Expectation of Privacy Analysis and Warrantless Trash Reconnaissance after *Katz v. United States*

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INTRODUCTION

Frequently in search and seizure cases, when a criminal investigation focuses on a particular suspect, law enforcement personnel will search the suspect's trash for incriminating evidence without a warrant. If the suspect is brought to trial, the warrantless trash search and its fruits often become the center of a lively battle. The defendant argues that the warrantless search violated the fourth amendment; the government counters that the defendant abandoned the trash, consented to the search, or simply had no reasonable expectation of privacy in the trash.[1] Although there are exceptions,[2] generally the evidence is admit-

1. At one time, the government could argue that a defendant in a warrantless garbage search case lacked the legal capacity to raise a substantive claim of a fourth amendment violation. *E.g.*, United States v. Alden, 576 F.2d 772, 777 (8th Cir.), *cert. denied*, 439 U.S. 855 (1978); United States v. Shelby, 431 F. Supp. 398, 402 (E.D. Wis. 1977), *modified*, 573 F.2d 971 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978); United States *ex rel.* Fein v. Deegan, 298 F. Supp. 359, 365 (S.D.N.Y. 1967), *aff'd*, 410 F.2d 13 (2d Cir.), *cert. denied*, 395 U.S. 935 (1969) (nontrash search case relying explicitly on the reasoning of the trash search cases). Standing to object had been held to be required by the "case or controversy" requirement of U.S. CONST. art. III, § 2, cl. 1. Jones v. United States, 362 U.S. 257, 261 (1960).

Two recent Supreme Court decisions have held that standing is no longer to be considered in fourth amendment cases, but rather the examination is to focus solely on the substantive merits of the claim. Rakas v. Illinois, 439 U.S. 128, 140 (1978) (after examining prior fourth amendment case law, the Court held that it is more logical to subsume the issue of standing into consideration of the merits of the fourth amendment claim); United States v. Salvucci, 448 U.S. 83, 85 (1980) (expressly overruling *Jones*). *See generally*, Slobogin, *Capacity to Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones*, 18 AM. CRIM. L. REV. 387 (1981).

Both *Rakas* and *Salvucci* held that the legal capacity to claim a fourth amendment violation turns on the existence *vel non* of a "legitimate expectation of privacy in the invaded place." 439 U.S. at 143; 448 U.S. at 91-92 (quoting *Rakas*). Thus, since standing is no longer a fourth amendment issue, this Note will ignore the subject where it has been discussed in the warrantless trash search cases.

2. *See, e.g.*, United States v. Kahan, 350 F. Supp. 784 (S.D.N.Y. 1972), *modified on other grounds*, 479 F.2d 290 (2d Cir. 1973), *rev'd*, 415 U.S. 239 (1974); People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *vacated*, 409 U.S. 33 (1972), *reaff'd*, 8 Cal. 3d 623, 504 P.2d

ted, and the appellate court affirms.

The appropriate inquiry in this situation centers on the reasonableness of the defendant's claim to an expectation of privacy under the fourth amendment. Other articulations of the relevant inquiry are deficient in one of two respects: Either they do not foster meaningful analysis, or they are outmoded in light of recent Supreme Court authority. In contrast, when properly applied, the reasonable expectation of privacy test results in a wide-ranging examination of factors bearing on the limits of protection under the fourth amendment.

This Note is divided into three major sections. The first section distills seven factors relevant to the expectation of privacy analysis from a thorough examination of case law since the United States Supreme Court's opinion in *Katz v. United States*.[3] The second section discusses all post-*Katz* decisions dealing with warrantless trash searches. Finally, the first two sections are synthesized, and a method of analyzing warrantless trash searches in the post-*Katz* era is proposed.

I. EXPECTATION OF PRIVACY ANALYSIS IN THE POST-*KATZ* ERA

A. Katz *and the Origin of Expectation of Privacy Analysis*

The fourth amendment test based upon reasonable expectations of privacy was first established in 1967 in *Katz v. United States*.[4] The petitioner in *Katz* was convicted of transmitting wagering information in violation of a federal statute.[5] At trial, the government introduced evidence obtained from the attachment of microphones and recording devices to the outside of public telephone booths used by petitioner.[6] The Ninth Circuit Court of Appeals, stressing the absence of any physical penetration into the booths, upheld the admission of the recordings.[7] The Supreme Court reversed[8] in one of the most important and controversial fourth amendment decisions in the late 1960's.[9]

In reaching its decision, the *Katz* court rejected prior fourth amendment analysis that focused on "constitutionally protected areas"[10] and the necessity of finding a technical trespass.[11] The majority

457, 105 Cal. Rptr. 521, *cert. denied*, 412 U.S. 919 (1973); Ball v. State, 57 Wis. 2d 653, 205 N.W.2d 353 (1973).

3. 389 U.S. 347 (1967).
4. *Id.*
5. *Id.* at 348.
6. *Id.*
7. *Id.* at 348-49; *see* text & notes 120-23 *infra*.
8. 389 U.S. at 359.
9. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 383 (1974).
10. 389 U.S. at 350-51.
11. *Id.* at 352-53. The government had claimed that the fourth amendment did not prohibit

stated:

> [T]his effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve, even in an area accessible to the public, may be constitutionally protected.[12]

In the most enigmatic portion of its opinion, the majority concluded that the government's surveillance technique "violated the privacy upon which [the petitioner] justifiably relied while using the telephone booth."[13] The underlying analysis emphasized justifiable expectations of privacy, but any meaningful explanation of that concept was deferred until a later date.

Although *Katz* is especially noteworthy for abandoning analysis based on "constitutionally protected areas" and for eliminating a technical trespass as a requirement for finding an illegal search, it is also significant for what it left intact. Most important is the continuing relevance of examining the physical characteristics of the area searched as a part of the fourth amendment analysis. Immediately after penning the maxim, "[T]he Fourth Amemdment protects people, not places,"[14] the majority held that just as the fourth amendment protects one while in a friend's apartment, a business office, or taxi cab, the same protection includes the occupant of a public telephone booth.[15] Thus, because the *Katz* expectation of privacy must be a reasonable one, and because physical surroundings of necessity form a part of what is reasonable, the appropriateness of viewing fourth amendment problems in the context of the immediate physical surroundings is not open to serious doubt.[16]

A second and related example concerns the effect of a technical trespass. There is nothing in *Katz* suggesting that trespass is no longer relevant to the fourth amendment inquiry. What the Court stated was that the trespass doctrine would no longer be considered as *controlling*

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the surveillance used because there was no physical penetration into the telephone booth. *Id.* at 352. Although the majority of the Court recognized that this would have been the correct result under its prior decisions, it stated that the theoretical underpinnings of the rule had been removed. *Id.* at 352-53. When the Court combined the fact that property interests did not control the government's right to search, that the fourth amendment protected "recording of oral statements overheard without any 'technical trespass under . . . local property law,'" and that the fourth amendment protects people not areas, "it [became] clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353.

12. *Id.* at 351-52.
13. *Id.* at 353.
14. *Id.* at 351.
15. *Id.* at 352.
16. *See id.*; text & note 19 *infra*.

and that the limits of fourth amendment protection would not turn on the presence of a physical intrusion.[17] But, in the absence of a trespass, the government has a stronger argument for reasonableness. This is suggested by both the measured quality of the Court's statement and the continuing importance of the physical characteristics of the search area.[18]

Justice Harlan concurred, suggesting that the limits of fourth amendment protection are seldom discoverable without reference to a place.[19] He also concluded that two requirements emerged from previous decisions: A person must exhibit an actual (subjective) expectation of privacy and the expectation must be one that society is prepared to recognize as reasonable.[20]

A majority of the Court eventually adopted the two-pronged analysis of Justice Harlan's concurrence when it decided *Smith v. Maryland*.[21] After noting that the application of the fourth amendment has consistently depended on demonstration of a "legitimate," "reasonable," or "justifiable" expectation of privacy,[22] the Court concluded that Justice Harlan was correct in suggesting that the *Katz* inquiry requires an analysis of both subjective[23] and objective expecations of pri-

17. 389 U.S. at 353.

18. *See, e.g.*, United States v. Crowell, 586 F.2d 1020, 1025 (4th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); Smith v. State, 510 P.2d 793, 797-98 (Alaska), *cert. denied*, 414 U.S. 1086 (1973); Croker v. State, 477 P.2d 122, 124-25 (Wyo. 1970); *see* text & notes 120-124 *infra*; text & notes 265-270 *infra*.

19. *See* 389 U.S. at 361.

20. *Id.*

21. 442 U.S. 735, 740-41 (1979). The circuitous road from Harlán's concurrence in *Katz* to the majority opinion in *Smith* began four years after *Katz* with United States v. White, 401 U.S. 745 (1971). Not only did the majority of the Court reject Harlan's subjective expectation test, *id.* at 751-52, but Harlan himself concluded that "the analysis must . . . transcend the search for subjective expectations." *Id.* at 786 (Harlan, J., dissenting). But in 1977, with Harlan no longer on the Court, the subjective expectation prong was resurrected in United States v. Chadwick, 433 U.S. 1 (1977). *Chadwick* involved a warrantless seizure and search of a double-locked footlocker incident to an arrest. In affirming the suppression of the evidence, the Court reasoned:

> In this case, important Fourth Amendment privacy interests were at stake. By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause.

