Was the Right of Privacy Trashed in California v. Greenwood

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MINOR: Was the Right of Privacy Trashed in California v. Greenwood

NOTES AND COMMENTS

WAS THE RIGHT OF PRIVACY TRASHED IN CALIFORNIA v. GREENWOOD?

I. INTRODUCTION

Every day our private notes and letters, bank and income statements, bills, medical records, and many other sensitive secrets end up in our garbage. Some may argue that a privacy interest in garbage is unnecessary to clean-living, honest citizens. This attitude, however, ignores the need of the individual for privacy and individuality.1 Some may argue that if people want to maintain privacy in their garbage, they should dispose of it on their own. This analysis makes an individual's right to privacy dependent on the affordability of an incinerator or paper shredder,2 and ignores the fact that most cities and states have laws which mandate the manner in which trash must be disposed.3 We would be incensed to find that a meddler—a neighbor, reporter, or detective—had scrutinized our trash to discover details of our personal lives.4

1. See A. MILLER, THE ASSAULT ON PRIVACY 48 (1971). "An individual's desire to control the information that comprises his life history is a natural part of the quest for personal autonomy . . . ." Id.
2. In Tulsa, Oklahoma, Randy Gwartney has a lucrative business he calls Shredders by George. He shreds private papers for businesses and private individuals and then issues a "certificate of destruction." Few people may be able to afford such a service and a new shredder costs from $850 to $15,000. Blum, PRIVATE PAPERS, SENSITIVE SECRETS MAKE FOR STACKS OF STUFFING, Tulsa World, Sept. 18, 1988, at F1, col. 1. Almost all large cities have services of this kind. Telephone interview with Randy Gwartney (Jan. 16, 1989).
3. "[T]he State should [not] be permitted to on the one hand demand citizens give their garbage to the State, primarily in the form of local ordinances restricting the transportation, possession, and storage of trash and at the same time declare open season on surveillance of its contents for public examination and criminal prosecution." Brief for Respondent at 7 n.2, California v. Greenwood, 108 S. Ct. 1625 (1988) (No. 86-684). "It would be a perversion" to interpret fourth amendment protection as extending "only to those who resort to extraordinary means to keep information regarding their personal lives out of the hands of the police." 1 W. LAFAVE, SEARCH AND SEIZURE § 2.6(c), 478-79 (2d ed. 1987).
4. See State v. Schultz, 388 So. 2d 1326, 1331 (Fla. Dist. Ct. App. 1980) (Anstead, J., dissenting). See also United States v. Kahan, 350 F. Supp. 784 (S.D.N.Y. 1972), aff'd in part, rev'd in part, 479 F.2d 290 (2d Cir. 1973), rev'd, 415 U.S. 239 (1974), where the court stated: [t]he concept of privacy is paramount in deciding a claimant's standing to invoke the protection of the Fourth Amendment. Courts should be hesitant to narrow that concept because, in this society, the sphere of personal privacy has become more and more confined. In a real sense, if courts begrudge the scope of the privacy expectations of the populace, not
Nonetheless, the Supreme Court has held that it is unreasonable for society to expect that its garbage is private. In *California v. Greenwood* the United States Supreme Court allowed the fruits of warrantless searches of trash to be used as evidence against a criminal defendant, thus holding that privacy rights of Americans do not extend to their trash. The broad holding in *Greenwood* makes society’s right to privacy in garbage contingent upon the uncontrolled will of a police officer and does not take into account society’s need for privacy in garbage.6

II. STATEMENT OF THE CASE

A. Facts

The Laguna Beach Police Department suspected that Billy Greenwood was a drug dealer. In February of 1984, a federal narcotics agent informed Investigator Stracner of the department that a truck full of illegal narcotics was en route to Greenwood’s residence.7 Later, neighbors told Stracner that automobiles made frequent, short stops at Greenwood’s home in the late evening and early morning hours.8 In addition, neighbors said that a U-Haul truck had been parked in front of the house for four days.9

Acting on this information Stracner began to make late-night observations of Greenwood’s residence.10 She observed the cars come and go as the neighbors had described.11 On one occasion she followed a truck

only will there be less and less freedom of the person, but his or her expectations of freedom will wither and with them the values of individuality and privacy from increasingly intrusive government control.  


6. “The ultimate question” put forth in fourth amendment cases is “whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.” W. LAFAVE, supra note 3, § 2.6(c), at 478 (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 348, 403 (1974)). Garbage surveillance by police should not go “unregulated, for a society in which all ‘our citizens’ trash cans could be made the subject of police inspection’ for evidence of the more intimate aspects of their personal life upon nothing more than a whim is not ‘free and open.’” *Id.* (quoting People v. Krivda, 5 Cal. 3d 357, 367, 486 P.2d 1262, 1269, 96 Cal. Rptr. 62, 69 (1971), vacated on other grounds, 409 U.S. 33 (1972)).


8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*
from the house to another residence thought to be a location for narcotics trafficking.\textsuperscript{12}

Stracner began to search trash that Greenwood set on the curb of his home for collection.\textsuperscript{13} The trash was tied in opaque plastic bags.\textsuperscript{14} In April of 1984, Stracner told the trash collector to keep Greenwood's trash separate from other trash in the truck and turn it over to her.\textsuperscript{15} The trash collector obliged, Stracner searched through the trash, and "found items indicative of narcotics use."\textsuperscript{16} She used the information acquired from the trash search to obtain a warrant to search Greenwood's home.\textsuperscript{17} When police, executing the warrant, found hashish and cocaine,\textsuperscript{18} they arrested Greenwood on felony narcotics charges. Greenwood later posted bail.\textsuperscript{19}

Officer Rahaeuser, another police investigator, subsequently received reports of further late-night activities at Greenwood's home.\textsuperscript{20} He obtained Greenwood's garbage just as Stracner had done and again found evidence of narcotics use.\textsuperscript{21} Using information from this second trash search, Rahaeuser secured another search warrant for Greenwood's home.\textsuperscript{22} The police found more drugs and evidence of trafficking when they executed the warrant. Again, Greenwood was arrested.\textsuperscript{23}

The California Superior Court dismissed the charges against Greenwood,\textsuperscript{24} relying on People v. Krivda,\textsuperscript{25} which held that warrantless trash searches violate the fourth amendment and the California Constitution.\textsuperscript{26} The court found that the warrants for the search of Greenwood's home would not have been issued, due to a lack of probable cause, without

\begin{thebibliography}{26}
\bibitem{12} Id.
\bibitem{13} Id.
\bibitem{15} "There was no evidence any contraband could be seen without opening the bag." Id.
\bibitem{16} Greenwood, 108 S. Ct. at 1627.
\bibitem{17} Id.
\bibitem{18} Id.
\bibitem{19} Id.
\bibitem{20} Id.
\bibitem{21} Id.
\bibitem{22} Id.
\bibitem{23} Id. at 1627-28.
\bibitem{24} Id. at 1628.
\bibitem{26} Id. at 367, 486 P.2d at 1269, 96 Cal. Rptr. at 69. In Krivda, on facts very similar to those in Greenwood, the California Supreme Court found that an individual who places contraband in trash barrels and subsequently places the barrels adjacent to the street for pickup by a garbage collector, may not be deemed to have foreseen any reasonable expectation of privacy with respect to the contents of the barrels.
\end{thebibliography}
information gleaned from the trash searches which was subsequently used in affidavits to obtain the warrants.27

