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I. INTRODUCTION

IMAGINE this scenario: you just arrived home from a long, yet typical day at work. You sit down for dinner with your family. At the dinner table, you converse with your family about the events of the day and discuss the tasks that need to be completed tomorrow. After dinner, as usual, you take out the trash and leave it at the curb.

After you tuck your kids into bed, you lay down in bed next to your spouse. In the darkness, you hear the whir of a helicopter directly above your home. Naturally, you are curious about what is happening outside. In the darkness, you stumble to the bedroom window.

You are shocked to observe members of the local police force rummaging through your garbage, undoubtedly dredging up intimate details of your private life and habits. You feel outraged and violated as you watch the police cart off your garbage in their squad cars.

After all, your trash speaks volumes about your identity. According to Supreme Court precedent, however, such search and seizure of trash discarded outside the curtilage of a home is not a violation of the Fourth Amendment.[1] A vehement dissent written by Justice Brennan in that case recognized:

> A single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it. A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. 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

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1. *See* California v. Greenwood, 486 U.S. 35, 37 (1988).

Fourth Amendment is designed to protect.[2]

Unbeknownst to you, the helicopter looming above your home is also using a Forward Looking Infra Red Device ("FLIR"), a thermal imager, to detect heat emanations from bodies and from other objects in your home. The FLIR allows the police to detect differences in the surface temperatures of targeted objects in your home.[3] Because it is being used at night, the FLIR displays sources of heat in your home as shades of white and cooler temperatures in your home as shades of gray.[4] With the FLIR, the police are able to, in effect, see through the walls of your home. In 1994, the Washington Supreme Court recognized that:

> [a FLIR] can detect a human form through an open window when the person is leaning against a curtain, and pressing the curtain between the window screen and his or her body. [A FLIR] can also detect the warmth generated by a person leaning against a relatively thin barrier such as a plywood door.[5]

A FLIR allows the police:

> [t]o draw specific inferences about the inside of [a home]. When directed at a home, the infrared device allows the officer to determine which particular rooms a homeowner is heating, and thus using, at night. This information may reflect a homeowner's financial inability to heat the entire home, the existence and location of energy consuming and heat producing appliances, and possibly even the number of people who may be staying at the residence on a given night. The device discloses information about activities occurring within the confines of the home, and which a person is entitled to keep from disclosure absent a warrant.[6]

According to some courts, warrantless infrared surveillance with a FLIR does not violate the Fourth Amendment.[7] However, the Supreme Court has not yet addressed this issue.[8]

In disbelief, you think that this really cannot be happening to you. These intrusions by the police proceed without a warrant and without probable cause to believe that you or your family were engaged in any criminal activity whatsoever.[9] Like most citizens of the United States,

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2. *Id.* at 50-51 (Brennan, J., dissenting) (quoting Oliver v. United States, 466 U.S. 170, 180 (1984)).

3. *See* State v. Young, 867 P.2d 593, 595 (Wash. 1994) (en banc) (holding that infrared surveillance without a warrant violates the Fourth Amendment to the United States Constitution and Article 1, section 7 of the Washington State Constitution).

4. *See id.*

5. *Id.*

6. *Id.* at 598.

7. *See* United States v. Ford, 34 F.3d 992, 995-97 (11th Cir. 1994); United States v. Pinson, 24 F.3d 1056, 1057 (8th Cir. 1994); United States v. Penny-Feeney, 773 F. Supp. 220, 223-24 (D. Haw. 1991).

8. The Supreme Court recently granted certiorari on this issue. *See* United States v. Kyllo, 190 F.3d 1041 (9th Cir. 1999), *cert. granted*, Kyllo v. United States, No. 99-8508, 2000 WL 267066 (U.S. Sept. 26, 2000)

9. *See* HARRY I. SUBIN ET AL., THE CRIMINAL PROCESS: PROSECUTION AND DEFENSE FUNCTIONS 69 (1993) (stating that the Fourth Amendment requires that probable cause must exist in order to obtain a search warrant and to seize evidence).

you believe that your home is a refuge of privacy away from the rest of the world. In recognizing this principle, Justice Brennan of the Supreme Court noted that "[t]he American society . . . 'chooses to dwell in reasonable security and freedom from surveillance' and is more dedicated to individual liberty and more sensitive to intrusions on the sanctity of the home than the Court is willing to acknowledge."[10] The Supreme Court of Washington has also recognized that "[h]omes enjoy a special status in federal constitutional jurisprudence. '[T]he right of a man to retreat into his own home and there be free from unreasonable governmental intrusion' stands at the 'very core' of the Fourth Amendment."[11] So, what happened to your right to be let alone?

Welcome to the new dimension of search and seizure. It is a world of ever-increasing technological sophistication where the police can monitor your every move. If this scenario sounds too much like a scene plucked from the movie *Conspiracy Theory*, then this is your wake-up call. In the era of the "war on drugs," it *can* happen to you.

There is a great temptation to dismiss this scenario as downright Orwellian.[12] In his novel, *1984*, George Orwell described an eerily similar situation:

> The black [mustached] face gazed down from every commanding corner. There was one on the house immediately opposite. BIG BROTHER IS WATCHING YOU, the captain said. . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.[13]

In a 1998 case involving clandestine video surveillance on private property for the purpose of locating incriminating evidence, the supreme court of Vermont held that such warrantless surveillance by the police was not

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Since the purpose of the search warrant is to search for and seize evidence, instrumentalities, fruits of a crime, or contraband, the warrant must specifically designate the items to be seized, and the whereabouts of this material. For search warrants, the particularity requirement safeguards the individual's privacy interest against a general exploratory rummaging. . . . The proposed search warrant is normally accompanied by an affidavit. The affidavit must establish probable cause to believe that the property sought is related to the crime being investigated, *and* that the property is at the place to be searched.
Id. (citations omitted).

10. California v. Greenwood, 486 U.S. 35, 56 (1988) (Brennan, J., dissenting) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

11. *Young*, 867 P.2d at 601 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)); *see also* Payton v. New York, 445 U.S. 573 (1980); United States v. Karo, 468 U.S. 705, 714 (1984) (holding that when the police use sense-enhancing devices to obtain information from someone's home that could not be obtained by unaided observation of the exterior, the police should have a search warrant).

12. Fifty-one years ago, George Orwell envisioned such a police state in his dreaded novel about what he thought life would be like in the 1980s. *See* Florida v. Riley, 488 U.S. 445, 466 (1989) (Brennan, J., dissenting). In *Florida v. Riley*, a plurality of the Supreme Court held that surveillance from a helicopter with the naked eye does not violate the Fourth Amendment. *See id.* at 450-52; *see also* California v. Ciraolo, 476 U.S. 207, 215 (1986) (holding that warrantless aerial observation of a fenced-in backyard was not a violation of the Fourth Amendment).

13. GEORGE ORWELL, 1984, at 4 (1949).

a search for purposes of the Fourth Amendment.[14] A forceful dissenting opinion, however, argued:

George Orwell's bleak and chilling vision of post-modern civilization has not come to pass, at least not in this country. But allowing police agents to set up surreptitious, twenty-four-hour video surveillance of landowners on their own property without judicial oversight *raises the specter of such a society.* Indeed, the use of technological advances to enhance government surveillance techniques threatens to erode the expectations of privacy we take for granted in a free and open society. Today's decision undermines the lone bulwark against such erosion—[the] warrant requirement.[15]

Thus far, warrantless infrared surveillance by helicopters and warrantless seizure of trash seem to be confined to the realm of drug smugglers. Upon closer investigation, however, there is cause for concern that the police and other law enforcement officials will abuse their power. A commentator recently noted:

> Due to developing surveillance and information technologies and the merger of these technologies, the constitutional right to privacy currently does not coincide with individuals' interests in privacy. New surveillance equipment allows surveillants to observe, without a search warrant, that which most individuals consider private. This surveillance technology, therefore, invades an individual's privacy interest against intrusion without infringing upon his legal right to privacy. As such, advances in surveillance technology diminish the legal right to privacy.[16]

For example, in a case involving warrantless infrared surveillance with a FLIR on a number of private residences, the Supreme Court of Washington held that such unlimited infrared surveillance violates the Fourth Amendment.[17] The Supreme Court of Washington recognized:

> If we were to hold the use of the [infrared] device does not constitute a search, no limitation would be placed on the government's ability to use the device on any private residence, on any particular night, even if no criminal activity is suspected. Such police activity is constitutionally offensive.[18]

The court further argued:

> Such unrestricted, sense-enhanced observations present a dangerous amount of police discretion. This kind of surveillance avoids the protection of a warrant issued upon probable cause by a neutral magistrate. Not only does this practice eviscerate the traditional requirement that police identify a particular suspect prior to initiat-

14. *See* State v. Costin, 720 A.2d 866 (Vt. 1998) (Johnson, J., dissenting) (emphasis added) (denying the defendant's motion to suppress).