Id. at 11. Having been given new life, the subjective expectation prong gathered more strength in Rakas v. Illinois, 439 U.S. 1 (1978). Although the plurality opined that a subjective expectation alone does not guarantee fourth amendment protection (since society must also recognize the expectation as reasonable), it strongly implied that such an expectation must be present before constitutional protections will attach. *See id.* at 143-44 n.12. The *Smith* decision followed in the next Court term, and a majority of the Court embraced the subjective expectation prong. *See* 442 U.S. at 740-41.

22. 442 U.S. at 740.

23. This subjective expectation of privacy prong has been roundly criticized by the commentators. In 1974, Professor Amsterdam raised a major objection to reliance on subjective expectations when he concluded that:

> An actual, subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the fourth amendment protects. It can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protec-

vacy.[24] The precise subjective and objective factors to examine have been crystallized in lower court decisions.[25]

B. *Seven General Factors for Expectation of Privacy Analysis*

By examining the application of *Katz* in the lower courts, one can glean at least seven general factors commonly included in an expecta-

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tion. If it could, the government could diminish each person's subjective expectations of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance. . . . Fortunately, neither *Katz* nor the fourth amendment asks what we expect of government. They tell us what we should demand of government.

Amsterdam, *supra* note 9, at 384. This criticism is undoubtedly what prompted the *Smith* Court to suggest the use of a "normative inquiry" in cases when privacy expectations "had been 'conditioned' by influences alien to well-recognized Fourth Amendment Freedoms." 442 U.S. at 740-42 n.5.

Five additional criticisms were outlined in Note, *Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home is His Fort*, 23 CLEV. ST. L. REV. 63 (1974). First, it is largely objective factors that are used to determine subjective expectations. *Id.* at 75. Second, courts' conclusions regarding subjective expectations have on occasion been at odds with defendants' actual expectations of privacy. *Id.* Third, the line of inquiry is often too narrow and fails to identify a defendant's total efforts to maintain privacy. *Id.* Fourth, there is nearly always an unspoken presumption against a subjective expectation of privacy. *Id.* at 76. Fifth, it has sometimes been the situation that unless the defendant has taken enough precautions to defeat the efforts of a "persistent policeman," a subjective expectation of privacy is foreclosed. *Id.* at 77.

Judicial dissatisfaction with the subjective expectation requirement has been evident on several occasions. In United States v. Kim, 415 F. Supp. 1252 (D. Hawaii 1976), for example, the court quoted the above excerpt from Professor Amsterdam's article and concluded that the subjective prong of Justice Harlan's test precludes fourth amendment protection only when activities are knowingly exposed to the public. *Id.* at 1256-57. *See generally* United States v. Davis, 482 F.2d 893, 905 (9th Cir. 1973); United States v. Pruitt, 464 F.2d 494, 496 (9th Cir. 1972); Smith v. Lubbers, 398 F. Supp. 777, 788 (W.D. Mich. 1975); United States v. Carroll, 337 F. Supp. 1260, 1262 (D.D.C. 1971); Dean v. Superior Court, 35 Cal. App. 3d 112, 118 n.1, 110 Cal. Rptr. 585, 590 n.1 (1973).

The subjective expectation prong, however, does intertwine with the objective expectation prong. Not only does knowingly exposing activities to public view preclude a subjective expectation as *Kim* recognized, but objectively society would not recognize a reasonable expectation of privacy in such activities. *See* text & notes 34-37 *infra*. On the other hand, society is more likely to find an objective expectation of privacy in a person's activities manifesting a subjective intent to preserve privacy. *See* text & notes 29-33 *infra*. Thus, to the extent that it helps define objective expectations, a subjective expectation of privacy can be relevant to a fourth amendment analysis.

24. 442 U.S. at 740-41.

25. Unfortunately, a number of courts have mistakenly incorporated a "balancing test" as part of the privacy analysis and have required balancing of the rights of the individual against the law enforcement needs. *See, e.g.*, Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976); Commonwealth v. Williams, 262 Pa. Super. Ct. 508, 517-18, 396 A.2d 1286, 1291 (1978); Turner v. State, 499 S.W.2d 182, 185 (Tex. Crim. 1973). A long line of Supreme Court decisions demonstrate that balancing is undertaken *after* it is concluded that there has been a search or seizure. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 653-54 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry v. Ohio, 392 U.S. 1, 16, 20-21 (1968); Camara v. Municipal Court, 387 U.S. 532, 534-35 (1967). Balancing helps determine whether a search or seizure is reasonable under the fourth amendment, but it does not bear on the reasonableness of expectations of privacy.

This point is not merely academic. In United States v. Fisch, 474 F.2d 1071 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973), for instance, the gravity of the offense involved and the degree of probable cause were both marshalled as factors suggesting the unreasonableness of defendants' expectations of privacy. *Id.* at 1078. Fourth amendment protections, however, cannot evaporate merely because the government has a strong suspicion of the identity of the perpetrator of a serious offense.

tion of privacy analysis: 1) the defendant's own privacy enhancing conduct; 2) the strength of physical barriers of the place searched; 3) the number of persons with legitimate access to the closure where the search took place; 4) the number of persons outside the closure; 5) the social inhibitions associated with the place searched; 6) sensory enhancing devices used in the search; and 7) the defendant's control of the closure. The first factor focuses on subjective expectations while the other six are more closely related to the question of objective reasonableness. Together they provide a detailed model of the appropriate areas of inquiry.[26] Moreover, the seven factors have a cumulative impact. Consequently, it is generally impossible to predict the outcome of a case without reference to all or several of them.

1. *The Defendant's Own Privacy Enhancing Conduct*

The character and extent of a defendant's own efforts to maintain privacy are frequently examined as part of the expectation of privacy claim.[27] Unlike the other factors discussed below, the defendant's privacy enhancing conduct is only relevant to the question of subjective expectations.[28]

A great variety of conduct has been found indicative of a subjective expectation of privacy. Where, for example, a defendant has posted "no trespassing" signs,[29] changed locks on the hallway door of an apartment,[30] allowed vision-obscurring California grass to flourish in the backyard,[31] erected posts in concrete and connected them with a chain to deny access to vehicles,[32] or used a louvered fan vent, two reinforced doors, and a "doorman,"[33] courts have had no difficulty finding a subjective expectation of privacy. On the other hand, where a defendant has made no attempt to conceal crab pots,[34] has driven a stolen pickup and camper on public streets and then parked it in a

26. Since expectation analysis requires an examination of all the surrounding circumstances, other factors might be relevant in a particular case.

27. *See* cases cited in notes 29-39 *infra*. *See also* Ponce v. Craven, 409 F.2d 621, 625 (9th Cir. 1969); United States v. Vilhotti, 323 F. Supp. 425, 431 (S.D.N.Y.), *aff'd in part and rev'd in part on other grounds*, 452 F.2d 1186 (2d Cir. 1971); *see generally* United States v. Chadwick, 433 U.S. 1, 11 (1977); Katz v. United States, 389 U.S. 347, 352 (1967).

28. *See, e.g.*, Nathanson v. State, 554 P.2d 456, 459 (Alaska 1976); State v. Kaaheena, 59 Hawaii 23, 29, 575 P.2d 462, 467 (1978); People v. Hicks, 49 Ill. App. 3d 421, 427-28, 364 N.E.2d 440, 444 (1977); Commonwealth v. Busfield, 242 Pa. Super. Ct. 194, 198-99, 363 A.2d 1227, 1229 (1976).

29. United States *ex rel.* Gedko v. Heer, 406 F. Supp. 609, 615-16 n.12 (W.D. Wis. 1975), *vacated and dismissed sub nom.* Gedko v. Cady, 588 F.2d 840 (7th Cir. 1978); State v. Byers, 359 So. 2d 84, 85, 87 (La. 1978).

30. United States v. Case, 435 F.2d 766, 768-69 (7th Cir. 1970).

31. State v. Kender, 60 Hawaii 301, 305, 588 P.2d 447, 450 (1978).

32. State v. Byers, 359 So. 2d 84, 85 (La. 1978).

33. Commonwealth v. Soychak, 221 Pa. Super. Ct. 458, 463, 289 A.2d 119, 122-23 (1972).

34. Nathanson v. State, 554 P.2d 456, 459 (Alaska 1976).

driveway in public view,[35] or has failed to use existing security devices including a door buzzer and a one-way mirror,[36] the claim of a subjective privacy expectation has been denied. Similarly, the failure to draw curtains or close window blinds has most often been responsible for the rejection of claims of subjective privacy expectations.[37]

The defendant's own privacy enhancing conduct should perhaps be entitled to the least weight in the *Katz* analysis. Indeed, one criticism of inquiry into the defendant's own actions[38] is that it frequently diverts attention from factors that are of far greater importance. A compelling example of the problem is provided by *Commonwealth v. Hernley*.[39] There, because of the location and size of the windows, an FBI agent was unable to observe the inside of a printshop from his position off the premises.[40] He overcame this problem by using a set of binoculars and climbing a four-foot ladder placed on a set of railroad tracks abutting defendant's property.[41] This allowed surveillance through a side window from a distance of thirty to thirty-five feet.[42] The court focused on defendants' "omissions" and failed to provide any form of meaningful analysis of the surrounding circumstances.[43] The court concluded that:

> Our case presents the situation in which it was incumbent on the suspect to preserve his privacy from visual observation. To do that the defendants had only to curtain the windows. . . . The law will not shield criminal activity from visual observation when the actor shows such little regard for his privacy.[44]

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35. Tate v. State, 544 P.2d 531, 536 (Okla. Crim. 1975).

