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Connecticut v. Mooney and Expectation of Privacy: The Double-Edged Sword of Advocacy for the Homeless

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CONNECTICUT v. MOONEY AND EXPECTATION OF PRIVACY: THE DOUBLE-EDGED SWORD OF ADVOCACY FOR THE HOMELESS

I. INTRODUCTION

We have reached that point in our society's evolution where, in order to extend Fourth Amendment protection to the homeless to be free from unreasonable searches and seizures of their personal property, we must also recognize our society's acceptance of the existence and conditions of homelessness. In granting an expectation of privacy to a homeless man, the Supreme Court of Connecticut, in *Connecticut v. Mooney*,[1] has broken new ground in defining the constitutional rights of the homeless. On the other hand, the court has perhaps pushed the homeless into an even more precarious position by finding that society has accepted homelessness as a cultural norm. *Connecticut v. Mooney*, a case of first impression, seeks to clarify a fine point of constitutional law in that it further defines Fourth Amendment protection;[2] unfortunately, establishing a theoretical right for the homeless to be free from unreasonable search and seizure does little for the day-to-day plight of the homeless.[3]

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[1] 588 A.2d 145 (Conn.), *cert. denied*, 112 S. Ct. 330 (1991).

[2] *Id.* at 149.

[3] Congress has defined the homeless as:

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 . . . shelter designed to provide temporary living accommodations . . .;

b) . . . 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.

Steward B. McKinney Homeless Assistance Act, 42 U.S.C. § 11302(a) (1988). *See also* Donald E. Baker, Comment, *"Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless*, 45 U. MIAMI L. REV. 417, 420 n.12 (1991).

Aside from housing or shelter, the homeless require assistance with a variety of needs: health care; food and other basic subsistence items; assistance in substance abuse; drug therapy; psychological counseling; employment assistance, job training, and counseling; and child-care assistance. *See* Baker, *supra*, at 420 n.12.

Although the courts have interpreted the Fourth Amendment[4] to protect people and their privacy, and not simply their property, from unreasonable search and seizure, the Connecticut ruling was the first[5] in which the highest court of a state applied these rights to the personal belongings left at "home" by a homeless person.[6]

Because the court's decision in *Mooney* was so tied to the particular circumstances of the case,[7] Part II, Section A, of this Note examines the facts upon which the court based its decision. Section B explains the various analyses the court used to assess whether a reasonable expectation of privacy could be found, first by looking at the area that the defendant wished protected, and second by looking at the containers that the defendant desired protected. Section C explores the rationale of the dissenting opinion in *Mooney*. Part III compares and contrasts the majority opinion with the dissent. Part IV, Section A, examines the perspective of homeless rights activists on the legal rights established by *Mooney*. Section B discusses "anti-homeless" legislation as a general trend. Section C looks at current trends in establishing rights of the homeless. Finally, in Part V, this Note concludes that *Mooney*, although correctly decided,[8]

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

[5] Though the *Mooney* case was the first to put the issues under such a thorough analysis and to find that Fourth Amendment protection applied to the facts of the case, it was not the first case to address the issue of Fourth Amendment prohibition of warrantless searches of the public places that the homeless occupy. United States v. Ruckman, 806 F.2d 1471 (10th Cir. 1986), considered the constitutionality of a warrantless search of a natural cave on federal lands in which a homeless man had lived for eight months. The *Ruckman* court found that the Fourth Amendment did not apply to the facts of that case because the cave was accessible to the public and because the defendant was a trespasser on federal lands. *Id.* at 1472–73.

[6] *A Home Under the Highway*, WASH. POST, Mar. 21, 1991, at A20.

[7] When faced with a legal issue in the criminal context, courts will sometimes narrow their holdings by focusing as much as possible on the particular facts of the case. *See, e.g.*, United States v. Fernandez-Angulo, 863 F.2d 1449, 1453 (9th Cir. 1988), *modified on other grounds*, 897 F.2d 1514 (9th Cir. 1990) (holding was "purposefully narrow [and] fact-specific"); United States v. Earley, 816 F.2d 1428, 1446 (10th Cir. 1987) (court "duly and properly limited [cases] to their narrow holdings. In turn and as would be expected, its holding also was narrow and limited to the facts before it."); United States v. Pope, 561 F.2d 663, 668–69 (6th Cir. 1977) ("We wish to emphasize the narrowness of this holding."). *See generally* Wayne R. LaFave, *Being Frank About the Fourth: On Allen's "Process of 'Factualization' in the Search and Seizure Cases,"* 85 MICH. L. REV. 427, 437–39 (1986); Francis A. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 3–5 (1950).

[8] For commentary taking issue with this Note's conclusion that the Connecticut court correctly decided *Mooney*, compare Peter Mancini, Discourse, Mooney *and Privacy: Some Tough*

further indicates a turn in society's attitude toward the homeless. This turn in attitude will do more harm than good if society's recognition of homelessness and its conditions results in eventual indifference to its problems or in disillusionment in finding its solutions.

II. *CONNECTICUT V. MOONEY*, A CASE DESCRIPTION

David Mooney, a homeless man, was tried for felony murder[9] and robbery in the first degree.[10] During his trial, Mooney filed a motion to suppress certain evidence that the police had obtained from a search of his duffel bag and a cardboard box that he had kept in his "home," an area under a bridge.[11] The trial court denied Mooney's motion, thus allowing into court evidence obtained from the search of his personal property that ultimately linked Mooney to the murder and robbery.[12] Mooney was convicted,[13] and he subsequently brought an appeal.[14] The Supreme Court of Connecticut held that the trial court should have granted the motion to suppress

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Questions, 72 B.U. L. REV. 425 (1992) (concluding court erred in finding any expectation of privacy in Mooney's unattended belongings), with Kevin Royer, Discourse, *The* Mooney *Blues: Homelessness and Constitutional Security from Unreasonable Searches*, 72 B.U. L. REV. 443 (1992) (concluding court erred in not granting Mooney expectation of privacy in his non-traditional homeless residence).

[9] Connecticut v. Mooney, 588 A.2d 145, 149 (Conn. 1991). *See* CONN. GEN. STAT. ANN. §§ 53a–54c (West 1985).

[10] *Mooney*, 588 A.2d at 149. *See* CONN. GEN. STAT. ANN. §§ 53a–134(a)(1) (West 1985).

[11] *Mooney*, 588 A.2d at 149.

[12] *Id.*

[13] Mooney was sentenced to 50 years in prison. He remained in custody at the state's maximum-security prison at Somers throughout the appeal process. *See* Sean P. Murphy, *Ruling Recognizes Privacy Rights of Homeless: Connecticut Court Throws Out Murder Conviction*, BOSTON GLOBE, Mar. 19, 1991, at 19, 21; Kirk Johnson, *Property of a Homeless Man is Private, Hartford Court Says*, N.Y. TIMES, Mar. 19, 1991, at B1, B6. The State opted to accept a plea bargain for first-degree manslaughter rather than risk conducting a new trial without the excluded evidence. As a result, David Mooney will be eligible for release from prison late in 1992 after having served five years. Joseph Calve, *Manslaughter Agreement Will Free Homeless Man*, CONN. L. TRIB., Jan. 13, 1992, at 8; *Homeless Man Convicted of Murder is to be Freed*, N.Y. TIMES, Jan. 8, 1992, at B5.

[14] *Mooney*, 588 A.2d at 149. Mooney's appeal actually contained four separate claims: 1) a motion to suppress evidence gathered from the challenged search and seizure; 2) a motion to dismiss for lack of a speedy trial; 3) a request that certain evidence regarding an alleged larceny occurring subsequent to the murder be declared inadmissible; and 4) a request for access to mental health records of a prosecution witness. *Id.* The court, however, found no merit in the latter three claims for various procedural reasons. *Id.* at 161–71. This Note confines itself to an analysis of Mooney's first claim for suppression of evidence obtained in the search and seizure of his personal property; the other three claims fall outside the scope of this Note.

the evidence referred to in Mooney's claim.[15] Consequently, the Supreme Court of Connecticut reversed the lower court's judgment and remanded the case for a new trial.[16]

A. *Facts of the Case*

For about a month prior to his arrest,[17] David Mooney, an unemployed carpenter,[18] had been living under a highway bridge abutment by the State Street entrance ramp to route I-91 in New Haven, Connecticut, a piece of property owned by the state.[19] A steep, crushed stone embankment and heavy underbrush separated the area in which Mooney lived from the I-91 entrance ramp.[20] For about two weeks before setting up his home under the bridge, Mooney had lived beside a fence near the Trumbull Street entrance to I-91.[21] When another homeless man moved in nearby, Mooney left that location and moved to the bridge abutment at the State Street area, presumably for reasons of privacy.[22]

As the court noted, the jury could reasonably have found the following facts.[23] On July 30, 1987, David Mooney took Mark Allen,[24] to whom Mooney owed money for drugs, to the Branford, Connecticut, condominium of Theodore Genovese, with whom Mooney claimed to have had a homosexual relationship.[25] They visited the condominium to steal personal property from Genovese; Mooney planned to then pay his debt to Allen with the stolen property.[26] Mooney told Allen to play along with the homosexual ploy as a cover for Allen's gaining entry into Genovese's home.[27]

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[15] *Id.* at 149.

[16] *Id.* at 171.

[17] *Id.* at 151.

[18] *A Home Under the Highway*, *supra* note 6, at A20.

[19] *Mooney*, 588 A.2d at 150.

[20] *Id.* Mooney's attorney, Emanuel Margolis—a partner at the Stamford, Connecticut, law firm of Wofsey, Rosen, Kweskin & Kuriansky, and then-chair of the Connecticut Civil Liberties Union who took over the case on appeal on a pro bono basis—at oral argument brandished photographs of Mooney's "home" under the I-91 bridge and asserted that the area was "almost impossible" to reach due to its physical characteristics. Joseph Calve, *Does the Fourth Amendment Protect the Homeless?*, N.J. L.J., Oct. 18, 1990, at 9.

