subdivision (a). CAL. PENAL CODE § 496(a) (West 1995).

139. *See Thomas*, 38 Cal. App. 4th at 1332.

140. *See id.*

141. The Superior Court sentenced Mr. Thomas to the high term of three years, suspended the sentence, and placed Thomas on probation for a period of three years on the condition that he serve 365 days in county jail, and imposed a \$200 restitution fine. *See* CT 100; RT 115.

142. *See Thomas*, 38 Cal. App. 4th at 1332; CT 102-03.

143. *See Thomas*, 38 Cal. App. 4th at 1336.

144. *See id.* at 1332; Appellant's Brief on Appeal 7-17 (copy on file with author) [hereinafter AOB]. Thomas relied on *Pottinger* to support his argument that his box was his "home," but *Pottinger* applies to containers on public property. *Pottinger*, 810 F. Supp. at 1571. Furthermore, *Pottinger* "is not the rule in this state." *Tobe*, 9 Cal. 4th at 1093. Thomas also relied heavily on *State v. Mooney*, 588 A.2d 145 (Conn. 1991). In *Mooney*, the Connecti-

court erred in admitting evidence from the warrantless search because Thomas's box constituted a "container" deserving Fourth Amendment protection.¹⁴⁵

The People of the State of California (People) first contended that the warrantless search of Thomas's box did not violate the Fourth Amendment because Thomas failed to show that he had an objectively reasonable expectation of privacy in his box located on a public sidewalk.¹⁴⁶ The People conceded that Thomas referred to his box as his "home" and may have had a subjective expectation of privacy therein, but contended that this alone did not give rise to an objectively reasonable expectation of privacy and, thus, Fourth Amendment protection.¹⁴⁷ Second, the People contended that Thomas's box did not constitute a container deserving of Fourth Amendment protection.¹⁴⁸ Third, and alternatively, the People contended that the search fell within the implied consent exception to the warrant requirement.¹⁴⁹

The California Court of Appeal upheld the search of Thomas's box and affirmed his conviction.¹⁵⁰ The Court of Appeal held that where "an individual 'resides' in a temporary shelter on public property without a permit or permission and in violation of a law which expressly prohibits what he is doing, he does not have an objectively reasonable expectation of privacy."¹⁵¹ The *Thomas* court wrote, "[i]n short, a person who occupies a temporary shelter on public property without permission and in violation of an ordinance prohibiting sidewalk blockages is a trespasser subject to immediate ejection and, therefore a person without a reasonable expectation that his shelter will remain undisturbed."¹⁵² The Court of Appeal held that "[v]iewed

cut Supreme Court specifically avoided ruling on the issue of whether the homeless defendant had an objectively reasonable expectation of privacy under a bridge abutment on state owned property where he resided for one month. *See id.* at 152. The *Mooney* court plainly stated that such a "broad claim of Fourth Amendment protection in the area involved must fail." *Id.* The *Mooney* court instead held that the Fourth Amendment extended only to the defendant's closed containers. *See id.* *See generally* Susan Neilson, *Right to Shelter Under the Connecticut Constitution*, 67 CONN. B.J. 441 (1993); Kathleen Marie Quinn, Note, *Connecticut v. Mooney and Expectation of Privacy: The Double Edged Sword of Advocacy for the Homeless*, 13 B.C. THIRD WORLD L.J. 87 (1993); Teryl Smith Eisenberg, Note, *Connecticut v. Mooney: Can a Homeless Person Find Privacy Under a Bridge?*, 13 PACE L. REV. 229 (1993); Jordan Gross, Note, *A Reasonable Expectation of Privacy? Homelessness and the Fourth Amendment—State v. Mooney*, 36 HOW. L.J. 75 (1993); Debra M. Katz, *Fourth Amendment Protection for Homeless Person's Closed Containers in an Outdoor "Home"—State v. Mooney*, 26 SUFFOLK U. L. REV. 279 (1992).

145. *See Thomas*, 38 Cal. App. 4th at 1335; AOB 18-20.

146. *See* Respondent's Brief at 7 (copy on file with author) [hereinafter RB].

147. *See id.* at 12.

148. *See id.* at 22.

149. *See id.* at 25.

150. *See Thomas*, 38 Cal. App. 4th at 1336.

151. *Id.* at 1334 (citing *United States v. Ruckman*, 806 F.2d 1471, 1474 (10th Cir. 1986)); *Amezquita*, 518 F.2d at 11-12; *State v. Cleator*, 857 P.2d 306, 308-09 (Wash. Ct. App. 1993); *Mooney*, 588 A.2d at 154.

152. *Id.*

from a practical perspective, it borders on the absurd to suggest the police should have to get a warrant before searching a transient's temporary shelter. By the time the warrant is issued, the odds are the shelter would be long gone."¹⁵³ The Court of Appeal did not rule on whether Thomas had given his implied consent to a search of his box.

