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FROM *KATZ* TO *GREENWOOD*: ABANDONMENT GETS RECYCLED  
FROM THE TRASH PILE — CAN OUR GARBAGE BE SAVED FROM  
THE COURT'S RUMMAGING HANDS?

*The United States Supreme Court has upheld the warrantless search and seizure of residential trash left for curbside pickup. The author contends that this decision was based not on the precedents cited by the Court but on previously discredited property law analyses. The author urges the Court to assess fourth amendment privacy rights on the basis of a defendant's outward manifestations of intent, rather than on self-validating conclusions regarding "reasonable" expectations of privacy.*

INTRODUCTION

SINCE ARTICULATING NEW standards for assessing the breadth of fourth amendment protection in *Katz v United States*,<sup>1</sup> the Supreme Court has beaten a retreat from the principles it set forth. The test announced in *Katz* was intended to be an expansion of an individual's right to be free from governmental intrusion.<sup>2</sup> Nevertheless, fourth amendment analysis under *Katz* has not been protective of individual liberties, except in the area of audio surveillance.<sup>3</sup> Over the years, the Court has refused to extend fourth amendment protection to the use of pen registers<sup>4</sup> or tracking beepers,<sup>5</sup> to packages already purposefully or inadver-

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1. 389 U.S. 347, 351 (1967).

2. See *United States v. Ford*, 553 F.2d 146 (D.C. Cir. 1977) (holding that *Katz* expanded the fourth amendment beyond the boundaries of actual physical trespass, broadening its scope and maintaining its existing safeguards against unreasonable intrusions upon physical privacy).

3. *Katz* specifically overruled a long line of cases allowing nontrespassory audio surveillance. See *Katz*, 389 U.S. at 353 (overruling *Goldman v. United States*, 316 U.S. 129 (1942), and *Olmstead v. United States*, 277 U.S. 438 (1928)).

4. See *Smith v. Maryland*, 442 U.S. 735 (1979) (phone company's use of a pen register to track numbers dialed is not a "search" within the meaning of the fourth amendment).

5. See *United States v. Knotts*, 460 U.S. 276 (1983) (police use of tracking beepers to follow defendant does not constitute a search or seizure).

tently opened by private citizens,<sup>6</sup> to aerial surveillance of citizens' backyards,<sup>7</sup> bank records,<sup>8</sup> or to conversations over cordless telephones.<sup>9</sup> Recently, the Court maintained its very narrow limits on fourth amendment protection, refusing, in *California v Greenwood*,<sup>10</sup> to require a warrant for the search and seizure of residential trash placed at the curbside for pickup by a designated disposal agency. *Greenwood* represents the most recent articulation of the Court's fourth amendment analysis regarding the definition of a search.<sup>11</sup> This note will propose a new method for resolving search-and-seizure issues within the factual framework of curbside trash reconnaissance.

*Katz* marked the end of the Court's application of an archaic property law analysis to fourth amendment questions.<sup>12</sup> In its place, *Katz* advocated a more flexible "expectation of privacy" test. This privacy test broadened the scope of fourth amendment protection beyond those places or things in which the citizen retained a possessory or property interest.<sup>13</sup> In the trash reconnaissance paradigm, the *Katz* case represents a departure from a simple examination of whether the trash was abandoned, in favor of the more sophisticated analysis of whether the individual manifested a reasonable expectation that the contents of the trash would remain private.<sup>14</sup> This note advocates an interpretation of *Katz* which grants fourth amendment protection to any individual who manifests an intent to keep his or her affairs private.

*Katz* created a new terminology for fourth amendment analy-

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6. See *United States v. Jacobsen*, 466 U.S. 109 (1984) (fourth amendment does not require a search warrant to test white powder flowing from a damaged package found on a private freight carrier).

7. See *California v. Ciraolo*, 476 U.S. 207 (1987) (police may conduct airborne search from public airspace without acquiring a warrant).

8. See *United States v. Miller*, 425 U.S. 435 (1976) (fourth amendment does not require a search warrant for examination of the bank records of a third party).

9. See *Tyler v. Berodt*, 877 F.2d 705 (8th Cir. 1989), cert. demed., 110 S. Ct. 723 (1990).

10. 486 U.S. 35 (1988).

11. A recent case from the lower courts is *Tyler v. Berodt*, in which the Eighth Circuit declined to extend fourth amendment protection to conversations on cordless telephones. 877 F.2d at 706-07. However, the Supreme Court denied the petition for certiorari in that case without an opinion. 110 S. Ct. 723. Hence, *Greenwood* remains the Court's most recent statement of its standards for assessing the scope of the fourth amendment.

12. See *Katz*, 389 U.S. at 352-53.

13. See *id.* at 353.

14. The phrase "reasonable expectation of privacy" actually derives from Justice Harlan's concurring opinion in *Katz*. 389 U.S. at 360. Through time, however, the phrase has become a shorthand for the approach contained in the majority opinion.

sis. However, courts have used the *Katz* terminology without employing its rationale. This note argues that the Court's present resolution of fourth amendment cases, such as *Greenwood*, is inconsistent with the analysis urged in *Katz*.<sup>15</sup> Moreover, this note suggests that what really lies behind the Court's present use of *Katz*-inspired fourth amendment terminology is an abandonment approach to the question of whether particular surveillance activity can be called a "search."

This note will scrutinize the Court's frequently cited contention that there is no reasonable expectation of privacy in something voluntarily conveyed to a third party.<sup>16</sup> This maxim merely denies the reasonableness of a privacy expectation in abandoned objects. This note argues that the purpose of *Katz* was to establish that a person might have a reasonable expectation of privacy in an abandoned object, but the majority failed to express this clearly enough. Consequently, the Court has interpreted *Katz's* "reasonable expectation of privacy" terminology to require that the asserted expectation be objectively reasonable. Combining this interpretation with the veiled abandonment analysis clarifies the Court's current analysis: To assert an expectation of privacy in something voluntarily transferred to a third party is to express one's expectation of privacy in an abandoned thing — an expectation entirely unreasonable when measured by accepted societal

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15. A number of commentators have attempted to highlight the apparent inconsistencies between the holding in *Greenwood* and the majority's analysis in *Katz*. See, e.g. Note, *Fourth Amendment—Further Erosion of the Warrant Requirement for Unreasonable Searches and Seizures: The Warrantless Trash Exception*, 79 J. CRIM. L. & CRIMINOLOGY 623, 645-46 (1988) [hereinafter Note, *Further Erosion*] (criticizing the Court's characterization of trash disposal as "voluntary" but concluding that the occasional "invasion" of trash bags puts garbage outside the realm of fourth amendment protection); Note, *California v. Greenwood: Supreme Court Decides To Keep the Fourth Amendment Out of the Trash*, 67 N.C.L. REV. 1191 (1989) [hereinafter Note, *Supreme Court Decides*] (arguing for a showing of probable cause); Note, *Was the Right to Privacy Trashed in California v. Greenwood?*, 24 TULSA L.J. 401 (1988) [hereinafter Note, *Right to Privacy*] (arguing for a fact specific approach to trash search cases, restriction of police conduct in garbage searches, and liability to private individuals and governmental employees for improper seizure and use of data gained in trash searches); Note, *California v. Greenwood: A Trashing of the Fourth Amendment?*, 91 W. VA. L. REV. 597 (1988) [hereinafter Note, *Trashing*] (criticizing the Court's characterization of trash conveyance as "voluntary" and its reasoning that because trash "bags are sometimes invaded" they should not be given fourth amendment protection).

16. See, e.g., *Greenwood*, 486 U.S. at 36-37 (garbage left at curbside); *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979) (phone numbers dialed using equipment installed by phone company); *United States v. Miller*, 425 U.S. 435, 442 (1976) (checks and deposit slips given to a bank).

norms.

Based on the foregoing analysis, this note contends that the Court, in cases such as *Greenwood*, propagates an interpretation of *Katz* that was wholly unintended by the *Katz* majority. This note concludes that a better approach is to recognize the paramount importance of the individual's "behavioral manifestations"<sup>17</sup> in resolving trash reconnaissance issues.<sup>18</sup> Courts should focus primarily on the defendant's manifestations of intent as they would be interpreted by a reasonable person, rather than asking whether an asserted expectation of privacy is itself abstractly reasonable.

## I. HISTORY OF FOURTH AMENDMENT ANALYSIS

### A. The Pre-*Katz* Approach: Abandonment and Trespass

Property law concepts such as "abandonment," "trespass," and "curtilage" dominate the history of fourth amendment jurisprudence. Employing a strict literal interpretation of the fourth amendment,<sup>19</sup> the Court limited the protection of the amendment to those cases involving some physical intrusion onto the property or against the person of the defendant.<sup>20</sup> Likewise, police conduct

17. *Smith v. State*, 510 P.2d 793, 801 (Alaska) (Rabinowitz, J., dissenting), *cert. denied*, 415 U.S. 1086 (1973).

18. In his dissent, Judge Rabinowitz concluded that he "would focus upon [the] appellant's behavior in an effort to determine whether or not she intended to knowingly disclose to the public the contents of her garbage." *Id.* at 803 (Rabinowitz, J., dissenting); see *infra* text accompanying notes 131-43.

