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Abandoned or Unattended? The Outer Limit of Fourth Amendment Protection for Homeless Persons' Property

by TIM DONALDSON*

Introduction

In 2017, the *Los Angeles Times* reported that the City of Los Angeles spent \$14-million on a citywide effort to address an increase of local homelessness and had cleaned up 16,500 homeless encampments since 2015.¹ The city removed 3,000 tons of material, which included over 900 tons from the city's downtown district alone.² In 2018, the *Seattle Times* reported that the City of Seattle spent \$10.2-million in 2017 to remove unauthorized homeless encampments and provide outreach assistance to camp residents.³ Between January 2017 and March 2018, Seattle removed almost 200 unauthorized encampments.⁴ Such efforts seem part of an endless cycle. Encampments in Los Angeles often reestablished nearby after being cleaned.⁵ Some areas were repeatedly addressed,⁶ and Los Angeles experienced a sevenfold increase in the number of cleanups between 2015

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1. Ben Poston & Doug Smith, *Homeless Cleanups in L.A. Have Surged, Costing Millions. What Has Been Gained?*, L.A. TIMES, June 30, 2017, at A1.

2. *Id.* at A1, A8–A9.

3. Vianna Davila, *Seattle to expand team that oversees homeless-camp removal*, SEATTLE TIMES, Aug. 3, 2018, at B2.

4. *Id.* at B1.

5. Poston & Smith, *supra* note 1, at A1.

6. *Id.* at A1, A8.

and 2017.⁷ Seattle similarly cleared more sites in the first seven months of 2018 than it did in all of 2017.⁸

The Ninth Circuit United States Court of Appeals held in *Lavan v. City of Los Angeles* that the Fourth Amendment's prohibition against unreasonable seizures guards against summary seizure and destruction of unabandoned personal property belonging to homeless persons.⁹ The court explained that the Fourth Amendment protects against both searches and seizures, and a person has a possessory interest in his or her property even if that person's expectation of privacy in the property has been extinguished.¹⁰ The Fourth Amendment's seizure restrictions are triggered "when there is some meaningful interference with an individual's possessory interests in that property."¹¹ It therefore protects unabandoned personal property momentarily left on a public sidewalk in violation of a city ordinance from being unreasonably seized and destroyed.¹²

The *Lavan* court remarked that it was not addressing whether a person has a "constitutionally-protected property right to leave possessions unattended on public sidewalks."¹³ Instead, the court stated that the case concerned a person's basic interest in the continued ownership of his or her personal possessions, and it held that a homeless person maintains a protected property right in the person's unattended belongings that have not been abandoned.¹⁴ It admonished that "by collecting and destroying [homeless persons'] property on the spot, the City acted unreasonably in violation of the Fourth Amendment."¹⁵

Lavan unfortunately gives little guidance regarding how to distinguish abandoned property from merely unattended property. It was not a central issue to the case because Los Angeles sought therein "a broad ruling that it may seize and immediately destroy any personal possessions, including medications, legal documents, family photographs, and bicycles, that are left

7. Poston & Smith, *supra* note 1, at A1.

8. Vianna Davila, *Seattle increasing removals of homeless encampments*, SEATTLE TIMES, Aug. 22, 2018, at A1 (reporting that Seattle cleared 191 sites in 2017 and 220 sites between the beginning of the year and the end July in 2018). Seattle has also experienced a similar problem of camps re-forming after they have been cleared. See Vernal Coleman, *In a New Clash Over Seattle Camps, Protesters Try to Block Cleanup of Ravenna Encampment*, SEATTLE TIMES, Apr. 18, 2018, at B2.

9. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1027–31 (9th Cir. 2012).

10. *Id.* at 1029.

11. *Id.* at 1027 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

12. *Id.* at 1029.

13. *Id.* at 1031.

14. *Id.* at 1031–32.

15. *Id.* at 1030.

momentarily unattended. . . .”¹⁶ The city did “not deny that it ha[d] a policy and practice of seizing and destroying homeless persons’ unabandoned possessions.”¹⁷ Los Angeles did not challenge any of the factual findings made by the district court in support of the ruling that was appealed.¹⁸ It also did not appeal the scope of the lower court’s injunction which prohibited the city from seizing homeless persons’ property “absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband. . . .”¹⁹ Los Angeles instead appealed only the legal standard applied by the district court, and there was no need for the appellate court to address at that point in the case whether the seized property was abandoned or merely unattended.²⁰

However, the distinction between abandoned property and merely unattended property is important.²¹ As reflected in news reports about cleanup efforts, tons of materials often need to be removed.²² It is not always obvious whether those materials consist of personal property someone hopes to retrieve later or only discarded items and waste. There is an old saying that “[o]ne man’s trash is another man’s treasure.”²³ This article reviews the differences between abandoned property and merely unattended property and proposes guidelines for making determinations during community cleanups whether an item may be taken to a landfill or must be preserved for potential reclamation by its owner.

16. *Lavan*, 693 F.3d at 1024 n.1.

17. *Id.* at 1025. The City did, however, claim in the underlying proceedings that it reasonably believed only abandoned property had been seized. *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1013 (C.D. Cal. 2011), *aff’d* 693 F.3d 1022 (9th Cir. 2012). It also renewed that claim upon remand. *Lavan v. City of Los Angeles*, No. CV 11-2874 PSG (AJWx), 2014 WL 12693524, at *4–6 (C.D. Cal. July 24, 2014).

18. *Id.* at 1024, n.2.

19. *Id.* at 1024; *see generally Lavan*, 797 F. Supp. 2d at 1020 (district court injunction), *aff’d* 693 F.3d 1022 (9th Cir. 2012).

20. *Id.* at 1024–27.

21. *See Los Angeles Catholic Worker v. Los Angeles Downtown Indus. District Bus. Improvement District*, No. CV-14-7344 PSG (AJWx), 2015 WL 13649801, at *3 (C.D. Cal. Jan. 13, 2015); *Lavan*, 2014 WL 12693524, at *8–9.

22. Theresa Walker, *Cleaning up a wasteland of epic proportions*, ORANGE COUNTY REG., Mar. 10-11, 2018, at A3 (reporting removal of 404 tons of debris); Poston & Smith, *supra* note 1, at A1 (reporting that Los Angeles had removed 3,000 tons of trash during its cleanup efforts).

23. RICHARD A. SPEARS, MCGRAW-HILL’S DICTIONARY OF AMERICAN IDIOMS AND PHRASALVERBS 473 (2005); *see also Pottinger v. City of Miami*, 810 F. Supp. 1551, 1559 (S.D. Fla. 1992) (“[A] homeless person’s personal property is generally all he owns; therefore, while it may look like ‘junk’ to some people, its value should not be discounted.”), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir. 1994), and *directed to undertake settlement discussions*, 76 F.3d 1154 (1996).

I. Fourth Amendment Protection Against Unreasonable Property Seizures

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .”²⁴ “This text protects two types of expectations, one involving ‘searches,’ the other ‘seizures.’”²⁵ Its express mention of “houses, papers, and effects” also “reflects its close connection to property. . . .”²⁶ The Fourth Amendment therefore protects against unreasonable trespassory governmental interference with private property.²⁷

The Supreme Court commented in *United States v. Jacobsen* that its prior cases had not much discussed the concept of a “seizure” of property, and it therefore borrowed a formulation from its arrest cases regarding seizure of a person.²⁸ The *Jacobsen* Court concluded that a “‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.”²⁹ Two elements must therefore converge for the Fourth Amendment to apply: (1) a person must have a possessory interest in the property at issue;³⁰ and (2) governmental action must interfere with that interest in some meaningful way.³¹ If a seizure has occurred, it is constitutionally tested to determine whether the seizure was reasonable.³²

The number of homeless persons in Miami, Florida increased dramatically between 1984 and 1991, and, due to a shelter shortage, most were left with no alternative to living in public areas.³³ Arrest records and internal police department memoranda indicated that the city adopted a policy of driving the homeless persons out of those areas.³⁴ As part of this effort, the city had a practice of seizing and destroying personal property belonging to homeless persons or forcing them to abandon it upon their

24. U.S. CONST. amend. IV.

25. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

26. *United States v. Jones*, 565 U.S. 400, 405 (2012).

27. *Id.* at 404–11; *see also Soldal v. Cook County*, 506 U.S. 56, 61–71 (1992).

28. *Jacobsen*, 466 U.S. at 113, n.5.

29. *Id.* at 113; *see also United States v. Karo*, 468 U.S. 705, 712–13 (1984).

30. *See Maryland v. Macon*, 472 U.S. 463, 469 (1985).

31. *See Karo*, 468 U.S. at 712.

32. *See Jacobsen*, 466 U.S. at 120–22; *Hooper v. City of Seattle*, No. C17-77RSM, 2017 WL 4410029, at *9 (W.D. Wash. Oct. 4, 2017); *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1013 (C.D. Cal. 2011), *aff’d* 693 F.3d 1022 (9th Cir. 2012).

33. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1558 (S.D. Fla. 1992); *see also Pottinger v. City of Miami*, 40 F.3d 1155 (11th Cir. 1994) (remanded for limited purposes); *Pottinger v. City of Miami*, 76 F.3d 1154 (11th Cir. 1996) (directed to undertake settlement discussions).

