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California v. Greenwood: A Trashing of the Fourth Amendment

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CALIFORNIA v. GREENWOOD: A TRASHING OF THE FOURTH AMENDMENT?

I. INTRODUCTION

During the first half of the 1970's, eager journalists recognized that an invaluable source of information about the private lives of public figures lay buried in their garbage cans. As a result, this period saw the emergence of a journalistic trend in which a number of reporters began to collect and rifle through the trash bags of various celebrities, with Henry Kissinger's garbage apparently being a favorite target.[1] Society's reaction to this trend was generally one of fervent disapproval. One journalist, focusing on the searches of Mr. Kissinger's garbage, called the behavior of his colleagues "a disgusting invasion of personal privacy."[2] Another journalist said, "There are certain basic conditions, certain vulnerabilities, to all our lives — public and private figures alike — that we must be able to assume others will not take unfair advantage of."[3]

1. Journalist A. J. Weberman attempted to secure Kissinger's garbage bags in 1971. *See* Weberman, *The Art of Garbage Analysis: You are What You Throw Away*, 76 ESQUIRE 113 (1971). In 1975, journalist Jay Gourley reportedly took five bags of Kissinger's garbage from his home, N.Y. Times, July 9, 1975, § 1, at 47, col. 1.

2. Flieger, *Investigative Trash*, U.S. NEWS & WORLD REPORT, at 72, July 28, 1975.

3. Washington Post, July 10, 1975, § 1, at 18, col. 1.

Unquestionably, the Constitution does not protect individuals from the intrusive searches of their debris by journalists. However, the negative public reaction to such searches is clearly illustrative of society's recognition that garbage harbors intimate details and secrets of one's private life which ought to remain private. Therefore, it seems to be a fair question to ask whether this particular privacy interest is constitutionally protected from unreasonable searches by governmental officials under the fourth amendment,[4] especially in the context of warrantless searches of garbage by an officer of the law who is seeking evidence of illicit activity for criminal prosecution.

Ironically, at approximately the same time journalists were being chastised for seeking interesting "tidbits" from garbage to increase newspaper sales, state[5] and federal[6] courts were beginning to hold that a criminal suspect's expectation of privacy in his garbage, discarded in public areas, was not reasonable. However, in the 1971 decision *People v. Krivda*,[7] the California Supreme Court extended fourth amendment protection to a defendant's trash cans by holding that the warrantless police search of defendant Krivda's garbage constituted an unreasonable governmental intrusion.[8] The *Krivda* court ordered the suppression of evidence seized in this illegal search and seizure.[9]

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4. The fourth amendment states that people have the right to be secure from unreasonable, warrantless, governmental searches and seizures of "their person, houses, papers, and effects . . . ." U.S. Const. amend. IV. This amendment was clearly written to protect people rather than places. Katz v. United States, 389 U.S. 347, 351 (1967). Therefore, "[t]he touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy [in the items searched by the government without a warrant issued upon probable cause.]' " California v. Ciraolo, 476 U.S. 207, 211 (1986). In determining whether a warrantless police search violates the fourth amendment, the United States Supreme Court applies the following inquiry: whether an individual manifests a subjective expectation of privacy in the object searched, which society is willing to recognize as objectively reasonable. *Katz* at 361.

5. *See, e.g.*, People v. Huddleston, 38 Ill. App. 3d 277, 347 N.E.2d 76 (1976); Willis v. State, 518 S.W.2d 247 (Tex. Crim. App. 1975); Smith v. State, 510 P.2d 793 (Alaska 1973), *cert. denied*, 414 U.S. 1086 (1973); State v. Fassler, 108 Ariz. 586, 503 P.2d 807 (1972); Croker v. State, 477 P.2d 122 (Wyo. 1970); State v. Purvis, 249 Ore. 404, 438 P.2d 1002 (1968).

6. *See, e.g.*, Magda v. Benson, 536 F.2d 111 (6th Cir. 1976); United States v. Mustone, 469 F.2d 970 (1st Cir. 1972).

7. People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971) *cert. granted*, 405 U.S. 1039, *vacated*, 409 U.S. 33 (1972).

8. *Id.*

9. *Id.* at 367, 486 P.2d at 1269, 96 Cal. Rptr. at 69.

Encouraged by this decision, defendants from other jurisdictions in similar situations argued for fourth amendment protection of their garbage.[10] However, most of these defendants were unsuccessful. California remained the only state to recognize this protection until the Supreme Court of Hawaii, in 1985, held that "defendants have a reasonable expectation of privacy in their trash bags . . . ."[11]

After 1982, California law enforcers believed that the state had abandoned its protection of garbage, previously afforded by the *Krivda* decision, when it amended its constitution to bar the suppression of any relevant evidence in a criminal proceeding (presumably even evidence seized in violation of a suspect's state right to be free from illegal searches and seizures or right to privacy).[12] In its 1985 decision *In re Lance W.*,[13] the Supreme Court of California interpreted this amendment to permit the exclusion of unlawfully obtained, relevant evidence only if the exclusion of such evidence is required by the United States Constitution.[14] Because *Krivda* was decided not only on grounds of state protection, but also on federal fourth amendment protection, the federal aspect of the protection in *Krivda* survived even after 1982.[15] Therefore, California authorities questioned whether the fourth amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home (beyond a person's yard or garden, normally on a public street).[16] This ques-

10. *See infra* notes 40-41 and accompanying text.