15. *Id.* at 871 (emphasis added).

16. Thomas B. Kearns, *Technology and the Right to Privacy: The Convergence of Surveillance and Information Privacy Concerns*, 7 WM. & MARY BILL RTS. J. 975, 1010 (1999).

17. *See Young*, 867 P.2d at 601.

18. *Id.* at 600. The police conducted thermal investigations not only on the defendant's home, but on the homes of his neighbors as well. *See id.*

> ing a search, but it also facilitates clandestine investigations by the police force, which are not subject to the traditional restraint of public accountability. Such secret surveillance may not only chill free expression, but also may encourage arbitrary and inappropriate police conduct.[19]

The Tenth Circuit also noted:

> The science of investigation has progressed to the point where the government can now divine useful data from clues so slight as to be beyond the awareness of the average citizen. We do not think, however, that subtlety can uncover that which the Constitution undoubtedly shields from the less refined tools of days past. Use of a thermal imager enables the government to discover that which is shielded from the public by the walls of the home. We reject the government's contention that its technical wizardry should free it from the restraints mandated by the Fourth Amendment. 'Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.' We therefore hold that the government must obtain a warrant before scanning a home with a thermal imager.[20]

If the courts sanction such warrantless searches will they open the door for such searches to come to a neighborhood near you? If we merely dismiss this issue as a "drug case," we do so at the peril of our own right to privacy. A dissenting opinion of the Supreme Court recognized:

> [T]he plurality has allowed its analysis of [the defendant's] expectation of privacy to be colored by its distaste for the activity in which [the defendant] was engaged. It is indeed easy to forget, especially in view of current concern over drug trafficking, that the scope of the Fourth Amendment's protection does not turn on whether the activity disclosed by a search is illegal or innocuous. But we dismiss this as a 'drug case' only at the peril of our own liberties. Justice Frankfurter once noted that '[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people,' and nowhere is this observation more apt than in the area of the Fourth Amendment, whose words have necessarily been given meaning largely through decisions suppressing evidence of criminal activity. The principle enunciated in this case determines what limits the Fourth Amendment imposes on aerial surveillance of any person, for any reason. If the Constitution does not protect [the defendant] . . . against such surveillance, it is hard to see how it will prohibit the government from aerial spying on the activities of a law-abiding citizen on her fully enclosed outdoor patio. . . . 'The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain

19. *Id.* (citations omitted).

20. United States v. Cusumano, 67 F.3d 1497, 1509 (10th Cir. 1995) (citation omitted) (affirming the district court's denial of the defendant's motion to suppress on other grounds).

of surveillance if we do not.'[21]

The dissenting opinion further noted:

> The interest [protected by the Fourteenth Amendment] is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously. . . . Interposition of a warrant requirement is designed not to shield 'wrongdoers,' but to secure a measure of privacy and a sense of personal security throughout our society.[22]

The difficult task for courts addressing this situation is to forge a delicate balance between two competing interests and concerns. Where is the middle ground between using advanced technological innovations to eliminate the danger of drugs from our streets and preserving our fundamental right to privacy under the Fourth Amendment? Do we really want to grant the police the right to use such increasingly sophisticated technological tools without a warrant to combat criminals in the "war on drugs" if it will mean sacrificing our right to privacy? At what point do we tread lightly on the coverage of the Fourth Amendment to eliminate the danger of drugs from our streets and at what point do we trample the protections against warrantless search offered by the Fourth Amendment?[23] Should citizens of the United States be relegated to passively watching their right to privacy erode in the name of the "war on drugs"? The Fourth Amendment might not protect you from warrantless searches of your trash and from warrantless infrared surveillance with a FLIR.[24] In fact, even shredding or burning will not ensure the privacy of your trash.[25]

In *United States v. Ishmael*, the court notably recognized the tension between the right to privacy and the increasing technological sophistication used in the "war on drugs."[26] The court argued:

> The question before the [c]ourt concerns the limitation, if any, on the [g]overnment's ability to use thermal imaging devices to detect con-

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21. *Florida v. Riley*, 488 U.S. at 463-64 (Brennan, J., dissenting) (citations omitted).

22. *Id.* at 464 n.6 (quoting United States v. White, 401 U.S. 745, 789-90 (1971) (Harlan, J., dissenting)).

23. In *Florida v. Riley*, the dissent argued that:

> The result of [this] inquiry in any given case depends ultimately on the judgment "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."

Id. at 456 (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974)).

24. The Fourth Amendment to the U.S. Constitution protects against unreasonable searches and seizures. The Fourth Amendment states:

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

U.S. CONST. amend. IV.

25. *See* United States v. Scott, 975 F.2d 927 (1st Cir. 1992).

26. *See* United States v. Ishmael, 843 F. Supp. 205, 207-08 (E.D. Tex. 1994) (granting a motion to suppress evidence resulting from the execution of a search warrant based on thermal imagery evidence).

> cealed underground illegal activity. The issue was spawned by the tension created between the right to privacy on the one hand and our society's rapidly evolving technological sophistication on the other. Left unchecked, technology has the potential to restrict, as a practical matter, the right to privacy . . . . We must take care that the war on drugs not count as one of its victims fundamental rights. The benefits to our society of safeguarding the right to privacy is such that the courts must say that there is a limit to the use of technological weapons, even in the war on drugs.[27]

The district court in *Ishmael* further recognized that "[i]f the government has the right to . . . make frequent flyovers using FLIR and other advanced technology, all without a warrant, there is precious little left of the right to privacy."[28]

This comment will argue that the use of advanced technologies in the "war on drugs" should not erode a person's fundamental right to privacy. To prevent this erosion of the right to privacy, courts should reexamine the right and should extend Fourth Amendment protection against warrantless search and seizure of garbage by the police and against warrantless police surveillance with thermal imagers.

First, we must examine the history of search and seizure generally. Next, we will discuss search and seizure in the specific contexts of warrantless trash seizures and warrantless surveillance with a thermal imager. Finally, in light of this discussion, we will address concerns over the future of the right to privacy in the face of evolving technological innovations used in the realm of search and seizure.

Exactly how far are we willing to allow warrantless search and seizure to extend? We begin with an overview of the history of search and seizure.

II. HISTORICAL BACKGROUND: SEARCH AND SEIZURE AND FOURTH AMENDMENT FUNDAMENTALS

The Fourth Amendment to the Constitution guarantees:

> [t]he 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 Warrant 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.[29]

The Fourth Amendment limits the government's investigatory activities by prohibiting unreasonable searches and seizures. It applies to the states through the Due Process Clause of the Fourteenth Amendment.[30] In order to comply with the Fourth Amendment, federal agents, police, and

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27. *Id.* (citation omitted).
28. *Id.* at 213.
29. U.S. CONST. amend. IV.
30. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that there is no difference between how the Fourth Amendment applies to a state action as opposed to a federal action); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

other law enforcement officials must demonstrate probable cause and must obtain a warrant prior to search.[31]

> Since the purpose of the search warrant is to search for and seize evidence, instrumentalities, fruits of a crime, or contraband, the warrant must specifically designate the items to be seized, and [the] whereabouts of the material. For search warrants, the particularity requirement safeguards the individual's privacy interest against a general exploratory rummaging. . . . The proposed search warrant is normally accompanied by an affidavit. The affidavit must establish probable cause to believe that the property sought is related to the crime being investigated, *and* that the property is at the place to be searched.[32]

Federal Rule of Criminal Procedure 41(c)(1) states:

> A warrant . . . shall issue only on an affidavit or affidavits sworn to before the federal magistrate judge or state judge and establishing the grounds for issuing the warrant. If the federal magistrate judge or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that magistrate judge or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. . . . The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed [ten] days, the person or place named for the property or person specified. The warrant shall be served in the daytime,[33] unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate judge to whom it shall be returned.[34]

After the search, the officer must give an inventory of the property seized to the federal magistrate judge.[35] A defendant can make a motion for return of property[36] or a motion to suppress[37] if the search and seizure is unlawful. In this manner, the Fourth Amendment's warrant requirement functions as a safeguard of a person's privacy rights by deterring potentially unconstitutional conduct by law enforcement officials. The Supreme Court has consistently held that all searches and seizures conducted by government agents that intrude upon an interest protected by the Fourth Amendment are per se unreasonable if they are conducted

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31. *See* SUBIN, *supra* note 9, at 62, 69.