19. The fourth amendment provides:

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

20. The origin of this restrictive construction of the fourth amendment undoubtedly lies in Lord Camden's celebrated decision in *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765), quoted in *Boyd v. United States*, 116 U.S. 616 (1885). Lord Camden, commenting on the validity of general search warrants, stated:

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damage be nothing, which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil [I]t is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

*Boyd*, 116 U.S. at 627 (quoting *Entick v. Carrington*, 19 Howell's State Trials 1066, 95

that did not transgress the physical boundaries of the defendant's property was not a "search" for fourth amendment purposes. Two illustrative cases are *Olmstead v United States*<sup>21</sup> and *Goldman v United States*.<sup>22</sup> Both cases concerned audio surveillance. In *Olmstead*, police secured evidence of an illegal liquor distribution conspiracy by attaching wiretaps to the defendant's telephone lines.<sup>23</sup> Since the telephone wires were tampered with at a point away from the defendant's property, the Court found the warrantless surveillance valid.<sup>24</sup> More specifically, the Court found that the defendant could not complain of the intrusion upon his private telephone calls because there had been no physical entry onto his property.<sup>25</sup> The Court stated that the language of the fourth amendment "shows that the search is to be of material things — the person, the house, his papers or his effects."<sup>26</sup> Thus, the Court found that a fourth amendment search necessarily involves a trespass.<sup>27</sup>

The Court reached a similar result in *Goldman*, in which agents obtained evidence in an investigation of an attorney by attaching a detectaphone, a small sound amplification device, against a partition wall of the attorney's office.<sup>28</sup> Finding that

Eng. Rep. 807 (K.B. 1765)).

Justice Bradley, speaking for the majority in *Boyd*, commented on Lord Camden's pronouncements, stating that "[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property which underlies and constitutes the essence of Lord Camden's judgment." *Id.* at 630. While Justice Bradley spoke in the more expansive terms of "liberty" and "security," the connection between privacy and physical trespass is evident and controlled fourth amendment thinking for the following eighty years.

21. 277 U.S. 438 (1928), *rev'd*, *Katz v. United States*, 389 U.S. 347 (1967).

22. 316 U.S. 129 (1942), *rev'd*, *Katz v. United States*, 389 U.S. 347 (1967).

23. *Olmstead*, 277 U.S. at 456.

24. *Id.* at 466.

25. On this point, Chief Justice Taft added:

The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.

*Id.* at 466.

26. *Id.* at 465.

27. *Id.* at 466 (There is no violation of the fourth amendment "unless there has been an official search and seizure of [a] person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure.").

28. *Goldman*, 316 U.S. at 131.

there was no trespass when the detectaphone was placed against the partition wall, the Court concluded that there had been no search.<sup>29</sup>

Justice Brandeis, in *Olmstead*, and Justice Murphy, in *Goldman*, issued scathing dissents. In what is possibly his most famous dissent, Brandeis noted that “[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions.”<sup>30</sup> Later, Justice Murphy echoed Brandeis’s admonitions, urging that the Court not construe the fourth amendment literally in order to limit its application “to those evils and phenomena that were contemporary with its framing.”<sup>31</sup> Recognizing the vast technological changes that were occurring, these dissents presaged the dissatisfaction with the restrictive property-based approach to the fourth amendment. In *Goldman*, Justice Murphy further argued that there was no “rational basis for denying to the modern means of communication the same protection that is extended by the Amendment to the sealed letter in the mails.”<sup>32</sup> Unfortunately, his reasoning remained unheeded for over twenty years.<sup>33</sup>

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29. *Id.* at 134.

30. *Olmstead*, 277 U.S. at 472-73 (Brandeis, J., dissenting).

31. *Goldman*, 316 U.S. at 138 (Murphy, J., dissenting).

32. *Id.* at 141.

33. The archaic approach taken in *Goldman* was an adequate test given the state of technological development at the time. Surveillance technology was just starting to evolve due to wartime research. When *Goldman* was decided, people could retire to their homes when they wished to be sheltered from governmental intrusion. However, this security was rapidly disappearing. In his dissent in *Goldman*, Justice Murphy argued for the need to liberalize fourth amendment protection to adapt to a changing community, stating that “[i]t is our duty to see that this historic provision receives a construction sufficiently liberal and elastic to make it serve the needs and manners of each succeeding generation.” *Id.* at 138. He further urged that “we should not permit any of the essentials of freedom to lose vitality through legal interpretations that are restrictive and inadequate for the period in which we live.” *Id.* at 142.

Professor Anthony Amsterdam has urged the Court to expand the protections of the fourth amendment to reflect current social conditions. His proposition addresses the problems of the increasing urbanization of society:

To us it seems intuitively evident that anything a person does within sight or hearing of his neighbors or the general public is not private—and that, as to such things, it makes no difference whether they are observed by a neighbor or a policeman—because we retire to our homes when we want *real* privacy. But if you live in a cheap hotel or in a ghetto flat, your neighbors can hear you breathing quietly even in temperate weather when it is possible to keep the windows and doors closed. For the tenement dweller, the difference between the observation by neighbors and visitors who ordinarily use the common hallways and ob-

Just as the concept of trespass onto property provided the analytical framework for the audio surveillance cases, courts solved the problem of trash searches by resorting to the property law concept of "abandonment."<sup>34</sup> *Work v United States*<sup>35</sup> and *United States v Minker*<sup>36</sup> illustrate the application of this doctrine. In each case, the court focused on whether the articles retrieved in a warrantless trash reconnaissance were abandoned.<sup>37</sup> In *Work*, police received information that the defendant was using narcotics in her home.<sup>38</sup> After police officers unlawfully entered her home, the defendant exited the house and deposited the narcotics in a trash can underneath the porch of the house.<sup>39</sup> The court found that the evidence was suppressible because the defendant did not intend to abandon the narcotics, but was trying to hide them from the police officers.<sup>40</sup>

In *Minker*, Internal Revenue Service agents investigating an illegal gambling operation searched the dumpster of the defendant's apartment complex.<sup>41</sup> The agents found adding machine tapes and other wagering paraphernalia in the dumpster.<sup>42</sup> The court held that the evidence was admissible because it had been abandoned and therefore no search had occurred.<sup>43</sup>

#### B. *Katz v United States*: Abrogating the Property Law Approach

Growing dissatisfaction with the rigidity of property law concepts in fourth amendment analysis culminated in 1967 in *Katz v*

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servation by policemen who come into the hallways to "check up" or "look around" is the difference between all the privacy that his condition allows and none. Is that small difference too unimportant to claim fourth amendment protection?

Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 404 (1974) (emphasis in original).

34. W LAFAVE, SEARCH AND SEIZURE § 2.6(c) (2d ed. Supp. 1986).

35. 243 F.2d 660 (D.C. Cir. 1957).

36. 312 F.2d 632 (3d Cir. 1962), cert. demed., 372 U.S. 953 (1963).

37. W LAFAVE, *supra* note 34, § 2.6, at 476; see *Minker*, 312 F.2d at 634-35; *Work*, 243 F.2d at 662-63.

38. 243 F.2d at 661.

39. *Id.*

40. *Id.* at 662.

41. *Minker*, 312 F.2d at 634.

42. *Id.*

43. *Id.* at 634-35. The court found, in part, that the materials were abandoned because the receptacle was outside the defendant's apartment complex and was used by several tenants. *Id.*



*United States*.<sup>44</sup> The defendant in *Katz* entered a public phone booth allegedly to transmit gambling information.<sup>45</sup> FBI agents had attached a listening device to the top of the booth.<sup>46</sup> The Supreme Court, stating that "the Fourth Amendment protects people, not places,"<sup>47</sup> ordered the suppression of the evidence gathered through the device.<sup>48</sup> The significance of this opinion lies in the Court's acknowledgement that individuals retain some degree of privacy with regard to evidence gathered without a physical trespass.<sup>49</sup>

*Katz* is noteworthy in at least two other respects. First, it addressed the inroads made by advanced technology in surveillance of citizens in their homes. Second, it viewed the citizen's right to privacy as ambulatory; that is, privacy rights and expectations warrant respect wherever the person goes.<sup>50</sup>

*Katz* was truly a landmark opinion in fourth amendment jurisprudence, but it failed to articulate a sufficiently concrete test. Consequently, Justice Harlan's separate concurrence became the source of the current test, commonly known as the "expectation of privacy" analysis.<sup>51</sup> Justice Harlan conceived of this analysis as "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" <sup>52</sup> The two-prong test was seized upon by the Court as a means to gauge the limits of fourth amendment protection without resorting to property law concepts. Unfortunately, in light of its progeny, *Katz* has had little effect in changing the fundamental manner in which the Court has addressed many fourth amendment issues. As one observer has noted, "[U]se of concepts

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44. 389 U.S. 351 (1967).

45. *Id.* at 348.

46. *Id.* at 348-49.

47. *Id.* at 351.

48. *See id.* at 359.