V. COURTS SHOULD ADOPT THE *DIAS* GOVERNMENT-ACQUIESCENCE DOCTRINE

Courts should adopt the *Dias* government-acquiescence doctrine to determine the Fourth Amendment rights of homeless persons residing in public areas. Courts should return to the *Katz* approach and focus more on the nature of the activity conducted at the place which police search, not the mere location.¹⁵⁴ Courts must recognize that "the Fourth Amendment protects people, not places."¹⁵⁵ The Fourth Amendment should protect the makeshift shelters of the homeless located in public areas because today's "society is prepared, because of its code of values and its notions of custom and civility, to give deference to a manifested expectation of privacy."¹⁵⁶

The decision of the California Court of Appeal in *People v. Thomas*, as well as those 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.¹⁵⁷ Linking Fourth Amendment rights to ancient property interests prevents the Constitution from adapting to present day realities, including the growing homelessness problem.¹⁵⁸ *Thomas* may have had a legitimate expectation of privacy because Los Angeles City had acquiesced to his residing at his location. Moreover, the *Thomas* court failed to even consider or rule on the government-acquiescence doctrine, despite evidence indicating its application.

In *Commonwealth v. Peterson*,¹⁵⁹ the Superior Court of Pennsylvania held that the defendant had no reasonable expectation of privacy in a private "gate house" used for selling drugs.¹⁶⁰ A majority of the *Peterson* court (two of the three judges), however, held that if homeless persons occupy an abandoned storefront, or an "abandonium,"¹⁶¹ they would have an objectively reasonable expectation of privacy.¹⁶² The *Peterson* court described the scope

153. *Id.* at 1335 n.2.

154. *See* Granston, *supra* note 15, at 1330.

155. *Katz*, 389 U.S. at 351.

156. *United States v. Taborda*, 635 F.2d 131, 138 (2d Cir. 1980).

157. *See* Florida v. Riley, 488 U.S. 445, 450-51 (1989).

158. *But see* Steinberg, *supra* note 15, at 1512 (asserting that privacy under the Fourth Amendment "is properly determined by assessing property interests").

159. 596 A.2d 172 (Pa. Super. Ct. 1991).

160. *Id.*

161. *Id.* at 188 n.2 (Hoffman, J., concurring), 185 n.12 (Popovich, J., dissenting).

162. *See id.* *But see* Clark v. State, 686 S.W.2d. 253, 254 (Tex. Crim. App. 1985)

of the Fourth Amendment as “a common, deep and basic understanding that our society accords to its citizens the right to be secure in areas and *activities* ordinarily associated with *autonomy, privacy and lifestyle.*”¹⁶³

In another state decision in *Commonwealth v. Gordon*,¹⁶⁴ the Superior Court of Pennsylvania held that the defendant had an objectively reasonable expectation of privacy in a room in an abandoned private house.¹⁶⁵ Despite the defendant’s lack of any legal property interest in the property, the *Gordon* court found the defendant’s expectation of privacy to be reasonable because he had resided in the abandoned house for two or three months and his room was separate from the rest of the house.¹⁶⁶

Thomas resided in his box for seventeen months.¹⁶⁷ Moreover, in *People v. Thomas*, the California Court of Appeal found that Thomas did not have an objectively reasonable expectation of privacy, in part, because he occupied a city street in violation of a municipal code prohibiting the occupation and obstruction of the sidewalk.¹⁶⁸ The police, however, seldom enforce such laws.¹⁶⁹ Courts should not rely on alleged violations of otherwise unenforced municipal codes making the homeless into trespassers, especially those prohibiting occupation and obstruction of public areas. Violation of such municipal codes should not go to prove the lack of an objectively reasonable expectation of privacy, especially if a necessity defense may exist.

Moreover, requiring a warrant to search makeshift enclosures on public property would not severely hinder law enforcement. Telephonic warrants and other expedited procedures can ensure efficient judicial review of police action. In *People v. Thomas*, the People argued that applying the search warrant requirement of the Fourth Amendment to the ramshackle enclosures of the homeless on public property would lead to severely adverse consequences for law enforcement.¹⁷⁰ The court held that it is not practicable to secure a warrant for a box, like Thomas’s, on public property because it can be

(holding that the defendant did not have an objectively reasonable expectation of privacy in an abandoned building because it lacked a “No Trespassing” sign and nothing clearly indicated that the defendant used it for residential purposes).

163. *Peterson*, 596 A.2d at 177 (emphasis added).

164. 640 A.2d 422 (Pa. Super. Ct. 1994).

165. *See id.*; *see also* 4 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW 2704-06 (2d ed. 1989).

166. *See Gordon*, 640 A.2d at 426. *See also* *People v. Smith*, 448 N.Y.S.2d 404 (N.Y. Trial Term 1982) (granting a Fourth Amendment suppression hearing to alleged subtenant of a squatter). *But see* *Commonwealth v. Cameron*, 561 A.2d 783 (Pa. Super. Ct. 1989) (finding no reasonable expectation of privacy in an abandoned house); *Morris v. State*, 521 So.2d 1364 (Ala. Crim. App. 1987) (same); *People v. Sumlin*, 431 N.Y.S.2d 967 (N.Y. Sup. Ct. 1980) (finding no reasonable expectation of privacy in an abandoned city-owned apartment).

