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NOTE

EMBRACING BIG BROTHER? *STATE V. A BLUE IN COLOR, 1993 CHEVROLET PICKUP**

Jeffrey D. Perkins**

He gazed up at the enormous face. Forty years it had taken him to learn what kind of smile was hidden beneath the dark mustache. O cruel, needless misunderstanding! O stubborn, self-willed exile from the loving breast! Two gin-scented tears trickled down the sides of his nose. But it was all right, everything was all right, the struggle was finished. He had won the victory over himself. He loved Big Brother.

—George Orwell, *1984*.[1]

* *State v. A Blue in Color, 1993 Chevrolet Pickup, 2-Door, MT 14T-D899 VIN/ 2GCEC19KOP1153371, & 1973 Boat Trailer, MT 14-Z20, VIN/SNTR30459MT, & 1972 Boat, Jolly Roger, Hull # MT2952AC*, 116 P.3d 800 (Mont. 2005) [hereinafter *Blue Chevrolet Pickup*].

** J.D. 2006, The University of Montana School of Law. I would like to take this opportunity to thank several people for their support and guidance throughout the writing of this Note. My wife Tracey, for the love, support and encouragement she has given me throughout this process; Dean Margaret Tonon, for serving as my advisor on this piece and reading numerous drafts; M. Shaun Donovan, for giving me an opportunity to gain valuable experience and serving as a mentor during my time in school; my parents, Wayne and Isabelle Perkins, for everything they have done for me throughout my life; the members of the *Montana Law Review*, for the considerable effort they have expended improving this piece. Finally, I would like to offer this Note in memory of Paul Raftery, a classmate and a friend who was taken from us much too early. Paul served as a sounding board for many of my ideas in this Note, spending countless hours debating and testing my conclusions, forcing me to examine my analysis closely, and the result was a better note. Paul, I am in your debt and may you be at peace.

1. George Orwell, *1984* at 245 (Signet Classic ed., Penguin Bks. 1981).

I. INTRODUCTION

The State of Montana is unique. While high courts in other states whose constitutions do not contain explicit privacy provisions must infer or construct a right to privacy from the penumbra of their respective constitutions, Montana trumpets its citizens' heightened right to privacy by explicitly providing for a right to privacy in its Constitution.[2] A right to privacy under the U.S. Constitution was not articulated until 1965 in *Griswold v. Connecticut*.[3] Justice Douglas characterized the right in the *Griswold* plurality opinion, saying "[i]n other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion."[4] The somewhat amorphous nature of the federal right to privacy makes it easier for the U.S. Supreme Court to endorse far-reaching law enforcement tactics. Meanwhile, the Montana Supreme Court must strike a balance between legitimate law enforcement and the provisions of Article II, section 10 of the Montana Constitution.[5]

Article II, section 11 of the Montana Constitution provides protection against unreasonable searches and seizures by the State.[6] There exists a symbiotic relationship between Montana's constitutional right to privacy and Montana search and seizure law. The Montana Supreme Court has defined what constitutes an illegal search in terms of an individual's right or expectation of privacy, saying: "[w]here no reasonable expectation of privacy exists, there is neither a 'search' nor a 'seizure' within the contemplation of the Fourth Amendment of the U.S. Constitution or Article II, section 11 of the Montana Constitution."[7] Whether an individual's right to privacy has been infringed by an unlawful search is determined by whether there has been a government intrusion

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2. Mont. Const. art. II, § 10 provides: "Right of Privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."

3. *Griswold v. Conn.*, 381 U.S. 479 (1965).

4. *Id.* at 483.

5. Mont. Const. art. II, § 10.

6. Mont. Const. art. II, § 11 provides:

> The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

7. *State v. Scheetz*, 950 P.2d 722, 724–25 (Mont. 1997) (quoting *State v. Bennett*, 666 P.2d 747, 749 (Mont. 1983)).

into an area subject to a reasonable expectation of privacy.[8] When the government infringes upon an individual's expectation of privacy that society considers objectively reasonable, that infringement is a search.[9]

The Montana Supreme Court's test for determining when a person has a reasonable expectation of privacy is: "(1) whether [the person] had an actual expectation of privacy . . . ; (2) whether society is willing to recognize that expectation as objectively reasonable; and (3) the nature of the State's intrusion."[10] Citing Montana's heightened constitutional right to privacy, the Montana Supreme Court has often been reluctant to approve of law enforcement tools and tactics widely accepted and used in states throughout the United States.[11] This reluctance has led to election-season criticism of the court as anti-law enforcement.[12] Perhaps, however, this reluctance is dissipating.

This Note addresses the Montana Supreme Court's finding that police confiscation of garbage placed at the curb for collection does not constitute a search or a seizure under the Montana Constitution, while simultaneously imposing restrictions on law enforcement's ability to search.[13] The court, in *State v. A Blue in Color, 1993 Blue Chevrolet Pickup* (*Blue Chevrolet Pickup*), addressed whether or not a warrantless search of a defendant's trash bags that were placed outside for collection violated that defendant's right to privacy under Article II, sections 10 and 11 of the Montana Constitution.[14] Has the Montana Supreme Court embraced Big Brother with this ruling?

Section II examines the holding, reasoning, and concurring and dissenting opinions of *Blue Chevrolet Pickup*. Section III examines garbage search and seizure jurisprudence from various jurisdictions. Section IV analyzes and criticizes the Montana Supreme Court's reasoning and conclusions. Section V presents a series of analyses and conclusions that, if employed by the court,

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8. *Id.* at 724.

9. *Id.* (citing *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984)).

10. *Blue Chevrolet Pickup*, 116 P.3d 800, 803 (Mont. 2005) (citing *State v. Smith*, 97 P.3d 567, 570 (Mont. 2004)).

11. *E.g. State v. Tackitt*, 67 P.3d 295, 300–01 (Mont. 2003) (holding that a canine sniff of an enclosed vehicle space was a search under the Montana Constitution); *State v. Bullock*, 901 P.2d 61, 76 (Mont. 1995) (holding that a warrantless search of a defendant's open field was unlawful under the Montana Constitution).

12. Mike Dennison, *Nelson's Decisions Draw Fire, Praise*, Great Falls Trib. A16 (Sept. 26, 2004).

13. *Blue Chevrolet Pickup*, 116 P.3d at 805.

14. *Id.* at 802.

would have resulted in a clearer, more coherent holding. Finally, Section VI concludes that the court should have found that the defendant had a reasonable expectation of privacy in his garbage; the court should have then carved out an exception to the warrant requirement, allowing law enforcement to conduct warrantless garbage searches.

II. *Blue Chevrolet Pickup*

A. *Facts*

This case arose out of forfeiture proceedings against Darrell Pelvit's pickup truck, boat, and boat trailer. While the actual appellant is not Pelvit but the forfeited property, for the sake of clarity and brevity the Montana Supreme Court refers to Pelvit as the appellant.[15] For the same reasons, this Note will follow the court's convention.