49. The Court stated that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52 (citations omitted).

50. "No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment." *Id.* at 352 (footnotes omitted) (citing *Rios v. United States*, 364 U.S. 253 (1960)), *Jones v. United States*, 362 U.S. 257 (1960), and *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)).

51. *See id.* at 361 (Harlan, J., concurring).

52. *Id.* (Harlan, J., concurring).

[such as abandonment] has persisted long after *Katz*. .[E]ven the *Greenwood* Court is unable to avoid an indirect reliance on these concepts."<sup>53</sup> Indeed, the Court has not remained true to its pronouncement in *Katz*. The Court's expectation-of-privacy analysis has become a veil for an abandonment analysis.

## II. "ABANDONMENT" LINGERS ON IN CURRENT FOURTH AMENDMENT ANALYSIS

Although the Supreme Court has abjured an analysis based expressly on abandonment in fourth amendment cases, state and lower federal courts implicitly have maintained abandonment as the method of resolving trash reconnaissance disputes.<sup>54</sup> Furthermore, the Supreme Court itself has applied a veiled abandonment analysis; *California v Greenwood* exemplifies this approach.<sup>55</sup> While the *Greenwood* case speaks in terms other than those normally encountered in an abandonment case, the meaning of its terminology is consistent with the classic abandonment analysis.

### A. The *Greenwood* Analysis: Voluntary Relinquishment to Third Parties

In 1984 a Laguna Beach, California Police Department investigator was informed that Billy Greenwood would receive a shipment of drugs at his residence.<sup>56</sup> This information was corroborated by neighbors' complaints of heavy, late-night traffic in front of Greenwood's home. Based on this information, the investi-

53. Note, *Supreme Court Decides*, *supra* note 15, at 1195.

54. See *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986); *United States v. Terry*, 702 F.2d 299 (2d Cir.), *cert. denied sub nom. Williams v. United States*, 461 U.S. 931 (1983); *United States v. Reicherter*, 647 F.2d 397 (3d Cir. 1981); *United States v. Vahalik*, 606 F.2d 99 (5th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980); *United States v. Crowell*, 586 F.2d 1020 (4th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); *Magda v. Benson*, 536 F.2d 111 (6th Cir. 1976); *United States v. Mustone*, 469 F.2d 970 (1st Cir. 1972). A New Jersey appellate court recently invoked abandonment theory, holding "that police may search without a warrant through *abandoned* household refuse" *State v. Pasanen*, 229 N.J. Super. 553, 556, 552 A.2d 212, 213 (1989), *rev'd sub nom. State v. Hempele*, 120 N.J. 182, 576 A.2d 793 (1990) (emphasis added).

55. The majority in *Greenwood* cited numerous federal circuit court cases in support of its claim that curbside trash was not protected under an expectation-of-privacy analysis. *California v. Greenwood*, 486 U.S. 35, 41-42 (1988). However, as pointed out in Justice Brennan's dissent, most of these cases denied protection to curbside trash "entirely or almost entirely on an abandonment theory that the Court has discredited." *Id.* at 49 n.2 (Brennan, J., dissenting) (citation omitted).

56. *Id.* at 37.

gator asked the neighborhood trash disposal workers to separate Greenwood's trash from the other trash in the neighborhood. An examination of the contents produced evidence of narcotics. Based on this evidence, the investigator was able to secure search warrants for Greenwood's home. A search of the home resulted in the arrest of Greenwood on felony narcotics charges. Another investigator obtained a second search warrant and an arrest after he performed a similar reconnaissance of Greenwood's trash.<sup>57</sup>

At trial, the indictments against Greenwood and his co-defendant were dismissed.<sup>58</sup> The trial court ruled that the search warrants issued for Greenwood's house were tainted by the warrantless reconnaissance of Greenwood's trash.<sup>59</sup> The trial court based its ruling on the authority of *People v Krivda*,<sup>60</sup> in which the California Supreme Court held that both the fourth amendment of the United States Constitution and its California counterpart<sup>61</sup> recognize that citizens have "a reasonable expectation that their trash [will] not be rummaged through and picked over by police officers acting without a search warrant."<sup>62</sup> Since the warrantless reconnaissance of trash was invalid, there was no probable cause for the issuance of the search warrants.<sup>63</sup> The Court of Appeals affirmed, and the California Supreme Court denied review.<sup>64</sup>

The Supreme Court of the United States granted certiorari and specifically reversed that part of the *Krivda* holding that extended federal constitutional protection to curbside trash reconnaissance.<sup>65</sup> The Court's approach to this issue was similar to its analysis of other troublesome fourth amendment issues, such as

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57. *Id.* at 37-38.

58. *Id.* at 38.

59. *Id.*

60. 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *vacated*, California v. Krivda, 409 U.S. 33 (1972), *cert. denied*, 412 U.S. 919 (1973).

61. CAL. CONST. art. I, § 19.

62. *Krivda*, 5 Cal. 3d at 367, 486 P.2d at 1268, 96 Cal. Rptr. at 68, *cited in* California v. Greenwood, 486 U.S. 35, 38 (1988).

63. *Greenwood*, 486 U.S. at 38. California, Hawaii, and New Jersey are presently the only states that interpret their state constitutions to require search warrants for curbside trash reconnaissance. *See, e.g., Krivda*, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62; *People v. Edwards*, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969); *State v. Tanaka*, 67 Haw. 658, 701 P.2d 1274 (1985); *State v. Hempele*, 120 N.J. 182, 576 A.2d 793 (1990).

64. *Greenwood*, 486 U.S. at 38-39.

65. *Id.*

searches of pen registers<sup>66</sup> and bank records.<sup>67</sup> The Court found that by voluntarily placing the trash in an area where it was readily accessible to the public, Greenwood's subjective expectation that the contents of his trash would remain private was not "objectively reasonable."<sup>68</sup> In reversing *Krivda*, the *Greenwood* Court compared its decision to that in *Smith v Maryland*.<sup>69</sup> The *Smith* Court held that the identity of the phone numbers dialed is not protected under the fourth amendment because those numbers are voluntarily revealed to the telephone company for billing purposes.<sup>70</sup> By analogy, the same rationale was deemed to apply to a search of Greenwood's garbage. The essence of the decision in *Greenwood*, as in *Smith v Maryland*, is that an individual can harbor "no legitimate expectation of privacy in information he voluntarily turns over to third parties."<sup>71</sup>

#### B. "Voluntary Conveyance to Third Parties": A New Label for Abandonment Analysis

The *Greenwood* Court has attempted to maintain a consistent approach to its analysis of fourth amendment issues by avoiding any discussion of "abandonment" as an analytical approach. However, it appears that *Greenwood* uses the language of privacy to mask an abandonment approach.<sup>72</sup>

66. See *Smith v. Maryland*, 442 U.S. 735 (1979) (holding that the use of pen registers to track phone numbers dialed by a defendant is not a search).

67. See *United States v. Miller*, 425 U.S. 435 (1976) (holding that police examination of defendant's bank records is not a search).

68. *California v. Greenwood*, 486 U.S. 35, 40 (1988). The Court concluded that the respondents exposed their garbage in a way that relinquished any fourth amendment claim. "Animals, children, scavengers, snoops, and other members of the public" have access to garbage left on or at the curbside. *Id.*

69. 442 U.S. 735 (1975).

70. *Greenwood*, 486 U.S. at 41.

71. *Id.* (quoting *Smith*, 442 U.S. at 743-44). Notably absent from Justice White's majority opinion is his usual recital that the property law concept of abandonment does not offer a mechanism through which to set the bounds of fourth amendment protection. In the previous term, Justice White, dissenting in *California v. Rooney*, 483 U.S. 307, 320 (1987), stated that the question in *Rooney* was not whether the defendant had abandoned his interest, but whether society viewed as reasonable his subjective expectation of privacy in his trash bag.

72. Justice Brennan made this argument in his dissent, claiming that "even the voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of a privacy expectation in it." *Greenwood*, 486 U.S. at 55 (Brennan, J., dissenting). Implicit in this statement is Justice Brennan's recognition that the majority has drawn a distinction based on whether trash is abandoned and that, after *Katz*, even abandoned objects deserve fourth amendment coverage. *Id.* (Brennan, J., dissenting).

While the Court speaks of voluntarily conveying one's trash to third parties<sup>73</sup> or voluntarily placing one's trash in a place accessible to the public,<sup>74</sup> it could equally claim that the trash was abandoned under property law concepts.<sup>75</sup> It may well be that the focus is shifted from "abandonment" as relinquishing physical control over property to "abandonment" as relinquishing a right — an expectation of privacy.<sup>76</sup> A number of courts have maintained that abandonment in the fourth amendment context refers to "whether there has been abandonment of a reasonable expectation of privacy as to the area searched or the property seized."<sup>77</sup> However, it is unclear how the two approaches truly differ from one another. The First Circuit, in *United States v. Mustone*,<sup>78</sup> attempted to reconcile the abandonment approach with the expectation of privacy approach. Yet the decision merely emphasizes the underlying role of abandonment, asserting that "[i]mplicit in the concept of abandonment is a renunciation of any 'reasonable' expectation of privacy *in the property abandoned*."<sup>79</sup> If placing one's trash in an area where it is accessible to the public is dispositive or even highly probative of whether it deserves fourth amendment protection, then the Court has merely restated the old maxim that what is abandoned is unprotected.<sup>80</sup> That is, by concluding that the defendant's act of placing his trash in a public place vitiates any objectively reasonable expectation of privacy, the *Greenwood* Court has not truly divorced itself from an abandonment analysis. This is necessarily the case, given the definition of abandonment as "an intention to relinquish all title, possession, or claim to prop-

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73. *Id.* at 40.