34. *Pottinger*, 810 F. Supp. at 1561, 1566–68.

arrests for various municipal violations.³⁵ The seized property consisted of bedrolls, blankets, clothing, food, personal identification, and other items that reasonably appeared to belong to someone.³⁶ Homeless persons alleged that the seizures violated their constitutional rights, and Miami responded that those persons' interest in their property was outweighed by the public's need to keep public areas sanitary.³⁷

The United States District Court for the Southern District of Florida found in *Pottinger v. City of Miami* that Miami's handling of homeless persons' property violated the Fourth Amendment's prohibition against unreasonable seizures.³⁸ The court had no difficulty concluding that Miami's seizure and destruction of personal belongings constituted meaningful interference.³⁹ The court devoted more attention to the question of whether personal property is entitled to constitutional protection when it is kept in a public area.⁴⁰ The court determined, under then-existing Supreme Court precedent, that the Fourth Amendment protected only reasonable privacy expectations.⁴¹ The court concluded that the homeless claimants in *Pottinger* had proven a subjective expectation of privacy from the manner in which they stored their property in containers and either covered it or placed it against a tree or other object.⁴² The court further decided, for a variety of reasons, that society's code of custom and civility would cause society to recognize the reasonableness of that expectation since homeless individuals' personal effects represent perhaps the last trace of privacy they have.⁴³ The court rejected Miami's claims that public concerns overrode individual interests, holding that a city's interest in having clean public areas "is outweighed by the more immediate interest of [homeless persons] in not having their personal belongings destroyed."⁴⁴

The City of Chicago experienced a similar situation as Miami and had dozens of homeless persons staying in the Lower Wacker Drive area of the city.⁴⁵ Chicago engaged in a practice of regularly cleaning the area of trash

35. See *Pottinger*, 810 F. Supp. at 1570.

36. *Id.* at 1559.

37. *Id.* at 1570.

38. *Id.* at 1570–73.

39. *Id.* at 1571.

40. *Pottinger*, 810 F. Supp. at 1571–73.

41. *Id.*

42. *Id.* at 1571.

43. *Id.* at 1571–72; see also *Cobine v. City of Eureka*, 250 F. Supp. 3d 423, 435 (N.D. Cal. 2017).

44. *Pottinger*, 810 F. Supp. at 1573.

45. *Love v. City of Chicago*, No. 96-C-0396, 1996 WL 627614, at *2, ¶ 1 (N.D. Ill. Oct. 25, 1996).

and debris upon twelve (12) hours advance notice.⁴⁶ Property not claimed or moved at the time of a cleaning could be discarded by city workers, but the city would not seize belongings from people who wished to remove them.⁴⁷ The United States District Court for the Northern District of Illinois rejected the arguments in *Love v. City of Chicago* that the city should be required to do more.⁴⁸

The court in *Love* wrote that the city had “an important public health responsibility to remove and discard abandoned materials so they don’t clutter the public way and endanger the health and safety of either the homeless or others passing through” the area.⁴⁹ It recognized that the Fourth Amendment protects reasonable privacy expectations, but wrote that such “expectation must be evaluated in light of objective circumstances.”⁵⁰ The court explained that “[r]easonableness remains the ultimate standard for determining the constitutionality of a seizure of property[.]”⁵¹ and it determined that removal of unattended materials during a cleanup, after giving advance notice, was reasonable.⁵² The court commented that a city is not an insurer for the property of persons who live on public property and attributed some risk of loss to those who leave their belongings unattended.⁵³ It recognized that “[v]ery unsanitary conditions can develop quickly, as a result of insects, excrement and the presence of items that are not systematically cleaned[.]”⁵⁴ and the court held that public concerns prevailed over private interests even though some people might be deprived of their personal property.⁵⁵

Search and seizure issues surrounding the removal of homeless persons’ property have been addressed most frequently by courts in the Ninth Circuit of the United States Court.⁵⁶ This is understandable, because over one-third

46. *Love*, 1996 WL 627614, at *3–4, ¶¶ 7–12.

47. *Id.* at *4, ¶¶ 13–19.

48. *Id.* at *4, ¶¶ 20–21.

49. *Id.* at *6; *see also Love v. City of Chicago*, No. 96-C-0396, 1998 WL 60804, at *4 (N.D. Ill. Feb. 6, 1998).

50. *Love*, 1996 WL 627614, at *5.

51. *Id.*; *see also Love*, 1998 WL 60804, at *9–10.

52. *Love*, 1996 WL 627614, at *6.

53. *Id.* at *5–6; *see also Love*, 1998 WL 60804, at *6, *12.

54. *Love*, 1996 WL 627614, at *3, ¶ 8; *see also Love*, 1998 WL 60804, at *4.

55. *Love*, 1996 WL 627614, at *6.

56. *See, e.g., Lavan v. City of Los Angeles*, 693 F.3d 1022, 1027–31 (9th Cir. 2012); *Cobine v. City of Eureka*, 250 F. Supp. 3d 423, 434–36 (N.D. Cal. 2017); *Watters v. Otter*, 955 F. Supp. 2d 1178, 1189–90 (D. Idaho 2013); *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1234–35 (E.D. Cal. 2009); *Joyce v. City and County of San Francisco*, 846 F. Supp. 843, 863–64 (N.D. Cal. 1994).

of the nation's homeless population resides in the Ninth Circuit.⁵⁷ The 2018 Annual Homeless Assessment Report to Congress reported that 552,830 people experienced homelessness on a single night in 2018.⁵⁸ Of those homeless persons, 196,124 of them were located in the Ninth Circuit (Alaska: 2,016, Arizona: 9,865, California: 129,972, Hawaii: 6,530, Idaho: 2,012, Montana: 1,405, Nevada: 7,544, Oregon: 14,476, and Washington: 22,304).⁵⁹ California had the largest number of homeless persons of any state, and Washington had the fifth most.⁶⁰ In addition, the five states with the highest rates of unsheltered homeless persons were all found in the Ninth Circuit (California: 68.9% of homeless persons were unsheltered, Oregon, 61.7%, Nevada: 56.2%, Hawaii: 53.2%, and Washington: 47.6%).⁶¹

The United States District Court for the Central District of California agreed with *Pottinger v. City of Miami*'s analysis of the Fourth Amendment in *Justin v. City of Los Angeles*.⁶² The court in *Justin* entered a temporary restraining order enjoining Los Angeles from “[c]onfiscating the personal property of the homeless when it has not been abandoned and destroying it without notice. . . .”⁶³ It remarked that the city had not put forth any justification for seizing and destroying the personal property of homeless persons.⁶⁴ The court recognized the value homeless persons place on the few possessions they have,⁶⁵ and held that they “have a legitimate expectation of privacy in their property” that is protected by the Fourth Amendment.⁶⁶

The Central District expanded upon its analysis in *Kincaid v. City of Fresno*.⁶⁷ The court in *Kincaid* wrote that cleanup sweeps conducted by the city resulted in more than just “meaningful” interference with the possessory rights that homeless persons have to their personal property because the

57. See MEGHAN HENRY ET AL., U.S. DEP'T. HOUS. & URB. DEV. OFF. OF CMTY. PLAN. & DEV., THE 2018 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 10, 14 (2018) (The reported number of 196,124 homeless persons residing in States that comprise the Ninth Circuit account for approximately 35.5% of the total reported number of 552,830 homeless persons nationwide.).

58. *Id.* at 10.

59. *Id.* at 14.

60. *Id.*

61. *Id.* at 15.

62. *Justin v. City of Los Angeles*, No. CV-00-12352 LGB (AIX), 2000 WL 1808426, at *10 (C.D. Cal. Dec. 5, 2000).

63. *Justin*, 2000 WL 1808426, at *13.

64. *Id.* at *10.

65. *Id.*

66. *Id.* at *9; see also *Lehr v. City of Sacramento*, 624 F.Supp.2d 1218, 1234–35 (E.D. Cal. 2009).

67. *Kincaid v. City of Fresno*, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732, at *35–37 (E.D. Cal. Dec. 8, 2006).

city's disposal of such property was "total and irrevocable."⁶⁸ It explained that "[a]n officer who comes across an individual's property in a public area may seize it only if Fourth Amendment standards are satisfied—for example, if the items are evidence of a crime or are contraband."⁶⁹ The *Kincaid* court held that the sweeps were more intrusive than necessary and therefore violated such standards.⁷⁰ It rejected the city's claim that the sweeps dealt only with abandoned property, because the evidence demonstrated that the homeless persons in that case did not intend to "abandon their tents, carts, clothing, bicycles, personal effects, memorabilia, and other property that they need to survive, and no reasonable official could believe this to be the case."⁷¹ The court wrote that a city cannot "treat property as abandoned and trash just because the owner has not removed it in the time the government has allotted."⁷²

The United States District Court for the Northern District of California indicated in *Joyce v. City and County of San Francisco* that a person only loses his or her expectation of privacy when property is intentionally abandoned.⁷³ It concluded that "Fourth Amendment protections therefore attach to unattended property[.]"⁷⁴ The court acknowledged, but did not resolve, the city's contention that "the distinction between abandoned and unabandoned property involves a 'difficult determination[.]'"⁷⁵ It instead concluded that San Francisco's policies requiring ninety (90) day storage of "property of value" collected during cleanup activities alleviated Fourth Amendment concerns.⁷⁶

The development of a framework by lower courts in *Justin, Kincaid*, and *Joyce* culminated in *Lavan v. City of Los Angeles*.⁷⁷ In *Lavan*, the Ninth Circuit Court of Appeals held that privacy expectations are irrelevant to the

68. *Kincaid*, 2006 WL 3542732, at *36; see also *Proctor v. District of Columbia*, 310 F. Supp. 3d 107, 114 (D.D.C. 2018); *Ellis v. Clark County Dep't. of Corrections*, No. 15-5449 RJD, 2016 WL 4945286, at *10 (W.D. Wash. Sept. 16, 2016); *Carr v. Oregon Dep't. of Transportation*, No. 3:13-cv-02218-MO, 2014 WL 3741934, at *3 (D. Or. July 29, 2014).