36. Commonwealth v. Weimer, 262 Pa. Super. Ct. 69, 75, 396 A.2d 649, 652 (1978).

37. *See, e.g.*, United States v. Coplen, 541 F.2d 211, 215 (9th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977); People v. Hicks, 49 Ill. App. 3d 421, 427-28, 364 N.E.2d 440, 444 (1977); Commonwealth v. Williams, 262 Pa. Super. Ct. 508, 518, 396 A.2d 1286, 1291 (1978); Commonwealth v. Busfield, 242 Pa. Super. Ct. 194, 199, 363 A.2d 1227, 1229 (1976). Drawn curtains and closed venetian blinds were found indicative of defendants' subjective expectations of privacy in State v. Kaaheena, 59 Hawaii 23, 29, 575 P.2d 462, 467 (1978).

38. Other criticisms of judicial reliance on subjective expectations are summarized in note 23 *supra*.

39. 216 Pa. Super. Ct. 177, 263 A.2d 904 (1970). *See also* People v. Hicks, 49 Ill. App. 3d 421, 364 N.E.2d 440 (1977). In *Hicks*, the defendants were conducting a large-scale gambling operation, *id.* at 424, 364 N.E.2d at 442, which meant that a great number of people were aware of the activity and, consequently, there was an increased likelihood of disclosure to police. There was extensive foot traffic to and from the hotel rooms, *id.*; the rooms were rented collectively and in a peculiar cycle, *id.* at 424-25, 364 N.E.2d at 442; they were located on the ground floor of a hotel in an urban area; *id.* at 424, 364 N.E.2d at 442; and on at least two occasions, the curtains were not drawn. *Id.* at 427, 364 N.E.2d at 444. The court upheld a search using binoculars specially designed for nighttime use to peer through defendants' first floor hotel window. *Id.* at 428, 364 N.E.2d at 444. This is so even though the objective factors mentioned above were far more relevant to the lack of privacy expectation, solely because defendants failed to close their curtains. *Id.*

40. 216 Pa. Super. Ct. at 178, 263 A.2d at 905.

41. *Id.* at 178-79, 263 A.2d at 905.

42. *Id.* at 179, 263 A.2d at 905.

43. *Id.* at 181-82, 263 A.2d at 907.

44. *Id.* Although the analysis was bankrupt, the outcome in *Hernley* was probably correct because of the nonretroactivity of *Katz*. *See id.* at 181, 263 A.2d at 907.

Yet why did the defendants have to curtain their windows when the only way their actions could be observed was with both an artificial platform and binoculars? Thus, the *Hernley* case demonstrates that although a defendant's own privacy enhancing conduct may be relevant, it certainly should not be dispositive of a fourth amendment claim and is, perhaps, not even entitled to great weight in the analysis.

2. *The Strength of Physical Barriers*

Where there is no meaningful barrier to sight, sound, or smell, a defendant has no justifiable expectation of privacy. Moreover, a more complete barrier yields a greater probability that expectations of privacy will be regarded as reasonable,[45] although the correlation is certainly not perfect.[46]

The collection of items that can serve as a barrier is nearly boundless. They can be either natural[47] or artificial,[48] tangible[49] or intangible,[50] and distance alone may serve as an effective barrier.[51] Walls,[52] hills,[53] trees,[54] fences,[55] curtains and blinds,[56] and weeds[57] are among the more common items in the group. When the barrier is essentially fortuitous, such as hanging laundry which obstructs the view temporarily, a defendant's privacy expectation may be held unreasonable because under the conditions that normally prevail, no reasonable privacy expectation exists.[58] Furthermore, once the barrier is destroyed, a defendant is only entitled to as much privacy as is afforded by the changed circumstances.[59]

Although case law is sparse, an especially fragile barrier may

45. *Compare* cases cited in notes 47-55 *infra, with* State v. Boone, 293 N.C. 702, 708-09, 239 S.E.2d 459, 463 (1977) *and* Commonwealth v. Best-Bey, 258 Pa. Super. Ct. 478, 485-86, 393 A.2d 459, 462-63 (1978) *and* McCall v. State, 540 S.W.2d 717, 720-21 (Tex. Crim. 1976).

46. *See* Commonwealth v. Hernley, 216 Pa. Super. Ct. 177, 263 A.2d 904 (1970), *cert. denied*, 401 U.S. 914 (1971).

47. *See* Phelan v. Superior Court, 90 Cal. App. 3d 1005, 1011, 153 Cal. Rptr. 738, 742 (1979) (marijuana garden "located in an isolated narrow ravine" surrounded by trees and brush).

48. *See* State v. Lamartiniere, 362 So. 2d 526, 528 (La. 1978) (locked, windowless storage unit with thirteen-foot-high ceiling separated from adjacent unit by twelve-foot windowless wall).

49. *See id.*

50. *See* State v. Fearn, 345 So. 2d 468, 470 (La. 1977) (ditch where marijuana was growing was far from property line and covered with weeds).

51. *See id.*; People v. Anonymous, 99 Misc. 2d 289, 292, 415 N.Y.S.2d 921, 924 (1979).

52. State v. Lamartiniere, 362 So. 2d 526, 528 (La. 1978).

53. Burkholder v. Superior Court, 96 Cal. App. 3d 421, 428, 153 Cal. Rptr. 86, 90 (1979).

54. *Id.*

55. State v. Chort, 91 N.M. 584, 584-85, 577 P.2d 892, 892-93 (1978).

56. State v. Kaaheena, 59 Hawaii 23, 29, 575 P.2d 462, 467 (1978).

57. State v. Kender, 60 Hawaii 301, 305, 588 P.2d 447, 450 (1979); State v. Fearn, 345 So. 2d 468, 470 (La. 1977).

58. State v. Brighter, 60 Hawaii 318, 322, 589 P.2d 527, 530 (1979).

59. People v. Calhoun, 90 Misc. 2d 88, 90, 393 N.Y.S.2d 529, 531 (1977). Michigan v. Tyler, 436 U.S. 499 (1978) (warrantless search of burned-down furniture store), is not to the contrary. The integrity of the external barriers was not at issue there. Moreover, the external walls of the building seem to have been intact. *Id.* at 517 (Rehnquist, J., dissenting).

weigh heavily against a legitimate expectation of privacy. In *State v. Wolohan*,[60] for instance, the court found it significant in determining the defendant's privacy expectation that a package is subject to dropping and tearing.[61] *United States v. Miller*[62] provides a second example. There, a bale of marijuana was discovered under a tarpaulin along a road in the woods.[63] The court concluded that the bale was "reasonably seized" largely because "the bale was not secured from intrusion in any meaningful way."[64]

The presence[65] or absence[66] of "no trespassing" signs is frequently included in the judicial analysis of the strength of existing barriers.[67] The posting of signs by a defendant is a fairly strong indicator of a subjective expectation of privacy.[68] In addition, if posting conforms with statutory standards, special sanctions may apply to anyone who enters without legal authorization.[69] Even if there are procedural deficiencies in the posting, however, posting in almost any form should increase the likelihood that a defendant's privacy expectations will be held objectively reasonable because some persons will heed a written warning of this type irrespective of its legal basis. As a result, there is likely to be a net reduction in the total number of entrants—a likelihood that is also significant in light of the next factor considered.

3. *Number of Persons with Legitimate Access*

The logic supporting consideration of the number of persons with legitimate access to the enclosure seems clear. Other things being

60. 23 Wash. App. 813, 598 P.2d 421 (1979).

61. *Id.* at 818, 598 P.2d at 424.

62. 442 F. Supp. 742 (D.Me. 1977), *aff'd*, 589 F.2d 1117 (1st Cir. 1978).

63. *Id.* at 754.

64. *Id.* On the related question of what contortions a police officer may go through in the course of surveillance, it is clear that the "plain view" doctrine still applies even though the officer may have to "crane his neck, or bend over, or squat." James v. United States, 418 F.2d 1150, 1151 n.1 (D.C. Cir. 1969); *see* United States v. Arrendondo-Hernandez, 574 F.2d 1312, 1314 (5th Cir. 1978).

65. United States v. Heer, 406 F. Supp. 609, 615-16 (W.D. Wis. 1975), *vacated and dismissed sub nom.* Gedko v. Cady, 588 F.2d 840 (7th Cir. 1978); Burkholder v. Superior Court, 96 Cal. App. 3d 421, 424, 428, 158 Cal. Rptr. 86, 88, 90 (1979); State v. Byers, 359 So. 2d 84, 85, 86 (La. 1978).

66. United States v. Miller, 442 F. Supp. 742, 754 n.11 (D. Me. 1977), *aff'd*, 589 F.2d 1117 (1st Cir. 1978); Phelan v. Superior Court, 90 Cal. App. 3d 1005, 1012, 153 Cal. Rptr. 738, 742 (1979); People v. Little, 33 Cal. App. 3d 552, 556, 109 Cal. Rptr. 196, 199 (1973); State v. Charvat, 175 Mont. 267, 272, 573 P.2d 660, 663 (1978); State v. Boone, 293 N.C. 702, 709, 239 S.E.2d 459, 463 (1977); Sesson v. State, 563 S.W.2d 799, 801-02 (Tenn. Ct. App. 1978).

67. This variable would more properly be discussed in the section dealing with a defendant's own privacy enhancing conduct, *see* text & notes 27-44 *supra*; since it has generally been treated as a part of the physical barrier in reported decisions, however, that practice will be followed here.