The court of appeals affirmed,28 the California Supreme Court refused to review the court of appeals' decision,29 and the United States Supreme Court granted certiorari.30

B. Issue

The United States Supreme Court found that the warrantless search and seizure of garbage bags left at the curb outside a home violates the fourth amendment only if individuals manifest "a subjective expectation of privacy in their garbage that society accepts as objectively reasonable."31 The question before the Court was whether society is prepared to accept as objectively reasonable an expectation of privacy in trash deposited at the curb for collection.32

III. Law Prior to the Case

The fourth amendment33 does not give the government an uncontrolled and free rein to monitor the attitudes, lifestyles, and activities of citizens.34 The Supreme Court has held that the fourth amendment prohibits the government from monitoring citizens without the intervention of a neutral and detached magistrate who will issue a search warrant if

27. California v. Greenwood, 108 S. Ct. 1625, 1628 (1988). There was no information absent the evidence found in the trash that would support a reasonable conclusion that narcotics would be found in Greenwood's home. Id.
29. The California Supreme Court was bound to follow the Krivda precedent unless or until the United States Supreme Court decided the fourth amendment question differently. See, e.g., California v. Rooney, 107 S. Ct. 2852, 2855 (1987) (per curiam).
30. California v. Greenwood, 107 S. Ct. 3260 (1987). Although the Krivda decision was binding on the court of appeals, Krivda "also held that the fruits of warrantless trash searches were to be excluded under federal law." Greenwood, 108 S. Ct. at 1628.
33. The fourth amendment of the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.
34. See Boyd v. United States, 116 U.S. 616, 630 (1886), where the Court stated that the fourth amendment applies to all invasions on the part of the government and its employes [sic] of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his
the government can show probable cause. The Court has explained that an officer attempting to fight crime “may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual’s interest in protecting his own liberty and the privacy of his home.” In 1914, the Court reached the logical conclusion that if government officials should violate the fourth amendment by conducting a warrantless search and seizure on a criminal suspect they should not be able to use the fruits of the search as evidence against the accused at trial. This policy is known as the “exclusionary rule.” Once the rule was established, the problem for the courts became that of establishing a standard for deciding whether there had in fact been a violation of the fourth amendment. In establishing such a standard, the fact that the Supreme Court has gone through changes in its approach to this problem over the years is not surprising. Cases involving intrusion into garbage have, of course, been affected.

A. History of the Exclusionary Rule

The United States Supreme Court held in Weeks v. United States that evidence obtained in violation of the fourth amendment is subject to exclusion in the federal courts. The defendant in Weeks was suspected

indedefensible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense.

Id.

35. See Steagald v. United States, 451 U.S. 204 (1981). In Steagald the Court stated that “[t]he purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search”. Id. at 212.

36. Id.


38. See W. LAFAVE, supra note 3, § 1.1(c), at 7. “It is primarily because of the exclusionary rule that courts are called upon to meet the seemingly unceasing challenge of marking the dimensions of the protections flowing from the Fourth Amendment.” W. LAFAVE, supra note 3, § 1.1, at 3.

39. Weeks, 232 U.S. at 390. The Court cited the opinion of Justice Bradley in Boyd v. United States, 116 U.S. 616 (1886). There Justice Bradley discussed the history and purpose of the fourth amendment, stating that it was originated by the framers of the Bill of Rights to give the American people safeguards which had evolved in England to protect against unreasonable searches and seizures. Prior to these safeguards, such searches and seizures were permitted under general warrants issued by the government which allowed invasions of the homes and privacy of citizens and seizures of their private papers to support real or imaginary charges made against them. This practice continued in the American colonies. Resistance to these practices established the fourth amendment principle that “a man’s house [is] his castle, and not to be invaded by any general authority to search and seize his goods and papers.” Weeks, 232 U.S. at 390.
of mail fraud and arrested by police at his job.\textsuperscript{40} The United States Marshal and other police officers went to the defendant’s home, gained access without a warrant, and took various papers and articles belonging to the defendant.\textsuperscript{41} The defendant’s motion to have his possessions returned to him prior to trial was denied.\textsuperscript{42} Letters found in the warrantless search, incriminating to the defendant, were given to the district attorney,\textsuperscript{43} who used them as evidence against the defendant at trial,\textsuperscript{44} where he was subsequently convicted.

The defendant appealed, challenging the court’s allowance of the use of his papers as evidence at trial.\textsuperscript{45} The Supreme Court found that the United States Marshal was a United States official acting under the color of his office and his acts were in direct violation of defendant’s constitutional rights.\textsuperscript{46} The Court held that the letters taken by the marshal should have been restored to the accused and it was prejudicial error to permit their use in the trial.\textsuperscript{47} As to the property seized by the police, the Court held that because the police were not acting under any claim of federal authority the fourth amendment did not apply to their unauthorized seizures.\textsuperscript{48}

Forty-six years later, the Supreme Court ruled in \textit{Mapp v. Ohio}\textsuperscript{49} 

\textsuperscript{40} \textit{Id.} at 386.
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.} at 388.
\textsuperscript{43} \textit{Id.} at 389.
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 393.
\textsuperscript{47} \textit{Id.} at 398. The Court remarked that the protection of the fourth amendment “reaches all alike, whether accused of crime or not, and the duty of giving it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws.” \textit{Id.} at 392. The Court also stated that “[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution. . . .” \textit{Id.}
\textsuperscript{48} \textit{Id.} at 398. The Court noted that the efforts of courts and their officials to punish the guilty are praiseworthy. However, if private property of an accused can be unlawfully seized and used as evidence, the protection of the fourth amendment is of no value. \textit{Id.} The Court further stated that it would not address what remedies the defendant might have against the police officers. The fourth amendment reaches only the federal government and its agencies, not the individual misconduct of state officials. \textit{Id.} (citing Boyd v. United States, 116 U.S. 616 (1886); Twining v. New Jersey, 211 U.S. 78 (1908)).
\textsuperscript{49} 367 U.S. 643 (1961). In \textit{Mapp}, the conviction was based on evidence seized during an unlawful search of the defendant’s home by state police. \textit{Id.} at 643. The Ohio Supreme Court upheld the conviction relying on the fact that the evidence was not seized “from defendant’s person by the use of brutal or offensive force against defendant.” \textit{Id.} at 645 (quoting State v. Mapp, 170 Ohio 427, 431, 166 N.E.2d 387, 389-90 (1960), rev’d, 367 U.S. 643 (1961)). The United States Supreme Court reversed and remanded the case. \textit{Id.} at 660. The Court found that the right to privacy, inherent in the fourth amendment, is enforceable against the states, and the right to be secure against invasions of that privacy by state officers is of constitutional origin. \textit{Id.}
that evidence obtained in violation of the fourth amendment is subject to exclusion in state as well as federal courts.\footnote{50} In so holding, the Court overturned its decision in \textit{Wolf v. Colorado},\footnote{51} which had held that the fourteenth amendment did not preclude the admission of evidence obtained by an unreasonable search in the prosecution in state courts of state crimes.\footnote{52}