69. *Id.* at *35.

70. *Id.* at *35–7.

71. *Id.* at *37.

72. *Id.*

73. *Joyce v. City and County of San Francisco*, 846 F. Supp. 843, 863 (N.D. Cal. 1994).

74. *Id.*

75. *Id.*; see also *Smith v. City of Corvallis*, No. 6:14-cv-01382-MC, 2016 WL 3193190, at *5 (D. Or. June 6, 2016) (holding that the question of whether property is abandoned entails a factual inquiry that cannot be summarily resolved if disputed).

76. *Joyce*, 846 F. Supp. at 863–64 (N.D. Cal. 1994); see also *Acosta v. City of Salinas*, No. 15-cv-05415 NC, 2016 WL 1446781, at *8–9 (N.D. Cal. Apr. 13, 2016); *Cobine v. City of Eureka*, 250 F. Supp. 3d 423, 434–35 (N.D. Cal. 2017).

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

question of whether a property seizure is unreasonable.⁷⁸ Seizures are subject to reasonableness requirements without regard to privacy expectations because the “Fourth Amendment protects against unreasonable interferences in property interests regardless of whether there is an invasion of privacy.”⁷⁹ The *Lavan* court explained that no more is necessary to trigger the Fourth Amendment’s reasonableness requirement than meaningful governmental interference with someone’s possessory right to his or her property.⁸⁰

Post-*Lavan* decisions have focused primarily upon the reasonableness of cleanup procedures.⁸¹ In *Watters v. Otter*, the United States District Court for Idaho engaged in a similar analysis as in *Kincaid* and *Lavan* that focused upon the justification for a seizure, but it reached a different conclusion due to distinguishing factual circumstances.⁸² The court upheld an Idaho statute that authorized officials to remove unattended personal property from state lands if left by its owner after being cited for unlawful camping.⁸³ Property was not however immediately destroyed, and it was instead removed to storage for ninety (90) days and disposal was authorized only if the property remained unclaimed.⁸⁴ The court recognized that meaningful interference with an individual’s possessory property interests triggers constitutionally mandated reasonableness considerations, but it determined that the removal and storage of property under the Idaho statute was justified under community caretaking exception to the Fourth Amendment since the seizures were made to protect the property.⁸⁵ The court ruled that the specified procedures for removal (requiring officials to post notice when removing property belonging to absent owners, to store the property for ninety (90) days, and to provide an opportunity for owners to contest the seizure) made the statute markedly different from situations where property was summarily destroyed.⁸⁶

The United States District Court for the Western District of Washington similarly held in *Hooper v. Seattle* that reasonableness is the touchstone of

78. *Lavan*, 693 F.3d at 1027.

79. *Id.* at 1028–29 (quoting *Miranda v. City of Cornelius*, 429 F.3d 858, 862 (9th Cir. 2005)).

80. *Id.* at 1030; *see also* *Russell v. City and County of Honolulu*, No. 13-00475 LEK-RLP, 2013 WL 6222714, at *15 (D. Haw., Nov. 29, 2013); *Johnson v. Board of Police Comm’rs*, 351 F. Supp.2d 929, 949 (E.D. Mo. 2004).

81. *See, e.g.*, *Proctor v. District of Columbia*, 310 F. Supp. 3d 107, 114–16 (D.D.C. 2018).

82. *Watters v. Otter*, 955 F. Supp.2d 1178, 1189–90 (D. Idaho 2013).

83. *Id.* at 1183, 1188–90.

84. *Id.* at 1188–89.

85. *Id.* at 1189.

86. *Watters*, 955 F. Supp. 2d at 1188–89; *see also* *Cobine v. City of Eureka*, No. C 16-02239 JSW, 2016 WL 1730084, at *4–5 (May 2, 2016).

Fourth Amendment analysis.⁸⁷ It explained that reasonableness is assessed by balancing the nature and quality of an intrusion upon an individual's possessory interests against the importance of the governmental interests used to justify the intrusion.⁸⁸ The court agreed with Seattle that *Lavan* did not prevent the city from lawfully seizing and detaining property or removing hazardous debris and trash during cleanup efforts as long as it provided notice beforehand and a reasonable opportunity for retrieval of property that had been removed.⁸⁹ It stressed that “[t]he Fourth Amendment prohibits ‘unreasonable’ seizures of property.”⁹⁰

The cleanup policy at issue in *Hooper* differentiated between “personal property” and “hazardous items.”⁹¹ “Personal property” was defined as “an item that: is reasonably recognizable as belonging to a person; has apparent utility in its present condition and circumstances; and is not hazardous.”⁹² “Hazardous items” were defined in part as items that reasonably appear “to pose a health or safety risk to members of the public or to City employees or to other authorized personnel.”⁹³ The rules advised that any dispute regarding characterization of an item was to be resolved in favor of treating the item as personal property.⁹⁴ City policies provided that notice be given prior to removal of an encampment unless it created an obstruction or an immediate hazard.⁹⁵ In addition, city procedures allowed for recovery of

87. *Hooper v. City of Seattle*, No. C17-77RSM, 2017 WL 4410029, at *9 (W.D. Wash. Oct. 4, 2017); *Hooper v. City of Seattle*, No. C17-77RSM, 2017 WL 591112, at *6 (W.D. Wash. Feb. 14, 2017); see also *Love v. City of Chicago*, No. 96-C-0396, 1998 WL 60804, at *10 (N.D. Ill. Feb. 6, 1998).

88. *Hooper*, 2017 WL 4410029, at *9; *Hooper*, 2017 WL 591112, at *6.

89. See *Hooper*, 2017 WL 591112, at *6.

90. *Hooper*, 2017 WL 4410029, at *9; see generally *Elkins v. United States*, 364 U.S. 206, 222 (1960) (“It must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.”).

91. *Id.* at *9.

92. *Id.*

93. *Id.*

94. *Id.*; see generally Declaration of Breanne Schuster in Support of Plaintiff's Motion for Preliminary Injunction, Ex. C, City of Seattle Dept. of Finance and Administrative Services Rules Regarding: Unauthorized Camping on City Properties Enforcement Procedures; and Removal of Unauthorized Property, at 2, § 3.5 [hereinafter Declaration Ex. C], Ex. D, City of Seattle Multi-Departmental Administrative Rules Regarding: Operating Hours for City Properties; Unauthorized Camping on City Properties; Enforcement Procedures; and Removal of Unauthorized Property, at 6, § 3.15 [hereinafter Declaration Ex. D], *Hooper v. City of Seattle*, No. 2:17-cv-00077-RSM (W.D. Wash. June 14, 2017).

95. See Declaration Ex. C, *supra* note 94 at 2–3, § 4 (re: removal of obstructions and hazards), 4, § 6 (re: encampment removal and notice requirements).

personal property and summary disposal only of garbage, debris, waste, hazardous items, and other like material.⁹⁶

The court in *Hooper* rejected an argument that the cleanup policy's definitions for "personal property" and "hazardous materials" left too much discretion to governmental officials.⁹⁷ It wrote, "[a]lthough the taking and destroying of property is considered a 'seizure,' this act is only unlawful if a party can demonstrate unreasonableness."⁹⁸ The court therefore concluded that the definitions were sufficient unless an aggrieved party could demonstrate that they would result in unreasonable seizures.⁹⁹ It found that the city's reasons for refusing to store certain items, such as those that were wet, muddy, or near drug paraphernalia or urine, were backed by scientifically supported concerns.¹⁰⁰ The court commented that the degree of discretion left to officials did "not by itself demonstrate that exercise of that discretion is unreasonable."¹⁰¹

In *Los Angeles Catholic Worker v. Los Angeles Downtown Industrial District Business Improvement District*, the United States District Court for the Central District of California held that homeless persons need not demonstrate a right to leave property unattended on public rights-of-way to be protected by the Fourth Amendment.¹⁰² It explained that municipal prohibitions against leaving personal property on a parkway or sidewalk must satisfy Fourth Amendment reasonableness requirements.¹⁰³ The court ruled that a seizure of unabandoned property may be unreasonable even if the government stores, rather than destroys, the property.¹⁰⁴

The parties in *Los Angeles Catholic Worker* later settled, and the court entered a stipulated judgment that described the circumstances under which

96. See Declaration Ex. C, *supra* note 94, at 5–7, § 9–12 (re: encampment site cleanup, post-removal notice, and storage and recovery of personal property); Declaration Ex. D, *supra* note 94, at 15, § 8.2.1 (re: summary removal and disposal).

97. *Hooper*, 2017 WL 4410029, at *9–10.

98. *Id.* at *9.

99. *Id.*

100. *Id.* at *10.