32. *Id.* at 69 (citation omitted).

33. "The term 'daytime' is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time." FED. R. CRIM. P. 41(h).

34. *Id.* 41(c)(1).

35. *See id.* 41(d).

36. *See id.* 41(e).

37. *See id.* 41(f). The motion to suppress is made later in the trial court. *See id.*

without a warrant.[38] There are only a few well-defined exceptions to the warrant requirement in searches and seizures. These exceptions include: (1) searches incident to arrest;[39] (2) when there are "exigent circumstances;"[40] (3) when the evidence is in "plain view;"[41] (4) when consent is given;[42] (5) stop and frisk searches;[43] and (6) regulatory searches.[44]

Probably the most important aspect of the Supreme Court's Fourth Amendment jurisprudence is the exclusionary rule. The exclusionary rule requires a court to exclude all evidence obtained by the government as a result of a search or seizure that is found to violate the Fourth Amendment.[45] The main purpose of this rule is to deter unconstitutional conduct by government agents.[46]

The Supreme Court has established a limited good faith exception to the exclusionary rule.[47] Under this good faith exception, the exclusionary rule no longer applies to those situations where evidence is obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate when that warrant is later held to have not been supported by probable cause.[48] Other exceptions to the exclusionary rule include: (1) when the illegally obtained evidence would have

38. *See* Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971).

39. *See* Chimel v. California, 395 U.S. 752 (1969) (holding that when a lawful arrest is made, the arresting officer does not need a warrant to search the arrestee's person and the area within his immediate control).

40. *See* Cupp v. Murphy, 412 U.S. 291 (1973) (holding that a warrant is not needed if the search is necessary to prevent the destruction of evidence).

41. *See* Horton v. California, 496 U.S. 128 (1990) (holding that when the police are legally on a person's premises, and they see obviously incriminating evidence that is immediately apparent, they can seize the evidence without a warrant).

42. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (holding that a person's lack of knowledge that he has a right to refuse to consent to the search is but one factor in determining the validity of that consent). Consent searches are exempted from the general requirements of probable cause and warrant. *See id.* at 219, 245-46; *see also* Davis v. United States, 328 U.S. 582, 593-94 (1946). Constitutional demands are met if permission to search is given *voluntarily* by a party *with the requisite authority*. *See Schneckloth*, 412 U.S. at 248-49 (holding that voluntariness is a question of fact to be determined from all the circumstances). Defense attorneys often challenge the voluntariness of the consent to the search, and the prosecution has the burden of showing the voluntary nature of the consent. *See* Bumper v. North Carolina, 391 U.S. 543, 548-50 (1968); *see also* United States v. Matlock, 415 U.S. 164, 171 (1974) (ruling that a party giving consent must possess authority over the premises or a sufficient relationship to the premises or effects to be inspected, but need not be the party against whom the investigation is conducted).

43. *See* Terry v. Ohio, 392 U.S. 1 (1968) (holding that when police officers observe unusual conduct that would lead a reasonable officer to believe that criminal conduct is afoot and the suspect may be armed and dangerous, no warrant is needed for them to conduct a brief stop and "pat down" search to discover weapons).

44. *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (holding that a brief stop of vehicle motorists to check for intoxication does not require a warrant, probable cause, or even individualized suspicion, as long as every motorist is stopped).

45. *See Mapp*, 367 U.S. at 655; Fremont Weeks v. United States, 232 U.S. 383 (1914). The exclusionary rule applies in both federal and state courts. *See Mapp*, 367 U.S. at 655.

46. *See* United States v. Leon, 468 U.S. 897, 906 (1984). The exclusionary rule deters police and other law enforcement misconduct in two ways: (1) exclusion discourages individual violations of the Fourth Amendment by eliminating incentives to disregard it; and (2) exclusion furthers systematic deterrence. *See* Stone v. Powell, 428 U.S. 465, 492 (1976).

47. *See Leon*, 468 U.S. at 922.

48. *Id.* at 907.

been inevitably discovered through lawful activity;[49] (2) when there is a standing exception, and the illegally obtained evidence is admitted against a defendant who is not the victim of the Fourth Amendment violation;[50] and (3) when the illegally obtained evidence is admitted to impeach the testimony of the defendant.[51]

A crucial part of the exclusionary rule is the fruit of the poisonous tree doctrine. Under this doctrine, evidence that is directly seized as part of an unconstitutional search (the "primary" or "tainted" evidence) is not the only evidence that is suppressed at trial.[52] Any evidence that is obtained as a result of that "primary" or "tainted" evidence is excluded as well.[53] Such later-acquired evidence is called "secondary" or "derivative" evidence and is referred to as the fruits of the poisonous tree.[54] So, if government agents obtain "primary" or "tainted" evidence as a result of an unconstitutional search, and because of this "tainted evidence" obtain a search warrant, any evidence acquired pursuant to that warrant should be suppressed at trial.[55]

There are two exceptions to the fruit of the poisonous tree doctrine. First, according to the independent source doctrine, evidence acquired through means wholly independent of police misconduct is admissible to prove a criminal violation.[56] Second, the attenuation exception allows evidence of the search to be admitted if the link between the police misconduct and the acquisition of the evidence has become attenuated, thereby dissipating the taint.[57]

However, the fruit of the poisonous tree doctrine appears less frequently than it once did in the 1960s.[58] One possible explanation for this

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49. *See* Nix v. Williams, 467 U.S. 431 (1984).

50. *See* Alderman v. United States, 394 U.S. 165 (1969).

51. *See* Walder v. United States, 347 U.S. 62 (1954).

52. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 9.3(a), at 471 (2d ed. 1992).

53. *See id.*

54. *See id.*

55. *See id.*; *see also* Nardone v. United States, 308 U.S. 338, 340-41 (1939) (holding that the government is not only forbidden from using information obtained from an illegal wiretap at trial, but also cannot use any evidence that it later acquired as a result of that illegal wiretap information).

56. *See* United States v. Crews, 445 U.S. 463, 473 (1980); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

57. *See Nardone*, 308 U.S. at 341. The focus of the attenuation analysis is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 488 (1963).

58. *See* Segura v. United States, 468 U.S. 796 (1984) (holding that where police officers illegally enter and secure a dwelling to preserve potential evidence, but later conduct a search under a warrant supported by an "independent source" for probable cause, evidence obtained from that warranted search is not fruit of the poisonous tree and not subject to the exclusionary rule); *Nix*, 467 U.S. at 443-44 (1984) (holding that evidence subject to the exclusionary rule should not be excluded if the court determines that the police officers would "inevitably" have discovered the same evidence by using other police techniques if they had not first discovered it illegally); Harris v. New York, 401 U.S. 222 (1971) (holding that evidence held inadmissible under the exclusionary rule may nonetheless be

decline is because the doctrine presents particular problems in the realm of search and seizure.[59]

The Fourth Amendment provides a powerful shield to criminal defendants. It allows criminal defendants to exclude otherwise admissible and highly probative evidence at their trial. If such evidence is suppressed, the government is often forced to drop charges, even though it is highly likely that the defendant is guilty. This is an important reason why criminal defendants often assert that the police violated their Fourth Amendment rights in order to avoid having incriminating evidence presented at their trial.

In order to make out a prima facie case for a Fourth Amendment violation and a case invoking the exclusionary rule, a criminal defendant must establish three elements. The defendant must first prove that the purported search or seizure was conducted by a government agent—the state action requirement.[60] The defendant must next prove that the search or seizure intruded upon an interest of the defendant that is protected by the Fourth Amendment.[61] Then, the defendant must establish the third element, that the government conduct involved a "search" or "seizure."[62]

Because warrantless trash seizures and warrantless infrared surveillance must involve a government agent, we will examine in-depth the first element that a criminal defendant must prove, the state action requirement.[63] The Supreme Court has consistently interpreted the Fourth Amendment as only restraining searches or seizures conducted by government actors, holding that the Fourth Amendment does not restrain purely private actions.[64]

However, the mere fact that the actual search is conducted by a private party is not dispositive of the agency issue. The Supreme Court has held that the relationship between a private party conducting a search and the

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used to impeach the defendant's trial testimony); *Wong Sun*, 371 U.S. at 491 (holding that connection between the illegal search and the evidence sought to be admitted can be so "attenuated as to dissipate the taint" of the original illegality).