11. Hawaii v. Tanaka, 67 Haw. 658, 662, 701 P.2d 1274, 1277 (1985).

12. CAL. CONST. art. I, § 28. This amendment is entitled "Victims' Bill of Rights." Its stated purpose is to ensure that persons who commit felonies will be appropriately detained, tried, and punished so that public safety is protected and encouraged. In order to achieve this desired goal, subdivision (d) of this amendment reads, "relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court." *Id.* at art. I, § 28(d).

13. *In re Lance W.*, 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985).

14. *Id.* at 890, 694 P.2d at 755, 210 Cal. Rptr. at 642.

15. *Krivda*, 5 Cal. 3d at 365, 486 P.2d at 1267, 96 Cal. Rptr. at 67.

16. "The word curtilage originally signified the land with the castle and out-houses, enclosed often with high stone walls, and where the old barons sometimes held their court in the open air, and which word we have corrupted into court-yard." Coddington v. Dry Dock Co., 31 N.J.L. 477, 485 (1863). The New Jersey Court of Errors and Appeals held in *Coddington* that curtilage not only included the lot surrounding a city home, but also included all out-houses, barns, stables, mills, and adjoining lands to a country estate as well. *Id.* at 484.

The United States Supreme Court established a more modern definition of curtilage in the 1987 decision, *United States v. Dunn*, 107 S. Ct. 1134 (1987). The Court held that although fourth amendment

tion ultimately was answered in *California v. Greenwood*,[17] in which the United States Supreme Court held that the fourth amendment does not prohibit such a search.[18]

This Note examines the *Greenwood* decision and focuses on the reasonableness of the decision. First, it summarizes the Supreme Court's opinion in *Greenwood* with a discussion of both the majority and dissenting opinions. Second, it explores the evolution of fourth amendment interpretation, noting how the Court has attempted to maintain a balance between the need for individual privacy rights and the need for police latitude in the incarceration and conviction of criminal suspects.[19] Finally, this Note analyzes the validity of the rationales employed by the authors of both the majority and dissenting opinions in *Greenwood*.

II. Statement of the Case

A. *Facts of* California v. Greenwood

In early February 1984, Laguna Beach Police Investigator Jenny Stracner received several tips indicating that Billy Greenwood might

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protection does not extend to open fields, it does protect the curtilage of a home. *Id.* at 1139. The Court then announced a four-factor test to be applied case by case in determining whether an individual may reasonably expect the area in question to be considered curtilage. *Id.* The four factors are as follows: "[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by." *Id.* The Court warned that these factors do not constitute a finely tuned formula that mechanically produces the correct answer to all extent-of-curtilage questions but that "these factors are useful analytical tools . . . [for determining] whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.*

17. California v. Greenwood, 108 S. Ct. 1625 (1988).

18. *Id.* at 1627.

19. For purposes of this article, the discussion of privacy rights is limited to the scope of criminal procedure. This article discusses the issue of privacy as it relates to searches and seizures under the fourth amendment only. It does not address: 1) the privacy rights involved in the conceiving and bearing of children, *e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (expanding privacy to allow the use of contraception); Roe v. Wade, 410 U.S. 113 (1973) (expanding privacy to allow a woman to have an abortion); 2) the privacy rights involved in familial relationships, *e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977) (expanding privacy to allow cohabitation among extended family members); or 3) the privacy rights involved in extramarital, sexual relationships, *e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (narrowing privacy to disallow homosexual sodomy). These issues are beyond the intended breadth of this article and are not discussed herein.

be involved in narcotics trafficking.[20] From February 14 to February 23, 1984, Stracner made various attempts to secure positive evidence of Greenwood's involvement in the sale of illicit drugs, but all such attempts proved futile.[21] Discouraged by her continued failure to obtain the necessary proof, Stracner decided to monitor and to search Greenwood's garbage, which was set out for collection in front of his house.[22]

On April 6, 1984, pursuant to a request by Stracner, the neighborhood's regular trash collector cleaned the bin of his truck of other refuse, collected the garbage bags from the street in front of Greenwood's home, and gave the bags to Stracner.[23] A search of the rubbish revealed items that Stracner believed to be indicative of narcotics use.[24] By describing these items in an affidavit, Stracner was able to obtain a warrant to search Greenwood's home.[25] Large quantities of cocaine and hashish were discovered inside the Greenwood residence when the search warrant was executed later the same evening.[26] Greenwood was arrested along with two other individuals who were inside the house at the time of the search.[27] All three posted bail.[28]

Subsequent to the arrest, Police Investigator Robert Rahaeuser, on three separate occasions between April 16 and May 3, 1984, received complaints of Greenwood's continued drug trafficking activ-

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20. People v. Greenwood, 182 Cal. App. 3d 729, 732, 227 Cal. Rptr. 539, 540 (1986), *cert. granted*, 107 S. Ct. 3260 (1987), *rev'd*, 108 S. Ct. 1625 (1988).