101. *Id.* at *9.

102. *Los Angeles Catholic Worker v. Los Angeles Downtown Industrial District Bus. Improvement District*, No. CV-14-7344 PSG (AJWx), 2015 WL 13649801, at *3 (C.D. Cal. Jan. 13, 2015).

103. *Id.* at *4 (C.D. Cal. Jan. 13, 2015).

104. *Los Angeles Catholic Worker*, 2015 WL 13649801, at *4. *But see* *Cobine v. City of Eureka*, 250 F. Supp. 3d 423, 434–35 (N.D. Cal. 2017); *Acosta v. City of Salinas*, No. 15-cv-05415 NC, 2016 WL 1446781, at *8–9 (N.D. Cal. Apr. 13, 2016); *Watters v. Otter*, 955 F. Supp. 2d 1178, 1188–90 (D. Idaho 2013); *Joyce v. City and County of San Francisco*, 846 F. Supp. 843, 863–64 (N.D. Cal. 1994).

city officials could remove items from sidewalks and other public places.¹⁰⁵ The judgment adopted a reasonableness test to determine whether property is abandoned.¹⁰⁶ Before determining whether property is abandoned, officials must ask any people who are nearby if they can identify the owner of the property.¹⁰⁷ If the owner of the property is unknown and the property is not packed up, officials may affix a notice to it that the property will be deemed abandoned and removed if it has not been moved to a new location within twenty-four (24) hours after the property has been posted.¹⁰⁸ If the property is packed up, officials may, after first observing it unattended in the same location for twenty-four (24) hours, affix a notice to it that the property will be deemed abandoned and removed if the property has not been moved to a new location within twenty-four (24) hours after it has been posted.¹⁰⁹

After posting property for the specified period, officials may proceed with removal of the property if “they have an objectively reasonable belief” that it is abandoned.¹¹⁰ “Abandoned property is defined as property where there is no objectively reasonable belief that the property belongs to a person.”¹¹¹ Property cannot be deemed abandoned if (1) its owner is present, (2) the property has been moved at least twenty feet (20’) since it was tagged with a removal notice, or (3) the property is packed up and placed in such a manner to allow thirty-six inches (36”) of travel clearance and has either been posted with a sign indicating that it is not abandoned or identified by someone near the property as belonging to a specific individual.¹¹²

Property owners, homeless persons, and advocates have all expressed dissatisfaction with the implementation of cleanup policies adopted in the wake of *Lavan v. City of Los Angeles*.¹¹³ Los Angeles has established a process whereby cleanup requests may be made either by telephone call or a smart phone app.¹¹⁴ Cleanups are preceded by seventy-two (72) hours advance notice posted in an affected area, and homeless persons are given 60-gallon bags to fill with their belongings on cleanup days.¹¹⁵ In addition,

105. Stipulated Judgment, *Los Angeles Catholic Worker v. Los Angeles Downtown Industrial District Bus. Improvement District*, No. CV-14-7344 PSG (AJWx) (C.D. Cal. Mar. 15, 2017).

106. *Id.* at 4–6, ¶I(2)(f)–(g).

107. *Id.* at 5, ¶I(2)(g)(i).

108. *Id.* at 6, ¶I(2)(g)(ii).

109. *Id.* at 6, ¶I(2)(g)(iii).

110. *Id.* at 4, ¶I(2)(f).

111. *Id.* at 4, ¶I(2)(f)(i).

112. *Id.* at 4–5, ¶I(2)(f)(ii).

113. See Vernal Coleman, *Protestors Attempt to Block Cleanup of Homeless Camp Near U-Village*, SEATTLE TIMES, Apr. 18, 2018, at B1–B2; Poston & Smith, *supra* note 1, at A8; see generally *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1027–33 (9th Cir. 2012).

114. Poston & Smith, *supra* note 1, at A9.

115. *Id.*

personal property may be tagged and stored by the city for ninety (90) days if someone has too much property to fit in a bag.¹¹⁶ Trash and other hazardous items are removed from a site by city workers, and the area is thereafter sprayed with disinfectant.¹¹⁷ Despite these efforts, some homeless still claim that city workers really don't clean and "just take people's stuff."¹¹⁸ In addition, residents and business owners desire a more permanent solution,¹¹⁹ and complain that city efforts have been futile since people "come right back" after an area has been cleaned.¹²⁰

Seattle residents complained in early 2018 that the city's cleanup process had become less responsive.¹²¹ Later that year, the city increased the number of encampment sites cleared without advance notice under the provisions of its policy allowing immediate removal of obstructions and hazards.¹²² The increase came amid political pressure to address the city's homeless encampment situation.¹²³ However, advocates for the homeless criticized the camp clearing efforts for just moving people around without addressing the real issues underlying homelessness.¹²⁴

City officials in both Los Angeles and Seattle nevertheless contend that the cleanup activities are important.¹²⁵ The mayor's office asserts that Seattle's efforts preserve public health and safety by removing obstructions and hazards, "to ensure sidewalks, roadways, and public spaces remain safe and open for all residents, businesses and visitors to utilize."¹²⁶ Officials in Los Angeles point out that the situation there would be much worse without its cleanup activities.¹²⁷ The president of its public works board asks that those critical of the city's endeavors consider, "[w]ho might have ended up in an unsafe situation because of hazardous material or where someone is forced to walk into the street?"¹²⁸

116. Poston & Smith, *supra* note 1, at A9.

117. *Id.*

118. *Id.* at A8.

119. *Id.* at A1–A8.

120. *Id.* at A8.

121. Vianna Davila, *As Shelter Beds Fill Up, Cleanup of Homeless Camps Slows*, SEATTLE TIMES, Feb. 16, 2018, at A11.

122. Davila, *supra* note 8, at A1, A6.

123. *Id.* at A6.

124. *Id.*

125. *Id.*; Poston & Smith, *supra* note 1, at A8.

126. Davila, *supra* note 8, at A6.

127. Poston & Smith, *supra* note 1, at A8.

128. *Id.*

II. Abandonment Under the Fourth Amendment

In *Hester v. United States*, the Supreme Court indicated that there is no seizure in a legal sense when property is examined after it has been abandoned.¹²⁹ However, the modern origin of the Court's abandonment doctrine is *Abel v. United States*¹³⁰ which was later popularized by the Tom Hanks' movie *Bridge of Spies*.¹³¹ "The *Abel* case does not teach that the defendant has no standing to object to a search and seizure of abandoned property, but that '[t]here can be nothing unlawful in the Government's appropriation of such abandoned property.'"¹³²

Rudolf Abel was arrested on an administrative immigration warrant at a hotel where he had been staying.¹³³ Following his arrest, Abel was told to pack his belongings and he agreed to check out of the hotel.¹³⁴ While packing, Abel deliberately left some items on a window sill and put others in a wastepaper basket.¹³⁵ FBI agents later searched the hotel room without a warrant and found a hollow pencil containing microfilm and a wood block containing a cipher pad in the wastepaper basket.¹³⁶ The Supreme Court upheld the seizure of the items found in the wastepaper basket, because Abel had "thrown them away" and thereby abandoned them.¹³⁷ The Court wrote that those items were "*bona vacantia*" as far as Abel was concerned (i.e., "[v]acant, unclaimed, or stray goods. Those things in which nobody claims a property, and which belonged, under the common law, to the finder. . . .").¹³⁸

129. *Hester v. United States*, 265 U.S. 57, 58 (1964); *accord California v. Hodari D.*, 499 U.S. 621, 628–29 (1991).

130. *Abel v. United States*, 362 U.S. 217 (1960).

131. See e.g. *United States v. Jones*, 707 F.2d 1169, 1172 (10th Cir. 1983) (citing *Abel*, 362 U.S. at 241 as the source of the abandonment rule); *United States v. Wilson*, 472 F.2d 901, 902 (9th Cir. 1972) (same).

132. *Wilson*, 472 F.2d at 902 (quoting *Abel*, 362 U.S. at 241); but see *United States v. Jackson*, 544 F.2d 407, 409 (9th Cir. 1976) (framing the issue of abandonment as a question of standing).

133. *Abel*, 362 U.S. at 222–23.

134. *Id.* at 224.

135. *Id.*

136. *Id.* at 225.

137. *Id.* at 241.

138. *Id.* at 241; *Bona Vacantia*, BLACK'S LAW DICTIONARY 223 (4th ed. 1968); see 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 288, ch. 8 (Oxford, Clarendon Press 1765) (describing *bona vacantia* items as "goods in which no one else can claim a property."); see also 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 409–10, ch. 27 (1766).

