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Fourth Amendment--Further Erosion of the Warrant Requirement for Unreasonable Searches and Seizures: The Warrantless Trash Search Exception

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CASENOTES

FOURTH AMENDMENT—FURTHER EROSION OF THE WARRANT REQUIREMENT FOR UNREASONABLE SEARCHES AND SEIZURES: THE WARRANTLESS TRASH SEARCH EXCEPTION

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

I. INTRODUCTION

In *California v. Greenwood*,¹ the United States Supreme Court held that the fourth amendment² does not prohibit the “warrantless search and seizure of garbage left for collection outside the curtilage of a home.”³ This Note explores the *Greenwood* opinions and concludes that the Court wrongly refused to recognize a reasonable expectation of privacy in garbage left for collection. This Note reasons further that the Court created a confusing and disturbing precedent by failing to sufficiently justify its conclusion that society does not recognize an individual’s reasonable expectation of privacy in the contents of his or her trash receptacle, and by wrongly relying on the false presumption that a citizen voluntarily surrenders his or her trash to the collector. Finally, this Note concludes that, despite the dissent’s erroneous contention that trash cans are containers supporting a reasonable expectation of privacy, the dissent accurately resolved the fundamental issue by concluding that society believes citizens may reasonably expect that the contents of their garbage bags will not be searched and seized without a warrant.

¹ 108 S. Ct. 1625 (1988).

² For the text of the fourth amendment, see *infra* text accompanying note 4.

³ *Greenwood*, 108 S. Ct. at 1627.

II. STATE BACKGROUND AND PROCEDURAL HISTORY

The fourth amendment to the United States Constitution provides:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no 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.⁴

The Supreme Court has traditionally held that warrantless searches “are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”⁵ In *Greenwood*, the Supreme Court expanded the exceptions to the warrant requirement to permit the warrantless search of an individual’s garbage.⁶

Greenwood came before the Court as a result of the unique posture of the California Supreme Court in excluding evidence obtained as a result of warrantless trash searches. Before *Greenwood*, California was one of two states that had invalidated warrantless trash searches as violative of the fourth amendment.⁷ In 1971, the California Supreme Court concluded that a warrantless search of the contents of a defendant’s trash barrel was an illegal search and seizure in violation of the defendant’s fourth amendment rights.⁸ In *Krivda*, the court held that an individual has a “reasonable expectation that [his or her] trash would not be rummaged through and picked over by police officers acting without a search warrant.”⁹ The *Krivda* court accordingly suppressed the evidence obtained from the illegal garbage search.¹⁰

In response to the State’s petition for a writ of certiorari, the United States Supreme Court remanded *Krivda* to the California

⁴ U.S. CONST. amend. IV.

⁵ *Katz v. United States*, 389 U.S. 347, 357 (1967)(footnotes omitted). See *infra* notes 108-113 and accompanying text. See also J. HADDAD, J. ZAGEL, G. STARKMAN & W. BAUER, *CRIMINAL PROCEDURE* 246 (3d ed. 1987)(“[T]he Supreme Court has frequently interpreted the reasonableness clause of the Fourth Amendment so as to make searches under warrants the rule and warrantless searches the exception”). Exceptions to the warrant requirement include: searches incident to a valid arrest, “consent searches, emergency searches, searches of vehicles stopped in transit, seizures under the plain view doctrine, searches and seizures in open fields, and seizures of abandoned property.” J. HADDAD, J. ZAGEL, G. STARKMAN & W. BAUER, *supra*, at 246-47.

⁶ *Greenwood*, 108 S. Ct. at 1627.

⁷ California and Hawaii appear to be the only states that had invalidated trash searches prior to *Greenwood*. See *People v. Krivda*, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971); *State v. Tanaka*, 67 Haw. 658, 701 P.2d 1274 (1985).

⁸ *Krivda*, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971).

⁹ *Id.* at 367, 486 P.2d at 1268, 96 Cal. Rptr. at 68.

¹⁰ *Id.*, 486 P.2d at 1269, 96 Cal. Rptr. at 69.

Supreme Court to establish whether the lower court's holding was based on federal or state grounds.¹¹ On remand, the California Supreme Court explicitly stated that its application of the exclusionary rule to warrantless garbage searches was valid because it was based upon both the fourth amendment to the United States Constitution and a comparable California constitutional provision.¹²

In 1985, California enacted Proposition 8, which disallowed the suppression of evidence obtained in violation of the California constitution.¹³ Shortly thereafter, the California Court of Appeals faced a similar issue in *People v. Rooney*.¹⁴ In *Rooney*, the appellate court refused to consider evidence obtained in a trash search on the ground that *Krivda* clearly held that warrantless searches of trash without probable cause violated both the California and federal constitutions.¹⁵ The California Supreme Court denied review, and the United States Supreme Court granted certiorari.¹⁶

However, the Supreme Court subsequently dismissed its grant of certiorari in *Rooney* as improvidently granted.¹⁷ The Court concluded that the procedural posture of *Rooney* was such that the search and seizure issue was not properly presented to the California Supreme Court for review.¹⁸ Instead, the Court observed that "[g]iving the California Supreme Court an opportunity to consider the issue in a case that properly raises it is a compelling reason for us to dismiss this petition."¹⁹

The California Supreme Court was afforded the opportunity to review its *Krivda* holding when the State appealed the appellate

¹¹ *California v. Krivda*, 409 U.S. 33 (1972).

¹² *People v. Krivda*, 8 Cal. 3d 623, 624, 504 P.2d 457, 105 Cal. Rptr. 521, cert. denied, *California v. Krivda*, 412 U.S. 919 (1973).

¹³ *People v. Greenwood*, 182 Cal. App. 3d 729, 734, 227 Cal. Rptr. 539, 541 (4th Dist. 1986). Proposition 8 states that "relevant evidence shall not be excluded in any criminal proceeding." CAL. CONST. art. I, § 28(d).

¹⁴ 175 Cal. App. 3d 634, 221 Cal. Rptr. 49 (2d Dist. 1985).

¹⁵ *Id.* at 644, 221 Cal. Rptr. at 55.

¹⁶ *California v. Rooney*, 479 U.S. 881 (1986).

¹⁷ *California v. Rooney*, 107 S. Ct. 2852 (1987).

¹⁸ *Id.* at 2855. The Court explained:

It is no answer to say that the California Supreme Court already had its chance to review the matter and declined to do so when it denied the State's petition for review in this case. The denial of review may well have been based on that court's recognizing, as we now do, that the prosecution won below, and was therefore not in a position to appeal.

Id. Justice White, joined by Chief Justice Rehnquist and Justice Powell, wrote a dissenting opinion that advocated deciding the trash search issue. *Id.* at 2856-62 (White, J., dissenting). Justice White's *Rooney* dissent is discussed in detail in the following pages as it substantially forecast his opinion on behalf of the *Greenwood* majority. See *infra* notes 138-149 and accompanying text.

¹⁹ *Rooney*, 107 S. Ct. at 2855.

court's decision in *People v. Greenwood*.²⁰ The California court denied the State's petition for review,²¹ and the Supreme Court granted certiorari to decide whether warrantless garbage searches violated the fourth and fourteenth amendments.²²

III. FACTS

In early February 1984, Laguna Beach Police Investigator Jenny Stracner learned from a Drug Enforcement Administration ("DEA") narcotics agent that a large U-Haul truck full of drugs was en route to Billy Greenwood's address.²³ Stracner and the agent searched for the truck without success.²⁴ Later that month, a neighbor of Greenwood's contacted Stracner to complain about frequent late-night automobile traffic in front of Greenwood's home.²⁵ The neighbor said visitors entered the house but stayed only briefly and added that a large U-Haul truck had been parked in front of Greenwood's house for four days.²⁶ On the nights of February 14 and 15, Stracner surveilled Greenwood's home from 11:00 p.m. until 2:30 a.m. and discovered that four vehicles arrived and departed each night, each visitor staying less than ten minutes.²⁷

On February 23, the same neighbor notified Stracner that a second large rental truck was parked in front of Greenwood's home.²⁸ Stracner and an Orange County Sheriff's investigator responded by going to the location with a dog trained to detect narcotics and conducted a canine "sniff search," which yielded negative results.²⁹ Later on February 23, Stracner and the investigator followed the truck to another residence, which Stracner learned had previously been investigated as a narcotics trafficking location.³⁰

Sometime during February, Stracner began to "monitor and search" the garbage Greenwood placed in front of his home for collection.³¹ At 6:00 a.m. on April 6, Stracner observed a man placing

²⁰ 182 Cal. App. 3d 729, 227 Cal. Rptr. 539 (4th Dist. 1986).