74. *Id.*

75. "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." Note, *Supreme Court Decides*, *supra* note 15, at 1195.

76. See Note, *Trashing*, *supra* note 15, at 605.

77. *United States v. Kahan*, 350 F. Supp. 784, 795 (S.D.N.Y. 1972); see *State v. Oquist*, 327 N.W.2d 587, 590 (Minn. 1982) ("[T]he question is whether the defendant has, in discarding the property, relinquished his expectation of privacy with respect to the property").

78. 469 F.2d 970 (1st Cir. 1972).

79. *Id.* at 972 (emphasis added).

80. See Note, *California v. Greenwood: Discarding the Traditional Approach to the Search and Seizure of Garbage*, 38 CATH. U.L. REV. 543, 568 (1989) ("Justice White simply could have equated [the respondents'] property interest in the trash with their privacy interest in it: having voluntarily abandoned their ownership interest, respondents could no longer reasonably expect society to support whatever subjective expectation they may have initially held in their trash.").

erty, accompanied by some type of activity or omission [manifesting such intention,]<sup>81</sup> or a renunciation of any privacy interest in a thing.<sup>82</sup>

This note will now examine the Court's rationale for its veiled abandonment analysis and how Justice Harlan's two-prong test in *Katz* inevitably leads to this veiled abandonment analysis. First, however, one assumption must be expressed and proven: curbside trash is abandoned, and any other interpretation is inconsistent with the reasonable expectation of the average person. This assumption establishes the nexus between the *Greenwood* Court's stated approach and the archaic abandonment approach. The strongest argument against this assumption is that municipal ordinances mandating particular methods of trash disposal eliminate the element of intent needed for a finding of abandonment.

### 1. Municipal Ordinances Do Not Destroy the Necessary Volition Required for a Finding of Abandonment

Because it is defined as a voluntary relinquishment of claim to the property, abandonment is often an issue of intent.<sup>83</sup> Placing one's garbage at the curb on the day designated for pickup by the disposal contractor arguably demonstrates the requisite voluntary relinquishment of possession and control.

A number of authors have attacked the Court's *Greenwood* pronouncement on the grounds that many municipal ordinances provide only one procedure for trash disposal.<sup>84</sup> They contend that such ordinances eliminate the volition necessary for a finding of abandonment.<sup>85</sup> However, this argument is unpersuasive because it is based on the premise that privacy, for purposes of the fourth amendment, concerns only those objects which would be incriminating in a criminal law context. As Professor Schulhofer notes,

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81. Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 BUFFALO L. REV. 399, 401-02 (1971).

82. See *Mustone*, 469 F.2d at 972.

83. Mascolo, *supra* note 81, at 401.

84. See, e.g., ORANGE COUNTY, CAL., CODE § 4-3-45(a) (1986) (requiring that all trash be removed from a residential dwelling at least once a week); *Id.* § 3-3-85 (1988) (prohibiting residential dwellers from burning brush, logs, fallen timber, or any other flammable material), cited in *California v. Greenwood*, 486 U.S. 35, 48 (1988).

85. See, e.g., Note, *Further Erosion*, *supra* note 15, at 645 ("The *Greenwood* majority failed to acknowledge that if a citizen must break the law to avoid voluntarily exposing the contents of his or her garbage can to public scrutiny, the crux of the issue is compulsion, not consent.").

“[A] real crook is not likely to toss his smoking gun into his own trash barrel. And he is subject to search on probable cause anyway. Why should the rest of us have to put up with this sort of intrusion in the *absence* of probable cause?”<sup>86</sup> While it is true that local ordinances compel individuals to expose that which they would not otherwise expose due to its incriminating nature, most trash is non-incriminatory.<sup>87</sup>

Even assuming that an individual is aware of those laws mandating a particular method of trash disposal, the nature of the objects discarded will affect the intent of the individual. An individual who wishes to discard an incriminating object would likely prefer to dispose of it in a surreptitious manner. This demonstrates a heightened awareness of the law requiring disclosure. One might conclude that the disposal of the incriminating article was, in a sense, forced or compelled, rather than intentional.<sup>88</sup>

The disposal of routine household refuse, however, does not evidence a heightened awareness of those same laws or ordinances. Rather, disposal in the prescribed method is the most economically efficient practice. Furthermore, if there were a choice of methods of disposal, most people presumably would choose the manner prescribed by law.<sup>89</sup> In such a case, the applicable municipal ordinances do not alter the volitional nature of the act. Therefore, municipal ordinances that mandate a particular method of disposal do not diminish the volition necessary to a finding of abandonment.

Privacy is far more pervasive than the desire to conceal incriminating objects. Even the most routine items of trash may re-

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86. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U.L.Q. 11, 27-28 (1989) (emphasis in original).

87. While not literally incriminating, much household trash reveals information a resident would prefer to keep private. See *infra* note 90 and accompanying text.

88. See Mascolo, *supra* note 81, at 419-20.

89. For an apt analogy, see *Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974). In that case, the California Supreme Court suppressed bank records searched and seized by agents. In discussing the claim that such records are voluntarily conveyed to the bank, the court asserted that a depositor makes this disclosure for the limited purpose of facilitating banking affairs. *Id.* at 244, 529 P.2d at 594, 118 Cal. Rptr. at 170. Similarly, most homeowners or apartment dwellers convey their garbage to the trash collectors for the equally limited purpose of facilitating a sanitary home environment. The methods designated by law appear to be the most efficient means of doing this. Moreover, it does not appear that the average person disposes of trash in the prescribed manner due to compulsion by the government. Rather, regulated trash disposal is a welcome means of achieving the social good of a clean living environment.

veal intimate aspects of one's personal life.<sup>90</sup> The right to privacy remains no less important, even as regards the most mundane items people discard.

Given the fact that curbside trash is, technically, abandoned, the Court's conclusion that society does not accept that there is an expectation of privacy in trash voluntarily placed in an area accessible to the public simply amounts to a conclusion that there is no reasonable expectation of privacy in abandoned objects. This is entirely consistent with a whole body of fourth amendment case law.<sup>91</sup> Furthermore, despite the Court's attempts to disclaim such an approach, its treatment of the issue is entirely consistent with an abandonment analysis. However, the Court's approach fails to examine the intent of the defendant, thereby giving the first prong of the *Katz* test only cursory treatment.<sup>92</sup> Instead, the Court assumes that placing the object (trash) where the public can see it renders any expectation of privacy with regard to the object unjustified, regardless of any attempts to safeguard its contents. The end result is that the *Greenwood* Court has not done anything different from those lower courts that resolve the fourth amendment issue "in essentially the same way as in *Work* and *Minker*

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90. *California v. Greenwood*, 486 U.S. 35, 50 (1988) (Brennan, J., dissenting) ("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."). It is often suggested that to keep something private, one should simply refrain from putting it in the trash. Therefore, compelled exposure of that which would otherwise remain concealed does not constitute abandonment. Mascolo, *supra* note 81, at 418. Thus, it is argued, what a person places into the trash is discarded voluntarily; if there were something to hide, an alternative means of disposal would have been found. However, such an argument fails to perceive the true dimensions of privacy. Privacy involves not only an individual's right to avoid or engage in self-incrimination, but also society's respect for that individual. "[R]espect for someone as a person, as a chooser, implic[es] respect for him as one engaged on a kind of self-creative enterprise, which could be disrupted, distorted, or frustrated even by so limited an intrusion as watching." Benn, *Privacy, Freedom, and Respect for Persons*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY* 223, 242 (F. Schoeman ed. 1984).

91. As Professor Mascolo has noted, abandonment presents no issue of search or seizure. See Mascolo, *supra* note 81, at 401.

92. Characteristically, the Court uncritically accepts any assertion by a defendant of a subjective expectation of privacy in his or her trash. See, e.g., *Greenwood*, 486 U.S. at 39 ("It may well be that respondents did not expect that the contents of their garbage bags would become known to the police or to other members of the public."); *California v. Ciraolo*, 476 U.S. 207, 211 (1986) ("Clearly — and understandably — respondent has met the test of manifesting his own subjective intent and desire to maintain [his] privacy").

93. W. LAFAVE, *supra* note 34, at 476. Justice Brennan's dissent in *Greenwood* illus-



It is clear that the *Katz* majority did not contemplate the nexus between the *Greenwood* Court's articulated approach and the abandonment approach discredited in cases such as *California v. Rooney*<sup>94</sup> Factually, *Greenwood* and *Katz* are fundamentally identical. The divergent results serve to highlight the interrelation the *Greenwood* Court sees between abandonment and privacy analysis. Examination of this divergence will aid in analyzing this nexus.