68. *See* Burkholder v. Superior Court, 96 Cal. App. 3d 421, 428, 158 Cal. Rptr. 86, 90 (1979).

69. *See* WIS. STAT. ANN. §§ 943.13, 939.51(3)(c) (West Supp. 1980-81) (entry onto posted land is a misdemeanor punishable by a $500 fine and/or 30 days imprisonment).

equal, the greater the number of such persons, the less likely it is that expectations of privacy are reasonable.

This factor has been considered in a great variety of situations. Where, for example, tenants and a mailman have had access to an apartment recreation room,[70] ranch hands were free to enter a pasture area,[71] keys to a locked chemistry laboratory were held by other professors, lab technicians, janitors, and campus police,[72] or the area in a pubic restroom was open to the public,[73] courts have rejected a defendant's privacy claim.

A special situation arises when law enforcement personnel have legitimate access to the disputed area. Courts have attached unusual significance to the frequency of their incursions and to a defendant's familiarity with this situation.[74] The peculiar status of police officers as trained observers who are duty-bound to report certain conduct justifies the somewhat unconventional treatment given this factor in case discussions. The actual impact that this variable has had on the results reached, however, is not easily discerned from the reported opinions.

4. *Number of Persons Outside the Closure*

Whenever the barrier to visual, aural, or olfactory surveillance is less than perfect, the probability of observation should rise with an increase in the number of people immediately outside the closure. Simply stated, the more people there are to see, hear, or smell whatever is going on inside, the greater the chances of discovery. Indeed, this fairly obvious principle has been widely acknowledged in reported decisions.[75] Other things being equal, expectations of privacy are more likely to be regarded as reasonable if there are few people available to test the existing barriers.[76]

One interesting aspect of this factor is the variety of different indicators that are used to measure the number of external observers.

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70. Cowing v. City of Torrance, 60 Cal. App. 3d 757, 762, 131 Cal. Rptr. 830, 834 (1976).
71. People v. McClaugherty, 193 Colo. 360, 362-63, 566 P.2d 361, 363 (1977).
72. People v. Dickson, 91 Cal. App. 3d 409, 414, 154 Cal. Rptr. 116, 118 (1979).
73. People v. Anonymous, 99 Misc. 2d 289, 290, 415 N.Y.S.2d 921, 923 (1979).
74. *See* United States v. Cogwell, 486 F.2d 823, 835 (7th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974) ("participants were fully aware of their observation by uniformed policemen."); Ouimette v. Howard, 468 F.2d 1363, 1364-65 (1st Cir. 1972); People v. Dickson, 91 Cal. App. 3d 409, 414-15, 154 Cal. Rptr. 116, 118-19 (1979).
75. See cases cited in notes 77-86 *infra*. Two other cases in this group, United States v. Case, 435 F.2d 766, 768, 769 (7th Cir. 1970), and State v. Alexander, 170 N.J. Super. 298, 304, 406 A.2d 313, 316 (1979), involve the situation where persons outside the barrier are members of a specific and limited group. This condition generally weighs in favor of upholding a defendant's privacy expectation.
76. *See* United States v. Venema, 563 F.2d 1003, 1005 (10th Cir. 1977); United States v. Solis, 536 F.2d 880, 882 (9th Cir. 1976); United States v. Bronstein, 521 F.2d 459, 462 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976). *But see* Wattenburg v. United States, 388 F.2d 853, 857 (9th Cir. 1968).

For example, expectations of privacy have been held unreasonable where the search area was in close proximity to adjoining residential homes,[77] a public school,[78] a heavily traveled sidewalk,[79] a public hallway,[80] a parking lot serving a restaurant and another business,[81] and a public highway and rest area.[82] Similarly, governmental eavesdropping was upheld in *United States v. Jackson*[83] largely because of the "element of public or shared property in motel surroundings."[84] The opposite result is reached when the circumstances lack any indicia of common or public ownership or use.[85]

Another more general distinction that has frequently been drawn segregates rural and urban areas.[86] Although there will undoubtedly be instances where the general clasification of an area is not indicative of the true external pressures, such information is clearly relevant.

5. *Social Inhibitions*

Social inhibitions are seldom discussed and generally have not been a particularly important factor in expectation of privacy cases. This is especially surprising since it is social custom (and not the fourth amendment) that serves as the most basic foundation of a great many legitimate privacy expectations.[87]

One good measure of the impact of social inhibitions is provided by the restroom stall cases. It is widely acknowledged that toilet stalls conceal activity of an especially personal nature.[88] Commentators have suggested that society places special emphasis on the privacy of such activities,[89] and several cases support this conclusion.[90] But even where a special impact could be expected, social inhibitions have had an une-

77. People v. Sirhan, 7 Cal. 3d 710, 742, 497 P.2d 1121, 1143, 102 Cal. Rptr. 385, 407 (1972), *cert. denied*, 410 U.S. 947 (1973).

78. State v. Boone, 293 N.C. 702, 708, 239 S.E.2d 459, 463 (1977).

79. United States v. Hanahan, 442 F.2d 649, 651, 653 (7th Cir. 1971).

80. United States v. Alewelt, 532 F.2d 1165, 1168 (7th Cir.), *cert. denied*, 429 U.S. 840 (1976).

81. People v. McClaugherty, 193 Colo. 360, 361, 363, 566 P.2d 361, 362, 363 (1977).

82. People v. Little, 33 Cal. App. 3d 552, 556, 109 Cal. Rptr. 196, 199 (1973).

83. 588 F.2d 1046 (5th Cir.), *cert. denied*, 442 U.S. 941 (1979).

84. *Id.* at 1052.

85. *See* Burkholder v. Superior Court, 96 Cal. App. 3d 421, 429, 158 Cal. Rptr. 86, 91 (1979).

86. *See* United States v. Holmes, 521 F.2d 859, 870 (5th Cir. 1975), *aff'd in part and rev'd in part on other grounds*, 537 F.2d 227 (5th Cir. 1976); United States *ex rel.* Gedko v. Heer, 406 F. Supp. 609, 616 (W.D. Wis. 1975), *vacated and dismissed sub nom.* Gedko v. Cady, 588 F.2d 840 (7th Cir. 1978); Huffer v. State, 344 So. 2d 1332, 1333 (Fla. Dist. Ct. App. 1977).

87. *See* Rakas v. Illinois, 439 U.S. 128, 143-44 n.12 (1978).

88. People v. Freeman, 66 Cal. App. 3d 424, 430, 136 Cal. Rptr. 76, 80 (1977); State v. Kender, 60 Hawaii 301, 306 n.1, 588 P.2d 447, 451 n.1 (1979).

89. *See* Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968); Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 984 (1968).

90. Kroehler v. Scott, 391 F. Supp. 1114, 1118 n.4 (E.D. Pa. 1975); People v. Triggs, 8 Cal. 3d 884, 893-94, 506 P.2d 232, 238, 106 Cal. Rptr. 408, 414 (1973); People v. Metcalf, 22 Cal. App. 3d 20, 22-23, 98 Cal. Rptr. 925, 926-27 (1971).

ven and sometimes negligible influence on the privacy analysis.[91]

Indeed, a number of recent cases hold that the privacy afforded by a restroom stall extends only to the limits of its design;[92] in other words, no recognition whatsoever is given to the restraints posed by social custom. In *Moore v. State*,[93] for instance, a police officer entered the men's restroom of a bus station for the general purpose of discovering unlawful behavior.[94] At the time, the defendant was in a locked pay stall.[95] The officer observed that the defendant's feet were pointed in a direction inconsistent with the normal use of the facilities and looked into the stall through a half-inch crack between the door and wall of the toilet stall.[96] By doing so, he was able to observe the defendant in the proces of administering an intravenous injection.[97] Consequently, narcotics were seized from inside the stall and the defendant was arrested.[98] Despite the fact that the officer acted on only minimal suspicion when he peered into the stall, the court refused to suppress the evidence and even noted the defendant's "poor choice" of facilities.[99] One conclusion that follows from this and similiar cases is that, at least in some jurisdictions, social inhibitions may be considered of such little consequence that they will not be held to compensate for even the most minor flaws in the existing physical barriers.

The best explanation of the part social inhibitions should play in assessing the reasonableness of privacy expectations is found in *United States v. Vilhotti*.[100] There the court stated:

> [U]nder Katz, an agent is permitted the same license to intrude as a reasonable respectful citizen would take. Therefore the nature of premises inspected—e.g. whether residential, commercial, inhabited or abandoned—is decisive; it determines the extent of social inhibition or natural curiosity and, inversely, the degree of care required to insure privacy. Here, given that an unattached garage was the object of search, neither social nor physical barriers were sufficient.[101]

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91. *See* notes 92-93 *infra*.

92. United States v. Smith, 293 A.2d 856, 858 (D.C. 1972); Moore v. State, 355 So. 2d 1219, 1221 (Fla. Dist. Ct. App. 1978); Gillett v. State, 588 S.W.2d 361, 363 (Tex. Crim. 1979); Buchanan v. State, 471 S.W.2d 401, 404 (Tex. Crim. 1971), *cert. denied*, 405 U.S. 930 (1972).

93. 355 So. 2d 1219 (Fla. Dist. Ct. App. 1978). The facts and result of *Moore* are almost identical to United States v. Smith, 293 A.2d 856 (D.C. 1972).

94. 355 So. 2d at 1220.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1221.

100. 323 F. Supp. 425 (S.D.N.Y. 1971), *aff'd in part and rev'd in part on other grounds*, 452 F.2d 1186 (2d Cir. 1971).

