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## ***California v. Greenwood*: Supreme Court Decides To Keep The Fourth Amendment Out Of The Trash**

The Framers of our Constitution, concerned with protecting American citizens from unrestricted searches and seizures, drafted the words of the fourth amendment and established "[t]he right of the people to be secure in their persons, houses, papers and effects."<sup>1</sup> In the past, federal and state courts have employed a number of rationales, primarily grounded in property law concepts such as abandonment and curtilage,<sup>2</sup> to determine whether fourth amendment protection should be extended to the contents of a person's trash. Recently, however, the United States Supreme Court in *California v. Greenwood*<sup>3</sup> held that the proper method of analysis was to determine whether there was a reasonable expectation of privacy in one's trash.<sup>4</sup> A majority of the Court found that no such expectation exists and concluded that the fourth amendment did not prohibit warrantless searches or seizures of garbage left for collection outside the curtilage of the home.<sup>5</sup>

This Note examines the development of the law of warrantless trash searches and analyzes the *Greenwood* majority's application of the reasonable expectation of privacy analysis. The Note identifies a number of factors that strongly support the contention that a reasonable expectation of privacy exists in a persons's trash when it is left for collection in sealed containers that shield the contents from public view. In light of this reasonable expectation, this Note concludes that the Supreme Court erred in denying fourth amendment protection against the warrantless police search of the defendant's trash in *Greenwood*.

In February 1984, a criminal suspect informed a federal drug enforcement agent that a truck transporting illegal drugs was en route to the Laguna Beach, California address of defendant Billy Greenwood.<sup>6</sup> This information was passed on to Investigator Jenny Stracner of the local police department. Stracner had also received reports from one of Greenwood's neighbors of heavy vehicular traffic late at night outside the Greenwood house.<sup>7</sup> The vehicles reportedly remained at the house for only a few minutes before moving on.<sup>8</sup>

Investigator Stracner conducted surveillance of the Greenwood residence, confirmed the vehicle traffic reports and followed one truck from the house to

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1. U.S. CONST. amend. IV. The full text of the amendment reads:

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.

2. See *infra* note 40 and accompanying text.

3. 108 S. Ct. 1625 (1988).

4. *Id.* at 1628. The Supreme Court first enunciated the reasonable expectation of privacy standard for fourth amendment cases in *Katz v. United States*, 389 U.S. 347 (1967). See *infra* notes 21, 35-39 and accompanying text.

5. *Greenwood*, 108 S. Ct. at 1627.

6. *Id.*

7. *Id.*

8. *Id.*

another residence that had previously been under investigation for narcotics trafficking.<sup>9</sup> Her suspicions aroused, Stracner, on April 6, 1984, asked the regular trash collector to pick up garbage bags that Greenwood had deposited for collection at the curb in front of his house and to turn them immediately over to her.<sup>10</sup> The bags were opaque plastic bags and had been sealed by Greenwood prior to disposal.<sup>11</sup>

Stracner opened the bags, searched through the trash, and found items indicative of narcotics use.<sup>12</sup> Stracner incorporated the information derived from the trash search into an affidavit she prepared to obtain a search warrant for the Greenwood house.<sup>13</sup> A search conducted following issuance of the warrant revealed quantities of cocaine and hashish in the house, and Greenwood and an accomplice were arrested on felony narcotics charges.<sup>14</sup>

The California Superior Court dismissed the charges against Greenwood on the authority of *People v. Krivda*,<sup>15</sup> which held that warrantless trash searches violated both the fourth amendment of the United States Constitution and article I, section 13 of the California Constitution.<sup>16</sup> The basis of the dismissal was that due to the illegality of the trash search, the evidence obtained from this search could not be used in the affidavits supporting the search warrant. Without this evidence, the trial court found there was no probable cause to search the Greenwood home.<sup>17</sup> The California Court of Appeals affirmed,<sup>18</sup> and following the denial of review by the California Supreme Court, the United States Supreme Court held that the fourth amendment of the federal constitution did

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9. *Id.*

10. *Id.*

11. *Id.* at 1631 (Brennan, J., dissenting).

12. *Id.* at 1627.

13. *Id.*

14. *Id.* Following their arrest, Greenwood and his accomplice posted bail. After the defendants were released on bail, the police received additional reports of heavy vehicular traffic outside the Greenwood home. On May 4, 1984, a second investigator conducted a trash search in the same manner as before, and again, evidence of narcotics was found. A second search warrant was obtained and Greenwood was again arrested when narcotics were found in his home. *Id.* at 1627-28. The *Greenwood* majority describes only these two trash searches. In fact, as the state court of appeals opinion observes, police began to monitor the defendant's trash in February. *People v. Greenwood*, 182 Cal. App. 3d 729, 732, 227 Cal. Rptr. 539, 540 (1986). This trash monitoring continued from the last week of February to the first week of May. See *Greenwood*, 108 S. Ct. at 1631 (Brennan, J., dissenting).

15. 5 Cal. 3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971), *vacated and remanded for further proceedings sub nom.* *California v. Krivda*, 409 U.S. 33, *reh'g denied*, 409 U.S. 1068 (1972), *on remand sub nom.* *People v. Krivda*, 8 Cal. 3d 623, 105 Cal. Rptr. 521, 504 P.2d 457 (1973).

16. *People v. Krivda*, 8 Cal. 3d 623, 624, 504 P.2d 457, 457, 105 Cal. Rptr. 521, 521 (1973).

17. *Greenwood*, 108 S. Ct. at 1628.

18. *People v. Greenwood*, 182 Cal. App. 3d 729, 733, 227 Cal. Rptr. 539, 541 (Cal. Ct. App. 1986). The court of appeals noted a 1982 amendment to the California Constitution that prohibited suppression of evidence seized in violation of the state constitution unless it also violated the federal constitution. *Greenwood*, 182 Cal. App. 3d at 734, 227 Cal. Rptr. at 541; CAL. CONST. art. I, § 28(d); see *In re Lance W.*, 37 Cal. 3d 873, 879, 694 P.2d 744, 747, 210 Cal. Rptr. 631, 634 (1985). Because of this amendment, the evidence obtained from the search of Greenwood's trash could still be used to support the warrant affidavit if *Krivda* was based only on the state constitution. This, however, was not the case, stated the court of appeals, since *Krivda* had held that warrantless trash searches violated both the federal and state constitutions. *Greenwood*, 182 Cal. App. 3d at 734, 227 Cal. Rptr. at 541-42.

not protect against warrantless searches of trash left outside the curtilage of the home.<sup>19</sup>

The Supreme Court began its opinion by identifying the appropriate analysis in fourth amendment garbage search cases. The Court held that the "warrantless search and seizure of the garbage bags left at the curb outside the Greenwood house would violate the Fourth Amendment only if [Greenwood] manifested a subjective expectation of privacy in [his] garbage that society accepts as objectively reasonable."<sup>20</sup> The Court relied on *Katz v. United States*, which, over twenty years ago, first developed the expectation of privacy standard as the proper method of analysis in fourth amendment cases.<sup>21</sup>

The Court appeared willing to concede that Greenwood may have manifested a subjective expectation of privacy in the contents of his trash.<sup>22</sup> The majority, however, rejected the idea that an expectation of privacy in one's trash is an expectation that society would view as reasonable. The Court provided four bases for this conclusion.