Circuit court cases have held Fourth Amendment abandonment differs from abandonment under property law.¹³⁹ They explain that analysis under the Fourth Amendment, “examines the individual’s reasonable expectation of privacy, not his property interest in the item.”¹⁴⁰ The principle underlying these cases “is that upon abandonment, the party loses a legitimate expectation of privacy in the property and thereby disclaims any concern about whether the property or its contents remain private.”¹⁴¹ Consequently, the cases do not really address abandonment of possessory interests because “what is abandoned is not necessarily the [person’s] property, but his reasonable expectation of privacy therein.”¹⁴²

Abandonment issues addressed in modern circuit court search and seizure cases are framed by *Katz v. United States*.¹⁴³ In *Katz*, the Supreme Court wrote, “the Fourth Amendment protects people, not places.”¹⁴⁴ It acknowledged that the Amendment was thought at one time to apply only to searches and seizures of tangible property but explained that the “premise that property interests control the right of the Government to search and seize has been discredited.”¹⁴⁵ The Court explained that the proper focus of inquiry is an individual’s expectation of privacy.¹⁴⁶ It held, “[w]hat a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”¹⁴⁷

Justice Harlan wrote in his *Katz* concurrence that the scope of the protection provided by the Fourth Amendment “requires reference to ‘place.’”¹⁴⁸ He explained that a home is generally a place where one expects privacy, but that objects, activities, and statements exposed to plain view of

139. *E.g.*, *United States v. Fulani*, 368 F.3d 351, 354 (3d Cir. 2004); *United States v. Hoey*, 983 F.2d 890, 892–93 (8th Cir. 1993); *United States v. Lewis*, 921 F.2d 1294, 1302 (D.C. Cir. 1990); *United States v. Jackson*, 544 F.2d 407, 409 (9th Cir. 1976); *United States v. Edwards*, 441 F.2d 749, 753 (5th Cir. 1971).

140. *Fulani*, 368 F.3d at 354; *see also* *United States v. Wilson*, 472 F.2d 901, 902–03 (9th Cir. 1972).

141. *United States v. Veatch*, 674 F.2d 1217, 1220 (9th Cir. 1981).

142. *City of St. Paul v. Vaughn*, 237 N.W.2d 365, 371 (Minn. 1975); *see also* *United States v. Thomas*, 864 F.2d 843, 845 (D.C. Cir. 1989).

143. *See, e.g.*, *United States v. Jackson*, 544 F.2d 407, 409 (9th Cir. 1976) (citing *Katz v. United States*, 389 U.S. 347 (1967)); *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973) (same).

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

145. *Id.* at 353 (1967) (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1966)).

146. *See id.* at 350–52.

147. *Id.* at 351–52 (citations omitted).

148. *Id.* at 361 (Harlan, J., concurring).

outsiders are not protected since they have not been kept private.¹⁴⁹ On the other hand, some activities, like calls from a telephone booth, may occur in a place open to the public, but are protected when a person takes reasonable steps to secure temporary privacy.¹⁵⁰ In Justice Harlan's opinion, Fourth Amendment protection depended upon a two part analysis: "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.'"¹⁵¹ Justice Harlan's formulation is now the prevailing view.¹⁵²

In *United States v. Jones*, the Supreme Court's decision signaled a departure from *Katz* and the resurrection of a property rights-based approach to the Fourth Amendment.¹⁵³ There, the Court found that installation of a global-positioning-system (GPS) tracking device to a vehicle constituted a search.¹⁵⁴ It rejected an argument made by the government that no search had occurred since the device was attached to the exterior of the vehicle and tracked only the movements on public roads.¹⁵⁵ The Court explained that Fourth Amendment rights do not rise or fall solely upon privacy expectations, and a physical intrusion of private property may constitute a search if it is done for the purpose of finding something or obtaining information.¹⁵⁶ It held that real and personal property law concepts are still relevant in the post-*Katz* environment, and wrote, "*Katz* did not narrow the Fourth Amendment's scope."¹⁵⁷ *Katz* remains part of the analysis, but *Jones* makes clear that it does not provide the exclusive test for Fourth Amendment violations.¹⁵⁸

Argument may be made in light of the 2012 *Jones* decision that property law principles should be used to analyze abandonment issues in situations involving seizures.¹⁵⁹ The Fourth Amendment accommodates both a privacy expectation test and a property rights test tied to common law trespass

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

150. *Id.*

151. *Id.*

152. See, e.g., *United States v. Jones*, 565 U.S. 400, 406 (2012); *Kyllo v. United States*, 533 U.S. 27, 31-35 (2001); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1571 (S.D. Fla. 1992), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir.1994), *and directed to undertake settlement discussions*, 76 F.3d 1154 (1996).

153. See *United States v. Jones*, 565 U.S. 400, 404-11 (2012).

154. *Id.* at 404.

155. *Id.* at 406-08.

156. *Id.* at 408, n.5.

157. *Id.* at 408.

158. *Jones*, 565 U.S. at 411.

159. See *id.* at 404-11.

concepts.¹⁶⁰ The privacy expectation test does not squarely address whether a person has a property right to an item.¹⁶¹ The Fourth Amendment protects a person's possessory interests in property apart from whatever privacy interest the person may have in it.¹⁶² It could therefore be argued that a privacy expectation test does not adequately evaluate whether possessory rights to property have been lost.

Pre-*Katz* search and seizure cases held that abandonment depended upon a factual determination regarding the combined acts and intent of the person who purportedly abandoned his or her property.¹⁶³ In *Friedman v. United States*, the Eighth Circuit Court of Appeals wrote that abandonment questions were twofold: "How did the person who was supposed to have abandoned the property act, that is, what did he do, and, second, what was his intention?"¹⁶⁴ The Virginia Supreme Court further explained in *Hawley v. Virginia* that intent was determined "from what the actor said and did; intent, though subjective, is determined from the objective facts at hand."¹⁶⁵ Those objective facts could consist of acts or words known to authorities.¹⁶⁶ For example, a change of residence indicated abandonment of a former residence.¹⁶⁷ A disclaimer of ownership also signaled abandonment.¹⁶⁸ Abandonment could not however be the result of unlawful pressure to discard an item.¹⁶⁹ The pre-*Katz* abandonment test therefore looked much like the test utilized by property law.¹⁷⁰

160. *Carpenter v. United States*, 138 S. Ct. 2206, 2213–14 (2018); *Byrd v. United States*, 138 S.Ct. 1518, 1526 (2018).

161. *See United States v. Oswald*, 783 F.2d 663, 666 (6th Cir. 1986); *City of St. Paul v. Vaughn*, 237 N.W.2d 365, 371 (Minn. 1975).

162. *Hudson v. Palmer*, 468 U.S. 517, 543 (1984) (Stevens, J., concurring in part and dissenting in part).

163. *Friedman v. United States*, 347 F.2d 697, 704 (8th Cir. 1965); *New Jersey v. Bailey*, 235 A.2d 214, 216 (N.J. Super. 1967); *People v. Chitty*, 243 N.Y.S.2d 453, 454 (N.Y. Sup. Ct. 1963); *see also United States v. Minker*, 312 F.2d 632, 634 (3rd Cir. 1962) (stating that abandonment is "largely a question of intent" with citation to *United States v. Wheeler*, 161 F. Supp. 193, 198 (W.D. Ark. 1958) which further explained that "intentions of men generally have to be determined by their acts. Intention to abandon, coupled with a surrender of possession, or what is equivalent thereto, constitutes legal abandonment") (quoting *Kunst v. Mabie*, 77 S.E. 987, 990 (W. Va. 1913).

164. *Friedman*, 347 F.2d at 704.

165. *Hawley v. Virginia*, 144 S.E.2d 314, 317 (Va. 1965).

166. *See Bailey*, 235 A.2d at 216–17.

167. *Argo v. United States*, 378 F.2d 301, 303 (9th Cir. 1967); *see also Feguer v. United States*, 302 F.2d 214, 249 (8th Cir. 1962) (departure from hotel room).

168. *See Elledge v. United States*, 359 F.2d 404, 405 (9th Cir. 1966); *Bailey*, 235 A.2d at 216; *Burton v. United States*, 272 F.2d 473, 476–77 (9th Cir. 1959).

169. *United States v. Festa*, 192 F. Supp. 160, 164–65 (D. Mass. 1960); *see also Work v. United States*, 243 F.2d 660, 662–63 (D.C. Cir. 1957).

170. *See, e.g., Friedman v. United States*, 347 F.2d 697, 704–05 (8th Cir. 1965) (relying upon property law cases).

In *Katsaris v. United States*, the Eleventh Circuit Court of Appeals surveyed cases across the nation involving abandonment in the strict property right sense.¹⁷¹ It concluded that guidance was limited, cases were few and old, and that the property law concept of abandonment has “a generally accepted and a well defined and technical meaning.”¹⁷² It explained that abandonment under property law requires “a voluntary intention to abandon, or evidence from which such intention may be presumed.”¹⁷³ In addition, “[i]t is essential that the owner act without coercion or pressure.”¹⁷⁴ The *Katsaris* court further explained that the property law doctrine of abandonment “has no application unless there is a total desertion by the owner without being pressed by any necessity, duty or utility to himself, but simply because he no longer desires to possess the thing and willingly abandons it to whoever wishes to possess it.”¹⁷⁵ Under property law, “[a]bandonment is always voluntary and involves a positive intention to part with ownership.”¹⁷⁶ It is a combination of a visible act and voluntary intent.¹⁷⁷

A test based solely upon an analysis of property rights may however be inadequate for constitutional analysis because such rights don’t independently control the government’s ability to search and seize.¹⁷⁸ Property law informs Fourth Amendment analysis by measuring the legitimacy of interests thereby protected, but is not by itself determinative of the scope of constitutional requirements.¹⁷⁹ On the same day *Abel v. United States* was decided, the Supreme Court was persuaded in *Jones v. United States*:

[T]hat it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law

171. *Katsaris v. United States*, 684 F.2d 758, 761-63 (1982).