59. Often because the actual seizure is not illegal, the connection between the police conduct and the acquisition is less apparent. The intervention of time and other circumstances make it especially difficult to prove causation. *See Nardone*, 308 U.S. at 341. Also, despite the fact that there is police misconduct, lawful investigatory measures may have contributed equally to the securing of the evidence. *See Silverthorne Lumber Co.*, 251 U.S. at 392. There is concern that a rigid application of the exclusionary rule would provide a perpetual shield to criminal defendants against prosecution because their illegal activities were first discovered through police misconduct. It was not intended for criminals to benefit from the exclusionary rule in this manner. *See Nix*, 467 U.S. at 443.

60. *See* United States v. Jacobsen, 466 U.S. 109 (1984) (noting that Fourth Amendment protection proscribes only governmental action).

61. *See Ciraolo*, 476 U.S. at 27 (defining a "protected interest").

62. *See* United States v. Place, 462 U.S. 696 (1983) (holding that if a canine sniffs a person's luggage, then it is not a "search" for Fourth Amendment purposes).

63. The agency issue presents particular problems in the realm of warrantless trash seizures when trash collectors or other private individuals become involved in the seizure.

64. *See* Burdeau v. McDowell, 256 U.S. 465 (1921). The Supreme Court has repeatedly held that the Fourth Amendment is implicated whenever the search or seizure is conducted by a "sovereign authority," not just the police or other law enforcement agents. *See* New Jersey v. T.L.O., 469 U.S. 325, 335 (1985).

government can be so close as to make the private party an agent of the government.[65] The landmark Supreme Court decision dealing with the question of whether a private party was acting as an agent of the government is *Coolidge v. New Hampshire*.[66] In *Coolidge*, the defendant stood accused of the kidnapping and murder of a teenage girl.[67] In the normal course of their investigation, two police officers assigned to the case routinely asked their prime suspects if they owned any guns.[68] If the suspects owned any guns, the two officers would then ask for the guns to run ballistics tests in order to rule out each person as a suspect.[69] The officers met with the defendant's wife and, when asked if the defendant owned any guns, she produced the gun that the defendant had used to murder the teenage girl.[70] The wife then asked the officers if they needed the gun, and the officers eventually took it.[71]

In *Coolidge*, the defendant moved for the gun, the murder weapon, to be suppressed as evidence at trial because his wife was acting as an agent of the police when she gave the two investigating officers the gun. Thus, the defendant argued that the police taking the gun was a warrantless seizure in violation of the Fourth Amendment.[72]

The Supreme Court disagreed with the defendant's argument in *Coolidge*. The Supreme Court held that the test for determining whether a person is acting as an agent of the government is "whether [the private party], in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state when [the search or seizure occurred]."[73]

The Supreme Court set forth two ways that this test could be met. First, the defendant could show that the police intended to seize the property beforehand and ought to have obtained a warrant.[74] Second, the defendant could show that the police attempted to "coerce, dominate, or direct" the actions of the private party.[75] In *Coolidge*, the Supreme Court addressed the first instance and found no evidence that the police officers intended to retrieve the murder weapon from the defendant or the defendant's wife beforehand or to rummage among the defendant's personal effects and dispossess him of any property.[76] In the second instance, the Supreme Court held that there was no evidence that the officers acted in any way to coerce, dominate, or direct the defendant's wife.[77] Instead,

65. *See* Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971).
66. 403 U.S. 443 (1971).
67. *See id.* at 445, 447.
68. *See id.* at 485.
69. *See id.*
70. *See id.* at 486.
71. *See Coolidge*, 403 U.S. at 486.
72. *See id.* at 487.
73. *See id.*
74. *See id.* at 488.
75. *See id.* at 488-89.
76. *See id.* at 485, 488.
77. *See Coolidge*, 403 U.S. at 489-90.

the Supreme Court found that the defendant's wife acted on her own initiative when she offered to retrieve her husband's gun to help the police.[78] The defendant's wife believed there was nothing to hide from the police.[79]

Subsequent to the Supreme Court's decision, there has been much confusion in the lower federal courts on how to apply the *Coolidge* test. A recent Ninth Circuit case helps illustrate how the lower federal courts have since applied the *Coolidge* test to various fact patterns. In *United States v. Reed*,[80] the manager of a private hotel suspected that one of his guests was using his room for illicit drug activities.[81] The manager called the local police under the guise that he needed officers to provide protection while he checked the room.[82] Two officers arrived at the hotel and accompanied the hotel manager into the guest's room. While in the room, they observed some drug instruments in plain view.[83] The officers then determined that the manager was safe and remained in the doorway to the guest's room.[84] Meanwhile, the manager of the hotel proceeded to rifle through a dresser drawer and opened the guest's briefcase.[85] Based on information obtained through that search, the police officers obtained a search warrant, found a pistol and drugs, and arrested the guest.[86]

The defendant (the guest) made a motion to suppress the evidence found pursuant to the search warrant. The defendant argued that the manager of the hotel was acting as a government agent and that the initial search leading to the warrant violated the Fourth Amendment.[87] The Ninth Circuit recognized the somewhat muddled gray area between the extremes of overt governmental participation in a search, clearly implicating the Fourth Amendment, and the complete absence of such participation, not implicating the Fourth Amendment.[88] The Ninth Circuit held that the search in *Reed* fell into the gray area that appears when private individuals become involved in searches and seizures, yet it still implicated the Fourth Amendment.[89] For cases that fall into the gray area, the Ninth Circuit set up a two-part test for determining whether a private individual is acting as a government agent for purposes of the Fourth Amendment.[90] First, the court should determine "whether the government knew of and acquiesced in the intrusive conduct."[91] Second, if this first prong is met, the court should determine "whether the party per-

78. *See id.*
79. *See id.*
80. 15 F.3d 928 (9th Cir. 1994).
81. *See id.* at 930.
82. *See id.*
83. *See id.*
84. *See id.*
85. *See id.*
86. *See Reed*, 15 F.3d at 930.
87. *See id.* at 930-31.
88. *See id.* at 931.
89. *See id.*
90. *See id.*
91. *Id.*

forming the search intended to assist law enforcement efforts or [to] further his own ends."[92]

The Ninth Circuit held in *Reed* that the two police officers knew of and acquiesced in the manager's search of the defendant's hotel room.[93] The court also ruled that the manager did not have any independent motivation for rummaging through the defendant's personal belongings.[94] The court held that the hotel manager was not protecting motel property but, instead, was solely helping the police take action.[95] According to the court, this is clearly not a motivation independent of the government.[96]

The Ninth Circuit flatly rejected the government's contentions that a desire by a private party to prevent criminal activity constitutes an independent motivation because that would mean the second element of the test would rarely be satisfied since most private parties assist the police to prevent criminal activity.[97] The Ninth Circuit also rejected the government's contention that the police officers' presence in the doorway was "merely incidental."[98] The Ninth Circuit found that the officers' presence at the motel was more than incidental and was sufficient to create an agency relationship.[99] The officers were aware the search was being conducted and were aware the search would have violated the Fourth Amendment had they performed it.[100]

Thus, federal courts have been increasingly willing to find the requisite contacts between a private party conducting a search and the government in order to apply the protections of the Fourth Amendment. However, at the same time, federal courts have been careful to distinguish those cases where the government is actively involved in the search or seizure, like in the *Reed* case, from those where the contact is merely incidental or de minimus.