The Eastern Montana Drug Task Force, following months of investigation, and based on information it received that Pelvit was operating a clandestine methamphetamine lab, conducted a warrantless "trash dive" on garbage cans located on an open wooden rack along a public alley behind Pelvit's residence. The garbage cans were unlocked. A search of one of the opaque trash bags yielded pseudoephedrine boxes, empty blister packs, and empty Naptha solvent cans (materials used to manufacture methamphetamine).[16]

Based on the discovery of the pseudoephedrine boxes and Naptha cans in Pelvit's trash, police obtained a search warrant for Pelvit's residence, pickup, and boat. After drug-related evidence was recovered from the residence, pickup, and boat, the State instituted forfeiture proceedings against Pelvit's pickup, boat, and boat trailer.[17]

Pelvit moved to suppress the evidence obtained under the search warrant, arguing the warrant was invalid because it was based on evidence obtained from an illegal search of his garbage can. The district court denied Pelvit's motion to suppress the evidence, holding that "Pelvit did not have an expectation of privacy in his garbage that society was willing to recognize as reasona-

15. *Id.*
16. *Id.*
17. *Id.*

ble."[18] On appeal to the Montana Supreme Court, Pelvit argued that the district court erred by concluding the warrantless search of his trash bags did not violate his right to privacy under Article II, sections 10 and 11 of the Montana Constitution.[19]

B. Majority Holding

The Montana Supreme Court affirmed the district court's ruling. The court held that when Pelvit left his garbage out for collection, he abandoned it and had no expectation of privacy that society was willing to accept as reasonable in it.[20] Therefore, the court concluded no search or seizure occurred within the contemplation of Article II, sections 10 and 11 of the Montana Constitution.[21]

Pelvit argued that he manifested both an objective and subjective expectation of privacy in his garbage because it was contained in opaque bags and trash cans located along the back of his property. Pelvit maintained that *State v. Siegal*[22] was controlling in his case.[23] *Siegal* held that warrantless use of thermal imaging violated the defendant's right to privacy.[24] The Montana Supreme Court agreed with the State's position that *Siegal* was distinguishable, and that society was not willing to accept as reasonable Pelvit's expectation of privacy in his trash.[25]

The court set out its test for determining when a person has a reasonable expectation of privacy in his trash as "(1) whether he had an actual expectation of privacy in their trash; (2) whether society is willing to recognize that expectation as objectively reasonable; and (3) the nature of the State's intrusion."[26] The court then differentiated the facts of *Siegal* from Pelvit's situation, finding that Siegal had exerted considerable effort to keep his property and activities private by fencing his property and remaining inside his house. In contrast, Pelvit placed his trash out specifically for a third party to collect. Based on this comparison, the court concluded that *Siegal* was not controlling.[27]

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18. *Id.*
19. *Blue Chevrolet Pickup*, 116 P.3d at 802.
20. *Id.* at 805.
21. *Id.*
22. *State v. Siegal*, 934 P.2d 176 (Mont. 1997).
23. *Blue Chevrolet Pickup*, 116 P.3d at 805.
24. *Siegal*, 934 P.2d at 192.
25. *Blue Chevrolet Pickup*, 116 P.3d at 804.
26. *Id.* at 803 (citing *State v. Smith*, 97 P.3d 567, 570 (Mont. 2004)).
27. *Id.* at 803–04.

Having freed itself of *Siegal*, the Montana Supreme Court analyzed the issue of legal abandonment and its ramifications on privacy interests. Relying upon its holding in *State v. Hill*,[28] in which the defendant voluntarily relinquished any control he had over property in his trunk by twice disavowing any interest in the property, the court found that Pelvit had also voluntarily relinquished control of his garbage by placing it out for collection.[29] The court likened voluntary relinquishment of one's interest in an item to legal abandonment. According to the court, "when a person intentionally abandons his property," he also abandons his privacy interest in that property.[30] The court determined that placing garbage in the alley for collection was irreconcilable with Pelvit's claimed expectation of privacy because it evidenced his intent not to exclude others from the garbage.[31]

The Montana Supreme Court assumed for the sake of argument that Pelvit had an actual expectation of privacy in his garbage, and discussed whether society was willing to recognize that expectation as objectively reasonable.[32] The court determined that society's experience with garbage left out for collection was inconsistent with an objective expectation of privacy, because pets, wildlife, and homeless people are known to rummage through trash put out for collection.[33] This determination led the court to hold that when Pelvit left his garbage out for collection, he abandoned it and had no expectation of privacy that society was willing to accept as reasonable. Therefore, no " 'search' or 'seizure' [had occurred] within the contemplation of Article II, sections 10 and 11 of the Montana Constitution."[34]

Although the Montana Supreme Court was confident that the public would not accept as reasonable an expectation of privacy in garbage, it was equally confident that the public would be uncomfortable with the idea that the police could rummage through their curbside garbage with impunity.[35] The court reasoned that even if people have not abandoned their garbage, they still must place their garbage in designated areas to be hauled away in compliance with local refuse ordinances, thereby exposing the garbage

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28. *State v. Hill*, 94 P.3d 752 (Mont. 2004).
29. *Blue Chevrolet Pickup*, 116 P.3d at 804 (citing *Hill*, 94 P.3d at 758).
30. *Id.* (citing *State v. Hamilton*, 67 P.3d 871, 875 (Mont. 2003)).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 805.
35. *Blue Chevrolet Pickup*, 116 P.3d at 805.

to the public. This apparent incongruity led the court to again walk the logical high-wire in order to reconcile the public's apparent distaste with the competing concepts of privacy in garbage and police impunity in searching it.[36]

The court addressed this perceived public distaste by limiting the nature and extent of permissible government intrusions into people's garbage. Borrowing the Indiana Supreme Court's holding in *Litchfield v. State*,[37] the Montana Supreme Court placed certain limitations on the warrantless seizure of garbage. First, for the seizure to be reasonable it must be quickly retrieved in "substantially the same manner as the trash collector would take it";[38] second, "officers must have an articulable individualized suspicion that a crime is being [or has been] committed"—similar to a '*Terry* Stop'—"to justify the garbage seizure."[39] The court held that both constraints were satisfied with respect to Pelvit's garbage, and therefore the district court did not err in denying Pelvit's motion to suppress.[40] The court was careful to limit its holding to garbage placed out for collection.[41]

C. *Concurring Opinion*

Justice Nelson's concurrence agreed with the majority's result and search and seizure analysis. However, Justice Nelson expressed misgivings over the omnipresence of the state and for-profit entities in citizens' daily lives, stating that "I don't like living in Orwell's *1984*; but I do."[42]

Justice Nelson voiced his unease with the idea of police searching people's garbage and Americans' diminished privacy. He noted that his own garbage contained credit card receipts, medical records, bills, and even DNA.[43] He speculated that few people likely considered what they throw away, where their garbage will end up, and who will look at it.[44] However, he also related the various everyday incursions into people's privacy, ranging from recordings of internet sites visited to medical records

36. *Id.*
37. *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005).
38. *Blue Chevrolet Pickup*, 116 P.3d at 805 (quoting *Litchfield*, 824 N.E.2d at 363).
39. *Id.* (citing *Litchfield*, 824 N.E.2d at 364).
40. *Id.* at 805–06.
41. *Id.* at 806.
42. *Id.* at 807 (Nelson, J., concurring).
43. *Id.* at 806.
44. *Blue Chevrolet Pickup*, 116 P.3d at 806 (Nelson, J., concurring).

transcribed in a foreign country by a worker unconcerned with American privacy rights.[45]

Justice Nelson concluded by stating that he may change his mind regarding whether police searches of garbage violate a person's reasonable expectation of privacy. If officers begin performing sweeps of garbage cans in a neighborhood, retrieving items that provide DNA or fingerprints to be added to the forensic database, or documents that could be archived and used in some future, unrelated case, he would reconsider his legal position.[46]

D. Dissent

In contrast to Justice Nelson, Justice Leaphart found the majority's analysis "internally incoherent and inconsistent with [Montana] privacy jurisprudence."[47] Justice Leaphart concluded that Pelvit had a reasonable expectation of privacy in his garbage, and criticized the majority's reliance on *State v. Hill* for the test of whether someone has voluntarily relinquished control over his property.[48] Indeed, Justice Leaphart believed *Hill* was readily distinguishable from the case at bar.

