California v. Greenwood: Discarding the Traditional Approach to the Search and Seizure of Garbage

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NOTES

CALIFORNIA V. GREENWOOD: DISCARDING THE TRADITIONAL APPROACH TO THE SEARCH AND SEIZURE OF GARBAGE

The fourth amendment¹ to the United States Constitution provides courts with an ambiguously worded framework upon which to build a coherent and functional system of criminal adjudication.² The amendment proscribes "unreasonable searches and seizures" by government authorities, and permits the issuance of search warrants only after a showing of probable cause.³ In applying the fourth amendment to particular cases, the United States Supreme Court has been forced to interpret the word "reasonable"⁴ and further, to establish a nexus between the warrant requirement clause and the seemingly unrelated clause prohibiting unreasonable searches and seizures⁵ of "persons, houses, papers, and effects."⁶ After nearly two centuries, the Court has failed to achieve a "clear vision"⁷ of fourth amendment jurisprudence.⁸

Modern technological advances and a more mobile society have added to the countless difficulties confronting the Court in its fourth amendment in-

¹. U.S. CONST. amend. IV. This amendment provides that:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.


³. U.S. CONST. amend. IV.

⁴. "Reasonable" is one of the most indefinite but commonly used words in legal language. See, e.g., Tomkovicz, Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province, 36 HASTINGS L.J. 645, 687 (1985).

⁵. See 1 W. E. RINGEL, supra note 2, at § 1.1.

⁶. U.S. CONST. amend. IV.

⁷. See Tomkovicz, supra note 4, at 647 (commenting on the lack of a clear vision of fourth amendment privacy).

⁸. Id.
terpretation. Largely as a result of such technological advances, the Court has shifted from an analysis based on property rights to one based on privacy interests, in an effort to determine the interests worthy of fourth amendment protection. The Court thus has ruled on contemporary issues such as automobile searches, aerial surveillance, electronic surveillance and the use of sensory enhancement devices. As a result of the theoretical shift brought on by the Court's decisions in these areas, the Court recently addressed the search and seizure aspect of another, albeit more ancient, result of civilized living: garbage.

In California v. Greenwood, the Supreme Court finally reached the garbage search issue. The Court ruled that an individual does not have a reasonable expectation of privacy in refuse placed on the street for collection. In Greenwood, police suspected respondents Billy Greenwood and Dyanne Van Houten of narcotics trafficking, based upon surveillance and reliable information. Police directed the neighborhood trash collector to empty his truck and pick up the opaque plastic bags from the curb in front of Greenwood's residence. Without a warrant, police searched the bags and found evidence of narcotics use. Based on their findings, police secured a warrant, searched Greenwood's house, and found substantial amounts of hashish and cocaine. Police arrested Greenwood and Van Houten on narcotics charges. Both were released after posting bail, and both continued their illicit activities. As a result of a subsequent trash

10. See infra notes 53-90 and accompanying text.
12. See infra text accompanying notes 91-93.
13. See infra text accompanying notes 77-82, 105-12.
15. The garbage search issue had come before the United States Supreme Court in California v. Rooney, 107 S. Ct. 2852 (1987) (per curiam). In Rooney, the Court ruled that because the California Supreme Court had not addressed the garbage search issue, a United States Supreme Court decision would be "premature." Id. at 2855.
16. See infra text accompanying notes 84-86.
18. Id. at 1627. A neighbor alerted police to heavy late night traffic at the Greenwood residence, with vehicles usually staying for only a matter of minutes. Laguna Beach police officer Jenny Straener began her own surveillance of the residence and noticed the same late night and early morning activity. Id.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
search, conducted in the same manner, both were arrested again.\textsuperscript{24} 

Relying on \textit{People v. Krivda},\textsuperscript{25} which held that warrantless trash searches violated the California Constitution\textsuperscript{26} and the fourth amendment to the United States Constitution,\textsuperscript{27} the California Superior Court dismissed charges against Greenwood and Van Houten.\textsuperscript{28} The Court of Appeal affirmed,\textsuperscript{29} stating that although warrantless trash searches no longer violated state law under \textit{Krivda},\textsuperscript{30} use of evidence seized as a result of such searches violated federal law.\textsuperscript{31} The California Supreme Court denied review, and the United States Supreme Court granted certiorari.\textsuperscript{32}

Justice White's majority opinion\textsuperscript{33} reversed the California Court of Appeal, ruling that society does not accept as objectively reasonable a subjective expectation of privacy in trash left on the street.\textsuperscript{34} The Court determined that trash placed outside the curtilage\textsuperscript{35} of the home is sufficiently open to public view to bar the respondents' fourth amendment claim.\textsuperscript{36}

A dissenting Justice Brennan,\textsuperscript{37} in a lengthy and spirited exegesis, criticized the majority for its disregard of previous court rulings regarding closed container searches,\textsuperscript{38} and expressed concern about the individual privacy

\begin{thebibliography}{9}
\bibitem{24} \textit{Id.} at 1627-28.
\bibitem{27} \textit{Krivda}, 8 Cal. 3d at 624, 504 P.2d at 557, 105 Cal. Rptr. at 521.
\bibitem{28} \textit{Greenwood}, 108 S. Ct. at 1628.
\bibitem{30} \textit{See CAL. CONST.} art. I, \S 28(d). The California Constitution was amended in 1982 to bar the suppression of evidence seized in violation of state but not federal law.
\bibitem{31} \textit{Greenwood}, 182 Cal. App. 3d at 734, 227 Cal. Rptr. at 541.
\bibitem{33} The Court was divided 6-2. \textit{Greenwood}, 108 S. Ct. at 1627; \textit{see infra} note 211.
\bibitem{34} \textit{Greenwood}, 108 S. Ct. at 1628.
\bibitem{35} Curtilage is a common law concept that extended the protection of burglary laws to the areas immediately surrounding a house. \textit{See United States v. Dunn}, 480 U.S. 294, 300 (1987). Although the Supreme Court often employed this concept in fourth amendment claims involving trespass upon real property, there had never been any criteria for determining the precise boundaries of curtilage. In \textit{Dunn}, a case involving a warrantless police entrance into a barn where the respondent was producing controlled chemical substances, the Court proposed four factors for resolving curtilage questions:
\begin{enumerate}
\item the proximity of the area claimed to be curtilage to the home,
\item whether the area is included within an enclosure surrounding the home,
\item the nature of the uses to which the area is put, and
\item the steps taken by the resident to protect the area from observation by people passing by.
\end{enumerate}
\textit{Id.} at 301. Justice White, writing for the majority, suggested that these factors are not to be construed as controlling in every situation, but rather to be used as "analytical tools." \textit{Id.}
\bibitem{36} \textit{Greenwood}, 108 S. Ct. at 1628.
\bibitem{37} Justice Brennan was joined in his dissent by Justice Marshall. \textit{Id.} at 1627.
\bibitem{38} \textit{Id.} at 1632-33 (Brennan, J., dissenting). For a discussion of the closed container search issue, \textit{see infra} text accompanying notes 120-50.
\end{thebibliography}
and public policy implications of Court-sanctioned warrantless trash searches. The dissent deemed the search of the respondents' trash illegal because of the often private nature of the contents in trash containers, an interest, according to the dissent, worthy of constitutional protection.