[21] *Mooney*, 588 A.2d at 151.

[22] *Id.*

[23] *Id.* at 149.

[24] Mark Allen was tried and convicted as an accomplice to the crimes in separate proceedings. *See* Connecticut v. Allen, 579 A.2d 1066 (Conn. 1990).

[25] *Mooney*, 588 A.2d at 149. *See also* Murphy, *supra* note 13, at 19, 21.

[26] *Mooney*, 588 A.2d at 149.

[27] *See id.*

When Mooney and Allen arrived at the condominium, Genovese invited them in and offered them drinks.[28] Mooney and the victim took a shower together, and after a certain amount of sexual contact, Mooney began beating Genovese.[29] Allen pulled Mooney off the victim, but then left the bedroom to search the condominium for items to steal.[30] Mooney then killed Genovese by strangling him with a cord.[31] Allen fled the condominium, taking with him coins, a VCR, and other items, and stole the victim's car.[32] Genovese's body was discovered on the floor of the bedroom the next day.[33]

The police arrested Allen in connection with Genovese's murder on August 5, 1987.[34] Allen admitted to being in the condominium on the day of the murder and to stealing the various items, but denied involvement in the murder.[35] In statements to the police, Allen implicated Mooney in Genovese's murder; the police subsequently obtained an arrest warrant for Mooney and took him into custody on the night of August 5, 1987.[36]

At the hearing on Mooney's motion to suppress, the parties disclosed the following facts.[37] While Mooney was in custody following his arrest, Detective Anthony Morro of the Branford Police Department met Mooney's girlfriend, Linda Spencer, at her place of employment shortly after midnight on August 6th.[38] Morro asked Spencer to take him to the place where Mooney had been living at the time of the murder, which she did.[39] Morro, after scrambling up the embankment, searched the area and found a blanket that Mooney used as a mattress, a sleeping bag, a closed cardboard box, a suitcase, a closed duffel bag, and some trash.[40] To shield them from public sight, Mooney had placed all the items up on the metal and cement beams of the highway support structure—using the beams as shelves—with the exception of the blanket, duffel bag,

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 150. Allen's arrest followed the police's discovery that Allen was in possession of some of the murder victim's property, including his car. *Id.* at 150–51.

[35] *Id.* at 150.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

and trash, which were lying on the ground.[41] Detective Morro opened the duffel bag and found a paper bag inside that contained around $700 in coins.[42]

Rather than search any of the other items at that time, Morro contacted the Branford police evidence officer[43] and requested that he come to the scene; the police then tagged the various items and took them to the police department where they were opened and searched.[44] The State subsequently submitted into evidence a size 38 belt that had been in the cardboard box; they also submitted the coins, a pair of bloodstained white pants, and pieces of jewelry, all of which had been in the duffel bag.[45] Aside from the belt, which Mooney asserted belonged to a drinking companion, Mooney claimed ownership of all the items.[46]

At the trial, the State succeeded in connecting Mooney to Genovese's murder by introducing the items that the police had seized from Mooney's closed containers—including the white, bloodstained pants and the size 38 belt (the same size as that worn by the victim).[47] Allen identified[48] the pants as those worn by Mooney on the day of the murder.[49]

Trial testimony also determined that during the month that Mooney lived under the bridge abutment, he was the sole occupant of the area.[50] Mooney slept at the site in the evenings[51] and would leave the area daily, but not before securing his belongings in the same manner in which the police had found them—up on the girders, so that people at the bottom of the embankment could not

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[41] *See id.* at 150–51.

[42] *Id.*

[43] Duties of evidence officers can vary greatly from precinct to precinct. Generally, they are specially trained to handle and preserve evidence at a crime scene so as not to lose the evidence or to contaminate its evidentiary value. Telephone interview with George Kelling, Professor, College of Criminal Justice, Northeastern University, Boston, Mass., and Fellow, Program in Criminal Justice Policy and Management, Kennedy School of Government, Harvard University, Cambridge, Mass. (Feb. 9, 1992).

[44] *Mooney*, 588 A.2d at 150–51.

[45] *See id.* at 151.

[46] *Id.*

[47] *Id.* The State offered other items taken from the closed containers, including the coins, to connect Mooney with a subsequent robbery of another homosexual man. *Id.* at 151–52. This evidence concerned the basis of Mooney's third claim in his appeal and falls outside the scope of this Note. *See id.* at 152; *see also supra* note 14.

[48] Because his testimony was required to connect Mooney to the robbery and murder of Genovese, Allen was an essential witness to the State's case. *Mooney*, 588 A.2d at 162 n.20.

[49] *Id.* at 151.

[50] *Id.*

[51] *Id.*

see them.[52] Though hiding the items in this manner afforded a degree of privacy, Mooney acknowledged that not only had a highway worker clearing brush stumbled upon him, but also that there was always the possibility that someone else could enter the state-owned area.[53] Faced with these facts, the Connecticut Supreme Court turned to an analysis of constitutional law to determine whether David Mooney could legitimately claim Fourth Amendment protection against the search and seizure of his personal property.

B. *The Majority Opinion*

Though Mooney based his claim on both the Fourth Amendment of the United States Constitution and Article 1, Section 7, of the Connecticut state constitution, the court limited its consideration to Mooney's claim under the United States Constitution.[54] Mooney

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[52] *Id.*

[53] *Id.*

[54] State supreme courts generally have the responsibility to decide federal constitutional issues when they are raised in cases arising within their jurisdictions. Cases will often raise a constitutional issue based both on the United States Constitution as well as the constitution of the particular state. State supreme courts will sometimes opt to confine their holdings to the federal constitutional question, thereby enabling the parties to appeal to the federal courts and sending the question up the judicial hierarchy for continued clarification of the law. By specifically declining to decide the case on the state constitutional basis, the court leaves open the possibility, in the event that a higher court overturns the United States Constitutional issue and remands for further proceedings, of obtaining the same result on a state constitutional basis. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

> [T]he point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protection of the federal Constitution. State constitutions, too, are a font of individual liberties, their protection often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

Id. at 491.

Although Mooney raised both a Federal Fourth Amendment claim and a state constitutional claim against the search and seizure of his personal property, the Connecticut Supreme Court expressly declined to address the state constitutional claim because Mooney had "offer[ed] no separate analysis thereunder. [The court] therefore decline[d] to consider his claim under the Connecticut constitution." Connecticut v. Mooney, 588 A.2d 145, 150 n.5 (Conn. 1991). Mooney's attorney on appeal, Emanuel Margolis, said that he provided no separate analysis for the state constitutional claim because "he simply couldn't forsake his client's stronger arguments in favor of the kind of full-blown state constitutional analysis the court demands—not with a 35-page limit on the brief." Joseph Calve, *Homeless Ruling: Privacy in Possessions, Not Place*, CONN. L. TRIB., Mar. 25, 1991, at 1.

After Mooney succeeded in his appeal to the Connecticut Supreme Court, the State

made two claims in his appeal. First, he alleged that the police violated his Fourth Amendment rights when they invaded his "home" without a warrant—a claim based on his condition of homelessness.[55] Second, he asserted a narrower claim that he had a rea-

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appealed to the United States Supreme Court, but the Court denied certiorari, 112 S. Ct. 330 (1991), probably because the Supreme Court tends to grant certiorari when there is a conflict on a legal question between federal courts and state supreme courts, a factor missing from the *Mooney* case. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE §§ 4.3–4.10 (6th ed. 1986).

As additional cases, which raise the same constitutional question as *Mooney*, move through the courts, it is likely that various courts will reach disparate findings. The issue will then be ripe for consideration by the United States Supreme Court. *See id.*

[55] In Connecticut, at the time of the *Mooney* decision, there were an estimated 30,000 homeless people. This number totalled more than the populations of 140 of the state's 169 cities and towns. David Margolick, *Poverty and Privacy: Home, Sweet Niche?*, N.Y. TIMES, Nov. 17, 1990, at 25. As the following excerpt illustrates, the make-up of the homeless population has changed:

> Difficulty in counting the homeless makes it clear that the days when "homeless" meant exclusively bag lady and "skid road [sic] alcoholic" have ended. While these people do make up a part of the homeless population, other homeless groups include families evicted for nonpayment of rent, battered women, individuals and families displaced by condominium conversion and urban renewal, the elderly, deinstitutionalized mental patients who have not been provided community-based mental health services, and the unemployed. . . . It is not possible any longer to describe the homeless population in brief. The homeless population is made up of an increasing number of minorities and women. The homeless populations in various sizes and kinds of communities differ, with a number of smaller communities reporting that the majority of their homeless are younger and have roots in the area. . . . Clearly, today's homeless are coming from an increasingly wide range of backgrounds.

Linda S. Dakin, *Homelessness: The Role of the Legal Profession in Finding Solutions Through Litigation*, 21 FAM. L.Q. 93, 97, 101–02 (1987).

As the homeless population has changed, so has its plight:

> The plight of the homeless, regardless of the region of the United States where they are found, is dire. Daily life is a continual struggle to gain the minimal resources needed to survive. The exigencies of everyday life for the homeless turn on these essential needs: a safe place to sleep, sufficient food and access to toilet and sanitary facilities. . . . [I]n most . . . cities, the pattern is simple: where refuge can be found or fashioned, it is being used. . . . The effects of homelessness are not difficult to fathom. Insecurity and persistent vigilance take their toll. It matters little where shelter is ultimately found, whether "on the grates, or in an abandoned building, sleep is invariably fitful or brief or both. Exhaustion becomes the day's constant companion. . . . To remain awake, hour after hour, when the body and mind are crying out for rest, is sheer torture."

Robert M. Hayes, *The Rights of the Homeless*, *in* 331 LITIG. & ADMIN. PRAC. SERIES 441, 447–49 (1987) (quoting MARY ELLEN HOMBS & MITCH SNYDER, HOMELESSNESS IN AMERICA: A FORCED MARCH TO NOWHERE 111 (1982)).

