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## Trash: A Matter of Privacy?

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# Casenote

## Trash: A Matter of Privacy?

### I. Introduction

The Fourth Amendment of the United States Constitution governs all searches and seizures conducted by government agents.<sup>1</sup> The Supreme Court has placed a person's reasonable expectation of privacy at the forefront of any Fourth Amendment analysis.<sup>2</sup> A defendant without a reasonable expectation of privacy in the area searched or the item seized has not been subjected to a "search" or "seizure" within the meaning of the Fourth Amendment. Thus, reasonable law enforcement practices are not required unless they are deemed either searches or seizures.<sup>3</sup> This casenote will describe the Fourth Amendment protections and the evolution of the law of warrantless trash searches, including the elements of the "reasonable expectation of privacy" test, announced by the Supreme Court in *Katz v. United States*.<sup>4</sup> Next, it will discuss and criticize the Supreme Court's decision in *California v. Greenwood*.<sup>5</sup> In *Greenwood*, the Court held that when a person puts her trash outside to be picked up by the garbage collectors, the police may freely search

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1. U.S. CONST. amend. IV. "The right of 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." The Fourth Amendment is applicable to state officials through the Due Process Clause of the Fourteenth Amendment. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in state court.").

2. See *Katz v. United States*, 389 U.S. 347 (1967).

3. See generally Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

4. 389 U.S. 347 (1967).

5. 486 U.S. 35 (1988).

the trash without a warrant.<sup>6</sup> Part IV will examine various state court decisions that have rejected *Greenwood* and instead have recognized an individual's privacy interest in her trash pursuant to individual state constitutions. Part V of the case-note will discuss the Fourth Amendment protection that should be granted to a person who mixes her trash with others, for example, someone who shares a community dumpster or disposes of trash at her place of employment. Finally, the article will analogize the disposing of one's trash with other activities that require individuals to "surrender something" to a third person, and where such third party disclosure should not, or in fact, does not eliminate privacy expectations in the information disclosed.

## II. Historical Background

The Fourth Amendment contains two separate clauses: the prohibition of unreasonable searches and seizures by the government; and, the requirement that probable cause support each warrant issued.<sup>7</sup> Probable cause to conduct a search is defined as "a fair probability that contraband or evidence of a crime will be found in a particular place."<sup>8</sup> Traditionally, only the issuance of a valid search warrant satisfied the reasonable search and seizure inquiry of the Fourth Amendment analysis.<sup>9</sup> However, the Supreme Court has acknowledged instances where it is not practical for the police to obtain a warrant and, therefore, excused the warrant requirement in those situations.<sup>10</sup>

Until 1967, courts viewed the Fourth Amendment as protecting certain places, "constitutionally protected areas," not the individual citizens.<sup>11</sup> The protection of the Fourth Amendment applied only to those places specifically enumerated in the Constitution, including "persons" (including the bodies and

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6. *See id.*

7. *See* U.S. CONST. amend. IV.

8. *Illinois v. Gates*, 462 U.S. 213, 214 (1983).

9. *See Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

10. *See, e.g., Maryland v. Buie*, 494 U.S. 325 (1990) (holding that a police officer can conduct a protective sweep of the premises pursuant to an arrest if there are articulable facts that would lead a reasonable officer to believe that there is an individual posing a danger on the premises).

11. *See Berger v. New York*, 388 U.S. 41, 57-59 (1967).

clothing of individuals); "houses" (including apartments, hotel rooms, garages, business offices, stores and warehouses); "papers" (such as letters); and, "effects" (such as automobiles).<sup>12</sup>

In 1967, the Court rejected the rigid "constitutionally protected area" test that focused only on the places that were being searched.<sup>13</sup> In *Katz v. United States*,<sup>14</sup> the Supreme Court held that the Fourth Amendment protects people, not places.<sup>15</sup> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."<sup>16</sup> There, the defendant, Charles Katz, a bookmaker, was convicted of conducting wagering activities across state lines in violation of a federal statute.<sup>17</sup> The FBI placed an "electronic listening and recording device" to the outside of a public telephone booth that the defendant used to conduct his business.<sup>18</sup> The Court of Appeals, over Katz's objection, permitted the government to introduce transcripts of the overheard conversations as evidence against Katz.<sup>19</sup> The Supreme Court granted certiorari to determine whether the defendant's Fourth Amendment rights had been violated.<sup>20</sup>

The government argued that since the phone booth, located in a public place, was constructed partly of glass, the defendant was as visible to the police inside the booth as if he had remained outside.<sup>21</sup> The Court, however, rejected this argument and stated that "what [Katz] sought to exclude . . . was not the intruding eye . . . [but] the uninvited ear."<sup>22</sup> By entering the phone booth, even though it was a public phone located in a

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12. See U.S. CONST. amend. IV; see also 1 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1(a), at 380-81 (3d. ed. 1996).

13. *Katz v. United States*, 389 U.S. 347, 351 (1967).

14. 389 U.S. 347 (1967).

15. See *id.* at 351.

16. *Id.*

17. See *id.* at 348.

18. See *id.*

19. See *Katz v. United States*, 369 F.2d 130, 134-35 (9th Cir. 1966), *rev'd* 389 U.S. 347 (1967).

20. See *Katz*, 389 U.S. at 350.

21. See *id.* at 352.

22. *Id.*

public place, shutting the door behind him, and "pay[ing] the toll," Katz was entitled to assume that the words he spoke would remain private and not be broadcast publicly.<sup>23</sup> Thus, this law enforcement practice "constituted a 'search and seizure' within the meaning of the Fourth Amendment."<sup>24</sup>

The *Katz* court adopted a new approach to Fourth Amendment analysis and focused on the protection of the individual as opposed to location. Although the government argued that since there was no "physical penetration of the telephone booth"<sup>25</sup> by the police, Fourth Amendment principles should not apply. The Court rejected these notions of property law as part of its analysis.<sup>26</sup> "[W]e have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any 'technical trespass under local property law.'"<sup>27</sup>

In his famous concurring opinion, Justice Harlan articulated a two-prong test for determining whether a person is entitled to Fourth Amendment protection. First, Justice Harlan's test required that a person exhibit an actual (subjective prong) expectation of privacy.<sup>28</sup> Second, the expectation must be one that society is prepared to recognize as reasonable (objective prong).<sup>29</sup> Justice Harlan, in applying his test to the facts of *Katz*, would have held that the defendant did have a reasonable expectation of privacy in the phone booth even though it was a public place. "[I]t is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable."<sup>30</sup>

### III. *California v. Greenwood*<sup>31</sup>

In early 1984, the Laguna Police Department received a tip that a truck filled with illegal drugs was en route to the address

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23. *See id.*

24. *Id.* at 353.