Despite the provocative issues Justice Brennan raised, a review of state and federal court opinions illustrates that the decision in California v. Greenwood was nearly a foregone conclusion from the outset. Nevertheless, the garbage search issue always has proved troublesome for courts, particularly since the Supreme Court's landmark ruling in Katz v. United States, that the fourth amendment protects "privacy, not property." Courts thus were given a new and more amorphous standard by which to adjudicate fourth amendment search and seizure claims, including trash searches.

This Note first will examine the property-based interpretations of the fourth amendment as the amendment applies to warrantless searches and seizures. Next, this Note will discuss the reasonable expectation of privacy test promulgated in Katz, and how this test has affected search and seizure jurisprudence regarding closed container searches over the past two decades. This Note then will examine the unique analyses courts have used in dealing with abandoned property and refuse. Further, this Note will analyze the decision in California v. Greenwood, its impact on the Katz test, and the issues the dissent raised. This Note will conclude that although the fourth amendment primarily protects the reasonable expectation of privacy, the Court erroneously failed to consider the abandoned property analysis developed by other courts as a legitimate means for denying fourth amendment protection.

I. PROPERTY-BASED FOURTH AMENDMENT ANALYSIS:
A VICTIM OF PROGRESS

A. The English Roots of the American Doctrine

In 1765, the English decision Entick v. Carrington laid the foundation for the American approach to challenging searches conducted under govern-
ment authority. 47 Entick established the test for determining the legitimacy of a search: a balance of public necessity versus the individual rights of the person being searched. 48 These individual rights, however, were based on the common law action of trespass, 49 and thus the concept of illegal search and seizure was based upon individual property rights. 50 American courts later adopted this property-based method of adjudicating unreasonable government searches because it provided a concrete and simple standard to follow, and the language of the Constitution provided for no other analysis. 51 Under the property-based standard, protected areas were those provided in the fourth amendment itself: "[P]ersons, houses, papers, and effects." 52

B. The Early American Approach: A Literal Interpretation

The seminal American search and seizure case was Boyd v. United States, 53 a case involving the forced production of the petitioner's private papers, which allegedly tied him to import duty fraud. 54 In Boyd, the Supreme Court formally accepted the trespass or property-based fourth amendment standard because "papers" are property that the fourth amendment protects, and a warrant is required to search such property. 55 The

47. Wilkins, supra note 9, at 1083.
48. See id.
50. See Wilkins, supra note 9, at 1083.
51. Id. at 1083-85.
52. 1 W. R. LaFave, supra note 42, § 2.1(a).
53. 116 U.S. 616 (1886).
54. Id. at 617-18.
55. Justice Bradley cited Lord Camden's opinion in Entick:
The great end for which men entered society was to secure their property. . . . Every invasion of private property, be it ever so minute, is a trespass. . . . It is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass. . . . Papers are the owner's goods and chattels. They are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection. . . .
Id. at 627-28

Boyd stands as one of the most important and influential fourth amendment decisions, largely because the Court, for the first time, recognized a nexus between the fourth and fifth amendments. After citing a lengthy passage from Entick, Justice Bradley observed:
The principles laid down in [the Entick] opinion affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions on the part of the government and its employ[e]es of the sanctity of a man's home and the privacies of life. . . . [I]t is the invasion of his indefeasible right of personal security, personal liberty and private property . . . -it is the invasion of this sacred right which underlies and constitutes the essence of [Entick]. . . . [A]ny forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict
decision was based on the petitioner's property interest in the papers;\(^5\) the Court's reasoning in this respect appears rudimentary today. The Court stated that if the papers involved were stolen, the petitioner would have no fourth amendment claim because no property interest existed in the goods.\(^5\)

Emphasis on physical invasion continued into the twentieth century.\(^5\) \textit{Olmstead v. United States},\(^5\) a case in which a telephone wiretap gathered incriminating evidence of a prohibition era liquor procurement and sales business, clearly set out the Court's equation of property rights with fourth amendment rights.\(^6\) The Supreme Court ruled that the installation of a listening device without any trespass upon property of the defendants\(^6\) did not amount to a warrantless search, plainly illustrating the Court's rigid adherence to a property-based fourth amendment theory.\(^6\)

The Court applied this property-based search and seizure doctrine again in \textit{Goldman v. United States},\(^6\) in which a "detectaphone" placed against the wall of an office was held not to constitute an unlawful search, because placement of the device against the common wall involved no physical inva-
sion of the petitioner's office. The Court simply refused to find any practical distinction between the use of a detectophone and an *Olmstead* wiretap.

As *Olmstead* and *Goldman* illustrate, the property-based standard in search cases survived technological advancements allowing government authorities to obtain evidence of criminal activity without risking physical trespass. Although the Court freed itself somewhat of the strictures of the property-based standard by extending the range of areas in which a person could have a property interest worthy of constitutional protection, such as hotel rooms, offices, and in limited circumstances, automobiles, electronic surveillance provided the Court with the dilemma of how to apply the property-based standard to situations in which the government perpetrated a different, though no less furtive, type of invasion.

**C. Recognizing the Privacy Interest**

The Court hinted at its growing frustration with the use of the property theory in resolving contemporary search issues in *Silverman v. United States*, a case that foreshadowed the end of the property-based standard. In *Silverman*, police placed a "spike mike" listening device into the party wall of an attached home, and listened to incriminating conversations regarding a gambling operation. Because the device touched the heating ducts of the petitioner's home, effectively conducting sound, the Court found a trespass under the *Olmstead* and *Goldman* analyses. *Silverman* did not overrule the factually similar *Goldman* case, and the Court "decline[d] to go beyond [*Goldman*], by even a fraction of an inch." The Court cautioned, however, that fourth amendment rights are not measurable in terms of the inveterate tort or real property common laws, thus expressing dissatisfac-

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64. *Id.* at 134-35.
65. *Id.* at 135.
66. See supra text accompanying notes 59-65.
67. 1 W. R. LAFAVE, supra note 42, § 2.1(a).
69. United States v. Lefkowitz, 285 U.S. 452 (1932). *Lefkowitz* is an early example of the Court's recognition of a fourth amendment "right to privacy." *Id.* at 464. But as in *Boyd*, privacy was recognized as an important interest within the bounds of a physical place, and it was not elevated to the level of a new constitutional standard.
72. *Id.* at 506.
73. *Id.* at 506-07.
74. *Id.* at 512.
75. *Id.* at 511. The Court cited to *Jones v. United States*, 362 U.S. 257, 266 (1960). *Jones* involved a warrant search by police of the petitioner's friend's apartment for illegal narcotics. The principle issue in the case was whether the petitioner had standing to make a motion to suppress the evidence found. The Court rejected the importation into constitutional search
tion with a constitutional interpretation that does not provide protection beyond the notions of a physical property trespass. The Court delivered the final blow to the property-based standard seven years later, in *Katz v. United States*.