21. People v. Greenwood, 182 Cal. App. 3d at 732, 227 Cal. Rptr. at 540.

22. *Id.*

23. California v. Greenwood, 108 S. Ct. at 1627.

24. Inside Greenwood's trash bags, Officer Stracner found "bindles," straws, and baggies with residue of cocaine. Brief for Respondent at 1, *Greenwood*, 108 S. Ct 1625 (1988) (No. 86-684). A "bindle" is defined as "a package, especially one of morphine or cocaine." WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 270 (2d ed. 1934).

25. California v. Greenwood, 108 S. Ct. at 1627.

26. *Id.*

27. People v. Greenwood, 183 Cal. App. 3d at 733, 227 Cal. Rptr. at 541. The other two individuals arrested were Dyanne Van Houten and Cathy Allegar. During the search of Greenwood's home, police found Van Houten's purse and searched it. Inside, they discovered cocaine. Allegar was not a named respondent in this case. However, Van Houten was named, along with Greenwood, as a respondent in this action. The search of Van Houten's purse "was predicated on the warrant for Greenwood's house, where . . . [she] probably also had an expectation of privacy due to her physical presence at the time the search warrant was executed." *Id.* at 735, 227 Cal. Rptr at 542.

28. *Id.* at 733, 227 Cal. Rptr. at 541.

ities.[29] On May 4, Rahaeuser obtained Greenwood's garbage in the same manner as had Stracner.[30] Rahaeuser secured a second search warrant based on the evidence of narcotics use gleaned from Greenwood's garbage.[31] More evidence of narcotics trafficking was discovered at Greenwood's home when the warrant was executed, and Greenwood again was arrested.[32]

B. Posture

Following his arrests, Greenwood moved for suppression of the evidence seized in his home pursuant to these warrants.[33] This motion, made before the magistrate, was based upon Greenwood's contention that the warrantless search of his garbage by police investigators was illegal and that the evidence flowing out of the illegal search should not have been used to obtain a warrant for the search of his home.[34] Greenwood based his contention upon *People v. Krivda*,[35] in which the California Supreme Court had held that an individual's placement of trash barrels onto a public sidewalk for collection does not constitute an abandonment of the refuse therein.[36] Moreover, the *Krivda* court had held that individuals maintain a reasonable privacy expectation that their trash will not be rummaged through and picked over by police officers acting without a search warrant.[37]

Despite *Krivda*, the magistrate at the preliminary hearing upheld both warrants.[38] The California Superior Court, however, disagreed and granted Greenwood's motion to set aside the information, concluding that Greenwood's earlier motion to suppress evidence should have been granted at the preliminary hearing.[39] The prosecution brought an appeal before the California Court of Appeals, Fourth

29. *Id.*
30. California v. Greenwood, 108 S. Ct. at 1627.
31. *Id.*
32. *Id.*
33. People v. Greenwood, 182 Cal. App. 3d at 731, 227 Cal. Rptr at 540.
34. *Id.* at 733-34, 227 Cal. Rptr. at 541.
35. *Krivda*, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62.
36. *Id.* at 367, 486 P.2d at 1268, 96 Cal. Rptr. at 68.
37. *Id.*
38. People v. Greenwood, 182 Cal. App. 3d at 731, 227 Cal. Rptr. at 540.
39. *Id.*

District, arguing that the *Krivda* decision was erroneous and directly contradictory to the majority view of federal circuit courts[40] and other state courts[41] on this very question.[42] Nevertheless, the Court of Appeals held that because it was bound by the California Supreme Court's interpretation of the fourth amendment in *Krivda* under the doctrine of *stare decisis*, it was thereby compelled to affirm the holding of that supreme court.[43] On June 26, 1987, the United States Supreme Court granted certiorari.[44]

C. *The Majority Opinion*

In a six to two opinion, Justice White, writing for the majority,[45] applied a twofold test in determining whether the warrantless search

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40. *See*, United States v. Dela Espriella, 781 F.2d 1432 (9th Cir. 1986) (evidence of suspect's laundering of narcotics trafficking funds, obtained from his garbage placed at curbside outside his home); United States v. O'Bryant, 775 F.2d 1528 (11th Cir. 1985) (evidence showing that suspect had made false statements on applications for passports found in briefcase which had been placed next to an overflowing trash dumpster on a busy city street); United States v. Michaels, 726 F.2d 1307 (8th Cir. 1984) *cert. denied*, 469 U.S. 820 (1984) (evidence of conspiracy to bomb an automobile seized from communal trash bin of suspect's apartment complex); United States v. Thornton, 746 F.2d 39 (D.C. Cir. 1984) (evidence of illegal gambling obtained from trash can located in alley behind suspect's apartment); United States v. Kramer, 711 F.2d 789 (7th Cir. 1983) *cert. denied*, 464 U.S. 962 (1983) (evidence of drug trafficking and tax evasion found in garbage removed from suspect's property by police); United States v. Vahalik, 606 F.2d 99 (5th Cir. 1979) *cert. denied*, 444 U.S. 1081 (1980) (evidence of illegal drug distribution obtained from garbage that suspect had placed at curb in front of his home); Magda v. Benson, 536 F.2d 111 (6th Cir. 1976) (evidence of burglary gleaned from garbage placed on treelawn next to street adjacent to suspect's home); United States v. Mustone, 469 F.2d 970 (1st Cir. 1972) (evidence of counterfeiting in garbage bags on sidewalk several doors from suspect's home).