**B. Analysis of Unreasonable Search and Seizure of Garbage Prior to 1967**

The above cases firmly established the exclusionary rule in federal and state courts. The next step was to decide upon a standard to use in determining whether there had in fact been an illegal intrusion into a citizen's personal effects. A landmark case decided in 1967, \textit{Katz v. United States},\footnote{53} set the modern standard for cases involving warrantless police searches. Prior to \textit{Katz}, the courts used a property law approach to decide which areas and interests were protected by the fourth amendment.\footnote{54} The issues the courts addressed were whether the defendant intended to abandon\footnote{55} the object which the police discovered and whether the discovery was accomplished by trespass or intrusion upon the curtilage.\footnote{56} Good examples of this pre-\textit{Katz} approach as applied to unlawful searches and seizures of garbage are \textit{Work v. United States}\footnote{57} and \textit{United
States v. Minker.\textsuperscript{58}

In \textit{Work}, police received information that the defendant was using narcotics at her home.\textsuperscript{59} They went to her home and, without a warrant, walked uninvited through her door and into her hallway.\textsuperscript{60} The defendant walked out the door and down the steps of the front porch, where she opened the lid of a trash can and placed an object in the can.\textsuperscript{61} The police did not see what she placed there, but when they lifted the top off the trash can, they found a phial of narcotics.\textsuperscript{62} The defendant moved to have the evidence suppressed at trial, but the motion was denied.\textsuperscript{63}

The Supreme Court, using the property analysis, held that the evidence should have been suppressed.\textsuperscript{64} The Court reasoned that the placing of the phial in the trash can situated under the porch would not constitute abandonment unless the person owning the article had authorized a trashman to remove the trash.\textsuperscript{65} Under the facts of this case there was no abandonment even to trashmen.\textsuperscript{66} The Court also concluded that because the search of the trash can occurred following an illegal entry by police into the defendant's home, the discovery was accomplished by intrusion onto the curtilage.\textsuperscript{67}

\textit{Minker} involved a defendant who was convicted of attempting to evade wagering excise taxes in violation of the Internal Revenue Code.\textsuperscript{68} The defendant lived in an apartment building with a trash receptacle located outside the structure, but on the premises.\textsuperscript{69} The receptacle was used by the defendant and four other residents.\textsuperscript{70} Government agents arranged to have the trash collector allow them to examine the contents of the trash receptacle off the premises.\textsuperscript{71} The agents found paper in the

\textsuperscript{58} 312 F.2d 632 (3d Cir. 1962), \textit{cert. denied}, 372 U.S. 953 (1963).
\textsuperscript{59} \textit{Work}, 243 F.2d at 661.
\textsuperscript{60} \textit{Id}.
\textsuperscript{61} \textit{Id.} at 661-63.
\textsuperscript{62} \textit{Id.} at 663.
\textsuperscript{63} \textit{Id}.
\textsuperscript{64} \textit{Id}.
\textsuperscript{65} \textit{Id.} at 662.
\textsuperscript{66} \textit{Id.} at 663. The Court said that instead of an abandonment, this was a "hiding." \textit{Id}.
\textsuperscript{67} \textit{Id.} at 662. The Court noted that it "need not decide whether the officers would have obtained the phial independently of their illegal entry, since the circumstances show that the seizure was a direct consequence of the search which began with the entry which did occur." \textit{Id}.
\textsuperscript{68} United States v. Minker, 312 F.2d 632, 634 (3d Cir. 1962).
\textsuperscript{69} \textit{Id}.
\textsuperscript{70} \textit{Id}.
\textsuperscript{71} \textit{Id}.
trash which was incriminating to the defendant.\footnote{72} The defendant challenged the taking of the paper as a violation of the fourth amendment.\footnote{73}

The Supreme Court held that the evidence need not be supressed.\footnote{74} The Court reasoned that intent is a question of fact and abandonment is a question of intent.\footnote{75} The Court found that under the facts of this case there was an intent to abandon.\footnote{76} The Court held that because the trash receptacle was shared with four others, and a trashman had been hired to remove the trash, the defendant had abandoned the trash and had no constitutional right against a search of the trash.\footnote{77}

The Court also addressed the curtilage doctrine, finding that relevant factors as to whether a given area is within the protected curtilage of a dwelling include: 1) the proximity of the area to the dwelling; 2) whether the area is within an enclosure surrounding the dwelling; 3) whether the area is used as an "adjunct to the domestic economy of the family";\footnote{78} and 4) the individual's interest and extent of the privacy of the area.\footnote{79} The Court found that because the trash receptacle was outside the apartment complex it was not in an area entitled to constitutional protection.\footnote{80}

C. The Katz Reasonable Expectation of Privacy Analysis

In Katz v. United States\footnote{81} the Court rejected the two-pronged property test used in Work and Minker.\footnote{82} The Court stated that the existence of a violation of the fourth amendment does not depend on whether the "area" invaded is "constitutionally protected."\footnote{83} Instead, the Court found that the fourth amendment "protects people not places."\footnote{84}

\begin{footnotes}
\item 72. Id.
\item 73. Id.
\item 74. Id.
\item 75. Id. (citing United States v. Wheeler, 161 F. Supp. 193, 198 (W.D. Ark. 1958); Schaufler v. United Ass'n of Journeymen & Apprentices of the Plumbing Industry Local 420, 230 F.2d 572, 576 (3d Cir.), cert. denied, 352 U.S. 825 (1956)).
\item 76. Minker, 312 F.2d at 634.
\item 77. Id.
\item 78. Id. (citing Care v. United States, 231 F.2d 22 (10th Cir.), cert. denied, 351 U.S. 932 (1956)).
\item 79. Id. (citing Jones v. United States, 362 U.S. 257 (1960)).
\item 80. Id.
\item 81. 389 U.S. 347 (1967).
\item 82. See W. LaFave, supra note 3, § 2.6(c), at 476.
\item 83. Katz, 389 U.S. at 351. The Court noted that it had occasionally described conclusions using the "[c]onstitutionally protected areas" language in the past but went on to say that that concept does not serve as a "talismanic solution to every Fourth Amendment problem." Id. at 351 n.9.
\item 84. Id. at 351.
\end{footnotes}
In *Katz*, the defendant was convicted of transmitting wagering information.\(^8^5\) His conviction was based on recordings obtained after FBI agents placed a microphone in a phone booth which they knew Katz would be using.\(^8^6\) The question before the Court was whether these recordings were obtained in violation of Katz's fourth amendment rights.\(^8^7\) The Court held that his fourth amendment rights were indeed violated.\(^8^8\)