## 2. *Katz* and *Greenwood* — Fundamentally Similar Facts, Radically Different Results: Where *Greenwood* Falters

The facts in *Greenwood* are essentially identical to the facts in *Katz*. Both cases involved receptacles (*Greenwood*'s trash can and *Katz*'s telephone booth) situated in public places. In each case, the "receptacle" contained evidence of some particular detail of the defendant's private activity. The Court sought to distinguish the two by urging that the likelihood of public apprehension was significantly greater in *Greenwood*.<sup>95</sup> However, the opposite may be true. A public phone booth is not immune to invasion by others. Any passerby could have heard *Katz*'s conversation. Moreover, the glass booth provides no protection from a person able to read lips.<sup>96</sup> Therefore, under the facts in *Greenwood* "[t]he mere possibility that unwelcome meddlers might open and rummage through the containers does not negate the expectation of privacy in its contents."<sup>97</sup> any more than did the fact that someone might have barged into *Katz*'s phone booth and overheard particularly incriminating segments of his phone call. In *Katz*, however,

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trates the curious nature of the majority opinion. First, he asserts that the Court properly rejected the state's claim that there is no expectation of privacy in garbage left at the curbside because it is abandoned. *Greenwood*, 486 U.S. at 51 (Brennan, J., dissenting). Then, he argues that "even the voluntary relinquishment of control over an effect does not necessarily amount to a relinquishment of the privacy expectation in it." *Id.* at 55 (Brennan, J., dissenting). The basis of the majority's holding is uncertain, given the fact that a voluntary relinquishment of control is, by definition, an abandonment. See Mascolo, *supra* note 81, at 401-02.

94. 483 U.S. 307 (1987).

95. *California v. Greenwood*, 486 U.S. 35, 40 (1988); see *State v. Ronngren*, 361 N.W.2d 224 (N.D. 1985) (defendant's fourth amendment rights were not violated when a dog dragged the defendant's trash bag into a neighbor's yard and the neighbor consented to a search of the bag).

96. Lecture by Lewis R. Katz, John C. Hutchins Professor of Law, at Case Western Reserve University School of Law (1990).

97. *Greenwood*, 486 U.S. at 54 (Brennan, J., dissenting) (emphasis in original).

the Court was more concerned with a factual account of the defendant's own understanding of the situation, asserting that "[o]ne who occupies [the booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."<sup>98</sup> In *Greenwood*, the Court did not look as far. Rather, it simply found that the defendant acted in a place where intrusion was possible. By voluntarily assuming that risk<sup>99</sup> the defendant necessarily gave up control, possession, and dominion over the object. Such relinquishment of control is, no doubt, an abandonment. However, the Court preferred to speak in terms of relinquishment of fourth amendment protection.<sup>100</sup> Nonetheless, the nexus is implicitly present — abandonment is highly probative, if not dispositive, of the limits of fourth amendment protection.<sup>101</sup>

Inasmuch as the facts in *Katz* and *Greenwood* are fundamentally identical, the analyses leading to these divergent results merit examination. As previously demonstrated, the *Greenwood* Court employed a veiled abandonment approach. The *Katz* Court, on the other hand, specifically denounced such an approach. In doing so, it reached a conclusion contrary to that in *Greenwood*. The divergence results from the *Greenwood* Court's skewed interpretation of *Katz*, particularly Justice Harlan's two-prong analysis. It is evident that the Court's interpretation of *Katz* is wholly at odds with the expressed aims of *Katz*.

### III. WHY THE COURT IS FORCED INTO AN ABANDONMENT ANALYSIS: THE NEED FOR A GENERALIZED AND SELF-VALIDATING OBJECTIVE CRITERION

Why, despite its protestations to the contrary, is the Supreme

98. *Katz v. United States*, 389 U.S. 347, 352 (1967).

99. Schulhofer, *supra* note 86, at 25 (arguing that a risk of public revelation is assumed when one voluntarily conveys information to another); see *Smith v. Maryland*, 442 U.S. 735, 744 (1979) (caller assumes the risk that numbers he or she dials may be revealed by the telephone company to third parties); *United States v. Miller*, 425 U.S. 435, 442-43 (1976) (patron assumes the risk of bank records being revealed by the bank to police or prosecutors).

100. *Greenwood*, 486 U.S. at 40.

101. Mascolo, *supra* note 81, at 401; see Note, *supra* note 80, at 559 ("After *Katz*, courts typically resolved the problem of trash searches by applying the abandoned property standard, modified by the reasonable expectation of privacy test; individuals surrender their privacy expectation when they discard their trash.").

Court using an abandonment approach in its analysis of numerous fourth amendment issues? Why has the Court failed to formulate an analytical framework that gives substantial effect to its oft-cited pronouncement that “the Fourth Amendment protects people, not places[,] what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected?”<sup>102</sup>

#### A. The Lack of Interplay Between the Strands of the Two-Prong Test: The Emergence of the Abstract Question, “What Is Reasonable?”

The answer lies in the interpretation of the *Katz* test by subsequent courts. Harlan’s two-prong inquiry<sup>103</sup> fails to capture the spirit of the *Katz* holding. Consequently, the Court has given only cursory consideration to the specific facts of each case, relying instead on a more abstract value judgment — one which depends on the values of the individual members of the Court.<sup>104</sup>

In *Katz*, Justice Stewart, writing for the majority, ruled that fourth amendment inquiry should focus on people rather than places.<sup>105</sup> The Court discarded the concept of “constitutionally protected area[s]” as a method of describing either what was protected or where a person was protected.<sup>106</sup> Inasmuch as the *Katz* majority contemplated a keenly person-oriented approach to the fourth amendment, Justice Harlan’s two-prong test is inadequate. The *Greenwood* Court’s rationale is anything but a person-oriented approach.

102. *Katz v. United States*, 389 U.S. 347, 351-52 (1967); see *Warden v. Hayden*, 387 U.S. 294, 304 (1966) (“The premise that property interests control the right of the Government to search and seize has been discredited.”).

103. See *supra* text accompanying note 52.

104. Justices Brennan and Marshall consistently have dissented in cases in which the Court has denied fourth amendment protection. In most of these cases, their arguments have simply rejected the majority Justices’ value judgments in favor of their own. See, e.g., *California v. Greenwood*, 486 U.S. 35, 51 (1988) (Brennan, J., dissenting) (“Most of us, I believe, would be incensed to discover a meddler scrutinizing our sealed trash containers to discover some details of our personal lives.”); *Smith v. Maryland*, 442 U.S. 735, 751 (1979) (Marshall, J., dissenting) (“Privacy in placing calls is of value not only to those engaged in criminal activity. The prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide.”); *United States v. Miller*, 425 U.S. 435, 451 (1976) (Brennan, J., dissenting) (“In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations.”).

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

106. *Id.* at 350.

Because the *Greenwood* analysis focuses on the second prong of the test,<sup>107</sup> the Court is narrowly limited in its investigation of specific facts concerning methods and manners in which individuals perform particular acts, whether in private or in public. Such fact-specific inquiries are impossible where the Court must make a prophylactic ruling on what society generally perceives as reasonable and legitimate. A test which is merely an estimation of social values renders subjective analysis virtually meaningless. Instead, the Court must devise a fairly generalized ruling which conveys the message that, at some point, an individual's conduct is no longer reasonable from society's standpoint. Professor Uviller, discussing this pure "reasonability" standard, notes that

[t]his philosophy deserves appreciation. It is, after all, in the best tradition of our common-law system of judge-made law. It will, as did the common law, naturally yield generalizations, which in turn will be formulated into canons if not codes, and the police will as surely instruct recruits according to the supposed precepts underlying the individual decisions.<sup>108</sup>

Unfortunately, these "generalizations" account for the Court's inability to escape from any analytical model which does not embrace the abandonment theory

#### B. "Where" Versus "How": Providing the Easiest Answer to an Abstract Question

As noted above, when the Court decides whether the fourth amendment will apply to a particular case, it simply determines what is abstractly reasonable. It does not look to what is reasonable in consideration of all the facts unique to the particular case. Logic requires that the former question be answered by a generalized statement concerning a broad category of activities. Furthermore, this generalized solution necessarily involves a value judgment; the Court merely surmises the reaction of the majority of Americans to the broad category of activities under discussion.

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107. See *Greenwood*, 486 U.S. at 41 ("[o]ur conclusion that society would not accept as reasonable respondents' claim to an expectation of privacy"); *California v. Ciraolo*, 476 U.S. 207, 214 (1986) ("we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable"); *Miller*, 425 U.S. at 442 ("We must examine the nature of the particular documents sought to be protected to determine whether there is a legitimate 'expectation of privacy' concerning their contents.").

108. Uviller, *Reasonability and the Fourth Amendment: A (Belated) Farewell to Justice Potter Stewart*, 25 CRIM. L. BULL. 29, 36 (1989).

The inherent dilemma is that persuasive answers can be given on either side of the issue, none of which are incorrect.<sup>109</sup> The distinction between the two questions posed above is crucial to fourth amendment jurisprudence.