41. *See, e.g.*, Smith v. State, 510 P.2d 793 (Alaska 1973) *cert. denied*, 414 U.S. 1086 (1973); State v. Fassler, 108 Ariz. 586, 503 P.2d 807 (1972); State v. Schultz, 388 So. 2d 1326 (Fla. App. 1980); People v. Huddleston, 38 Ill. App. 3d 277, 347 N.E.2d 76 (1976); Commonwealth v. Chappee, 397 Mass. 508, 492 N.E.2d 719 (1986); People v. Whotte, 113 Mich. App. 12, 317 N.W.2d 266 (1982); State v. Oquist, 327 N.W.2d 587 (Minn. 1982); State v. Ronngren, 361 N.W.2d 244 (N.D. 1985); State v. Brown, 20 Ohio App. 3d 36, 484 N.E.2d 215 (1984); Cooks v. State, 699 P.2d 653 (Okla. Crim. App. 1985), *cert. denied*, 474 U.S. 935 (1985); State v. Purvis, 249 Ore. 404, 438 P.2d 1002 (1968); Commonwealth v. Minton, 288 Pa. Super. 381, 432 A.2d 212 (1981); Willis v. State, 518 S.W.2d 247 (Tex. Crim. App. 1975); State v. Stevens, 123 Wis. 2d 303, 367 N.W.2d 788 (1985) *cert. denied*, 474 U.S. 852 (1985); Croker v. State, 477 P.2d 122 (Wyo. 1970). *But see, Krivda*, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62; State v. Tanaka, 67 Haw. 658, 701 P.2d 1274 (1985).

42. People v. Greenwood, 182 Cal. App. 3d at 731, 227 Cal. Rptr. at 540.

43. *Id.* at 734, 227 Cal. Rptr. at 542.

44. California v. Greenwood, 107 S. Ct. 3260.

45. Justice White was joined by Chief Justice Rehnquist and by Justices Blackmun, Stevens, O'Connor, and Scalia. Justice Brennan filed a dissenting opinion, in which he was joined by Justice Marshall. Justice Kennedy took no part in the consideration or decision of this case. *Greenwood*, 108 S. Ct. at 1627.

and seizure of Greenwood's garbage, left for collection outside the curtilage of his home, constituted a violation of the fourth amendment.[46] This two-pronged analysis has been used by the Court in resolving fourth amendment protection questions since it was first expressed by Justice Harlan in his concurrence with the majority in *Katz v. United States*.[47] To find a constitutional privacy interest the test requires: "first that a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, that the expectation . . . [is] one that society is prepared to recognize as 'reasonable.'"[48] In adapting this test to the situation at hand, Justice White stated that the warrantless search of Greenwood's garbage would be found to violate the fourth amendment "only if . . . [Greenwood] manifested a subjective expectation of privacy in . . . [his] garbage that society accepts as objectively reasonable."[49]

Because the first part of this test pertains to the defendant's subjective expectation, it is quite easy for a defendant to prove. Thus, Justice White conceded *arguendo* that Greenwood may have possessed a subjective expectation of privacy with respect to his garbage.[50] However, without something more, "[a]n expectation of privacy [alone] does not give rise to Fourth Amendment protection. . . ."[51] This something more is what constitutes the second prong of the Court's test: the defendant's privacy expectation must be deemed reasonable by society. The Supreme Court held that Greenwood's expectation of privacy in the items he discarded fell short of fourth amendment protection because society is unwilling to accept such a privacy expectation as being reasonable.[52] The majority noted that Greenwood placed his plastic garbage bags on the public street where their contents could easily be disturbed by "animals, children, scavengers, snoops, and other members of the public."[53] Furthermore, his very purpose in placing the garbage on the street was to convey it to a

46. People v. Greenwood, 182 Cal. App. 3d at 731, 227 Cal. Rptr. at 540.
47. Katz v. United States, 389 U.S. 347 (1967).
48. *Id.* at 361 (Harlan, J., concurring).
49. People v. Greenwood, 108 S. Ct. at 1628.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 1628-29 (Court's footnotes are omitted).

