

NATIONAL LAW CENTER
ON HOMELESSNESS & POVERTY

Violations of the Right to Privacy for Persons Experiencing Homelessness in the United States

A Report to the
Special Rapporteur on the Right to Privacy

May 31, 2017

I. Issue Summary

1. This report outlines the violations of the right to privacy for persons experiencing homelessness in the United States. Article 17 of International Covenant on Civil and Political Rights (ICCPR), which the U.S. has ratified, states “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence....”¹ However, the more than 3.5 million people who experience homelessness in the United States annually are forced to exist partially or fully in the public sphere, where they “have to face a consistent suspicion and scrutiny because they are consistently visible.”² What little privacy a homeless person enjoys rests on their personal belongings and makeshift dwellings, but “sweeps” of homeless encampments frequently result in the seizure and destruction of homeless persons’ property.³ People experiencing homelessness can also face criminal charges if police disregard the walls of their tents or tarps and uncover evidence of crimes (such as possession of drugs) in searches that would be impermissible in someone’s house.⁴ Because homelessness falls disproportionately on communities of color, LGBTQ individuals (particularly youth), persons with disabilities, and women and families fleeing domestic violence, these violations frequently intersect with other forms of discrimination, and result in further marginalization of these homeless individuals.⁵ We call on the Special Rapporteur on the Right to Privacy to affirm that people experiencing homelessness are entitled to the same level of privacy in whatever “home” they have access to, whether it be a shanty, a tent, a tarp, or just a blanket, as a regularly housed person would expect in their home, and to call on U.S. law enforcement and other agencies to respect, protect, and fulfill that right.

II. Sweeps of Homeless Encampments

2. More than 3.5 million people experience homelessness each year in the U.S., and because their numbers far exceed the number of shelter beds in most communities, homeless encampments can be found in every state in the country, and appear to be on the rise.⁶ Some communities have begun to address encampments constructively, through outreach and ensuring every person has an adequate, appropriate place to go.⁷ Many more, however, view the encampments as nuisances to be simply swept out of existence, forcibly evicting their residents with no regard for their dignity or property.⁸ More than 100 encampments were been evicted between 2008 and 2012,⁹ and more continue to be evicted every day.¹⁰ These evictions occur year round, regardless of weather, often destroying the only shelter homeless people have from freezing cold or scorching heat.¹¹ In January 2016, for example, the Charleston, WV mayor evicted a long-term encampment in 11 degree Fahrenheit (-11 degrees Celsius) weather, with no warning and no plan for where to house the residents.¹²
3. These sweeps result in “the often arbitrary seizure and frequent destruction of homeless people’s personal property. . . . Belongings are seized while homeless people are asleep, momentarily away from their possessions, or under arrest.”¹³ These sweeps are prevalent throughout the United States.¹⁴ In 2012, Los Angeles, California, faced its fifth lawsuit since 1987 over the city’s practice of seizing homeless people’s property during cleaning sweeps.¹⁵ Although the court issued a preliminary injunction to halt these sweeps,¹⁶ this has not stopped the searches and seizures of homeless people’s valuable property. In the past, Los Angeles has continued its practice in the face of an injunction.¹⁷

4. Public authorities often claim that the cleaning sweeps serve important public purposes. For example, the city of Seattle, Washington, justified its sweeps by arguing that encampments represent a danger to public health and safety.¹⁸ The city focused on these concerns instead of addressing the underlying causes of the encampments, such as the lack of shelter space.
5. Regardless of their alleged purpose, the repercussions of the sweeps alone are significant enough to render them unreasonable. For example, during sweeps in Fresno, California, police destroyed homeless people's personal property such as medicine and clothing.¹⁹ The loss of property can have profound ramifications for a homeless individual's health.²⁰