An example of the latter types of cases, where the federal courts find no agency relationship, is *United States v. Kinney*.[101] In *Kinney*, the defendant's girlfriend voluntarily called the police after she discovered guns, which she believed to be stolen, in the defendant's locked closet.[102] Upon the girlfriend's request, the police entered the defendant's apartment.[103] After the police refused to look inside the locked closet, the

92. *Reed*, 15 F.3d at 931.
93. The Ninth Circuit relied on three facts in making its decision: (1) the officers "were personally present during the search"; (2) the officers "knew exactly what [the manager] was doing as he was doing it"; and (3) the officers "made no attempt to discourage [the manager] from examining [the defendant's] personal belongings beyond what was required to protect hotel property." *Id.*
94. *See id.*
95. *See id.* at 931-32.
96. *See id.*
97. *See id.*
98. *See Reed*, 15 F.3d at 931-32.
99. *See id.*
100. *See id.*
101. 953 F.2d 863 (4th Cir. 1992).
102. *See id.* at 864.
103. *See id.*

girlfriend opened it up and handed the guns to the officers, who did not have a warrant.[104]

At trial, the defendant in *Kinney* made a motion to suppress the evidence on the grounds that his girlfriend had been acting as a government agent and that the warrantless search violated the Fourth Amendment.[105] The Fourth Circuit rejected the defendant's argument and allowed the evidence in at trial, reasoning that "more than the mere presence of a police officer [at the time of the search] is necessary to constitute the government action required to implicate Fourth Amendment concerns."[106] The Fourth Circuit found that where private parties act on their own initiative to make a search, without any suggestion by police officers, there is no agency under the *Coolidge* test.[107]

Apparently, the *Coolidge* test did not establish a bright-line rule that lends itself to easy application by the lower federal courts. Some lower federal courts adopted the Ninth Circuit's rigid two-part test from *Reed*, while others have required a certain level of government involvement or a certain amount of evidence indicating a lack of an independent motive by the private party. For example, the Sixth Circuit expressed its opinion that the proper analysis under *Coolidge* is whether the police "instigated, encouraged or participated in the search," a test that ignores motive.[108] This is in direct conflict with the courts that have given almost controlling weight to the motivation of the private party.[109] Although each court places its individual spin on both parts of the Ninth Circuit's test, some form of that test remains as the majority view in the federal system.[110]

The agency issue may present multifarious problems, particularly in the realm of warrantless trash seizures. This is especially true when the police involve trash collectors or other private individuals in the search and seizure of the garbage.[111] This comment will now examine search and seizure in the specific context of trash seizure cases.

III. ORIGINS OF THE TRASH SEIZURE CASES: ABANDONMENT OR PRIVACY?

There are two approaches in trash seizure cases: abandonment and privacy. The early Supreme Court adopted a property-based approach to

104. *See id.* at 864-65.

105. *See id.* at 865.

106. *Id.*

107. *See id.*

108. United States v. Lambert, 771 F.2d 83, 89 (6th Cir. 1985).

109. *See* Gundlach v. Janing, 401 F. Supp. 1089, 1093 (D. Neb. 1975), *aff'd per curiam*, 536 F.2d 754 (8th Cir. 1976) (holding that "the intent of the private person in conducting a search . . . is a proper factor for consideration.").

110. *But see* Anthony G. Scheer, Note, *A Search by Any Other Name: Fourth Amendment Implications of a Private Citizen's Actions in State v. Sanders*, 69 N.C. L. REV. 1449, 1456 (1991) (arguing that the courts should adopt a but for test).

111. *See, e.g.*, State v. Hauser, 464 S.E.2d 443 (N.C. 1995).

the search and seizure of trash.[112] The Court used an abandonment analysis in its first trash seizure cases and reasoned through the basic law of property that when an object is abandoned, the defendant relinquishes [all] property rights as to subsequent finders.[113] In line with this analysis, if the police seize abandoned property, they DO not violate the Fourth Amendment. Under the logic of the abandonment approach, if the original owner relinquishes all property rights, then there are no Fourth Amendment consequences.

This abandonment analysis consisted of two inquiries: (1) whether the defendant intended to abandon the object recovered by the police; and (2) whether the police intrusion took place in an area protected by the Fourth Amendment.[114]

Addressing the first prong, property law recognizes that the act of abandonment is demonstrated by an intention to relinquish all title, possession, or claim to property, accompanied by some type of act or omission by which such intention is manifested.[115] Intent is a question of fact and is not presumed, and proof supporting it must be direct or affirmative or reasonably beget the exclusive inference of the throwing away.[116]

Regarding the second inquiry, a violation of the Fourth Amendment occurs when the police physically intrude into a "constitutionally protected area."[117] Areas protected include persons, houses, and papers and effects.[118] The Fourth Amendment also protects clothing, apartments, hotel rooms, garages, business offices, stores, warehouses, letters, and automobiles.[119]

Under the abandonment approach, the concept of curtilage helped determine what and where constitutionally protected areas were.[120] Curtilage, the area immediately surrounding the home, was protected by the Fourth Amendment under the abandonment approach.[121] The courts as-

112. *See* Hester v. United States, 265 U.S. 57 (1924); Abel v. United States, 362 U.S. 217 (1960).

113. *Hester*, 265 U.S. at 58-59.

114. *See* Work v. United States, 243 F.2d 660 (D.C. Cir. 1957) (applying both prongs of the abandonment analysis).

115. *See generally* Edward G. Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 BUFF. L. REV. 399, 400-01 (1970-71). Mascolo contends that:

> The significance of abandoned property in the law of search and seizure lies in the maxim that the protection of the Fourth Amendment does not extend to it. Thus, where one abandons property, he is said to bring his right to privacy therein to an end, and may not later complain about its subsequent seizure and use in evidence against him. In short, the theory of abandonment is that no issue of search is presented in such a situation, and the property so abandoned may be seized without probable cause.

Id.

116. *See id.* at 402; *see also* United States v. Cowan, 396 F.2d 83, 87 (2d Cir. 1968) (quoting Foulke v. New York Consol. R.R., 127 N.E. 237, 238 (N.Y. 1920)).

117. WAYNE R. LAFAVE, SEARCH & SEIZURE § 2.6(c), at 302-03 (2d ed. 1987).

118. *See id.* at 303.

119. *See id.*

120. *See* United States v. Dunn, 480 U.S. 294 (1987); Olmstead v. United States, 277 U.S. 438 (1928).

121. *See Dunn*, 480 U.S. at 300 n.3; *Olmstead*, 277 U.S. at 440.

sessed the dimensions of the curtilage on a case-by-case basis.[122]

In 1967, in the watershed case *Katz v. United States*,[123] the Supreme Court rejected abandonment and adopted an approach based on an individual's expectation of privacy. The focus shifted to protecting the privacy of the citizen from unreasonable government investigation. The Court reasoned that the Fourth Amendment protects *people, not places*.[124]

The 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. But what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[125] Under *Katz*, a person must meet two requirements: (1) the person must have exhibited an actual (subjective) expectation of privacy; and (2) the expectation of privacy must be one that society is prepared to recognize as objectively reasonable.[126] The Supreme Court continues to follow the test formulated in *Katz* and it continues to be the prevailing test regarding trash seizure cases today.[127]

The Supreme Court retreated from *Katz's* twenty one years later in *California v. Greenwood* privacy approach.[128] In a confusing and often

122. *See* Rosencranz v. United States, 356 F.2d 310, 313 (1st Cir. 1966) (holding that curtilage is determined by the facts of the case); *see also* United States v. Minker, 312 F.2d 632 (3d Cir. 1962). The Supreme Court has articulated four additional factors in determining curtilage: (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 of the area; and (4) the steps taken by the resident to protect the area from observation by people passing by. *See Dunn*, 480 U.S. at 300-03.

123. 389 U.S. 347 (1967). In *Katz*, the government agents suspected the defendant of conducting an illegal gambling operation from a public telephone booth. *See id.* The agents placed a recording device outside the booth and monitored the defendant's telephone conversations. *See id.* at 348. Despite the defendant's motion to suppress, the evidence was ruled admissible at trial and the defendant was found guilty. *See id.* On appeal, the Supreme Court afforded Fourth Amendment protection to the defendant's phone calls. *See id.* at 359.

124. *See id.* at 353 (emphasis added). The Supreme Court recognized that "the Fourth Amendment protects people—and not simply 'areas' . . . it becomes clear that the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* The Court forcefully rejected its property-based abandonment analysis. *See id.*

125. *Id.* at 351 (citations omitted).