trash collector, who could have sorted through the bags himself or "permitted others, such as the police, to do so."[54] Thus, the majority reasoned, Greenwood knowingly and voluntarily exposed to the public the evidence of his criminal activity, and in so doing, he unwittingly relinquished his rights to fourth amendment protection of that evidence.[55] The majority opinion concluded by quoting Justice Blackmun in *Smith v. Maryland*:[56] "[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."[57]

D. The Dissenting Opinion

Justice Brennan began his dissent by comparing Greenwood's sealed, opaque trash bags to other containers which the Court has found to be worthy of fourth amendment protection. Brennan cited the 1981 Supreme Court decision *Robbins v. California*,[58] which held that "[w]hat one person may put into a suitcase, another may put into a paper bag . . . [thus] . . . no court, no constable, [and] no citizen, can sensibly be asked to distinguish the relative 'privacy interests' in a closed suitcase, briefcase, portfolio, dufflebag, or box."[59] Justice Brennan hypothesized that had Greenwood been carrying his personal belongings in garbage bags identical to those he set out for collection, the contents of those bags would certainly have been protected by the fourth amendment.[60] Therefore, he concluded, Greenwood deserves no less protection just because he "used the bags to discard rather than to transport his personal effects."[61]

Furthermore, Justice Brennan warned that much about an individual can be determined by examining his garbage.[62] A search of a person's garbage can reveal his "eating, reading, and recreational

54. *Id.* at 1629.
55. *Id.*
56. Smith v. Maryland, 442 U.S. 735 (1979).
57. *Id.* at 743-44.
58. Robbins v. California, 453 U.S. 420 (1981).
59. *Id.* at 426-27.
60. People v. Greenwood, 108 S. Ct. at 1633.
61. *Id.*
62. *Id.* at 1634.

habits . . . the intimate details about [his] sexual practices, health, and personal hygiene . . . [his] financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests."[63] Thus, Justice Brennan speculated that "society will be shocked to learn that the Court, the ultimate guarantor of liberty, deems unreasonable our expectation that the aspects of our private lives that are concealed safely in a trash bag will not become public."[64]

Had Greenwood himself or some non-governmental intruder revealed the contents of these bags to the public by strewing the trash all over the public street, or had the police somehow found and identified Greenwood's incriminating trash when commingled with the trash of others at a public dump, then the majority's holding would have been proper in Justice Brennan's eyes.[65] Justice Brennan concluded that the majority had painted a grim picture of the future for individual liberties.[66]

III. Prior Law

Any fourth amendment analysis must begin with an examination of the text of the fourth amendment itself:

> 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.[67]

The framers' purpose in drafting this amendment as part of the Bill of Rights was to enumerate and to limit the powers of the national government.[68] Thus, the fourth amendment was initially enforced only against the federal government and not against the individual states.[69]

A. The Exclusionary Rule

The first major jurisprudential development in fourth amendment interpretation occurred in 1914 in the *Weeks v. United States*[70] de-

63. *Id.*
64. *Id.* at 1632.
65. *Id.* at 1636.
66. *Id.* at 1637.
67. U.S. Const. amend. IV.
68. G. Stone, L. Seidman, C. Sustein & M. Tushnet, Constitutional Law 115-16 (1986).
69. *Id.*
70. Weeks v. United States, 232 U.S. 383 (1914).

cision. In *Weeks*, the United States Supreme Court stated that the fourth amendment had no value if the documents illegally seized from a citizen could be used as evidence in federal court against that citizen.[71] Thus, the exclusionary rule emerged, wherein evidence seized by the government in violation of a criminal defendant's fourth amendment rights must be suppressed in the prosecution's case-in-chief against that defendant.[72] However, the Supreme Court refused to extend the exclusionary rule to state court practice for nearly half a century. For example, in *Wolf v. Colorado*,[73] the Supreme Court expressly denied the extension of the rule where a criminal suspect is being tried "in a State court for . . . [violation of a] State crime. . . ."[74] Ultimately, however, the *Wolf* holding was overruled by the 1961 case of *Mapp v. Ohio*,[75] in which the Supreme Court held that evidence obtained in violation of the fourth amendment is to be excluded at a state court criminal trial.[76] With the *Weeks* and *Mapp* decisions, the Supreme Court created a powerful tool to be used in the protection of individual rights of criminal suspects.[77] Yet, the Court had to be wary of the possible abuse of this tool. After all, evidence illegally obtained is still credible evidence that a crime has been committed.

B. Maintaining a Balance

In its construction of the fourth amendment, the Supreme Court must seek to maintain a balance "which will preserve the fundamental safeguard which the Amendment was designed to secure, and at the same time not unduly fetter the arm of the Government in the en-

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71. *Id.* at 393.

72. The exclusionary rule "commands that where evidence has been obtained in violation of the privileges guaranteed by the U[nited] S[tates] Constitution, the evidence must be excluded at trial." BLACK'S LAW DICTIONARY 712 (5th ed. 1979).

73. Wolf v. Colorado, 338 U.S. 25 (1948), *overruled*, Mapp v. Ohio, 367 U.S. 643 (1961).

74. *Id.* at 33.

75. *Mapp*, 367 U.S. 643.

76. *Id.* at 643.