101. *Id.* at 431-32. In United States v. Block, 590 F.2d 535 (4th Cir. 1978), the court held that the police are charged with an understanding of the "[c]ommon experience of life" when the reasonableness of their conduct is challenged. *Id.* at 541. According to the *Block* court, that experience:

6. *Sensory Enhancing Devices*

Although not yet found in the trash search cases, attention has been frequently given to the investigatory use of some form of sensory enhancing device.[102] The underlying fear is that the development of sophisticated means of detection might outstrip the growth of fourth amendment protections.[103] Both the frequency with which this variable has been pondered and the reassurance courts gain from the absence of such techniques[104] indicate that this factor may assume primary importance in fourth amendment law.

A variety of sensory enhancing devices appear in the cases. The courts are virtually unanimous in rejecting the claim that the use of a flashlight or other form of artificial illumination transforms lawful surveillance into an illegal search.[105] Further, a majority of the decisions find that the use of trained dogs to detect explosives[106] or drugs[107] does not constitute a search.[108] With regard to binoculars or other optical aids, the majority view is that reliance on these devices to observe con-

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teaches all of us that the law's "enclosed spaces"—mankind's valises, suitcases, footlockers, strong boxes, etc.—are frequently the object of his highest privacy expectations, and that the expectations may well be at their most intense when such effects are deposited temporarily or kept semi-permanently in public places or in places under the general control of another. Indeed, to the sojourner in our midst—all of us one time or another—the suitcase or trunk may well constitute practically the sole repository of such expectations of privacy as are had.

Id.

102. *See, e.g.*, cases cited in notes 105-116 *infra*.

103. *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting); United States v. Bronstein, 521 F.2d 459, 463 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); United States v. Kim, 415 F. Supp. 1252, 1257 (D. Hawaii 1976); People v. Arno, 90 Cal. App. 3d 505, 511, 153 Cal. Rptr. 624, 627 (1979).

104. *See, e.g.*, United States v. Fisch, 474 F.2d 1071, 1078 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973); State v. Stachler, 58 Hawaii 412, 421, 570 P.2d 1323, 1328 (1977); State v. Moses, 367 So. 2d 800, 803, 804 (La. 1979).

105. State v. Stone, 294 A.2d 683, 688-89 (Me. 1972); *see, e.g.*, United States v. Lee, 274 U.S. 559, 563 (1927); United States v. Coplen, 541 F.2d 211, 215 (9th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977); United States v. Wright, 449 F.2d 1355, 1357-58 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 947 (1972). Nevertheless, even reliance on such a simple, unintrusive device may be relevant to the determination of a reasonable expectation of privacy. *Cf.* Marshall v. United States, 422 F.2d 185, 189 (5th Cir. 1970) ("We do not hold, of course, that *every* use of a flashlight is not a search. A probing, exploratory quest for evidence of crime is a search governed by Fourth Amendment standards whether a flashlight is used or not. The mere use of a flashlight, however, does not magically transmute a non-accusatory visual encounter into a Fourth Amendment search." (Emphasis in original)).

106. State v. Quatzling, 24 Ariz. App. 105, 107, 536 P.2d 226, 228 (1975), appears to be the only reported decision dealing with a canine-assisted investigation of illicit explosives. Like the cases in the following footnote, *Quatzling* held that the use of a dog's keen sense of smell for such purposes was not a search. *Id.*

107. *See, e.g.*, United States v. Venema, 563 F.2d 1003, 1005 (10th Cir. 1977); United States v. Solis, 536 F.2d 880, 881 (9th Cir. 1976); United States v. Bronstein, 521 F.2d 459, 463 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

108. The only case to uphold the use of a canine on less than founded suspicion, however, is United States v. Race. 529 F.2d 12 (1st Cir. 1976). *But cf.* Doe v. Renfroe, 475 F. Supp. 1012, 1021 (N.D. Ind. 1979) (generalized suspicion of student's drug activities sufficient to support canine search in public school). But the issue of minimal suspicion was apparently never briefed or raised at oral argument in *Race*. 529 F.2d at 14 n.2.

duct in the open does not alone convert a visual observation into a search.[109] But when the inside of a private residence is surveyed, the cases are not consistent.[110] Wiretapping is now controlled by statute.[111] Magnetometers used at airports to detect metal carried by people or in luggage constitute searches, but some courts hold them reasonable.[112] Finally, the courts are split on whether enforcement personnel necessarily conduct a search when they use beepers[113] and ultraviolet lamps.[114]

7. *Defendant's Control of the Closure*

This factor is closely interrelated with those that have been discussed above. For example, a defendant's lack of control implies that there may be at least one other person—the controlling party—who may enter at will and who may extend the right of entry to countless others. Not only does the number of people with legitimate access to the closure decrease the privacy expectation,[115] but the controlling party may also decide to report anything observed to the police.[116] This same person may alter the strength of the existing physical barriers, if any, and in many instances may exert some control over the number of persons immediately outside the barrier. Finally, the controlling party can adjust the strength of social inhibitions by, for example, changing the nature of a structure (*e.g.*, converting a garage into an apartment) or by posting or removing "no trespassing" signs. Thus, a

109. *E.g.*, United States v. Minton, 488 F.2d 37, 38 (4th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); United States v. Grimes, 426 F.2d 706, 708 (5th Cir. 1970); Burkholder v. Superior Court, 96 Cal. App. 3d 421, 426, 158 Cal. Rptr. 86, 89 (1979); State v. Stachler, 58 Hawaii 412, 421, 421 n.6, 570 P.2d 1323, 1329, 1329 n.6 (1977); Commonwealth v. Ortiz, — Mass. —, —, 380 N.E.2d 669, 672 (1978).

110. *Compare* Commonwealth v. Hernley, 216 Pa. Super. Ct. 177, 181-82, 263 A.2d 904, 907 (1970) (upheld surveillance because no subjective privacy expectation if window uncovered), *cert. denied*, 401 U.S. 914 (1971) *and* People v. Hicks, 49 Ill. App. 3d 421, 427-28, 364 N.E.2d 440, 444 (1977) (same) *with* United States v. Kim, 415 F. Supp. 1252, 1255-56 (D. Hawaii 1976) (struck down surveillance because sophisticated visual aids are just as intrusive as the electronic surveillance in *Katz*) *and* People v. Arno, 90 Cal. App. 3d 505, 511, 153 Cal. Rptr. 624, 627 (1979) (there is a reasonable expectation of privacy in that which can be observed only by sensory enhancing devices).

111. *See* 18 U.S.C. §§ 2510-2520 (1976 & Supp. III 1979).

112. *See* United States v. Albarado, 495 F.2d 799, 803, 806 (2d Cir. 1974). *See also*, Andrews, *Screening Travelers at the Airport to Prevent Hijacking: A New Challenge For the Unconstitutional Conditions Doctrine*, 16 ARIZ. L. REV. 657 (1974).

113. *See* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(d), at 418-19 (1978).

114. *Id.* § 2.2(d), at 264-65.

115. *See* State v. Abram, 353 So. 2d 1019, 1023 (La. 1977) (defendant who left motel room unattended for two days could reasonably expect maids to enter the room and search his possessions on the assumption that he abandoned the room); text & notes 70-74 *supra*.

116. *Cf.* United States v. White, 401 U.S. 745, 752 (1971) (one who reveals criminal plans to companions takes the risk that they are police agents); United States v. Agapito, 620 F.2d 324, 331-32 (2d Cir. 1980) (user of motel room takes the risk that people in adjoining rooms, who may have adverse interests to the user's, will hear and report any noise, including conversations, emanating from the user's room).

defendant who lacks substantial control over the area searched may have little privacy expectation because of the other factors relevant to expectation analysis; courts are disinclined to find a reasonable expectation of privacy in such a case.[117]

C. *Property Concepts: Trespass, Open Fields, and Curtilage*

Rakas v. Illinois[118] laid to rest doubts concerning the continuing vitality of property concepts. There the Court acknowledged that real and personal property law provide the ultimate source of a great many legitimate privacy expectations.[119] Furthermore, property rights and social custom undergird the entire set of factors discussed in the previous pages. For instance, without the right to exclude, the number of persons with legitimate access inside the closure could not be restricted and a defendant could not ensure the continuing integrity of existing physical barriers. Aside from the general importance of property rights, however, there are certain traditional property concepts that continue to receive an unwarranted amount of attention from which a corresponding amount of confusion has resulted. Three of these concepts—trespass, the open fields doctrine, and curtilage—are discussed in the following paragraphs.

A large number of decisions have treated trespass as a relevant but not dispositive consideration.[120] A violation of a defendant's reasonable expectation of privacy is more likely with a trespass than without one. The fact that there has been a trespass establishes entry into an area over which the defendant may have the right to exclude others. That right gives rise to a legitimate expectation of privacy with regard to those excluded. Additionally, the right to exclude others suggests an ability to utilize the physical surroundings to ensure privacy.

Although its bare relevance seems clear, the fact that there was, or was not, a trespass is simply not very probative in most cases.[121] There is an abundance of authority holding that a trespass alone will not convert surveillance into an unreasonable search.[122] In fact, the long-

117. *E.g.*, United States v. Alewelt, 532 F.2d 1165, 1168 (7th Cir.), *cert. denied*, 429 U.S. 840 (1976); United States v. Cogwell, 486 F.2d 823, 835 (7th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974), United States v. Romano, 388 F. Supp. 101, 105 (E.D. Pa. 1978).

118. 439 U.S. 128 (1978).