25. *Katz*, 389 U.S. at 352.

26. *See id.* at 353.

27. *Id.*

28. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring).

29. *See id.* (Harlan, J., concurring).

30. *Id.* (Harlan, J., concurring).

31. 486 U.S. 35 (1988).

of the defendant, William Greenwood.<sup>32</sup> In addition to the tip, the police received information from one of Greenwood's neighbors that there was heavy vehicular traffic late at night in front of Greenwood's home.<sup>33</sup> Police surveillance outside of Greenwood's home confirmed this report.<sup>34</sup> In April of 1984, the police instructed the local trash collector to pick up the garbage bags that Greenwood had deposited for collection at the curb in front of his house and to immediately turn them over.<sup>35</sup> The plastic bags were opaque and had been sealed by Greenwood prior to their disposal.<sup>36</sup>

Over the next few months, the police continued to search through Greenwood's trash.<sup>37</sup> Enough evidence indicative of narcotics use was discovered to obtain a search warrant of his home.<sup>38</sup> During this search, the police discovered quantities of cocaine and hashish.<sup>39</sup> Greenwood was subsequently arrested on felony drug charges.<sup>40</sup>

The Superior Court of California dismissed the charges against Greenwood pursuant to the authority of *People v. Krivada*.<sup>41</sup> The California Court of Appeal affirmed.<sup>42</sup> The United States Supreme Court, applying Justice Harlan's two-prong test announced in *Katz*, reversed the lower California courts.<sup>43</sup> The Supreme Court held that the police are permitted to conduct warrantless searches of trash left at the curbside.<sup>44</sup>

Justice White, writing for the majority, concluded that while Greenwood might have had a subjective expectation of privacy, it was not an expectation that society was prepared to

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32. See *id.* at 37.

33. See *id.*

34. See *id.*

35. See *id.*

36. See *Greenwood*, 486 U.S. at 45.

37. See *id.*

38. See *id.* at 37-38.

39. See *id.* at 38.

40. See *id.*

41. See *Greenwood*, 486 U.S. at 38 (citing *People v. Krivada*, 5 Cal. 3d 357 (1971) (holding that warrantless trash searches violate federal law and the California Constitution)).

42. See *Greenwood*, 486 U.S. at 38 (citing *People v. Krivada*, 182 Cal. App. 3d 729 (1986)).

43. See *Greenwood*, 486 U.S. at 43.

44. See *id.* at 45.

recognize as reasonable.<sup>45</sup> In support of this conclusion, the Court focused on three main factors: first, society recognizes that garbage left on the street is "accessible to animals, children, scavengers, snoops, and other members of the public;"<sup>46</sup> second, when the defendant left his trash at the curbside for the garbage collector to take, he renounced control over it;<sup>47</sup> and, third, that "the police cannot be expected to avert their eyes from evidence of criminal activity that could have been observed by [the trash collectors or] any [other] member of the public."<sup>48</sup> The Court, in making its decision, also relied on the expectation of privacy analysis used in *Smith v. Maryland*.<sup>49</sup> There, the Supreme Court held that a person does not have a reasonable expectation of privacy in the telephone numbers that she dials from her home telephone because she is voluntarily conveying that information to a third party.<sup>50</sup> The release of that information to the telephone company, according to the Court, was enough to eliminate any privacy interests a person might have in protecting the identity of the people that she calls.<sup>51</sup> Thus, she received no Fourth Amendment protection.<sup>52</sup> Similarly, the majority in *Greenwood* held that a person who places her trash at the curbside for the garbage collectors relinquishes any privacy expectation in its contents, and thus, would not receive any Fourth Amendment protection in a subsequent search.<sup>53</sup>

Justice Brennan, writing for the dissent in *Greenwood*, stated: "I suspect . . . members of our society will be shocked to learn that the Court, the ultimate guarantor of liberty, deems unreasonable our expectation that the aspects of our private lives that are concealed safely in a trash bag will not become public."<sup>54</sup>

The conclusion of the Supreme Court in *Greenwood* is at odds with "commonly accepted notions of civilized behavior."<sup>55</sup>

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45. *See id.* at 40-41.

46. *Id.* at 40.

47. *See id.* at 40-41.

48. *Greenwood*, 486 U.S. at 41.

49. 442 U.S. 735 (1979).

50. *See id.* at 742.

51. *See id.*

52. *See id.* at 745-46.

53. *See California v. Greenwood*, 486 U.S. 35, 40 (1988).

54. *Id.* at 45-46 (Brennan, J., dissenting).

55. *Id.* at 45 (Brennan, J., dissenting).

First, even though one's garbage might be accessible to animals or children, it does not follow that the police have an unregulated right to search it. "We expect officers of the State to be more knowledgeable and respectful of people's privacy than are dogs and curious children."<sup>56</sup> Most individuals would be outraged to find a neighbor searching through their trash. Assuming Justice Brennan's assertion is correct, there must be a cognizable societal expectation of privacy in our garbage. "If one has not abandoned the right of privacy in his trash to his neighbor, he certainly has not abandoned it to persons involved in law enforcement."<sup>57</sup>

Trash contains information concerning intimate aspects of a person's life: a person's eating habits, what newspapers or magazines she reads or subscribes to, what associations she belongs to, what credit cards she owns, her financial status according to bank records, what stores she shops in, intimate details of her sexual practices, matters of her personal hygiene, whom she speaks to on the telephone, what music she listens to - details that essentially reveal the innermost aspects of a person's private life.<sup>58</sup> In a vast number of situations, people want to keep their habits and preferences private. Almost every daily activity will result in some form of refuse. In a person's trash, one could find evidence of a person's darkest secrets - information that she would never voluntarily share with another person. As Justice Brennan stated in *Greenwood*, "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 the privacies of life,' which the Fourth Amendment is designed to protect."<sup>59</sup> This information is conveyed to the garbage collector for the purpose of eliminating it from one's life — forever.

Second, a person often has no alternative means to eliminate her trash. In *Greenwood*, the county where the defendant lived had an ordinance that required residents to dispose of

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56. *State v. Schultz*, 388 So. 2d 1326, 1330 (Fla. App. 1980) (Anstead, J., dissenting).

57. *Id.* at 1331 (Anstead, J., dissenting).

58. *See Greenwood*, 486 U.S. at 50 (Brennan, J., dissenting).