²¹ *Greenwood*, 108 S. Ct. at 1628.

²² *California v. Greenwood*, 107 S. Ct. 1260 (1987). See also *Petition for Certiorari* at 4, *California v. Greenwood*, 108 S. Ct. 1625 (1988)(No. 86-684)("Question Presented: Do warrantless trash searches of discarded garbage violate the fourth and fourteenth amendments?").

²³ *Greenwood*, 108 S. Ct. at 1627.

²⁴ *People v. Greenwood*, 182 Cal. App. 3d 729, 732, 227 Cal. Rptr. 539, 540 (1986).

²⁵ *Greenwood*, 108 S. Ct. at 1627.

²⁶ *People v. Greenwood*, 182 Cal. App. at 732, 227 Cal. Rptr. at 540.

²⁷ *Id.*, 227 Cal. Rptr. at 540.

²⁸ *Id.*, 227 Cal. Rptr. at 540.

²⁹ *Id.*, 227 Cal. Rptr. at 540.

³⁰ *Id.*, 227 Cal. Rptr. at 540.

³¹ *Id.*, 227 Cal. Rptr. at 540.

trash in front of the house, and Stracner told the garbage collector that she wanted him to collect the trash and give it to her.³² The garbage collector complied with Stracner's request and emptied his truck's bin, collected Greenwood's trash and turned it over to Stracner.³³ Greenwood's garbage was contained in a dark colored, opaque plastic bag that was sealed at its top.³⁴ Stracner searched through the garbage and discovered straws and baggies containing narcotics residue.³⁵ On the basis of these findings, Stracner obtained a warrant to search Greenwood's home later that day.³⁶

When Stracner and additional officers executed the warrant on the evening of April 6, they observed Greenwood, Van Houten and another woman through the glass front doors of Greenwood's home.³⁷ When the officers knocked and announced their purpose, Greenwood fled upstairs and one of the women ran out of view.³⁸ The officers repeated their announcement and, hearing no answer, forcibly entered the house.³⁹ The officers' subsequent search yielded quantities of cocaine and hashish, and Greenwood, Van Houten and the other woman were arrested.⁴⁰

Later, Stracner told Investigator Robert Rahaeuser of her findings and Greenwood's arrest.⁴¹ On three separate occasions during April and May of 1984, Greenwood's neighbor again complained about continuing late-night traffic in front of Greenwood's home, this time speaking to Rahaeuser.⁴² On May 3, an officer travelled to Greenwood's home on an unrelated noise complaint and reported to Rahaeuser that the woman he spoke with seemed quite nervous, while several others within Greenwood's home peeked out from behind the draperies.⁴³

The following day, Rahaeuser observed a man bringing garbage to the front of Greenwood's home, presumably for collection.⁴⁴ Following Stracner's procedure, Rahaeuser obtained the trash from the garbage collector and searched through the bags,

³² California v. Greenwood, 108 S. Ct. 1625, 1627 (1988).

³³ *Id.*

³⁴ Brief for Respondent Dyanne Van Houten at 30, California v. Greenwood, 108 S. Ct. 1625 (1986)(No. 86-684).

³⁵ *Id.*

³⁶ California v. Greenwood, 108 S. Ct. 1625, 1627 (1988).

³⁷ People v. Greenwood, 182 Cal. App. 3d at 732, 227 Cal. Rptr. at 541.

³⁸ *Id.* at 733, 227 Cal. Rptr. at 541.

³⁹ *Id.*, 227 Cal. Rptr. at 541.

⁴⁰ California v. Greenwood, 108 S. Ct. 1625, 1627.

⁴¹ People v. Greenwood, 182 Cal. App. 3d. at 733, 227 Cal. Rptr. at 541.

⁴² *Id.*, 227 Cal. Rptr. at 541.

⁴³ *Id.*, 227 Cal. Rptr. at 541.

⁴⁴ *Id.*, 227 Cal. Rptr. at 541.

again discovering evidence of drug trafficking.⁴⁵

Greenwood and Van Houten were arrested and charged with felony narcotics possession on the basis of the contraband discovered during the executions of the two search warrants.⁴⁶ However, the appellate court concluded that, without the evidence obtained in the trash searches, the State had no probable cause on which to issue the warrants.⁴⁷ Greenwood and Van Houten moved to set aside the information on the ground that the warrants and resultant discoveries were the product of the original, illegal trash searches.⁴⁸ The magistrate at the preliminary hearing upheld the warrants, but the superior court granted the defendants' motion to suppress the evidence obtained under the warrants on the basis of the California Supreme Court's holding in *Krivda*, which invalidated warrantless trash searches as violative of the fourth amendment.⁴⁹ The court of appeals affirmed the superior court holding,⁵⁰ and the California Supreme Court denied the State's petition for review.⁵¹ The United States Supreme Court granted certiorari to determine "whether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home."⁵²

IV. SUPREME COURT OPINIONS

A. MAJORITY OPINION

In *Greenwood*, the Court⁵³ held that the fourth amendment does not prohibit the "warrantless search and seizure of garbage left for collection outside the curtilage of a home."⁵⁴ Writing for the majority,⁵⁵ Justice White observed that Greenwood's fourth amendment rights would be violated only if he "manifested a subjective expectation of privacy in [his] garbage that society accepts as objectively reasonable."⁵⁶

⁴⁵ *California v. Greenwood*, 108 S. Ct. 1625, 1627 (1988).

⁴⁶ *People v. Greenwood*, 182 Cal. App. 3d at 731, 227 Cal. Rptr. at 540.

⁴⁷ *Id.* at 733, 227 Cal. Rptr. at 541.

⁴⁸ *Id.* at 735, 227 Cal. Rptr. at 542.

⁴⁹ *Id.*, 227 Cal. Rptr. at 542-43.

⁵⁰ *Id.* at 736, 227 Cal. Rptr. at 543.

⁵¹ *California v. Greenwood*, 108 S. Ct. 1625, 1628 (1988).

⁵² *Id.* at 1627.

⁵³ *Greenwood* was a 6-2 decision; Justice Kennedy took no part in the resolution of the case.

⁵⁴ *Greenwood*, 108 S. Ct. at 1627.

⁵⁵ Justice White was joined by Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, and Scalia.

⁵⁶ *Id.* at 1628 (citations omitted). This "reasonable expectation" of privacy standard was first articulated by Justice Harlan in *Katz v. United States*, 389 U.S. 347 (1967)(Harlan, J., concurring). Justice Harlan discerned a two part test to determine

Justice White dismissed Greenwood's contention that he had demonstrated an expectation of privacy worthy of fourth amendment protection regarding the garbage that was searched by Stracner and Rahaeuser.⁵⁷ The Court noted that, while Greenwood had placed his trash in opaque plastic bags on the street for collection at "a fixed time" and may have expected his garbage to be "mingle[d] with the trash of others, and deposited at the garbage dump," such an expectation does not result in fourth amendment protection "unless society is prepared to accept that expectation as objectively reasonable."⁵⁸

The Court concluded that, by placing his garbage in plastic bags near a public street and thereby rendering it "readily accessible to animals, children, scavengers, snoops, and other members of the public,"⁵⁹ Greenwood "exposed [his] garbage to the public sufficiently to defeat [his] claim to Fourth Amendment protection."⁶⁰ Justice White observed that Greenwood brought his garbage to the curb "for the express purpose of conveying it to . . . the trash collector," who might himself have sifted through the refuse or, as happened, permit other parties (such as police officers) to do so.⁶¹ The Court reasoned that Greenwood had no reasonable expectation of privacy in his incriminating trash because he deposited it by his curb, an area "particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having others take it."⁶²

Justice White continued by observing that because Greenwood had exposed his garbage to the public, the police officers could not reasonably be expected to avoid seeing "evidence of criminal activity that could have been observed by any member of the public."⁶³ The Court went on to discuss its denial of fourth amendment pro-

whether a search invades a constitutionally protected "private area": "[F]irst . . . a person [has] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." *Id.* at 361 (Harlan, J., concurring).