119. *Id.* at 143-44 n.12.

120. *E.g.*, United States v. Williams, 581 F.2d 451, 454-55 (5th Cir. 1978), *cert. denied*, 440 U.S. 972 (1979); United States v. Carriger, 541 F.2d 545, 549-50 (6th Cir. 1976); People v. Wright, 41 Ill. 2d 170, 175, 242 N.E.2d 180, 184 (1968); Commonwealth v. Soychak, 221 Pa. Super. Ct. 458, 462, 289 A.2d 119, 122 (1972).

121. *But see* text & notes 262-273 *infra*.

122. *E.g.*, United States v. Johnson, 561 F.2d 832, 842 (D.C. Cir. 1977); United States v. Conner, 478 F.2d 1320, 1323 (7th Cir. 1973); State v. Kaaheena, 59 Hawaii 23, 27, 575 P.2d 462, 465 (1978).

standing rule that fourth amendment protection does not extend into open fields is based on a rejection of the notion that one's privacy is coextensive with one's landholding.[123] It is one thing to intrude into a defendant's home; it is quite another to enter into the fringe of the defendant's undeveloped section of land in the wilds. In both cases there has been a trespass, but this fact alone provides little assistance in determining whether there has been a breach of a legitimate expectation of privacy.[124]

The second of these concepts—the open fields doctrine—originated in *Hester v. United States*.[125] The appeal in that case was based upon the district court's refusal to suppress the testimony of two witnesses who, from a distance of fifty to one hundred yards from the plaintiff's residence, observed Hester in possession of moonshine whiskey.[126] Speaking on behalf of the Court, Mr. Justice Holmes stated that the fourth amendment protection accorded to "persons, houses, paper, and effects"[127] would not be extended to open fields.[128]

The open fields doctrine is in tension with the third concept—curtilage. Traditionally, fourth amendment protection has extended beyond the physical limits of one's home to the outer extremes of the curtilage.[129] Since open fields have not been protected, while the curtilage has been, much has depended upon the location of the line separating these two zones. The following standard definition of curtilage has the effect of drawing that line:

> The curtilage includes those outbuildings which are directly and intimately connected with the habitation and in proximity thereto . . . and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment . . . . What is included "within the curtilage is to be determined from the facts including its proximity . . . to the dwelling, its inclusion within the general enclosure surrounding the dwelling and its use and enjoyment as an adjunct to the domestic economy of the family."[130]

Widespread disagreement has developed over the continuing in-

123. *See* United States v. Vilhotti, 323 F. Supp. 425, 431 (S.D.N.Y.), *aff'd in part and rev'd in part on other grounds*, 452 F.2d 1186 (2d Cir. 1971).

124. *But see* text & notes 265-273 *infra*.

125. 265 U.S. 57 (1924).

126. *Id.* at 57-58.

127. U.S. CONST. amend. IV.

128. 265 U.S. at 59.

129. *See* Wakkuri v. United States, 67 F.2d 844, 845 (6th Cir. 1933); Temperani v. United States, 299 F. 365, 366-67 (9th Cir. 1924).

130. State v. Hanson, 113 N.H. 689, 690-91, 313 A.2d 730, 732 (1973) (citations omitted); *accord* United States v. Wolfe, 375 F. Supp. 949, 958 (E.D. Pa. 1974); State v. Kender, 60 Hawaii 301, 304, 588 P.2d 447, 449 (1979); Hunsucker v. State, 475 P.2d 618, 621 (Okla. Crim. App. 1970).

dependent significance of the doctrines of open fields[131] and curtilage[132] after *Katz*. The better view is that these concepts are no longer independently dispositive of the fourth amendment issue. The general factors bearing on reasonable expectations of privacy—the strength of the physical barriers, absence of control, the number of legitimate entrants inside the closure, etc.—have significance without regard to the location of the search.

The open fields/curtilage distinction is probably relevant in a purely evidentiary sense. Normally, one would not expect privacy in fields that are truly open (there are, by definition, no physical barriers, the number of entrants is not restricted, social inhibitions are at a low ebb, etc.), while the area inside the curtilage will more likely justify an expectation of privacy (usually there is some form of physical barrier, there are a limited number of entrants, social inhibitions are stronger, etc.). But the terms "open fields" and "curtilage" are devoid of analytical content. They are useful only when they represent a shorthand for an analysis already performed on all seven factors of privacy analysis. The concepts do not embrace all of the factors, however, and the shorthand obscures the analysis; it would doubtless promote judicial accuracy and efficiency if these notions were simply forgotten.

II. WARRANTLESS TRASH SEARCHES SINCE *KATZ*

The focus of this Note now shifts to a discussion of warrantless trash reconnaissance in the post-*Katz* era.[133] The cases generally fit into categories based on the fourth amendment theory applied by the courts. There are three types of theories used: abandonment, other non-*Katz* theories, and explicit applications of *Katz*. But even those cases applying *Katz* have failed to explain and apply an analysis encompassing all of the relevant factors as developed in Part I.[134]

131. *Compare* United States v. Campbell, 395 F.2d 848, 848-49 (4th Cir. 1968), *cert. denied*, 393 U.S. 834 (1968) *and* United States v. Diaz-Segovia, 457 F. Supp. 260, 269-70 (D. Md. 1978) *and* State v. Dow, 392 A.2d 532, 535-36 (Me. 1978) *with* United States v. Freie, 545 F.2d 1217, 1223 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) *and* Burkholder v. Superior Court, 96 Cal. App. 3d 421, 427, 158 Cal. Rptr. 86, 90 (1979) *and* People v. McClaugherty, 193 Colo. 360, 362, 566 P.2d 361, 363 (1977).

132. *Compare* United States *ex rel.* Saiken v. Bensinger, 546 F.2d 1292, 1295-97 (7th Cir. 1976), *cert. denied*, 431 U.S. 930 (1977) *and* Fixel v. Wainwright, 492 F.2d 480, 483 n.3 (5th Cir. 1974) *with* United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978), *cert. denied*, 440 U.S. 972 (1979) *and* Wattenburg v. United States, 388 F.2d 853, 857-58 (9th Cir. 1968) *and* United States v. Kim, 415 F. Supp. 1252, 1255 (D. Hawaii 1976) *and* United States v. Romano, 388 F. Supp. 101, 105 (E.D. Pa. 1975).

133. The authors have attempted to cite all of the reported cases involving such a situation since the *Katz* case was decided (1967 through 1980).

134. A possible exception is Smith v. State, 510 P.2d 793 (Alaska), *cert. denied*, 414 U.S. 1086 (1973). Although the *Smith* court concluded that *Katz* requires an examination of the location of the trash, the nature of the closure, who removed the trash from the premises, and where the search took place, *id.* at 797-98, it failed to consider the social inhibitions, the number of persons outside the closure, the strength of physical barriers, etc., as discussed in Part I *supra*.

A. *Abandonment*

The most popular of the theories used to assess the propriety of warrantless trash search cases in the post-*Katz* era is the theory of abandonment. One commentator explains that abandonment forecloses fourth amendment protection because its signals an end to the right of privacy in the abandoned item.[135] He suggests that in the criminal context, there must not only be a physical abandonment of property but also a voluntary relinquishment of a known constitutional right.[136] Thus, once there is physical abandonment, the fourth amendment issue becomes primarily a question of the intent of the person abandoning the property.[137]

The federal courts of appeals reviewing trash searches since *Katz* have essentially applied such a two-pronged analysis.[138] *United States v. Mustone*[139] is a representative decision. In that case, federal agents[140] conducted a warrantless search of garbage that the defendants had placed at the curb for collection.[141] The fruits of the search constituted incriminating evidence which provided the probable cause for a warrant authorizing a search of defendants' premises.[142] Additional evidence was obtained during the second search.[143] Defendants chal-

135. Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 BUFFALO L. REV. 399, 400 (1970).

136. *Id.* at 401; *accord* People v. Howard, 50 N.Y.2d 583, *593*, 408 N.E.2d 908, 915, 430 N.Y.S.2d 578, 585 (1980).

137. *See* Mascolo, *supra* note 135, at 401.

138. *See* United States v. Vahalik, 606 F.2d 99, 100-01 (5th Cir. 1979); United States v. Crowell, 586 F.2d 1020, 1025 (4th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); United States v. Alden, 576 F.2d 772, 777 (8th Cir.), *cert. denied*, 439 U.S. 855 (1978); United States v. Shelby, 573 F.2d 971, 973 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978); United States v. Moone, 558 F.2d 1038 (9th Cir. 1977) (mem.); Magda v. Benson, 536 F.2d 111, 112 (6th Cir. 1976); United States v. Mustone, 469 F.2d 970, 972 (1st Cir. 1972); United States v. Jackson, 448 F.2d 963, 971 (9th Cir. 1971), *cert. denied*, 405 U.S. 924 (1972); United States v. Dzialak, 441 F.2d 212, 215 (2d Cir.), *cert. denied*, 404 U.S. 883 (1971); United States v. Stroble, 431 F.2d 1273, 1276 (6th Cir. 1970).

139. 469 F.2d 970 (1st Cir. 1972).

140. *Id.* at 972. *Mustone* involved an investigation by secret service agents into a counterfeiting operation. In United States v. Dzialak, 441 F.2d 212 (2d Cir. (1971)), *cert. denied*, 404 U.S. 883 (1971), the searcher was an investigator for the company from which the defendant employee was suspected of stealing parts of shipments. A postal inspector performed the search in Magda v. Benson, 536 F.2d 111 (6th Cir. 1976). These distinctions from *Mustone* had no effect on the end result.