126. *See id.* at 361 (Harlan, J., concurring). Under *Katz*, "a man's home is, for most purposes, a place where he expects privacy . . . ." *Id.*

127. *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 740 (1979); *Greenwood*, 486 U.S. at 35; Terry v. Ohio, 392 U.S. 1 (1968); Oliver v. United States, 466 U.S. 170 (1984). However, some commentators argue that the abandonment approach is still alive and well. They argue that the property-based abandonment approach is viable and remains the dominant approach. *See* United States v. Mustone, 469 F.2d 970 (1st Cir. 1972) (suggesting a link between the property and privacy approaches). *But see* People v. Edwards, 458 P.2d 713 (Cal. 1969); People v. Krivda, 486 P.2d 1262 (Cal. 1971), *vacated*, 409 U.S. 33 (1972) (per curiam), *aff'd*, 504 P.2d 457 (Cal. 1973), *cert. denied*, 412 U.S. 919 (1973).

128. *See Greenwood*, 486 U.S. at 35. In *Greenwood*, the police suspected the defendant of narcotics trafficking . The police asked a trash collector to pick up the trash bags that the defendant had left on the curb in front of his house. The trash collector turned the garbage bags over to the police. The police rummaged through the defendant's trash bags without a warrant. This inspection of the trash revealed evidence of narcotics use and a

contradictory opinion, the Court held that "privacy expectations [with respect to trash in seizure cases] were objectively unreasonable."[129] Previous court decisions were in accordance with this view.[130]

In a vehement dissent to the Court's decision in *Greenwood*, Justice Brennan argued that trash bags were private containers.[131] Justice Brennan stated:

> A single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it. A search of trash, like the search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. 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.[132]

For support of his dissenting argument, Brennan relied upon local ordinances prohibiting others from rummaging through garbage.[133] Brennan contended through this analogy that these ordinances reinforced an individual's privacy expectations in their garbage.[134]

Furthermore, Justice Brennan attacked the majority's argument that police officers and other law enforcement officials should be able to claw through a person's trash without a warrant because any scavenger off the street can do so. Justice Brennan countered:

> The mere possibility that unwelcome meddlers might open and rummage through the containers does not negate the expectation of privacy in their 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

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warrant to search the defendant's home was issued based on the evidence obtained through the trash seizure. *See id.* at 37-38.

129. *Id.* at 41-42.

130. "Understandable as this desire for [privacy in trash] may be, it is not conclusive of society's willingness to recognize an expectation of privacy in . . . garbage . . . as reasonable. . . . [I]t would be reasonable to expect trash to be accidentally removed . . . by running children, passing cars, stray dogs, or even a visitor. . . ." Smith v. State, 510 P.2d 793, 798 (Alaska 1973). The Alaska Supreme Court's weak analogy between scavengers and law enforcement officials bolsters the argument that the police ought to be able to perform searches without a warrant simply because scavengers can. The Supreme Court later adopted this view in support of its decision that a privacy expectation in garbage is objectively unreasonable. *See Greenwood*, 486 U.S. at 54 (citing People v. Krivda, 504 P.2d 457 (1973)).

131. *See Greenwood*, 486 U.S. at 50 (Brennan, J., dissenting).

132. *Id.* at 50-51.

133. *See id.* at 52. Justice Brennan argued that the Court had protected privacy expectations in containers similar to trash bags and that the fact that the garbage bags were being used to dispose, not transport, items should not make a difference. *See id.* at 49, 52.

134. *See id.* at 51.

> spoken on the telephone. "What a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." We have therefore repeatedly rejected attempts to justify a State's invasion of privacy on the ground that the privacy is not absolute. As Justice Scalia [has stated], the Fourth Amendment protects "privacy . . . not solitude."[135]

It should come as no surprise that the legacy of *Greenwood* is rather confusing. The *Greenwood* Court suggested at least three approaches to analyzing trash seizure cases, yet failed to adopt any one of the three as controlling. Coming away from the hodgepodge of *Greenwood*, it is clear: (1) that the Court relied upon *Katz* to conclude that privacy expectations in trash are unreasonable; (2) that the Court also relied on *Katz* to assert that when persons knowingly expose their garbage, their privacy expectations are necessarily defeated (the knowing exposure test); and (3) that the Court relied upon the abandonment approach to endorse a more bright-lined test under which no privacy expectations can attach to garbage left outside the curtilage.[136]

The Court's decision seems to suggest that the property-based abandonment test is still viable. However, just a year before its decision in *Greenwood*, Justice White, in a forceful dissenting opinion, explicitly rejected this property-based analysis in the context of trash seizure cases.[137] This is yet another example of the inconsistencies in the Court's decision in *Greenwood*.

Post-*Greenwood*, lower courts have had a difficult time interpreting which rule to apply in the context of trash seizure cases. Notably, the Seventh Circuit, in *United States v. Hedrick*,[138] formulated its own adaptation of the knowing-exposure test outlined by the Supreme Court in *Greenwood*. The Seventh Circuit held that the main determination was whether the garbage was in a publicly accessible place where it was likely to be viewed by the public.[139] If so, then the garbage is knowingly ex-

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135. *Id.* at 54 (citations omitted); *see also* Chapman v. United States, 365 U.S. 610, 616-17 (1961); Stoner v. California, 376 U.S. 483 (1964); O'Connor v. Ortega, 480 U.S. 709 (1987).

136. *See Greenwood*, 486 U.S. at 35.

137. *See* California v. Rooney, 483 U.S. 307, 320 (1987) (per curiam) (White, J., dissenting). Justice White, who wrote the opinion in *Katz*, stated:

> I assume that under state law [defendant] retained an ownership or possessory interest in the trash bag and its contents. [This] property interest, however, does not settle the matter for Fourth Amendment purposes, . . . As we have said, the premise that property interests control the right of officials to search and seize has been discredited.

Id.

138. 922 F.2d 396 (7th Cir. 1991).

139. *See id.* at 400. But the Seventh Circuit relied on the all too familiar scavenger analogy. *See id.* The court argued:

> The willingness of members of the public to trespass upon private property in order to search through garbage cans cannot automatically defeat the Fourth Amendment expectation of privacy any more than a series of burglaries could eliminate any expectation of privacy in the home. Where, however, the garbage is readily accessible from the street or other public thoroughfares, an expectation of privacy may be objectively unreasonable because of the common practice of scavengers, snoops, and other members of the public in sorting through garbage. In other words, garbage placed where it is not only accessible to

posed to the public for Fourth Amendment purposes. Any expectation of privacy is, therefore, deemed objectively unreasonable per *Katz*.[140] It is interesting to note here that the knowing-exposure test focuses mainly on *place*, not privacy. The concept of curtilage is still coming into play, although the Seventh Circuit follows the Supreme Court and argues that it is not controlling.[141]

Finally, *United States v. Scott*[142] opened up yet another dimension in trash seizure cases. In *Scott*, a bookkeeper began to file IRS returns electronically from his personal computer in 1989. The IRS later learned of a possible scheme to defraud the government by filing false tax returns. In June 1989, the IRS investigation focused on the bookkeeper, Scott. Every week, the IRS conducted searches of Scott's garbage. An IRS agent would actually pose as a trash collector and pick up Scott's garbage from the curb in front of Scott's house. However, much of the trash had been shredded, so the IRS agents had to reconstruct those documents from the trash. These reconstructed documents were used to obtain a search warrant for Scott's home. In that search, the IRS seized numerous papers and effects. The seized documents, along with those reconstructed from Scott's trash, constituted virtually all of the evidence against Scott that connected him to the tax fraud scheme.[143]

At trial, Scott moved to suppress all documents seized in both the warrantless search of his trash and the search of his home, as the fruits of those searches, arguing that the IRS had violated the Fourth Amendment. The district court granted that motion, holding that the search was unconstitutional because it violated Scott's reasonable expectations of privacy.[144] The district court argued:

> [D]efendant had taken steps to protect his privacy rights by shredding his trash. In *Greenwood* the [c]ourt stated that it was "common knowledge" that trash left on the curb is accessible to snoops and scavengers. But, it is not "common knowledge" that snoops and scavengers may retrieve shredded materials and then "painstakingly reconstruct" them to learn the contents. Society would accept as reasonable, therefore, defendant's belief that, once he shredded his documents, they would be shielded from public examination.[145]

On appeal, the First Circuit reversed, holding that even the warrantless seizure of shredded trash does not violate the Fourth Amendment.[146] The confusion of lower courts in how to review trash search and seizure

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the public but likely to be viewed by the public is "knowingly exposed" to the public for Fourth Amendment purposes.
Id.

140. *See id.*

141. *See id.* at 398.

142. 776 F. Supp. 629, 630 (D. Mass. 1991), *rev'd*, 975 F.2d 927 (1st Cir. 1991), *cert. denied*, 507 U.S. 1042 (1993).