According to Justice Leaphart, *Hill* was decided based upon the defendant's lack of authority to grant or deny permission to search duffel bags in the trunk of the car, because he was not lawfully in control of the car.[49] This lack of authority suggested that Hill did not have a subjective expectation of privacy in the duffel bags in the trunk.[50] In addition, Hill voluntarily relinquished any control he had over the objects in the trunk when he twice denied ownership or knowledge of anything in the trunk.[51]

Justice Leaphart noted the distinction between *Blue Chevrolet Pickup* and *Hill* was that garbage placed out for collection remains connected to the individual who placed it there until it is commingled with the garbage of others. Unlike *Hill*, in which the defendant twice disclaimed any connection to the drug-filled duf-

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45. *Id.* at 806–07. Justice Nelson echoed the same sentiments in his Keynote Address at the Honorable James R. Browning Symposium, *The Right to Privacy*, on October 11, 2006. James C. Nelson, *Keynote Address: The Right to Privacy*, 68 Mont. L. Rev. 257 (2007).

46. *Id.* at 807.

47. *Id.* (Leaphart, J., dissenting).

48. *Id.* at 807–08, 810.

49. *Id.* at 808 (citing *State v. Hill*, 94 P.3d 752, 757 (Mont. 2004)).

50. *Blue Chevrolet Pickup*, 116 P.3d at 808 (Leaphart, J., dissenting) (citing *Hill*, 94 P.3d at 757).

51. *Id.* at 808 (citing *Hill*, 94 P.3d at 757–58).

fel bags, Justice Leaphart argued that leaving garbage out for collection amounted to "proprietary renunciation"[52] as opposed to "absolute disavowal."[53]

The final distinction Justice Leaphart drew between *Hill* and *Blue Chevrolet Pickup* was that, in *Hill*, the rental car company granted police permission to search the trunk; this amounted to a voluntary-consent search.[54] In contrast, no consent was sought or given for the garbage search in *Blue Chevrolet Pickup*.[55]

Justice Leaphart next addressed the majority's finding that Pelvit abandoned his garbage by setting it out for collection. Justice Leaphart believed this was error because abandonment is "the giving up of a thing absolutely, without reference to any particular person or purpose."[56] Justice Leaphart argued that when people place their garbage out for collection they are doing so for a particular purpose (collection) and leaving it for a particular person (the garbage collector). Therefore, garbage is not abandoned property. Justice Leaphart attacked the majority's assertion that voluntary relinquishment of one's interest in property is akin to legal abandonment, calling it "vague, sweeping, and entirely unsupported."[57]

Justice Leaphart further argued that the majority's connection of proprietary abandonment with abandonment of privacy was error. According to Justice Leaphart, the majority's reasoning was in line with old abandonment/curtilage analysis, but was long ago superseded by *Katz v. United States*.[58] The Montana Supreme Court's three-prong test for impermissible governmental intrusions is now based on *Katz*, not curtilage.[59]

Justice Leaphart argued that the real question the court should have addressed was whether Pelvit knowingly exposed his garbage to the public, thereby relinquishing his privacy interest. Since Pelvit put his garbage into opaque bags, and then into sealed garbage cans, Justice Leaphart would have held that Pelvit did not knowingly expose his garbage to public view.[60] Justice Leaphart also dismissed the idea that one's expectation of privacy

52. *Id.* (emphasis omitted).
53. *Id.* (emphasis omitted).
54. *Hill*, 94 P.3d at 758.
55. *Blue Chevrolet Pickup*, 116 P.3d at 808 (Leaphart, J., dissenting).
56. *Id.* (emphasis omitted) (citing *Moore v. Sherman*, 159 P. 966, 967 (Mont. 1916)).
57. *Id.*
58. *Katz v. U.S.*, 389 U.S. 347 (1967).
59. *Blue Chevrolet Pickup*, 116 P.3d at 809 (Leaphart, J., dissenting).
60. *Id.* at 809–10.

in garbage is decreased simply because animals or people might rummage through it.[61] Quoting *State v. Hamilton*,[62] Justice Leaphart argued that "the reality that certain people lack respect for the property of another is no reason to diminish the expectation of privacy we protect so jealously in Montana."[63]

Finally, Justice Leaphart challenged the majority's conclusion that Pelvit did not have a reasonable expectation of privacy. Although no search or seizure occurred, the court still placed legal constraints upon how and when law enforcement officers may search and seize garbage. According to Justice Leaphart, this was a logical contradiction. "Either Pelvit had a reasonable expectation of privacy or he did not"; if he did not, then no constraints could be placed upon law enforcement's search and seizure of garbage.[64] Justice Leaphart concluded that Pelvit did have a reasonable expectation of privacy in his garbage.[65]

III. Other Jurisdictions

A. California v. Greenwood

Whether or not a person has a reasonable expectation of privacy in his garbage was a case of first impression before the Montana Supreme Court. However, the issue was previously addressed by the U.S. Supreme Court in *California v. Greenwood*.[66] In *Greenwood*, local law enforcement received information indicating that Greenwood may have been selling drugs. Police received two tips: (1) that a truck would deliver a shipment of illegal drugs to Greenwood's residence; and (2) complaints from a neighbor that cars frequently stopped outside Greenwood's residence late at night for short periods of time. Based on that information, the investigating officer conducted surveillance of Greenwood's home.[67]

In addition to conducting surveillance, the investigating officer also asked the neighborhood garbage collector to retrieve opaque garbage bags from in front of Greenwood's house, and to

61. *Id.*
62. *State v. Hamilton*, 67 P.3d 871 (Mont. 2003).
63. *Blue Chevrolet Pickup*, 116 P.3d at 810 (Leaphart, J., dissenting) (quoting *Hamilton*, 67 P.3d at 876.).
64. *Id.* at 810.
65. *Id.*
66. *Cal. v. Greenwood*, 486 U.S. 35 (1988).
67. *Id.* at 37.

turn the bags over to the police without commingling Greenwood's garbage with the garbage from other residences.[68] Using information obtained from Greenwood's garbage, the officer obtained a warrant to search Greenwood's residence. When the resulting search uncovered illegal drugs, police arrested Greenwood and co-defendant Van Houten.[69]