167. *Thomas*, 38 Cal. App. 4th at 1333.

168. *See id.* at 1335.

169. *See* Zamichow & Wilgoren, *supra* note 4; Douglas P. Shuit, *Zoning Limits on the Down and Out*, L.A. TIMES, July 14, 1997, at B1 (asserting that California cities are “digging into their municipal code books to rein in growing numbers of homeless people”).

170. *See* RB at 20.

quickly moved out of the locality or jurisdiction.¹⁷¹ In other words, requiring a search warrant for a box on public property would mean that a person residing in such a box could avoid a search by authorities having probable cause by simply moving his box across a jurisdictional line.¹⁷² These arguments, however, are not convincing in light of the fact more efficient judicial procedures will better safeguard citizen's important constitutional rights. Also, any movement or flight observed by police officers arguably would constitute exigency, another exception to the warrant requirement.

VI. PRIVACY RIGHTS UNDER INTERNATIONAL LAW

Arguably applicable in U.S. courts, international customary law and several human rights treaties could provide a remedy to unreasonable searches and seizures. Beyond the Fourth Amendment, international human rights law also grants privacy rights. Article 12 of the 1948 Universal Declaration of Human Rights (UDHR) prohibits arbitrary interference with one's privacy and home.¹⁷³ Article 17 of the International Covenant on Civil and Political Rights protects against arbitrary or unlawful interference with one's privacy or home.¹⁷⁴ Article 11 of the 1978 American Convention on Human Rights (ACHR) grants that "[n]o one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation."¹⁷⁵ Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that everyone "has the right to respect for his private and family life, his home and his correspondence."¹⁷⁶ The European Convention appears to grant both a right to privacy and a right to be free from State interference while in one's home.

Because the United States is party to the ACHR, and this treaty provides every person the right to petition an adjudicatory body known as the Commission,¹⁷⁷ it appears that a homeless person subject to a warrantless search could lodge a complaint against the United States for violating his privacy rights after exhausting his national remedies. Moreover, several legal scholars assert that a significant portion of international human rights law has crystallized into customary international law, now binding on all members of

171. See 38 Cal. App. 4th at 1335 n.2. See also *supra* text accompanying note 153.

172. See 38 Cal. App. 4th at 1335.

173. See Universal Declaration of Human Rights, Dec. 10, 1948, art 12, U.N.G.A. Res. 217 A (III).

174. International Covenant on Civil and Political Rights, art. 17(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

175. American Convention on Human Rights, art. 11 (2), *reprinted in* 9 I.L.M. 679 (1970).

176. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, 213 U.N.T.S. 211 (1968). The United States is not a party to this convention.

177. See American Convention on Human Rights, art. 44, *reprinted in* 9 I.L.M. 673, 739 (1970).

the international community.¹⁷⁸

This means that some international human rights law, including rights under the UDHR, is binding on all U.S. courts. To date, however, no homeless litigants have asserted such claims, and U.S. courts have not interpreted the federal Constitution to embrace a right to shelter,¹⁷⁹ although such a right may exist under international human rights law.¹⁸⁰ In the future, homeless litigants also might assert a claim based on emerging international human rights to shelter and to be free of arbitrary interference with one's home, regardless of its nature or location.

VII. CONCLUSION

The California Court of Appeal erred in *People v. Thomas* because it decided that a defendant's expectation of privacy is not objectively reasonable based primarily on the location of the area searched, and because it ignored the nature of the private human activity occurring at a home. This ignores the problem of homelessness and ties constitutional and emerging human rights to an outdated, ancient, property-interests analysis. The *Thomas* court failed to properly consider the government-acquiescence doctrine, despite its validity. The recent decision of the California Court of Appeal in *Eichorn*¹⁸¹ also highlights that the lack of shelter for the homeless may mean that they have no legal alternative to "camping" on public property. Courts should consider this fact when determining the reasonableness of any search.

Courts should adopt the *Dias* government-acquiescence doctrine. While hearing a shelterless defendant's Fourth Amendment claim, i.e., a civil rights claim under U.S.C. section 1983¹⁸² or a motion to suppress illegally seized evidence, the court should inquire: (1) whether the government has acquiesced to the defendant's presence on public property; and (2) whether society is willing to recognize the private nature of the defendant's conduct in his "home," so as to transform his expectation of privacy into one that is objectively reasonable. If his expectation of privacy is objectively reasonable, courts must treat his makeshift shelter under the Fourth Amendment as a home, as his "castle," even if it is made of cardboard.

178. See generally THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).

179. See *Lindsey v. Norment*, 405 U.S. 56 (1972).

180. See Universal Declaration of Human Rights, Dec. 10, 1948, art. 25, U.N. GAOR 217A(III) (1948); International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec. 16, 1966, art. 11, 6 I.L.M. 360 (1967). The United States, however, is not a party to the ICESCR.

181. 69 Cal. App. 4th 382 (1998).

182. 42 U.S.C. § 1983.