The government argued that the surveillance activities of the agents should not be tested by fourth amendment standards because the technique employed did not involve any physical penetration into the booth.\(^8^9\) The Court rejected this argument noting that it had expressly held in *Silverman v. United States*\(^9^0\) that the fourth amendment governs not only the seizure of tangible items, but also extends to recordings of oral statements even without a property law trespass.\(^9^1\) The Court concluded in *Katz* that because the fourth amendment protects people, the question of whether there has been an unreasonable search and seizure does not "turn upon the presence or absence of a physical intrusion."\(^9^2\)

The government also argued that the defendant had placed his calls from a glass booth so that he was visible to the public.\(^9^3\) The Court found this argument unpersuasive because what one "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."\(^9^4\) Applying these findings to the facts of the case, the Court found that although the defendant was visible to the public, what he sought to exclude in the booth "was not the intruding eye—it was the uninvited ear."\(^9^5\) The Court concluded that the government's surveillance of the defendant in the phone booth violated the fourth amendment

\(^8^5\) *Id.* at 348.
\(^8^6\) *Id.* at 354. Six recordings, each approximately three minutes in length, with conversations regarding placing of bets and wagering information, were obtained and admitted into evidence. *Id.* at 354 n.14.
\(^8^7\) *Id.* at 349-50.
\(^8^8\) *Id.* at 359.
\(^8^9\) *Id.* at 352.
\(^9^0\) 365 U.S. 305, 511 (1961).
\(^9^1\) *Katz* v. United States, 389 U.S. 347, 353 (1967). The Court noted that the absence of a physical intrusion did at one time preclude fourth amendment protection. *Id.* (citing Olmstead v. United States, 277 U.S. 438, 457, 464, 466 (1928)). However, this premise has since been discredited. *Id.* (citing Warden v. Hayden, 387 U.S. 294, 304 (1967)).
\(^9^2\) *Id.*
\(^9^3\) *Id.* at 352.
\(^9^4\) *Id.* at 351 (citing Rios v. United States, 364 U.S. 253 (1960)). See also *Ex parte Jackson*, 96 U.S. 727, 733 (1877). The Court acknowledged 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." *Katz*, 389 U.S. at 351 (citing *Lewis* v. United States, 385 U.S. 206, 210 (1966); United States v. Lee, 274 U.S. 559, 563 (1927)).
\(^9^5\) *Katz*, 389 U.S. at 351. The Court further stated that anyone who enters a phone booth and
because the defendant had a justifiable expectation of privacy. 96

Justice Harlan in his concurrence stated that in a phone booth, as in a home, a person does have a “reasonable expectation of privacy.” 97 He agreed that the fourth amendment protects people, not places. However, he stated that what protection it gives people requires reference to a “place.” 98 Justice Harlan stated that “there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’ ” 99 Physical surroundings are important in an analysis of what expectations of privacy are deemed to be reasonable; therefore, although trespass onto curtilage is no longer considered controlling, it should be taken into consideration. 100

The Court has adopted Justice Harlan’s test for deciding where and when fourth amendment protection is appropriate. California v. Rooney 101 concerned the warrantless search and seizure of trash. The appeal was dismissed because in the opinion of the Court, the legality of the search was not an issue properly before the Court. 102 Justice White, joined by Chief Justice Rehnquist and Justice Powell, dissented. 103 The dissenters believed that the question of the legality of the search was properly presented and addressed the issues of the case. 104 Justice White stated that “[t]he primary object of the Fourth Amendment is to protect privacy, not property. . . .” 105 White, therefore, found that the question was not whether the defendant had abandoned his interest in the trash in

96. Id. at 361 (Harlan, J., concurring).
97. Id. at 360 (Harlan, J., concurring).
98. Id. at 361 (Harlan, J., concurring).
99. Id. In explaining the test he wrote, “Thus a man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the “plain view” of outsiders are not “protected” because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.” Id. (Harlan, J., concurring).
100. Id.
102. Id. at 2855.
103. Id. at 2856 (White, J., dissenting).
104. Id.
105. Id. at 2859 (White, J., dissenting).
a property law sense, but instead, whether he had a subjective expectation of privacy in the garbage bin that society accepts as objectively reasonable. The Court applied this same test in Greenwood.107

IV. The Greenwood Decision

A. Decision of the Court

Applying the reasonable expectation of privacy test, the Court concluded that by placing plastic garbage bags on the curb for collection, Greenwood sufficiently exposed his garbage to the public to defeat his claim to fourth amendment protection.108 The Court held that there is no prohibition of a warrantless search and seizure of garbage left outside the curtilage of the home for collection.109

B. How The Court Reached its Decision

Greenwood claimed that he did have an actual expectation of privacy in the trash searched by the police.110 The Court rejected this claim and held that even if Greenwood did not expect the contents of his garbage to become known to the police and others, there would be no fourth amendment protection unless society is prepared to accept that expectation as objectively reasonable.111 The Court found that society is not so prepared. In reaching this conclusion, the Court stated that it is common knowledge that garbage bags left on or near a public street are accessible to the public.112 The Court stated that animals,113 children, scavengers,114 and snoopsth all have access to the bags.116 Next, the

108. Id.
109. Id. at 1630-31.
110. Id. at 1628.
111. Id.
112. Id. at 1628-29.
113. Id. at 1628 n.2 (citing State v. Ronngren, 361 N.W.2d 224 (N.D. 1985)) (held there was no violation of the fourth amendment when police searched trash that a dog had dragged into a neighbor's yard).
114. Id. at 1629 n.3 (citing M. Sloane, "The Supermarket Shopper's" 1980 Guide to Coupons and Refunds 74, 161 (1980) (A consumer columnist suggested many people in apartments make friends with the building's trashman in order to obtain supermarket coupons. The publication also told of a woman who donned rubber gloves and hip boots and waded through the town dump once a week to find coupons.).
115. Id. at 1629 n.4 (citing The Washington Post, July 9, 1975, at A1, col. 8) (describing an incident in which a reporter took garbage from outside Secretary of State Henry Kissinger's home).
Court reasoned that because the defendant had left his trash out for collection, the garbageman might have rummaged through the garbage himself or could have let the police do so. Therefore, there was no reasonable expectation of privacy in the trash. The Court cited Smith v. Maryland for the proposition that there is no legitimate expectation of privacy in information that one voluntarily turns over to third persons. The Court's premise was that police cannot be expected to turn away from criminal evidence that can be observed by any member of the public. The Court then noted that all federal appellate courts and most state courts, reviewing similar claims, have rejected the notion that society will accept as objectively reasonable an expectation of privacy in trash that has been discarded in a public place. The Court found that one factor on which fourth amendment analysis must turn is "our societal understanding that certain areas deserve the most scrupulous protection from government invasion." The Court concluded that society does not have this understanding in connection with garbage set on the curb for collection.
V. Analysis

The Court's conclusion in Greenwood ignores society's need for privacy in garbage because so much can be ascertained about people by scrutinizing their garbage. Further, the Court's holding can be read too broadly. If the holding is not limited to the facts of the case, law enforcement officials, without any supervision, can obtain trash at their own whim and use information gained from trash for any purpose they wish. In addition, private individuals or other government officials might conceivably take advantage of the holding in the same way.