Relying on *People v. Krivda*,[70] the Superior Court of California dismissed the charges against Greenwood and Van Houten, holding that warrantless trash searches violate the California Constitution and the Fourth Amendment to the U.S. Constitution.[71] The California Court of Appeals affirmed, noting that due to a change in the California Constitution, the fruit of warrantless trash searches could no longer be suppressed.[72] However, since *Krivda* held that warrantless trash searches also violated the Fourth Amendment to the U.S. Constitution, the California Court of Appeals affirmed the Superior Court's decision.[73] Although the California Supreme Court refused to review the decision, the U.S. Supreme Court granted certiorari.[74]

The U.S. Supreme Court held that no reasonable expectation of privacy exists in garbage under the Fourth Amendment to the U.S. Constitution.[75] The Court held that Greenwood had exposed his garbage sufficiently to the public to defeat his claim to Fourth Amendment protection. The fact that Greenwood had left the trash in an area that was easily accessible to the public and could be expected to be picked over by scavengers and children was important to the holding. The Court held that the police could not be expected to ignore evidence of criminal activity that could be observed by any member of the public. Additionally, Greenwood was conveying the trash to a third party, the trash collector, who could reasonably be expected to examine its contents.[76] Therefore, Greenwood had no reasonable expectation of privacy in the in-

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68. *Id.*

69. *Id.* at 38.

70. *People v. Krivda*, 486 P.2d 1262 (Cal. 1971).

71. *Greenwood*, 486 U.S. at 38.

72. *Id.* at 38 (citing Cal. Const. art. I, § 28(d); *In re Lance W.*, 694 P.2d 744 (Cal. 1985)). In a 1982 initiative measure, the State of California "barred the suppression of evidence seized in violation of California law but not federal law." *Id.*

73. *Greenwood*, 486 U.S at 38–39 (citing *People v. Greenwood*, 227 Cal. Rptr. 539, 542 (Cal. App. 4th Dist. 1986); *Krivda*, 486 P.2d at 1267–68).

74. *Id.* at 39.

75. *Id.* at 40–41.

76. *Id.* at 40.

criminating items that he discarded.[77] The Court also noted that, "of those state appellate courts that have considered the issue, the vast majority have held that the police may conduct warrantless searches and seizures of garbage discarded in public areas."[78]

B. Jurisdictions that Follow Greenwood

The majority of states follow the *Greenwood* decision. In those states, people do not have a reasonable expectation of privacy in garbage placed out for collection; therefore, a warrantless search and seizure of that garbage is permitted.[79] A sampling of state cases shows most follow a substantially similar approach to the U.S. Supreme Court's *Greenwood* analysis.

The North Dakota Supreme Court held in *State v. Rydberg*,[80] quoting extensively from *Greenwood*, that the defendant had no reasonable expectation of privacy in her garbage because she placed it out for collection by a third party and left it in a place "where it was exposed it to the general public."[81] In *Rydberg*, police received a tip that the defendant was a cocaine supplier. Police conducted surveillance of the defendant's residence and searched the defendant's garbage three times. The third garbage search yielded paper that tested positive for cocaine residue. Based on the garbage search and the informant's information, the police obtained a warrant to search the defendant's residence.[82]

Similarly, in *State v. Kimberlin*,[83] the Kansas Supreme Court held the defendant did not have a reasonable expectation of privacy in his garbage because he left it adjacent to a public street for a third party to collect.[84] In *Kimberlin*, the county drug task force received a tip that marijuana was being used at the defendant's residence. Officers searched the defendant's garbage on three different occasions and discovered contraband, which was used to ob-

77. *Id.* at 41.

78. *Greenwood*, 486 U.S. at 42 (citations omitted).

79. *E.g. Rikard v. State*, 123 S.W.3d 114, 120 (Ark. 2003); *People v. Hillman*, 834 P.2d 1271, 1277–78 (Colo. 1992); *State v. McCall*, 26 P.3d 1222, 1224–25 (Idaho 2001); *State v. Texel*, 433 N.W.2d 541, 543–44 (Neb. 1989); *State v. Stevens*, 367 N.W.2d 788, 796–97 (Wis. 1985).

80. *State v. Rydberg*, 519 N.W.2d 306 (N.D. 1994).

81. *Id.* at 309–10.

82. *Id.* at 308.

83. *State v. Kimberlin*, 984 P.2d 141 (Kan. 1999).

84. *Id.* at 146.

tain a search warrant.[85] The defendant challenged the legality of the garbage searches.[86]

The Kansas Supreme Court noted that section 15 of the Kansas Bill of Rights is more or less identical to the Fourth Amendment to the U.S. Constitution, and "[i]f conduct is prohibited by the one, it is prohibited by the other."[87] Relying principally upon *Greenwood*, the Kansas Supreme Court held that "[o]nce defendant placed his trash out for collection, adjacent to a public thoroughfare, he defeated any reasonable expectation of privacy in the garbage."[88]

In *State v. DeFusco*,[89] the Connecticut Supreme Court adopted an approach similar to *Greenwood*. In *DeFusco*, the defendant moved to suppress evidence seized from his residence pursuant to a warrant. The warrant was obtained based in part on information acquired during warrantless searches of the defendant's garbage, which had been placed out for collection.[90] The Connecticut Supreme Court held that garbage, when placed out for collection, is subject to the intrusions of various scavengers.[91]

Given the variety of intruders to which garbage is exposed, the Connecticut Supreme Court viewed the defendant's claim of privacy as a question of whether different expectations of privacy exist for different classes of intruders.[92] The court rejected this argument, holding that the reasonableness of the defendant's "expectation of privacy . . . cannot, logically, depend on the source of the intrusion on his or her privacy."[93] The court held that the defendant did not have a reasonable expectation of privacy in his garbage in part because the garbage was placed out for collection, and thus was subject to the intrusions of a variety of actors.[94]

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85. *Id.* at 142–43.

86. *Id.* at 143.

87. *Id.* at 144–45 (quoting *State v. Bishop*, 732 P.2d 765, 772 (Kan. 1987)).

88. *Kimberlin*, 984 P.2d at 146.

89. *State v. DeFusco*, 620 A.2d 746 (Conn. 1993).

90. *Id.* at 748.

91. *Id.* at 751–52.

92. *Id.* at 752. The Court characterized the defendant's claim of state constitutional protection against warrantless law enforcement searches of his garbage as "an argument that a person may harbor different expectations of privacy, all of which are reasonable, as to different classes of intruders." *Id.* The Court dismissed this argument stating "[w]e cannot countenance such a rule. A person's reasonable expectations as to a particular object cannot be compartmentalized so as to restrain the police from acting as others in society are permitted or suffered to act." *Id.*

93. *Id.* at 753.