59. *Id.* at 50-51 (Brennan, J., dissenting) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).



their trash through the county sanitation system at least once a week.<sup>60</sup> Other means of disposal, including burning the trash or even allowing it to accumulate in one's own garage, were strictly prohibited by the ordinance.<sup>61</sup> Since local laws and social customs gave rise to this mandatory system of garbage removal, society should expect that people would retain their privacy interests in such items affected by the system.<sup>62</sup> Justice Brennan stated that "the Court paints a grim picture of our society."<sup>63</sup> It depicts a society where "local authorities may command their citizens to dispose of their personal effects in the manner least protective of the 'sanctity of the home and privacies of life,' and then monitor them arbitrarily and without judicial oversight . . . ."<sup>64</sup>

Third, *Greenwood* was careful to protect his "stuff" from the view of outsiders by using opaque, sealed bags.<sup>65</sup> Thus, the Court's belief that the police cannot be reasonably expected to "avert their eyes from evidence of criminal activity that could have been observed by any member of the public"<sup>66</sup> was not applicable to *Greenwood* since there was nothing in *Greenwood's* trash that was visible. "The majority mistakenly interprets exposure of the outside of the container as public exposure of the contents."<sup>67</sup> Conversely, *Greenwood* did everything in his power to keep the contents of his garbage private. "By sealing the containers in a secure manner and placing the containers on his own property, the owner has done everything within his own means to insure the privacy of the contents thereof, short of delivering the containers to a central disposal site himself."<sup>68</sup>

Courts have recognized instances where a sealed container does prevent police from conducting a search without a warrant. In *United States v. Chadwick*,<sup>69</sup> the Court held that an

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60. See *Greenwood*, 486 U.S. at 54-55 (Brennan, J., dissenting).

61. See *id.* (Brennan, J., dissenting).

62. See generally Madeline A. Herdrich, Note, *California v. Greenwood: The Trashing of Privacy*, 38 AM. U. L. REV. 993 (1989).

63. *Greenwood*, 486 U.S. at 55 (Brennan, J., dissenting).

64. *Id.* at 55-56 (Brennan, J., dissenting).

65. See *id.* at 45 (Brennan, J., dissenting).

66. *Id.* at 41.

67. Herdrich, *supra* note 62, at 1015.

68. *State v. Schultz*, 388 So. 2d 1326, 1330 (Fla. App. 1980) (Anstead, J., dissenting).

69. 433 U.S. 1 (1977).

individual had a reasonable expectation of privacy in a package or container, specifically, a footlocker located in an open trunk of a car.<sup>70</sup> There, the defendants arrived in Boston by train from San Diego and were arrested at their waiting automobile.<sup>71</sup> Federal narcotics agents were alerted by Amtrak officials in San Diego that they had observed the defendants loading a brown footlocker that looked unusually heavy and that was leaking talcum powder.<sup>72</sup> Since these observations matched the profile of possible drug traffickers, the Amtrak officials in San Diego notified their Boston counterparts.<sup>73</sup> The agents did not obtain either a search or arrest warrant, yet they had a dog trained to detect drugs with them.<sup>74</sup> The suspects were later arrested.<sup>75</sup> The agents opened the footlocker without the defendants' consent and found large amounts of marijuana inside.<sup>76</sup>

"[T]he government argue[d] that only homes, offices, and private communications implicate interests which lie at the core of the Fourth Amendment."<sup>77</sup> According to the government's position, since none of these constitutionally protected areas were implicated, lawfulness of this search or seizure should not turn on whether police had a warrant but rather only on whether the police had probable cause to believe that evidence of criminal conduct was present.<sup>78</sup> The Court rejected this argument and relied upon the holding in *Katz* that the Fourth Amendment "protects people, not places."<sup>79</sup> The Court stated that luggage typically contains an individual's personal effects and thus should be granted a high level of Fourth Amendment protection, even though the defendants carried the luggage in a public place.<sup>80</sup> Further, the Court stated that "luggage contents are

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70. *See id.*

71. *See id.*

72. *See id.* at 3 (noting that talcum powder is a substance often used to mask the odor of marijuana or hashish).

73. *See id.* at 1.

74. *See Chadwick*, 433 U.S. at 4.

75. *See id.*

76. *See id.*

77. *Id.* at 7.

78. *See id.*

79. *Chadwick*, 433 U.S. at 7 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

80. *See id.* at 13.

not open to public view . . . luggage is intended as a repository of personal effects."<sup>81</sup> Thus, the police must have a warrant in order to lawfully conduct such a search.

Unfortunately for members of our society, a person does not have the ability to protect her trash from intrusive police examination. Even if a person takes the additional step of shredding her trash into small pieces in order to ensure that it is not recognizable, she still will not be deemed to have a reasonable expectation of privacy in it. In *United States v. Scott*,<sup>82</sup> the defendant shredded his tax documents into minute strips, yet the police were permitted to seize them, piece them together and use the information without obtaining a warrant.<sup>83</sup> The defendant argued that by shredding the trash, he had exhibited an "objectively reasonable expectation of privacy."<sup>84</sup> However, the court rejected this argument. It held that, although the defendant's attempt to destroy the documents exhibited his subjective intention to keep the contents of his trash private, "the trash was left for collection in a public place and over which its producer had relinquished possession."<sup>85</sup> The court concluded that the defendant's act of placing the trash at the curb amounted to a relinquishment of any expectation of privacy in the trash because he placed it in the public domain.<sup>86</sup> Short of allowing the garbage to build up in his home, the court in *Scott* left no means for a person to keep the contents of his trash private. The court analogized the defendant in that case to a person who attempts to have a private conversation in a public place where others might overhear the conversation.<sup>87</sup> There, the person must accept the "obvious risk" that another person might overhear.<sup>88</sup> However, the court's analogy disregards the fact that a person who places his shredded garbage outside for removal is not exposing its contents to the public, but rather making every attempt to keep them private.

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81. *Id.*

82. 975 F.2d 927 (1st Cir. 1992).

83. *See id.*

84. *Id.* at 928.

85. *Id.* at 929.

86. *See id.*

87. *See Scott*, 975 F.2d at 930.

88. *Id.*

In contrast, a person who speaks too loudly or is not aware of others standing around her, is not attempting to keep her conversation private. Similarly, simply because an activity emanates from within the home does not automatically give the activity constitutional protection. If, for example, a person blasts her music in the middle of the night or if there are suspicious screams coming from inside her home, she cannot reasonably expect to be protected by the Fourth Amendment. There, the person is exposing those sounds to the public and is no longer seeking to preserve them as private. Thus, even though Katz was using a public phone booth located in a public place, he was still granted the protection of the Fourth Amendment.<sup>89</sup> The focus of the Court was whether a person was knowingly exposing information to the public or attempting to keep it private, irrespective of the location where the information was coming from.