A. Society's Need for Privacy in Garbage

The Court failed to address Greenwood's arguments for the legitimation of an expectation of privacy in garbage. In its disregard for the defendant's arguments, the Court appears to have followed the reasoning used in United States v. Shelby. Shelby was a warrantless trash search case in which the Seventh Circuit court applied the reasonable expectation of privacy test. The defendant claimed an expectation of privacy in his trash. The court rejected this argument stating that, "[i]n the real world to so view the status of one's discarded trash is totally unrealistic, unreasonable, and in complete disregard of the mechanics of its disposal." Courts following the reasoning set out in Shelby are too insensitive and ignore the fact which the dissent in Greenwood points out: "[S]crutiny of another's trash is contrary to the notions of civilized behavior." These courts have jumped to the conclusion that no legitimate expectation of privacy exists, without any analysis of societal privacy needs. As the court in Krivda recognized:

We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse and trash to be examined by neighbors or others, at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere. Half truths leading to rumor and gossip may readily flow from an attempt to "read" the contents of

127. 573 F.2d 971 (7th Cir.), cert. denied, 439 U.S. 841 (1978).
128. Id. at 973.
129. Id.
130. Id. In addition the court chided that it "seems to be more prudent to put only genuine trash, not secrets, in garbage cans, except perhaps in California." Id. at 974.
another's trash.\textsuperscript{132}

Counsel for Greenwood aptly pointed out in their brief that in deciding whether "trash" is protected by the Constitution, the label "trash" is unfortunate because it conjures up images of scavengers sifting through banana peels and used dinner napkins, when included among these items are also financial records, discarded drug prescription bottles, letters from children divulging their indiscretions, and other intimate family secrets.\textsuperscript{133} Trash can reveal myriad details about the life of its disposer.\textsuperscript{134}

One source for the legitimation of an expectation of privacy is "by reference to concepts of real or personal property or to understandings that are recognized and permitted by society."\textsuperscript{135} The majority in Greenwood, without qualification or limitation, has decided that government seizure of trash is an activity that is recognized and permitted by society. This assumption may be indicative of the personal views of the members of the Court; however, it is incompatible with society's right to preserve its possessions and beliefs as private and free from government

\textsuperscript{132} People v. Krivda, 5 Cal. 3d 357, 366, 486 P.2d 1262, 1268, 96 Cal. Rptr. 62, 68, (1971) (quoting People v. Edwards, 71 Cal. 2d 1096, 1104, 458 P.2d 713, 718, 80 Cal. Rptr. 633, 638 (1971) (emphasis added by the Krivda court)), vacated on other grounds, 409 U.S. 33 (1972). This argument is justified. A.J. Weberman, the author of an article in Esquire Magazine, went to the homes of various celebrities, sifted through their garbage, photographed it, and published the photographs with descriptions of what he had found and what he thought it meant. Greenwood, 108 S. Ct. at 1634 (citing Weberman, The Art of Garbage Analysis: You Are What You Throw Away, ESQUIRE, Nov. 1971, at 113). One commentator has noted many other ways garbage searches are used in an unscrupulous manner. For example, industrial spies investigate trash to find competitors' secrets, and campaign managers do the same to obtain information about opposing candidates. Bush & Bly, supra note 55, at 283, 312. In one case a party to a lawsuit went through his opponent's trash to find copies of confidential letters that had been written to his opponent's counsel and obtained information that would have otherwise been protected by the attorney-client privilege. Suburban Sew 'N Sweep v. Swiss Bernina, Inc., 91 F.R.D. 254 (N.D. Ill. 1981). A list of intolerable uses of the investigation of trash could clearly become extensive.


A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like riffling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. It cannot be doubted that a sealed trash bag harbors telling evidence of the "intimate activity associated with the 'sanctity of a man's home and privacies of life,'" which the Fourth Amendment is designed to protect.

\textit{Id.} (quoting \textit{Oliver}, 466 U.S. at 180).

intrusion.136

1. Analysis of Greenwood's Claims of an Expectation of Privacy in Garbage

Clearly, society does have a valid interest in privacy in garbage. Because of this, the Court should have addressed Greenwood's claim for his own subjective expectation of privacy in trash before concluding that any expectation of privacy in trash is objectively unreasonable. Greenwood based his claim for an expectation of privacy in his trash on three contentions:

First, the trash was set on the curb at a fixed time and was there only temporarily, so there was little likelihood that it would be inspected by anyone.137 The police officers had to examine the garbage at a precise time of the day because it would otherwise be too late to distinguish it from other trash once placed in the truck.138 That the trash would not be at the curb long enough for animals, scavengers, children, or other members of the public to invade it was reasonable to believe. Even if the trash was there long enough to be accessible to animals, "common sense tells us that one should be able to expect that his property and the trash containers will be free from search and seizure by the police, neighbors, and others who are or should be more knowledgeable and respectful of the property and privacy rights of others."139 Arguably most citizens would probably find this expectation reasonable.

Second, the trash was contained in opaque plastic bags tied at the top.140 Justice Brennan pointed out that "so long as a package is 'closed against inspection,' the Fourth Amendment protects its contents 'whenever they may be,' and the police must obtain a warrant to search it ...."141 Further, "unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment."142 Greenwood's garbage bags were sealed at the top, and nothing was visible to onlookers.143 Justice Brennan reasoned that if

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136. See supra notes 33-38 and accompanying text, discussing the fourth amendment.
138. Brief for Respondent at 10, California v. Greenwood, 108 S. Ct. 1625 (1988) (No. 86-684). "Illustrative is the fact that, on one of the occasions, the collector had not maintained several of the bags separate from other trash, and Petitioner's trash became irretrievable." Id.
141. Greenwood, 108 S. Ct. at 1632 (quoting Ex parte Jackson, 96 U.S. 727, 733 (1877)).
142. Id. (quoting Robbins v. California, 453 U.S. 420 (1981)).
Greenwood had been carrying his possessions in these same bags his expectation of privacy would have been protected under the fourth amendment.144

Third, Greenwood expected the garbage collector to pick up the trash and mingle it with the trash of others.145 The Court has specifically held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.146 The underlying premise is that if there is consent for garbage collectors to take away trash, there is a waiver of an expectation of privacy.147

The Court made the presumption that Greenwood waived his expectation of privacy by conveying the trash to the garbage collector.148 This approach ignores the fact that "[t]he burden is on the government to justify the validity of a warrantless search and a court should not presume a waiver of a constitutional right."149 In addition, the Court seems to have used the property law abandonment approach which it has previously rejected.150 Individuals often turn over items to third persons and still retain a legitimate privacy interest in them.151 For example, individuals retain a privacy interest in mail which is conveyed to government and private entities for delivery.152 There is no reason for the Court to

Counsel for the defendant stated in its brief that Greenwood did everything he could, short of placing a label on his garbage bag or a sign on his lawn, prohibiting garbagemen or scavengers from opening them and this manifested an expectation of privacy. Id. In addition, Justice Brennan noted that if the contents in a container are not clearly observable by others there is no distinction between "worthy" and "unworthy" containers. Greenwood, 108 S. Ct. at 1632 (Brennan, J., dissenting) (citing Robbins v. California, 453 U.S. 420 (1981)).