III. Criminalization of homelessness

6. Beyond the consequences of losing one's entire home and belongings, homeless persons are also subject to potential criminal consequences due to their living with only the barest of protection in public places. For example, in 2015, Walter Pippin was experiencing homelessness in Vancouver, WA, living under a tarp draped over a fence and guardrail, preventing those outside from seeing in.²¹ While police were notifying encampment members that they had to remove their camping structures between the hours of 6:30am and 9:30pm under Vancouver's camping ordinance, they knocked on Pippin's tarp.²² He said he would be out shortly, but the officer lifted the tarp without Pippin's consent, revealing Pippin in his makeshift bed with a bag of methamphetamine, for which he was then charged.²³ A lower court suppressed this evidence as having been obtained in violation of the Washington State Constitution's protection of privacy in one's home and belongings, but the prosecutors appealed to the Washington Court of Appeals in a case that is now pending.²⁴ "If this person had rented wooden walls, we wouldn't have this debate. It would be unquestionable that the police overstepped their bounds. But because this person is poor, then there becomes a debate about whether this person even had a home and has any of the fundamental guarantees afforded to the rest of us."²⁵
7. Pippin's experience is common to many persons experiencing homelessness, who often face homelessness for extended periods of time—months and even years.²⁶ For them, whatever shelter they are able to construct, whether legally or illegally, is their home, and their right to privacy should inhere to that home the same as it would for any regularly housed person. To deny them that right is to further marginalize and dehumanize this already highly marginalized and dehumanized population.

IV. Analysis and Conclusions

8. Because the detrimental effects of sweeps on homeless persons are out of proportion with their alleged governmental purpose, and the interference with homeless persons' privacy in their makeshift housing creates disparate and disproportionate harm compared to regularly housed persons, these acts violate the privacy rights of homeless people. Article 17 of the ICCPR limits the manner in which the State can interfere with the right to privacy. The specific prohibition of "arbitrary" interference extends the right to privacy beyond interferences that are provided

for by law. It adds a protection against “capriciousness”²⁷, since “regardless of its lawfulness, arbitrary interference contains elements of injustice, unpredictability and unreasonableness.”²⁸ Indeed, the Committee has recognized:

[T]he concept of arbitrariness is intended to guarantee that even interference provided by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, *reasonable in the particular circumstances*.²⁹

9. Thus, the proportionality standard inquires into whether enforcement “had a purpose that seems legitimate on the basis of the Covenant in its entirety, whether it was predictable in the sense of rule of law and, in particular, *whether it was reasonable (proportional) in relation to the purposes to be achieved*.”³⁰ Furthermore, the right to privacy “dictates that State interference be restrained and the principle of reasonableness be respected even with conduct that has certain effects upon the common good (e.g., vagrancy, begging, prostitution, etc.)”³¹
10. In 2015, the U.S. supported a recommendation from the Human Rights Council’s second Universal Periodic Review to “Amend laws that criminalize homelessness and which are not in conformity with international human rights instruments.”³² This built on 2014 recommendations from the U.N. Human Rights Committee and Committee on Racial Discrimination that federal agencies “engage with state and local authorities to: (a) abolish criminalization of homelessness laws and policies at state and local levels; (b) ensure close cooperation between all relevant stakeholders including social, health, law enforcement and justice professionals at all levels to intensify efforts to find solutions for the homeless in accordance with human rights standards; and (c) offer incentives for decriminalization and implementation of such solutions, including by providing continued financial support to local authorities implementing alternatives to criminalization and withdrawing funding for local authorities criminalizing individuals experiencing homelessness.”³³
11. The U.S. government should be commended for recognizing that the imposition of criminal penalties on homeless people is counterproductive public policy in violation of the ICCPR and Convention Against Torture (CAT).³⁴ Since 2015, the U.S. Departments of Justice (DOJ) and Housing and Urban Development (HUD), as well as the U.S. Interagency Council on Homelessness (USICH) has taken some significant steps to end the criminalization of homelessness, citing their human rights obligations as part of the context for their actions.³⁵
12. Despite these positive steps, criminalization of homelessness continues to grow.³⁶ The international community has recognized the criminalization of homelessness as a human rights issue and the response reflects a growing consensus: criminalization laws violate the human rights of those experiencing homelessness and should be abolished. Numerous UN Special Rapporteurs³⁷, treaty bodies³⁸, and the Human Rights Council³⁹ have denounced the practice and call upon the United States to right this wrong. Several of their reports state that criminalization of life-sustaining activities can constitute cruel, inhuman and degrading treatment/punishment in violation of the United States’ treaty obligations.⁴⁰ Even the United States Interagency Council on Homelessness cautioned in its 2012 report that “criminalization

measures may also violate international human rights law, specifically the Convention Against Torture and the International Covenant on Civil and Political Rights.”⁴¹ Indeed, several domestic courts have found criminalizing statutes unconstitutional under the Eighth Amendment’s prohibition against cruel and unusual punishment,⁴² but there is no universally-binding precedent and criminalization practices continue at the local level.