#### IV. State Court Decisions that Declined to Follow *Greenwood*

Since 1988, several states have provided greater privacy protections for their citizens pursuant to individual state constitutions than *Greenwood* provided under the Fourth Amendment of the United States Constitution.

In *State v. Hemepele*,<sup>90</sup> the Supreme Court of New Jersey held that a person does have a reasonable expectation of privacy in the garbage she leaves at the curbside.<sup>91</sup> The Hemepeles' home was "one of about ten attached row houses, each [having] its own front entrance."<sup>92</sup> The trash was located next to a flight of stairs leading to defendants' home.<sup>93</sup> The state police were told by a confidential informant "that [the] defendants, Conrad and Sharon Hemepele, were distributing illicit drugs from their home" and that the informant had seen a large amount of drugs in Conrad's bedroom.<sup>94</sup> Based on this information, a state trooper removed garbage from the front of the Hemepeles'

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89. See *Katz*, 389 U.S. at 352.

90. 576 A.2d 793 (N.J. 1990).

91. See *id.*

92. *Id.* at 796.

93. See *id.*

94. See *id.*

home.<sup>95</sup> Two weeks later, the trooper seized more trash, each time removing the plastic bag from a plastic garbage can.<sup>96</sup> Upon searching the trash, the police found traces of marijuana, cocaine and methamphetamine.<sup>97</sup>

The *Hempele* court applied a slightly different test from that of the Supreme Court in *Katz*.<sup>98</sup> The court rejected the first part of Justice Harlan's test in *Katz*, requiring an actual or subjective expectation of privacy.<sup>99</sup> Despite the similarities between the United States Constitution and the New Jersey State Constitution, the Supreme Court of New Jersey held that a defendant's "actual (subjective) expectation of privacy does not determine the New Jersey Constitution's restraints on the State's power to search and seize."<sup>100</sup> The court envisioned a situation where the government could simply eliminate a citizen's actual expectation of privacy by announcing on television that various private homes located in a certain area were going to be subjected to warrantless searches.<sup>101</sup> Thus, an individual in that area could no longer claim that she believed that she had an actual expectation of privacy since the government just informed her otherwise.<sup>102</sup> "In such circumstances . . . those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was."<sup>103</sup>

The New Jersey Constitution requires only that "an expectation of privacy be reasonable."<sup>104</sup> The court determined that reasonable "expectations of privacy are established by general social norms."<sup>105</sup> In applying that standard, the court first asked "whether it was reasonable for a person to want to keep the contents of his . . . [trash] private."<sup>106</sup> The answer, accord-

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95. See *Hempele*, 576 A.2d at 796.

96. See *id.*

97. See *id.*

98. See *id.* at 801.

99. See *id.*

100. *Hempele*, 576 A.2d at 801.

101. See *id.*

102. See *id.*

103. *Id.* (quoting *Smith v. Maryland*, 442 U.S. 735 (1979)).

104. *Hempele*, 576 A.2d at 802.

105. *Id.* (citing *Robbins v. California*, 453 U.S. 420, 428 (1981)).

106. *Hempele*, 576 A.2d at 802.

ing to the court, was "yes."<sup>107</sup> The court focused on the secrets that refuse can disclose — including, but not limited to, "information revealing intimate details about sexual practices, health and hygiene . . . [a person's] financial and professional status, political . . . inclinations, [and] private thoughts . . ."<sup>108</sup> According to the court, most people rarely, if ever, expose this information to the public and do have an interest in keeping these matters private.<sup>109</sup> "Undoubtedly many would be upset to see a neighbor or stranger sifting through their garbage, perusing their discarded mail, reading their bank statements, looking at their empty pharmaceutical bottles, and checking receipts to see what videotapes they rent."<sup>110</sup>

In *State v. Boland*,<sup>111</sup> the Supreme Court of Washington rejected *Greenwood* pursuant to its state constitution, which explicitly protects a citizen's "private affairs."<sup>112</sup> There, the local police and the prosecutor's office received an anonymous tip that the defendant was distributing legend drugs.<sup>113</sup> This tip, in the form of a letter, also contained a brochure that listed the names of both Health West Products and Brad Boland.<sup>114</sup> When the police officer attempted to order drugs, the defendant sent a letter stating that he did not understand the officer's request.<sup>115</sup> Months later, the police began a series of four warrantless searches of the defendant's garbage in order to find enough evidence to enable them to obtain a warrant to search Boland's home.<sup>116</sup> Prior to each search, the police observed Boland putting his garbage in the outside trash bin for collection, securing the can with both a form-fitting lid and a heavy piece of wood that he placed on top of the lid.<sup>117</sup> During at least three of the

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107. *See id.* at 803.

108. *Id.*

109. *See id.*

110. *Id.*

111. 800 P.2d 1112 (Wash. 1990).

112. *See id.* Washington Constitution Article 1 § 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. 1 § 7.

113. *See Boland*, 800 P.2d at 1113 (defining "legend drugs" as those which federal law prohibits the distribution of without a prescription from a physician).

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*

warrantless searches, the police found evidence of drug-related activity.<sup>118</sup>

The court held that Boland's "private affairs were unreasonably intruded upon."<sup>119</sup> While the court agreed that it might be reasonable to expect that scavengers or animals might invade the garbage, it is not unreasonable for the average person to believe that her garbage will be free from governmental intrusion.<sup>120</sup> In support of its conclusion, the court cited numerous local ordinances that served to regulate trash collection and provide citizens with a reasonable expectation that their trash would not be picked up or looked through by anyone except for the local trash collectors.<sup>121</sup> For example, one local ordinance required citizens to place their trash in locations "where they will be convenient for the collector."<sup>122</sup> Another example cited by the court was a Seattle ordinance that made it unlawful for "anyone other than the owner of a trash can, or one authorized by the owner to place objects in the can, to remove its contents, except for collection."<sup>123</sup> Based on these ordinances, the court concluded that a person could have reasonably inferred that her trash would be free from handling by anyone other than trash collectors.<sup>124</sup> "It would be improper to require that in order to maintain a reasonable expectation of privacy in one's trash, that the owner must forego use of ordinary methods of trash collection."<sup>125</sup> The Washington Supreme Court recognized the vital role that the process of trash collection plays in our society.<sup>126</sup> "The proper and regulated collection of garbage, as evidenced by the ordinances such as [those cited above] . . . is . . . necessary to the proper functioning of a modern society . . . ."<sup>127</sup>

Although *State v. Boland* held that people do have a reasonable expectation of privacy in their trash, police will not be required to avert their eyes from possible illegal activity when

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118. See *Boland*, 800 P.2d at 1113.