II. FROM PROPERTY TO PRIVACY: *Katz* AND THE NEW TECHNOLOGIES

A. *Katz* and Its Implications

In *Katz v. United States*, the Supreme Court resoundingly rejected the property-based interpretation of the fourth amendment in favor of a new privacy-based standard for fourth amendment search analysis. *Katz* involved the placement of an electronic bugging device upon a telephone booth in which the petitioner was communicating wagering information in violation of a federal statute. The Court overruled both *Olmstead* and *Goldman*, because of the erosion of the trespass doctrine in subsequent decisions such as *Silverman*. The Court recognized that fourth amendment protection extends to oral communication, and formally adopted the dicta in *Silverman* that criticized the property law approach to fourth amendment claims. The Court emphasized that "[t]he Fourth Amendment protects people, not places." After *Katz*, an area cannot be subject to a warrantless search if an individual holds a privacy interest in that area, regardless of the individual's property rights in the area. Justice Harlan, in a brief concurring opinion, formulated the two-prong reasonable expectation of privacy test now used to

and seizure jurisprudence of common law distinctions between licensees, invitees, and guests. See id. at 266.


77. Id. Nevertheless, Justice Stewart, author of the majority opinion, cited instances in which the Court has found constitutionally protected interests in areas outside the home, such as business offices, friends' apartments, and taxicabs; and remarked: "One who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." Id. at 352. But Justice Stewart emphasized that it is no longer the place that is determinative of fourth amendment protection. Id. at 351.

78. Id. at 351-52. Justice Stewart, cautioned, however, that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy,' . . . the protection of a person's general right to privacy. . . . is, like the protection of his property and his very life, left largely to the law of the individual States." Id. at 350-51 (emphasis added).

79. Id. at 348.

80. Id. at 353.

81. Id.

82. Id. at 351.

83. See generally id. at 351-53. Justice Stewart writes: "One it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches
evaluate the reasonableness of searches and seizures. This test requires that: one, a person must first exhibit an actual expectation of privacy in the given area or interest; and two, this expectation must be one that society accepts as reasonable. The Court analyzes the first prong subjectively, while the second prong is analyzed according to objective factors. Numerous cases following the decision illustrate the Supreme Court's reliance on the Katz standard in circumstances that never before would have received fourth amendment consideration. But many of these cases also show how the Katz rule has proved difficult in application. Whereas the property-based standard often hinged upon the relatively simple concrete issue of physical trespass, the reasonable expectation of privacy standard requires more abstract determinations of both a criminal defendant's expectations of privacy, and society's views. Thus, rather than giving courts a practical tool for adjudicating search issues, the Katz standard has produced a confused and fragmented jurisprudence regarding searches.

B. Narrowing Katz: Unreasonable Expectations

A number of cases show the Court's reluctance to give full force to the privacy interests set forth in Katz. One such case is California v. Ciraolo, involving the aerial surveillance of the petitioner's fenced-in back yard, which revealed a marijuana crop. The Court ruled that the Katz reasonable expectation of privacy test was not met because any member of the general public flying over the petitioner's property at a low altitude could have seen what the officers in the airplane saw. The Court acknowledged that by erecting a ten foot fence, the petitioners exhibited an expectation of privacy, but the Court refused to concede that this expectation was reasonable in an era of frequent and often low-flying air travel, and thus the search was

and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Id. at 353.
84. Id. at 361 (Harlan, J., concurring). Although Justice Stewart's majority opinion expressed the same concepts of privacy, Justice Harlan's concurring opinion is recognized as the principle rationale of Katz. Wilkins, supra note 9, at 1086-87.
86. See id.
87. See 1 W. R. LaFave, supra note 42, § 2.1(b).
88. See infra text accompanying notes 120-50.
89. See 1 W. R. LaFave, supra note 42, § 2.1(b).
90. See id; see generally Wilkins, supra note 9, at 1086-91. (discussing the difficulty courts have had in applying Katz).
Similarly, in *Oliver v. United States*, the Court ruled that the petitioner did not have a reasonable expectation of privacy in the fields around his home. Police arrived at the petitioner's farm and came upon a locked gate with a "No Trespassing" sign. They walked along a fence for a mile and found a marijuana field. The Court in *Oliver* re-affirmed the "open fields" doctrine, first announced in 1924 in *Hester v. United States*, which held that a person does not have a fourth amendment interest in the open fields around his home, because open fields do not fall under "persons, houses, papers, and effects." In *Oliver*, however, the Court did not address the *Hester* holding as a strictly textual interpretation of the fourth amendment, but rather determined that the *Katz* reasonable expectation of privacy was fully consistent with, and applicable to, the open fields doctrine. The Court found that the petitioner could not hold a "legitimate" expectation of privacy in the field in which he grew his illicit crop, because society was not prepared to accept such an expectation as reasonable. The Court declared that open fields "do not provide a setting for those intimate activities that the Amendment is intended to shelter" and that, regardless of the presence of a "No Trespassing" sign, such areas are open to public viewing.

A significant post-*Katz* electronic surveillance case was *Smith v. Maryland*. In *Smith*, the Supreme Court declared, after a glowing reaffirmation of *Katz*, that the government's use of a pen register presented no fourth amendment violation. In this case, police directed the phone com-

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93. *Id.*
95. *Id.* at 181.
96. *Id.* at 173.
97. *Id.*
98. 265 U.S. 57, 59 (1924).
99. *Id.*
101. *Oliver*, 466 U.S. at 181.
102. *Id.*
103. *Id.* at 179.
104. *Id.*
106. *Id.* at 739-41.
108. 442 U.S. at 744-46.
pany to attach a pen register to the telephone of a robbery suspect to record all numbers dialed from that phone. The pen register, installed and activated from the phone company offices, recorded the victim's phone number. In addressing the petitioner's claim that the use of the pen register required a warrant, the Court ruled that the petitioner failed to demonstrate the legitimacy of an expectation of privacy as to numbers dialed. The Court held that society accepts the conveyance of phone numbers to the phone company, and thus any privacy interest in these numbers is not reasonable.

_Ciraolo, Oliver and Smith_ represent a discernible trend in the Supreme Court's approach to the reasonable expectation of privacy test. In all three cases, the Court rejected claims that an expectation of privacy was reasonable. In _Ciraolo_ and _Oliver_ the respondent had manifested a subjective privacy expectation by means of a fence, or the remote location of the illegal activity on the property. In _Smith_ the petitioner similarly argued his expectation that law enforcement officials would not monitor his phone calls. While recent commentary suggests that the Court is slowly returning to the property-based theory, these cases illustrate, rather, the Court's narrowing of the _Katz_ reasonable expectation of privacy test by placing emphasis on the reasonableness element of the second prong of the test. Further, it appears that the Court defines society's view of reasonableness in terms of the degree to which the defendant exposes his activity to third parties. The respondents in _Ciraolo_ and _Oliver_ exposed their marijuana crops to anyone flying over, or passing through, the open fields of their

109. _Id._ at 737-38. The suspect's automobile and license plate number matched the description provided by the robbery victim. The victim also complained of threatening phone calls from a man claiming to be the robber. _Id._

110. _Id._ at 737.

111. _Id._ at 744.