172. *Id.*

173. *Id.* at 762 (quoting *The No. 105, Belcher Oil Co. v. Griffin*, 97 F.2d 425, 426 (5th Cir. 1938)).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*; see generally 1 AM. JUR. 2d *Abandoned, Lost, and Unclaimed Property* § 8 (2018).

178. *Katz v. United States*, 389 U.S. 347, 352-53 (1967); *Warden v. Hayden*, 387 U.S. 294, 304-07 (1966).

179. *Georgia v. Randolph*, 547 U.S. 103, 111 (2006); *Oliver v. United States*, 466 U.S. 170, 183-84 (1984); *United States v. Jacobsen*, 466 U.S. 109, 122, 122 n.22 (1984); *Rakas v. Illinois*, 439 U.S. 128, 142-44, 163 n.12 (1978); see also *Carpenter v. United States*, 138 S.Ct. 2206, 2213 (2018).

which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical.¹⁸⁰

An abandonment test based solely on property law principles might not sufficiently protect either the rights of homeless persons or the public interest. The Fourth Amendment's prohibition against unreasonable searches and seizures applies to the States through the Due Process Clause of the Fourteenth Amendment.¹⁸¹ The Supreme Court has explained in the context of due process that "[p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ."¹⁸² The dimensions of a property law based test would arguably fall under the aegis of each State to decide with little constitutional impediment.¹⁸³ It could therefore be defined in a manner that avoids Fourth Amendment scrutiny altogether, because "Fourth Amendment protection

180. *Jones v. United States*, 362 U.S. 257, 266 (1960); *see also* *United States v. Salvucci*, 448 U.S. 83, 91–93 (1980); *Silverman v. United States*, 365 U.S. 505, 511 (1961); *United States v. Wilson*, 472 F.2d 901, 902–03 (9th Cir. 1972).

181. *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949), *overruled on other grounds by* *Mapp v. Ohio*, 367 U.S. 643, 650–60 (1961).

182. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see also* *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1001 (1984) (restating with respect to the Taking Clause of the Fifth Amendment, "the basic axiom that 'property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'") (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)); *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1031 (9th Cir. 2012). The Supreme Court has similarly indicated that the Fourth Amendment protects interests having a "source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *United States v. Jones*, 565 U.S. 400, 408 (2012) (quoting *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)); *see also* *Rakas v. Illinois*, 439 U.S. 128, 143–44 n.12 (1978); *Cooper v. Gray*, No. CV 12-208 TUC DCB, 2015 WL 13119400, at *8 (D. Az. Feb. 13, 2015).

183. *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 435–36 (1951) ("As a broad principle of jurisprudence rather than as a result of the evolution of legal rules, it is clear that a state, subject to constitutional limitations, may use its legislative power to dispose of property within its reach, belonging to unknown persons."); *see also* *Delaware v. New York*, 507 U.S. 490, 497 (1993) ("States as sovereigns may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly (though somewhat erroneously) called escheat."); *Anderson National Bank v. Lockett*, 321 U.S. 233, 240 (1944) ("At common law, abandoned personal property was not the subject of escheat, but was subject only to the right of appropriation by the sovereign as *bona vacantia*. . . . Like rights of appropriation, except so far as limited by state law and the Fourteenth Amendment, exist in the several states of the United States.") (citation omitted); *cf.* *Security Savings Bank v. California*, 263 U.S. 282, 285–90 (1923) (upholding a State escheat statute against constitutional challenge).

does not extend to abandoned property.”¹⁸⁴ While this might logically follow from *Abel v. United States*,¹⁸⁵ it would create considerable uncertainty and insecurity for transient homeless persons unfamiliar with local laws.

In addition, important public policy issues are not addressed by the traditional abandonment test used in the property law setting. The court in *Lavan* did not address whether a person has a right to leave his or her belongings on a public sidewalk.¹⁸⁶ It is however a core question of public concern, because sidewalks are provided for everyone, and other users are impacted when individuals unilaterally devote portions of them to prolonged personal use.¹⁸⁷ For example, shop owners have a legitimate interest in removal of personal property from the sidewalks in front of their businesses that discourages customers from entering, and they are entitled to know what can and cannot be done when they encounter those situations.¹⁸⁸ Property law abandonment principles do not answer such questions or delve into the propriety of particular private uses of public property and rights-of-way or issues regarding when, where, and how long persons may reasonably leave personal property unattended in public places.¹⁸⁹

III. Proposed Abandonment Test

A modified version of Justice Harlan’s *Katz* rubric would better address competing private and public interests than a test based solely on property law principles; to wit: (1) has someone “exhibited an actual (subjective)” possessory interest in property left unattended, and (2) is that interest “one that society is prepared to recognize as ‘reasonable.’”¹⁹⁰ The original *Katz*

184. *United States v. Rem*, 984 F.2d 806, 810 (7th Cir. 1993); *see also* *United States v. Thomas*, 451 F.3d 543, 545 (8th Cir. 2006); *United States v. Lee*, 916 F.2d 814, 818 (2d Cir. 1990); *Olivera v. City of Modesto*, 38 F. Supp. 3d 1162, 1172 (E.D. Cal. 2014).

185. *See* *United States v. Rem*, 984 F.2d 806, 810 (7th Cir. 1993) (asserting that abandonment eliminates further Fourth Amendment considerations); *United States v. Wilson*, 472 F.2d 901, 902 (9th Cir. 1972) (same); *United States v. Edwards*, 441 F.2d 749, 751–53 (5th Cir. 1971) (same); *see generally* *Abel v. United States*, 362 U.S. 217, 241 (1960); Edward G. Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 BUFF. L. REV. 399, 400–01 (1971).

186. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1031 (9th Cir. 2012).

187. *See, e.g., John A. Tolman & Co. v. City of Chicago*, 88 N.E. 488, 489–90 (Ill. 1909).

188. An abutting property owner may own the land underlying a sidewalk and street subject only to the public’s right of passage. *E.g. Puget S. Alumni Kappa Sig. v. Seattle*, 422 P.2d 799, 802 (Wash. 1967). Such owner may also have the right to enjoin unlawful uses, and the scope and extent of the public’s easement might therefore limit the purposes for which a sidewalk or street may be used. *See, e.g., Motoramp Garage Co. v. City of Tacoma*, 241 P. 16, 16–18 (Wash. 1925).

189. *Cf. Kincaid v. City of Fresno*, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732, at *37 (E.D. Cal. Dec. 8, 2006) (limiting the scope of a property law inquiry to owner intent).

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

formulation has detractors.¹⁹¹ It can arguably be somewhat “circular, and hence subjective and unpredictable.”¹⁹² Those criticisms do not, however, diminish its value as an analytical tool to bilaterally evaluate issues involving an interplay between personal exigencies and societal norms.¹⁹³ For example, a person may sincerely intend to go back to a campsite and belongings that are deserted during periods of inclement weather, but the plausibility of any purported belief that forsaken property will realistically await the person’s return undisturbed diminishes with the passage of time.¹⁹⁴ A day might be considered reasonable, but weeks or months strain reasonableness despite someone’s subjective intent,¹⁹⁵ especially if the unattended property interferes with other uses of the public property or right-of-way on which it sits. An abandonment test based solely on property law would focus only on owner intentions,¹⁹⁶ whereas a *Katz*-based test would also consider the reasonableness of the owner’s expectations.¹⁹⁷

Following remand in *Lavan*, Los Angeles contended that the unattended property destroyed by city was indeed abandoned.¹⁹⁸ The United States District Court for the Central District of California referenced the abandonment test developed under the *Katz* framework and indicated that the inquiry focused “on whether, ‘through words, acts or other objective indications, a person has relinquished a reasonable expectation of privacy in the property at the time of the search or seizure.’”¹⁹⁹ The court commented that “a determination is ‘to be made in light of the totality of the circumstances, and two important factors are denial of ownership and physical relinquishment of the property.’”²⁰⁰ The modification proposed in

191. *Carpenter v. United States*, 138 S.Ct. 2206, 2236–46 (Thomas, J., dissenting); *Minnesota v. Carter*, 525 U.S. 83, 97–98 (1998) (Scalia, J., concurring).

192. *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

193. See, e.g., *Love v. City of Chicago*, No. 96-C-0396, 1996 WL 627614, at *5–6 (N.D. Ill. Oct. 25, 1996); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1571–73 (S.D. Fla. 1992), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir.1994), *and directed to undertake settlement discussions*, 76 F.3d 1154 (1996).

194. *Cf. California v. Greenwood*, 486 U.S. 35, 40 (1988) (“It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.”).

195. See *Proctor v. District of Columbia*, 310 F. Supp. 3d 107, 114–15 (D.D.C. 2018).

196. See *Katsaris v. United States*, 684 F.2d 758, 761–62 (1982).

197. See, e.g., *United States v. Alden*, 576 F.2d 772, 777 (8th Cir. 1978); see also *United States v. Reichert*, 647 F.2d 397, 399 (3rd Cir. 1981).

198. *Lavan v. City of Los Angeles*, No. CV 11-2874, 2014 WL 12693524, at *4–6 (C.D. Cal. July 24, 2014).

199. *Id.* at *8, (quoting *United States v. Nordling*, 804 F.2d 1466, 1469 (9th Cir. 1986)); accord *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1013 (C.D. Cal. 2011), *aff’d on other grounds* 693 F.3d 1022, 1026–31 (9th Cir. 2012).