First, because defendant left his garbage in an area particularly subject to public inspection he surrendered any claim of fourth amendment protection.<sup>23</sup> Because it is "common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public" as well as to the prying eyes of the trash collector, the Court concluded that the defendant could have had no reasonable expectation of privacy.<sup>24</sup>

Second, the Court held that once defendant exposed his garbage to the public, "the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public."<sup>25</sup> In other words, when a person exposes incriminating evidence to the general public as well as to the police, he cannot seriously maintain that he had a

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19. *California v. Greenwood*, 108 S. Ct. 1625, 1627 (1988). The Court could possibly have found the evidence found in the house admissible on other grounds. In particular, the Court might have relied on the good faith exception developed in *United States v. Leon*, 468 U.S. 897 (1984). Under *Leon*, illegally obtained evidence will not be suppressed if the evidence was obtained by officers acting with a warrant, and if the officers had an objectively reasonable belief in the validity of the issuing magistrate's probable cause determination and in the technical sufficiency of the warrant. *Id.* at 922. The question then becomes: Would a police officer who knew the affidavit supporting the warrant was based on a prior trash search also be expected to know that warrantless trash searches were illegal under California law at that time? If not, then the good faith exception may be applicable.

20. *Id.* at 1628.

21. 389 U.S. 347 (1967). In *Katz*, Justice Harlan stated in concurrence that fourth amendment protection must be afforded when a person has a subjective expectation of privacy and that expectation of privacy is one that society is prepared to recognize as reasonable. *Id.* at 361 (Harlan, J., concurring). This two-part analysis has been used in numerous federal and state court decisions since *Katz*. See *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Smith v. State*, 510 P.2d 793, 797 (Alaska), *cert. denied*, 414 U.S. 1086 (1973); *Croker v. State*, 477 P.2d 122, 125 (Wyo. 1970). The majority in *Greenwood* noted that defendant acknowledged the *Katz* analysis as the proper standard. *Greenwood*, 108 S. Ct. at 1628.

22. *Id.*

23. *Id.*

24. *Id.* at 1628-29.

25. *Id.* at 1629.

reasonable expectation of privacy in the evidence. A police examination of such evidence would be reasonable per se and thus would not fall within the scope of fourth amendment protection which is limited to "unreasonable searches and seizures."<sup>26</sup>

Third, the Court rejected the claim of privacy because defendant voluntarily conveyed his trash to the trash collector for disposal, holding that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."<sup>27</sup>

Finally, the majority held that society would not recognize defendant's expectation of privacy as reasonable on precedential grounds, stating that there has been a "unanimous rejection of similar claims" by the federal appellate courts and that a "vast majority" of state courts of appeals have also reached the same conclusion.<sup>28</sup>

Justices Brennan and Marshall joined in a vigorous dissent arguing that "[s]crutiny of another's trash is contrary to commonly accepted notions of civilized behavior."<sup>29</sup> The dissent pointed to prior Supreme Court cases that did not involve trash but were similar in that they also concerned warrantless police searches of sealed containers.<sup>30</sup> The dissent argued that the rule derived from these prior cases is that any "container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant."<sup>31</sup>

The dissent also noted that the very nature of trash supports an expectation of privacy. In the dissent's words "[a] trash bag . . . 'is a common repository for one's personal effects'" and is, therefore, "inevitably associated with the expectation of privacy."<sup>32</sup> Because many details about a person's private life can be ascertained from a search of one's garbage, the dissent argued that there should be no difficulty in recognizing "as reasonable an individual's expectation of privacy in the most private of personal effects sealed in an opaque container and disposed of in a manner designed to commingle it imminently and inextricably

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26. U.S. CONST. amend. IV; see *supra* note 1.

27. *Greenwood*, 108 S. Ct. at 1629 (quoting *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979)).

28. *Id.* at 1629-30.

29. *Id.* at 1632 (Brennan, J., dissenting).

30. *Id.* (Brennan, J., dissenting) (citing *United States v. Jacobsen*, 466 U.S. 109 (1984) (federal agent's search of plastic bags containing white powdery substance); *Ex parte Jackson*, 96 U.S. 727 (1877) (police search of sealed letters and packages in the mail)).

31. *Id.* at 1632 (Brennan, J., dissenting) (quoting *United States v. Jacobsen*, 466 U.S. 109, 120 n.17 (1984)). The dissent argues that in order for a container to support a reasonable expectation of privacy it merely has to be sealed so as to prevent its contents from being exposed to plain view. *Id.* (Brennan, J., dissenting) (citing *Robbins v. California*, 453 U.S. 420, 427 (1981) (plurality opinion), *overruled*, *United States v. Ross*, 456 U.S. 798, 824 (1982)). Only if the contents are exposed to plain view or if the container is of such a nature as to "announce" or give away the identity of the contents inside will the expectation of privacy vanish. *Id.* (Brennan, J., dissenting) (quoting *Robbins*, 453 U.S. at 428). The dissent maintains that all other containers would support a reasonable expectation of privacy because the Supreme Court previously rejected any attempt to distinguish between "worthy" and "unworthy" containers for fourth amendment purposes. *Id.*; see *Ross*, 456 U.S. at 822 ("a constitutional distinction between 'worthy' and 'unworthy' containers would be improper.").

32. *Greenwood*, 108 S. Ct. at 1634 (Brennan, J., dissenting) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979), *modified by United States v. Ross*, 456 U.S. 798, 824 (1982)).

with the trash of others.”<sup>33</sup> This is particularly true, concludes the dissent, because American society “‘chooses to dwell in reasonable security and freedom from surveillance.’”<sup>34</sup>

The *Greenwood* Court recognized that the expectation of privacy standard developed in *Katz* must be the focus of any fourth amendment analysis.<sup>35</sup> The *Katz* decision arose out of dissatisfaction with prior case law which appeared to limit the fourth amendment to “searches and seizures of tangible property.”<sup>36</sup> This limitation had led prior courts to focus on “constitutionally protected area[s]”<sup>37</sup> when determining the scope of the amendment’s protection. The *Katz* Court held that this focus was improper because the fourth amendment extended beyond tangible property to protect “individual privacy.”<sup>38</sup> This protection of privacy led the Court to conclude that “the Fourth Amendment protects people, not places.”<sup>39</sup>

Although the *Greenwood* Court correctly relied on the expectation of privacy analysis developed in *Katz*, traditionally five other theories have been applied in the warrantless trash search cases: abandonment, curtilage, consent, plain view, and exigency.<sup>40</sup> It is interesting to note that although the expectation of privacy analysis precludes a conclusory reliance on property law theories like abandonment and curtilage, use of these concepts has persisted long after *Katz*. As this Note will point out, even the *Greenwood* Court is unable to avoid an indirect reliance on these two concepts.<sup>41</sup>

Abandonment as a property concept occurs when the owner “has voluntarily, intentionally, and unconditionally relinquished his interest in the property so that another, having acquired possession, may successfully assert his superior interest.”<sup>42</sup> Courts using the abandonment approach have stated that the inquiry “‘is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts.’”<sup>43</sup> In cases factually similar to *Greenwood*, the accepted rule is that the act of placing one’s garbage outside the home for collection constitutes abandonment of the property.<sup>44</sup>

The abandonment doctrine can be traced back to *Hester v. United States*.<sup>45</sup>

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33. *Id.* at 1637 (Brennan, J., dissenting).