⁵⁷ *Greenwood*, 108 S. Ct. at 1628.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1628-29 (citations omitted). Justice White cited anecdotal illustrations involving various types of characters, ranging from an errant canine to a "[r]ich lady from Westmont," who "make use of others' refuse." *Id.* at 1628-29 nn.2-4.

⁶⁰ *Id.* at 1628.

⁶¹ *Id.* at 1629.

⁶² *Id.* (quoting *United States v. Reicherter*, 647 F.2d 397, 399 (3d Cir. 1981)). For a discussion of *Reicherter*, see *infra* notes 147-49 and accompanying text.

⁶³ *Id.* at 1629.

tection to telephone numbers dialed by a criminal suspect.⁶⁴ Justice White analogized the dialing of a telephone with the placing of garbage by a curb for collection and concluded that in both cases, the individual "voluntarily conveys" information to third parties, either to the telephone company simply by using the telephone or to the trash collector by leaving garbage for pick-up.⁶⁵

Justice White explained further that people do not have a reasonable expectation of privacy in that which is left open to public view. Citing *California v. Ciraolo*,⁶⁶ the Court observed that homeowners do not have a reasonable expectation of privacy against aerial police surveillance in their own fenced-in backyard because "[a]ny member of the public flying [at an altitude of 1000 feet] who glanced down could have seen everything that these officers observed."⁶⁷

Justice White continued by describing how the Court's opinion in the instant case comports with the view of most federal circuit courts of appeals⁶⁸ and state supreme courts⁶⁹ that police may con-

⁶⁴ *Id.* (citing *Smith v. Maryland*, 422 U.S. 735 (1979)). For a discussion of *Smith*, see *infra* notes 153-61 and accompanying text.

⁶⁵ *Greenwood*, 108 S. Ct. at 1629.

⁶⁶ 476 U.S. 207 (1986). *Ciraolo* involved a homeowner who claimed a reasonable expectation of privacy in activities conducted in his backyard behind an opaque, ten-foot tall fence. *Id.* at 208.

⁶⁷ *Greenwood*, 108 S. Ct. at 1629 (quoting *Ciraolo*, 476 U.S. at 213-14).

⁶⁸ *Id.* at 1629-30. Justice White cited the following federal court decisions that reject claims of privacy in garbage: *United States v. Dela Espriella*, 781 F.2d 1432, 1437 (9th Cir. 1986); *United States v. O'Bryant*, 775 F.2d 1528, 1533-34 (11th Cir. 1985); *United States v. Thornton*, 746 F.2d 39, 49 (D.C. Cir. 1984); *United States v. Michaels*, 726 F.2d 1307, 1312-13 (8th Cir.), *cert. denied*, 469 U.S. 820 (1984); *United States v. Kramer*, 711 F.2d 789, 791-94 (7th Cir.), *cert. denied*, 464 U.S. 962 (1983); *United States v. Terry*, 702 F.2d 299, 308-09 (2d Cir.), *cert. denied sub nom Williams v. United States*, 461 U.S. 931 (1983); *Reicherter*, 647 F.2d at 399; *United States v. Vahalik*, 606 F.2d 99, 100-01 (5th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980); *United States v. Crowell*, 586 F.2d 1020, 1025 (4th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); *Magda v. Benson*, 536 F.2d 111, 112-13 (6th Cir. 1976) (*per curiam*); *United States v. Mustone*, 469 F.2d 970, 972-73 (1st Cir. 1972).

⁶⁹ Justice White cited the following state court decisions: *Smith v. State*, 510 P.2d 793 (Alaska), *cert. denied*, 414 U.S. 1086 (1973); *State v. Fassler*, 108 Ariz. 586, 592-93, 503 P.2d 807, 813-14 (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, 512-13, 492 N.E.2d 719, 721-22 (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 224, 228-30 (N.D. 1985); *State v. Brown*, 20 Ohio App. 3d 36, 37-38, 484 N.E.2d 215, 217-18 (1984); *Cooks v. State*, 699 P.2d 653, 656 (Okla. Crim. App.), *cert. denied*, 474 U.S. 935 (1985); *State v. Purvis*, 249 Or. 404, 411, 438 P.2d 1002, 1005 (1968); *Commonwealth v. Minton*, 288 Pa. Super. 381, 391, 432 A.2d 212, 217 (1981); *Willis v. State*, 518 S.W.2d 247, 249 (Tex. Crim. App. 1975); *State v. Stevens*, 123 Wis. 2d 303, 314-17, 367 N.W.2d 788, 794-97, *cert. denied*, 474 U.S. 852 (1985); *Crocker v. State*, 477 P.2d 122, 125-26 (Wyo. 1970).

duct warrantless searches of trash "discarded in public areas."⁷⁰ In a footnote, the Court tersely observed that since "the dissenters are among the tiny majority of judges whose views are contrary to ours, we are distinctly unimpressed with the dissent's prediction that 'society will be shocked to learn' of today's decision."⁷¹

The Court next rejected Greenwood's contention that because the warrantless search of his garbage was impermissible as a matter of California law,⁷² his expectation of privacy in his trash should be found reasonable as a matter of federal constitutional law and protected by the fourth amendment.⁷³ Justice White reiterated the Court's view that societal understanding, not state law, determines whether a search is invalid under the fourth amendment, and emphasized that in the instant case, the Court had already determined that "society as a whole possesses no such understanding with regard to garbage left for collection at the side of a public street."⁷⁴

Justice White concluded the opinion of the Court by dismissing Greenwood's argument that Proposition 8⁷⁵ violates due process.⁷⁶ The Court observed that even though the *Krivda* holding recognized a citizen's "right to be free from warrantless searches of garbage,"⁷⁷ California may amend its constitution to negate the *Krivda* holding and "eliminate the exclusionary rule as a remedy for violations of that right."⁷⁸ Justice White noted that the fourth amendment exclusionary rule does not apply "indiscriminately" and that "[the Court's] decisions concerning the scope of the Fourth Amendment exclusionary rule have balanced the benefits of deterring police misconduct against the costs of excluding reliable evidence of criminal activity."⁷⁹

B. DISSENTING OPINION

Justice Brennan, joined by Justice Marshall, dissented from the *Greenwood* holding and argued that Greenwood had a reasonable ex-

⁷⁰ *Greenwood*, 108 S. Ct. at 1630.

⁷¹ *Id.* at 1630 n.5 (quoting *id.* at 1632 (Brennan, J., dissenting)).

⁷² See *supra* notes 7-10 and accompanying text.

⁷³ *Greenwood*, 108 S. Ct. at 1630.

⁷⁴ *Id.* at 1630-31.

⁷⁵ See *supra* note 13 and accompanying text.