For an in-depth look at current homelessness issues, see generally James K. Langdon, II & Mark A. Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 COLUM. J.L. & SOC. PROBS. 305 (1985); Donna Mascari, *Homeless Families: Do They Have a Right to Integrity?*, 35 UCLA L. REV. 159 (1987).

sonable expectation of privacy in his duffel bag and cardboard box, which were located under the bridge abutment, and that the police violated his privacy when they searched through his personal effects without first obtaining a search warrant.[56]

In Connecticut, as elsewhere, successful invocation of Fourth Amendment protection requires a defendant to establish that the area the defendant wishes protected can support a legitimate expectation of privacy.[57] Courts take a case-by-case approach to determine whether this expectation legitimately exists.[58] The Connecticut Supreme Court used a two-part inquiry to determine whether Mooney could establish a legitimate expectation of privacy: "first, whether the individual has exhibited an actual subjective expectation of privacy, and second, whether that expectation is one society recognizes as reasonable."[59] The court acknowledged that Mooney had manifested a subjective expectation of privacy through his actions.[60] The question therefore became whether Mooney could establish the second prong of the test, namely, an expectation of privacy that society is prepared to recognize as reasonable. The court looked at cases that made "fact-specific inquir[ies]"[61] into places that were searched to determine whether the defendants' expectations of privacy were reasonable.[62]

Propounding a theme from *United States v. Taborda*,[63] to which it would repeatedly refer, the Connecticut Supreme Court emphasized that for a place to be protected by the Fourth Amendment, "society [must be] prepared, because of its *code of values* and its *notions of custom and civility*, to give deference to a manifested

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[56] Connecticut v. Mooney, 588 A.2d 145, 152 (Conn. 1991).

[57] *Id.*; *see also* Connecticut v. Reddick, 541 A.2d 1209, 1213 (Conn. 1988).

[58] *Reddick*, 541 A.2d at 1213.

[59] *Mooney*, 588 A.2d at 152.

[60] "For these purposes, we accept the defendant's claim that he sufficiently manifested a subjective expectation of privacy in the area and in the items seized to satisfy the first prong of the applicable [F]ourth [A]mendment analysis. The trial court so concluded, and the [S]tate does not seriously contend otherwise." *Mooney*, 588 A.2d at 152 n.9.

[61] *See* Connecticut v. Brown, 503 A.2d 566, 570 (Conn. 1986).

[62] These cases were Oliver v. United States, 466 U.S. 170 (1984) (finding no legitimate expectation of privacy in open fields); Rakas v. Illinois, 439 U.S. 128 (1978), *reh'g denied*, 439 U.S. 1122 (1979) (examining the invaded place as a factor in determining reasonableness of expectation of privacy); and United States v. Ruckman, 806 F.2d 1471 (10th Cir. 1986) (finding no reasonable expectation of privacy in cave on public land in which defendant lived).

[63] 635 F.2d 131, 138 (2d Cir. 1980) (finding identifying items or activities inside a home by use of a telescope when those items or activities could not be identified from outside without the telescope impaired a legitimate expectation of privacy).

expectation of privacy."[64] The court also indicated that this determination of what is reasonable may involve a balancing of conflicting interests.[65] After establishing these initial concerns, the court then proceeded to examine, first, the broad claim of Fourth Amendment protection in the area under the bridge abutment, and, second, the narrower claim of Fourth Amendment protection in the duffel bag and cardboard box.

1. Expectation of Privacy in the Bridge Abutment Area

Mooney's broad claim of Fourth Amendment protection in the area in which he lived rested solely on his homelessness.[66] Mooney argued that because he had "exclusive possession"[67] of the area during the time he lived there, he was entitled to no less privacy under the Fourth Amendment than "more fortunate members of society" who happened to dwell in houses.[68] The State countered that because the area in question falls under the "open fields doctrine,"[69] and because Mooney was in effect a trespasser on state land[70]—property accessible to anyone who happened along—the

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[64] *Mooney*, 588 A.2d at 153 (emphasis added).

[65] *Id.* (referring to Hudson v. Palmer, 468 U.S. 517, 527 (1984), in which the Court weighed the interest in the fundamental right to an expectation of privacy with society's interest in the security of penal institutions, and found that society's interest outweighed a prisoner's interest in privacy within his or her cell).

[66] *Mooney*, 588 A.2d at 152; *see supra* note 55.

[67] *Mooney*, 588 A.2d at 152.

> [Mooney] departed from the spot each morning to wash in a nearby reservoir, taking care not to be seen whenever he left. He left behind his Walkman, his cassettes and hundreds of dollars in coins he kept in his duffel bag—money, he said, that came from tips that his girlfriend earned at a nearby restaurant. His property was always undisturbed when he returned.

Margolick, *supra* note 55, at 26.

[68] *Mooney*, 588 A.2d at 152.

[69] In Oliver v. United States, 466 U.S. 170 (1984), the United States Supreme Court reached the conclusion that open fields outside the immediate enclosure of a dwelling house could not hold a reasonable expectation of privacy because of their open, visible nature, and therefore were not protected by the Fourth Amendment. *See generally* Annotation, *Supreme Court's Development of "Open Fields Doctrine" with Respect to Fourth Amendment Search and Seizure Protection*, 80 L. Ed. 2d 860 (1984); *see also* Hester v. United States, 265 U.S. 57 (1924), and its progeny. *See also infra* text accompanying notes 84 & 106.

[70] Attorney Margolis, at oral argument, asserted that it was of no consequence that Mooney was on public property. Given the fact that the police located Mooney's living quarters while Mooney was in their custody, Margolis argued, the police acted improperly in not obtaining a warrant in light of the fact that there was plenty of time to get one. Otherwise, "a homeless individual too poor to afford a storage locker automatically waives all privacy claims to his diaries, letters, books, or other personal effects not in his immediate possession." Margolick, *supra* note 55, at 26; *see also supra* note 20.

area was incapable of sustaining Mooney's asserted privacy interest.[71]

The court stated that it did not need to decide whether the area under the bridge abutment could shelter a reasonable expectation of privacy because the court had established a way to resolve the issue based on Mooney's other claim of reasonable expectation of privacy in his closed containers.[72] Nevertheless, the court spent a great deal of effort analyzing the issue, and even went so far as to say that it assumed, as the State argued, that Fourth Amendment protection of the area must fail.[73]

The court identified two factors that render an area—in the eyes of society—not worthy of an expectation of privacy:[74] where the person is a trespasser,[75] and where the area is "readily accessible to animals, children, scavengers, snoops, and other members of the public."[76] Though the court saw these factors as relevant, the court stated that they were merely "helpful guides" and were not to be "undertaken mechanistically" as "ends in themselves."[77] The court insisted that society would consider all the circumstances of each case, including these factors, to determine if the expectation of privacy is reasonable.[78]

Because the court found for Mooney on the basis of the narrower, closed container claim, it did not expressly decide whether Mooney's broad claim—that the area under the bridge was entitled to Fourth Amendment protection—was valid, although the court assumed that it was not.[79] By developing the discussion in the manner that it did, however, the court left open the possibility that under a different fact-specific inquiry, it might find that a homeless

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[71] *Mooney*, 588 A.2d at 152.

[72] *See id.*

[73] *Id.* One possible explanation for why the court analyzed the issue as it did might be that because the holding is intimately tied to the fact-specific circumstances of the case, the court left open the possibility that another set of circumstances might allow it to find an expectation of privacy in a homeless person's "home." Even though the court found no merit in Mooney's claim of privacy in the bridge abutment area, the court's holding does not preclude its finding of a legitimate expectation of privacy in a future case. *See infra* note 237 and accompanying text.

[74] *Mooney*, 588 A.2d at 153.

[75] United States v. Ruckman, 806 F.2d 1471, 1472–73 (10th Cir. 1986); *see supra* note 5.

[76] California v. Greenwood, 486 U.S. 35, 40 (1988) (no reasonable expectation of privacy in garbage bags left for collection outside curtilage, meaning land surrounding house or dwelling).

[77] *Mooney*, 588 A.2d at 154 (quoting *Ruckman*, 806 F.2d at 1476 (McKay, J., dissenting)).

[78] *Id.*

[79] *Id.* at 152.

person's "home" comes under Fourth Amendment protection from warrantless searches.

2. Expectation of Privacy in the Containers

Mooney's narrower claim that he maintained an expectation of privacy in the closed containers, namely the duffel bag and cardboard box, found merit with the court.[80] The court held that

> the [F]ourth [A]mendment applie[d] to the unique factual circumstances of this case, where the closed containers were found by the police in a secluded place that they knew the defendant regarded as his home, where the defendant's absence from that place at the time of the search was due to his arrest and custody by the police, and where the purpose of the search was to obtain evidence of the crimes for which he was in custody.[81]

Unlike Mooney's broader claim, his narrower claim did not rest solely on his homelessness; the narrower claim also relied on the nature of the containers and the circumstances surrounding their search.[82]

Before reaching their holding, however, the court delineated what the claim did *not* involve: 1) claims of reasonable expectation of privacy in any of Mooney's effects except his duffel bag and cardboard box, from which the evidence used at trial was obtained;[83] 2) claims of expectation of privacy of homeless people in goods and effects that they have on their person or "under [their] immediate control";[84] 3) claims for Fourth Amendment protection of goods and effects of all the homeless, regardless of circumstances;[85] 4) whether the police, with probable cause, were entitled to seize and preserve the containers while they secured the warrant;[86] and 5) under what circumstances the police may search closed containers

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[80] *Id.*

[81] *Id.* at 155.

[82] *Id.* at 154.

[83] *Id.*

[84] *Id.* Oliver v. United States, 466 U.S. 170, 179 n.10 (1984), stands for the proposition that these effects would receive constitutional protection. *See supra* note 69.

[85] *Mooney*, 588 A.2d at 155.