94. *Id.*

C. *States that Have Found a Right to Privacy in Garbage*

A minority of states have reached the opposite conclusion to the U.S. Supreme Court's *Greenwood* holding, finding that warrantless garbage searches violate their state constitutions.[95]

In *State v. Boland*,[96] the Washington Supreme Court held that law enforcement officers unreasonably intruded upon the defendant's private affairs when they seized his garbage.[97] During the course of a narcotics investigation, police removed garbage bags from the defendant's trash can and brought them back to the station for inspection.[98] The police used evidence found in the trash to secure a search warrant for the defendant's residence.[99]

Under Washington's constitutional provision relating to search and seizure, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[100] Not only does this language differ from that of the federal Constitution, but the Washington Supreme Court has stated that a person's right to privacy under this provision is not restricted to his subjective privacy expectations, but rather depends on "whether the state unreasonably intruded into the defendant's 'private affairs.' "[101] While this provision is more expansive than the federal provision, it is not nearly as explicit as the right of privacy in Montana's Constitution.[102]

In *Boland*, the Washington Supreme Court cited two reasons for not following the U.S. Supreme Court's *Greenwood* decision. First, the *Boland* court rejected *Greenwood*'s analysis regarding garbage left outside the curtilage of the home for collection, noting that under Washington law, "the location of a search is indeterminative [as to] whether the State has unreasonably intruded into an individual's private affairs."[103] Second, the *Boland* court rejected the *Greenwood* holding that society is unwilling to accept an expectation of privacy in garbage because local ordinances mandate the collection of garbage to ensure the proper functioning of a

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95. *E.g. State v. Tanaka*, 701 P.2d 1274, 1277 (Haw. 1985); *State v. Goss*, 834 A.2d 316, 318–19 (N.H. 2003).

96. *State v. Boland*, 800 P.2d 1112 (Wash. 1990).

97. *Id.* at 1116.

98. *Id.* at 1113.

99. *Id.*

100. Wash. Const. art. I, § 7.

101. *State v. Myrick*, 688 P.2d 151, 153–54 (Wash. 1984) (citing *State v. Simpson*, 622 P.2d 1119, 1205 (Wash. 1980)).

102. Mont. Const. art. II, § 10.

103. *State v. Boland*, 800 P.2d at 1112, 1117 (Wash. 1990).

modern society.[104] Therefore, the court found that while people may reasonably expect a garbage collector will collect their garbage, this expectation does not extend to governmental intrusions.[105]

The New Jersey Supreme Court, in *State v. Hempele*,[106] took a slightly different approach, holding that "[a] person has as much of a right to privacy in items concealed in a garbage bag as in items concealed in other opaque containers."[107] In *Hempele*, the defendant's trash was in opaque garbage bags in close proximity to the street when the police seized the garbage bags.[108] A search warrant was issued based on the evidence seized from the defendant's garbage and an informant's tip.[109]

Despite similar language in Article I, paragraph 7, of the New Jersey Constitution[110] and the Fourth Amendment to the U.S. Constitution, the New Jersey Supreme Court stated that in some instances the New Jersey Constitution "affords our citizens greater protection against unreasonable searches and seizures than does the fourth amendment."[111]

The *Hempele* court cited several reasons for electing not to follow *Greenwood*. The court observed that (1) most people have an interest in keeping the contents of their garbage private;[112] (2) there is no "constitutional distinction between 'worthy' and 'unworthy' containers";[113] (3) "[a] privacy expectation in garbage can be reasonable even though the contents are not invulnerable to inspection by outsiders";[114] (4) a reasonable expectation of privacy in the contents of a garbage bag is not negated by relinquishing the garbage bag to a garbage collector;[115] and (5) "[b]y enclosing

104. *Id.*
105. *Id.*
106. *State v. Hempele*, 576 A.2d 793 (N.J. 1990).
107. *Id.* at 810.
108. *Id.* at 796.
109. *Id.*
110. N.J. Const. art. I, ¶ 7 provides,

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

111. *Hempele*, 576 A.2d at 799 (quoting *State v. Novembrino*, 519 A.2d 820, 850 (N.J. 1987)).
112. *Id.* at 803.
113. *Id.* (quoting *U.S. v. Ross*, 456 U.S. 798, 822 (1982)).
114. *Id.* at 805.
115. *Id.* at 807.

their trash in opaque bags, people can maintain the privacy of their garbage even though they may place them in an area accessible to the public."[116]

Similarly, the Vermont Supreme Court held in *State v. Morris*[117] "that the Vermont Constitution protects people from warrantless police searches . . . of secured opaque trash bags" left on a curb for collection.[118] The Vermont Constitution contains very similar language to the Fourth Amendment of the U.S. Constitution.[119] In *Morris*, police officers seized several garbage bags from the curb in front of the defendant's house and used evidence retrieved from the garbage bags to obtain a search warrant of the defendant's residence.[120]

The *Morris* court, like the *Greenwood* Court, focused on the objective reasonableness of a defendant's privacy expectation.[121] Unlike the *Greenwood* Court, however, the *Morris* court emphasized that the garbage bags were opaque and the contents could not been seen from the outside. Therefore, the defendant had manifested an expectation of privacy recognized by society by placing the garbage in opaque bags.[122]

Like *Hempele*, the *Morris* court provided several reasons for its rejection of the *Greenwood* holding. First, the presence of, and knowledge that, scavengers may sift through a person's garbage does not require citizens to accept greater police intrusion into their private affairs.[123] Second, placing garbage out for third-party collection does not constitute consent for that garbage to be searched.[124] Third, the plain view exception does not apply to sealed garbage bags whose contents are concealed from public view.[125]

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116. *Id.*

117. *State v. Morris*, 680 A.2d 90 (Vt. 1996).

118. *Id.* at 92.

119. Vt. Const. ch. 1, art. XI provides:

> That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

120. Morris, 680 A.2d at 93.

121. *Id.* at 96.

122. *Id.* at 95.

123. *Id.* at 99.

124. *Id.*

125. *Id.* at 100.

IV. ANALYSIS

A. *Improper Focus on Property Interest*

The Montana Supreme Court incorrectly mixed the property law concept of abandonment with the search and seizure expectation-of-privacy analysis. Montanans have a heightened expectation of privacy under the Montana Constitution.[126] At the outset of *Blue Chevrolet Pickup*, the Montana Supreme Court stated the law regarding search and seizure in Montana: "[a]n impermissible search and seizure occurs within the meaning of Article II, Section 10 of the Montana Constitution when a reasonable expectation of privacy had been breached."[127] The court also stated the test for determining whether a person has a reasonable expectation of privacy: (1) whether the person had an actual expectation of privacy; (2) whether society is willing to recognize that expectation as objectively reasonable; and (3) the nature of the State's intrusion.[128]

The court's initial analysis properly focused on Pelvit's expectation of privacy, but the court only conducted this analysis to distinguish Pelvit's situation from that faced by the defendant in *Siegal*. Although it noted that Pelvit placed his garbage in opaque bags, and then in trash cans, the court did not analyze whether these steps manifested a subjective expectation of privacy. Instead, the court focused on the fact that Pelvit placed the trash cans at the edge of the alley for collection.[129]

Had the Montana Supreme Court stopped there, and held that Pelvit had no reasonable expectation of privacy because he had knowingly exposed his garbage to the public, the court's analysis would have been consistent with *Greenwood*, and therefore consistent with Montana's *Katz*-based expectation-of-privacy analysis. Instead the court digressed into an analysis of whether or not Pelvit had abandoned his garbage.[130] In doing so, the court applied a property law analysis of abandonment as support for its seasrch-and-seizure holding.