⁷⁶ *Greenwood*, 108 S. Ct. at 1631.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* (citing *United States v. Leon*, 468 U.S. 897 (1984)). The Court cited *Leon* as an example of its cost/benefit analysis. In *Leon*, the Court held that the application of the exclusionary rule to evidence obtained pursuant to a warrant should be determined on a case-by-case basis. *Leon*, 468 U.S. at 925. The *Leon* majority refused to exclude evidence obtained on the basis of a subsequently invalidated search warrant. *Id.* at 926.

pectation of privacy in his sealed, opaque garbage bags.⁸⁰ Justice Brennan stated that no court “before or since” has concluded that Stracner and Rahaeuser acted with probable cause to believe Greenwood was breaking the law, and further that “[s]crutiny of another’s trash is contrary to commonly accepted notions of civilized behavior.”⁸¹

Justice Brennan elected to emphasize the nature of the container in which Greenwood placed his trash. Quoting *United States v. Jacobsen*,⁸² the dissent explained that “[a] container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant.”⁸³ Justice Brennan traced this proposition back a century, to when the Court observed that when a package is “closed against inspection,” its contents, “wherever they may be,” come within the scope of fourth amendment protection against warrantless searches.⁸⁴

The dissent also drew upon the Court’s more recent decisions in *Robbins v. California*⁸⁵ and *United States v. Ross*⁸⁶ to conclude that the fourth amendment protects the owner of any container that hides its contents from plain view without regard to whether the container is “worthy” or “unworthy,” or made of leather or plastic.⁸⁷ Justice Brennan cited other instances in which the Court found a reasonable expectation of privacy in sealed containers such as a 200 pound “double-locked footlocker,”⁸⁸ an unlocked suitcase,⁸⁹ a totebag,⁹⁰ and “packages wrapped in green opaque

⁸⁰ *Greenwood*, 108 S. Ct. at 1633 (Brennan, J., dissenting).

⁸¹ *Id.* at 1631-32 (Brennan, J., dissenting).

⁸² 466 U.S. 109 (1984)(federal agents did not violate a reasonable expectation of privacy by searching and seizing contents of damaged, unsealed mailing tube that had already been opened by private carrier).

⁸³ *Greenwood*, 108 S. Ct. at 1637 (Brennan, J., dissenting)(quoting *Jacobsen*, 466 U.S. at 120 n.17).

⁸⁴ *Greenwood*, 108 S. Ct. at 1632 (Brennan, J., dissenting)(quoting *Ex parte Jackson*, 96 U.S. 727, 733 (1877)(establishing that letters and sealed packages in the mails are subject to the same fourth amendment protection as are papers in an individual’s household)).

⁸⁵ 453 U.S. 420 (1981)(plurality opinion)(closed, opaque containers within an individual’s automobile may not be opened without a warrant).

⁸⁶ 456 U.S. 798 (1982). See *infra* notes 128-133 and accompanying text for a discussion of *Ross*.

⁸⁷ *Greenwood*, 108 S. Ct. at 1632-33 (Brennan, J., dissenting).

⁸⁸ *United States v. Chadwick*, 433 U.S. 1, 11 (1977)(establishing that absent exigent circumstances, a warrant is required to search locked trunk that has been removed from its owner’s possession).

⁸⁹ *Arkansas v. Sanders*, 422 U.S. 753, 762 n.9 (1979)(establishing that absent exigent circumstances, a warrant is required to search personal luggage taken from an automobile).

⁹⁰ *Robbins v. California*, 453 U.S. 420, 422 (1980).

plastic.”⁹¹ Justice Brennan concluded that Supreme Court precedent

leaves no room to doubt that had respondents been carrying their personal effects in . . . bags—identical to the ones they placed on the curb—their privacy would have been protected from warrantless police intrusion. So far as the Fourth Amendment is concerned, opaque plastic bags are every bit as worthy as “packages wrapped in green opaque plastic” and “double-locked footlocker[s].”⁹²

Justice Brennan dismissed the notion that Greenwood’s expectation of privacy is less reasonable because he used the bags to dispose of, rather than to transport, his belongings.⁹³ The dissent observed that a garbage bag is “‘a common repository for one’s personal effects’”⁹⁴ and its contents reveal intimate details about its owner’s personal habits.⁹⁵

The dissent attacked the majority’s use of federal and state court precedent in demonstrating the widespread acceptability of unwarranted trash searches. Justice Brennan observed that, of the eleven federal court decisions cited by the majority, “at least two are factually or legally distinguishable . . . and seven rely entirely or almost entirely on an abandonment theory . . . [which] the Court has discredited.”⁹⁶ Justice Brennan curtly noted that “[a] reading of the Court’s collection of state court cases reveals an equally unimpressive pattern.”⁹⁷

Finally, Justice Brennan argued that a “reasonable expectation” of privacy in one’s sealed trash containers is an understanding shared by society.⁹⁸ For example, he cited the public criticism surrounding a reporter who searched through Henry Kissinger’s trash⁹⁹ and municipal ordinances that prohibit unauthorized persons from searching through garbage cans.¹⁰⁰

The dissent explained that the fourth amendment does not protect objects which have already become public, such as trash that has

⁹¹ *Id.*

⁹² *Greenwood*, 108 S. Ct. at 1633 (Brennan, J., dissenting) (quoting *Robbins*, 453 U.S. at 420, and *Chadwick*, 433 U.S. at 11).

⁹³ *Id.* (Brennan, J., dissenting).

⁹⁴ *Id.* at 1634 (Brennan, J., dissenting) (quoting *Sanders*, 422 U.S. at 762).

⁹⁵ *Id.* at 1634 (Brennan, J., dissenting).

⁹⁶ *Id.* at 1633-34 n.2 (Brennan, J., dissenting). For a citation of all eleven decisions, see *supra* note 68. For a discussion of how seven of these cases rely upon abandonment, see *infra* note 145.

⁹⁷ *Id.* at 1634 n.2 (Brennan, J., dissenting). The state court cases Justice White cited are listed *supra* note 69.

⁹⁸ *Id.* at 1635 (Brennan, J., dissenting).

⁹⁹ *Id.* (Brennan, J., dissenting) (citing N.Y. Times, July 9, 1975, at A1, col. 8).

¹⁰⁰ *Id.* at 1635 (Brennan, J., dissenting). For an example of such an ordinance, see *infra* note 103.

been strewn on the sidewalk.¹⁰¹ However, Justice Brennan stated that “[t]he 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.”¹⁰²

The dissent contended that the majority’s reliance on Greenwood’s conveyance of the trash to the garbage collector is unpersuasive. First, Justice Brennan noted that Greenwood had no alternative under county ordinance¹⁰³ but to leave his trash at his curb for removal.¹⁰⁴ Second, the dissent observed that if “voluntary relinquishment” was, as the majority appears to indicate, dispositive of the privacy issue, “a letter or package would lose all Fourth Amendment protection when placed in a mail box or other depository with the ‘express purpose’ of entrusting it to the postal officer or a private carrier.”¹⁰⁵ Justice Brennan concluded that such a result is inconsistent with long-standing Court precedent.¹⁰⁶ Justice Brennan closed his dissent by remarking that the majority opinion

paints a grim picture of our society. . . . [as one] in which local authorities may command their citizens to dispose of their personal effects . . . and then monitor them arbitrarily and without judicial oversight—a society that is not prepared to recognize as reasonable an individual’s expectation of privacy in the most private of personal effects sealed in an opaque container designed to commingle it imminently and inextricably with the trash of others. The American society with which I am familiar “chooses to dwell in reasonable security and freedom from surveillance,” and is more dedicated to individual liberty and more sensitive to intrusions on the sanctity of the home than the Court is willing to acknowledge.¹⁰⁷

¹⁰¹ *Id.* at 1636 (Brennan, J., dissenting).

¹⁰² *Id.* (Brennan, J., dissenting)(emphasis in original).

¹⁰³ ORANGE COUNTY, CAL., CODE § 4-3-45(a) (1986), mandates that one must “remov[e] from the premises at least once each week [all] . . . solid waste created, produced or accumulated in or about [his] dwelling house.” *Greenwood*, 108 S. Ct. at 1636-37 (Brennan, J., dissenting). Justice Brennan also noted that Orange County prohibits its citizens from disposing of trash in “any other way.” *Id.* at 1637 (Brennan, J., dissenting)(citing ORANGE COUNTY, CAL., CODE § 3-3-85 (1988) (prohibiting the burning of garbage)).

¹⁰⁴ *Greenwood*, 108 S. Ct. at 1636 (Brennan, J., dissenting).