77. The exclusionary rule serves as an efficient tool in the protection of an individual's rights by forcing the suppression of evidence seized by police in violation of a criminal suspect's Fourth Amendment rights. When damaging evidence against the defendant is not admitted at trial because a police officer violated the defendant's constitutional rights, the prosecution is greatly disadvantaged at trial. Thus, the exclusionary rule serves as an effective deterrent to police from violating an individual's rights. *See, e.g.*, Elkins v. United States, 364 U.S. 206, 217-18 (1960).

forcement of law."[78] In other words, the Supreme Court has the burdensome duty, whenever it is called upon to interpret the fourth amendment, to strive toward the realization of two opposing goals: it must protect individuals against unreasonable invasions of personal privacy by the government while simultaneously aiding that very government in the conviction of criminals.

Because the amendment itself states that a person's home is a place clearly deserving of protection from warrantless searches and seizures, a private residence has always been afforded great protection by the fourth amendment.[79] The Supreme Court articulated this principle by stating that "[a]t the very core [of fourth amendment protection] stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion."[80] Over the years, the Court has expanded the reach of this amendment far beyond the confines of a person's home in the context of a criminal suspect's individual rights to include a business office,[81] a friend's apartment,[82] a taxicab,[83] a motel room,[84] and, finally, a public telephone booth.[85] Thus, during the 1960's, the Court appeared to be giving much more deference to personal privacy than it was to law enforcement.[86]

However, the late 1960's was a time of political and social unrest. It was an era marked by "violence in the ghettos and disorder on the campuses, political assassinations and near-assassinations, ever-soaring crime statistics and widespread criticism of the [Supreme] Court. . . ."[87] Members of society, generally, had grave concerns that our country was experiencing a complete breakdown of law and order. Richard Nixon, as a 1968 presidential candidate, was quick to

78. Olmstead v. United States, 277 U.S. 438, 452 (1928), *overruled*, 389 U.S. 347 (1967) (from the argument for the United States).

79. *See* W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 2.3 (1978).

80. Silverman v. United States, 365 U.S. 505, 511 (1961).

81. Sliverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

82. Jones v. United States, 362 U.S. 257 (1960).

83. Rios v. United States, 364 U.S. 253 (1960).

84. Stoner v. California, 376 U.S. 483 (1964).

85. *Katz*, 389 U.S. 347.

86. Note, *The United States Supreme Court's Erosion of Fourth Amendment Rights: The Trend Continues*, 30 S.D.L. REV. 574, 575 (1985).

87. Kamisar, *The Swing of the Pendulum*, 239 NATION 262 (1984).

exploit the growing fears of the citizenry and promised, if elected, to appoint justices to the Court who would return law and order.[88] Nixon readily carried out this campaign promise by appointing four such justices to the Court during his Presidency.[89] With a new conservative majority, the Court was able to address the concerns of the public by shifting the balance of fourth amendment interpretation away from individual privacy rights of criminal suspects and by broadly redefining the constitutional authority of law enforcement officials.

Recent Supreme Court decisions dealing with fourth amendment interpretations are illustrative of the Court's shifting of the balance. For example, in *Smith v. Maryland*,[90] the Court held that the installation of a pen register by the telephone company at the request of police in order to record the telephone numbers dialed from a criminal suspect's home telephone did not violate the fourth amendment because the defendant "entertained no actual expectation of privacy in the phone numbers he dialed. . . ."[91] Likewise, in *United States v. Knotts*,[92] the Court found permissible the use by police of an electronic beeper placed within a suspect's car in order to follow the suspect to his private cabin.[93] The Court further expanded police authority in *United States v. Jacobsen*[94] when it held that a Federal Drug Enforcement agent may conduct the warrantless search of a package which had already been opened by a private citizen, either accidentally or deliberately.[95] Finally, the Court held in *California v. Ciraolo*[96] that although defendant Ciraolo clearly intended to maintain the privacy of his yard, by completely surrounding his property with a six-foot outer fence and a ten-foot inner fence, his privacy expectation was unreasonable.[97] The Court found that the acts of police

88. *Id.*

89. Schwartz, *Fifteen Years of the Burger Court*, 239 NATION 263 (1984). President Nixon made the following appointments to the Supreme Court: Warren E. Burger in 1969, Harry A. Blackmun in 1970, and William H. Rehnquist and Lewis F. Powell in 1972.

90. Smith v. Maryland, 442 U.S. 735 (1979).

91. *Id.* at 745.

92. United States v. Knotts, 460 U.S. 276 (1983).

93. *Id.*

94. United States v. Jacobsen, 466 U.S. 109 (1984).

95. *Id.* at 115.

96. California v. Ciraolo, 476 U.S. 207 (1986).

97. *Id.* at 214.

in conducting a warrantless aerial observation of Ciraolo's yard from an altitude of 1,000 feet, in discovering marijuana plants growing there, and in using evidence thus obtained against Ciraolo did not infringe upon his fourth amendment rights.[98] Therefore, when viewed in light of the Court's growing trend of limiting individual rights, the *California v. Greenwood*[99] decision appears to have been somewhat predictable.