The court found that Pelvit had voluntarily relinquished control of his garbage, likening his voluntary relinquishment of control over his garbage to the legal concept of abandonment, without

126. *State v. Scheetz*, 950 P.2d 722, 724 (Mont. 1997).

127. *Blue Chevrolet Pickup*, 116 P.3d 800, 803 (Mont. 2005) (citing *State v. Smith*, 97 P.3d 567, 570 (Mont. 2004)).

128. *Id.* at 803.

129. *Id.* at 804.

130. *Id.*

citing any precedent for this leap in logic.[131] The court held further that "when a person intentionally abandons his property, that person's expectation of privacy with regard to that property is abandoned as well."[132]

Justice Leaphart challenged the court's analysis in his dissent, calling it "a throwback to the old abandonment-and-curtilage analysis that *Katz* superseded almost four decades ago."[133] For example, the U.S. Supreme Court observed in *Katz* that "the premise that property interests control the right of the Government to search and seize has been discredited."[134]

In his dissent in *Greenwood*, Justice Brennan noted that the Court had rejected the State of California's attempt to characterize trash as "abandoned and therefore not entitled to an expectation of privacy."[135] The Maryland Supreme Court summarized the state of the law after *Greenwood*:

> The law that has emerged since *Greenwood* is essentially the same as it was before that case was decided, although, as a general rule, it is based less on the property concept of abandonment than on the conclusion that, by depositing the trash in a place accessible to the public, for collection, the depositor has relinquished any reasonable expectation of privacy.[136]

Nonetheless, the Montana Supreme Court resurrected this abandonment concept in *Blue Chevrolet Pickup*.

In *Blue Chevrolet Pickup*, the Montana Supreme Court stated that in order to determine whether someone has abandoned property, a court must look to that person's intent.[137] Intent may be ascertained from the acts of the owner.[138] The court held Pelvit's act of placing the trash in the alleyway for collection was an indication of his intent to abandon, and that this act was irreconcilable with Pelvit's claimed expectation of privacy.[139]

The court's line of analysis, based on proprietary abandonment, if followed to its logical conclusion, would produce absurd

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131. *Id.*

132. *Id.* (citations omitted).

133. *Blue Chevrolet Pickup*, 116 P.3d at 809 (Leaphart, J., dissenting) (citing Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* vol. 1, § 2.6(c), 689–90 (4th ed., West 2004); *Katz v. U.S.*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

134. *Katz*, 389 U.S. at 353 (quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967)).

135. *Cal. v. Greenwood*, 486 U.S. 35, 51 (1988) (Brennan, J., dissenting).

136. *State v. Sampson*, 765 A.2d 629, 634 (Md. 2001).

137. *Blue Chevrolet Pickup*, 116 P.3d at 804.

138. *Id.*

139. *Id.*

results. As Justice Leaphart argued, if a person leaves a letter in a mail box to be picked up by the postman, does he or she abandon a privacy interest in the letter? No.[140] An individual's expectation of privacy is a separate and distinct concept from his or her ownership interest in a particular piece of property.

The Montana Supreme Court needlessly muddied the waters of search and seizure law by applying an unnecessary and out-of-date property analysis. The court could have reached the same conclusion by holding that Pelvit had knowingly exposed his garbage to the public, and, therefore, it was not protected. Instead, the court blended the concept of privacy interest and the concept of proprietary abandonment. This will only lead to future confusion when the issue comes up again.

B. *Illogical and Inconsistent Restrictions on Law Enforcement*

The most puzzling turn in *Blue Chevrolet Pickup* occurred when the court, after holding that no search or seizure had taken place within the meaning of the Montana Constitution, nonetheless restricted when law enforcement officers may lawfully search garbage. Presumably, the court dismissed Pelvit's claimed expectation of privacy based on the first prong of the privacy analysis, holding that Pelvit did not have an actual expectation of privacy because he abandoned his garbage.[141] However, the court nonetheless proceeded to the second prong of the analysis, assuming *arguendo* that Pelvit had an actual expectation of privacy in his garbage. The court determined that, because Pelvit abandoned his garbage, he did not have a reasonable expectation of privacy that society was willing to accept.[142] If society is not willing to recognize an expectation of privacy as reasonable, there is search within the contemplation of the Montana Constitution.[143]

In the first sentence of the next paragraph, however, the court contradicted its own reasoning, stating "[w]hile we do not believe the public would accept as reasonable an expectation of privacy in abandoned garbage, neither do we believe the public would be entirely comfortable with the image of police officers overtly foraging through curbside garbage."[144] Therefore, the court determined

140. *Id.* at 809 (Leaphart, J., dissenting) (citing *Greenwood*, 486 U.S. at 55 (Brennan, J., dissenting)).

141. *Id.* at 804 (majority).

142. *Id.* at 805.

143. *Blue Chevrolet Pickup*, 116 P.3d at 805.

144. *Id.*

that, in exchange for the public's compliance with local refuse ordinances requiring citizens to "abandon" their garbage for collection, the court would place limitations upon the seizure of garbage by law enforcement officers.[145]

In this one paragraph, the court's reasoning defies logic. While this characterization may seem harsh, this paragraph confuses everything the court had discussed up to that point. If, as the court asserted, Montanans have no reasonable expectation of privacy in their garbage, and therefore no search has occurred, how can limitations be placed upon law enforcement's ability to collect "abandoned" garbage? If it truly is not a search, then there is no need and, more importantly, no justification for placing restrictions on law enforcement's ability to examine garbage.

The questions only multiply from there. The court confidently expressed its conclusion that society is not willing to recognize an expectation of privacy in "abandoned" garbage. The court then proceeded to throw this conclusion into doubt by expounding its belief that Montanans would be quite leery of police rummaging indiscriminately through garbage cans across the State: "Nor do we believe the public would embrace the idea of police officers conducting random and arbitrary fishing expeditions through garbage cans, in the hopes of finding contraband."[146] This concern would certainly seem to call into question the court's assertion that society is not willing to accept an expectation of privacy in "abandoned" garbage.

The statements that society is not willing to recognize an expectation of privacy in garbage and the public would be uncomfortable with the idea that police can search through garbage cans indiscriminately are contradictory. Both statements are speculation on the court's part as to what the public's reaction would be to Pelvit's claim of privacy in his garbage and the thought of indiscriminate police garbage searches.