¹⁰⁵ *Id.* at 1637 (Brennan, J., dissenting).

¹⁰⁶ *Id.* (Brennan, J., dissenting)(citing *Ex parte Jackson*, 96 U.S. 727 (1878); *United States v. Jacobsen*, 466 U.S. 109 (1984)).

¹⁰⁷ *Id.* at 1637 (Brennan, J., dissenting)(quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948))(citations omitted).

V. DISCUSSION AND ANALYSIS

A. KATZ AND THE SOCIAL REASONABLENESS INQUIRY: BEHAVIORAL AND VALUE-ORIENTED RESPONSES

In his concurring opinion in *Katz v. United States*,¹⁰⁸ Justice Harlan posited a two-pronged inquiry that has become the Supreme Court's standard for applying fourth amendment protection against warrantless searches: "[F]irst 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."¹⁰⁹ In *Katz*, the Court held that the Federal Bureau of Investigation's placement of an electronic listening device on the wall of a public telephone booth without a warrant constituted an unreasonable search and seizure in violation of the fourth amendment.¹¹⁰

The *Katz* majority explained that:

the Fourth Amendment protects people, not places. 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.¹¹¹

In *Greenwood*, Justices White and Brennan agreed that Justice Harlan's two-pronged test is the proper standard for determining whether a search violates the fourth amendment.¹¹² Justices White and Brennan agreed further that *Greenwood* fulfilled the first prong of the *Katz* test because he manifested a subjective expectation of privacy in his garbage.¹¹³ Instead, the debate between the *Greenwood* majority and dissent centered upon whether an individual's expectation of privacy in his or her garbage is socially reasonable.

Applying the *Katz* criteria to *Greenwood*, Justice White concluded

¹⁰⁸ 389 U.S. 347 (1967).

¹⁰⁹ *Id.* at 361 (Harlan, J., concurring). Justice Harlan's concurring opinion has frequently been accepted as if it were the binding majority view. See J. HADDAD, J. ZAGEL, G. STARKMAN & W. BAUER, *supra* note 5, at 435 n.1 (1987).

¹¹⁰ *Katz v. United States*, 389 U.S. 348, 359 (1967).

¹¹¹ *Id.* at 351-52 (citations omitted).

¹¹² Compare *Greenwood*, 108 S. Ct. at 1628 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring))(Justice White stated that the garbage search did not violate the fourth amendment unless *Greenwood* "manifested a subjective expectation of privacy in [his] garbage that society accepts as objectively reasonable.") with *id.* at 1632 (Brennan, J., dissenting)("Thus, as the Court [majority] observes, if *Greenwood* had a reasonable expectation that the contents of the bags he placed on the curb would remain private, the warrantless search of those bags violated the fourth amendment.")

¹¹³ Compare *id.* at 1628 (White, J.)("It may well be that [*Greenwood*] did not expect that the contents of [his] garbage bags would become known to the police or other members of the public."); with *id.* at 1633 (Brennan, J., dissenting)("Greenwood's decision to discard [his trash bags] . . . does not diminish his expectation of privacy.")

that Greenwood failed to demonstrate an expectation of privacy worthy of fourth amendment protection.¹¹⁴ Justice White reasoned that Greenwood was unable to meet the second prong of the *Katz* inquiry because society does not accept an expectation of privacy in one's trash as "objectively reasonable."¹¹⁵ Justice White explained that Greenwood's privacy expectation was not protected because Greenwood placed his garbage bags where they were vulnerable to the possible intrusions of "animals, children, scavengers, snoops, and other members of the public."¹¹⁶ Furthermore, Justice White added that Greenwood's trash collector "might himself have sorted through [the] trash" or, as happened, allowed the police to do so.¹¹⁷

Justice White's 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.

The *Greenwood* dissent sharply criticized Justice White's probabilistic justification for concluding Greenwood's expectation was not "reasonable." Arguing that the mere chance that uninvited scavengers might rifle through the sealed trash bags does not eliminate privacy expectations any more than the chance of a malevolent intrusion diminishes one's expectation of privacy in his or her home,¹¹⁸ Justice Brennan quoted *Katz* to emphasize that "[w]hat a person . . . seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected."¹¹⁹

Instead, Justice Brennan postulated a value-oriented reponse to the *Katz* social reasonableness inquiry that involves an assessment of society's collective individual, intuitive beliefs. Justice Brennan developed this theme by describing what he perceived as a general reaction to trash searches: "[m]ost of us, I believe, would be incensed to discover a meddler . . . scrutinizing our sealed trash containers to discover some detail of our personal lives."¹²⁰

The social commentary surrounding publicized episodes of garbage reconnaissance confirms the accuracy of Justice Brennan's as-

¹¹⁴ *Id.* at 1628.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1628-29 (citations omitted).

¹¹⁷ *Id.* at 1629.

¹¹⁸ *Id.* at 1636 (Brennan, J., dissenting).

¹¹⁹ *Id.* at 1636 (Brennan, J., dissenting)(quoting *Katz*, 389 U.S. at 351-52) (emphasis added by Justice Brennan).

¹²⁰ *Id.* at 1635 (Brennan, J., dissenting).

sumption. For example, when information-seekers searched the trash of certain celebrities and politicians in a non-criminal context, many observers expressed disapproval.¹²¹ If these commentators reflect a broader societal view that public figures accustomed to scrutiny should be able to expect that their garbage will not be searched, Justice Brennan is correct in concluding that this social mor should extend to all citizens.

Nonetheless, Justice White's assessment of actual probabilities is more in line with the Court's recent precedent than is Justice Brennan's value-oriented interpretation of the *Katz* test. For example, in *Oliver v. United States*,¹²² the Court refused to recognize as reasonable an individual's privacy expectation in activities conducted in a fenced-in, rural field with posted "No Trespassing" signs because signs and fences are not generally effective in preventing the public from gaining access to the fields enclosed within.¹²³ Therefore, regardless of the veracity of Justice Brennan's presumption that most individuals believe garbage reconnaissance is ethically repugnant, Justice White's *Greenwood* opinion implies that a majority of the Court is unwilling to implement a standard of social reasonableness that encompasses societal beliefs; instead, in determining whether an individual's expectation of privacy is reasonable, the Court examines how members of society actually behave.

B. THE FALLACY OF GARBAGE BAGS AS CONTAINERS SUPPORTING A REASONABLE EXPECTATION OF PRIVACY

In his *Greenwood* dissent, Justice Brennan shifted away from individual and societal beliefs and behavior and argued that a reasonable expectation of privacy may be discerned from the nature of the container the individual uses to store his or her garbage. Justice

¹²¹ *Id.* at 1635 (Brennan, J., dissenting). Justice Brennan observed that when a "tabloid reporter" published his findings from a search of Henry Kissinger's garbage in 1975, commentators condemned such conduct as "a disgusting invasion of personal privacy," Fliieger, *Investigative Trash*, U.S. NEWS AND WORLD REP., July 28, 1975, at 72, and "indefensible . . . as civilized behavior . . . [unlike] the way decent people behave in relation to each other," Washington Post, July 10, 1975, at A18, col. 1 (editorial). *Greenwood*, 108 S. Ct. at 1635 (Brennan, J., dissenting).

Other commentators have criticized similar exposés of celebrities' garbage. For example, in an article describing the importance of protecting expectations of privacy in trash, the authors describe how one journalist "surreptitiously snatched trash from the garbage cans of various celebrities" and published photographs of his findings with interpretive descriptions of the stars' reading habits, finances and social lives. Bush and Bly, *Expectation of Privacy Analysis and Warrantless Trash Reconnaissance after Katz v. United States*, 23 ARIZ. L. REV. 283, 311-12 (1981) (criticizing Weberman, *The Art of Garbage Analysis: You Are What You Throw Away*, 76 ESQUIRE 113 (1971)).

¹²² 466 U.S. 170 (1984).

¹²³ *Id.* at 171, 179-81.