34. *Id.* (Brennan, J., dissenting) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

35. *Id.* at 1628; see *supra* note 21.

36. *Katz v. United States*, 389 U.S. 347, 352-53 (1967) (citing *Olmstead v. United States*, 277 U.S. 438, 464-66 (1928), *overruled*, *Katz v. United States*, 389 U.S. 347 (1967)).

37. *Katz*, 389 U.S. at 350.

38. *Id.*

39. *Id.* at 351.

40. See Note, *Expectation of Privacy Analysis and Warrantless Trash Reconnaissance After Katz v. United States*, 23 ARIZ. L. REV. 283, 299-307 (1981) (describing these five theories).

41. See *infra* text accompanying notes 99-100, 116-119.

42. *City of St. Paul v. Vaughn*, 306 Minn. 337, 346, 237 N.W.2d 365, 370 (1975).

43. *United States v. Andersen*, 663 F.2d 934, 938 (9th Cir. 1981) (quoting *United States v. Jackson*, 544 F.2d 407, 409) (9th Cir. 1976)).

44. See *United States v. Dela Espriella*, 781 F.2d 1432, 1437 (9th Cir. 1986); *United States v. Reichert*, 647 F.2d 397, 399 (3d Cir. 1981); *United States v. Shelby*, 573 F.2d 971, 973 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978).

45. 265 U.S. 57 (1924).

In *Hester*, the Supreme Court held that there could be "no seizure in the sense of the law" when police officers remove and examine an item which has been abandoned by its owner.<sup>46</sup> The Court followed this reasoning in *Abel v. United States*<sup>47</sup> in which the defendant, an alien charged with espionage, was arrested, and the Federal Bureau of Investigation searched his hotel room without a warrant. The agents discovered a hollowed-out pencil and a block of wood containing a cipher pad in a wastepaper basket inside the room. At trial, the Court upheld the admission of these items into evidence because the defendant had abandoned them.<sup>48</sup> These items, concluded the Court, were *bona vacantia*<sup>49</sup> from the defendant's perspective [meaning those "things in which nobody claims as property"]<sup>50</sup>, and "[t]here can be nothing unlawful in the Government's appropriation of such abandoned property."<sup>51</sup>

Although *Hester*, *Abel*, and some more recent federal appellate cases involving warrantless trash searches<sup>52</sup> have applied abandonment as a property-law concept to determine whether fourth amendment protection exists, this approach has been rejected by the Supreme Court. In *Cardwell v. Lewis*<sup>53</sup> the Court specifically stated that "[r]ather than property rights, the primary object of the Fourth Amendment [is] . . . the protection of privacy."<sup>54</sup> In *Warden v. Hayden*<sup>55</sup> the Court noted that "it had previously recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property."<sup>56</sup> The *Hayden* Court concluded that because of this emphasis on privacy, the Court had "increasingly discarded fictional and procedural barriers rested on property concepts."<sup>57</sup> The *Katz* Court also declared that "[t]he premise that property interests control the right of the Government to search and seize has been discredited."<sup>58</sup> In other words, property rights involve a determination of legal ownership or title with regard to the object searched. Because the fourth amendment is concerned with an individual's reasonable privacy interest, the status of the person's property rights should not be determinative.

In view of these clear Supreme Court holdings and with a proper understanding that privacy is the controlling interest protected by the fourth amendment, reliance on the property concept of abandonment in previous warrantless

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46. *Id.* at 58.

47. 362 U.S. 217 (1960).

48. *Id.* at 240-41.

49. *Id.* at 241.

50. BLACK'S LAW DICTIONARY 160 (5th ed. 1979).

51. *Abel*, 362 U.S. at 241.

52. See, e.g., *United States v. Alden*, 576 F.2d 772, 777 (8th Cir.), cert. denied, 439 U.S. 855 (1978) ("Because no one owns or possesses abandoned property, no one can claim a Fourth Amendment interest in it."); *United States v. Dzialak*, 441 F.2d 212, 215 (2d Cir. 1971) ("nothing unlawful in the Government's appropriation of such abandoned property.").

53. 417 U.S. 583 (1974).

54. *Id.* at 589; see *Harris v. United States*, 331 U.S. 145, 150 (1947) (the right of privacy is "of the very essence of constitutional liberty").

55. 387 U.S. 294 (1967).

56. *Id.* at 304.

57. *Id.*; see *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of . . . real property law.").

58. *Katz*, 389 U.S. at 353 (quoting *Hayden*, 387 U.S. at 304).

trash search cases is clearly misplaced. There is, however, a second category of abandonment cases that have attempted to reconcile the abandonment doctrine with the proper expectation of privacy analysis used in *Katz*.<sup>59</sup> These cases recognize that there is an important

distinction between abandonment in the property-law sense and abandonment in the constitutional sense . . . . In the law of property, the question . . . is whether the owner has relinquished his interest in the property so that another, having acquired possession, may successfully assert his superior interest. In the law of search and seizure, however, the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment.<sup>60</sup>

The reasoning in these cases is that "[i]mplicit in the concept of abandonment is a renunciation of any 'reasonable' expectation of privacy in the property abandoned."<sup>61</sup> Unfortunately, few posit any rationale as to why the act of abandonment should lead to a per se conclusion that all expectations of privacy cease.<sup>62</sup> In fact, to the contrary, the Supreme Court has held that "legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest."<sup>63</sup> This is because the correct method of analysis in fourth amendment cases after *Katz* is to determine whether there was a reasonable expectation of privacy, requiring an examination of the particular facts of each case. As this Note points out, there are significant factors that weigh in favor of recognizing a reasonable expectation of privacy in one's trash.<sup>64</sup> While abandonment may be a factor in establishing whether an expectation of privacy exists, the fourth amendment interests are not controlled by "arcane distinctions developed in property . . . law."<sup>65</sup> As such, a superficial, conclusory reliance on abandonment as a bright-line indicator of whether a reasonable privacy expectation exists is not an adequate substitute for the privacy analysis mandated by *Katz* and its progeny.

A number of courts have used the concept of curtilage in warrantless trash

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59. See *United States v. McKennon*, 814 F.2d 1539, 1545-46 (11th Cir. 1987) (per curiam); *United States v. Morales*, 737 F.2d 761, 763-64 (8th Cir. 1984); *United States v. Pirolli*, 673 F.2d 1200, 1204 (11th Cir.), cert. denied, 459 U.S. 871 (1982); *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973) (en banc); *United States v. Mustone*, 469 F.2d 970, 972 (1st Cir. 1972); *State v. Schultz*, 388 So. 2d 1326, 1329 (Fla. Dist. Ct. App. 1980); *State v. Brown*, 20 Ohio App. 3d 36, 37-38, 484 N.E.2d 215, 217-18 (1984).

60. *City of St. Paul v. Vaughn*, 306 Minn. 337, 346, 237 N.W.2d 365, 370-71 (1975) (citations omitted).