119. *Id.* at 1116.

120. See *id.*

121. See *id.* at 1114.

122. *Id.* (quoting Port Townsend Municipal Ordinance 6.04.030).

123. *Boland*, 800 P.2d at 1114 (quoting Seattle Municipal Ordinance 21.36.100).

124. See *id.* at 1116.

125. *Id.* at 1115.

126. See *id.* at 1117.

127. *Id.*

evidence is exposed to them. Thus, in *State v. Graffius*,<sup>128</sup> the court held that an officer's intentional look into the defendant's partially open garbage can did not constitute a search within the meaning of the Fourth Amendment and thus was not an unreasonable intrusion into the defendant's privacy.<sup>129</sup> There, the narcotics detectives received a tip from the FBI that Graffius was growing marijuana.<sup>130</sup> Since the detectives did not have enough information to obtain a search warrant, they decided to conduct a "knock and talk."<sup>131</sup> When the officers approached Graffius' home, they knocked loudly on both the front and side doors but received no response.<sup>132</sup> Meanwhile, one of the officers saw two garbage cans located next to the side door.<sup>133</sup> The lid was ajar on one of the cans, creating an opening about six to eight inches wide.<sup>134</sup> The detective looked inside the can and saw a "fist-sized bud of marijuana on top of a few pieces of household garbage."<sup>135</sup> The officer stated that "he was not visually searching when he walked by . . . [t]he marijuana was 'clearly visible' about two-thirds of the way down in the can."<sup>136</sup> According to the court, "when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a 'search' within the meaning of the Fourth Amendment."<sup>137</sup>

The court held that the officer did not act in an unlawful manner for several reasons. First, he was at the premises on official police business and the path that he took to get to the garbage cans was a "normal one for an ordinary member of the public attempting to see if someone was home."<sup>138</sup> Second, the

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128. 871 P.2d 1115 (Wash. Ct. App. 1994).

129. *See id.*

130. *See id.* at 1116.

131. *Id.* at 1116 (defining a "knock and talk" as "uniform officers going to a specific address in an attempt to contact the occupant. If he answers, they tell him that they are investigating and ask if they can enter and talk to him. If the occupant refuses, they leave.") *Id.*

132. *See Graffius*, 871 P.2d at 1116.

133. *See id.*

134. *See id.*

135. *Id.*

136. *Id.* at 1116-17.

137. *Id.* at 1117 (quoting *State v. Seagull*, 632 P.2d 44 (Wash. Ct. App. 1981)).

138. *Graffius*, 871 P.2d at 1118.



officer did not spy into the residence in any way nor did he act in any secretive manner.<sup>139</sup> Most important, the officer did not conduct a search because he did not remove the lid, shine a flashlight down it, nor did he create an artificial vantage point from which to look from.<sup>140</sup> Unlike in *Boland*, where the police took affirmative steps in order to uncover the evidence, the police officer in *Graffius* simply looked into the opening created by Graffius himself. Conversely, the defendant in *Boland* made a conscious attempt to conceal his trash by placing it in a can with a form-fitting lid and laying an additional piece of heavy wood on top of the can.<sup>141</sup> The court in *Graffius* stated that “[a]n officer should not be expected to walk around with blinders on.”<sup>142</sup> Thus, the officer’s conduct did not violate Graffius’ right to be free from unreasonable intrusions under Art. 1, § 7 of the Washington Constitution.<sup>143</sup>

#### V. Is There a Reasonable Expectation of Privacy if One Person’s Trash is Mixed with Another’s?

The mere fact that one person lives in an apartment building, and another person owns a home, should not weaken their constitutional rights. Thus, the use of a common trash receptacle as a means of disposing of one’s garbage does not eliminate a person’s Fourth Amendment protection. The ownership of property alone should not determine whether a warrantless search is reasonable. Even if a person’s trash is not located directly at the end of her driveway or next to her garage, she should still be entitled to a reasonable expectation of privacy in it. The primary distinction between those who live in an apartment and must use community trash receptacles and those who live in a single-family home and dispose of trash at the curbside, is the knowledge that other people will use those community trash receptacles to discard of their trash as well. Therefore, tenants in an apartment building have no greater reason to expect that their trash will be searched by police officers than do people who live in single-family homes.

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139. See *id.*

140. See *id.*

141. See *State v. Boland*, 800 P.2d 1112, 1113 (Wash. 1990).

142. *Graffius*, 871 P.2d at 1119.

143. See *supra* note 112.

Most importantly, the fact that a person lives in an apartment instead of a house does not change the fact that the private remnants of her daily activities can still be found within her trash. As stated in *Katz*, "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."<sup>144</sup> Here, when a person discards private material into the dumpster, regardless of whether the dumpster is located at the end of her driveway or in the parking lot of her apartment building, she does not expose its contents to the public. Rather, she is discarding the contents for the trash collector to pick up. A person maintains a reasonable expectation of privacy in that trash because it contains information about the most intimate details of her life, irrespective of the fact that it might be located in a place that is possibly accessible to others. Further, the fact that numerous bags of trash are mixed together in one large receptacle does not eliminate the possibility of linking each bag to its original owner. Most trash bags contain some form of a "person identifier" — a piece of mail with a name and address, a bill or bank statement, a school paper or work memo. Thus, a tenant in an apartment building should not be without Fourth Amendment protections solely because she had no other choice but to share a trash receptacle with her neighbors.

The Vermont Constitution<sup>145</sup> protects a person from a warrantless search of her trash even if she lives in an apartment building and discards her trash on a curb along with other tenants. In *State v. Morris*,<sup>146</sup> the police were notified by a confidential informant that the defendant was selling marijuana out of his apartment.<sup>147</sup> On the regularly scheduled trash collection day, the police went to the defendant's apartment building and seized the five or six bags that had been set out for collection by numerous people who lived in this apartment building.<sup>148</sup> From the exterior of the bags alone, there was no way to identify

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144. *Katz v. United States*, 389 U.S. 347, 351 (1967).

145. Chapter 1, Article 11 states that "the people have a right to hold themselves, their houses, papers, and possessions, free from search and seizure." VT. CONST. Chap. I art. XII.

146. 680 A.2d 90 (Vt. 1996).

147. *See id.* at 92.