The Court's phrasing of the question yields an easily applicable rule for the law enforcement agent who will ultimately have to make the day-to-day decisions concerning searches and seizures.<sup>110</sup> Thus, the Court may have made a policy decision to prefer efficient law enforcement to extensive fourth amendment coverage. In any event, when the inquiry focuses on reasonableness, the court must strive to create a test that produces universally consistent results for a very broad range of factual scenarios within one general category of activity. Trash disposal, dialing phone numbers, and depositing bank funds exemplify broad categories of activity. But in asking the abstract question, the Court must forego analyzing the particular factual complexities of each case. Instead it must make a more generalized inquiry.

Curbside trash is abandoned. This fact is implicit in recent cases and was consistently and explicitly determined in older cases. Moreover, the *Greenwood* Court is correct to assert that, in general, it is unreasonable to expect abandoned property to remain private. However, this admission is made with the caveat that it is limited only to the abstract, general case. An expectation of privacy may be justified given a more specific factual accounting. The value judgment that one cannot have a reasonable expectation of privacy in abandoned property is a justifiable generalization. However, recognizing that a generalization is only the mean

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109. Consider, for example, the conception of American values asserted by Judge Anstead dissenting in *State v. Schultz*, 388 So. 2d 1326 (Fla. 1980):

In my view, a homeowner, upon placing items in a closed garbage container and placing the container in a position on his property where the container can be conveniently removed by authorized trash collectors, is entitled to reasonably expect that the container and the trash therein will be removed from his property only by those authorized to do so, and that such trash will be disposed of in a manner provided by ordinance or private contract. Consider the average citizen who, upon the occasion of taking his trash out to the front of his property on the day appointed for collection, reenters his house and almost immediately notices his next door neighbor rushing out to rifle through the trash that is contained in the covered containers. What would his reaction be? I suggest he would be absolutely incensed.

*Id.* at 1330-31.

110. See *Oliver v. United States*, 466 U.S. 170, 181-82 (1984) (arguing that an ad hoc approach would make it difficult for police officers to know the limits of their authority).

conclusion of a varied array of results, the court should always determine whether the generalization is sufficiently rebutted in the case at hand. Just as an apparent case of abandonment may, upon further inspection, turn out not to be such a case,<sup>111</sup> a justified case of abandonment should not always prevent application of the fourth amendment.<sup>112</sup> However, unless the further inquiry is made, the fourth amendment will afford no protection. Therefore, a determination that no fourth amendment protection extends to information voluntarily conveyed to third persons<sup>113</sup> represents a validation of the generalized value judgment that there can be no reasonable expectation of privacy in abandoned objects.

The Court engages in a veiled abandonment analysis in that it makes the wrong inquiry in determining the limits of the fourth amendment. The Court is misled by its interpretation of Justice Harlan's two-prong test as involving no connection between the two prongs. The Court explains the test as if a connection exists, but the connection is actually a fiction. Rather, the two-prong test involves two distinct inquiries. The first relates to the defendant's subjective awareness. But, as noted above, this inquiry usually ends with the defendant's unsupported assertion of an expectation of privacy in the trash.<sup>114</sup> Then, rather than using the second prong as a check on the first, the Court employs the second prong in an abstract manner by asking "what is reasonable?" as opposed to "is the defendant's assertion truthful from an objective standpoint?" The latter approach requires a more fact-specific analysis by the Court to determine whether the particular facts serve to rebut the asserted expectation.

The application of the two-prong test as two distinct inquiries explains the divergent results in *Katz* and *Greenwood*. *Katz*, like *Greenwood*, acted in a public setting. Yet the Court employed different analyses in the two cases. In *Katz* the inquiry focused on how the defendant acted, regardless of the defendant's location.

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111. Professor Mascolo advocates a fact-specific inquiry into every apparent case of abandonment because, upon further inspection, what looks like an abandonment may not be. For instance, a person who, fearing an imminent confrontation with a policeman, discards an incriminating object instead of risking its discovery during a frisk may not have abandoned the object because of the element of compulsion. Mascolo, *supra* note 81, at 418-20. Hence, if police activity "prompt[s] the victim into revealing what would otherwise be the product of an unreasonable search and seizure," *Id.* at 419, there cannot be an abandonment.

112. See W. LAFAYE, *supra* note 34, § 2.6(c) at 477.

113. See *supra* notes 68-74 and accompanying text.

114. See *supra* note 92 and accompanying text.

Hence, in *Katz*, the public-private place distinction was abrogated.<sup>115</sup> Having placed a call in a public place was of no consequence. In *Greenwood*, however, the desire for a universal objective standard led the court to narrow the inquiry to essentially the one rejected in *Katz*. Had *Greenwood* truly followed the approach taken in *Katz*, the result would have conformed to Justice Brennan's argument:

Had Greenwood flaunted his intimate activity by strewing his trash all over the curb for all to see I could accept the Court's conclusion that an expectation of privacy would have been unreasonable. But all that Greenwood "exposed to the public," were the exteriors of several opaque, sealed containers.

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.<sup>116</sup>

The majority, however, failed to take this approach and chose instead the more abstract approach, looking only to the ease of public access to the area in which the thing or the activity is located.<sup>117</sup> Ready public access indicates the defendant's recognition of a loss of control and dominion over the object. Insofar as such a loss of control amounts to abandonment,<sup>118</sup> the Court holds that society will not acknowledge any expectation of privacy that the defendant may have with respect to that object.<sup>119</sup> The *Greenwood* Court's approach has the advantage of allowing the Court to condition a societal response, thus affirming its value judgment. However, this consideration is inappropriate because it seeks to achieve socially acceptable results at the expense of fairness.

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115. "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 he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States*, 389 U.S. 347, 351-52 (1967) (citations omitted).

116. *Greenwood v. California*, 486 U.S. 35, 54 (1988) (Brennan, J., dissenting) (citations omitted) (emphasis in original).

117. See *supra* text accompanying note 74.

118. See *supra* text accompanying notes 75-76.

119. See *supra* text accompanying notes 67-75.

### C. The Abstract Question and the Easy Answer: The Court Conditions a Societal Response Rather Than an Individual Response

Having placed all of its emphasis on the second prong of the *Katz* test, the Court is able to make a tautological statement of what society considers objectively reasonable. Because the Court's rulings condition society's expectations, whatever the Court concludes will accurately reflect societal expectations.

Attempts to mitigate the harsh results of the Court's pronouncement of reasonable expectations of privacy can be readily observed. Public awareness that trash is not subject to the warrant requirement causes people to take greater precautions to protect their trash from public disclosure. From the perspective of the individual, an unpopular decision has the effect of inducing the individual to engage in behavior which manifests a certain demand for privacy.<sup>120</sup> Simply because the court claims that one does not have a reasonable expectation of privacy in the contents of his trash does not cause individuals to cease seeking privacy for the contents of their trash, within the limitations imposed upon the alternatives by local law.<sup>121</sup> The desire for privacy and the measures taken to secure it are increased rather than diminished.

The *Greenwood* Court's pronouncement is self-proving in that it conditions a societal response that deviates from the individual response.<sup>122</sup> By claiming that society does not view an expectation of privacy in trash as objectively reasonable, the Court sets a societal standard — in effect conditioning a societal response for future cases.<sup>123</sup> But such a response only relates to how the individ-

120. See *infra* text accompanying note 137.

121. See, e.g., *supra* note 84.

122. *Greenwood* made a similar argument in a different context. His argument, made on due process grounds, asserted that laws and judicial pronouncements tend to establish the objective views of society:

[T]he reasonableness of [the] Respondent's expectation of privacy must be seen in the context of applicable state law. For to the extent that notions of a reasonable expectation of privacy must rest in part on those expectations that society will accept as reasonable, the pronouncements of that society on the subject should not be ignored. Were [the] Respondent living in an area in which trash was by law made available for public inspection on a regular basis, no expectation of privacy could be considered reasonable.

Respondent's Brief at 15-16, *California v. Greenwood*, 485 U.S. 35 (1988) (No. 86-684).

123. One author explains the difference between the majority and dissenting opinions in *Greenwood* by distinguishing between behavioral responses, which focus on society's opinion of the reasonableness of the individual's behavior, and value-oriented responses, which focus on society's overall view of the nature of the activity itself: "Justice White's



ual views the situation with regard to other individuals. Regarding one's self, the response to the situation is often entirely different from the societal response.

#### IV ANALYZING BEHAVIORAL MANIFESTATIONS AS A CORRECT APPROACH TO FOURTH AMENDMENT ISSUE RESOLUTION

The *Greenwood* decision does not embody a rejection of traditional property law analysis of fourth amendment issues. Moreover, the decision provides the Court with a societal response-conditioning approach to the fourth amendment. It is now necessary to examine whether such an approach was contemplated in the *Katz* decision and then, if this were not contemplated, to formulate an approach that is compatible with *Katz*.

The approach taken by the *Greenwood* Court is not the approach to fourth amendment issues contemplated by *Katz*. The *Katz* majority contemplated a test that places far more emphasis upon defendant's actual expectations, as gauged by the reasonableness of their behavioral manifestations, than on the mere passing reference to the subjective belief of the defendant that the Court makes in *Greenwood*.