112. _Id._

113. See _supra_ text accompanying notes 91-93.

114. See _supra_ text accompanying notes 94-104.

115. Justice Blackmun, in his _Smith_ majority opinion, did not view the use of a pen register as being as intrusive as a wiretap or other means of electronic surveillance: "When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business." 442 U.S. at 744; see also _supra_ text accompanying notes 105-12.

116. See generally _Comment, Reviving Trespass-based Search Analysis Under the Open View Doctrine: Dow Chemical Co. v. United States_, 63 N.Y.U. L. REV. 191 (1988). _Dow Chemical_ was a companion case to _Ciraolo_. The author concludes that the case represents a return to the property-based search theory. _Id._ at 228.

117. See _supra_ text accompanying notes 84-86.

118. See generally _Comment, supra_ note 116, where the author takes the view that this new standard of reasonableness signifies a reversion to the property-based standard.

The Court's reasoning in these cases, involving exposure of criminal activity to third parties,
property. The petitioner in *Smith* exposed not the conversation, but the numbers dialed, to the phone company.

Although these three cases suggest that *Katz* has been considerably narrowed, the reasonable expectation of privacy test has worked fairly well in search cases involving visual or audio observation, and particularly well regarding electronic surveillance, an area where little pre-*Katz* law existed. Applying the *Katz* test to the types of searches that pre-dated the modern electronic era has proven more difficult.119

### III. *Katz*-Resultant Property Theories

#### A. Container Searches

The Supreme Court’s treatment of container searches demonstrates its failure to achieve a coherent privacy standard with regards to tangible personal property.120 The confusion has resulted chiefly from containers found in automobiles, largely because the area of automobile searches has also provided courts with a difficult standard.121 This standard was developed in *Carroll v. United States*.122 In *Carroll*, the Court adopted the “automobile exception” rule, which allows police who have stopped a vehicle to conduct a warrantless search, provided that there is probable cause to believe that the vehicle contains contraband.123 That police were “searching” an automobile under this rule was only implied from the decision, and *Carroll* left the permissible scope of such searches to future courts, an issue with which courts still struggle.124

The *Katz* reasonable expectation of privacy test only compounded the confusion wrought by the *Carroll* automobile exception rule.125 *United States v. Chadwick*126 involved the seizure of a footlocker as it was being placed into the trunk of the respondent’s vehicle.127 A later warrantless

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119. See infra text accompanying notes 120-50.
120. See generally Wilkins, supra note 9, at 1091-96.
121. See id. at 1091.
123. See *Carroll* 267 U.S. at 149; see also Note, Warrantless Vehicle Searches and the Fourth Amendment: The Burger Court Attacks the Exclusionary Rule, 68 CORNELL L. REV. 105 (1982).
124. See Wilkins, supra note 9, at 1091.
125. See generally id. at 1091-96.
127. Id. at 4.
search of the footlocker revealed marijuana. The Court determined that the respondent held a reasonable expectation of privacy in the contents of the footlocker. Regardless of the diminished privacy interest in the vehicle, the automobile exception rule did not apply to containers that serve as a "repository of personal effects," and therefore the search was unconstitutional.

The Chadwick holding was clouded, however, in Arkansas v. Sanders, a case involving the search of a brief case seized in a taxicab. The Court declared that fourth amendment rights were violated because of the type of container involved, thus implying that some containers deserved constitutional protection while others did not. Sanders resulted in attempts by lower federal courts to determine exactly what type of container was worthy of protection.

The closed container automobile search issue appeared settled with the Court's decision in Robbins v. California. In Robbins, police seized bricks of marijuana wrapped in opaque plastic from the trunk of the petitioner's car. The Court ruled that the search and seizure of the wrapped packages was illegal, and concluded that any sealed container in an automobile enjoyed constitutional protection. The Court refused to recognize any distinction between "worthy" and "unworthy" containers. This decision did not overrule the Carroll automobile exception rule, but modified it with respect to sealed containers found in automobiles.

Only one year later, the Court abandoned the Robbins holding in United States v. Ross. Ross involved a warrantless police search of a paper bag

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128. Id.
129. Id. at 13.
130. Id.
131. Id.
132. 442 U.S. 753 (1979). Sanders was decided on the same day as Smith v. Maryland, 442 U.S. 735 (1979). See supra text accompanying notes 105-12.
133. Sanders, 442 U.S. at 764-65; see also Wilkins, supra note 9, at 1092-93.
134. See Wilkins, supra note 9, at 1092.
135. Id. at 1093.
137. Id. at 422.
138. Id. at 426-27.
139. Id.
140. Id. at 424. The majority stated that "[i]n recent years, we have twice been confronted with the suggestion that this 'automobile exception' somehow justifies the warrantless search of a closed container found inside an automobile. Each time, the Court has refused to accept the suggestion." Id. (referring to United States v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979)).
141. 456 U.S. 798 (1982); see Comment, Search and Seizure: From Carroll to Ross, the Odyssey of the Automobile Exception, 32 Cath. U.L. Rev. 221 (1982); Note, The Scope of
and zippered leather pouch found in the trunk of the respondent's car,\textsuperscript{142} both of which contained narcotics.\textsuperscript{143} While still rejecting the worthy-unworthy container distinction,\textsuperscript{144} the Court gave renewed strength to the Carroll automobile exception by ruling that if police have authority to conduct a warrantless search of a vehicle, based on specifically defined probable cause, they have authority to search any container within that automobile that may contain the object of the search.\textsuperscript{145} The Court provided the caveat that a search is limited to only those containers that could possibly hold the object for which the police were searching.\textsuperscript{146} Although the Court rejected some of the Sanders reasoning and the holding in Robbins, Ross overruled neither of these cases.\textsuperscript{147}

Ross demonstrates the ultimate failure of the Katz reasonable expectation of privacy test in cases involving closed containers in automobiles.\textsuperscript{148} While the Court in Chadwick and Sanders specifically relied on Katz, the reasonable expectation of privacy test proved immaterial to the Ross holding, because privacy expectations in containers yielded to a police officer's probable cause that the container held contraband.\textsuperscript{149} While a more thorough examination of the closed container cases is beyond the scope of this Note, these cases show that the Katz reasonable expectation of privacy test was simply too unclear as a practical standard to apply to the container search issue.\textsuperscript{150}

\subsection*{B. Abandoned Property}

Another important line of fourth amendment cases concerns abandoned property. Where an owner of personal property intentionally abandons the property, all interest in that property is severed, and police may seize such

\begin{itemize}
\item 142. \textit{Ross}, 456 U.S. at 801.
\item 143. \textit{Id.} at 800-01.
\item 144. \textit{Id.} at 824.
\item 145. \textit{See id.} at 809-14.
\item 146. \textit{Id.} at 824.
\item 147. \textit{Id.} at 820-21. The Court ruled that:
\begin{quote}
A warrant to search a vehicle would support a search of every part of that vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions . . . must give way to the interest in the prompt and efficient completion of the task at hand.
\end{quote}
\textit{Id.} at 821. Further, the Court said that "[t]he scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause." \textit{Id.} at 823.
\item 148. \textit{See} Wilkins, \textit{supra} note 9, at 1096.
\item 149. \textit{Id.}
\item 150. \textit{Id.}
\end{itemize}
Search and Seizure of Garbage

property without probable cause. Simply phrased, the fourth amendment does not extend to abandoned property. Abandonment is a property concept, most often revolving around the factual issue of the criminal defendant's intent.