148. *See id.*

which bags belonged to which tenant.<sup>149</sup> However, once the police searched through each bag, they were able to connect the defendant with illegal drug activity based on various pieces of discarded mail that revealed his identity.<sup>150</sup> The police subsequently obtained a warrant to search Morris' apartment, and upon doing so, found several ounces of marijuana.<sup>151</sup>

The court held that the warrantless police search violated the Vermont State Constitution.<sup>152</sup> In doing so, the court explicitly rejected any distinction between people who live in a single-family dwelling and apartment dwellers. Justice Dooley, in his dissenting opinion, argued that if a person wants to keep his trash private, he always has the option of moving to another location.<sup>153</sup> However, the majority stated that this suggestion "makes the incredible assumption that all persons could afford a single-family home . . . [m]any people live in apartments because they cannot afford their own homes . . . [m]aking the protection of Article 11 contingent on factors that hinge on a person's financial status is unacceptable."<sup>154</sup>

In *State v. Tanaka*,<sup>155</sup> the Supreme Court of Hawaii held that society is prepared to recognize a person's actual expectation of privacy in his trash at his place of employment.<sup>156</sup> There, the defendant approached a confidential informant about betting on football games.<sup>157</sup> The informant placed numerous bets with the defendant.<sup>158</sup> All of the contacts between the defendant and the informant occurred at the defendant's place of work, Granger Pacific.<sup>159</sup> The police officer then trespassed onto the private property of Granger Pacific, searched the Granger Pacific trash bin, and while doing so, discovered betting slips in opaque, closed trash bags.<sup>160</sup>

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149. *See id.* at 93.

150. *See id.*

151. *See Morris*, 680 A.2d at 93.

152. *See id.*

153. *See id.* at 106 (Dooley, J., dissenting).

154. *Id.* at 95 n.3.

155. 701 P.2d 1274 (Haw. 1985).

156. *See id.*

157. *See id.* at 1275.

158. *See id.*

159. *See id.*

160. *See Tanaka*, 701 P.2d at 1275.

The court, applying the two-part *Katz* test, found that the defendant did have a reasonable expectation of privacy in the garbage he disposed of at work.<sup>161</sup> First, the court stated that since the defendant placed his garbage in opaque, closed trash bags, he did exhibit a reasonable expectation of privacy in it.<sup>162</sup> Second, the court held that since a person's trash can reveal so many details about his life, society is prepared to recognize these individual subjective privacy expectations as reasonable.<sup>163</sup> "People reasonably believe that police will not indiscriminately rummage through their trash bags to discover their personal effects . . . [b]usiness records, bills, correspondence, magazines, tax records, and other telltale refuse can reveal much about a person's activities, associations, and beliefs."<sup>164</sup> According to the court, to hold otherwise would grant police unfettered discretion to search everyone's trash and enable them to gain access to much private information.<sup>165</sup> "It is exactly this type of overbroad governmental intrusion that article I, § 7 of the Hawaii Constitution was intended to prevent."<sup>166</sup>

However, in *Smith v. State*,<sup>167</sup> the Supreme Court of Alaska upheld a warrantless search of an apartment building dumpster.<sup>168</sup> There, a state trooper received information that the defendant was involved in narcotics activities and subsequently instituted a stakeout of the apartment complex where the defendant lived.<sup>169</sup> The trooper ordered the officers to remove garbage placed in the dumpster by Charles Smith.<sup>170</sup> On several occasions the officers removed bags of garbage from the dumpster after they saw Charles Smith throw them in.<sup>171</sup> Evidence found in the bags was introduced at trial.<sup>172</sup>

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161. See *id.* at 1276.

162. See *id.*

163. See *id.* at 1276-77.

164. *Id.*

165. See *Tanaka*, 701 P.2d at 1277.

166. *Id.*

167. 510 P.2d 793 (Alaska 1973).

168. See *id.* at 795.

169. See *id.* at 794.

170. See *id.*

171. See *id.*

172. See *Smith*, 510 P.2d at 794. Smith lived with another person and the police were also instructed to remove any garbage that this person threw into the dumpster as well. See *id.*

The Supreme Court of Alaska declined to announce a general rule relating to the gathering of a person's trash.<sup>173</sup> However, they determined that under these facts, the defendant did not have a reasonable expectation of privacy in the trash he threw in a community dumpster. The court concluded that since the dumpster accommodated several different apartments, other people in the building, including the building superintendent, would be looking into it when they discarded their own trash.<sup>174</sup> Furthermore, since the dumpster was located outside the building in the parking area, it would be reasonable to conclude that the garbage might be removed by passing cars or a tenant from another apartment.<sup>175</sup> Thus, the court held that it could not deny police open access to garbage that could be so easily had by many others.<sup>176</sup> The court also incorporated the property law concept of abandonment into its analysis, even though the Supreme Court in *Katz* specifically rejected this concept in identifying Fourth Amendment protections.<sup>177</sup> There, the Court held that the Fourth Amendment "protected people, not places."<sup>178</sup> However, the Supreme Court of Alaska returned to property law in its holding that "the sequence of an individual's placing an article in a receptacle, from which routine municipal collections are made, and then withdrawing from the area, as activity clearly indicative of 'an intention to relinquish all title, possession, or claim to property.'"<sup>179</sup>

#### VI. Do Situations that Require People to Divulge Information to a Third Party Necessarily Eliminate a Reasonable Expectation of Privacy in that Information?

When a person conveys information to a third party for a specific purpose, it is reasonable for that person to expect that the information will only be used in connection with that limited purpose. However, in *Smith v. Maryland*,<sup>180</sup> the Supreme

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173. *See id.* at 795.

174. *See id.*

175. *See Smith*, 510 P.2d at 798.

176. *See id.* at 799.

177. *See supra* Part II.

178. *Katz v. United States*, 389 U.S. 347, 351 (1967).

179. *Smith*, 510 P.2d at 795 (defining the property law concept of abandonment).

180. 442 U.S. 735 (1979).

Court upheld a warrantless installation of a pen register by the telephone company upon police request, in order for the police to gain access to the numbers that the defendant was dialing from his home telephone.<sup>181</sup> There, the victim of a robbery gave the police a description of the robber and of a 1975 automobile she noticed near the scene of the crime.<sup>182</sup> After the robbery, the victim received threatening phone calls, including one which told her to go out onto her front porch, and upon doing so, she saw the same 1975 automobile driving slowly past her home.<sup>183</sup> She recorded the license plate number and the police subsequently learned that the car was registered to the defendant.<sup>184</sup> The police, without a warrant to do so, instructed the telephone company to place a pen register<sup>185</sup> at its central offices in order to record the numbers dialed from Smith's home.<sup>186</sup> The Court applied Justice Harlan's *Katz* test and determined that the defendant did not have a reasonable expectation of privacy in the telephone numbers he dialed.<sup>187</sup> Justice Blackmun, writing for the majority, held that people do not "generally entertain any actual expectation in the numbers they dial . . . [since] all telephone users realize that they must 'convey' phone numbers to the telephone company . . ."<sup>188</sup> In addition, according to the majority, all telephone users are aware that the telephone numbers they dial result in a permanent record — their phone bill.<sup>189</sup> Finally, the court noted that most telephone books alert consumers to the fact that telephone records assist the telephone company in identifying annoying or troublesome phone calls made to the subscriber.<sup>190</sup> Thus, since people are aware of the numerous legitimate business purposes

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181. *See id.*

182. *See id.* at 737.