[86] *Id.* Because the trial court had found that Mooney had no Fourth Amendment claim under the circumstances of the case, the issue of probable cause to seize the containers was not adjudicated in the court below or before the appeals court. *Id.* at 155 n.11. The Connecticut Supreme Court, however, assumed that the police could have seized the containers, upon probable cause that they contained evidence, in order to preserve them while the police obtained a search warrant. *Id.* at 155; *see* United States v. Jacobsen, 466 U.S. 109, 115 (1984).

discovered in public places for purposes other than searching for evidence.[87]

a. *Container cases*

Mooney relied on a line of cases establishing that when a person places personal effects inside luggage or other appropriately closed containers, the individual manifests an expectation of privacy in the contents of these containers.[88] The court addressed the tension inherent in the issue by balancing the deference typically afforded by society to privacy in appropriately closed containers against the principle that property left in public places generally cannot sustain Fourth Amendment protection.[89]

The court examined a number of cases in which the defendants claimed to have had Fourth Amendment protection in their containers.[90] The court concluded that the Fourth Amendment affords protection[91] to containers that are intended as "repositor[ies] of personal effects."[92] The "place" invaded, therefore, is the interior, or the contents.[93]

Although the Connecticut court acknowledged that a broad reading of these cases would provide "conclusive support" of Mooney's claim, it chose not to rely on them.[94] Instead, the court distinguished them because in each of the cases, when the challenged search occurred, the owner was either accompanying the container,[95] the owner had entrusted the container to another for

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[87] *Mooney*, 588 A.2d at 155. Examples that the court gave as other purposes were preserving the property's safety or determining ownership. *See, e.g.*, United States v. Sumlin, 909 F.2d 1218 (8th Cir.), *cert. denied*, 111 S. Ct. 559 (1990) (finding no violation of expectation of privacy when police opened stolen handbag to determine ownership).

[88] 588 A.2d at 156. For cases illustrating this general principle, *see infra* notes 90–92 and accompanying text. Exceptions to this general principle are: when contents can be inferred from the outward appearance of the container; when the container is transparent; or when the container "otherwise clearly reveal[s] its contents." *See* Robbins v. California, 453 U.S. 420, 427 (1981).

[89] *Mooney*, 588 A.2d at 155.

[90] United States v. Chadwick, 433 U.S. 1 (1977) (striking down warrantless search of footlocker seized from automobile at time of arrest); *Ex Parte* Jackson, 96 U.S. 727 (1878) (holding that sealed packages in mail cannot be opened without warrant); Connecticut v. Edwards, 570 A.2d 193 (Conn. 1990) (holding that a backpack located in a temporary residence is protected from warrantless search).

[91] *Mooney*, 588 A.2d at 157.

[92] *See Chadwick*, 433 U.S. at 13.

[93] *Mooney*, 588 A.2d at 157.

[94] *See id.* at 158.

[95] *See, e.g.*, Arkansas v. Sanders, 442 U.S. 753 (1979) (suitcase was in trunk of defendant's

safekeeping or for another particular purpose,[96] or the container was left in a place that had a reasonable expectation of privacy.[97]

The court indicated, however, that although these cases do not compel a conclusion that Mooney had a reasonable expectation of privacy in the contents of his box and bag, neither do they preclude such a conclusion.[98] At this point, the court referred back to the tension it felt it must resolve, and tipped the scale in favor of society's "weighty interest" in the expectation of privacy in the contents of luggage and other appropriately closed containers.[99]

b. *Abandonment cases*

The court then turned to a line of cases discussing abandoned property. Distinguishing the property law notion of abandonment (legal title or possessory interest abandonment), the court affirmed that abandonment in the search and seizure context is essentially the abandonment of the reasonable expectation of privacy in that property, not of the property itself.[100]

The court cited to a number of cases[101] to support the proposition that it is relevant whether the defendant manifested by conduct an intent to "shed, albeit temporarily" the expectation of privacy in the property.[102] The court admitted that, at first glance, these cases uphold the State's arguments against Mooney's claim of privacy in his containers.[103] As they had done with the line of container cases, however, the court insisted that the abandonment

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taxi); United States v. Chadwick, 433 U.S. 1 (1977) (defendant was loading footlocker into trunk of car).

[96] *See, e.g.*, United States v. Jacobsen, 466 U.S. 109 (1984) (private freight carrier); United States v. Van Leeuwen, 397 U.S. 249 (1970) (United States mail); United States v. Barry, 853 F.2d 1479 (8th Cir. 1988) (locked suitcase left with bailee at airport).

[97] *E.g.*, Connecticut v. Edwards, 570 A.2d 193 (Conn. 1990) (backpack located at temporary residence); *see Mooney*, 588 A.2d at 158.

[98] *Mooney*, 588 A.2d at 158. Indeed, the court stated that the cases "strongly suggest" just such a conclusion in Mooney's case.

[99] *Id.*

[100] *Mooney*, 588 A.2d at 158–59; *see also* St. Paul v. Vaughn, 237 N.W.2d 365, 370–71 (Minn. 1975).

[101] California v. Greenwood, 486 U.S. 35 (1988) (holding no reasonable expectation of privacy in trash bags left at curbside for trash collection); United States v. Thomas, 864 F.2d 843 (D.C. Cir. 1989) (holding no expectation of privacy in gym bag left in apartment building hallway); United States v. Brown, 473 F.2d 952 (5th Cir. 1973) (holding suitcase buried under chicken coop on abandoned farm was discarded and therefore fell within open field doctrine).

[102] *Mooney*, 588 A.2d at 159; *see also Greenwood*, 486 U.S. at 39–40; *Thomas*, 864 F.2d at 845.

[103] *Mooney*, 588 A.2d at 159.

cases do not compel the conclusion that Mooney retained no expectation of privacy in his duffel bag and cardboard box.[104] The court distinguished the abandonment cases from the facts of *Mooney* by noting, first, that none of the cases involved a homeless defendant's luggage found in a secluded area that the police knew the defendant considered his home and that the police searched after the defendant was in custody; second, that none of the cases gave any indication that the defendants raised, or that the courts considered, the independent question of privacy rights in the interior of the containers; and third, that most of the abandonment cases involved an element of conduct on the part of the defendant that manifested the defendant's intent to relinquish an expectation of privacy in the luggage.[105]

Further, the court distinguished *Mooney* from *United States v. Oliver* because the *Oliver* court declared that open fields were not "effects" within the meaning of the Fourth Amendment,[106] whereas effects were at issue in *Mooney*.[107] The court also distinguished *Mooney* from *California v. Greenwood*[108] on the simple principle that in *Greenwood* the defendants had exposed the property—trash bags—to the public by placing them at the curb *for the express purpose of conveying them to a third party*.[109]

The court made the further observation that the balancing of interests—society's fundamental interest in preserving the constitutional right to privacy versus society's legitimate interest in law enforcement—tipped the scale in Mooney's favor.[110] The court noted that there would have been "no significant impairment" of the law enforcement interest by requiring the police to obtain a search warrant before searching Mooney's effects.[111]

In its summary, the court returned to the question of whether, under the fact-specific inquiry into the circumstances of Mooney's

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[104] *Id.*

[105] *Id.* The court did not identify, however, which cases did or did not involve conduct that manifested a defendant's intent to relinquish any expectation of privacy.

[106] 466 U.S. 170, 176 (1984); *see supra* notes 69 & 84.

[107] 588 A.2d at 160. "The right of the people to be secure in their . . . effects, against unreasonable searches and seizures. . . ." U.S. CONST. amend. IV.

[108] 486 U.S. 35 (1988).

[109] *Mooney*, 588 A.2d at 160. It is important to note that the Court in *Greenwood* did not rely on abandonment principles, but rather relied on exposure to the public. 486 U.S. at 40–41. Nevertheless, the majority in *Mooney* discussed *Greenwood* in the context of the abandonment cases, as did, subsequently, the minority. *Mooney*, 588 A.2d at 172 n.2.

[110] *Mooney*, 588 A.2d at 161.

[111] *Id.*

case, society would be prepared, by virtue of its code of values and notions of custom and civility, to grant Mooney an expectation of privacy in his duffel bag and box. The court concluded that, given the conditions of homelessness and the other circumstances in Mooney's case, notions of custom and civility dictated that society was indeed ready to take such a step.[112]

C. *Dissenting Opinion*

The dissenting judges did not support the majority's holding that Mooney could have a reasonable expectation of privacy in his belongings under the bridge.[113] First, the dissent explained its agreement with the majority's assessment that there was no expectation of privacy in the abutment area.[114] The dissent, citing extensive authority,[115] emphasized that what has been knowingly exposed to, or is readily accessible to, the public does not carry any Fourth Amendment protection from unreasonable search and seizure.[116] Because the public had ready access to the area under the bridge,[117]

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[112] *See id.* at 160–61.

[113] *Id.* at 171 (Callahan, J., dissenting). Though they disagreed over Mooney's first claim, the dissenters agreed with the majority that Mooney's last three claims had no merit. *See supra* note 14.

[114] *Mooney*, 588 A.2d at 171 (Callahan, J., dissenting).

[115] The dissent cited the following cases to support the contention that the area was readily accessible to the public: California v. Greenwood, 486 U.S. 35, 40–41 (1988) (no protection for what is readily accessible to public); California v. Ciraolo, 476 U.S. 207, 213–14 (1986) (no protection for what is readily observable by aerial surveillance); Oliver v. United States, 466 U.S. 170, 179 (1984) (no protection in open field); United States v. Knotts, 460 U.S. 276, 281–82 (1983) (no protection in movement over public road that was readily viewable); Katz v. United States, 389 U.S. 347, 351 (1967) (no protection for what is knowingly exposed to public). The dissent then cited to the following cases to support its trespasser argument: United States v. Ruckman, 806 F.2d 1471, 1472 (10th Cir. 1986) (no privacy interest in natural cave on federal land); Amezquita v. Hernandez-Colon, 518 F.2d 8, 11 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976) (no privacy interest for squatters on public land).