200. *Id.* at *8 (quoting *Nordling*, 804 F.2d at 1469); accord *Lavan*, 797 F. Supp. 2d at 1013.

this article would redirect the analysis to whether a reasonable expectation of an ongoing possessory interest has been relinquished as opposed to a reasonable expectation of privacy, but the words, acts, or other objective indications examined to make a determination would remain much the same.

The point of analysis under a modified test would be slightly different than a privacy expectation test, but the method of inquiry should not change.²⁰¹ In summary, “[a]bandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts. . . . All relevant circumstances existing at the time of the alleged abandonment should be considered.”²⁰² There is a subjective component, but there must be more than just subjective intent, because any expectation must be objectively reasonable.²⁰³ Therefore, an abandonment “determination is to be made by objective standards.”²⁰⁴ In *United States v. Basinski*, the Eighth Circuit Court of Appeals more fully explained:

To demonstrate abandonment, the government must establish by a preponderance of the evidence that the defendant’s voluntary words or conduct would lead a reasonable person in the searching officer’s position to believe that the defendant relinquished his property interests in the item searched or seized. . . . Because this is an objective test, it does not matter whether the defendant harbors a desire to later reclaim an item; we look solely to the external manifestations of his intent as judged by a reasonable person possessing the same knowledge available to the government agents We look at the totality of the

201. The district court in *Lavan* described the test as being a question of whether a person had relinquished a privacy expectation in property that has been seized, but it applied the test more like the modified *Katz* test proposed in this article by considering “under the totality of circumstances, whether any other objective facts indicate[d] that the property in question appeared to be abandoned at the time of seizure.” *Lavan*, 2014 WL 12693524, at *8. Such application seems to follow from the Ninth Circuit’s earlier ruling in the case that Fourth Amendment protection against unreasonable seizures are not dependent on privacy expectations. *Lavan*, 693 F.3d at 1027–29.

202. *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973) (citation omitted); *accord Nordling*, 804 F.2d at 1469; *Lavan*, 2014 WL 12693524, at *8; *Lavan*, 797 F. Supp. 2d at 1013, *aff’d* 693 F.3d 1022 (9th Cir. 2012).

203. *United States v. Austin*, 66 F.3d 1115, 1118 (10th Cir. 1995); *see also United States v. Basinski*, 226 F.3d 829, 837, 837 n.2 (7th Cir. 2000).

204. *United States v. Jones*, 707 F.2d 1169, 1172 (10th Cir. 1983); *accord United States v. Fulani*, 368 F.3d 351, 354 (3d Cir. 2004); *United States v. Rem*, 984 F.2d 806, 810–11 (7th Cir. 1993); *United States v. Wider*, 951 F.2d 1283, 1285 (D.C. Cir. 1991); *United States v. Kendall*, 655 F.2d 199, 200–02 (9th Cir. 1981); *Proctor v. District of Columbia*, 310 F. Supp. 3d 107, 114 (D. D.C. 2018).

circumstances, but pay particular attention to explicit denials of ownership and to any physical relinquishment of the property.²⁰⁵

Under a modified *Katz*-based abandonment test, officials would evaluate the totality of the circumstances during a cleanup action to determine if objective manifestations (i.e., words, acts or other objective indications) would lead a reasonable person in the official's position to conclude that possessory interests in the property targeted for removal have been relinquished.²⁰⁶ The following guidelines are suggested:

1. Property is not abandoned when its owner is present; unless it has been physically relinquished or affirmatively disclaimed.²⁰⁷
2. Property left in someone else's care is not abandoned.²⁰⁸
3. Garbage and debris left in a public area is abandoned.²⁰⁹
4. Property deserted beyond a reasonable period of time, when considering the totality of the circumstances, is abandoned.²¹⁰

These guidelines cannot, however, be blindly applied. "Whether there has been an abandonment, of course, depends upon all relevant circumstances existing at the time."²¹¹

Recurring considerations have emerged from property removal cases involving homeless persons to evaluate whether someone has demonstrated a possessory interest in unattended property.²¹² Organized and packed items

205. *Basinski*, 226 F.3d at 836–37 (citations omitted); see also *United States v. Quintana-Grijalva*, 332 F. App'x 487, 491 (10th Cir. 2009). Some courts however hold that abandonment "must be established by clear and unequivocal evidence." *Fulani*, 368 F.3d at 354; see also *Friedman*, 347 F.2d at 704.

206. See *Proctor*, 310 F. Supp. 3d at 114; *Lavan*, 2014 WL 12693524, at *8–9; see generally *Basinski*, 226 F.3d at 836–37.

207. See *United States v. Nordling*, 804 F.2d 1466, 1469–70 (9th Cir. 1986) (disclaimer); see also *United States v. Liu*, 180 F.3d 957, 960 (8th Cir. 1999) (physical relinquishment).

208. *United States v. James*, 353 F.3d 606, 616 (8th Cir. 2003) ("a person does not abandon his property merely because he gives it to someone else to store"); see also *Basinski*, 226 F.3d at 837–38.

209. *E.g.*, *United States v. Redmon*, 138 F.3d 1109, 1112–14 (7th Cir. 1998); *United States v. Alden*, 576 F.2d 772, 777 (8th Cir. 1978).

210. See, e.g., *United States v. Chandler*, 197 F.3d 1198, 1200–01 (8th Cir. 1999).

211. *United States v. Manning*, 440 F.2d 1105, 1111 (5th Cir. 1971).

212. Compare Stipulated Judgment at 4–6, ¶I(2)(f)–(g), *Los Angeles Catholic Worker v. Los Angeles Downtown Industrial District Business Improvement District*, No. CV-14-7344 PSG (AJWx) (C.D. Cal. Mar. 15, 2017) (stipulated factors used to determine if a seizure is reasonable) with *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1571 (S.D. Fla. 1992) (reviewing factual circumstances manifesting an expectation of privacy), remanded for limited purposes, 40 F.3d 1155 (11th Cir.1994), and directed to undertake settlement discussions, 76 F.3d 1154 (1996).

show ownership by their arrangement.²¹³ Haphazardly placed materials might reasonably be considered abandoned.²¹⁴ The characteristics of the items are also relevant.²¹⁵ Blankets, clothing, food, and identification indicate an ownership interest, while refuse and scattered materials demonstrate abandonment.²¹⁶ In addition, the manner in which items are placed or arranged is pertinent.²¹⁷ Items placed out of the way are more likely owned than abandoned.²¹⁸ Safekeeping measures are a particularly important indicator.²¹⁹ Property left in the care of others cannot fairly be classified as abandoned.²²⁰ However, disavowal of ownership may be viewed as an act of relinquishment.²²¹ Walking away from property during a cleanup effort may indicate abandonment.²²² There is also temporal element, and the longer an item is left unattended in the same spot, the more likely it is abandoned.²²³ Such considerations would be material under either a modified *Katz*-based test to determine whether someone has displayed a possessory interest in unattended property or a property law based test to

213. See *Pottinger*, 810 F. Supp. at 1571; compare Stipulated Judgment at 5, ¶I(2)(g)(ii), *Los Angeles Catholic Worker* (allowing unpacked materials to be immediately posted with a removal notice), with Stipulated Judgment at 5, ¶I(2)(g)(iii), *Los Angeles Catholic Worker* (requiring a twenty-four (24) hour observation period before packed materials may be posted).

214. See *Lavan*, 2014 WL 12693524, at *8.

215. See *Kincaid v. City of Fresno*, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732, at *37 (E.D. Cal. Dec. 8, 2006); *Pottinger*, 810 F. Supp. at 1571.

216. See *Pottinger*, 810 F. Supp. at 1571 (concluding that “bedrolls, blankets, clothing, toiletry items, food, and identification” suggest ownership and are reasonably distinguishable from paper refuse and scattered items; *Hooper v. City of Seattle*, No. C17-77RSM, 2017 WL 4410029, at *9–10 (W.D. Wash. Oct. 4, 2017) (distinguishing between “personal property” and “hazardous materials”).

217. See *Pottinger*, 810 F. Supp. at 1571.

218. See *Love v. City of Chicago*, No. 96-C-0396, 1998 WL 60804, at *10 (N.D. Ill. Feb. 6, 1998)(materials moved to “safe areas” during cleanups are not abandoned); *Pottinger*, 810 F. Supp. at 1571 (items placed against a tree or other object or covered by a pillow or blanket indicate ownership); Stipulated Judgment at 4-5, ¶I(2)(f)(ii), *Los Angeles Catholic Worker* (items stored in a manner that preserves an area for public passage cannot be deemed abandoned).

219. See *Pottinger*, 810 F. Supp. at 1571 (recognizing that homeless persons may ask others to watch their property while they are away); Stipulated Judgment at 5, ¶I(2)(g)(i), *Los Angeles Catholic Worker* (requiring officials to ask persons who are nearby unattended property if they can identify its owner).

220. See *Cooper v. Gray*, No. CV 12-208 TUC DCB, 2015 WL 13119400, at *8 (D. Az. Feb. 13, 2015).

221. *Lavan v. City of Los Angeles*, No. CV 11-2874 PSG (AJWx), 2014 WL 12693524, at *9. (C.D. Cal. July 24, 2014).

222. See *Proctor v. District of Columbia*, 310 F. Supp. 3d 107, 114–15 (D. D.C. 2018); *Lavan*, 2014 WL 12693524, at *9; *Love*, 1998 WL 60804, at *10.