The Supreme Court addressed the abandonment issue in *Hester v. United States*, which involved a bottle of moonshine whiskey discarded in a field during a police pursuit. The Court, in an opinion by Justice Holmes, determined that the bottle was abandoned and the petitioner, therefore, was not entitled to fourth amendment protection when the police seized the bottle. Similarly, in *Abel v. United States*, the Court ruled that the petitioner abandoned, in a hotel waste basket, incriminating papers related to a federal espionage investigation and therefore could claim no fourth amendment protection. The Court in both *Hester* and *Abel* relied on abandoned property concepts to determine the constitutionality of the seizure. *Hester* was based on the "open fields" doctrine, while the *Abel* Court based its decision on the items in question being "bona vacantia," a common law property-based abandonment doctrine.

Courts have adopted a unique approach to the search and seizure of abandoned property in most post-*Katz* criminal proceedings, considering concepts of both property law and modern constitutional privacy interpretation. Courts often use the property element of the issue as a starting point in their decisional process, before moving on to the more important and decisive privacy issue. If courts find abandonment, they often conclude that the criminal defendant retained no reasonable expectation of privacy in the particular item because the defendant abandoned it. Post-*Katz* courts have adopted this modified reasonable expectation of privacy


152. See id. at 400-01; see also 1 W. R. LAFAVE, supra note 42, § 2.6(b).

153. Mascolo, supra note 151, at 401.

154. Id. at 404.

155. 265 U.S. 57 (1924); see supra text accompanying notes 98-99.


158. Id. at 218-20.

159. See 1 W. R. LAFAVE, supra note 42, § 2.6(b).

160. See supra text accompanying notes 98-99.

161. Black's Law Dictionary describes bona vacantia as: "Vacant goods; unclaimed property. Generally, personal property which escheats to [the] state because no owner, heir or next of kin claims it. Now includes real as well as personal property and passes to state as an incident of sovereignty." BLACK'S LAW DICTIONARY 161 (5th ed. 1979).

162. Mascolo, supra note 151, at 400-01.

163. Id. at 401.

164. See generally id. at 400-02. (discussing the unique "dual qualities" of the abandon-
test on both the state\textsuperscript{165} and federal\textsuperscript{166} levels, and although it is not fully consistent with the two prong \textit{Katz} test, it at least recognizes the privacy interest of the first prong.

\textbf{C. Trash: A Pre-Greenwood Analysis}

Trash is a specific type of abandoned property.\textsuperscript{167} Objectively, trash searches involve some invasion of a person's privacy.\textsuperscript{168} All of what we do in our personal lives results in some form of waste\textsuperscript{169} and this waste can reveal much about our day-to-day activities.\textsuperscript{170} State and federal garbage search cases illustrate that the question of whether police have impermissibly invaded an individual's privacy is a matter of degree, depending upon the location and type of trash container.\textsuperscript{171} Courts must balance individual and state interests, whether a search takes place in a receptacle in a person's backyard,\textsuperscript{172} or in a plastic bag left on the sidewalk for collection.\textsuperscript{173} Moreover, large public receptacles for apartment dwellers add to the problem, as trash is sometimes viewed as losing its identification to a particular individual when it is mingled with the refuse of others.\textsuperscript{174}

\textit{Pre-Katz} trash search law made the trash issue relatively simple. Courts found two factors dispositive: intentional abandonment and police intrusion upon the curtilage.\textsuperscript{175} In \textit{United States v. Minker},\textsuperscript{176} for example, the search for papers linking the respondent to a gaming operation occurred in a dumpster outside the curtilage of the respondent's apartment unit, and the United States Court of Appeals for the Third Circuit deemed the disposed papers abandoned.\textsuperscript{177} By disposing of the papers in a common receptacle, the removal issue: post-\textit{Katz} courts consider both the individual privacy interest and the property element of abandonment).

\begin{itemize}
  \item \textsuperscript{165} See 1 W. R. \textsc{LaFave}, \textit{supra} note 42, \S 2.6(b).
  \item \textsuperscript{166} Id.
  \item \textsuperscript{167} Id. \S 2.6(c).
  \item \textsuperscript{170} See Greenwood, 108 S. Ct. at 1634-35.
  \item \textsuperscript{172} Edwards, 71 Cal. 2d at 1096, 458 P.2d at 713, 80 Cal. Rptr. at 633.
  \item \textsuperscript{173} See People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971).
  \item \textsuperscript{175} 1 W. R. \textsc{LaFave}, \textit{supra} note 42, \S 2.6(c).
  \item \textsuperscript{176} 312 F.2d 632 (3d Cir. 1962).
  \item \textsuperscript{177} Id. at 634; see also 1 W. R. \textsc{LaFave}, \textit{supra} note 42, \S 2.6(c).
\end{itemize}
spondent demonstrated the requisite intent to abandon. Conversely, in Work v. United States the United States Court of Appeals for the District of Columbia Circuit found an intrusion upon the curtilage of the home, because of police entry into the petitioner's house and their search for evidence of narcotics violations in a trash receptacle under the back porch. Moreover, the petitioner's conduct evinced no intent to abandon an incriminating vial of pills, thus the court held the search unconstitutional.

After Katz, courts typically resolved the problem of trash searches by applying the abandoned property standard, modified by the reasonable expectation of privacy test; individuals surrender their privacy expectation when they discard their trash. This type of analysis mingles privacy and property concepts; privacy is the protected interest, but abandonment is a key element in the disposition of the case. This analysis is generally consistent with the fourth amendment privacy interpretation, although it does not represent an application of the two prong Katz test.

On occasion, courts have strictly applied the Katz rule in trash search

178. Minker, 312 F.2d at 634; see also 1 W. R. LAFAVE, supra note 42, § 2.6(c).
179. 243 F.2d 660 (D.C. Cir. 1957).
180. Id. at 661; see also 1 W. R. LAFAVE, supra note 42, § 2.6(c).
181. Work, 243 F.2d at 662; see also 1 W. R. LAFAVE, supra note 42, § 2.6(c).
183. See supra note 164.
184. See 1 W. R. LAFAVE, supra note 42, § 2.6(c).
cases. In *People v. Edwards* police trespassed upon the respondent's property to search a trash receptacle at his back door, and found marijuana. The respondents later were arrested and convicted. The California Supreme Court acknowledged the trespass, but decided the case based on the respondent's expectation of privacy in his trash. The court found that because the respondents occupied the house, and the marijuana was not readily visible in the receptacle without searching through it, they maintained a privacy interest in the container. The court rejected the abandonment theory, stating that the trash was abandoned only as to authorized trash collectors. Although factually similar to *Work*, the determinative element in *Edwards* was not the act of abandonment, but rather the respondent's expectation of privacy in his trash.