[116] *Mooney*, 588 A.2d at 171–72 (Callahan, J., dissenting).

[117] The dissent made reference to a newspaper article, *Anthropologist-In-Training Tracks the City's Homeless*, HARTFORD COURANT, Nov. 12, 1990, at A1, A6, as support for their contention that accessibility to the public negates any homeless person's reasonable expectation of privacy. The article featured an anthropology student who searched through belongings and makeshift residences of the homeless when he knew the homeless person was absent. *Mooney*, 588 A.2d at 172 n.1 (Callahan, J., dissenting).

Carrying the dissent's argument through to its logical conclusion, would it not be possible to cite to the numerous reportings in the press of break-ins and burglaries of private homes and offices as an indication that reasonable expectation of privacy in these areas has been eviscerated? Or perhaps it would at least be possible to conclude that the anthropology student himself violated the homeless people's right to privacy by first rummaging through their belongings and then publicizing the details in the media.

and because the State viewed Mooney as a trespasser on state property, the dissenting judges concluded that Mooney could have no reasonable expectation of privacy there.[118]

In turning to the issue of whether Mooney could have a reasonable expectation of privacy in the containers, the dissenting judges asserted that this issue was closely linked to whether Mooney could have had any expectation of privacy in the abutment area itself when he left the containers there.[119] Unwilling to separate the container issue from the area issue, the dissent concluded that because Mooney had no legitimate expectation of privacy in the area under the bridge, he could not have had any legitimate expectation of privacy in anything he left there unattended, whether a closed container or not.[120] Finding no support for adding a "circumstances of the searched" prong to the analysis, the dissent dismissed the fact-specific circumstances of Mooney's case that the majority used to distinguish his situation from the line of abandonment cases.[121]

The dissent strongly criticized the majority's reliance on the purpose of the police search as a factor in the analysis.[122] Citing *Scott v. United States*,[123] the dissent argued that police motive is irrelevant in determining the reasonableness of a search, and that the standard is an objective, not a subjective, one.[124] Additionally, the dissent indicated that the majority's focus on Mooney's inability to assert his Fourth Amendment rights because of his arrest implies that the majority was concerned with a pretextual arrest for the purpose of searching the abutment area.[125] The dissent found this concern flawed for the same reason that they found the purpose of the search argument flawed—motive is irrelevant as to whether expectation of privacy is reasonable.[126]

The dissent seemed puzzled by how the majority distinguished the line of abandonment cases from the facts of the *Mooney* case by asserting that the abandonment cases focused on the areas in which

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[118] *Mooney*, 588 A.2d at 172 (Callahan, J., dissenting).

[119] *Id.* (Callahan, J., dissenting).

[120] *See id.* (Callahan, J., dissenting).

[121] *Id.* at 173 (Callahan, J., dissenting); *see infra* note 135 and accompanying text.

[122] *See Mooney*, 588 A.2d at 173 (Callahan, J., dissenting).

[123] 436 U.S. 128 (1978) (finding police noncompliance with statutory requirement to minimize interference of communication not subject to investigation irrelevant in determining reasonableness of telephone wiretap interceptions).

[124] *Mooney*, 588 A.2d at 173 (Callahan, J., dissenting).

[125] *Id.* at 174.

[126] *Id.*

those containers were found and not on the interiors of the containers themselves.[127] The dissent, however, repeated its conclusion that it did not see how the area analysis and container analysis could be distinguished, and therefore thought it axiomatic that when the abandonment cases considered the reasonable expectation of privacy in the area, they were also considering any reasonable expectation of privacy in the interior of the containers.[128]

Lastly, the dissent took exception to the majority's use of *intent* to relinquish an expectation of privacy as a factor distinguishing Mooney's circumstances from the line of abandonment cases.[129] The dissenting judges reasoned that express or implied conduct indicating relinquishment was not a condition necessary for a finding of no reasonable expectation of privacy.[130] Further, according to the dissent, the express conduct of hiding a container in an area accessible to the public was insufficient in and of itself to support an objectively reasonable expectation of privacy.[131] This finding brought the dissent back to its original conclusion that the predominant factor in assessing whether a privacy right had been relinquished by Mooney was the nature of the abutment area itself.[132] The dissenters believed that, given the public nature of the abutment area, Mooney could not have expected his belongings to remain safe from the public; therefore, the dissenters concluded, Mooney relinquished any privacy interest in his belongings when he left them behind.[133]

III. Contrasting the Majority and Minority Opinions

The majority and dissenting opinions, in essence, split on the issue of abandonment. Did Mooney, in voluntarily departing the area—concededly public property—and in leaving all his worldly goods behind, also voluntarily relinquish his expectation of privacy in those personal effects?[134] The dissenting judges found no merit

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[127] *Id.* at 174–75.

[128] *Id.*

[129] *Id.* at 175.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *See id.*

[134] *See generally* John P. Ludington, Annotation, *Search and Seizure: What Constitutes Abandonment of Personal Property Within Rule That Search and Seizure of Abandoned Property is Not Unreasonable—Modern Cases*, 40 A.L.R.4th 381 (1985). *See also* Edward G. Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 Buff. L. Rev. 399 (1971).

in Mooney's claim because when they considered the abandonment issue they were unable to keep separate, as the majority opinion had done in its narrow, fact-specific holding,[135] Mooney's two claims: one for Fourth Amendment protection of the bridge abutment area and the other for Fourth Amendment protection of the closed containers.[136]

The dissent felt that because the area under the bridge was a public place, Mooney could have had neither a reasonable expectation of privacy in the abutment area, nor, consequently, a reasonable expectation of privacy in the closed containers he left there.[137] The dissenting opinion did some fast backpedaling on this issue, however, albeit buried in a footnote:[138] the dissent acknowledged that some containers left unattended in an area to which the public has access may warrant Fourth Amendment protection.[139] Referring to *Kelly v. Florida*,[140] a case in which a defendant was found to have a reasonable expectation of privacy in a backpack attached to a bicycle left for ten minutes in a public parking lot, the dissent inferred that the circumstances of the *Kelly* case made it so unlikely that the backpack would be disturbed that an objectively reasonable expectation of privacy might arise.[141] The dissent, however, did not provide any rationale as to why a backpack on a bicycle left for a short period of time in a public parking lot would warrant an objectively reasonable expectation of privacy when a closed cardboard box hidden from sight under a bridge abutment, hoisted up on steel girders, for a longer period of time, would not.[142]

Since *Mooney*, other courts have decided cases differing in viewpoint from the dissenters in *Mooney*. In one case that takes issue with the dissent's argument that a privacy interest in a closed container cannot be separated from the expectation of privacy in the area in which the container is located, the court in *Owens v.*

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[135] *See Mooney*, 588 A.2d at 160. The majority listed the four factors leading to its holding: 1) place searched was the interior of a repository of personal effects; 2) police knew Mooney, as a homeless person, regarded the area as his home; 3) Mooney could not be at the area to assert Fourth Amendment rights because the police had placed him under arrest; and 4) the purpose of the search was to obtain evidence against Mooney rather than safeguard the containers or identify their owner.

[136] *See id.* at 171–72 (Callahan, J., dissenting).

[137] *Id.* at 172.

[138] *See id.* at 172 n.3.

[139] *Id.*

[140] 536 So. 2d 1113 (Fla. App. 1988).

[141] *Mooney*, 588 A.2d at 172–73 n.3 (Callahan, J., dissenting).

[142] *See id.* (Callahan, J., dissenting).

Maryland[143] made an analytical distinction similar to that made by the majority in *Mooney*.[144] In *Owens*, the defendant left his luggage in the apartment of an acquaintance.[145] The police arrived at the apartment in the defendant's absence and requested the acquaintance's permission to search the apartment and the luggage, both of which the acquaintance allowed even though the defendant had not given the acquaintance permission to open his luggage.[146] In ruling on the defendant's motion to suppress evidence obtained in the search of his luggage, the Supreme Court of Maryland held that the defendant did not have a reasonable expectation of privacy in the apartment, which, from the court's point of view, was accessible to the public as far as the defendant was concerned.[147] The court went on to hold, as the *Mooney* court had done, that the defendant nevertheless had a reasonable expectation of privacy in the contents of his luggage.[148]

In *United States v. Scott*,[149] a Federal District Court elaborated on the *California v. Greenwood* proposition that what is readily accessible to the public has no reasonable expectation of privacy.[150] In *Greenwood*, the United States Supreme Court held that trash bags left at the curb of a public street had no reasonable expectation of privacy because the bags were left there essentially to be conveyed to another party.[151] In *Scott*, IRS agents seized the defendant's trash from the curb, found it shredded, and painstakingly reconstructed it.[152] Using information obtained from the seized trash, the IRS obtained search warrants for the defendant's home where they found additional evidence that led to a grand jury indictment.[153]

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[143] 589 A.2d 59 (Md.), *cert. denied*, 112 S. Ct. 452 (1991).

[144] *See* 588 A.2d at 150.

[145] 589 A.2d at 60.

[146] *Id.* at 61.

[147] *Id.* at 64.

[148] *Id.* at 65. The *Owens* court followed a similar line of closed container cases as the *Mooney* court.

The presence of a gratuitous bailment, however, also factored into the *Owens* court's consideration in determining that society would deem this expectation reasonable. *Id.* Gratuitous bailment results when care and custody of a person's property is accepted by someone without charge and without any expectation of compensation. BARRON'S LAW DICTIONARY 38 (2d ed. 1984).

[149] 776 F. Supp. 629 (D. Mass. 1991). This case is entirely different than Scott v. United States, 436 U.S. 128 (1978), discussed by both the majority and dissent in *Mooney*.

[150] *Id.* at 631; *see supra* notes 101–02, 109, 115 and accompanying text.

[151] 485 U.S. 35, 39 (1988).

[152] 776 F. Supp. at 630.