223. See *Proctor*, 310 F. Supp. 3d at 114–15; Stipulated Judgment at 6, ¶I(2)(g)(iii), *Los Angeles Catholic Worker*, No. CV-14-7344 PSG.

determine whether a voluntary intention to abandon has been exhibited.²²⁴ If any reasonable doubt exists whether unattended property is abandoned, the property should be treated as unabandoned.²²⁵

Conclusion

The Fourth Amendment protects against both unreasonable searches and unreasonable seizures.²²⁶ It applies to seizures even if they are not the outcome of a search.²²⁷ An official “who happens to come across an individual’s property in a public area [can] seize it only if Fourth Amendment standards are satisfied . . .”²²⁸ A property seizure occurs when there is any meaningful interference with person’s possessory interests in that property.²²⁹ The Fourth Amendment therefore prohibits unreasonable interference with the possessions and belongings of homeless persons,²³⁰ because “the property of homeless individuals is due no less protection under the fourth amendment than that of the rest of society.”²³¹

The Fourth Amendment is inapplicable to seizures of abandoned property.²³² This does not mean that property momentarily left on a public sidewalk can be summarily seized and destroyed.²³³ The Ninth Circuit Court of Appeals held in *Lavan v. City of Los Angeles* that a homeless person retains a protected property right in the person’s unattended belongings unless they have been abandoned.²³⁴ The modern abandonment test focuses upon whether a person has relinquished a reasonable expectation of privacy

224. Cf. *Lavan*, 2014 WL 12693524, at *8–9 (considering abandonment under a *Katz* based test); *Kincaid v. City of Fresno*, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732, at *37 (E.D. Cal. Dec. 8, 2006) (considering abandonment under a test based on property law); *Pottinger*, 810 F. Supp. at 1571–72 (applying a *Katz* based test), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir.1994), *and directed to undertake settlement discussions*, 76 F.3d 1154 (1996).

225. Cf. *Hooper v. City of Seattle*, No. C17-0077RSM, 2017 WL 4410029, at *9 (W.D. Wash. Oct. 4, 2017) (upholding policies giving officials a degree of discretion but stressing that the policies required that “[a]ny doubts regarding the classification of an item are to be resolved in favor of treating the item as personal property.”).

226. See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

227. *Soldal v. Cook County*, 506 U.S. 56, 68 (1992).

228. *Id.*

229. See *Jacobsen*, 466 U.S. at 113.

230. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030–31 (9th Cir. 2012).

231. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1573 (S.D. Fla. 1992), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir.1994), *and directed to undertake settlement discussions*, 76 F.3d 1154 (1996); see also *Recchia v. City of Los Angeles Dept. of Animal Svcs.*, 889 F.3d 553, 558 (9th Cir. 2018); *Cobine v. City of Eureka*, 250 F. Supp. 3d 423, 434–35 (N.D. Cal. 2017).

232. See *Abel v. United States*, 362 U.S. 217, 241 (1960); *Hester v. United States*, 265 U.S. 57, 58 (1964).

233. *Lavan*, 693 F.3d at 1029.

234. *Id.* at 1031–32.

in the property at the time of its seizure.²³⁵ However, the court in *Lavan* held that a person “need not show a reasonable expectation of privacy to enjoy the protection of the Fourth Amendment against *seizures* of their unabandoned property.”²³⁶ The modern abandonment test therefore does not squarely address abandonment for seizures not involving searches, because “it is possible for a person to retain a property interest in an item, but nonetheless to relinquish his or her reasonable expectation of privacy in the object.”²³⁷

The modern abandonment test is based upon a two-part rubric proposed in Justice Harlan’s concurrence in *Katz v. United States*.²³⁸ When applied to decide whether property belonging to homeless persons has been abandoned, it looks at “first, whether the individual has a subjective expectation of privacy in the belongings; and second, whether that expectation is one that society is prepared to recognize as reasonable.”²³⁹ It may be argued, based on more recent Supreme Court opinions that depart from *Katz*, that a property rights approach should be utilized in situations involving seizures to determine abandonment issues.²⁴⁰ A property law based approach would however only address subjective intent to abandon.²⁴¹ A retreat to strict property law principles would be at odds with the Supreme Court’s repeated repudiation of “the notion that ‘arcane distinctions developed in property and tort law’ ought to control [] Fourth Amendment inquiry.”²⁴²

Abandonment issues involving homeless persons’ property should instead be evaluated using a modified version of the *Katz* framework; namely: (1) has someone “exhibited an actual (subjective)” possessory interest in property left unattended, and (2) is that interest “one that society is prepared to recognize as ‘reasonable.’”²⁴³ Inquiry under a modified *Katz*-based test would focus “on whether, through words, acts or other objective indications, a person has relinquished a reasonable expectation of [a

235. *Lavan v. City of Los Angeles*, No. CV 11-2874 PSG (AJWx), 2014 WL 12693524, at *8 (C.D. Cal. July 24, 2014); *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1013 (C.D. Cal. 2011), *aff’d on other grounds* 693 F.3d 1022 (9th Cir. 2012); *Pottinger*, 810 F. Supp. at 1570–71.

236. *Lavan*, 693 F.3d at 1027–28.

237. *United States v. Thomas*, 864 F.2d 843, 845 (D.C. Cir. 1989).

238. *See e.g.*, *United States v. Wilson*, 472 F.2d 901, 902 (9th Cir. 1972); *see generally* *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

239. *Pottinger*, 810 F. Supp. at 1571; *see also* *Love v. City of Chicago*, No. 96-C-0396, 1998 WL 60804, at *9 (N.D. Ill. Feb. 6, 1998).

240. *See* *United States v. Jones*, 565 U.S. 400, 404–11 (2012).

241. *See* *Katsaris v. United States*, 684 F.2d 758, 761–63 (1982).

242. *United States v. Salvucci*, 448 U.S. 83, 91–93 (1980) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)); *see also* *Katz*, 389 U.S. at 352–53; *Jones v. United States*, 362 U.S. 257, 266 (1960).

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

possessory interest in unattended] property at the time of [its] seizure.”²⁴⁴ The determination would be made using an objective standard considering a totality of the circumstances known to officials at the time of seizure.²⁴⁵ A modified test would remain aligned closely enough to the original framework that resort could still be made with respect to procedural matters to abandonment cases decided under the *Katz* rubric.²⁴⁶

Homelessness is a national epidemic. On a given night in 2018, 194,467 homeless persons were staying in locations without shelter in the United States.²⁴⁷ They suffer from “exposure to the elements, insect and rodent bites, and the absence of sanitary facilities for sleeping, bathing or cooking[,]” and rarely choose to live in such conditions.²⁴⁸ There are legitimate reasons for local authorities to keep areas clean where homeless persons congregate, because noxious conditions can quickly develop that “present a health hazard to the general public, as well as to the homeless individuals in the area.”²⁴⁹

Cleanup activities are important. The *Orange County Register* reported in 2018 that a cleanup along the Santa Ana River Trail in Anaheim, California yielded 404 tons of debris, including 13,950 needles, and 5,279 pounds of hazardous waste (human waste, propane, pesticides, etc.).²⁵⁰ However, local authorities must “balance the right of people living unsheltered with the [] responsibility to maintain public health and safety.”²⁵¹ It is sometimes difficult to differentiate between abandoned property and unabandoned property during cleanup efforts.²⁵² Authorities should therefore err on the side of characterizing usable personal property as unabandoned if they are unsure whether something is abandoned, because

244. *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1013 (C.D. Cal. 2011) (quoting *United States v. Nordling*, 804 F.2d 1466, 1469 (9th Cir. 1986)), *aff’d* 693 F.3d 1022 (9th Cir. 2012).

245. *United States v. Basinski*, 226 F.3d 829, 836-37 (7th Cir. 2000).

246. *See generally id.* at 836–37 (summarizing the procedure used under *Katz* to determine whether something has been abandoned).

247. MEGHAN HENRY ET AL., U.S. DEP’T. HOUSING & URB. DEV. OFF. OF COMMUNITY PLAN. & DEV., THE 2018 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 10 (2018).

248. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir.1994), *and directed to undertake settlement discussions*, 76 F.3d 1154 (1996).

249. *Love v. City of Chicago*, No. 96-C-0396, 1996 WL 627614, at *3, ¶ 8 (N.D. Ill. Oct. 25, 1996).

250. Theresa Walker, *Cleaning up a wasteland of epic proportions*, ORANGE COUNTY REG., Mar. 10–11, 2018, at A3.

251. Davila, *supra* note 8, at A6 (quote attributed to the City of Seattle Mayor’s Office).

252. *Cf. Joyce v. City and County of San Francisco*, 846 F. Supp. 843, 863 (N.D. Cal. 1994) (acknowledging San Francisco’s argument that it is difficult to distinguish between abandoned and unabandoned property).

“the loss of items such as clothes and medicine threatens the already precarious existence of homeless individuals by posing health and safety hazards; additionally, the prospect of such losses may discourage them from leaving the parks and other areas to seek work, food or medical attention.”²⁵³ Well intended premature disposal of a usable unabandoned item only worsens the plight of the homeless person deprived of its use and perpetuates the public health and safety problem that a cleanup effort seeks to alleviate.

253. *Pottinger*, 810 F. Supp. at 1573.