The Court has claimed that any inquiry into the subjective expectations of the defendant would be meaningless because issues of proof would make it nearly impossible to challenge a defendant who asserts a subjective expectation that the object discovered would remain private.<sup>124</sup> This is certainly true under the two-prong test that the Court has chosen to apply. When the first prong of the test is limited to an inquiry into whether the defendant had an actual subjective expectation of privacy, there is no standard by which to gauge the sincerity of an affirmative answer.

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reasoning indicates that he believes the *Katz* social reasonableness inquiry is answered by examining whether an individual's privacy expectation is currently subject to invasion. By stressing the likelihood of *Greenwood*'s privacy actually being invaded, Justice White framed the *Katz* inquiry in pragmatic terms of actual probabilities." Note, *Further Erosion*, *supra* note 15, at 636.

This distinction is valid, but in the reverse context. By holding that society does not accept as objectively reasonable any expectation of privacy in the contents of one's garbage, the Court is assessing the behavioral response of the community at large. Such an assertion is merely a recognition that society does not "practice what it preaches." The Court's analysis does not alter the individual's concept of privacy rights in one's own trash. Individuals are apt to advocate a value-oriented response when it comes to their own trash but express the societal behavioral response with respect to the trash of others. *See id.* at 636-37.

124. *See Greenwood*, 485 U.S. at 39-40; *supra* note 92.

The two-prong test is disintegrative in the sense that the answer to the second inquiry has no bearing on the truthfulness of the answer given to the first inquiry. Such a muting of the defendant's subjective expectation is inconsistent with the majority opinion in *Katz*.<sup>125</sup>

This is not to suggest that a defendant's asserted expectation is dispositive of the matter for purposes of the fourth amendment.<sup>126</sup> However, *Katz* does stand for the expansion of the protections of the fourth amendment to the plethora of situations in which the defendant both claims and manifests an expectation of privacy. The defendant's true intent can be measured against the reasonable person's interpretation of the defendant's behavioral manifestations. What society views as reasonable should be construed not in the abstract, as in *Greenwood*; rather, it should be construed to act as a qualification, limitation, or standard for assessing the truthfulness of a defendant's subjective demand for coverage by the fourth amendment. This proposition is consistent with the *Katz* concept that fourth amendment coverage is tied to the individual's intent to actively assert a privacy interest in a given situation.<sup>127</sup>

An apt analogy to the analysis proposed is the traditional conceptual framework of contract law. In fact, Justice Stewart's majority opinion speaks in vaguely contractual terms, as if to imply that promissory estoppel bars the government from rescinding the promised protection of the fourth amendment. Justice Stewart wrote: "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon

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125. Professor Amsterdam asserts that "neither *Katz* nor the fourth amendment asks what we expect of government. They tell us what we should demand of government." Amsterdam, *supra* note 33, at 384.

126. Professor Amsterdam further claims that the defendant's subjective expectation "has no place in a statement of what *Katz* held or in a theory of what the fourth amendment protects." *Id.*

127. For example, the *Katz* Court says that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). Further, the court explains, "[W]hat [*Katz*] sought to exclude when he entered the booth was not the intruding eye — it was the uninvited ear." *Id.* at 352 (emphasis added).

Even Justice Harlan agreed, "[A] man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." *Id.* at 361. Such a statement is a far cry from the characteristic deference with which the modern court accepts any statement by the defendant that he has an actual subjective expectation of privacy in the object searched.

which he *justifiably relied* while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."<sup>128</sup> Under contract law, the theory of promissory estoppel enforces promises where the promisee detrimentally and "justifiably relies" on the promise.<sup>129</sup> Moreover, the promisee's reliance on the promise is analyzed from the perspective of the reasonable person making an assessment of the promisee's behavior. Applying this approach to *Katz*, the reasonable person could conclude that *Katz's* actions were motivated by reliance on the promise of the protections contained in the fourth amendment. Perhaps *Katz* actually indicates a shift from property law principles to contract law principles.<sup>130</sup> At the very least, contract concepts relating to proof are analogous to the type of proof required to resolve fourth amendment issues.

Analyzing fourth amendment issues in this way avoids the need to invoke an abandonment analysis to resolve cases of warrantless trash reconnaissance. The question of whether one has abandoned one's trash is no longer germane to the issue of fourth amendment coverage of that trash.<sup>131</sup> Whether an individual

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128. *Id.* at 353 (emphasis added).

129. RESTATEMENT (SECOND) OF CONTRACTS § 90 comment c (1979).

130. Coincidentally, traditional property law was itself moving toward contract law at roughly the same time *Katz* was decided. Traditional property law concepts were being replaced by contract law concepts primarily because the latter were more amenable to the rapid urbanization of America. Property law concepts were considered too archaic to reflect the concerns and intentions of modern city dwellers. See Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C.L. REV. 503 (1982) (lease law had long been an amalgam of property and contract notions; changes since the nineteenth century reflect trends in private law generally). Perhaps the most celebrated case regarding the emerging contract theory of property law was *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970):

[A]s the Supreme Court has noted in another context, "the body of private property law, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life

As we have said before, "[T]he continued vitality of the common law depends upon its ability to reflect contemporary community values and ethics."

*Id.* at 1074 (quoting *Jones v. United States*, 362 U.S. 257, 266 (1960), and *Whetzel v. Jess Fisher Management Co.*, 282 F.2d 943, 946 (D.C. Cir. 1960)) (footnotes omitted).

Because fundamental tenets of property law were being questioned at the time *Katz* was decided, the Court may have concluded that those same archaic property law concepts were wholly inadequate to deal with the myriad fourth amendment issues created by both the technology explosion and the rapid urbanization of America. See *supra* note 30 (describing the impact of technological development).

131. "A justified expectation of privacy may exist as to items which have been abandoned in the property law sense, just as it is true that no such expectation may exist on some occasions even though the property has not been abandoned." W LAFAVE, *supra*

places garbage at the curbside for pickup or buries it in a ditch, the intention regarding abandonment is identical.<sup>132</sup> However, in the second situation it is clear that the person did not dispose of the trash whimsically. Rather, one disposes of trash in this way to protect the privacy of its contents. Once the focus shifts to the fact that the trash was disposed of in a private place, the superficial locational analysis gives way to an analysis of the individual's fundamental activities. This analysis focuses on "how," as opposed to "where," a person acts.<sup>133</sup>

Such a test assesses the defendant's subjective expectation regarding the trash. However, the subjective expectation must be gauged against the person's objective manifestations of intent. Hence, any discussion of objective reasonableness need not be abstract. Rather, the conclusion that the defendant's expectation of privacy is reasonable should mean that the behavioral manifestations of intent tend to demonstrate the expectation that the defendant claims to have held. This is the proper interpretation of the phrase "reasonable expectation of privacy" in light of the *Katz* majority opinion. Subsequently, notions of abstract objectivity have entered into the *Katz* test, confusing the results intended. Hence, courts have interpreted the reasonable-expectation-of-privacy test as measuring whether an asserted expectation of privacy is objectively reasonable in light of social mores. From that point, the war of values has raged. Regrettably, the justification for this conflict undermines the very foundation of individual liberty. As one commentator has observed, "[t]he overriding constitutional issue of our time has been the split between those who view the Bill of Rights as a firm judicial mandate empowering the Supreme

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note 34, § 2.6(c), at 377.

132. See *supra* text accompanying notes 83-89.

133. In other contexts, courts have successfully engaged in more fact-specific inquiries to determine the limits of the fourth amendment. The failure to employ a similar approach in the trash context remains baffling. The urine testing cases are representative of the correct approach. For instance, in *Shail v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988), the court stated:

The fact that urine is voluntarily discharged from the body and treated as a waste product does not eliminate the expectation of privacy which an individual possesses in his or her urine. While urine is excreted from the body, it is not "knowingly expose[d] to the public" instead, the highly private manner by which an individual disposes of his or her urine demonstrates that it is not intended to be inspected or examined by anyone.

*Id.* at 1312 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). Likewise, the focus in *cfi* Greenwood should have been the manner in which the garbage was disposed even though the garbage was voluntarily placed in public.

Court' to enforce its specific prohibitions, and those who merely balance its values against competing ones."<sup>134</sup> Some even consider the Bill of Rights "a serious impediment in the war against crime."<sup>135</sup> The result of such thinking has been a radical diminution of individuals' privacy, based solely on the triumphant value judgments in the Court's present battle of ideologies.