IV. Analysis

Justice White, writing for the majority, and Justice Brennan, writing for the dissent, agreed as to the appropriate test to be applied in fourth amendment analysis: an individual must manifest a subjective expectation of the privacy in the item to be searched which society accepts as objectively reasonable.[100] However, they sharply disagreed as to the results of that test. In the majority opinion, Justice White stated that Greenwood's expectation of privacy in the contents of these plastic bags was unreasonable because Greenwood himself "exposed . . . [his] garbage to the public sufficiently to defeat . . . [his] claim to Fourth Amendment protection."[101] This is an interesting, although somewhat unfounded, conclusion by the Court, considering the fact that Greenwood purposefully placed his garbage within the protected confines of nontransparent, sealed plastic bags. Greenwood actually exposed nothing to the public except the exteriors of these opaque containers.[102]

Justice White gave great weight to the fact that the thin plastic walls of the trash bags are easily punctured and that the content of these bags is, therefore, readily accessible to any member of the public who chooses to break them open. However, the majority failed to recognize that in the 1981 decision *Robbins v. California*,[103] the Court held that packages wrapped in green plastic, identical to Greenwood's plastic bags, deserved fourth amendment protection.[104]

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98. *Id.* at 215.
99. California v. Greenwood, 108 S. Ct. 1625.
100. *Id.* at 1628.
101. *Id.*
102. *Id.* at 1636.
103. Robbins v. California, 453 U.S. 420 (1981).
104. *Id.*

In *Robbins*, the Court was not concerned with the ease in which the plastic covering of the packages could be disturbed, but rather with the extent to which the contents of those packages could be reasonably inferred from their outward appearance.[105] The Court stated, "[I]f the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from a searching officer's view. The same would be true . . . if the container were transparent, or otherwise clearly revealed its contents."[106] For example, a gun case does not deserve fourth amendment protection because it can be easily inferred by the officers that it contains a gun.[107] On the other hand, the cigarbox-sized blocks of marijuana at issue in *Robbins* were wrapped in green plastic and did not adequately reveal their contents to police. Therefore, the blocks retained fourth amendment protection.[108]

Had Justice White applied the *Robbins* rule, he would likely have concluded that nothing about the outward appearance of Greenwood's garbage bags indicated that they contained anything other than garbage. In fact, Greenwood's garbage bags looked like all filled garbage bags; they had no distinctive configuration indicating that they contained anything illegal. As Justice Brennan pointed out in his dissent, Greenwood did not flaunt the intimate contents of these bags "by strewing his trash all over the curb for all to see. . . ."[109] In fact, the bags adequately hid their contents from the world until they were opened by the police investigators.[110]

Justice Brennan argued that the police acted unreasonably in revealing the private contents of these bags to the public on numerous occasions.[111] In their attempt to uncover evidence against Greenwood, the police clawed through his garbage just outside his home "[e]very week for two months, and at least once more a month later, ... [while] [c]omplete strangers minutely scrutinized their bounty, un-

105. *Id.* at 427.
106. *Id.*
107. Arkansas v. Sanders, 442 U.S. 753, 764 n.13 (1979).
108. *Id.* at 428.
109. California v. Greenwood, 108 S. Ct. at 1636.
110. *Id.*
111. *Id.* at 1631.

doubtedly dredging up intimate details of Greenwood's private life and habits."[112] This intrusive behavior proceeded without a warrant, and "no court before or since has concluded that the police acted on probable cause to believe that Greenwood was engaged in any criminal activity."[113] Thus, Justice Brennan concluded that the police acted contrary to commonly accepted notions of civilized behavior and that such behavior should not be condoned by the Supreme Court.[114] Clearly, the dissent has the more convincing argument on this point.

Greenwood should not be faulted for placing his garbage bags on the street at a specific time for the express purpose of having a garbage collector remove them in a timely fashion because a county ordinance required him to dispose of his waste in this fashion.[115] Yet, the majority gave special consideration to the fact that Greenwood placed his garbage on the curb to convey it to a third party, the collector, who might have compromised the privacy of the bags himself or might have allowed someone else, like the police, to do so.[116]

At first blush, this appears to be a relatively logical argument, especially in light of the rule Justice White quoted from *Smith v. Maryland*,[117] stating that "a person has no legitimate expectation of privacy in information he voluntarily turns over to a third party."[118] However, the majority misapplied this rule to the situation at hand. In *Smith*, the police were merely collecting a list of telephone numbers corresponding to calls placed by the suspect from his home telephone rather than listening in on the private conversations.[119] Thus, the Court reasoned that although Smith may have fully intended "to keep the contents of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the number he dialed."[120]

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112. *Id.*
113. *Id.* at 1631-32.
114. *Id.* at 1632.
115. ORANGE COUNTY CODE § 4-3-45(a) (1986).
116. California v. Greenwood, 108 S. Ct. at 1629.
117. *Smith*, 442 U.S. 735.
118. *Id.* at 743-44.
119. *Id.* at 741.
120. *Id.* at 743.