Brennan contended that the contents of Greenwood's sealed, opaque trash bags should not have been searched on the ground that they were containers which can support a reasonable expectation of privacy.¹²⁴ Justice Brennan cited long-standing Court precedent to support his contention that "so long as a package is 'closed against inspection,'"¹²⁵ it may not be searched without a warrant.¹²⁶

Justice Brennan reasoned that the Court has recently reaffirmed this principle and rejected any distinction between containers "worthy" and "unworthy" of fourth amendment protection.¹²⁷ Justice Brennan stated that in *United States v. Ross*:¹²⁸

the Court, relying on the "virtually unanimous agreement in *Robbins* . . . that a constitutional distinction between 'worthy' and 'unworthy' containers would be improper," held that a distinction among "paper bags, locked trunks, lunch buckets, and orange crates" would be inconsistent with "the central purpose of the Fourth Amendment. . . . [A] traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case." As Justice Stewart stated in *Robbins*, the Fourth Amendment provides protection to the owner of "every container that conceals its contents from plain view."¹²⁹

Justice Brennan's reliance upon *Ross* to support his argument that an opaque, closed container creates a per se right to fourth amendment protection is both misplaced and misleading. The holding in *Ross* directly contradicts this view by permitting the warrantless search of "compartments and containers" within an automobile legitimately stopped by police officers if the officers have probable cause to believe that contraband may be concealed within the automobile, even if "[the container's] contents are not in plain view."¹³⁰ Furthermore, Justice Brennan's quoted excerpts from the *Ross* opinion ignore or simply fail to include explanatory statements that contradict his conclusion.¹³¹ For example, while emphatically

¹²⁴ *Greenwood*, 108 S. Ct. at 1632-33 (Brennan, J., dissenting).

¹²⁵ *Id.* at 1632 (Brennan, J., dissenting)(quoting *Jackson*, 96 U.S. at 733 (1878)).

¹²⁶ *Id.* (Brennan, J., dissenting).

¹²⁷ *Id.* at 1632-33 (Brennan, J., dissenting).

¹²⁸ 456 U.S. 798 (1982).

¹²⁹ *Greenwood*, 108 S. Ct. at 1633 (Brennan, J., dissenting)(quoting *Ross*, 456 U.S. at 822-23)(emphasis added by Justice Brennan).

¹³⁰ *Ross*, 456 U.S. at 800. Justice Brennan's extensive citation of the *Ross* majority opinion is particularly puzzling because he and Justice Marshall dissented from that opinion. At the time the *Ross* majority rendered its decision, Justice Brennan joined in Justice Marshall's admonition that "[t]he majority today not only repeals all realistic limits on warrantless automobile searches, it repeals the Fourth Amendment warrant requirement itself." *Id.* at 827 (Marshall, J., dissenting).

¹³¹ In his *Greenwood* dissent, Justice Brennan ignored the following footnote that ap-

quoting the *Ross* majority's statement that "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view,"¹³² Justice Brennan failed to include its subsequent qualification: "But the protection afforded by the Amendment varies in different settings."¹³³

In light of the Court's unwillingness to distinguish between the traveller who carries his or her belongings in a wrapped bandana or an executive with expensive luggage,¹³⁴ Justice Brennan may have been correct in observing that Greenwood would have had a fourth amendment right to privacy in his garbage bags had he been carrying them.¹³⁵ However, Justice Brennan failed to adequately support his declaration that Greenwood was entitled to the same degree of protection even though he used the bags to dispose of, rather than transport, his "personal effects."¹³⁶ In contrast to the general intuitive thrust of his dissenting opinion, Justice Brennan's arguments on the container issue did not address the fundamentally different ways in which a person subjectively perceives the contents of his or her garbage can versus the contents of his or her luggage.¹³⁷

peared in *Ross* that discusses the distinction between "worthy" and "unworthy" containers:

If the distinction is based on the proposition that the Fourth Amendment protects only those containers that objectively manifest an individual's reasonable expectation of privacy, however, the propriety of a warrantless search necessarily would turn on much more than the fabric of the container. A paper bag stapled shut and marked "private" might be found to manifest a reasonable expectation of privacy, as could a cardboard box stacked on top of two pieces of heavy luggage. The propriety of the warrantless search seemingly would turn on an objective appraisal of all the surrounding circumstances.

Ross, 456 U.S. at 822 n.30.

¹³² *Greenwood*, 108 S. Ct. at 1633 (Brennan, J., dissenting)(quoting *Ross*, 456 U.S. at 822-23).

¹³³ *Ross*, 456 U.S. at 823.

¹³⁴ See, e.g., *id.* at 822.

¹³⁵ *Greenwood*, 108 S. Ct. at 1633 (Brennan, J., dissenting).

¹³⁶ *Id.* (Brennan, J., dissenting). Justice Brennan explained that the contents of the trash bags "[were] not inherently any less private" simply because Greenwood decided to discard them. *Id.* (Brennan, J., dissenting). Justice Brennan reasoned that "a trash bag . . . is 'a common repository for one's personal effects' and . . . is therefore . . . 'inevitably associated with the expectation of privacy.'" *Id.* at 1634 (Brennan, J., dissenting)(quoting *Arkansas v. Sanders*, 442 U.S. 753, 762 (the contents of a small, unlocked suitcase are protected by the fourth amendment)).

¹³⁷ For example, generally no one wishes to be reunited with his or her garbage after a trash collector removes it from his or her possession. In contrast, virtually every traveller hopes to be reunited with his or her luggage after surrendering it to a baggage handler.

C. THE UNSPOKEN ROLE OF ABANDONMENT IN DETERMINING
WHETHER GARBAGE RECONNAISSANCE IS SOCIALLY
UNREASONABLE

Though the *Greenwood* majority did not directly address whether Greenwood's expectation of privacy was socially unreasonable because he deposited his garbage on the curb with the intent of never seeing it again, Justice White had earlier discussed the application of the abandonment theory to justify warrantless garbage searches in his dissenting opinion in *California v. Rooney*.¹³⁸ While the similarities between his *Rooney* dissent and *Greenwood* opinion are illuminating,¹³⁹ the most telling aspect of the *Rooney* dissent appears to be what Justice White failed to incorporate into his *Greenwood* opinion; specifically, his explicit rejection of the theory of abandonment as a method of determining whether an individual has a socially recognized reasonable expectation of privacy in his or her garbage.¹⁴⁰

In dispensing with the abandonment argument in *Rooney*, Justice White reasoned that:

Rooney's property interest . . . does not settle the matter for Fourth Amendment purposes, for the reach of the Fourth Amendment is not determined by state property law. . . . The primary object of the Fourth Amendment is to protect privacy, not property, and the question . . . is not whether *Rooney* had abandoned his interest in the property law sense, but whether he retained a subjective expectation of privacy in his trash bag that society accepts as objectively reasonable.¹⁴¹

However, the text of Justice White's *Greenwood* opinion contains no

¹³⁸ 107 S. Ct. 2853 (1987). *Rooney* involved the warrantless search of an individual's garbage bag placed in a communal trash bin in an apartment complex. *Id.* at 2853. Justice White contended that the *Rooney* search did not violate the defendant's fourth amendment rights because "society is not prepared to accept as reasonable an expectation of privacy in trash deposited in an area accessible to the public." *Id.* at 2862 (White, J., dissenting). See *supra* notes 14-19 and accompanying text.

¹³⁹ Justice White recited some passages from his *Rooney* dissent almost verbatim in *Greenwood*. Compare *Rooney*, 107 S. Ct. at 2859 (White, J., dissenting) ("It is common knowledge that trash bins and cans are commonly visited by animals, children, and scavengers looking for valuable items") with *Greenwood*, 108 S. Ct. at 1628-29 ("It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops and other members of the public.") (footnotes omitted).