61. *United States v. Mustone*, 469 F.2d 970, 972 (1st Cir. 1972).

62. See Note, *supra* note 40, at 302. "[W]hat is absolutely unwarranted is the quantum leap from physical abandonment to a conclusive presumption of intent to waive any expectation of privacy." *Id.*

63. *United States v. Salvucci*, 448 U.S. 83, 91 (1980). Indeed, it has been explicitly recognized that "it is conceivable that property could be abandoned yet still be deemed to be within the realm of Fourth Amendment protection." *People v. Whotte*, 113 Mich. App. 12, n.3, 317 N.W.2d 266, 268 n.3 (1982); see 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.6(c) at 477 (2d ed. 1987) ("A justified expectation of privacy may exist as to items which have been abandoned in the property law sense.").

64. See *infra* notes 120-40 and accompanying text.

65. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).



search cases rather than the abandonment theory. Curtilage is the area on one's property that includes the house and the immediately adjacent property. Courts have recognized that this area should be "afforded the most stringent Fourth Amendment protection."<sup>66</sup> Underlying this rule is a recognition that "[a]t common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'"<sup>67</sup>

In the warrantless trash search cases, courts relying on the curtilage principle have held that garbage placed for collection at the curb is outside the home's curtilage, and therefore a defendant can claim no reasonable expectation of privacy.<sup>68</sup> These courts concede that an expectation of privacy exists in one's trash while the trash remains on the property (within the curtilage), but at the moment it is placed off the premises for collection or is actually removed by the trash collector the expectation of privacy vanishes.<sup>69</sup>

The curtilage doctrine, however, is of limited usefulness. The doctrine's *per se* recognition of certain areas as deserving more "stringent" protection is inconsistent with the *Katz* Court's holding that "the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.'"<sup>70</sup> Recognizing that the fourth amendment did protect privacy, the *Katz* Court stated that the "Fourth Amendment protects people, not places."<sup>71</sup> The Court reaffirmed this sentiment in *United States v. Chadwick*<sup>72</sup> in which it held "[w]e do not agree that the Warrant Clause protects only dwellings and other specifically designated locales."<sup>73</sup>

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66. *United States v. Cobler*, 533 F. Supp. 407, 410 (W.D. Va. 1982) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)).

67. *Oliver v. United States*, 466 U.S. 170, 180 (1984) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). An important Supreme Court case in the development of the curtilage doctrine is *Hester v. United States*, 265 U.S. 57 (1924). In *Hester*, the Court held that the fourth amendment protection accorded to people in their houses did not extend to "open fields" surrounding the home. *Id.* at 59.

68. *See United States v. Stroble*, 431 F.2d 1273, 1276 (6th Cir. 1970).

69. *See United States v. Biondich*, 652 F.2d 743, 745 (8th Cir.), *cert. denied*, 454 U.S. 975 (1981). The Supreme Court has developed a four factor test for evaluating curtilage situations in general. *See United States v. Dunn*, 107 S. Ct. 1134, 1139 (1987). The four factors are: 1) proximity of the area to the home; 2) "whether the area is included within an enclosure surrounding the home;" 3) "the nature of the uses to which the area is put;" 4) the steps taken to protect the area from observations by passersby. *Id.*

In trash search cases, other courts have developed a four-part curtilage "continuum" test. These courts evaluate the expectation of privacy by asking four questions: 1) where the trash was located; 2) whether the dwelling is a multiple or single unit; 3) who removed the trash; 4) where the trash search takes place. The reasoning in these decisions posits that there is a continuum, in which trash located on the property of a single unit dwelling makes the strongest case for a reasonable expectation of privacy. The reasonableness weakens as the trash is moved off the property or if the trash is placed in a communal dumpster outside a multi-unit dwelling. *See People v. Whotte*, 113 Mich. App. 12, 317 N.W.2d 266 (1982); *Smith v. State*, 510 P.2d 793, 797-98 (Alaska), *cert. denied*, 414 U.S. 1086 (1973).

70. *Katz*, 389 U.S. at 350; *see United States v. Fluker*, 543 F.2d 709, 716 (9th Cir. 1976) ("the 'curtilage' test is no longer appropriate in ascertaining the extent of the Fourth Amendment's protections").

71. *Katz*, 389 U.S. at 351. *But see Patler v. Slayton*, 503 F.2d 472, 478 (4th Cir. 1974) ("The maxim of *Katz* . . . is of only limited usefulness, for in considering what people can reasonably expect to maintain as private we must inevitably speak in terms of places.").

72. 433 U.S. 1 (1977).

73. *Id.* at 7. This conclusion is logical because, by its own language, the fourth amendment

Indeed, the Court has consistently extended constitutional protection to areas well beyond the curtilage of the home,<sup>74</sup> and, conversely, in some instances have denied protection to areas clearly within the curtilage.<sup>75</sup> The rationale behind these decisions is that the proper test for fourth amendment protection is the expectation of privacy analysis. As the second circuit stated in *United States v. Arboleda*,<sup>76</sup> "[Defendant] is not helped by the hoary concept of 'curtilage'. Terming a particular area curtilage expresses a conclusion; it does not advance Fourth Amendment analysis. The relevant question is . . . whether the defendant has a legitimate expectation of privacy in the area."<sup>77</sup> While the location of an object remains relevant in that it can be understood as supporting inferences about whether a reasonable privacy expectation exists, location cannot by itself be determinative.

In addition to the abandonment and curtilage approaches, some courts have used a consent theory to justify warrantless trash searches. These courts rely on the reasoning that "one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."<sup>78</sup> In the warrantless trash search cases, the argument is that if the defendant freely and voluntarily consented to the collection of his garbage by trash collectors, who may themselves choose to look through the trash, then this consent justifies a later police search of the trash once the trash is removed from the property.<sup>79</sup> The weaknesses in this theory are twofold. First, even if it is established that a person freely and voluntarily consented to trash removal and to the examination of his garbage by the trash collector, consent is not a principle without limits,<sup>80</sup> and it is highly unlikely that the depositor of trash believed he was consenting to a police search of his trash as well.<sup>81</sup> Second, by focusing on whether the trash collector has removed the trash from the

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extends protection to "effects" and is not limited to houses. See *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

74. See *Mancusi v. DeForte*, 392 U.S. 364, 369 (1968) (warrantless search of business office that defendant shared with others violated fourth amendment); *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (fourth amendment applies to citizens on the street as well as at home); *Katz v. United States*, 389 U.S. 347, 352 (1967) (constitutional protection extended to conversation conducted from public phone booth); *Stoner v. California*, 376 U.S. 483, 490 (1964) (warrantless search of hotel room unconstitutional); *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (letters and sealed packages in the mail protected by the fourth amendment).

75. See *California v. Ciraolo*, 476 U.S. 207, 212-14 (1986) (warrantless low-level police reconnaissance flight over defendant's backyard that was enclosed by two fences and shielded from view at ground level not a violation of fourth amendment); *United States v. Smith*, 783 F.2d 648, 651 (6th Cir. 1986) (the fact that driveway is within curtilage of house not determinative of constitutional protection).

76. 633 F.2d 985 (2d Cir. 1980); *cert. denied*, 450 U.S. 917 (1981).

77. *Id.* at 992.

78. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

79. See *State v. Stevens*, 123 Wis. 2d 303, 316, 367 N.W.2d 788, 795, *cert. denied*, 474 U.S. 852 (1985); *Croker v. State*, 477 P.2d 122, 125 (Wyo. 1970).

80. See *Walter v. United States*, 447 U.S. 649, 656-57 (1980) (the scope of a consent search "is limited by the terms of its authorization."); see also *LO-JI Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979) (even general invitation to the public to enter an area does not establish consent to "wholesale searches and seizures that do not conform to Fourth Amendment guarantees.").

81. *Smith v. State*, 510 P.2d 793, 803 (Alaska 1973) (Rabinowitz, C.J., dissenting), *cert. denied*, 414 U.S. 1086 (1973).

property, "courts have merely recast the curtilage theory,"<sup>82</sup> which, by itself, does not determine if a reasonable privacy expectation exists.<sup>83</sup>

A fourth theory in trash search cases is the plain view theory.<sup>84</sup> Courts have used this theory to justify warrantless trash searches in two different instances: 1) when the police enter a dwelling lawfully with some type of law enforcement motive or purpose in mind and discover evidence in an openly exposed trash container;<sup>85</sup> and 2) when police view the exposed evidence while on a public street following disposal of the evidence at the curb for collection.<sup>86</sup> Invocation of the plain view theory in these instances is consistent with the reasoning in *Katz*. There is no misplaced reliance on property law concepts, and there is direct support from the *Katz* Court which acknowledged that "[w]hat a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection,"<sup>87</sup> because there can be no reasonable expectation of privacy in openly exposed items.<sup>88</sup>

The fifth traditional alternative in the warrantless trash search cases is the exigent circumstances doctrine. Courts using this theory to justify searches have pointed to the highly portable nature of trash, maintaining that police must act quickly to avoid losing the evidence to a passerby or trash collectors.<sup>89</sup> The problems with permitting a warrantless search solely on exigency grounds are twofold. First, it is unlikely that trash bags will be removed by passersby, and second, because trash collection takes place on a regular schedule, police can create their own exigency by intentionally waiting to conduct their search and seizure until right before the scheduled collection. Moreover, while exigency may justify seizure of the suspicious trash container, once the container has been seized, the exigent circumstances disappear. Thus, there is no reason why police cannot obtain a warrant while the seized trash receptacle remains in their control.<sup>90</sup>

The *Greenwood* majority avoids direct reliance on any of the five traditional

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82. See Note, *supra* note 40, at 306.

83. See *supra* notes 70-77 and accompanying text.

84. The plain view exception to the fourth amendment warrant requirement was articulated by the Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The Court held that to invoke the plain view theory: 1) the police must properly be in the area where the inspection takes place; 2) the officer must discover the item in question "inadvertently"; and, 3) it must be "immediately apparent" to the police that the object in view is evidence of a crime. *Id.* at 466.

85. See *People v. Sirhan*, 7 Cal. 3d 710, 741, 102 Cal. Rptr. 385, 405-06, 497 P.2d 1121, 1141-42 (1972), *cert. denied*, 410 U.S. 947 (1973) (envelope with incriminating writing on its face left in open trash box in defendant's backyard); *State v. Austin*, 584 P.2d 853, 856 (Utah 1978) (partially destroyed evidence of robbery left exposed in open wastebasket inside defendant's hotel room).

86. See *United States v. Stroble*, 431 F.2d 1273, 1276 (6th Cir. 1970) (empty carton for stolen television left at the curb and visible from adjacent public street).

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

88. The plain view doctrine would, however, be limited to cases where the trash contents are exposed. It would not apply to trash in sealed containers.

89. See *People v. Parker*, 44 Cal. App. 3d 222, 229-30, 118 Cal. Rptr. 523, 529 (1974); *People v. Stewart*, 34 Cal. App. 3d 695, 701, 110 Cal. Rptr. 227, 230 (1973).

90. See *Walter v. United States*, 447 U.S. 649, 654 (1980) ("an officer's authority to possess a package is distinct from his authority to examine its contents"); *United States v. Chadwick*, 433 U.S. 1, 13 (1977) (when seized footlocker was in police possession "it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.").

theories discussed above and states clearly at the beginning of its opinion that the reasonable expectation analysis developed in *Katz* is the proper standard for assessing the defendant's fourth amendment claims in the case.<sup>91</sup> The Court appears willing to concede that Greenwood manifested a subjective expectation of privacy but rejects the idea that such an expectation can ever be reasonable.<sup>92</sup>

The majority rejects the reasonableness of this expectation because plastic garbage bags left at the curb of a public street are "readily accessible to animals, children, scavengers, snoops, and other members of the public" including the trash collector, "who might himself have sorted through respondents' trash or permitted others, such as the police, to do so."<sup>93</sup> Because this area is "'particularly suited for public inspection,'" concludes the Court, there can be no reasonable expectation of privacy in trash kept in this area.<sup>94</sup> The majority's reasoning makes sense to an extent. The public accessibility of the trash, while not itself dispositive, should be a factor. While one may maintain a reasonable expectation of privacy in an object left accessible to the public, the reasonableness of the expectation would obviously be less than if the object was in a completely protected area.

The problem, however, with the majority's reliance on this argument is that the possibility that some third party *might* violate the sanctity of the sealed, opaque containers is not determinative. The Supreme Court in *United States v. Jacobsen* stated that "[t]he reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred."<sup>95</sup> In *Greenwood*, at the time the "invasion occurred" the trash bags were still safely sealed and remained inviolate, exposing nothing to the police or to the outside world. As the dissent in *Greenwood* aptly states,

The mere *possibility* that unwelcome meddlers *might* open and rummage through the containers does not negate the expectation of privacy in its contents any more than the possibility of a burglary negates an expectation of privacy in the home; or the possibility of a private intrusion negates an expectation of privacy in an unopened package; or the possibility that an operator will listen in on a telephone conversation negates an expectation of privacy in the words spoken on the telephone.<sup>96</sup>

Moreover, the location of the trash at the curbside, an area given to public inspection, does not necessarily preclude a reasonable expectation of privacy. The *Katz* Court held that what one "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."<sup>97</sup> In addition, the

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91. *Greenwood*, 108 S. Ct. at 1628. The Court, however, is unable to divorce itself entirely from the concepts of curtilage and abandonment. See *infra* text accompanying notes 99-100 & 116-19.

92. *Greenwood*, 108 S. Ct. at 1628.

93. *Id.* at 1628-29.

94. *Id.* at 1629 (quoting *United States v. Reicherter*, 647 F.2d 397, 399 (3d Cir. 1981)).

95. 466 U.S. 109, 115 (1984); see *United States v. O'Bryant*, 775 F.2d 1528, 1534 (11th Cir. 1985).

96. 108 S. Ct. at 1636 (Brennan, J., dissenting).

97. *Katz*, 389 U.S. at 351-52. In *Katz*, the content of the defendant's telephone conversation made from a public telephone booth was protected by the fourth amendment. *Id.* at 353.