144. Greenwood, 108 S. Ct. at 1633 (Brennan, J., dissenting). Justice Brennan stated: "Respondents deserve no less protection just because Greenwood used the bags to discard rather than to transport his personal effects. Their contents are not inherently any less private, and Greenwood's decision to discard them, at least in the manner in which he did, does not diminish his expectation of privacy." Id.

145. Id. at 1628.


147. See Bush & Bly, supra note 55, at 306. The authors assert that this is the curtilage theory revisited. Once the trash is in the hands of the authorized garbage collector and not at the home of the disposer, the police are allowed to search the trash, presumably because it is outside the curtilage. Id.


150. See supra notes 81-107 and accompanying text (discussing the rejection of property law concepts in the fourth amendment analysis).

151. Greenwood, 108 S. Ct. at 1637 (Brennan, J., dissenting). Justice Brennan stated that "even the voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of a privacy expectation in it." Id.

152. Id. Justice Brennan stated that if this were not so, a letter or package would lose constitutional protection when placed in a mail box with the purpose of conveying it to a postal officer or
presume that individuals do not intend to retain a privacy interest in their garbage simply because it is entrusted to the care of a garbage collector.

In this case, it cannot be said that Greenwood voluntarily conveyed his garbage to third persons or impliedly consented to have the garbage collector take the trash. A county ordinance where Greenwood resided dictated the manner in which trash was to be discarded.153 A governmental penal statute compelled the conveyance of trash to third persons. Burying or burning trash was also unlawful.154 Therefore, Greenwood cannot be said to have placed his trash on the curb freely and voluntarily or to have given actual or implied consent for the collector to do with it as he pleased. Even if there were consent on Greenwood’s part for the collector to sift through his garbage, there was no consent for the police to search it without a warrant. “The assertion, without further analysis, that once the garbage leaves the owner’s property, no fourth amendment right can be asserted, simply does not conform to Katz’s holding that ‘the Fourth Amendment protects people, not places.’ ”155

In addition, the Court found that there is no expectation of privacy in trash on the curb because trash collectors, along with scavengers and other members of the public, might be able to examine the trash and allow the police to do so.156 This ignores the fact that “[t]he mere possibility that unwelcome meddlers might open and rummage through the containers does not negate the expectation of privacy in its contents any more than the possibility of a burglary negates an expectation of privacy in the home . . . .”157 The lack of absolute certainty in privacy

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153. ORANGE COUNTY, CAL. MUNICIPAL CODE § 4-3-45(a) (1986). The statute provides: “solid waste created, produced or accumulated in an apartment house or a dwelling house, or other place of human habitation shall be removed from the premises at least once a week.” Id.
157. Id. at 1636 (Brennan, J., dissenting). Justice Brennan gave other examples: the possibility of private intrusion does not negate an expectation of privacy in an unopened package or the possibility that someone will listen to a phone call does not negate an expectation of privacy in the words spoken. Id. See also People v. Edwards, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969) (Even though a hotel guest might know that a maid will enter the room to clean, there should be no expectation that a hotel employee will allow police to search the room.); Chapman v. United States, 365 U.S. 610 (1961) (Although a landlord had authority to enter a tenant’s house for some purposes, the tenant’s constitutional rights were violated when the landlord allowed police to search it.).
expectations does not support a finding that the privacy expectation was unreasonable. Therefore, although one may not be absolutely certain that a garbage collector or scavenger will not rummage through garbage, to expect that police will not do so is not unreasonable.

Another argument in support of an expectation of privacy in trash is the fact that when an individual places trash on the curb on a designated day for collection, the expectation that the trash will be intermingled with that of others and later will be buried forever at the local dump is reasonable. It is reasonable for people to “believe that police will not indiscriminately rummage through their trash bags to discover their personal effects.”

2. The Alternative Argument for a Lowered Expectation of Privacy In Garbage Standard Which the Court Failed to Address

There are very good arguments on the side of recognizing a reasonable expectation of privacy in garbage. However, the majority in Greenwood was unwilling to accept them. One well-reasoned alternative submitted by counsel for the defendant would have been an excellent compromise, but the court failed to address it.

The defendant’s counsel argued that if the Court was unwilling to conclude that an expectation of privacy in trash is equal to an expectation of privacy in objects in the home or in phone conversations, then the

158. O’Connor v. Ortega, 480 U.S. 709 (1987) (plurality opinion). Justice Scalia in his concurring opinion stated that

[It] is privacy that is protected by the Fourth Amendment, not solitude. A man enjoys Fourth Amendment protection in his home, for example, even though his wife and children have the run of the place—and, indeed, even though his landlord has the right to conduct unannounced inspections at any time. Similarly, in my view, one's personal office is constitutionally protected against warrantless intrusions by the police, even though employer and co-workers are not excluded.

Id. at 730.


See also State v. Schultz, 388 So. 2d 1326, 1330 (Fla. Dist. Ct. App. 1980) (Anstead, J., dissenting), where a dissenting judge wrote:

[A] homeowner, upon placing items in a closed garbage container and placing the container in a position on his property where the container can be conveniently removed by authorized trash collectors, is entitled to reasonably expect that the container and the trash therein will be removed from his property only by those authorized to do so, and that such trash will be disposed of in the manner provided by ordinance or private contract.

Id.


Court should at least grant a limited expectation of privacy in trash.\footnote{162} In United States v. Ross\footnote{163} police had probable cause to believe that contraband would be found in an automobile on the road. Acting on this probable cause, police stopped and searched the automobile. The warrantless search was upheld.\footnote{164} The Court recognized that individuals have a reasonable but lowered expectation of privacy in an easily movable object.\footnote{165} Therefore, where an easily movable object is involved, police must have probable cause, but may forego the requirement of a decision by a neutral magistrate.\footnote{166}

Greenwood's counsel contended that if the Court were to deny full fourth amendment protection to trash left at the curbside, it should adopt the rules stated in Ross, thereby requiring at least probable cause before a warrantless search takes place where an individual manifests a reasonable expectation of privacy in the trash.\footnote{167} The Court did not acknowledge this argument in its opinion. If the Court had agreed with this lowered expectation standard, Greenwood might have gone free because it was strongly argued that the police officers did not act on probable cause when they searched the trash.\footnote{168}

B. Implications for Future Cases

Because the Court failed to give any credence to the arguments set out above, there is a danger that the Court's holding will be read too broadly. As a consequence of the sweeping decision that society has no reasonable expectation of privacy in garbage for fourth amendment purposes, the Court has jeopardized society's legitimate privacy interest in garbage. There is no mention of guidelines for police conduct and no mention of what implications the holding will have when applied to the intrusive use of garbage by private individuals or other government officials.