183. *See id.*

184. *See id.*

185. *See Smith*, 442 U.S. at 736. Pen registers and similar devices are frequently used by telephone companies for the purposes of checking billing operations and preventing violations of the law. Pen registers obtain the local telephone numbers that the subscriber dials. Such devices do not enable anyone to hear any of the communications transmitted. *See id.*

186. *See id.* at 737.

187. *See id.* at 742.

188. *Id.*

189. *See Smith*, 442 U.S. at 742.

190. *See id.*

for which these numbers are used, they cannot possibly maintain a legitimate expectation of privacy in them.<sup>191</sup>

More broadly, the Court held that even if a person did have that expectation, society is not prepared to accept that expectation as reasonable. According to Justice Blackmun, "a person has no legitimate expectation of privacy in information voluntarily turned over to third parties."<sup>192</sup> The majority held that once Smith dialed those numbers, thereby exposing them to the telephone company, "[he] assumed the risk that the company would reveal to the police the numbers he dialed."<sup>193</sup> Thus, the Court concluded that the installation and use of the pen register was not a "search" within the meaning of the Fourth Amendment and therefore that no search warrant was required.<sup>194</sup>

In light of the most recent technology, including caller identification devices, the Court's opinion can result in an invasion of privacy in the lives of people who do not "voluntarily expose" anything to the telephone company. For example, if a person has a caller identification device and the phone company can tap into her phone line and gain access to the caller identification, the government could learn the names and numbers of those who called her, without her revealing or exposing any information to the public.

In a similar case, *United States v. Miller*,<sup>195</sup> the Supreme Court held that a bank depositor has no legitimate expectation of privacy with respect to any deposit slips or checks that he "voluntarily conveyed to the banks and exposed to their employees . . . the depositor takes the risk in revealing his affairs to another, that the information will be conveyed by that person to the Government."<sup>196</sup> There, the defendant was suspected of committing various federal offenses. The government ordered the bank where the defendant maintained his accounts to produce the defendant's bank records, including all checks, deposit slips, two financial statements, and three monthly statements.<sup>197</sup> The Court held that the defendant had no legitimate

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191. *See id.*

192. *Id.* at 743-44.

193. *See id.* at 744.

194. *Smith*, 442 U.S. at 746.

195. 425 U.S. 435 (1976).

196. *Id.* at 442-43.

197. *See id.* at 438.

privacy interest in those records because the defendant voluntarily exposed this information to a third party — the bank.<sup>198</sup>

The conclusions in both of the above Supreme Court decisions are at odds with the way most people conduct their day-to-day affairs. First, in order for a person to efficiently conduct her business, it becomes critical for her to make use of both the telephone and the bank. The telephone serves as one of the primary sources of communication. People use their telephone in order to connect with virtually everyone, including, but not limited to, business associates, doctors, friends and relatives. Similarly, a bank is a place where most people keep or invest their money. People use a bank as both a safe place to hold their money, and a mechanism for possibly increasing the amount that they have through various investments or accounts. “[U]nless a person is prepared to forego use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance . . . it is idle to speak of ‘assuming’ risks in context where, as a practical matter, individuals have no realistic alternative.”<sup>199</sup>

Second, as in *Greenwood*, a person reveals this information to specific third parties for a specific purpose. In *Miller*, that purpose is to maintain necessary personal and business contacts with the outside world via the telephone or to conduct their banking. In *Greenwood*, the defendant put his trash at the curb in order to dispose of it to the trash collectors. None of these disclosures should amount to a blanket relinquishment of Fourth Amendment protection, so long as the person takes reasonable steps to ensure that the information is only being transmitted to its intended third party.

Third, both telephone records and bank statements reveal a great deal of private information about a person’s life — including whether she is a member of any political associations, what doctors she speaks to, whether she might be having an affair, which bank she uses, how much money she has, who her friends or business associates are, and perhaps, depending on her profession, various sources that she is obligated to keep confiden-

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198. *See id.* at 443.

199. *Smith*, 442 U.S. at 750 (Marshall, J., dissenting).



tial.<sup>200</sup> According to *Katz*, that information is exactly what the Fourth Amendment protects — the information that people “seek to preserve as private.”<sup>201</sup> As Justice Stewart stated in his dissenting opinion in *Smith v. Maryland*, “the numbers dialed from a private telephone — although certainly more prosaic than the conversation itself — are not without ‘content.’”<sup>202</sup>

Fourth, the disclosure of this information to the telephone company or the bank should not automatically entitle the police to gain unlimited access to it. These numbers are being recorded by the telephone company for specific business purposes. “Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes.”<sup>203</sup>

The law has recognized other instances where the “voluntary disclosure” of information is protected against governmental intrusion. For example, the attorney-client privilege protects all voluntary disclosures, with very narrow exceptions, made by a client to her lawyer. Similarly, a patient is entitled to maintain an expectation of privacy in the information she shares with her doctor.<sup>204</sup> Likewise, it is a federal offense punishable with fines and imprisonment, to take any “letter, postal card, or package out of any post office or any authorized depository . . . before it has been delivered to the person to whom it was directed . . . or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same . . . .”<sup>205</sup> In those instances, even though a person has voluntarily “exposed” information to a third party, she still maintains a reasonable expectation of privacy in the information so exposed. Furthermore, in each of those instances, the person has taken some af-

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200. “Permitting governmental access to telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society.” *Smith*, 442 U.S. at 751 (Marshall, J., dissenting).

201. *Katz v. United States*, 389 U.S. 347, 351 (1967).

202. *Smith*, 442 U.S. at 748 (Stewart, J., dissenting).

203. *Id.* at 749 (Marshall, J., dissenting).

204. Gregory E. Sopkin, *The Police Have Become our Nosy Neighbors: Florida v. Riley and Other Supreme Court Deviations From Katz*, 62 U. COLO. L. REV. 407, 413-14 (1991).