Supreme Court has repeatedly held that a governmental invasion of privacy cannot be justified because a person's expectation of privacy toward the particular area is less than absolute.<sup>98</sup> The *Greenwood* Court's reliance on the concept of curtilage here is also problematic. Although the Court states that it is following a strict *Katz* expectation of privacy analysis, the majority specifically holds that there is no fourth amendment protection for "garbage left for collection outside the curtilage of the home."<sup>99</sup> This implies that the Court would have reached a different conclusion if the trash had been located within the curtilage. Such a result is troublesome because a legitimate expectation of privacy in a container is not worth very much if it can be destroyed by merely moving the container a few feet farther from the house. More importantly common law property concepts, like curtilage, by themselves have no talismanic effect on fourth amendment protection.<sup>100</sup> At best, these concepts support inferences about the reasonableness of an expectation of privacy; alone, however, they are never determinative.

The Supreme Court has stated that if a private party violates the sanctity of a sealed container, the police may examine the container's contents "to the extent that they ha[ve] already been examined by third parties."<sup>101</sup> This rule does not, however, lead to the conclusion that because a private third party may hypothetically intrude upon the container the police may conduct a warrantless search of the container.<sup>102</sup> Permitting a governmental search of a container's contents following their exposure by a private party is based on the idea that the individual's expectation of privacy has already been compromised by the private party.<sup>103</sup> This, however, was not the case in *Greenwood*, in which no third party had opened the containers prior to the police search.

This brings us to the Court's second argument. The majority states that the search was justified because "police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public."<sup>104</sup> The Court is absolutely right; it would be unreasonable to expect police not to examine evidence left exposed for all to see. This was

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98. See *O'Connor v. Ortega*, 480 U.S. 709, 718 (1987) (fourth amendment protection extended to defendant's desk and file cabinets even though hospital staff had access to office); *Mancusi v. DeForte*, 392 U.S. 364, 369 (1968) (expectation of privacy in office protected as to government intrusion even though defendant shared office with other union officials); *Stoner v. California*, 376 U.S. 483, 489-90 (1964) (police search of hotel room unconstitutional even though janitorial staff could enter); *Chapman v. United States*, 365 U.S. 610, 616-17 (1961) (search of defendant's house violated fourth amendment even though landlord had authority to enter for limited purposes).

99. *Greenwood*, 108 S. Ct. at 1627.

100. See *supra* notes 66-77 and accompanying text.

101. *Walter v. United States*, 447 U.S. 649, 656 (1980). The intrusion by the private party is not a violation of the fourth amendment because the amendment applies only to governmental intrusions. See *United States v. Jacobsen*, 466 U.S. 109, 115 (1984); *Burdeau v. McDowell* 256 U.S. 465, 475 (1921); *United States v. McDaniel*, 574 F.2d 1224, 1226 (5th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979).

102. Indeed, even when a private party has conducted a preliminary search, police authority to search is still circumscribed. See *Walter*, 447 U.S. at 657 ("the Government may not exceed the scope of the private search unless it has the right to make an independent search"). Moreover, the *Katz* Court ruled that what one "knowingly exposes to the public" is unprotected by the fourth amendment, not what *might be exposed to the public*. *Katz*, 389 U.S. at 351 (emphasis added).

103. *Jacobsen*, 466 U.S. at 121.

104. *Greenwood*, 108 S. Ct. at 1629.

one of the bases for the Supreme Court's prior development of the plain view doctrine.<sup>105</sup> The *Greenwood* majority's reasoning on this point is directly supported by *Katz*. The *Katz* Court stated, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."<sup>106</sup> Unfortunately, one is left to wonder why this argument appears in the majority's decision in *Greenwood*. At the time of the warrantless search of *Greenwood*'s sealed trash bags, no evidence of criminal conduct "could have been observed by any member of the public," and therefore the police were not required to "avert their eyes" from anything.

A third basis for the majority's holding in *Greenwood* is that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties"<sup>107</sup>—in this case the trash collector. The Court's conclusion here appears to be grounded in prior decisions in *United States v. White*<sup>108</sup> and *Hoffa v. United States*.<sup>109</sup> These cases questioned whether fourth amendment protection was to be extended to the content of "private" conversations that took place between a defendant and a government informer. In both cases the Court stated that the answer was no because "one contemplating illegal activities must realize and risk that his companions may be reporting to the police".<sup>110</sup> The *Hoffa* Court concluded that the fourth amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."<sup>111</sup>

Cases like *White* and *Hoffa* are, however, clearly distinguishable from trash search cases like *Greenwood*.<sup>112</sup> As Chief Justice Rabinowitz points out in his dissenting opinion in *Smith v. State*,<sup>113</sup> a trash search case decided by the Alaskan Supreme Court:

*Hoffa* and the instant case, however, are distinguishable. There the defendants knowingly and voluntarily communicated certain incriminating information to a third person who turned out to be a paid informer; a communication to another was intentionally initiated and undertaken. Having intentionally conducted such communication, the defendants were obliged to assume the risk that the recipient of the communication might turn out to be a governmental agent. Their expectation of privacy, under such circumstances, was necessarily diminished. Here, the facts suggest that no such knowing or voluntary disclosure of the contents of the closed garbage bag to the collectors or any other person was initiated or attempted by appellant. If anything, the facts would seem to suggest that appellant and her husband ex-

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105. See *Coolidge v. New Hampshire*, 403 U.S. 443, 467-68 (1971); *Ker v. California*, 374 U.S. 23, 43 (1963).

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

107. *Id.* (quoting *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979)).

108. 401 U.S. 745 (1971).

109. 385 U.S. 293 (1966).

110. *White*, 401 U.S. at 752.

111. *Hoffa*, 385 U.S. at 302.

112. See 1 W. LAFAYE, *supra* note 63, § 2.6(c), at 485 (distinguishing *White* and *Hoffa* from warrantless trash cases).

113. 510 P.2d 793 (Alaska), *cert. denied*, 414 U.S. 1086 (1973).

pected the refuse collectors to "commingle" or destroy the garbage. If appellant had deposited personal letters rather than contraband into the dumpster, it could not be seriously maintained that she voluntarily and knowingly meant to communicate the contents of such letters to the collectors or police.<sup>114</sup>

Chief Justice Rabinowitz describes the act of trash disposal more accurately than the majority in *Greenwood*. What is directly conveyed to the trash collector is not the evidence of a crime, but a sealed, opaque trash container. Garbage collectors do not stop repeatedly to look through every bag of refuse left for removal; and even if one "might expect some minor, inadvertent examination by garbagemen or other third persons, . . . such expectations would not necessarily include a detailed, systematized inspection of the garbage by law enforcement personnel."<sup>115</sup>

Equally unpersuasive is the *Greenwood* majority's assertion that their conclusion "is reinforced by the unanimous rejection of similar claims by the Federal Courts of Appeals" as well as a "vast majority" of state appellate courts.<sup>116</sup> The Court cites eleven federal appellate court cases and fifteen state appellate court cases in support of its conclusion.<sup>117</sup> Upon closer examination, however, and as the *Greenwood* dissent observes, most of these cases based their decision "entirely or almost entirely on an abandonment theory."<sup>118</sup> As discussed earlier, because the emphasis of the fourth amendment is on privacy, state property law concepts such as abandonment are not controlling.<sup>119</sup> Consequently, whatever precedential support the majority draws from these lower court cases that rely on the abandonment theory is limited at best.