\footnote{162} Id. at 24.
\footnote{163} 456 U.S. 798 (1982).
\footnote{165} Id. at 25.
\footnote{166} Id. In Ross, the Court noted that "individuals always had been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts." Ross, 456 U.S. at 806 n.8.
\footnote{168} Id. at 27. According to the defendant's brief, Officer Straener conducted the initial searches based upon conjecture and unsupported, uncorroborated information from an informant. Id.
1. The Need for Guidelines for Police Conduct in Garbage Searches

The Greenwood decision may have an intolerable impact on the means by which police search for evidence. The Court gave no guidelines for reasonable police behavior in conducting trash searches. Because the Court has rejected a probable cause requirement, the door may be opened to “unbridled police harassment.” Significant amounts of information about a person can be obtained from an examination of trash. Moreover, “the amount of information gained about the disposer logically is proportional to the number of searches performed.” Thus, as the number of searches increases, so does the amount of intrusion into privacy. Unconstrained exploratory searches which are conducted until something incriminating is found should not be allowed. Although a search may be reasonable under the fourth amendment at its commencement, if its scope and intensity become intolerable it will become a violation of the fourth amendment. Harrassment is inherent when police are determined to find incriminating evidence no matter how many searches it takes to find such evidence.

2. The Need for Individuals to Have Recourse if Private Citizens Damage Them Through Information Obtained from Trash Searches

Fourth amendment protection applies only to government action and Greenwood leaves unclear what rights private citizens might have to information obtained from trash. One might presume that the police will use fruits of warrantless trash searches only for legitimate purposes. However, it could be dangerous to read the Greenwood holding to extend to the acts of private individuals or to other government employees who might use garbage in an unscrupulous manner. Reading the holding to include these acts will increase the number of people who, by having legitimate access to trash, are capable of inflicting damage by negligence, ignorance, or lack of sensitivity to personal privacy of others.

170. See supra notes 132-35 and accompanying text.
174. See Bush & Bly, supra note 56, at 319.
175. Bush & Bly, supra note 56, at 313.
176. Cf. A. MILLER, supra note 1, at 32.
One case in which the Greenwood holding was read to include the unscrupulous use of trash by private individuals and public employees is Rice v. City of Oneonta. One day, as a prank, Mrs. Rice's daughter took a photograph of her as she was getting dressed. The photo ended up in Mrs. Rice's garbage. Richard Eakes, the garbage collector, fished it out of the garbage and "paraded this photograph of her scantily-clad body around town." Mrs. Rice and her husband were embarrassed and outraged when they received this information. Mrs. Rice claimed that the appropriation of the photograph and the publication of it to several individuals violated her constitutional right of privacy. She brought suit under 42 U.S.C. Section 1983. She also claimed intentional infliction of emotional distress and the tort of outrage. The defendants, the City of Oneonta and Richard Eakes, moved for dismissal. The court granted the motion.

The court first noted that "[s]ection 1983 requires both deprivation of a constitutional right and action by a defendant under color of state law." The court then conceded that the taking of the photo from the trash by Eakes was arguably under color of state law since the function of sanitation workers is to collect and dispose of trash. The court found, however, that Mrs. Rice had no "constitutional property or liberty interest in the contents of the trash which could have been abridged by Eakes' appropriation."

The court used the authority of Greenwood as the grounds for this finding. The court stated that "[w]hile Greenwood held that there was no expectation of privacy in trash vis-a-vis police conduct for purposes of the Fourth Amendment, the Court premised its decision in part on the

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178. This was the statement Mrs. Rice's attorney gave the newspaper. Birmingham Post Herald, Aug. 6, 1988, at 16A.
179. Id.
180. Id.
181. Id. According to the newspaper article Eakes showed off the photograph at a Christmas family gathering and one of Mrs. Rice's friends or relatives was there and realized who it was and told Mrs. Rice about it. Id.
182. Rice, slip op. at 2.
183. Id.
184. Id.
186. Id.
187. Id.
basis that people should expect their trash to be searched by trash collectors.”188 The court concluded that there is no authority for “requiring the court to treat claims of a property or liberty interest under the Fourteenth Amendment differently from those asserting an expectation of privacy under the Fourth Amendment.”189 Therefore, the court held that, although the publication of the photograph may have caused embarrassment to Mrs. Rice and her husband, her constitutionally protected privacy interest was not infringed.190 Because the section 1983 claims were dismissed, the federal district court declined to exercise jurisdiction over the state law tort claims.191

The right of privacy, as a legal concept, has two main aspects.192 The first is a general law of privacy which provides for damages which result from unlawful invasion of privacy.193 Second is the constitutional right of privacy which protects against unlawful government invasion.194 There are four violations of the right to privacy recognized as supporting a claim for damages: 1) intrusion; 2) public disclosure of private facts; 3) false light in the public eye; and 4) appropriation.195 There is a danger as a result of the holding in Greenwood that an individual whose garbage is used in any one of these four manners will have no legal recourse for recovery. In order to recover on any of these causes of action, it must be shown that what was intruded upon or published was private and the intrusion must be offensive to a person of “ordinary sensibilities.”196

Whether the courts treat information obtained from trash as private

188. Id. (citing California v. Greenwood, 108 S. Ct. 1625 (1988)).
189. Id. (citing Whalen v. Roe, 429 U.S. 589, 604 n.32 (1977)) (Supreme Court refused to hold that the fourth amendment's interest in privacy offers more protection than any right or liberty protected by the fourteenth amendment).
190. Rice, No. CV 88-P-0767-S, slip op. (N.D. Ala. July 25, 1988). In addition, the court found that "Eakes' display of the photo was clearly done for purposes of his own amusement and cannot be considered an exercise of power 'possessed by virtue of state law.'" Id. (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). The Court held that since Mrs. Rice had no section 1983 claim against Eakes, their claim against the city must also be dismissed.
191. Id.
192. Annotation, Supreme Court's Views as to the Federal Legal Aspects of the Right of Privacy, 43 L.Ed.2d 871, 875-76 (1976).
193. Until the close of the nineteenth century, a person whose privacy was invaded had no redress in the courts. The courts saw mental distress caused by loss of a personal right to privacy too unimportant to be a legitimate cause of action. The courts were also fearful that providing protection for this personal interest would open the "floodgates of litigation." A. Miller, supra note 1, at 169-70. Because of an article written by Samuel D. Warren and Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890), the right to recover for invasion of privacy has received overwhelming recognition. See W. Keeton, PROSSER AND KEETON ON THE LAW OF TORTS, 849-69 (5th ed. 1984).
196. W. Keeton, supra note 194 at 857; A. Miller, supra note 1, at 181.
depends on the general community's attitude rather than a fixed norm.\textsuperscript{197} The success of an invasion of privacy action depends on the community's ability to distinguish what is part of the public domain and what should not be.\textsuperscript{198} Because of the Supreme Court's holding in Greenwood, a privacy cause of action may suffer from this community standard.\textsuperscript{199} The Rice case\textsuperscript{200} demonstrates that the Greenwood holding can be interpreted to define information found in trash as public so the law will not protect it. Once this standard is accepted, the next step would be to say the intrusion is not offensive to persons of ordinary sensibilities. This would be an unfair and untrue statement.

If Mrs. Rice decides to pursue her tort claims in state court, the holding of Greenwood should not prevent her from recovering damages from Eakes. However, it appears from the holding in Rice that the contents of garbage are everyone's business,\textsuperscript{201} and unfortunately, this attitude may prohibit Mrs. Rice from recovering damages.