The restrictions the court placed upon police use were borrowed from the Indiana Supreme Court's ruling in *Litchfield v. State*.[147] The Montana Supreme Court stated that the search in *Litchfield* was upheld on abandonment grounds, but the *Litchfield* court attached certain limitations to the warrantless seizure of garbage.[148] In *Litchfield*, the defendant's address was on a list of

145. *Id.*
146. *Id.*
147. *Id.* (citing *Litchfield v. State*, 824 N.E.2d 356, 364 (Ind. 2005)).
148. *Id.*

Indiana addresses that received shipments from a gardening-supply store that advertised in *High Times*, a publication about marijuana. Twice, Indiana State troopers went to the defendant's residence and retrieved garbage bags from trash cans set out for collection. An examination of the bags' contents revealed marijuana leaves and drug paraphernalia. Based on their search, police obtained a search warrant, which resulted in a search yielding fifty-one marijuana plants.[149]

Despite the factual parallels between *Litchfield* and *Blue Chevrolet Pickup*, the Montana Supreme Court failed to note an important distinction—Indiana does not follow the *Katz* expectation-of-privacy test to determine whether a search has occurred.[150] Instead, the Indiana Supreme Court looks to the reasonableness of the police conduct under the totality of the circumstances.[151] When evaluating the totality of the circumstances, the Indiana Court looks at "the degree of intrusion into the [person's] ordinary activities and the basis upon which the officer selected the subject" to be searched.[152] Ultimately, the reasonableness of a search or seizure under Indiana law comes down to "a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs."[153]

Applying the above analysis, the Indiana Supreme Court held that when the defendant placed his garbage out for collection, he effectively "ceded all rights in it" and as a result, "no material intrusion into [his] ordinary activities" occurred.[154] The Indiana Supreme Court ultimately held that

> a search of trash recovered from the place where it is left for collection is permissible under the Indiana Constitution, but only if the investigating officials have an articulable basis justifying reasonable suspicion that the subjects of the search have engaged in violations of law that might reasonably lead to evidence in the trash.[155]

This is clearly a different standard from the three-pronged *Katz*-based analysis employed by the Montana Supreme Court. It seems curious that the Montana Supreme Court would borrow

149. *Litchfield*, 824 N.E.2d at 357–58.
150. *Id.* at 359.
151. *Id.*
152. *Id.* at 360.
153. *Id.* at 361.
154. *Id.* at 364.
155. *Litchfield*, 824 N.E.2d at 357.

from a case that is applying a different standard and analysis from that performed under Montana law. Even if the court only looked to *Litchfield* for the restrictions the Indiana court placed on law enforcement, the Montana Supreme Court's imposition of those same restrictions was inconsistent with the its own reasoning and conclusion in *Blue Chevrolet Pickup*.

V. Three Alternative Solutions

The holding in *Blue Chevrolet Pickup* sends mixed messages. If the court had been logically consistent, it could have justifiably reached any of the following three holdings. First, the court could have fully embraced Big Brother, holding Pelvit had no reasonable expectation of privacy in his garbage that society is willing to accept, thereby allowing unrestricted law enforcement garbage searches. Second, the court could have fully rejected Big Brother, holding Pelvit did have a reasonable expectation of privacy in his garbage that society is willing to accept and, therefore, all garbage searches would require a warrant. Third, the court could have partially embraced Big Brother, holding Pelvit did have a reasonable expectation of privacy in his garbage, but that expectation is not entitled to the same level of protection as his home. In this third approach, the restrictions on law enforcement announced by the court would serve as the prerequisites to an exception to the warrant requirement.

With the first two approaches, the question becomes whether the court is more confident that most Montanans would not find an expectation of privacy in garbage reasonable or that most Montanans would be uncomfortable with the idea of the police searching their garbage with impunity. An affirmative response to the first inquiry leads to a *Greenwood* analysis. In comparison, an affirmative answer to the latter inquiry would require the court to follow a *Hempele* analysis.

A. Fully Embracing Big Brother

Without substantially changing its analysis in *Blue Chevrolet Pickup*, the Montana Supreme Court could have followed *Greenwood* and still found that Pelvit had exposed his garbage to the public by placing it out for collection, because scavengers and children are known to rummage through garbage. The court went to great pains to disabuse Pelvit of the notion that he had a reasonable expectation of privacy in his garbage. The court could have

left the analysis there and reached a similar conclusion that reached by the U.S. Supreme Court in *Greenwood*, without entering into the proprietary abandonment analysis. Such an approach would not have diminished Montana's heightened right to privacy.

The full embrace would have placed Montana within the comfortable majority of jurisdictions in which courts have found no reasonable expectation of privacy in garbage set out for collection. The key difference between a full embrace of Big Brother and the Montana Supreme Court's actual holding in *Blue Chevrolet Pickup*, is that fully embracing Big Brother places no restrictions on law enforcement's ability to perform searches on garbage left out for collection. Adopting a full embrace, however, would leave the Montana Supreme Court unable to assuage the apparent discomfort they believe most Montanans would feel toward limitless garbage searches.

B. *Rejecting Big Brother*

If the Montana Supreme Court believes that the sight of Big Brother picking through their garbage is too Orwellian for most Montanans' taste, then the application of a *Hempele* analysis is in order. This analysis would lead the court to hold that Pelvit had a reasonable expectation of privacy in his garbage requiring police to obtain a search warrant prior to searching the garbage.

It seems unlikely that the court would adopt a *Hempele* approach when the majority in *Blue Chevrolet Pickup* found that there was no reasonable expectation of privacy in garbage.[156] While this approach is unlikely to gain favor with the court, it is important to note that the fears about government access to the information contained in garbage, expressed by Justice Nelson in his concurring opinion, are not completely unfounded, nor necessarily overstated, as demonstrated by *State v. Hoesly*.[157]

In *Hoesly*, Portland (Oregon) police received a tip that the defendant—herself a Portland police officer—was using drugs, prompting an investigation.[158] In the course of their investigation, police seized the defendant's garbage that had been placed out for collection. While searching through the garbage, police found small amounts of leafy material and a pipe that bore traces

156. *Blue Chevrolet Pickup*, 116 P.3d 800, 805 (Mont. 2005).

157. *State v. Galloway*, 109 P.3d 383 (Or. App. 2005) (*State v. Hoesly* was consolidated with *State v. Galloway* in one opinion).

158. *Id.* at 384.

of powdery residue.[159] They also recovered a blood-soaked tampon, which the police sent to the police laboratory for testing for narcotics, DNA, and seminal fluid.[160] The tests came back negative for narcotics and seminal fluid, but DNA was present on the tampon and pipe.[161]

The results of the garbage search helped police obtain warrants to search the defendant's residence and take a sample of the defendant's DNA. The DNA test showed the defendant's DNA matched the DNA found on the tampon and the pipe.[162] The Oregon Court of Appeals affirmed the lower court's decision to invalidate the search as infringing upon the defendant's possessory interest in her garbage can and its contents.[163]

As *Hoesly* demonstrates, the threat of so called "trash dive" searches by law enforcement, revealing highly sensitive personal information, is very real. With information serving as the new world currency, and so much information available in garbage—from DNA to identification numbers, medical records to financial records—identifying a privacy interest in garbage seems less an act of paranoia and more grounded in reality. While resolving the question presented remains the paramount concern of judges, the methodical march of scientific advancement should also be fixed in their minds when drafting their opinions. Perhaps employing Montana's heightened right to privacy makes sense in this case in order to be ahead of the technological curve, rather than playing catch-up.

C. The Half-Embrace of Big Brother

Although application of either of the previous two approaches would create clear and consistent law, the court's holding indicates it finds itself torn between the competing interests of legitimate law enforcement practices and a citizen's right to privacy. The court's attempt to split the difference in *Blue Chevrolet Pickup* resulted in a logical and legal inconsistency that is more puzzling than practical.