[153] *Id.* The defendants were indicted for filing false tax claims. *Id.*

Although the defendant exposed the trash to the public for the express purpose of conveying it to a third party, the *Scott* court found that society would recognize as reasonable an expectation of privacy in deliberately shredded documents.[154] While the court relied on case law supporting the proposition that an individual has a privacy interest in shredded documents,[155] the court also considered what society would take into account as "common knowledge"—the equivalent of what the *Mooney* court called "notions of custom and civility"—in explaining both its and the *Greenwood* decisions.[156]

The dissenting judges in *Mooney* would perhaps have been willing to concede that the circumstances of the items and the public area may be considered in finding an objectively reasonable expectation of privacy.[157] The majority, however, took the analysis of the circumstances one step further, specifically taking into consideration Mooney's homeless state.[158] The minority reasoned that relying on Mooney's homelessness would create a situation in which a homeless person leaving items at "home" would receive greater Fourth Amendment protection than someone who had a home but placed articles under the bridge abutment for other purposes.[159] One wonders at the irony of the dissent's reasoning; it ignores the fact that the person with the home could simply leave the item at home and claim the same privileges the dissent argued they would be denied under the bridge abutment, an option not available to the homeless.[160]

The dissent next took the majority to task over its use of the "purpose of the search" as a factor in evaluating whether Mooney's expectation of privacy in the containers was reasonable.[161] Citing *California v. Ciraolo*,[162] and *Scott v. United States*,[163] the dissent would

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[154] *Id.* at 631–32.

[155] *Id.* at 632.

[156] *Id. See* Connecticut v. Mooney, 588 A.2d 145, 153 (Conn. 1991).

[157] *Mooney*, 588 A.2d at 172–73 n.3 (Callahan, J., dissenting); *see supra* text accompanying notes 137–42.

[158] *Mooney*, 588 A.2d at 173 (Callahan, J., dissenting). The dissent called this the "circumstances of the searched" prong of the analysis. *Id.*

[159] *Id.*

[160] *See id.*

[161] *Id.* at 173–74.

[162] 476 U.S. 207, 213, *reh'g denied*, 478 U.S. 1014 (1986) (finding purpose of aerial surveillance not relevant to whether police conduct was a search).

[163] 436 U.S. 128, 137–38, *reh'g denied*, 438 U.S. 908 (1978) (finding motive irrelevant in assessing objective standard for reasonableness of search).

not consider this factor at all in determining whether Mooney had any reasonable expectation of privacy.[164] The dissent distinguished the cases[165] that the majority cited from Mooney's situation.[166] Though recognizing that the United States Supreme Court through these cases has carved out exceptions where the purpose of the search is used to establish that the search was reasonable, the dissenting judges limited those exceptions where purpose is a valid factor to cases examining the question of whether the search was reasonable.[167] According to the dissent, *Mooney* called for examining a different issue, namely, whether the inspection of the contents of the containers was actually a search, and not whether the search was reasonable.[168] Limiting the issue in this way, however, would not resolve Mooney's claim of expectation of privacy because

> [t]he [F]ourth [A]mendment to the United States Constitution poses two substantive questions about governmental searching. The first, what is a search?, might be called the amendment's "reach" and could be restated: what general type of governmental activity is this amendment interested in scrutinizing and regulating? The second and logically subsequent question—which searches are unreasonable?—might be termed the amendment's "grasp" and could be restated: from this universe of searches, which are permitted and which prohibited? It is, after all, only "unreasonable" searches that the [C]onstitution prohibits.[169]

The dissent seemed to limit its analysis of Mooney's constitutional claim to the issue of whether the police conduct fell within the reach of the Fourth Amendment.[170] The majority seemed to take for granted that a search had occurred, relying on the record at trial where the police stated that they took the items into custody because they believed they would find evidence to connect Mooney to the crime.[171] Unlike the dissent, however, the majority analyzed the conduct to see whether the search fell within the grasp of that

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[164] *Mooney*, 588 A.2d at 173–74 (Callahan, J., dissenting).

[165] *E.g.*, Hudson v. Palmer, 468 U.S. 517 (1984) (finding a prisoner had no reasonable expectation of privacy in prison cell); *see also, e.g.*, Florida v. Wells, 495 U.S. 1 (1990) and Colorado v. Bertine, 479 U.S. 367 (1987) (the "inventory cases").

[166] *Mooney*, 588 A.2d at 173–74 (Callahan, J., dissenting).

[167] *Id.*

[168] *Id.*

[169] Bruce G. Berner, *The Supreme Court and the Fall of the Fourth Amendment*, 25 VAL. U. L. REV. 383, 383 (1991).

[170] *See id.*; *Mooney*, 588 A.2d at 173–74 (Callahan, J., dissenting).

[171] *Mooney*, 588 A.2d at 155–56 n.13.

conduct prohibited by the Fourth Amendment.[172] Given that even the dissent acknowledged that the reason for the search has been used to determine when a search is unreasonable, the discussion between the majority and minority opinions on this issue seems at cross purposes.

The dissenting judges dedicated much time to addressing the issue of a pretextual arrest, claiming that should be considered irrelevant because they did not accept that the purpose of the search should be a part of the analysis.[173] To this the majority responded that the dissent was trying to answer an argument the majority had never made.[174] The majority simply countered that Mooney's inability to be at "home" is one factor that society would consider influential in the totality of the circumstances analysis of whether a reasonable expectation of privacy existed.[175]

IV. Contradictions in Homeless Rights

The court in *Mooney*, in reaching its conclusion of law, asserted its unwillingness to reach a decision that would be premised on "the majestic equality of the laws which forbid rich and poor alike to sleep under bridges, to beg in the streets, and to steal bread."[176] In seeking to do justice by its decision, however, the court has also raised questions in the minds of homeless advocates regarding the effect that *Mooney* will have on the rights of the homeless.

A. Mooney *As a Double-Edged Sword*

While the Connecticut Supreme Court was deliberating *Connecticut v. Mooney*, many homeless activists hoped the court would establish a precedent that would extend Fourth Amendment protection to the makeshift homes of the homeless.[177] Even though the court did not go quite that far, the finding that Mooney had an expectation of privacy in his personal possessions did expand the rights of the homeless at a time when the United States Supreme Court had decided a series of cases tending to restrict Fourth

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[172] *See id.*; *see also* Berner, *supra* note 169, at 383.

[173] *Mooney*, 588 A.2d at 174 (Callahan, J., dissenting).

[174] *Id.* at 160–61 n.17.

[175] *See id.*

[176] *See id.* at 161 (quoting Anatole France, The Red Lily 91 (Winifred Stephens trans., 1925)).

[177] Murphy, *supra* note 13, at 21.

Amendment protection.[178] "'It's a breath of fresh air to be going in the other direction,'" Mooney's attorney commented when the court's decision was announced. "'It sends a message that the Constitution applies to everyone. The police here thought they could act with impunity because it was a homeless person, but the court said no, that this was a human being and he was not without rights just because he couldn't afford a house.'"[179] Mary Coombs, a professor of law at the University of Miami School of Law, explained her view of the case:

> Did [Mooney] take all the steps he could reasonably have taken given his economic situation? The most he was able to do was to put his things in closed containers and to signal that this belongs to somebody, that it isn't just trash. Here he did everything he could do. The only other thing he could do was to not be homeless.[180]

Some advocates for the homeless, however, even though they support Mooney's cause, see this cause as a double-edged sword, finding its broader implication disturbing.[181] Many advocates for the homeless consider a freeway embankment—or an alleyway, a secluded heating grate, an obscure park bench—an unacceptable symbol of a home.[182] Tim Harris, director of Jobs With Peace in Boston, a group that advocates for more money for housing, health care, and education, has said, "It's a double-edged question: if it's not a home, the guy has no rights; if it is a home, we're saying it's OK for people to live under freeways. I don't think either of those answers are [sic] morally justifiable. It's a no-win situation."[183] Robert M. Hayes, founder of the National Coalition for the Homeless and an authority on the legal rights of homeless people, considered the *Mooney* decision legally correct, but called it a "miserable,

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[178] *Id.*; *see generally* Berner, *supra* note 169.

[179] Murphy, *supra* note 13, at 21 (quoting Emanuel Margolis' response when he heard of the Connecticut Supreme Court's decision).

[180] Calve, *supra* note 54, at 1.

[181] John H. Kennedy, *Legal Issue: Is A Homeless Man's "Home" A Castle?*, BOSTON GLOBE, Jan. 13, 1991, at 29.

[182] *Id.*

[183] *Id.* at 29, 32. "'I mean,' asked Connecticut Supreme Court Justice David M. Borden during [oral argument], 'are we at the point now in our social development where society has said the homeless are a permanent part of our landscape, and wherever they live, public property or not, they are at their residence?'

'I think there is a growing development in that direction,' answered Emanuel Margolis, state-appointed lawyer for Mooney. 'I think that we are in an evolving time, insofar as that issue is concerned.'" *Id.* at 32.

wretched right to win" because of its suggestion of the social acceptance of homelessness as a fact of life, a fact that Hayes said "should be resisted to the grave."[184] Hayes recognized that the decision will protect some people from further violations beyond those caused by homelessness itself, but felt little comfort in knowing that homeless people's belongings possess some Fourth Amendment protection when, as he put it, "both the people and the possessions should be inside."[185]

Still other commentators assert that for the court to conclude that Mooney's expectation of privacy in his makeshift home was illegitimate is to conclude that "only propertied people, who can afford . . . a residence, can legitimately expect the Government to respect their constitutional right to privacy in their abode by obtaining a search warrant before entering. The constitutional right to be free from illegitimate searches should not have to be purchased with mortgage payments or rent."[186]

B. *Anti-Homeless Legislation*

Police in cities across the country enforce legislation that prohibits people from sleeping on the streets or sidewalks, or from remaining in public parks after hours.[187] Consider, for example, *People v. Davenport.*[188] In *Davenport,* the county of Santa Barbara sought to uphold the constitutionality and enforcement of a municipal ordinance that provides: "It shall be unlawful for any person to sleep in (1) Any public park during the period of time from 10:00 P.M. to 6:00 A.M.; (2) Any public street; (3) Any public parking lot or public area, improved or unimproved; or (4) Any

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[184] Margolick, *supra* note 55, at 26.