In addition to the weaknesses in the *Greenwood* Court's reasoning, it overlooks significant factors that support a reasonable expectation of privacy in one's trash and that militate against permitting warrantless search of trash containers without probable cause. First, and most obvious, warrantless police searches of trash are inconsistent with the fourth amendment's general requirement of a search warrant as a matter of policy. Warrantless searches are "*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions."<sup>120</sup>

Second, when a police officer, in the absence of any controlling standard, can randomly pick through any number of trash containers on a particular street and continue to do so until he finds evidence of a crime, he violates the well-established prohibition against "arbitrary invasions [of privacy] by governmental

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114. *Id.* at 804 (Rabinowitz, C.J., dissenting).

115. *Id.* at 803 (Rabinowitz, C.J., dissenting).

116. *Greenwood*, 108 S. Ct. at 1629-30.

117. *Id.*

118. *Id.* at 1633-34 n.2 (Brennan, J., dissenting).

119. See *supra* notes 42-65 and accompanying text. Although some of the decisions cited by the majority attempt to link abandonment with the proper expectation of privacy analysis, none satisfactorily establish why abandonment should automatically negate the privacy expectation in all circumstances. See *supra* text accompanying notes 59-65.

120. *Katz*, 389 U.S. at 357; see *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971).

officials.”<sup>121</sup> The result in *Greenwood* does not merely permit police to search a criminal’s garbage, but permits police to arbitrarily search anyone’s garbage.

Third, by not requiring a warrant for these types of searches, the Court has, for all purposes, sanctioned the use of an otherwise illegal “general warrant”<sup>122</sup> by police. By permitting the police to bypass the fourth amendment warrant requirement, which mandates that police describe with particularity the place to be searched and items to be seized, the *Greenwood* Court allows police to conduct “a general exploratory search from one object to another until something incriminating at last emerges.”<sup>123</sup> Even if no incriminating evidence is found, the Court has, at the very least, provided police with a unique tool for harassing individuals, particularly in cases in which the police conduct repeated trash searches over a period of time.<sup>124</sup>

Fourth, a very strong case can be made for recognizing a subjective expectation of privacy that is objectively reasonable by societal standards under the factual circumstances of *Greenwood*. The very nature of trash supports this conclusion. A single trash bag is a unique, aggregate source of information about a person’s political, financial, medical, religious, and sexual beliefs and practices.<sup>125</sup> To quote the *Greenwood* dissent, “It cannot be doubted that a sealed trash bag harbors telling evidence of the ‘intimate activity associated with the sanctity of a man’s home and the privacies of life,’ which the Fourth Amendment is designed to protect.”<sup>126</sup>

Fifth, defendant here disposed of his garbage in a sealed, opaque container which protected its contents from scrutiny. Other courts in other contexts have held that a sealed bag or package supports an inference of an expectation of privacy.<sup>127</sup> In addition, any attempt to distinguish between one type of sealed container and another when performing an expectation of privacy analysis is entirely inconsistent with the Supreme Court’s refusal to distinguish between “worthy” and “unworthy” containers in fourth amendment search and seizure cases.<sup>128</sup> Moreover, when one deposits trash at the curbside, he expects that the trash will be destroyed, buried or, at the very least, commingled<sup>129</sup> with the

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121. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); see *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Ortiz*, 422 U.S. 891, 895 (1975).

122. *Payton v. New York*, 445 U.S. 573, 583-84 (1980) (general warrants “were the immediate evils that motivated the framing and adoption of the Fourth Amendment.”).

123. *Coolidge*, 403 U.S. at 466.

124. In *Greenwood*, for example, the trash searches took place over several months. See *supra* note 14.

125. See *Greenwood*, 108 S. Ct. at 1634 (Brennan, J., dissenting); *People v. Edwards*, 71 Cal. 2d 1096, 1104, 80 Cal. Rptr. 633, 638, 458 P.2d 713, 718 (1969); *State v. Tanaka*, 701 P.2d 1274, 1276-77 (Hawaii 1985).

126. *Greenwood*, 108 S. Ct. at 1634 (Brennan, J., dissenting) (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))).

127. See *Government of Virgin Islands v. Rasool*, 657 F.2d 582, 590 (3d Cir. 1981); *United States v. Goshorn*, 628 F.2d 697, 701 (1st Cir. 1980).

128. *United States v. Ross*, 456 U.S. 798, 822 (1982). The *Ross* Court continued: “a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.” *Id.*

129. *Greenwood*, 108 S. Ct. at 1637 (Brennan, J., dissenting).



trash of others. This commingling process effectly severs any connection between the trash and its original owner and further validates a reasonable expectation of privacy.

Finally, local ordinances, as they do in many communities, required Greenwood to dispose of his trash in this manner.<sup>130</sup> It is irrelevant that the purpose of these ordinances may be to effect sanitation and not privacy; one can reasonably infer from these ordinances that only trash collectors and not others will handle his trash.<sup>131</sup> It would also be improper to require that in order to maintain a reasonable expectation of privacy in one's trash that the owner must forego use of ordinary methods of trash collection. Many people cannot afford paper shredders or trash compactors<sup>132</sup> and burning of trash is often prohibited. Moreover,

[i]t would be a perversion of *Katz* to interpret it as extending protection only to those who resort to extraordinary means to keep information regarding their personal lives out of the hands of police. 'Mr. Katz could, of course, have protected himself against surveillance by forbearing to use the phone', but the fact that he did not do so did not deprive him of a justified expectation of privacy in the public telephone booth.<sup>133</sup>

The *Greenwood* Court states that even if there was a subjective expectation of privacy, it could not be found objectively reasonable under these circumstances.<sup>134</sup> The Court, however, forgets that trash left in a sealed container is of a highly personal nature. As the *Greenwood* dissent observes, "Most of us, I believe, would be incensed to discover a meddler—whether a neighbor, a reporter, or a detective—scrutinizing our sealed trash containers . . ." <sup>135</sup> Indeed, in 1975 when a reporter searched the trash of then-Secretary of State Henry Kissinger and then wrote an article about what he had discovered, the public responded by condemning the reporter.<sup>136</sup> Commentators characterized the reporter's actions as "indefensible . . . as civilized behavior,"<sup>137</sup> and "a disgusting invasion of personal privacy"<sup>138</sup> that was contrary to "the way decent people behave in relation to each other."<sup>139</sup> In view of such a reaction, it is difficult to understand how the *Greenwood* majority concludes that "society as a whole"

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130. *Id.* at 1636-37.

131. See *State v. Schultz*, 388 So. 2d 1326, 1330 (Fla. Dist. Ct. App.) (Anstead, J., dissenting) (by placing trash in a location for collection the owner is entitled to reasonably expect that it will be removed only by those authorized to do so). But see *United States v. Vahalik*, 606 F.2d 99, 101 (5th Cir. 1979) (purpose of municipal trash ordinance is to effect cleanliness and not to create an expectation of privacy), *cert. denied*, 444 U.S. 1081 (1980).

132. See Note, *supra* note 40, at 304.

133. See 1 W. LAFAYE, *supra* note 63, § 2.6(c), at 478-79 (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974)).

134. *Greenwood*, 108 S. Ct. at 1628.