The court did not wish to impede effective and necessary law enforcement, yet was justifiably troubled by what could result

159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Galloway*, 109 P.3d at 389.

from fully embracing Big Brother. The Montana Supreme Court could have, and should have, found a compromise by holding that while Pelvit did have a reasonable expectation of privacy in his garbage, that expectation of privacy was lesser than the protection of the home, allowing for the creation of a warrant exception. In carving out this exception, the search of garbage placed out for collection would be permitted so long as the police have a particularized suspicion, and the garbage is retrieved in substantially the same way as it ordinarily would be collected. This approach is not without precedent.[164] Although it may be fraught with difficulties, creating a warrant exception could represent the ideal compromise between the previous two approaches and come closest to approximating exactly what the court sought to achieve in *Blue Chevrolet Pickup*.

In *State v. Tackitt*, the Montana Supreme Court crafted just such a compromise. *Tackitt* discussed whether a drug-detecting canine sniff of a parked vehicle in a public area constituted a search under the Montana Constitution.[165] Based on a corroborated tip that Tackitt was selling drugs, an officer using a drug-sniffing dog conducted a sniff survey of Tackitt's vehicle parked at his residence.[166] The dog alerted on the trunk of the vehicle. Based on the tip and the dog's alert, a judge issued a warrant to search Tackitt's residence and vehicle.[167]

Tackitt claimed the dog sniff was a search that violated his privacy rights.[168] The court held that Tackitt had a "reasonable expectation of privacy in the enclosed and concealed spaces of his vehicle," no matter where the vehicle was parked.[169] Therefore, the canine sniff of Tackitt's vehicle constituted a search under the Montana Constitution.[170]

However, because a dog sniff is minimally intrusive, the court created a warrant exception, allowing for the use of a canine to detect odors freely exposed to the public without a warrant, so long as particularized suspicion exists prior to the search.[171] The court stated that this compromise was in line with a previous case which held that "under limited circumstances, the particularized

164. *See e.g. State v. Tackitt*, 67 P.3d 295, 302 (Mont. 2003).
165. *Id.* at 297.
166. *Id.* at 297–98.
167. *Id.* at 298.
168. *Id.*
169. *Id.* at 300–01.
170. *Tackitt*, 67 P.3d at 300–01.
171. *Id.* at 302-03.

suspicion standard properly balances individual privacy and government law enforcement interests."[172]

Tackitt provides the perfect blueprint for constructing a compromise position in *Blue Chevrolet Pickup*. Reaching this compromise would require the court to hold that the police examination of the garbage was a search. In other words, Pelvit did in fact have an expectation of privacy in his garbage, one that society is willing to recognize as objectively reasonable. The reasoning required for holding that Pelvit had a reasonable expectation of privacy in his garbage would be easy to reach once the court discarded its outmoded abandonment analysis.

With the focus restored to Pelvit's expectation of privacy, the facts of *Blue Chevrolet Pickup* lend themselves to a *Hempele*-like series of holdings. First, "there is no constitutional distinction between 'worthy' and 'unworthy' containers,"[173] so garbage bags should receive the same treatment as the concealed spaces of a vehicle in *Tackitt*. Second, "[a] privacy expectation in garbage can be reasonable even though the contents are not invulnerable to inspection by outsiders."[174] Third, a reasonable expectation of privacy in the contents of a garbage bag is not negated by disposing of the garbage bag to a garbage collector.[175] Lastly, "[b]y enclosing their trash in opaque bags, people can maintain the privacy of their garbage even though they may place them in an area accessible to the public."[176]

Had the court established that Pelvit had a reasonable expectation of privacy, the next step would have been to ask whether or not society is willing to recognize that expectation as reasonable. In order to legitimize Pelvit's privacy interest in his garbage, the court would have to hold that most Montanans are not comfortable with the idea of law enforcement rummaging through their garbage with impunity. That holding, in turn, would allow the court to find that society is willing to recognize Pelvit's privacy interest in his garbage as objectively reasonable—making the warrantless "trash dive" a search within the meaning of the Montana Constitution.

172. *Id.* at 302 (citing *Hulse v. Mont. Dept. of Just.*, 961 P.2d 75, 86–87 (Mont. 1998)).

173. *State v. Hempele*, 576 A.2d 793, 803 (N.J. 1990) (quoting *U.S. v. Ross*, 456 U.S. 798, 822 (1982)).

174. *Id.* at 805.

175. *Id.* at 806.

176. *Id.* at 807.

Once Pelvit's privacy interest in his garbage had been established, the court could have followed the *Tackitt* analysis. According to *Tackitt* the court could have analyzed the nature of the state's intrusion. While the privacy interest in garbage is legitimate, the intrusion into a person's garbage placed out for collection is minimal because of the purpose of placing garbage out for collection and the fact that the garbage is being transferred to a third person. Placing garbage at the curbside does not eliminate a person's privacy interest. However, it can be an important mitigating factor which the court may rely upon as justification for using the particularized suspicion standard to properly balance the competing interests of law enforcement and an individual's right to privacy.

After coming to this conclusion, the court could then have created a warrant exception by imposing as prerequisites to any warrantless "trash dive" search the two restrictions it announced in *Blue Chevrolet Pickup*. First, for the seizure to be reasonable, the garbage "must be quickly retrieved . . . 'in substantially the same manner as the trash collector would take it.' "[177] Second, "officers must have an articulable individualized suspicion that a crime is being [or has been] committed," similar to a "*Terry* Stop," to justify the garbage seizure.[178]

If the court were to adopt such a holding, it would not alter the manner in which law enforcement conducts "trash dives." The prerequisites for a legal warrantless search under this scenario are identical to the restrictions the court imposed upon law enforcement in *Blue Chevrolet Pickup*. It would successfully split the difference between the all or nothing *Greenwood* and *Hempele* analyses by creating an approach that better balances the needs of legitimate law enforcement and a citizen's right to privacy. This analysis most closely approximates the balance the court hoped to achieve in *Blue Chevrolet Pickup*, while providing a clear and consistent rule for prosecutors and defense attorneys.

VI. Conclusion

The Montana Supreme Court's holding in *Blue Chevrolet Pickup* was logically inconsistent and left search and seizure law in a precarious position by restricting law enforcement's ability to

177. *Blue Chevrolet Pickup*, 116 P.3d 800, 805 (quoting *Litchfield v. State*, 824 N.E.2d 356, 363 (Ind. 2005)).

178. *Id.* at 805 (citing *Litchfield*, 824 N.E.2d at 364).

perform a "non-search." This inconsistency was born of the court's reluctance to adopt the existing jurisprudence from other jurisdictions either allowing warrantless garbage searches or requiring law enforcement to obtain a warrant to conduct the search.

The most logical way to eliminate this inconsistency without effectively changing the impact of the court's holding in *Blue Chevrolet Pickup* is for the court to hold that Pelvit had a expectation of privacy that society is willing to recognize. By so holding, the court could follow the path it blazed in *Tackitt*, by carving out a warrant exception to allow warrantless searches of garbage placed out for collection. The prerequisites to the warrant exception would provide the necessary protection of citizens' right to privacy without unnecessarily encumbering legitimate law enforcement. Such a holding would maintain the carefully carved compromise—the half-embrace of Big Brother—the court sought in *Blue Chevrolet Pickup*, while creating clear and consistent law.