143. *See id.* at 630.

144. *See id.* at 633-33.

145. *Id.* at 632 (citations omitted).

146. *See* United States v. Scott, 975 F.2d 927, 928 (1st Cir. 1992).

cases after *Greenwood* becomes evident through the decision in *United States v. Scott.* There is tension between those courts that continue to see vitality in *Katz*'s exclusive consideration of the defendant's privacy expectations and those courts relying upon the knowing-exposure tests and remaining abandonment analysis from *Greenwood.*

Next, this comment will discuss search and seizure in the particular context of helicopter surveillance.

IV. SOMEBODY'S EYES ARE WATCHING: WARRANTLESS INFRARED SURVEILLANCE AND THE FOURTH AMENDMENT

This section will begin with a discussion of *United States v. Penny-Feeney,*[147] which was one of the earliest and most influential cases holding that warrantless thermal scanning does not violate the Fourth Amendment.[148] A substantial number of courts are in accordance with *Penny-Feeney.*[149] *Penny-Feeney* involved two defendants who were suspected of federal drug and firearm violations.[150] The investigation leading to the defendants' indictment began in 1988, when the police received a tip that one defendant, Penny, had previously sold drugs in California and continued to sell drugs in Hawaii.[151] In 1989, the police obtained a search warrant to open a package mailed to Penny.[152] The package contained $2,700 in cash and a trained dog detected traces of narcotics on the money.[153] Another anonymous informant contacted the police department approximately eight months later, stating that Penny was operating a large-scale marijuana-growing operation in his home.[154] A separate informant corroborated this information and provided the police with a layout of the growing area in the garage.[155] The informant also stated that Penny had just married Feeney and that the newlywed couple made their living from the profits from the marijuana-growing operation.[156]

An officer then drove by the defendants' home and further corrobo-

147. 773 F. Supp. 220 (D. Haw. 1991).

148. *See id.* at 228.

149. *See* United States v. Ford, 34 F.3d 992, 995-97 (11th Cir. 1994); United States v. Pinson, 24 F.3d 1056, 1058-59 (8th Cir. 1994); United States v. Domitrovich, 852 F. Supp. 1460, 1472-75 (E.D. Wash. 1994), *aff'd,* 57 F.3d 1078 (9th Cir. 1995); United States v. Porco, 842 F. Supp. 1393, 1396-98 (D. Wyo. 1994), *aff'd sub nom.*, United States v. Cusumano, 67 F.3d 1497 (10th Cir. 1995); United States v. Kyllo, 809 F. Supp. 787, 791-92 (D. Or. 1992), *aff'd in part, vacated and remanded in part,* 37 F.3d 526, 530-31 (9th Cir. 1994); State v. Cramer, 851 P.2d 147, 150 (Ariz. Ct. App. 1992); State v. McKee, 510 N.W.2d 807, 808-10 (Wis. Ct. App. 1993). *Ford* and *Pinson* are the only cases in which federal courts of review have decided the issue, following the reasoning of *Penny-Feeney. See Ford,* 34 F.3d at 995-97; *Pinson,* 24 F.3d at 1058-59.

150. *See Penny-Feeney,* 773 F. Supp. at 221.

151. *See id.*

152. *See id.* at 222.

153. *See id.*

154. *See id.*

155. *See id.* at 222 n.3.

156. *See Penny-Feeney,* 773 F. Supp. at 223.

rated that the informant's descriptions were accurate.[157] To obtain further confirmation, the officer also arranged to fly over the house in a helicopter with a FLIR.[158] The FLIR enabled the police officer to see what he could not have seen with his naked eye alone. The FLIR registered a strong artificial heat source from the walls of the garage, which is consistent with the use of grow lamps for marijuana production.[159] Based on the results of the package mailed to Penny, the informant's testimony, the officer's visual observations, and the FLIR reading, the judge issued a warrant to search the house.[160] The police searched the house and found extensive evidence of a marijuana-growing operation.[161]

The defendants made a motion to suppress the evidence seized pursuant to the warrant to search their house and pursuant to the warrant to search Penny's package.[162] The defendants contended that the judge had based the warrants on illegally obtained information, more specifically, that the warrantless scan with an infrared device was a search in violation of the Fourth Amendment.[163]

The district court rejected this argument by the defendants and held that the use of an infrared device in airspace above the defendants' residence was not a "search" within the meaning of the Fourth Amendment.[164] The district court applied the Supreme Court's privacy test from *Katz*.[165]

The *Katz* test requires: (1) that the person involved exhibit an actual, subjective expectation of privacy under the circumstances, and (2) that expectation of privacy must be one society will recognize as reasonable.[166] In applying the *Katz* test, the *Penny-Feeney* court, in a particularly weak analogy, characterized the FLIR's target as "waste heat," reasoning that the infrared device only detected heat that emanated from the house.[167] Also, the court held that the defendants made no attempt to contain the heat, but, instead, voluntarily vented it.[168] Accordingly, under the first prong of the *Katz* test, the court in *Penny-Feeney* determined that the defendants had no actual expectation of privacy in this "waste heat" because they voluntarily exposed the heat to the public and did not try to prevent it from escaping.[169] Under the second prong of the

157. *See id.*
158. *See id.* at 223 n.5.
159. *See id.* at 224.
160. *See id.*
161. *See id.*
162. *See Penny-Feeney*, 773 F. Supp. at 224-25.
163. *See id.* at 225.
164. *See id.* at 228. The *Penny-Feeney* court also held that there was probable cause to support the warrant independent of the FLIR evidence. *See id.* at 229.
165. 389 U.S. 347 (1967).
166. *See id.* at 361.
167. *See Penny-Feeney*, 773 F. Supp. at 225.
168. *See id.*
169. *See id.* at 226 (stating that defendants "voluntarily vented [heat] outside the garage where it could be exposed to the public and in no way attempted to impede its escape or exercise dominion over it").

Katz test, the *Penny-Feeney* court concluded that, even if the defendants had manifested an actual expectation of privacy in the heat, society would not recognize that expectation of privacy as reasonable.[170]

This "waste heat" that the FLIR detected was analogized to the warrantless search and seizure of garbage left on the curb outside of a residence.[171] Much like in *Greenwood*,[172] the *Penny-Feeney* court deemed controlling the scavenger analogy because the general public had knowledge that anyone had access to garbage set outside for collection.[173] Society would not accept a privacy interest in such garbage as reasonable.[174]

The court in *Penny-Feeney* further reasoned that the use of the FLIR did not embarrass the defendants or involve a bodily search, and the heat physically indicated a possible crime.[175] The court further noted that the Supreme Court had upheld the observation of the area near a home from an airplane or a helicopter flying in public airspace.[176] The Supreme Court relied upon the fact that these observations involved no physical intrusion.[177] The *Penny-Feeney* court characterized the FLIR as a "passive, non-intrusive instrument" that sends no "beams or rays into the area on which it is fixed."[178] The court reasoned that an infrared device *does not in any way penetrate the area.*[179] The court in *Penny-Feeney* determined that an overflight using a FLIR resembled the flights that the Supreme Court found permissible.[180]

Another important case holding that a warrantless infrared scan of a defendant's home did not violate the Fourth Amendment is *United States v. Pinson*.[181] In *Pinson*, the police suspected that the defendant grew marijuana after they received notice that suppliers of hydroponics equipment had mailed packages to the defendant.[182] Based on the packages and evidence of the defendant's unusually high electrical usage, the police decided to perform aerial thermal surveillance of the defendant's home with a FLIR.[183] The FLIR scan detected excessive amounts of heat emanating from a covered window, the roof, and a skylight.[184] Based on the packages and the FLIR scan, the police obtained a search warrant and

170. *See id.* at 226-28.
171. *See id.* at 226.
172. 486 U.S. 35 (1988).
173. *See Penny-Feeney*, 773 F. Supp. at 220, 226.
174. *See id.* at 227.
175. *See id.*
176. *See* Florida v. Riley, 488 U.S. 445 (1989); California v. Ciraolo, 476 U.S. 207 (1986).
177. *See Riley*, 448 U.S. at 449; *Ciraolo*, 476 U.S. at 212-14.
178. *Penny-Feeney*, 773 F. Supp. at 223.
179. *See id.*
180. *See id.* at 227-28 (comparing overflight in the case to the flights in *Ciraolo* and *Riley* and placing great emphasis on the fact that the infrared beams from the FLIR did not physically invade the defendants' home).
181. 24 F.3d 1056 (8th Cir. 1994) (holding that because defendant's subjective expectation of privacy is not one that society finds objectively reasonable, the warrantless search did not violate the Fourth Amendment).
182. *See id.* at 1057.
183. *See id.*
184. *See id.*

arrested the defendant for the growing and processing of marijuana. At trial, the defendant was found guilty.[185] On appeal, the defendant claimed that the warrantless FLIR scan violated the Fourth Amendment.[186]