205. 18 U.S.C.A. § 1702.

firmative step to keep the information private by directing it very specifically to its intended recipient. Similarly, the defendant in *Greenwood* took affirmative steps to protect the contents of his trash by placing the trash in opaque plastic bags, tying the bags shut and placing them at the curb so they could be picked up by the trash collectors. Thus, Greenwood should have received Fourth Amendment protection for the personal contents of those bags.

Various state courts have rejected the Supreme Court's conclusion that a person relinquishes any reasonable expectation of privacy in information he voluntarily reveals to a third party. In *State v. Hunt*,<sup>206</sup> the Supreme Court of New Jersey held that an individual maintains a protected privacy interest in phone records that contain the long distance numbers dialed from his telephone.<sup>207</sup> There, acting on a tip, police went to the office of New Jersey Bell Telephone Company and obtained Hunt's home toll billing records covering a specific period of time.<sup>208</sup> The phone records revealed evidence of gambling activity.<sup>209</sup>

The Hunt court explicitly rejected the analysis of the Supreme Court under *Smith v. Maryland*.<sup>210</sup> First, the court acknowledged the vital role that the telephone plays in everyday life in our modern society: "It has become part and parcel of the home."<sup>211</sup> The court applied the analysis used by the majority in *Katz*, concluding that a telephone caller is "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."<sup>212</sup> Similarly, the court held that the same caller is entitled to assume that the numbers dialed in the privacy of her home will also remain private except for the legitimate business use of the phone company.<sup>213</sup> The caller does not

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206. 450 A.2d 952 (N.J. 1982).

207. *See id.*

208. *See id.* at 953.

209. *See id.*

210. 442 U.S. 735 (1979). The Hunt court stated that "the equities so strongly favor protection of a person's privacy interest that we should apply our own standard rather than defer to the spirit of the federal provision." *Hunt*, 450 A.2d at 955.

211. *Id.* at 956.

212. *Hunt*, 450 A.2d at 956 (quoting *Katz v. United States*, 389 U.S. 347, 352 (1967)).

213. *See Hunt*, 450 A.2d at 956.

distinguish between the telephone numbers she dialed and the conversation she carries on afterwards in determining the amount of privacy she can reasonably expect. "Telephone calls cannot be made except through the telephone company's property and with payment to it for service. This disclosure has been necessitated because of the nature of the instrumentality . . . ." <sup>214</sup>

Similarly, in *State v. Gunwall*,<sup>215</sup> the Supreme Court of Washington held that the police conducted an unreasonable search when they placed a pen register on the defendant's telephone line without a search warrant.<sup>216</sup> The court held that doing so was comparable in impact to electronic eavesdropping devices because "it is continuing in nature, may affect other persons and can involve multiple invasions of privacy . . . ." <sup>217</sup>

The Supreme Court of Colorado has recognized a person's legitimate expectation of privacy in both her telephone records and her bank statements.<sup>218</sup> In doing so, the court held that the voluntary disclosure of financial information to the bank and of dialed telephone numbers to the phone company are unavoidable consequences to the use of those services.<sup>219</sup> Information learned through conducting a financial transaction with the bank is "a mere by-product of the depositor's major purpose of utilizing the bank as a vehicle for fund transfers and was not a true disclosure to a third person such as would vitiate the depositor's reasonable expectation of privacy in the information . . . ." <sup>220</sup> Similarly, the court viewed the disclosure of telephone numbers as a necessary step to "using the telephone as a means of communication and the telephone company's method of determining the cost of the service utilized." <sup>221</sup>

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214. *Id.*

215. 720 P.2d 808 (Wash. 1986).

216. *See id.* at 814.

217. *Id.* at 816.

218. *See Charnes v. DiGiacomo*, 612 P.2d 1117 (Colo. 1980) (rejecting the holding of *United States v. Miller* by recognizing a bank depositor's reasonable expectation of privacy in checks and deposit slips given to the bank for the purpose of conducting their financial business); *see also* *People v. Sporleder*, 666 P.2d 135 (Colo. 1983) (rejecting the holding of *Smith v. Maryland* and recognizing that telephone subscribers have an actual privacy expectation in the numbers they dial).

219. *See Charnes*, 612 P.2d at 1124; *see also Sporleder*, 666 P.2d at 144.

220. *Sporleder*, 666 P.2d at 140.

221. *Id.* at 141.

This analysis can be applied to the discarding of one's trash. Putting one's trash on the curb is a necessary step in complying with many local laws that prohibit the discarding of trash in any other fashion. Further, it is necessary for the health and safety of society. If everyone allowed refuse to collect in their homes, people would not be living in clean, healthy environments. Placing the trash at the curb specifically for garbage collectors is a means to achieve this end.

The court in *People v. Sporleder*<sup>222</sup> held that society is prepared to recognize as reasonable a person's privacy interest in the telephone numbers that they dial.<sup>223</sup> The telephone company, according to the court, is in the business of providing consumers with the means to participate in an electronic age.<sup>224</sup> However, the government is in the business of investigating crimes.<sup>225</sup> Thus, a person's reasonable expectation of privacy that such information will not be randomly, without legal process, supplied to the government, is according to the court, "eminently reasonable."<sup>226</sup>

## VII. Conclusion

"[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."<sup>227</sup> While in 1967 the Supreme Court held that the Constitution protected "people, not places,"<sup>228</sup> the Court has not held true to its word. Instead, the Court has chipped away at citizens' Fourth Amendment rights by analogizing what a person might be forced to reveal to a third person for a specific business purpose to a bullhorn announcement of that information in Times Square. The Court has effectively given the police unlimited discretion in deciding when and whether to look through a person's trash, seize the financial statements that she must disclose to her bank in order to obtain a mortgage or pay her bills, and monitor the telephone numbers she dials from the

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222. 666 P.2d 135 (Colo. 1983).

223. *See id.* at 144.

224. *See id.* at 142.

225. *See id.*

226. *Id.*

227. *Katz v. United States*, 389 U.S. 347, 351 (1967).

228. *Id.*

privacy of her own home. Common sense dictates that in order for a citizen to avoid such invasive governmental intrusion, she must store her trash within the walls of her home, keep all of her money under her mattress, and refrain from using the telephone to contact anyone.

Despite the protection that the Fourth Amendment grants to our citizens: the right for "people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures;"<sup>229</sup> and, the pronouncement in *Katz* that the Fourth Amendment protects "people, not places,"<sup>230</sup> a person adhering to local laws by placing her trash at the curb, calling her doctor, or depositing money in her bank account, can no longer reasonably expect that police will not be monitoring these activities.

*Hope Lynne Karp\**

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229. U.S. CONST. amend. IV.

230. *Katz*, 389 U.S. at 351.

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