13. Since the United States fails to provide homeless people with adequate shelter or housing, they have no choice but to live on the streets. Makeshift encampments, from the communal tent cities described above to even a simple blanket or tarp pulled over one’s head, add security and privacy to an otherwise haphazard existence. The harsh repercussions that sweeps impose on homeless people are disproportionate to the ends of cleaning up public spaces under Article 17’s right to privacy. Similarly, the invasion of homeless persons’ privacy in their makeshift homes by law enforcement and use of evidence of crimes they find through those invasions violate the right to privacy.

V. Suggested Questions for the Rapporteur to Ask Federal, State, and Local Government

14. As the Rapporteur conducts his review, we respectfully suggest the following questions and concerns be raised during the meetings with federal, state, and local government officials:
 - a. What steps has the federal government taken to work with local authorities to cease forced evictions and sweeps of outdoor encampments and instead ensure homeless residents are provided with adequate alternative housing?
 - b. What measures does the federal government take to challenge specific criminalizing ordinances or practices that promote interference with homeless persons privacy and property rights?
 - c. What steps are local law enforcement agencies taking to ensure the privacy rights of homeless persons are respected?

VI. Suggested Conclusions and Recommendations

15. The Rapporteur notes with concern reports that homeless persons in the United States continue to be routinely and disproportionately criminalized for essential human functions and behaviors they have no choice but to perform in public due to lack of available housing or shelter space. Homeless encampments are routinely evicted, often under threat of arrest, without the provision of adequate alternatives for their residents, often destroying homeless persons’ belongings and putting them in physical danger in addition to violating their rights’ to privacy. The Rapporteur is particularly concerned with reports that evidence obtained through non-consensual searches of homeless persons’ tents, tarps, and other sheltering materials is potentially allowed in criminal cases against them.
16. The State Party should take immediate measures to eliminate the criminalization of basic life activities where homeless persons have no choice but to perform them in public, cease disparate enforcement of other laws that adversely affect homeless persons, and ensure homeless persons are provided with housing—not punishment for their status. The fact that homeless persons must exist in public does not diminish their right to privacy in whatever limited space they are able to construct for themselves. For law enforcement purposes, a

person's housing, whether bricks and mortar, a tent, a tarp, or a blanket, should all be treated with equivalent respect for the right to privacy for what lies within. Local governments should immediately cease criminalization activities, including sweeps of homeless encampments and destruction of homeless persons' belongings and focus on housing, storage, and other constructive solutions. Federal agencies should take active steps to discourage criminalization, provide funding incentives for decriminalization and constructive alternative approaches, ensure that they do not fund local practices that criminalize homelessness, and investigate and prosecute criminalization policies or enforcement wherever they occur.

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¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

² NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, GRADING THE U.S. RESPONSE TO HOMELESSNESS: THE 2016 HUMAN RIGHT TO HOUSING REPORT CARD (2016),

https://www.nlchp.org/documents/Right_to_Housing_Report_Card_2016. Justin Stec, *Why the Homeless Are Denied Personhood Under the Law: Toward Contextualizing the Reasonableness Standard in Search and Seizure Jurisprudence*, 3 RUTGERS J. L. & URB. POL'Y 321 (2006).

³ National Law Center on Homelessness & Poverty & Yale University Law School Allard K. Lowenstein Human Rights Clinic, WELCOME HOME: THE RISE OF TENT CITIES IN THE UNITED STATES (2013) (hereinafter "WELCOME HOME"), http://nlchp.org/documents/WelcomeHome_TentCities.

⁴ See *Washington v. Pippin*, No. 48540-1-II, Brief of Amici Curiae American Civil Liberties Union of Washington, and Outsiders Inn (WA 2017).

⁵ See U.N. Human Rights Council, *Report of the Working Group of Experts on People of African Descent on its mission to the United States of America*, ¶ 50-53, 72, 76, 83 A/HRC/33/61/Add.2 (2016), (hereinafter UN WGPAD Report) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/183/30/PDF/G1618330.pdf?OpenElement>; see generally, National Law Center on Homelessness and Poverty, *Racial Discrimination in Housing and Homelessness in the United States* (2014), available at http://www.nlchp.org/documents/CERD_Housing_Report_2014. [need race, disability, VAW info]

⁶ WELCOME HOME, *supra*, note 3 (documenting media reports of tent cities in 46 states across the country, and we have since documented reports in all other states).

⁷ INDIANAPOLIS, IN., CODE Title I, Sec. 231-501 et. seq. (2016); see also, National League of Cities, *Indianapolis Ordinance on Homeless Encampments*, (Apr. 2016), <http://www.nlc.org/find-city-solutions/city-solutions-and-applied-research/city-practice-database/indianapolis-ordinance-on-homeless-encampments>.