C. \textit{How the Court's Opinion Should be Interpreted in Order to Avoid Guideline Deficiencies}

1. The Holding Should be Read Narrowly to Impose Some Control Over Police Conduct in Garbage Searches

The holding in Greenwood should be read narrowly to allow warrantless trash search only when facts exist similar to the ones presented in Greenwood, where the police intrusion was minimal. In some situations, a warrantless garbage search may be the only effective means of gaining criminal evidence. As the Court in Greenwood stated: "[o]ur decisions concerning the scope of the Fourth Amendment exclusionary rule have balanced the benefits of deterring police misconduct against the costs of excluding reliable evidence of criminal activity."\textsuperscript{202} Because the Court approves of this balancing test and has found that probable cause is not required, it should at least narrow the holding of the case to the

\begin{footnotes}
\item[197] A. Miller, \textit{supra} note 1, at 181.
\item[198] A. Miller, \textit{supra} note 1, at 181.
\item[199] In order to recover for an invasion of privacy, "the intrusion must be something which would be offensive or objectionable to a reasonable person... It is clear also that the thing into which there is intrusion or prying must be, and be entitled to be, private." W. Keeton, \textit{supra} note 194, at 855.
\item[201] Birmingham Post Herald, Aug. 6, 1988, at 16A.
\end{footnotes}
specific circumstances involved in the case and require some reasonable basis for a trash search.

Under the facts of Greenwood, officers Stracner and Rahauesser at least had a "legitimate suspicion"\(^{203}\) that they would find evidence of drugs.\(^{204}\) This legitimate suspicion standard requires that a "police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."\(^{205}\) Use of this standard would allow recognition of a need for warrantless search of garbage, but would prevent unrestrained intrusion into individuals' private effects.\(^{206}\)

The Court also noted in its ruling that it will not indiscriminately apply the exclusionary rule "when law enforcement officers have acted in objective good faith or their transgressions are minor."\(^{207}\) Under the facts of Greenwood, the police officers appeared to have acted in good faith with minimal intrusiveness. The Court's refusal to apply the exclusionary rule should be limited to circumstances where the police waited until the garbage was collected by the authorized collector. An individual should have the right to retrieve trash until authorized collectors remove it from the property.\(^{208}\)

Further, though there was more than one search in this case, it does not appear that its scope and intensity became intolerable. The holding should be limited to these facts.\(^{209}\)

At the point where legitimate suspicion turns into a groundless belief, the searches should stop. Courts must preserve their constitutional responsibility to protect against police conduct which is harassing or intrudes upon personal privacy or security by mandating warrants, issued by an impartial magistrate.\(^{210}\) The police should still be required to

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203. See Bush & Bly, supra note 56, at 318-19.
204. Greenwood, 108 S. Ct. at 1627. One of Greenwood's neighbors was an informant, and observed the suspicious late-night activity at Greenwood's home. Id.
209. See Bush & Bly, supra note 56, at 319.

If the police had a legitimate suspicion to justify [a] one time search, they should not be limited by whether fortune leads them to search the right batch of garbage the first time. Nevertheless, a point is reached after some number of searches when the legitimate suspicion becomes either probable cause sufficient to obtain a warrant or else turns into groundless belief which cannot excuse a further fishing expedition.

Id.
obtain a warrant for searches and seizures whenever their reasonable sus-
picion becomes probable cause.\textsuperscript{211}

2. **The Holding Should be Read Narrowly in Order to Disallow**

**Unscrupulous Use of Trash by Private Individuals and**

**Other Government Employees**

The holding should be read narrowly to apply only to fourth amend-
ment search and seizure cases. "[T]he potential for unscrupulous use of
seized garbage has been demonstrated," and there is a need to protect the
disposer of garbage from these unscrupulous uses.\textsuperscript{212} The holding in
*Greenwood* should be based completely on a need to minimize the exclu-
sion of reliable evidence in criminal cases. The holding should not be
extended to civil damage actions to punish improper interceptions and
use of data gained in trash searches conducted by private individuals and
other government officials.

The concept of the right of privacy is nearly impossible to define
because it is vague and means different things to different people.\textsuperscript{213}
However, the conclusion reached by most attorneys and social scientists
is that the basic attribute of a right to privacy is the individuals' ability to
control the circulation of information relating to themselves.\textsuperscript{214} When
individuals are deprived of the right to control information pertaining to
themselves, they become subservient to people and institutions able to
manipulate the information.\textsuperscript{215}

There are dangerous effects in holding that an individual's trash is
not private. To have information coercively extracted from a person's
trash or gathered without their knowledge is violative of the constitu-
tional right of privacy.\textsuperscript{216} The presentation of evidence of a person's
actions and associations to an audience to which the person did not consent
or anticipate when he surrendered the information could be harmful.\textsuperscript{217}
There can easily be factual and contextual inaccuracies in the data that
give an erroneous impression of the subject's actual conduct or activi-
ties.\textsuperscript{218} Further, a person who has gained access to an individual's trash
can use the information to damage the owner of the trash without the

\textsuperscript{211} \textit{Id.} at 20.
\textsuperscript{212} Bush & Bly, \textit{supra} note 56, at 313.
\textsuperscript{213} A. MILLER, \textit{supra} note 1, at 25.
\textsuperscript{214} A. MILLER, \textit{supra} note 1, at 25.
\textsuperscript{215} A. MILLER, \textit{supra} note 1, at 25.
\textsuperscript{216} A. MILLER, \textit{supra} note 1, at 47.
\textsuperscript{217} A. MILLER, \textit{supra} note 1, at 32.
\textsuperscript{218} A. MILLER, \textit{supra} note 1, at 32.
owner knowing about it.\textsuperscript{219} Even if victims could trace the damage to the improper use of their trash, they may be prevented from recovering damages if the contents of trash are seen as public.\textsuperscript{220}

There is a need for guidelines to direct how the contents of garbage can be used. The threat of private information being leaked to the public increases with the holding in \textit{Greenwood} unless the decision is read to apply only to use of criminal evidence taken with reasonable suspicion on the part of police officers. It should be implicit in the \textit{Greenwood} holding that safeguards and restraints remain against improper dissemination of trash.

\section*{VI. Conclusion}

The Supreme Court has "the responsibility to enforce constitutional guarantees."\textsuperscript{221} The holding in \textit{Greenwood} ignores this obligation. Rather than apply the \textit{Greenwood} majority's broad, generalized approach that there is no justifiable expectation of privacy in garbage, each case should be decided on its own facts. If this is not done, substantial privacy interests may be invaded in an intolerable manner. Application of the \textit{Greenwood} holding should be based completely on the need to minimize the exclusion of reliable criminal evidence. Restrictive guidelines for police conduct in garbage searches should be read as implicit in the holding. In addition, the holding should not be read to prohibit liability for improper interceptions and use of data gained in trash searches by private individuals and other government employees.

\textit{Mary Elizabeth Minor}

\textsuperscript{219} Cf. \textit{A. Miller}, supra note 1, at 177.
\textsuperscript{220} Cf. \textit{A. Miller}, supra note 1, at 177. \textit{See supra} note 199 and accompanying text.