[185] Johnson, *supra* note 13, at B6.

[186] Deborah A. Geier, *Letter to the Editor,* N.Y. TIMES, Dec. 4, 1990, at A30. For the view that Fourth Amendment protection of the homeless should focus on whether society in any given locale has accepted homelessness as a cultural norm, see Elizabeth Schutz, Note, *The Fourth Amendment Rights of the Homeless,* 60 FORDHAM L. REV. 1003, 1028–31 (1992). Such a standard, however, would amount to discriminatory application of Fourth Amendment rights for the homeless on the basis, or the lack thereof, of snobbery. *See id.* For an elucidation of a standard based on private activities as opposed to private places, see Michael D. Granston, Note, *From Private Places to Private Activities: Toward a New Fourth Amendment House for the Shelterless,* 101 YALE L.J. 1305, 1326–30 (1992).

[187] *See* Baker, *supra* note 3, at 418–19. Baker describes this type of legislation as a clash of competing interests, with the homeless' need to perform fundamental life activities on one side of the arena, pitted against the non-homeless' desire to use public facilities without encountering the unsightly. *Id.* at 419.

[188] 176 Cal. App. 3d Supp. 10, 222 Cal. Rptr. 736 (App. Dep't Super. Ct. 1985), *cert. denied,* 475 U.S. 1141–42 (1986).

public beach during the period of time from 10:00 P.M. to 6:00 A.M."[189] The court of appeals overturned the municipal court's finding of unconstitutionality, stating "it is clear that the sleeping to which this ordinance was directed was of the general kind, which enjoys no peculiar constitutional advantage. . . . [T]he government can constitutionally prohibit overnight sleeping in public areas as part of its broad police powers."[190] In effect, the ordinance bans sleeping in public in a manner that effectively criminalizes homelessness.[191] Using the analogy of drivers who pull off the road to sleep in public places rather than risk their own and others' lives by dangerous driving, the *Davenport* court stated that "the law does not exonerate one who forces an election between evils and chooses the lesser of the two."[192] The court concluded by noting that because one of the legitimate purposes of the ordinance was the protection of the sleeping transient, the ordinance viewed the homeless as victim rather than as culprit.[193]

Enforcing anti-homeless legislation, however, provides only a temporary solution to the perceived problems that the legislation seeks to assuage.[194] Police arrest the homeless for minor offenses like sleeping in the park, but then generally release them after several hours.[195] Enforcing these laws actually avoids solving the problem of homelessness because enforcement merely encourages the homeless to relocate from one city to another.[196] Some cities have actively sought to further the relocation of the city's homeless onto someone else's shoulders by offering the homeless free, one-way airplane and bus tickets.[197]

The types of constitutional issues raised in cases like *Davenport* have received inconsistent judicial treatment. One approach is that

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[189] *Davenport*, 176 Cal. App. 3d Supp. at 13, 22 Cal. Rptr. at 737 (citing SANTA BARBARA, CAL., MUNICIPAL CODE § 15.16.085 (1986) (known as the City's "sleeping ordinance")).

[190] *Davenport*, 176 Cal. App. 3d Supp. at 15, 222 Cal. Rptr. at 738.

[191] Hayes, *supra* note 55, at 545.

[192] *Davenport*, 176 Cal. App. 3d Supp. at 16, 222 Cal. Rptr. at 739 (quoting United States v. Hogue, 752 F.2d 1503, 1505 (9th Cir. 1985)).

[193] *See id.*

[194] Baker, *supra* note 3, at 426.

[195] *Id.*

[196] *Id.*

[197] *Id.* at 424 n.40 (footnote references: Michele DiGirolamo, *Plan to Bus Homeless Out of Town Questioned*, UPI, Dec. 5, 1989, *available in* LEXIS, Nexis Library, UPI File (citing an Atlantic City, N.J. councilwoman's plan to give one-way bus tickets to homeless people); *Suburbs Shipping Their Homeless to Philadelphia*, UPI, Feb. 12, 1989, *available in* LEXIS, Nexis Library, UPI File (asserting that suburbs send homeless to Philadelphia against their will); Sally Johnson, *Homeless Get Ticket to Leave*, N.Y. TIMES, Nov. 20, 1988, at 52 (describing Vermont property owner's offer to fund one-way tickets for the homeless to leave town)).

of the *Davenport* court. Other courts have found such sleeping ordinances unconstitutional and have struck them down as vague and overbroad.[198]

As legislatures continue to promulgate anti-homeless regulations, the legislation will continue to restrict the activities that the homeless can perform on public properties. As one commentator has said:

> What is emerging—and it is not just a matter of fantasy—is a state of affairs in which a million or more citizens have no place to perform elementary human activities like urinating, washing, sleeping, cooking, eating and standing around. Legislators voted for by people who own private places in which they can do all these things are increasingly deciding to make public places available only for activities other than these primal human tasks. The streets and subways, they say, are for commuting from home to office. They are not for sleeping; sleeping is something one does at home. The parks are for recreations like walking and informal ball-games, things for which one's own yard is a little too confined. Parks are not for cooking or urinating, again, these things one does at home. Since the public and the private are complementary, the activities performed in public are to be the complement of those appropriately performed in private. This complementarity works fine for those who have the benefit of both sorts of places. However, it is disastrous for those who must live their whole lives on common land. . . . [I]t is one of the most callous and tyrannical exercises of power in modern times by a (comparatively) rich and complacent majority against a minority of their less fortunate fellow human beings.[199]

Anti-homeless legislation simply widens the gulf between "them that have" and "them that have not."

C. *Other Cases Furthering Rights of the Homeless*

Although *Connecticut v. Mooney* is the first case that discusses the precise issue of Fourth Amendment protection in the personal property of the homeless, it merely provides one more example of the emerging jurisprudence in the area of the rights of the

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[198] *See* Florida v. Penley, 276 So. 2d 180, 181 (Fla. Dist. Ct. App. 1973), *cert. denied*, 281 So. 2d 504 (Fla. 1984) (striking down ordinance prohibiting sleeping upon or in any street, park, wharf, or other public place). *See generally* Paul Ades, *The Unconstitutionality of "Anti-homeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595 (1989); Baker, *supra* note 3. *See also infra* notes 200–227 and accompanying text.

[199] Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 301–02 (1991).

homeless.[200] A federal judge in New York, for example, has ruled that for purposes of voter registration, even a park bench can be a "home," as homeless persons establish a legal residence via an out-of-doors "domicile."[201] In *Pitts v. Black*,[202] a group of homeless persons brought a class action suit, based on the Equal Protection Clause of the Fourteenth Amendment, against the city of New York because the City's Board of Elections refused to allow the homeless to register to vote on the ground that the homeless lacked a legal residence.[203] The City Board of Elections took the position that the state's election statute required that an applicant have a "*right* to the physical location, to the property," in order for that location to be properly considered a residence.[204] The city claimed that the restriction was necessary in order to ensure that voters have a verifiable nexus to the community, to prevent fraudulent voting practices, and to provide administrative feasibility.[205] The court, however, found the city's standard too restrictive and, subsequently, violative of the homeless applicants' right to participate in elections.[206] As a result, homeless individuals who identify "a specific location within a political community which they consider their home base, to which they return regularly, manifest an intent to remain for the present, and a place from which they can receive messages and be contacted," satisfy the standard for establishing a domicile for purposes of voter registration.[207]

Other states have recognized similar rights in the area of voter registration. Via a consent decree, a Federal District Court in Philadelphia gave the homeless the right to vote by allowing them to list the address of a shelter as their residence.[208] The District of

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[200] Margolick, *supra* note 55, at 25–26 (quoting Robert M. Hayes, National Coalition for the Homeless).

[201] *See* Pitts v. Black, 608 F. Supp. 696, 708–10 (S.D.N.Y. 1984).

[202] *Id.* For a more thorough discussion of the case, see David L. Rosendorf, Note, *Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights*, 45 U. MIAMI L. REV. 701, 717–22 (1991). *See generally* Donald T. Kramer, Annotation, *Validity, Under Federal Constitution, of State Residency Requirements for Voting in Elections*, 31 L. Ed. 2d 861 (1973).

[203] *Pitts*, 608 F. Supp. at 697–98. The courts of New York have interpreted the term "residence" to be equivalent to "domicile," and "dependent upon the applicant's expressed intent, his conduct, and all attendant surrounding circumstances." *Id.* at 698 n.3 (quoting Palla v. Suffolk Co. Bd. of Elections, 286 N.E.2d 247, 251 (1972)).

[204] *Id.* at 698 (emphasis added).

[205] *Id.* at 699.

[206] *See id.* at 708–09.

[207] *Id.* at 710.

[208] *See id.* at 708 (citing Committee for the Dignity and Fairness for the Homeless v.

Columbia as well has made provisions for the homeless to register to vote by allowing them to specify a location where they intend to remain.[209] More recently, the New Jersey Attorney General issued an opinion indicating that a homeless person who regularly sleeps on a particular park bench can qualify for a voter registration card.[210]

Homeless advocates offer two rationales for ensuring the voting rights of the homeless.[211] First, the exercise of voting rights empowers the homeless politically.[212] Though some commentators have criticized this rationale as unjustified by results to date, homeless individuals' lack of political "clout" is no justification for denying them the right to vote.[213] Second, society's concept of individuality encompasses the right to participate in politics as a means of self-identification and freedom.[214] The ability to vote is an end in itself, given that "the inherent value of the right to vote is considered as separate from what tangible results might be achieved through the exercise of such [a] right."[215]

In addition to ensuring access to the voting booth, some courts are establishing for the homeless other protections such as prohibiting the destruction of their belongings in police sweeps to "clean up" the streets, or declaring that the homeless have a right to shelter. A federal judge in Miami ruled that police sweeps of homeless belongings were in contempt of an earlier injunction.[216] In *Pottinger v. Miami*,[217] homeless advocates, in a class action suit, are seeking to stop the continual harassment and arrests[218] of the homeless in

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Tartaglione, No. 84-3447 (E.D. Pa. Sept. 14, 1984) (unreported order)); Rosendorf, *supra* note 202, at 717 n.94.