Another California case, *People v. Krivda*, extended this expectation of privacy to trash placed on the street for collection. The respondent in *Krivda* allegedly injected her children with dangerous narcotics, and participated in other illicit drug-related activities. Police directed the local trash collector to pick up and sequester the respondent's trash. A search of the trash revealed evidence of marijuana usage. Addressing the motion to suppress on appeal, the California Supreme Court cited local ordinances that allowed only licensed collectors to pick up trash, and which prohibited members of the general public from tampering with trash. The court, relying on both *Katz* and *Edwards*, concluded that a person can reasonably expect that his trash remain free from warrantless police searches.

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185. See, e.g., *People v. Edwards*, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969); see also 1 W. R. LAFAVE, supra note 42, § 2.6(c).


187. Id. at 1098-99, 458 P.2d at 714, 80 Cal. Rptr. at 634.

188. Id.

189. Id. at 1104, 458 P.2d at 718, 80 Cal. Rptr. at 638.

190. Id.

191. Id.

192. See 1 W. R. LAFAVE, supra note 42, § 2.6(c).

193. 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971).

194. Id. at 360, 486 P.2d at 1263, 96 Cal. Rptr. at 63.

195. Id.

196. Id.

197. Id. at 366, 486 P.2d at 1268, 96 Cal. Rptr. at 68. The court also emphasized that people expect their trash to remain free from examination by the public or law enforcement officials "at least . . . until the trash has lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere." Id.

198. Id. at 365, 486 P.2d at 1267, 96 Cal. Rptr. at 67. The court noted that "[t]he fact that a search may or may not involve a trespass or other invasion of defendant's property interests is not conclusive, for 'The prohibition in the [fourth] amendment is against unreasonable searches and seizures, not trespasses.'" Id.
Viewing trash search law as a whole, the vast majority of both state and federal courts hold that trash is abandoned property in which an individual has no reasonable expectation of privacy. \(^{199}\) Edwards and Krivda represent the minority view. While the United States Supreme Court in California v. Greenwood \(^{202}\) confirmed as a constitutional standard that a reasonable expectation of privacy does not exist in trash, the Court did not weigh any notions of abandonment or common property law in reaching this conclusion, and favored a narrow application of the two prong Katz test. \(^{203}\) But as closed container and abandoned property cases illustrate, \(^{204}\) Katz can be difficult to apply because search and seizure of tangible personal property does not easily yield to newer legal concepts of privacy and the reasonable expectations thereof.

IV. California v. Greenwood: Applying the Katz Rationale to Garbage Searches

In California v. Greenwood, the Supreme Court declared that a warrantless search of opaque plastic garbage bags did not violate the respondents' constitutional right to privacy, thereby adhering to the Katz reasonable expectation of privacy standard. \(^{205}\) In Greenwood, police discovered narcotics paraphernalia in trash bags collected from the curb in front of the respondents' home. \(^{206}\) The search provided police with probable cause to secure a warrant and to search the respondents' home, where substantial amounts of cocaine and hashish were found. \(^{207}\) The California Superior Court dismissed felony narcotics charges on the basis of People v. Krivda. \(^{208}\) The


\(^{200}\) See supra note 182.

\(^{201}\) See supra text accompanying notes 84-86.


\(^{203}\) The majority does not mention the abandonment theory. The dissent, however, commends the majority for rejecting the state's abandonment argument. Greenwood, 108 S. Ct. at 1634 (Brennan, J., dissenting).

\(^{204}\) See supra text accompanying notes 120-66.

\(^{205}\) 108 S. Ct. at 1628-29.

\(^{206}\) Id. at 1627.

\(^{207}\) Id.

\(^{208}\) 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), vacated by 409 U.S. 33 (1972); see supra text accompanying notes 193-98.
Court of Appeal upheld the dismissal, and following the California Supreme Court's denial of a hearing, the United States Supreme Court granted certiorari.

A. The Majority: Remaining True to Katz?

Both the majority and the dissent in Greenwood employed the Katz reasonable expectation of privacy standard, but reached varying results. In determining that no violation occurred, Justice White's majority opinion observed that although the respondents may have had an expectation that their trash would remain free from police or public rummaging in the short time it was on the street, society does not accept such an expectation as reasonable. Justice White reasoned that the trash was sufficiently exposed to the public to defeat any fourth amendment claim, because trash bags left in a public area are easily accessible to "animals, children, scavengers, snoops," and the public in general. Justice White relied specifically on language in Katz which cautioned that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Justice White also compared the search in Greenwood to the aerial surveillance in California v. Ciraolo, in which the Court found that an expectation of privacy in a field exposed to aerial observation was similarly unreasonable. He analogized the respondents' exposure of their trash to public inspection with the Ciraolo aerial search. The Court additionally noted that the trash was set at the curb for conveyance to a third party, who could have allowed the police to search it. Justice White also relied on the weight of federal and state court cases holding against a privacy expectation in trash.

212. Id. at 1628.
213. Id. at 1628-29.
216. 108 S. Ct. at 1624.
217. Id.
218. Id. at 1629-30. The majority also rejected the respondents' two alternative arguments. First, the respondents argued that despite a California constitutional amendment that denied the use of the exclusionary rule in cases involving violations of California but not federal law, Kriva is still applicable, and the fourth amendment should be extended to meet this deficiency in California law. Justice White ruled that states may "impos[e] more stringent constraints on
B. The Dissent: The Synergetic Application of the Two Prongs

Justice Brennan, in his dissent, applied a much broader vision of the Katz reasonable expectation of privacy. He initially emphasized that a trash bag is a container "'closed against inspection'" and therefore protected by the fourth amendment. In support of his proposition, Justice Brennan cited Robbins v. California, a case in which the Court rejected any distinctions among various types of sealed containers for fourth amendment objectives. Justice Brennan also found support in United States v. Ross, in which the Court again conceded that a distinction between "worthy" and "unworthy" containers was not constitutionally permissible.

Finding that an individual may have an expectation of privacy in an opaque plastic trash bag under a closed container analysis, Justice Brennan next addressed the issue of the containers in Greenwood being used to discard personal items, rather than to preserve their safety or to transport them. He opined that the contents of a person's trash are not essentially less private, and the manner in which the respondents discarded the items does not diminish their privacy expectations. Justice Brennan discussed how a search of garbage can reveal "intimate details" of the most private aspect of one's life, interests protected by the fourth amendment.

Justice Brennan then focused his attention on the public policy ramifications of the majority decision. He addressed the second prong of Katz, police conduct than does the federal constitution," id. at 1630, but he refused to extend the fourth amendment to the protection of state rights simply because privacy rights guaranteed by individual states beyond those guaranteed by federal law are not protected by federal law. Id. at 1630-31.

Second, Justice White rejected the respondents' fourteenth amendment due process argument. The respondents claimed that the California constitutional amendment, which revoked the exclusionary rule as it applied to state law violations under Krivda, violated federal due process rights. Justice White contended that California may negate the Krivda holding or any other state property or privacy law with legislation, provided that the legislation does not impinge on federal rights. Further, the Court noted that the fourteenth amendment does not always bar all evidence that state or federal authorities illegally seize. Id. at 1631.