135. *Id.* at 1635 (Brennan, J., dissenting).

136. *Id.* (Brennan, J., dissenting).

137. *Id.* (Brennan, J., dissenting) (quoting Washington Post, July 10, 1975, at A18, col. 1. (editorial)).

138. *Id.* (Brennan, J., dissenting) (quoting Flieger, *Investigative Trash*, U.S. NEWS & WORLD REP., July 28, 1975, at 72 (editor's page)).

139. *Id.* (Brennan, J., dissenting)

does not consider one's expectation of privacy in trash as reasonable.<sup>140</sup>

Having established that there is ample evidence of a reasonable expectation of privacy in one's trash, it is interesting to note that the Court would not, in the alternative, be able to justify its opinion by holding that the police search in *Greenwood* was reasonable and thus not subject to fourth amendment restrictions.<sup>141</sup> As the Supreme Court has said in the past, a search may be considered reasonable only if the police need to search outweighs the resulting invasion of privacy.<sup>142</sup> In *Greenwood*, the police suspected the defendant of drug trafficking. The Supreme Court previously held in *United States v. Place*<sup>143</sup> that it is not necessary to obtain a search warrant to screen an item with a drug-sniffing dog.<sup>144</sup> When the occasion for a trash search arises in a narcotics case like *Greenwood*, the trash could be screened by these dogs without opening the sealed container and violating the owner's privacy rights.<sup>145</sup> A positive reaction from the dog would provide probable cause for a warrant to search the container. If removal of the bag by a passerby or trash collector appeared imminent, the bag could be seized and held unopened pending receipt of the warrant.

Not only would this be a reasonable procedure, striking an effective balance between the law enforcement needs of the police and society and the rights of the individual, but in *Greenwood* it could have been done with no difficulty whatsoever. Although the Court's decision is silent on this matter, the state court opinion informs us that police did at one point have a drug-sniffing dog on the scene to check out a suspicious truck parked in front of the *Greenwood* home.<sup>146</sup> As a result, the police need to physically search the contents of *Greenwood*'s trash did not outweigh the defendant's personal privacy rights, and thus, the search cannot be deemed reasonable.

In light of these six factors and in the absence of a compelling law enforcement interest in the warrantless trash search, a better approach would be to presume a reasonable expectation of privacy exists in trash in sealed, opaque

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140. *Id.* at 1630-31 (Brennan, J., dissenting).

141. The fourth amendment only prohibits "unreasonable" searches and seizures. See *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *supra* note 1.

142. See *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (citing *Camara v. Municipal Ct.*, 387 U.S. 523, 536-37 (1967)).

143. 462 U.S. 696 (1983).

144. *Id.* at 707 (exposure of respondent's luggage to a trained canine in a public place did not constitute a search within the meaning of the fourth amendment).

145. See generally Loewy, *The Fourth Amendment As A Device For Protecting The Innocent*, 81 MICH. L. REV. 1229, 1244-48 (1983) (discussing use of the drug-sniffing dog as an "evidence-detecting divining rod").

146. *People v. Greenwood*, 182 Cal. App. 3d 729, 732, 227 Cal. Rptr. 539, 540 (Cal. Ct. App. 1986), *rev'd*, 108 S. Ct. 1625 (1988). This does not imply that warrantless trash searches will only be unreasonable in drug trafficking cases. They may very well be unreasonable in other contexts as well. In determining reasonableness one must analyze all the "circumstances surrounding the search" and balance the need for a particular search against the invasion of personal rights. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). The fact that a warrantless trash search may expedite a police investigation, however, does not obviate the need for a warrant. The Supreme Court has stated explicitly, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

containers.<sup>147</sup> This presumption may be weakened by the location of the container, but not negated. Situations that would defeat this presumption would include: 1) trash discarded without any type of container and left in plain view; 2) trash left in a type of container that reveals the identity of the contents;<sup>148</sup> 3) containers whose sanctity had already been violated by a third-party search.

One final observation is necessary. One commentator has observed, to establish that

people do have a justified expectation of privacy in their garbage is only to say that an examination of that garbage by the police is a search and therefore subject to Fourth Amendment constraints. Just what those constraints are is another matter. This expectation of privacy, 'although considerable, is less intense and insistent' than the expectation of privacy which one has as to his home, and thus it should not be concluded that the search of garbage is bounded by precisely the same limitations which are applicable to a search inside a dwelling.<sup>149</sup>

In other words, having established that sealed trash containers deserve fourth amendment protection, it would still be possible for a jurisdiction to permit searches of such containers without a warrant provided that police could articulate a legitimate justification for the search.

For example, the Supreme Court has authorized warrantless searches of automobiles and their contents provided that there is probable cause to believe that the vehicle contains contraband.<sup>150</sup> The justification for this exception to the warrant requirement is that automobiles enjoy a lesser, although still reasonable, expectation of privacy than the home, and that automobiles are highly mobile, making it impractical to obtain a warrant.<sup>151</sup> While trash containers are less likely to be moved than automobiles, trash containers are portable and are not generally accorded the same privacy expectations that a house receives. Thus, an analogy can be drawn between the warrantless search cases involving automobiles and trash containers.<sup>152</sup> Requiring a showing of probable cause in trash search cases, but not demanding that the police obtain a warrant, would be a reasonable balance between the competing law enforcement needs of the police and society and the fourth amendment privacy interests of the individual.

The *Greenwood* Court, however, by neglecting to require probable cause or any other standard of suspicion in the warrantless trash search cases, fails to take into account the private and confidential nature of trash, and overestimates society's tolerance for systematized violations of sealed trash containers and gov-

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147. Although *Greenwood* establishes that there is no protection against warrantless search and seizures of trash under the federal constitution, the states remain able to grant such protection under their own constitutions. *Greenwood*, 108 S. Ct. at 1630.

148. For example, transparent containers or those that conform to the shape of the object inside might disclose their contents. See *Arkansas v. Sanders*, 442 U.S. 753, 764 n.13 (1979), modified, *United States v. Ross*, 456 U.S. 798, 824 (1982).

149. See 1 W. LAFAVE, *supra* note 63, § 2.6(c), at 486 (quoting *People v. Dumas*, 9 Cal. 3d 871, 882, 109 Cal. Rptr. 304, 312, 512 P.2d 1208, 1216 (1973)).

150. *United States v. Ross*, 456 U.S. 798, 823 (1982).

151. See *California v. Carney*, 471 U.S. 386, 390-91 (1985).

152. See *People v. Parker*, 44 Cal. App. 3d 222, 230, 118 Cal. Rptr. 523, 529 (Cal. Ct. App. 1974) (drawing similar analogy between automobile and trash searches).

ernmental scrutiny of their contents. Those who feel that such violations would never be visited upon mainstream society and will only happen to those who, perhaps like Greenwood, deserve it, should note that at no time did the police contend that they had probable cause to believe Greenwood was involved in criminal activity.<sup>153</sup> The warrantless police searches of Greenwood's trash infringed on a reasonable expectation of privacy and, without at least a showing of probable cause, violated the fourth amendment.

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153. *Greenwood*, 108 S. Ct. at 1631-32 (Brennan, J., dissenting).