[209] *See* Rosendorf, *supra* note 202, at 717 n.94 (citing *In re* Jenkins, slip op. (District of Columbia Bd. of Elections & Ethics, June 7, 1984)).

[210] Mark Curriden, *Homeless Privacy Rights: Court Requires Warrant for Search of Duffel Bag Hidden Under Bridge*, 77 A.B.A. J. 33 (1991) (referring to the Office of the Attorney General of the State of New Jersey's Formal Opinion No. 2, Apr. 17, 1991, Voter Registration of Homeless Persons (*available in* LEXIS, N.J. Library, AG File, 1991 N.J. AG LEXIS 2).

[211] *See* Rosendorf, *supra* note 202, at 721–22.

[212] *Id.* at 721.

[213] *Id.*

[214] *Id.*

[215] *Id.* at 722.

[216] Curriden, *supra* note 210, at 33 (citing Pottinger v. Miami, No. 88-2406-CVI-ATKINS (S.D. Fla. Mar. 18, 1991) (unreported order)).

[217] No. 88-2406-CVI-ATKINS (S.D. Fla. Mar. 18, 1991) (unreported order). For a more thorough discussion of the *Pottinger* case, see Baker, *supra* note 3, at 457–63.

[218] Harassment included arrests for disorderly conduct; public intoxication; loitering in public places; standing, sitting, or sleeping on the sidewalks; and sleeping in parks. *See* Baker, *supra* note 3, at 457 n.241.

downtown Miami.[219] The complaint alleges that the police customarily seize and destroy the personal property of the homeless, including "identification, clothing, medication, food and bedding."[220] Although the court granted a preliminary injunction proscribing the destruction of the homeless' property, the police continued in the practice.[221] The court subsequently held the City of Miami in civil contempt for the burning and destruction of the homeless' property that the City had performed in the name of "clean-up."[222] *Callahan v. Carey* established a right to shelter for the homeless in New York.[223] Relying on the state's constitution, which sought to promote the care and support of the needy and declared that such needs would be provided for by the state, the homeless succeeded in obtaining an injunction directing the state to furnish meals and lodging to homeless men who applied for shelter.[224] The New York courts, however, never actually have decided that a right to shelter is a fundamental right under the state's constitution.[225] In *Maticka v. City of Atlantic City*,[226] on the basis of a statutory obligation found in the New Jersey General Public Assistance Law, homeless persons in New Jersey succeeded in prohibiting the state from denying them shelter solely because of their inability to furnish a permanent residence.[227]

V. CONCLUSION

As the *Mooney* court emphasized in its opinion, its holding applies to the unique factual circumstances of the case, "where the closed containers were found by the police in a secluded place that they knew the defendant regarded as his home, where the defendant's absence . . . was due to his arrest . . . by the police, and where

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[219] *Id.* at 457.

[220] *Id.* at 458 n.242.

[221] *Id.* at 459 n.243.

[222] *Id.*; *see also Miami Lawsuit Seeks to Give Homeless a Legal Guarantee*, N.Y. TIMES, Jun. 20, 1992, at L23.

[223] No. 42582 (N.Y. App. Div. Dec. 5, 1979) (cited in Robert C. Coates, *Legal Rights of Homeless Americans*, 24 U. SAN FRAN. L. REV. 297, 309 (1990)). *Eldridge v. Koch* expanded the *Callahan* decision. 118 Misc. 2d 163, 459 N.Y.S.2d 960 (N.Y. Sup. Ct.), *rev'd in part*, 98 A.D.2d 675, 469 N.Y.S.2d 744 (1983).

[224] Coates, *supra* note 223, at 310.

[225] *Id.* at 310–11; *see also* Patricia Siebert, *Homeless People: Establishing Rights to Shelter*, 4 L. & INEQ. J. 393, 397 (1986) (no constitutional right to adequate housing).

[226] 524 A.2d 416 (N.J. App. Div. 1987).

[227] Coates, *supra* note 223, at 311.

the purpose of the search was to obtain evidence. . . ."[228] As one commentator has said, this decision is hardly a primer on expansive constitutional interpretation.[229] Because the court tied the decision so specifically to the circumstances of the case, the impact for other homeless people in Connecticut and nationally remains unclear.[230] Nevertheless, the opinion did result in David Mooney's case being remanded for a new trial—one in which the evidence obtained in violation of the Fourth Amendment would not be available for the State's case.[231]

The United States Supreme Court's denial of certiorari to *Connecticut v. Mooney* has prevented the Connecticut Supreme Court's analysis from receiving critical assessment within the context of judicial review. Many United States Supreme Court commentators feel that the Court of late has been backing away from the sweeping protection of individual liberties established during the Court's Warren era.[232] Therefore, had the Court granted certiorari, it is doubtful that the Connecticut Supreme Court's decision would have been upheld. Even if the United States Supreme Court had granted *Connecticut v. Mooney* review and declared that the Connecticut Supreme Court had erred in extending Fourth Amendment protection on the facts of the case, the decision would not have ended Mooney's claims. The Connecticut Supreme Court has found in the past that the state constitution's Article 1, Section 7,[233] encompasses

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[228] Connecticut v. Mooney, 588 A.2d 145, 155 (Conn. 1991).

[229] Calve, *supra* note 54, at 1.

[230] Johnson, *supra* note 13, at B6.

[231] The result of the *Mooney* decision raises a point regarding the administration of justice that was addressed in United States v. Scott, 766 F. Supp. 629, 631 (D. Mass. 1991). *Mooney* established an expectation of privacy in items that had been used as evidence in support of a murder conviction. It is important to recognize, however, that the case, in extending Fourth Amendment protection to Mooney's belongings, does not stand for the proposition that "society would approve of a putative defendant's efforts to [suppress] potentially incriminating evidence." *Id.*

Mooney did not receive a new trial; he plea-bargained instead. *See supra* note 13.

[232] *See generally* Berner, *supra* note 169; Craig S. Michalk, Note, Alabama v. White: *The Supreme Court's Latest Attack on Fourth Amendment Protection Against Warrantless Searches*, 16 T. MARSHALL L. REV. 333 (1991); Brennan, *supra* note 54. See also the hypothetical Supreme Court opinion written by Professor Wayne LaFave (called the "patron saint of the search and seizure law" in Juarez v. Texas, 758 S.W.2d 772, 784 (Tex. Crim. App. 1988)) entitled, *A Fourth Amendment Fantasy: The Last (Heretofore Unpublished) Search and Seizure Decision of the Burger Court*, 1986 U. ILL. L. REV. 669 (1986).

[233] Article 1, Section 7, of the Connecticut State Constitution reads, "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

broader protection than does the Fourth Amendment.[234] If the United States Supreme Court had struck down Mooney's Fourth Amendment protection, perhaps the Connecticut Supreme Court would then have found a broader protection based on the state constitution.[235]

The *Mooney* court could have gone further if it had found a constitutionally protected interest in the bridge abutment area,[236] or if it had specifically established that, although not applicable to Mooney's situation, it would be willing to concede other fact-specific situations in which the homeless would have Fourth Amendment protection in their "homes."[237] Advocates for the homeless, however, fear that if society takes the step of finding acceptable that an alleyway or a space under a bridge abutment is a "home" deserving of privacy, then by corollary society will find homelessness acceptable and will no longer seek a solution.

Connecticut v. Mooney asserts that the constitutional right to be free from unreasonable searches and seizures need not be purchased with rent or mortgage payments.[238] Though homeless rights advocates may legitimately fear that the *Mooney* decision is a further indication of society's acceptance of homelessness as a cultural norm, one can argue that the role of the courts in this area is the protection of civil rights, and not the resolution of the social

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[234] In Connecticut v. Kimbro, 496 A.2d 498, 506 (Conn. 1985), the Connecticut Supreme Court established that the state constitution "affords more substantive protection to citizens than does the [F]ourth [A]mendment to the [F]ederal [C]onstitution in the determination of probable cause." The court affirmed this increased protection in Connecticut v. Morrill, 534 A.2d 1165, 1169 (Conn. 1987).

[235] *See generally* Daniel R. Gordon, *Progressives Retreat: Falling Back from the Federal Constitution to State Constitutions*, 23 ARIZ. ST. L.J. 801 (1991); Brennan, *supra* note 54.

[236] For an expansion of this argument, see Royer, *supra* note 8, at 454–61.

[237] While a court is not likely to extend [F]ourth [A]mendment protection to such openly public places as park benches or subway grates, lawyers say other more secluded spots where the homeless call home may deserve such protection.

> Ironically, some homeless shun shelters and seek their own space outdoors because of privacy. In many shelters, workers by necessity check for drugs and weapons and require them to shower and sleep side-by-side with people they neither choose nor trust. "And that's why people sleep under bridges, to get that privacy back," says Stewart Guernsey, a lawyer and executive director of Second Home, which provides shelter and low-cost housing in Boston and Cambridge.

Kennedy, *supra* note 181, at 32.

Constitutional law scholar, Laurence Tribe, commented on *Mooney*, saying that "while propertied men wrote the U.S. Constitution, the document encompasses rights they would never have dreamed possible. And a more expansive view of [F]ourth [A]mendment protection would be warranted to encompass the situations of some homeless." *Id.* at 32.

[238] *See* Geier, *supra* note 186, at A30.

problem of homelessness. Given that mandate, *Connecticut v. Mooney* was correctly decided. The major success of the case was in taking one small step toward refining individual civil rights apart from property ownership principles, thus helping to chip away at an obstacle the law tends to impose on the property-poor homeless.

Kathleen Marie Quinn