Furthermore, Justice White employed many of the same citations in *Greenwood* that he had previously used in his *Rooney* dissent. Both *Greenwood*, 108 S. Ct. at 1629 and *Rooney*, 107 S. Ct. at 2860-61 (White, J., dissenting) cite the holdings in *Smith v. Maryland*, 442 U.S. 735 (1979) and *California v. Ciraolo*, 476 U.S. 207 (1986). For a discussion of *Smith*, see *infra* notes 153-61 and accompanying text; for a discussion of *Ciraolo*, see *supra* notes 66-67 and accompanying text.

¹⁴⁰ See *Rooney*, 107 S. Ct. at 2858-59 (White, J., dissenting).

¹⁴¹ *Id.* (White, J., dissenting) (citations omitted).

reference to abandonment or his rejection of the abandonment theory in *Rooney*, although the petitioner in *Greenwood* presented the abandonment argument to the Court.¹⁴²

The *Greenwood* dissent did not attack Justice White's failure to acknowledge his earlier rejection of the abandonment theory. Instead, Justice Brennan quoted Justice White's *Rooney* dissent and presumed that the *Greenwood* majority adhered to Justice White's earlier logic and "properly reject[ed]" the state's abandonment argument.¹⁴³ Nonetheless, Justice Brennan observed that the vast majority of the state and federal court opinions Justice White cited to support his contention that "society would not accept as reasonable [a] claim to an expectation of privacy in trash left for collection in an area accessible to the public"¹⁴⁴ relied upon the theory that garbage placed for collection was abandoned property and therefore not protected by the fourth amendment.¹⁴⁵

Justice Brennan's criticism indicates that, after *Greenwood*, the theory of abandonment has an unspoken role in determining whether an individual has a reasonable expectation of privacy in his or her garbage. However, the *Greenwood* majority was unwilling or unable to delineate the dimensions of this role. While his *Greenwood*

¹⁴² Brief for Petitioner at 13, *California v. Greenwood*, 108 S. Ct. 1625 (1988)(No. 86-684)("The act of placing trash out for collection constitutes an abandonment of the trash to, at the very least, the trash collector, and constitutes an abandonment of an expectation of privacy to anyone who examines it.")

¹⁴³ *Greenwood*, 108 S. Ct. at 1634-35 (Brennan, J., dissenting).

¹⁴⁴ *Greenwood*, 108 S. Ct. at 1629 (White, J.). See *supra* notes 68-69 for citations of these state and federal court opinions.

¹⁴⁵ *Id.* at 1633-34 n.2 (Brennan, J., dissenting). Justice Brennan noted that seven of the federal courts of appeals decisions Justice White cited "rely entirely . . . on an abandonment theory that . . . the Court has discredited." *Id.* (citing *United States v. Dela Espriella*, 781 F.2d 1432, 1437 (9th Cir. 1986) ("The question, then, becomes whether placing garbage for collection constitutes abandonment of property."); *United States v. Terry*, 702 F.2d 299, 309 (2d Cir.), *cert. denied sub nom Williams v. United States*, 461 U.S. 931 (1983) ("the circumstances in this case clearly evidence abandonment by [the defendant] of his trash"); *United States v. Reicherter*, 647 F.2d 397, 399 (3d Cir. 1981) (quoting *United States v. Shelby*, 573 F.2d 971, 973 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978))("the placing of trash in garbage cans at 'a time and place for anticipated collection by public employees for hauling to a trash dump signifies abandonment'"); *United States v. Vahalik*, 606 F.2d 99, 100-01 (5th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980) ("the act of placing garbage for collection is an act of abandonment which terminates any fourth amendment protection"); *United States v. Crowell*, 586 F.2d 1020, 1025 (4th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979) ("The act of placing [trash] for collection is an act of abandonment and what happens to it thereafter is not within the protection of the fourth amendment"); *Magda v. Benson*, 536 F.2d 111, 112-13 (6th Cir. 1976)(*per curiam*)("federal case law . . . holds that garbage . . . is abandoned and no longer protected by the Fourth Amendment"); *United States v. Mustone*, 469 F.2d 970, 972-73 (1st Cir. 1972) (when the defendant "deposited the bags on the sidewalk he abandoned them.").

opinion is silent on the abandonment issue, Justice White implicitly endorsed the abandonment rationale in *Greenwood* by relying upon the reasoning in *United States v. Dela Espriella*, *United States v. Terry*, *United States v. Reicherter*, *United States v. Vahalik*, *United States v. Crowell*, *Magda v. Benson*, and *United States v. Mustone*.¹⁴⁶

Justice White's dilemma involving the abandonment issue is evident even in his *Rooney* dissent.¹⁴⁷ In *Rooney*, Justice White quoted the Third Circuit's reasoning in *Reicherter* to reinforce the argument that an individual has no reasonable expectation of privacy in trash discarded for collection outside the curtilage of his or her home:

"Defendant claims that . . . he had a reasonable expectation of privacy in the trash he placed in a public area to be picked up by trash collectors. . . . A mere recitation of the contention carries with it its own refutation. . . . Having placed the trash in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, it is inconceivable that the defendant intended to retain a privacy interest in the discarded objects. If he had such an expectation, it was not reasonable."¹⁴⁸

However, Justice White edited the text of the *Reicherter* quotation to delete the court's reliance upon the abandonment principle.¹⁴⁹

The *Greenwood* majority inexplicably failed to justify or condemn the view that an expectation of privacy in garbage is not protected by the fourth amendment because the garbage is abandoned property. Justice White could have eliminated this confusion and incorporated abandonment into the *Katz* criterion of social reasonableness by referring to the Court's previous observation that property rights reflect society's recognition of an owner's right to exclude others, and that "one who owns or lawfully possesses or

¹⁴⁶ *Greenwood*, 108 S. Ct. at 1629-30. See *supra* note 145.

¹⁴⁷ *Rooney*, 107 S. Ct. at 2858 (White, J., dissenting).

¹⁴⁸ *Id.* at 2862 (White, J., dissenting)(quoting *Reicherter*, 647 F.2d at 399)(omissions by Justice White).

¹⁴⁹ One of the deleted portions of the *Reicherter* quotation contains a favorable reference to a Seventh Circuit decision based upon the abandonment theory. *United States v. Shelby*, 573 F.2d 971 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978). The italicized portion of the following text indicates Justice White's omission in context:

A mere recitation of the contention carries with it its own refutation. Every circuit considering the issue has concluded that no reasonable expectation of privacy exists once trash has been placed in a public area for collection. The reasoning underlying these decisions is clear and persuasive. *As stated by the Seventh Circuit in Shelby: "The placing of trash in garbage cans at a time and place for anticipated collection by public employees for hauling to a public dump signifies abandonment."* Having placed the trash in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, it is inconceivable that the defendant intended to retain a privacy interest in the discarded objects. *Reicherter*, 647 F.2d at 399 (citations omitted).

controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude."¹⁵⁰

The *Greenwood* Court affords little guidance to state tribunals in explaining why an individual has no socially recognized reasonable expectation of privacy in his or her garbage.¹⁵¹ If the cases decided shortly after *Greenwood* indicate the course of future state court decisions, the most compelling explanation lies in Justice White's reasoning that a citizen who places his or her trash out for collection forfeits any claim to a reasonable expectation of privacy because he or she "voluntarily" conveys the garbage to the trash collector.¹⁵²

D. "VOLUNTARY CONVEYANCE" TO THIRD PARTIES AS FORFEITURE OF PRIVACY INTERESTS

Prior to *Greenwood*, the Court applied the *Katz* reasonableness test in a series of cases that find a voluntary conveyance of information to third parties automatically precludes any protection of that information under the fourth amendment. In *Smith v. Maryland*,¹⁵³ the Court employed the *Katz* rationale to reject a petitioner's claim that the warrantless placement of a pen register to record numbers dialed from his home telephone violated his fourth amendment rights.¹⁵⁴ Writing for the *Smith* majority, Justice Blackmun observed that it is unlikely "people in general entertain any actual expectation of privacy in the numbers they dial."¹⁵⁵ Justice Blackmun emphasized that "[a]ll telephone users realize that they must convey phone

¹⁵⁰ *Oliver v. United States*, 466 U.S. 170, 189-90 (Marshall, J., dissenting)(quoting *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978)). For a discussion of *Oliver*, see *supra* notes 122-23 and accompanying text.