219. Justice Brennan was joined by Justice Marshall. Id. at 1631.
220. Id. at 1632 (quoting Ex parte Jackson, 96 U.S. 727, 733 (1878)).
221. Id.
222. 453 U.S. 420 (1981); see supra text accompanying notes 136-40.
226. Id.
227. Id. at 1633-34.
228. Id.
229. Id. at 1634.
230. Id.
231. See id. at 1635-37.
relied upon by the majority: societal acceptance of this privacy expectation as reasonable.\textsuperscript{232} Justice Brennan employed a two-fold public policy analysis.\textsuperscript{233} First, he supported his closed container analogy with a discussion of how refuse reflects society's behavior and private conduct, citing to a number of studies and commentaries on the subject of garbage analysis.\textsuperscript{234} Second, he elaborated on the revulsion individuals feel when they see strangers pick through their trash.\textsuperscript{235} Justice Brennan also pointed out the fact that many cities and towns have ordinances forbidding such meddling in garbage, for varying reasons of tidiness, health and safety, or the preservation of the contents' integrity.\textsuperscript{236}

Justice Brennan admitted that the respondents would relinquish any privacy interest in their refuse if it were strewn about the curb for the public or the police to examine.\textsuperscript{237} Justice Brennan argued that the possibility that one's trash might be rummaged through does not negate the expectation of privacy.\textsuperscript{238} By comparison, he asserted that the possibility of a burglar invading the home does not diminish the privacy interest in the home.\textsuperscript{239} To support this opinion, Justice Brennan looked to \textit{Katz}, which provided that "[w]hat a person...seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."\textsuperscript{240}

Finally, Justice Brennan rejected the argument that a person necessarily surrenders his reasonable expectation of privacy by virtue of the fact that his property is given to a third party.\textsuperscript{241} Justice Brennan noted that a person retains his privacy interest in letters and packages that are in the temporary custody of the post office.\textsuperscript{242} Justice Brennan summed up his dissenting opinion by noting that the Court's decision "paints a grim picture of our society,"\textsuperscript{243} by allowing police to invade, unrestrained, a private aspect of a

\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} Id. at 1634.
\textsuperscript{235} Id. at 1635. Justice Brennan cited several media commentaries, including the dismaying reaction of Henry Kissinger when he discovered a reporter rummaging through his trash. Id.
\textsuperscript{236} Id.
\textsuperscript{237} Id. at 1635-36.
\textsuperscript{238} Id. at 1636.
\textsuperscript{239} Id.
\textsuperscript{240} Id. (citing \textit{Katz} v. United States, 389 U.S. 347, 351-52 (1967)). Justice Brennan uses this language from \textit{Katz} to contradict Justice White's assertion that public exposure of one's activities terminates any fourth amendment protection. See id. at 1628-29. Ironically, the decisive language utilized by both Justices appears in the same paragraph of the \textit{Katz} opinion, further demonstrating that \textit{Katz} lacks a coherent standard of privacy analysis.
\textsuperscript{241} Id. at 1636-37.
\textsuperscript{242} Id. at 1637.
\textsuperscript{243} Id.
person's life, thereby intruding upon the individual liberty that the fourth amendment guarantees.  

C. The Focus on the Second Prong  

The Court in Greenwood, as in Ciraolo, Oliver, and Smith, conceded the respondents' expectation of privacy, and therefore summarily dismissed the first prong of the Katz test. It is the second prong, requiring a societal standard of reasonableness, that proves decisive. Reasonableness is determined, as explained in previous cases, by the criminal defendant's exposure of his activities to third parties. In Greenwood the majority reasoned that the respondents' placing of the trash on the curb sufficiently exposed it to the public to render a privacy interest unreasonable, and thus a warrantless search reasonable. The decision, thus, is at least superficially consistent with Ciraolo, Oliver and Smith.

But as Justice Brennan pointed out, trash, while admittedly a routine and rarely contemplated aspect of daily life, nonetheless may contain scraps of one's most private interests and activities, regardless of its discarded status. The government's right to conduct a warrantless search of trash affects the public in a personal way, as what is recovered often discloses far more than merely the object of the search.

In addition, trash sealed in opaque plastic bags is not in plain view, or "exposed to the public." The dissent distinguished trash scattered about

\[244. \text{Id.}\]
\[245. \text{See supra text accompanying note 85-86. The focus on the second prong as the determinative element of the two prong Katz rationale is a development whose origins cannot be found in the Katz opinion.}\]
\[246. \text{See supra text accompanying note 118.}\]
\[247. 108 S. Ct. at 1628.}\]
\[248. \text{See supra text accompanying notes 91-119.}\]
\[249. \text{See Greenwood, 108 S. Ct. at 1635 (Brennan, J., dissenting). The Greenwood decision received considerable negative reaction from the media also. In the days following the decision, a number of editorials appeared in leading newspapers, highly critical of the Court's shortsighted approach to privacy. See, e.g., Do We Really 'Expect' Snoop in Our Garbage?, Los Angeles Times, May 19, 1988, pt. I, at 7, col. 1; Trashing Privacy, N.Y. Times, May 18, 1988, at A3, col. 1; Trash Revisited, Wash. Post, May 18, 1988, at A20, col. 1.}\]
\[250. \text{See Greenwood, 108 S. Ct. at 1634.}\]
\[251. \text{Id. at 1628.}\]
the street from trash that is sealed in containers,252 thus implying that public exposure of the contents of the trash container negates the fourth amendment privacy interest, not public exposure of only the container. The majority erroneously based its conclusion on the possibility of the contents being disturbed,253 rather than the plain fact that the contents of a sealed opaque container, even in a public place, are not exposed to the public. Justice Brennan used these arguments to justify his finding that the respondents' subjective expectations were reasonable, and he found those expectations virtually dispositive of the issue.254

In Greenwood, two Justices arrived at opposite interpretations of the second prong of Katz. This indicates the flaw in the Katz test: by completely rejecting a property-based standard, Katz leaves the Court without any predictable or principled means of determining when “society” will “accept” an individual's expectation of privacy.

V. PUTTING PROPERTY BACK INTO THE FOURTH AMENDMENT

A. Katz Narrowed Further

In California v. Greenwood, the Court emphasized what is “reasonable” under the second prong of Katz, rather than what physical areas an individual may consider “private.”255 The Supreme Court thus continues its trend toward narrowing the scope of fourth amendment privacy interests.256 Specifically, the Court held that police may search trash receptacles placed outside the curtilage of the home.257

Greenwood further demonstrates the Supreme Court's unwillingness to depart from the privacy analysis delineated in Katz.258 While remnants of property-based analysis remain in concepts such as curtilage,259 the Court

252. Id. at 1636.
253. Id. at 1628-29.
254. See id. at 1632, 1635.
255. Justice Black, in his Katz dissent, argued that the fourth amendment requires no more than a standard of reasonableness:

With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against unreasonable searches and seizures as one to protect an individual's privacy. . . . The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of 'persons, houses, papers, and effects.' . . .

256. See supra text accompanying notes 91-119.
258. See supra text accompanying notes 77-90.
259. The Court in Greenwood did not emphasize the issue of the trash being outside the respondents' curtilage. The location of the trash, however, is a key element in the decision.
focused exclusively on privacy as the chief interest that the fourth amendment protects. Additionally, Greenwood appears to have effectively foreclosed the application of the abandoned property analysis commonly utilized by state and lower federal courts, as the Court rejected concepts of state property and privacy law, and failed to consider abandonment as a means for denying the respondents' fourth amendment claim.