⁸ WELCOME HOME; National Law Center on Homelessness and Poverty, CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 19-20 (2011), https://www.nlchp.org/Criminalizing_Crisis. 62% of respondents answered that their city engaged in cleaning sweeps (only 14% answered no; the remaining 24% did not know). Of those who answered in the affirmative, 42% stated that their cities did not provide notification before engaging in the sweeps (23% did not know, only 35% said yes), while 37% said their city did not retain the belongings seized so that owners could claim them afterwards (46% did not know, while only 17% said yes).

⁹ *Id.*, at 3.

¹⁰ See, e.g. John Gillie, Pierce County tells homeless to vacate riverbank encampments, *The News Tribune* (June 29, 2016), <http://www.thenewstribune.com/news/local/article86711282.html>.

¹¹ See, e.g. Homeless Forced Out of Tents and into Snowstorm by Denver Police, Dec. 16, 2015, <http://www.unicornriot.ninja/?p=3166>.

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- ¹² Carrie Hodousek, *Residents Lash Out at Charleston Mayor for Dismantle of Tent City*, Metro News, (Jan. 20, 2016), <http://wvmetronews.com/2016/01/20/residents-lash-out-at-charleston-mayor-for-dismantle-of-tent-city/>.
- ¹³ Kevin Bundy, “Officer, Where’s My Stuff?” *the Constitutional Implications of A De Facto Property Disability for Homeless People*, 1 HASTINGS RACE & POVERTY L. J. 57, 59 (2003).
- ¹⁴ NLC.
- ¹⁵ Christina Hoag, *Lawsuit Fights Seizures of LA Homeless’ Property*, ASSOC. PRESS (Mar. 30, 2012), <http://www.utsandiego.com/news/2012/mar/30/lawsuit-fights-seizures-of-la-homeless-property>.
- ¹⁶ The injunction forbade the city from seizing property “absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband,” and the court forbade “destruction of said seized property without maintaining it in a secure location for a period of less than 90 days.” *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1020 (C.D. Cal. 2011) *appeal denied*, 693 F.3d 1022 (9th Cir. 2012). On appeal, the Ninth Circuit upheld the injunction. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1031 (9th Cir. 2012).
- ¹⁷ In 2000, the court ordered an injunction forbidding the city from “[c]onfiscating the personal property of the homeless when it has not been abandoned and destroying it without notice.” *Justin v. City of Los Angeles*, CV0012352LGBAIJX, 2000 WL 1808426 (C.D. Cal. Dec. 5, 2000).
- ¹⁸ The city’s arguments against encampments included their purported “unsanitary hygiene conditions, including the accumulation of garbage, human and animal feces, and other hazardous materials . . . criminal activity, including incidents of violent crime and felony drug tracking . . . destruction or vandalism of public property . . . [and] obstructions that interfere with the intended uses of the property.” *Media Analysis of Homeless Encampment “Sweeps,”* HOMELESS MEDIA COVERAGE STUDY GROUP, 10-11 *available at* <http://faculty.washington.edu/stygall/homelessmediacoveragegroup/EncampmentSweepsCoverageFinalv3.3.pdf>.
- ¹⁹ NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, “SIMPLY UNACCEPTABLE”: HOMELESSNESS AND THE HUMAN RIGHT TO HOUSING IN THE UNITED STATES 43 (2011), https://www.nlchp.org/Simply_Unacceptable/
- ²⁰ The loss of medicine can obviously lead to untreated conditions, while the loss of clothing may increase exposure to harsh weather. In the resulting lawsuit, the court issued an injunction preventing Fresno from continuing the sweeps, stating that, “[t]he City’s destruction of the property of the homeless, including shelter, blankets, clothes, food and medication, makes it more difficult for the homeless to survive.” *Kincaid v. City of Fresno*, 106CV-1445 OWW SMS, 2006 WL 3542732 (E.D. Cal. Dec. 8, 2006).
- ²¹ *Washington V. Pippin*, No. 48540-1-II, Brief of Amici Curiae American Civil Liberties Union of Washington, and Outsiders Inn (WA 2017).
- ²² *Id.*
- ²³ *Id.*
- ²⁴ See Heidi Groover, *Is a Tarp a Home?*, *The Stranger* (Feb. 15, 2017), <http://www.thestranger.com/features/2017/02/15/24868979/is-a-tarp-a-home>.
- ²⁵ *Id.*, quoting Tristia Bauman, senior attorney at the National Law Center on Homelessness & Poverty.
- ²⁶ See, *Washington V. Pippin*, No. 48540-1-II, Brief of Amici Curiae American Civil Liberties Union of Washington, and Outsiders Inn (WA 2017), *citing* Bob Young, *Inside the grim world of The Jungle*, *The Seattle Times*, June 17, 2016 (discussing multiple long-time residents of a homeless encampment, including one living there for fifteen years).
- ²⁷ Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary 382 (1993) (NOWAK (2005).
- ²⁸ *Id.* at 383.
- ²⁹ Human Rights Committee, General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17), §4 (Apr. 8, 1988) (emphasis added).
- ³⁰ NOWAK (2005), *supra* note 27, at 211 (emphasis added).
- ³¹ *Id.* at 389 (emphasis added). The Committee has applied this test in previous jurisprudence regarding interferences with the right to privacy. When examining legislation proscribing private homosexual behavior, the Committee interpreted “the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and necessary in the circumstances of any given case,” and