¹⁵¹ In a case decided under the authority of *Greenwood*, the Nebraska Supreme Court merely echoed Justice White's observation that "the overwhelming weight of authority" dictates that a citizen has no reasonable expectation of privacy in garbage placed for collection outside the curtilage of his or her home. *State v. Trahan*, 229 Neb. 683, 687, 428 N.W.2d 619, 622 (1988)(quoting *Greenwood*, 108 S. Ct. at 1630). Without distinguishing the authorities relying upon the abandonment theory, the Nebraska Supreme Court did not remedy the lack of clarity surrounding the abandonment's role in determining the scope of the fourth amendment.

¹⁵² See, e.g., *Trahan*, 229 Neb. at 687, 428 N.W.2d at 622 (quoting *Greenwood*, 108 S. Ct. at 1629 (White, J.)(citation omitted))("[H]aving deposited their garbage 'in an area particular suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it' respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded."); *State v. Manera*, No. 87-221 (Ohio App. June 30, 1988)(LEXIS, States library)(citing *Greenwood*, 108 S. Ct. at 1628-29)("The [*Greenwood*] Court reasoned that there is no reasonable expectation of privacy in items voluntarily left for trash collection in an area which is susceptible to open examination.").

¹⁵³ 442 U.S. 735 (1979).

¹⁵⁴ *Id.* at 743.

¹⁵⁵ *Id.* at 742.

numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed," and noted that most people are aware that the phone company records numbers dialed "for a variety of legitimate business purposes."¹⁵⁶

The Court concluded that, even if a person believes the telephone numbers he or she dials will remain private, such a subjective expectation is not within the *Katz* criterion of "one that society is prepared to recognize as 'reasonable,'" ¹⁵⁷ because Supreme Court precedent dictates that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."¹⁵⁸ Justice Blackmun explained that one who uses a telephone "exposes" the numbers he or she dials to phone company equipment and therefore "assume[s] the risk that the company [will] reveal to police the numbers he dialed."¹⁵⁹

Justices Stewart, Brennan, and Marshall dissented from the *Smith* majority on the ground that such a conveyance is not truly voluntary.¹⁶⁰ Justice Marshall explained that "[i]mplicit in the concept of assumption of risk is some notion of choice. . . . It is idle to speak of assuming risks in contexts where, as a practical matter, individuals have no realistic alternative."¹⁶¹

The *Greenwood* majority's use of the "voluntary conveyance" principle is vulnerable to similiar criticism. An individual who wishes to keep his or her trash reasonably private may be hard-pressed for alternatives to "voluntarily" conveying his or her trash to the garbage collector. For example, local statutes prohibited *Greenwood* from burning, burying, or amassing his trash within his home¹⁶² and, though no such law was described in *Greenwood*, some

¹⁵⁶ *Id.* at 742-43.

¹⁵⁷ *Id.* at 743 (citing *Katz*, 389 U.S. at 361).

¹⁵⁸ *Id.* at 743-44 (citing, *inter alia*, United States v. Miller, 425 U.S. 435, 442-44 (1976); *Lopez v. United States*, 373 U.S. 427 (1963)).

¹⁵⁹ *Id.* at 744.

¹⁶⁰ *Id.* at 746 (Stewart, J. dissenting). Justice Stewart, joined by Justice Brennan, observed that "[a] telephone call simply cannot be made without the use of telephone company property and without payment to the company for the service." *Id.* (Stewart, J., dissenting). Justice Marshall, also joined by Justice Brennan, remarked that "unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance." *Id.* at 2585 (Marshall, J., dissenting).

¹⁶¹ *Id.* at 749-50 (Marshall, J., dissenting).

¹⁶² See ORANGE COUNTY, CAL., CODE § 3-3-85 (1988)(burning garbage is illegal) and § 4-3-45(a)(1986)("solid waste created, produced, or accumulated in or about . . . [a] place of human habitation shall be removed from the premises at least once each week"), cited in *Greenwood*, 108 S. Ct. at 1636-38 (Brennan, J., dissenting) and Brief for Respondent Dyanne Van Houten at 34, *California v. Greenwood*, 108 S. Ct. 1625 (1988)(No. 86-684).

local governments prohibit citizens from disposing of their own garbage.¹⁶³ While an individual who wishes to keep a document private might shred the paper into tiny, indistinguishable pieces, other items one might wish to keep secret, such as contraceptive containers and prescription bottles, are not readily destructible.

Under the *Greenwood* holding, a person who complies with the laws of his or her community by depositing sealed bags of garbage on the curb for collection voluntarily reveals whatever "secrets" that trash may contain to the mercy and discretion of the garbage collector or, in jurisdictions that do not prohibit unauthorized tampering with garbage, anyone who happens to walk by. 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.

VI. CONCLUSION

The *Greenwood* decision is a disturbing and confusing manifestation of the Court's continuing emasculation of the fourth amendment's warrant requirement. The core issue in *Greenwood* was neatly framed by the two-pronged *Katz* test. Because it was clear that *Greenwood* subjectively believed the contents of his garbage bags would remain private, the essential inquiry in determining if the search was constitutionally permissible was whether society accepts that privacy expectation as reasonable.

The *Greenwood* majority's conclusion that an expectation of privacy in trash is not socially reasonable is based upon two unsettling propositions. First, by arguing that the contents of an individual's garbage bags should not be accorded privacy rights because such bags are sometimes invaded,¹⁶⁴ the Court rests constitutional safeguards on the capricious actions of particular individuals. For example, taken literally, the *Greenwood* majority's analysis could support the position that the information contained in computer networks is no longer private in light of recent episodes of interception and tampering by third parties. Second, to support its conclusion that garbage placed along the curb for collection may be searched without a warrant, the majority used a false, hollow notion of voluntary conveyance to characterize a transaction between citizen and trash collector that is often mandated by local ordinance.¹⁶⁵

¹⁶³ See *Krivda*, 5 Cal. 3d at 361, 486 P.2d at 1268, 96 Cal. Rptr. at 66 (1971) (citing Los ANGELES COUNTY, CAL., CODE ch. 9, §§ 1611-22, 1681-91 (1971)(restricting the right to collect and transport garbage to licensed collectors)).

¹⁶⁴ *Greenwood*, 108 S. Ct. at 1628-29.

¹⁶⁵ *Id.* at 1629. See *supra* note 103 for an example of such an ordinance.

Furthermore, the *Greenwood* majority opinion is confusing because the Court made an assertion about societal beliefs while shrouding its conclusion in legal precedent.¹⁶⁶ The *Greenwood* majority contended that the vast majority of lower federal and state courts agreed with its conclusion that society does not recognize as reasonable an individual's expectation of privacy in the contents of his or her garbage cans, but Justice White refused to acknowledge that a concept of property law, not societal understanding, was the dispositive factor governing most of these decisions.

In contrast, the *Greenwood* dissent directly answered *Katz*' social reasonableness inquiry. Omitting his flawed attempt to equate garbage bags with containers such as suitcases and mailing envelopes, Justice Brennan's opinion clearly stated his contention that society, as an aggregate of individuals, believes that the contents of a person's trash container can and should remain private.¹⁶⁷ Whether his contention about societal belief is right or wrong, at least Justice Brennan's dissent addressed *Katz*' fundamental inquiry about societal understanding in lucid, candid terms.

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¹⁶⁶ See *id.* at 1629-30. Justice White contended in his opinion that society does not accept an expectation of privacy in trash as reasonable comported with the views of most federal and state courts that had addressed the legality of warrantless trash searches. See *supra* notes 68-69 for a listing of the federal and state court decisions cited by Justice White.

¹⁶⁷ See, e.g., *id.* at 1635 (Brennan, J., dissenting) ("Most of us, I believe, would be incensed to discover a meddler . . . scrutinizing our sealed trash containers to discover some detail of our personal lives.").