#### V APPLYING A BEHAVIORAL MANIFESTATIONS TEST. MAKING A COGNIZABLE "DEMAND" FOR PRIVACY

The *Katz* majority intended a formulation of the reasonable-expectation-of-privacy test that looks to an interpretation of the defendant's behavioral manifestations. The petitioner in *Katz* framed the issues as follows:

When the now discredited physical trespass theory is abandoned in favor of one stressing the right to privacy, it is possible to suggest a workable test to be employed in determining whether or not a specific area is protected by the Fourth Amendment. This test merely turns on the answer to the question: "Would the average reasonable man believe that the person whose conversation had been intercepted intended and desired his conversation to be private?"<sup>136</sup>

An appropriate analysis of a warrantless trash reconnaissance would consist of simply examining the totality of facts and circumstances with a view towards determining whether the individual expected privacy as judged against a reasonable person's interpretation of his or her actual behavior. When the individual's assertion of an expectation of privacy is judged in light of that individual's actual behavior, it is not the same as asking simply whether the individual had a subjective expectation of privacy. On the contrary, this inquiry examines whether the individual is making a cognizable "demand" for privacy.<sup>137</sup> In *Katz* the defendant made such a demand. He placed his call from a public phone booth, but in a manner that conveyed a demand for privacy. Katz's actions put the community on notice that he did not wish

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134. Levine, "The Great Hand of Executive Justice" *The Crime Problem and the Activist Judge*, 7 HASTINGS CONST. L.Q. 907, 938 n.196 (1979-80) (quoting Redlich, *Are There "Certain Rights Retained by the People"?*, 37 N.Y.U. L. Rev. 787 (1962)).

135. *Harris v. United States*, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting).

136. Petitioner's Brief at 13, *Katz v. United States*, 389 U.S. 347 (1967) (citation omitted).

137. See Amsterdam, *supra* note 33, at 384.

to be intruded upon while he placed his call.

Similarly, looking at the totality of facts and circumstances in *Greenwood*, one can reach a conclusion opposite to that of the *Greenwood* Court. The threshold inquiry would look to where the individual performs the acts or places the objects. The public-private distinction is still useful insofar as it indicates the types of further activity necessary to conclude that an expectation of privacy has been manifested. Since *Greenwood* placed his trash at the curbside, the inquiry must look further for evidence that the defendant put the garbage in this public place in a manner that put the community on notice of a demand for privacy with respect to that garbage. In *Greenwood* that demand is clear. By placing his trash in opaque bags, sealed at the top, and inside trash containers, *Greenwood* sufficiently established a "claim of right" to privacy in the content of those bags.<sup>138</sup>

Since the *Katz* Court held that what a person knowingly exposes to the public cannot be protected by the fourth amendment,<sup>139</sup> some degree of mens rea is required on the part of the defendant. How, then, can an individual who takes every precaution to protect objects from exposure still "knowingly" expose those things to the public?<sup>140</sup> By plain interpretation, one who knowingly exposes something to the public indicates an element of indifference to its discovery. Such indifference to discovery cannot be found where a person takes every reasonable precaution against disclosure.<sup>141</sup>

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138. "The key to the [fourth] amendment is the question of what interests it protects. Mr. Katz's conversation in a pay telephone booth was protected because he 'justifiably relied' upon its being protected — relied, not in the sense of an expectation, but in the sense of a claim of right." *Id.* at 385 (footnote omitted).

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

140. In *People v. Agee*, 200 Cal. Rptr. 827 (Cal. Ct. App. 1984) (pursuant to a court order, this opinion is not published in the official reporter), a California Appellate Court dealt with the issue of random aerial surveillance of residential backyards for evidence of marijuana cultivation. In rejecting the validity of these warrantless observations, the court reasoned that "[k]nowing exposure is not the same as any exposure, however remote the likelihood that members of the general public will avail themselves of it." *Id.* at 835. The Court in *Greenwood* seems to have taken the opposite stance, having equated the bare "likelihood of exposure" with "knowing exposure." See *Greenwood v. California*, 486 U.S. 35, 40-41 (1988).

141. In his dissenting opinion in *Oliver v. United States*, 466 U.S. 170 (1984), Justice Marshall described the issue in terms of presumptions and rebuttals of presumptions: [W]e have traditionally looked to a variety of factors in determining whether an expectation of privacy asserted in a physical space is "reasonable." First, we consider whether the expectation at issue is rooted in entitlements defined by positive law. Second, we consider the nature of the uses to which spaces of the

The approach advocated in this note is a novel one. However, the importance of its essential element — the defendant's behavioral manifestations — has been underscored in a widely cited dissent by Judge Rabinowitz of the Alaska Supreme Court in *Smith v State*.<sup>142</sup> While Judge Rabinowitz did not adopt the exact approach advocated in this note, he expressed a similar preference for a fact-oriented analysis.

[W]e are concerned with the determination of constitutional rights rather than spatial relationships or property interests. It seems to me to be preferable to consider the external, behavioral [sic] manifestations of an individual in order to ascertain his or her expectations of privacy.<sup>143</sup>

Judge Rabinowitz was correct to take an approach to *Katz* that looks to the individual's behavioral manifestations. However, he stopped just short of the more complete exposition advocated here. He would retain the two-prong test, only modified insofar as the first prong is concerned.<sup>144</sup> Yet his concern is well taken. Under

sort in question can be put. Third, we consider whether the person claiming a privacy interest manifested that interest to the public in a way that most people would understand and respect.

[Some] spaces are, by positive law and social convention, presumed accessible to members of the public unless the owner manifests his intention to exclude them.

*Id.* at 189, 193 (Marshall, J., dissenting).

142. 510 P.2d 793 (Alaska), *cert. denied*, 414 U.S. 1086 (1973).

143. *Id.* at 801 (Rabinowitz, J., dissenting). The case involved a search of a trash dumpster used at a multi-unit dwelling. Judge Rabinowitz argued for the suppression of evidence seized pursuant to a search warrant issued upon evidence gained from the search of the trash dumpster:

Rather than focusing upon the physical location of the dumpster and property law notions of abandonment of ownership interests, I would focus upon appellant's behavior in an effort to determine whether or not she intended to knowingly disclose to the public, publicly communicate, or publicize the contents of her garbage.

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

The Ninth Circuit had the opportunity to comment on the then-new *Katz* test: "[I]t seems to us a more appropriate test is whether it constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public." *Wattenburg v. United States*, 388 F.2d 853, 857 (9th Cir. 1968) (citing *Katz v. United States*, 389 U.S. 347 (1967)).

144. Judge Rabinowitz clearly intended his behavioral manifestations concept to apply only to the first, subjective prong of the Harlan test:

[T]he [Alaska Supreme C]ourt adopt[s] an unworkable test which imposes upon appellant an impossible burden. That is, the court employs the test laid down by Justice Harlan in *Katz*. In my opinion, establishing a person's subjective expectations or mental attitudes will be extremely difficult, if not

the present Court's analysis it is impossible for a defendant to make a case for fourth amendment coverage. The approach taken by Judge Rabinowitz is more solicitous of the defendant's asserted expectation of privacy since it examines additional facts which, from an objective standpoint, may prove the veracity of his claim. Under Judge Rabinowitz's approach, however, a defendant would still face the equally difficult burden of countering the generalization that fourth amendment protection does not extend to information voluntarily conveyed to third persons.

Judge Rabinowitz's approach would not move the Court away from its veiled abandonment analysis. To do this requires an additional inquiry into whether the reasonable person would conclude that the defendant has made a cognizable demand for privacy. Only then will the reasonable-expectation-of-privacy test be consistent with the approach to fourth amendment analysis contemplated by the *Katz* majority. Failing this, the reasonable-expectation-of-privacy test, as it is presently applied by the Court, is simply a modern name for an archaic approach to fourth amendment law.

#### CONCLUSION

This note has attempted to demonstrate that there is a pervasive rift separating the rationales of *Katz* and *Greenwood*, even though the two are factually similar and purport to apply the same analysis. Even though *Katz* was the first case to use what came to be known as the reasonable-expectation-of-privacy test and *Greenwood* purports to use that same test, the two analyses are radically different. The relevant distinction is that *Greenwood's* reasonable - expectation - of - privacy analysis actually amounts to a veiled abandonment approach identical to the analysis employed in pre-*Katz* cases. The *Greenwood* Court uses the wrong analysis because it asks the wrong question. It has interpreted the expectation-of-privacy analysis as asking whether a person's claim to an expectation of privacy is objectively reasonable. This formulation collapses into an abandonment analysis because the Court must gauge objective rationality against traditional property law concepts. For example, the Court presently

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impossible, in most cases. It seems to me to be preferable to consider the external, behavioral manifestations of an individual in order to ascertain his or her expectations of privacy.

*Smith*, 510 P.2d at 801 (Rabinowitz, J., dissenting).



asks if it is objectively reasonable to expect privacy in something voluntarily conveyed to third parties. However, this is tantamount to asking whether the object has been abandoned, as the pre-*Katz* Court would have asked.

The reasonable-expectation-of-privacy test, as contemplated by the *Katz* majority (though not using that exact terminology), was conceptually much different than subsequent cases have interpreted it to be. The *Katz* Court demanded far more emphasis on the steps taken by a person to secure privacy regardless of location, taking into account the constraints of his or her environment. The correct question, however is whether the reasonable person would conclude that, regardless of the circumstances of one's present environment, one has made a cognizable demand for privacy. That is, the Court should ask whether a person's asserted expectation of privacy is bona fide in light of a reasonable interpretation of that person's behavioral manifestations. This is the appropriate inquiry if the phrase "reasonable expectation of privacy" is to embody the *Katz* decision and the policies, aims, and analysis contained therein. Otherwise, the present Court should discontinue its references to *Katz* and admit that it actually uses the abandonment approach employed prior to *Katz*.

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