Following this reasoning, the contents of Smith's telephone conversations are analogous to the contents of Greenwood's bags, and the number dialed by Smith equates to the outside lining of the garbage bags. Therefore, if the Court had correctly applied the *Smith* reasoning in the *Greenwood* context, it might have held that Inspectors Stracner and Rahaeuser were free to collect statistical data on the number, size, and color of trash bags Greenwood regularly placed on the street in front of his home and nothing more, for that truly constitutes the full extent of information Greenwood volunteered. The contents of Greenwood's bags, like the contents of Smith's telephone conversations, were intended to remain private.

Justice Brennan also challenged the majority by stating that "voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of a privacy expectation in it."[121] He likened Greenwood's surrender of his garbage to the bailment of a letter or package, which is dropped into a "mail box or other depository with the 'express purpose' of entrusting it to the postal officer or a private carrier. . . ."[122] Justice Brennan noted that postal bailees certainly have more incentive to sort through the personal items entrusted to them than do garbage collectors; therefore, one might expect a relinquishment to occur when one uses the postal service.[123] However, for 110 years, since the Supreme Court decision in *Ex parte Jackson*,[124] no relinquishment has been found, and police have been precluded from the warrantless search of packages and letters.[125]

Justice Brennan's argument, although not without some merit, is not entirely sound either. There is clearly a distinction to be made between mail and garbage. Unlike garbage, mail is highly protected by the United States Constitution, which vests Congress with the power to establish post offices and post roads.[126]

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121. California v. Greenwood, 108 S. Ct. at 1637.
122. *Id.*
123. *Id.*
124. *Ex parte Jackson*, 96 U.S. 727 (1878).
125. California v. Greenwood, 108 S. Ct. at 1637.
126. U.S. CONST. art. I, § 8, cl. 7.

An important reason cited by Justice White for the Court's majority decision was the persuasive number of lower court decisions rejecting similar claims of fourth amendment protection of garbage.[127] Justice White argued that these lower court interpretations serve as an indication of society's inability to accept as reasonable an individual's claim to a privacy expectation "in trash left for collection in an area accessible to the public. . . ."[128] This is a fairly sound argument. Juries are comprised of individual members of society, and jury verdicts generally are reflective of public sentiment. Therefore, if members of society held such a privacy interest in high regard, this interest would be reflected in lower court decisions.

In his dissent, Justice Brennan was apparently most concerned about the potential for discovery of highly personal details of one's life by searching an individual's refuse. Citing *Oliver v. United States*,[129] Justice Brennan contended that a sealed trash bag should be extended fourth amendment protection because, without doubt, a sealed trash bag harbors telling evidence of the "intimate activities associated with the 'sanctity of a man's home and the privacies of life[.]' "[130] Justice Brennan, thus, indicates that the rule established by the majority is highly susceptible to abuse because it appears to give intruding neighbors, reporters, and detectives *carte blanche* license to "scrutiniz[e] our sealed trash containers to discover some detail of our personal lives."[131] By refusing to recognize as reasonable any expectation of privacy in garbage under the fourth amendment, there is a distinct possibility that the Supreme Court has, likewise, effectively precluded citizens from stating causes of action in tort against similar intrusions by nongovernmental persons. This is especially frightening in light of the fact that "almost every human activity ultimately manifests itself in waste products. . . ."[132]

V. Conclusion

The tension between the majority and dissenting opinions in *Greenwood* is representative of the tension inherent in all fourth

127. California v. Greenwood, 108 S. Ct. at 1629.
128. *Id.*
129. Oliver v. United States, 466 U.S. 170 (1984).
130. California v. Greenwood, 108 S. Ct. at 1634.
131. *Id.* at 1635.
132. Smith v. State, 510 P.2d 793, 798 (1973) *cert. denied*, 414 U.S. 1086 (1983).

amendment analyses. The Court is asked to assume opposing duties in the determination of the legality of warrantless searches and seizures. It must act as a protector of the individual rights of the United States citizenry while simultaneously granting governmental authority to protect the citizenry from crime. In order to maintain this delicate balance, the Court, which is theoretically insulated from political pressures in its interpretation of the Constitution, must realistically weigh the ever changing moods and needs of society in order to interpret the fourth amendment more liberally or more narrowly as the times might dictate to be necessary.

The *Greenwood* holding is in keeping with a recent trend by the Court to narrow the scope of the fourth amendment and to give greater freedom to law enforcement. Because the vast majority of lower courts had addressed this issue earlier and had held that a person possesses no Constitutionally protected interest in his garbage, the Supreme Court holding in *Greenwood* will likely have little impact upon members of society. On the other hand, there is great potential for the abuse of *Greenwood* because the decision fails to recognize any reasonable expectation of privacy in the telling items Americans throw away. Thus, those who wish to protect themselves from such abuse and to maintain privacy in their garbage must resort to other, more expensive, self-help measures such as an investment in a trash compactor or a paper shredder.

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