Ironically, however, as the dissent points out, the numerous cases cited by Justice White merely support the majority's holding, and not its reasoning. Such a glaring inconsistency in the majority opinion suggests an inherent weakness in the Katz test as it applies to tangible property or containers such as trash receptacles. This inconsistency suggests that Greenwood itself will prove to be of limited utility to lower courts in deciding garbage search cases that do not precisely mirror the Greenwood fact pattern.

**B. Property: A Valid Consideration Within the Scheme Of Katz**

Greenwood is an example of the Court's application of nebulous privacy concepts to fourth amendment claims involving tangible personal property in an attempt to define the extent of the privacy interest. But the concept of privacy is often inextricably tied to property interests. Justice White at

The Court recently established criteria for determining the bounds of curtilage, thereby qualifying the property-based doctrine as a valid fourth amendment consideration. See United States v. Dunn, 480 U.S. 294 (1987); see also Greenwood, 108 S. Ct. at 1628. The Court in California v. Ciraolo, 476 U.S. 207 (1986), admitted that curtilage is an important consideration: "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." Id. at 212-13.

The Supreme Court has never addressed the issue of a garbage search conducted within the bounds of a person's curtilage, and Greenwood does not suggest an answer. It may be ineradicable from the Court's recognition that the respondents' trash was not within the curtilage of their home, and also from the Court's recent decision in Dunn, that an intrusion into the curtilage of the home to conduct a trash search may be a per se violation of the fourth amendment. See Dunn, 480 U.S. at 294. But see United States v. Kramer, 711 F.2d 789, 794 (7th Cir.), cert. denied, 464 U.S. 962 (1983).

260. See supra text accompanying notes 162-66, 182-84.
262. See id.
263. Id. at 1633 n.2 (Brennan, J., dissenting).
264. The Supreme Court of Nebraska relied on the Greenwood decision in State v. Trahan, 229 Neb. 683, 428 N.W.2d 619, cert. denied, 57 U.S.L.W. 3412 (1988), although in Trahan there was some dispute as to whether the trash was within the curtilage of the respondent's property. Because Greenwood did not specifically address this aspect of trash searches, the Nebraska court turned to Kramer, 711 F.2d at 789, and the open fields doctrine of Oliver v. United States, 466 U.S. 170 (1984), discussed supra text accompanying notes 94-104, to complement the Greenwood rationale and hold that the search was lawful.
265. Tomkovicz, supra note 4, at 658 n.58.
tempted to justify the majority's holding based, at least in form, on the respondents' privacy interest, asserting that merely because "animals, children, snoops, [and] scavengers" might meddle in the trash, a privacy interest is lost.\textsuperscript{266} Justice White could have achieved the same holding had he considered that the respondents lost a privacy interest in their trash because they abandoned it, following the rationale employed by many lower courts.\textsuperscript{267} Rather than relying on the possibility that third party interlopers may have ransacked the respondents' trash, Justice White simply could have equated their property interest in the trash with their privacy interest in it: having voluntarily abandoned their ownership interest, respondents could no longer reasonably expect society to support whatever subjective expectation of privacy they may have initially held in their trash.

Such an analysis suggests neither a renunciation of the \textit{Katz} reasonable expectation of privacy test, nor a return to the all or nothing approach to fourth amendment trespass interpretation applied in \textit{Olmstead} and \textit{Goldman}. Rather, it presents a reconciliation of property and privacy theories, to an extent limited by the nature of the interests at stake. The use of property concepts, such as curtilage and abandonment, would allow the Court to bring predictability and consistency to the second prong of \textit{Katz}, and thus to the resolutions of fourth amendment questions. Privacy remains the ultimate end to be protected, but without acknowledging that the respondents' privacy interest is linked to tangible property (and not spoken words or oral communications), the Court's resultant reasoning appears contrived, and the \textit{Katz} test becomes unworkable and essentially subjective.

Justice Brennan's analysis, in which he employs a more emphatic rejection of abandonment theory and advocates a more balanced application of the \textit{Katz} test,\textsuperscript{268} similarly offers little guidance for lower courts. While he regards distinctions between a container in an individual's possession and one placed on the street for disposal as meaningless,\textsuperscript{269} much of his reasoning relies on \textit{Katz} as it applies to closed container searches,\textsuperscript{270} and such an analysis has already proven arduous and ineffective.\textsuperscript{271}

Moreover, under Justice Brennan's analysis, there is no obvious objective limit to the respondents' expectations of privacy. If the act of abandonment does not sever these expectations, and Justice Brennan asserts that it does not, there remains no logical point at which one could say that the subject of

\begin{itemize}
\item \textsuperscript{266} \textit{Greenwood}, 108 S. Ct. at 1628-29.
\item \textsuperscript{267} See supra text accompanying notes 162-66, 182-84.
\item \textsuperscript{268} \textit{Greenwood}, 108 S. Ct. at 1633-35.
\item \textsuperscript{269} \textit{Id.} at 1633; see supra text accompanying notes 227-30.
\item \textsuperscript{270} \textit{Greenwood}, 108 S. Ct. at 1634.
\item \textsuperscript{271} See supra text accompanying notes 120-50.
\end{itemize}
the search has relinquished his privacy expectations.\textsuperscript{272} Absent such an objective basis for determining when society will accept an expectation of privacy as reasonable, the inquiry under the second prong of \textit{Katz} becomes irrelevant. The expectation extends indefinitely, and ultimately becomes the unfounded declaration of a given judge's vision of what society ought to accept.

\textbf{VI. CONCLUSION}

The legacy of the \textit{Greenwood} decision is twofold. First, \textit{Greenwood}, as part of a trend of recent fourth amendment warrantless search cases, represents the Supreme Court's unwillingness to liberally apply the \textit{Katz} reasonable expectation of privacy test. This narrowing of \textit{Katz} stems from the \textit{Katz} decision's innate lack of clarity and direction. The Court's response was not to disregard or overrule \textit{Katz}, or to return to the property-based standard, but to narrow the application of privacy analysis into a judicial tool that is indicative of a stricter fourth amendment interpretation.

Second, the case provides state and lower federal courts with some certainty in the future adjudication of trash search claims: trash searches outside the curtilage of the home are now constitutionally permissible. Moreover, the Court's analysis is fully consistent, at least in form, with the recognized reasonable expectation of privacy standard. The issue of abandonment, a remnant of the discredited property-based theory, is thus irrelevant to the issue of trash searches.

But \textit{Greenwood} also shows the flaws in the \textit{Katz} analysis. The majority's reasoning fails to recognize the soundness of property concepts in determining the extent of fourth amendment privacy interests. Such considerations would alleviate the uncertainty generated by \textit{Katz}, and provide meaningful guidance to lower courts in resolving search issues not yet specifically addressed by the Supreme Court.

\textit{David W. Cunis}

\textsuperscript{272} This does not suggest that trash placed at the curb is necessarily abandoned property. The moment at which property becomes abandoned property, thereby devoid of any privacy expectations, is an issue about which reasonable minds can differ.