The *Pinson* court followed *Penny-Feeney* and concluded that because the FLIR detected only surface heat and did not invade the defendant's residence, it did not constitute a search for purposes of the Fourth Amendment.[187] The *Pinson* court also held that society would not recognize the defendant's expectation of privacy in the surface heat as reasonable under the *Katz* privacy test.[188]

However, a Texas district court has also addressed the issue of whether the warrantless scan of the defendants' buildings with a thermal imaging device is a search in violation of the Fourth Amendment. In *United States v. Ishmael*,[189] the court held that the warrantless infrared search did, indeed, violate the Fourth Amendment.[190]

The defendants in *Ishmael* purchased a large amount of concrete and begun a construction project on a secluded area of property.[191] After the police became aware that the defendants had built a basement under the mobile home on the property, the police engaged in aerial surveillance with a FLIR device.[192] The police found a metal building and a nearby brush pile that were considerably hotter than their surroundings.[193] The police obtained a search warrant based on the scan and arrested the defendants after they found marijuana on the premises.[194] The defendants then claimed that the warrantless FLIR scan violated the Fourth Amendment.[195]

The court then applied the *Katz* test and held that the warrantless infrared search violated the Fourth Amendment. The court first held that the defendants had manifested a subjective expectation of privacy in the heat vented from their building.[196] The court next found that society recognized the defendants' expectation of privacy in the heat as reasonable.[197]

Also, in *State v. Young*,[198] the Supreme Court of Washington considered whether a warrantless infrared surveillance of the defendant's home

185. *See id.*
186. *See id.*
187. *See Pinson*, 24 F.3d at 1058-59 (concluding that use of the FLIR is not a search).
188. *See id.*
189. 843 F. Supp. 205 (E.D. Tex. 1994), *rev'd*, 48 F.3d 850 (5th Cir. 1995).
190. *See id.* at 205.
191. *See id.* at 208.
192. *See id.*
193. *See id.*
194. *See id.* at 209.
195. *See Ishmael*, 843 F. Supp. at 209.
196. *See* id.
197. *See id.* at 212 (distinguishing the case on the basis that the search did not involve naked eye observations, but observations that the government had to use high-technology devices to detect the heat).
198. *See* 867 P.2d 593, 594 (Wash. 1994) (en banc).

constituted a search in violation of the Fourth Amendment. The police received an anonymous note, which stated that the defendant operated a large marijuana-growing operation.[199] After observing the defendant's home and determining that the defendant's power consumption records were abnormally high, the police scanned the defendant's house with a thermal device.[200] The thermal scanner revealed that the basement and other portions of the defendant's house were excessively hot.[201] The police obtained a search warrant, and their search revealed a marijuana-growing operation.[202] The defendant moved to suppress the evidence obtained in the illegal search.[203]

The court in *Young* held that the warrantless thermal scan search was an unreasonable search in violation of the Fourth Amendment.[204] The court rejected the *Penny-Feeney* analysis,[205] stating:

> [W]e find the reasoning of the district court in *Penny-Feeney* unpersuasive. First, it is difficult to say one voluntarily vents heat waste in the same way that one disposes of garbage. Heat, unlike garbage, automatically leaves a person's home without any deliberate participation by the homeowner. Even if some heat is vented to the outside, as in *Penny-Feeney*, the device detects all heat leaving the home, not just the heat directed out through the vent. . . . [I]t is difficult to say one should expect other people to use sophisticated infrared instruments on one's home to view so-called heat waste. . . . [T]he only way for a person to avoid the risk of exposure in this case, and in *Penny-Feeney*, would be to turn off all heat sources in the home, even in sub-zero temperatures.[206]

The court further argued:

> The only value of the so-called heat waste is what it discloses about the interior of the home. The infrared device produces an image of the interior of the home that otherwise is protected by the home's walls. In this sense, the infrared thermal device allows the government to intrude into the defendant's home and gather information about what occurs there. A resident has a reasonable expectation of privacy in what occurs within the home, "a location not open to visual surveillance." It is this reasonable expectation of privacy in the home that is violated by warrantless infrared surveillance, not the expectation of privacy in "heat waste" as the *Penny-Feeney* court asserts.[207]

The court noted that heat does not resemble garbage because people do not voluntarily vent heat like they dispose of garbage and because

199. *See id.* at 595.
200. *See id.*
201. *See id.*
202. *See id.*
203. *See id.* at 594.
204. *See Young*, 867 P.2d at 601.
205. *See id.* at 602-03.
206. *Id.*
207. *Id.* at 603 (citation omitted).

heat reveals information about the interior of the home.[208] The court was concerned that FLIRs indiscriminately pick up *any* heat emissions and scans neighboring houses, a broader range than many other devices. FLIRs also search the home, a place in which the courts have commonly found that a person has the highest expectation of privacy.[209]

The court in *Young* also held that *Katz* was not concerned with the expectation of privacy in the technical item intercepted, but with the expectation of privacy in the basic activity in which the defendant was engaged.[210] The court also ruled that the *Penny-Feeney* line of cases incorrectly separated the information that the police gained about the activity inside of the home from the heat that the activity generated.[211] The court attacked the "waste heat" distinction and held that defendants have at least as much of an expectation that the government will not detect information about the interior of the defendants' houses or places of business.[212] The *Young* court made it clear that it is incorrect to characterize FLIRs as passive, non-intrusive instruments, especially when aimed at an individual's home.

V. A BRAVE NEW WORLD: CAN PRIVACY BE PROTECTED?

Can privacy be protected under the present state of warrantless trash seizures and of warrantless infrared surveillance? The police and other law enforcement officials have been given a great deal of discretion to perform such warrantless searches. Some might argue that the police and other law enforcement officials are just doing their job and arresting drug dealers. Some might further argue that they have nothing to hide, so what's the big deal with what the police are doing? The big deal is the evisceration of the Fourth Amendment's purpose as a protector of the privacy interests of ordinary, law-abiding citizens. If we give police this much discretion to use technologically advanced play tools to arrest drug dealers at all costs, then will we sacrifice our right to carry on our private lives freely, openly, and spontaneously? Are we really comfortable opening that door and allowing the government to observe us at any time and in any place?

Although these searches have thus far been confined to the realm of drug smugglers, will the courts continue to uphold the distinction they have drawn when it comes to the home, our refuge of privacy? Will the courts tread softly on the Fourth Amendment in the name of the "war on drugs" or will they trample our right to privacy under the Fourth Amendment? The courts have been extremely reluctant to allow such warrantless searches of an individual's home, but will that barrier hold up in our world of ever-increasing technological sophistication? Will the courts

208. *See id.* at 602-03.
209. *See Katz*, 389 U.S. at 360 (Harlan, J., concurring).
210. *See id.* at 351-52.
211. *See Young*, 867 P.2d at 602-03.
212. *See id.* at 603-04.

continue to carefully observe the Fourth Amendment's warrant requirement or will our privacy considerations become inconsequential as the police gain more and more technological play toys? Will the courts strengthen the constitutional right to privacy? That remains to be seen.

For now, I conclude with the forceful dissenting opinion in *State v. Costin*,[213] which considered the big picture of what warrantless searches and seizures mean for United States citizens. The dissent voiced its concern over the erosion of the right to privacy by stating:

> George Orwell's bleak and chilling vision of post-modern civilization has not come to pass, at least not in this country. But allowing police agents to set up surreptitious, twenty-four-hour video surveillance of landowners on their own property without judicial oversight *raises the specter of such a society.* Indeed, the use of technological advances to enhance government surveillance techniques threatens to erode the expectations of privacy we take for granted in a free and open society. Today's decision undermines the lone bulwark against such erosion—[the] warrant requirement.[214]

213. 720 A.2d 866 (Johnson, J., dissenting).
214. *Id.* at 871.