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- found that the authorities' public health argument failed the reasonableness test because it did not amount to "a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV." *Toonen v. Australia* (488/1992), ICCPR, A/49/40 vol. II, ¶ 8.3 (Mar. 31, 1994).
- ³² Report of the Working Group on the Universal Periodic Review, United States of America, A/HRC/30/12, ¶ 176.310 (July 20, 2015).
- ³³ U.N. Human Rights Committee, *Concluding observations on the fourth report of the United States of America*, ¶ 19, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014) [hereinafter HRC, *Concluding observations*]; see also, Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of United States of America*, ¶ 12, CERD/C/USA/CO/7-9 (Aug. 29, 2014).
- ³⁴ United States Interagency Council on Homelessness, *SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF HOMELESSNESS*, 8 (2012).
- ³⁵ See *GRADING THE U.S. RESPONSE TO HOMELESSNESS: THE 2016 HUMAN RIGHT TO HOUSING REPORT CARD*, *supra* note 2, at 2.
- ³⁶ National Law Center on Homelessness and Poverty, *HOUSING NOT HANDCUFFS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES* (2016), <https://www.nlchp.org/documents/Housing-Not-Handcuffs>.
- ³⁷ UNHRC, *Report on United States Mission*, *supra* note 5, at ¶ 95; U.N. Human Rights Council, *Final Draft of the Guiding Principles on Extreme Poverty and Human Rights*, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, ¶¶ 65, 66(c), U.N. Doc. A/HRC/21/39 (July 18, 2012); U.N. Human Rights Council, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶¶ 48-50, 78(c), U.N. Doc. A/67/278 (Aug. 9, 2012) (detailing the "excessive and arbitrary use of detention and incarceration" against those in poverty and those experiencing homelessness); U.N. Human Rights Council, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque: Stigma and the realization of the human rights to water and sanitation*, ¶¶ 36, 42, U.N. Doc. A/HRC/21/42 (July 2, 2012) [hereinafter UNHRC, *Report on Stigma*]; U.N. Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, Mission to the United States of America*, ¶ 64, U.N. Doc. A/HRC/11/36/Add.3 (Apr. 28, 2009) (decrying "the enforcement of minor law enforcement violations" against the homeless population).
- ³⁸ U.N. Human Rights Committee, *Concluding observations on the fourth report of the United States of America*, ¶ 19, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014) [hereinafter HRC, *Concluding observations*]; Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of United States of America*, ¶ 12, CERD/C/USA/CO/7-9 (Aug. 29, 2014).
- ³⁹ Human Rights Council, *Draft report of the Working Group on the Universal Periodic Review, United States of America*, 30, A/HRC/WG.6/22/L.10 (May 21, 2015) (recommendation 176.310: "[a]mend laws that criminalize homelessness and which are not in conformity with international human rights instruments").
- ⁴⁰ See, e.g., HRC, *Concluding observations*, *supra* note 38, at ¶ 19; U.N. Human Rights Council, Report of the U.N. Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, ¶ 36, U.N. Doc. A/66/265 (Aug. 4, 2011); UNHRC, *Report on Stigma*, *supra* note 37, at ¶ 36; Special Rapporteurs on the Rights to Adequate Housing, Water and Sanitation, and Extreme Poverty and Human Rights, *USA: "Moving Away from the Criminalization of Homelessness, A Step in the Right Direction"* (Apr. 23, 2012), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12079&LangID=E>;
- ⁴¹ USICH, *SEARCHING OUT SOLUTIONS*, *supra* note 34, at 8.
- ⁴² *Id.*