141. 469 F.2d at 972. In United States v. Dzialak, 441 F.2d 212 (2d Cir.), *cert. denied*, 404 U.S. 883 (1971), a company investigator searched the defendant employee's trash and turned evidence of theft over to FBI agents. The police had a private trash collector seize defendant's garbage and turn it over to them in United States v. Crowell, 586 F.2d 1020 (4th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979). A similar situation arose in United States v. Shelby, 573 F.2d 971 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978), where FBI agents asked the municipal garbage collectors to search defendant's trash for specific incriminating evidence. These differences from *Mustone* had no effect on the decisions in *Dzialak* and *Shelby*. The *Crowell* court did note that the trash was removed from the defendant's premises in the usual manner before the police searched it, but this fact merely added to the weight of the decision and was not dispositive of the defendant's intent to abandon. *See* 586 F.2d at 1025.

142. 469 F.2d at 972.

143. *Id.*

lenged admission of the evidence obtained in both searches, claiming that the warrantless trash search violated the fourth amendment[144] and tainted all of the evidence subsequently acquired.[145] In upholding the warrantless search of the trash, the court ruled that the defendants abandoned the trash by placing it at the curb for collection.[146] With respect to the defendants' intent, the court merely stated, "Explicit in the concept of abandonment is a renunciation of any 'reasonable' expectation of privacy in the property abandoned. The contrary suggestion strikes us as anomalous."[147] This view that physical abandonment evinces an intent to renounce any expectation of privacy in trash is taken by all the federal courts of appeals that have considered the issue.[148] Some of the federal district courts are in accord,[149] and many of the state courts also agree.[150]

144. The defendants based their argument on People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *vacated*, 409 U.S. 33 (1972), *reaff'd*, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521, *cert. denied*, 412 U.S. 919 (1973) (see text & notes 193-214 *infra*) and Katz v. United States, 389 U.S. 347 (1967). *See* 469 F.2d at 972.

145. 469 F.2d at 972. *See generally* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).

146. 469 F.2d at 972.

147. *Id.* One court added that another indication of intent to abandon the expectation of privacy in trash placed at the curb was that rummagers and animals had occasionally gone through the defendant's garbage and exposed it to public view. *See* United States v. Shelby, 573 F.2d 971, 973-74 (7th Cir. 1978).

148. In United States v. Alden, 576 F.2d 772 (8th Cir.), *cert. denied*, 439 U.S. 855 (1978), the police arrested a suspected bank robber. *Id.* at 775. The police then went to the defendant's house to look for another suspect. *Id.* at 776. While moving in on the house, an officer came across a partially burned trash pile on the defendant's property and discovered some evidence. *Id.* Relying on *Mustone* and *Shelby*, see text & notes 139-147 *supra*, the court held that the defendant had renounced his expectation of privacy in a partially burned trash pile open to the elements. *Id.* at 777. The trash container in *United States v. Moone*, 558 F.2d 1238 (9th Cir. 1977) (mem.), was a dumpster in a public parking lot and the trash seized had been placed alongside the dumpster rather than in it. In United States v. Jackson, 448 F.2d 963 (9th Cir. 1971), *cert. denied*, 405 U.S. 924 (1972), one of the trash containers was a public wastebasket in a motel hallway. *Id.* at 968. The court held that the defendants surrendered their right to privacy by physically abandoning the trash in the public wastebasket. *Id.* at 971.

149. *See* United States v. Shelby, 431 F. Supp. 398, 402 (E.D. Wis. 1977), *modified*, 573 F.2d 971 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978); United States v. Harruff, 352 F. Supp. 224, 226 (E.D. Mich. 1972) (finding an abandonment of garbage placed in the dumpster used by the entire apartment complex but holding that it is the intent of the actor, not the location of the trash, that determines the issue).

150. *See* State v. Fassler, 108 Ariz. 586, 593, 503 P.2d 807, 814 (1972) (warrantless search of garbage can in alleyway behind defendant's premises upheld on basis that garbage was knowingly exposed to public); State v. Siquieros, 121 Ariz. 465, 468, 591 P.2d 557, 560 (Ct. App. 1978) (warrantless search of garbage can in the alleyway behind defendant's premises upheld on basis that it was knowingly exposed to public); People v. Superior Court, 23 Cal. App. 3d 1004, 1010, 100 Cal. Rptr. 604, 607 (1972) (warrantless seizure of trash placed in a neighbor's garbage can be upheld since defendant had no expectation of privacy in neighbor's garbage can); State v. Schultz, 388 So. 2d 1326, 1329 (Fla. Dist. Ct. App. 1980) (warrantless search of trash set out for collection on swale in front of home upheld); State v. Preston, 387 So. 2d 495, 497 (Fla. Dist. Ct. App. 1980) (warrantless search of wastebasket in defendant's room inside his mother's house upheld); mother consented to search and trash was abandoned); People v. Klausing, 41 Ill. App. 3d 588, 591, 353 N.E.2d 441, 444 (1976) (upholding warrantless search of plastic trash bags placed alongside curb for collection); People v. Huddleston, 38 Ill. App. 3d 277, 281, 347 N.E.2d 76, 80 (1976) (upholding same search subsequently found valid in *Klausing*, the court noted that defendant had manifested no actual expectation of privacy, and even if he had, it would not be recognized as reasonable by society); Everhart v. State, 20 Md. App. 71, 95, 315 A.2d 80, 95 (1974) (upholding warrantless search of plastic trash bags placed alongside a house); Campbell v. State, 278 So. 2d 420, 422-23

Unfortunately, the courts that apply the abandonment theory frequently do not analyze the underlying issue properly.[151] Certainly there is little doubt that when garbage is set out for collection or placed in a public receptacle there is a physical abandonment. But what is absolutely unwarranted is the quantum leap from physical abandonment to a conclusive presumption of intent to waive any expectation of privacy.[152] Since the burden is on the government to justify the validity of a warrantless search,[153] a court should not presume the waiver of a constitutional right.[154] Clearly this analysis directly contradicts the defendant's claim of a reasonable expectation of privacy in the trash and no intent to waive it.

Even though the federal courts rely on property concepts to justify their abandonment analysis, they fail to carry that analysis to a logical conclusion. Property concepts are a matter of local law.[155] Some local

(Miss. 1973) (upholding the warrantless search of an open garbage can outside the defendant's apartment); State v. Purvis, 249 Or. 404, 411, 438 P.2d 1002, 1005 (1968), *habeas corpus hearing ordered sub nom.* Purvis v. Wiseman, 298 F. Supp. 761 (D. Or. 1969) (upholding warrantless seizure of trash from defendant's hotel room by maids possibly acting on a police request); Willis v. State, 518 S.W.2d 247, 249 (Tex. Crim. 1975) (upholding warrantless search of fifty gallon drum in which all the tenants of defendant's apartment building placed their trash, which was taken out and burned daily). *But see* People v. Howard, 50 N.Y.2d 583, 593, 408 N.E.2d 908, 915, 430 N.Y.S.2d 578, 585 (1980) (invalidating seizure of package that defendant had thrown onto junk pile during attempts to elude police pursuit because court found no intent to abandon).

151. In fact, the federal courts deciding the issue since 1976 have, with one exception, merely cited prior federal cases without any further analysis. The lone exception is United States v. Shelby, 573 F.2d 971 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978). The court gives a detailed discussion of the nature of garbage disposal and concludes that one assumes the risk that garbage disposed of in the customary way might be searched by government agents. *Id.* at 973.

152. See text & notes 146-147 *supra*. United States v. Shelby, 573 F.2d 971 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978), contains a more detailed analysis. The court discusses the mechanics of garbage disposal, including garbage removal by public employees who have no fiduciary relationship to individual disposers. *Id.* at 973. The court also notes that society does not regard garbage placed out for collection as private. *Id.* Further, since rummagers and animals often strew trash about and expose it to public view, a person can have no reasonable expectation of privacy in garbage set out for collection. *Id.* at 973-74.

For a response to the argument that public employees haul the garbage away, see text & notes 199-200 *infra*. The argument that society does not regard trash as private is not empirically derived and is merely a matter of conjecture. Equally persuasive is the assertion that while society does not regard trash as private from authorized removers, one does not expect government agents to search the trash without a warrant before it has lost its identity connecting it to its original owner. *See* United States v. Kahan, 350 F. Supp. 784, 796 (S.D.N.Y. 1972), *modified on other grounds*, 479 F.2d 290 (2d Cir. 1973), *rev'd with instructions to reinstate dist. ct.'s judgment*, 415 U.S. 239 (1974); People v. Edwards, 71 Cal. 2d 1096, 1104, 458 P.2d 713, 718, 80 Cal. Rptr. 633, 638 (1969). Similarly, a person may expect a vagrant, child, or animal to rummage through the trash but does not expect the police to do so without a warrant. People v. Krivda, 5 Cal. 3d 357, 367, 486 P.2d 1262, 1269, 96 Cal. Rptr. 62, 69, *vacated*, 409 U.S. 33 (1972), *reaff'd*, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521, *cert. denied*, 412 U.S. 919 (1973); State v. Schultz, 388 So. 2d 1326, 1330 (Fla. Dist. Ct. App. 1980) (Anstead, J., dissenting). Taking cognizance of *Krivda* and other California decisions, the *Shelby* court concluded, "It therefore seems to be more prudent to put only genuine trash, not secrets, in garbage cans, except perhaps in California." 573 F.2d at 974.

153. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 219, 222 (1973); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Katz v. United States, 389 U.S. 347, 357 (1967).

154. Mascolo, *supra* note 135, at 401-04; *see* People v. Howard, 50 N.Y.2d 583, 593, 408 N.E.2d 908, 915, 430 N.Y.S.2d 578, 585 (1980).

155. *See, e.g.*, Leis v. Flynt, 439 U.S. 438, 441 (1979) (per curiam); Paul v. Davis, 424 U.S. 693,

ordinances prohibit anyone but an authorized remover to interfere with garbage set out for collection. Several defendants have argued that such local laws provide an expectation of privacy against anyone other than authorized removers, but the federal courts have declined to give this argument any decisional weight.[156]

Trespass is another problem not analyzed by the courts using the abandonment theory. Assume, arguendo, that mere physical abandonment indicates an intent to relinquish any reasonable expectation of privacy in the garbage. Where can the police seize abandoned trash? Disposal of garbage does not also waive the expectation that unauthorized persons will not enter the owner's property. Yet some of the federal courts have upheld just such a search.[157] Not only is a search performed after entering the owner's property trespassory, it also prevents the owner from retrieving the garbage before it is collected.[158] Until authorized collectors remove the garbage from a person's property, that person has exclusive legal control over the garbage—a factor

710 (1976); Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The Court of Appeals of New York, unlike the federal courts, has held that abandonment for fourth amendment purposes is partly a question of property law but mostly a question of constitutional law. People v. Howard, 50 N.Y.2d 583, 593, 408 N.E.2d 908, 915, 430 N.Y.S.2d 578, 585 (1980).

156. United States v. Vahalik, 606 F.2d 99, 101 (5th Cir. 1979) (holding that there was no evidence that defendant relied on local ordinance and that purpose of the ordinance was presumably sanitation and not privacy); Magda v. Benson, 536 F.2d 111, 113 (6th Cir. 1976) (holding that such an ordinance "is a matter of local municipal law, not federal constitutional law"); United States v. Dzialak, 441 F.2d 212, 215 (2d Cir.) (holding that the ordinance did not change the fact of defendant's abandonment), *cert. denied*, 404 U.S. 883 (1971). *See also* People v. Krivda, 5 Cal. 3d 357, 368 n.1, 486 P.2d 1262, 1269 n.1, 96 Cal. Rptr. 62, 69 n.1 (1971) (Wright, C.J., dissenting, suggests that the local laws are intended only to give municipality a monopoly in trash collection and are not meant to create an expectation of privacy in trash), *vacated*, 409 U.S. 33 (1972), *reaff'd*, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521, *cert. denied*, 412 U.S. 919 (1973). *But see* State v. Schultz, 388 So. 2d 1326, 1330 (Fla. Dist. Ct. App. 1980) (Anstead, J., dissenting) (person who follows disposal procedure set out in ordinance or collection contract has reasonable expectation that the entire procedure set out will be followed without police interference; disposer has done everything possible to preserve privacy).

157. United States v. Vahalik, 606 F.2d 99 100-01 (5th Cir. 1979); United States v. Alden, 576 F.2d 772, 775 (8th Cir.), *cert. denied*, 439 U.S. 855 (1978) (discussed in note 158 *infra*); Magda v. Benson, 536 F.2d 111, 112 (6th Cir. 1976). If physical abandonment alone is the only issue, what is to prevent the police from entering a private residence to seize trash thrown into a wastebasket? The only court to consider the issue held that trash still located within the defendant's house is not yet abandoned. *See* State v. Chapman, 250 A.2d 203, 212 (Me. 1969). But if physical abandonment is the only privacy consideration with respect to garbage, there is no difference between garbage in a wastebasket located inside a house and garbage at curbside waiting for collection. If there is a fourth amendment difference between the two examples, then there must be other relevant privacy considerations.

158. In United States v. Alden, 576 F.2d (8th Cir.), *cert. denied*, 439 U.S. 855 (1978), the court held that the defendant had abandoned any evidence found in a partially burned trash pile on his property since there was no indication that he intended to retain anything in the pile. *Id.* at 777. *But see* State v. Schultz, 388 So. 2d 1326, 1330-31 (Fla. Dist. Ct. App. 1980) (Anstead, J., dissenting) (trespassing police had no right to be where they were when they conducted search; disposer has right to retrieve trash until authorized collectors remove it); Ball v. State, 57 Wis. 2d 653, 662-63, 205 N.W.2d 353, 357 (1973) (holding that a search of a barrel used for burning trash located on defendant's property and hidden from public view was invalid since, *inter alia*, defendant was arrested miles away and never had a chance to evince an intent to reclaim or abandon the trash).

suggesting a privacy expectation.[159]

A final problem with the abandonment theory is that courts applying it never consider whether the police had probable cause to search, nor do they look at the number of trash searches directed at the defendant. Thus, the application of this theory opens the door to unbridled police harassment.[160] Much of a person's life can be read from a continued examination of his or her garbage.[161] Furthermore, the amount of information gained about the disposer logically is proportional to the number of searches performed. The typical person has scant protection. Not all people can afford paper shredders or garbage disposals. Many areas prohibit the burning of trash to control air pollution.[162] Local health laws may require the disposal of garbage by setting it out for authorized collectors.[163] Therefore, to comply with the law an individual may be forced to physically abandon trash, with the result that the police can then search and seize it with impunity.[164]

B. *Other Non-*Katz *Theories*

A few courts use neither the abandonment theory discussed above nor strictly a *Katz* theory discussed below in analyzing a warrantless trash search. Instead, these courts apply one of several traditional fourth amendment theories.

One theory relies on whether the search occurred within the "curtilage" of the owner's dwelling.[165] The theory is based on the fact that

159. *See* text at note 117 *supra*.

160. Dealing in *United States v. Bonnano* with a warrantless garbage search of about five years "not prompted by any hard information of purported law violations on the part of defendant Bonanno, but rather . . . an exercise of 'potluck' curiosity probably prompted by the Arizona Strike Force's view of Mr. Bonnano's reputation," the court stated, "The trash cover, while it involves a course of conduct which I at least find to be offensive on its face and conducted upon no real provication [sic], is not apparently offensive to the Fourth Amendment." United States v. Bonnano, No. CR-79-170-WAI(SJ) (N.D. Cal., filed Nov. 14, 1979).

161. *See* text & notes 221-236 *infra*.

162. *E.g.*, ARIZ. REV. STAT. ANN. § 36-789 (Supp. 1980-81) (prohibiting all open outdoor fires except those expressly permitted in the statute); ILL. ANN. STAT. ch. 111½, § 1009(c) (Smith-Hurd 1977) (banning open burning of refuse); WIS. STAT. ANN. § 144.44 (West 1974) (requiring a license for all burning of solid waste, which includes garbage. *Id.* § 144.30).

163. TUCSON, ARIZ., CODE §§ S15.3, 15.8 (1965) (providing that garbage shall be set out in specified types of containers along the nearest alley, side entrance, or curb (in that order), and may only be placed along a street or curb on designated collection days. *See also id.* § 15.9 (allowing inspection of containers and condemnation of those not in compliance with the law); § 15.11 (forbidding retention or other method of outdoor disposal of garbage); § 15.16 (proscribing the accumulation of trash).

164. The argument can be made that police do not intend to bother the law abiding citizen, and they would certainly not do so by taking on the undesirable and time-consuming task of searching through garbage. If true, these claims support rejection of the abandonment theory. A theory recognizing a greater expectation of privacy in garbage in order to prevent governmental harassment would not deter good faith police efforts. Such a theory would prevent bad faith activity so bent on harassment that, despite the unpleasantness of searching garbage, the officer continues to do so without probable cause or a warrant.

165. *See* United States v. Long, 449 F.2d 288, 294 (8th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972) (warrant authorizing the search of defendant's "premises" impliedly includes an authoriza-

the fourth amendment protects "persons, houses, papers, and effects" but not the "open fields" beyond the curtilage of the house.[166] The curtilage of a dwelling, however, like the house itself, comes within the protection of the fourth amendment.[167]

The curtilage doctrine is subject to severe criticism under a *Katz* analysis.[168] First, it contradicts the assertion in *Katz* that "the Fourth Amendment protects people, not places."[169] Although the curtilage doctrine does protect personal rights by restricting searches around a person's house, it offers no protection of personal rights outside that area. Furthermore, since *Katz* holds that the fourth amendment protects people and not places, whether an article is within the curtilage of a person's dwelling should not be conclusive of the fourth amendment issue.[170] The curtilage doctrine also per se excludes business premises from fourth amendment protection without regard to personal rights.[171] Finally, the curtilage doctrine arises from a common law property concept with no historical relevance to the fourth amendment.[172]

Another traditional fourth amendment theory used by some courts is that of consent.[173] The reasoning is that when trash is placed in the proper area for collection, the owner impliedly consents to let authorized removers take it away.[174] Once the trash is legally taken from the premises, the authorized removers may turn it over to the police without violating the fourth amendment since the owner's expectation of privacy does not extend beyond the owner's premises.[175]

Some support for the consent theory might be drawn from a post-*Katz* Supreme Court decision that consent to search constitutes a

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tion to search the premises' trash can located adjacent to the building); United States v. Stroble, 431 F.2d 1273, 1276 (6th Cir. 1970) (upholding a warrantless trash search, the court states that trash placed along the curb is not within the curtilage of the house); United States v. Wolfe, 375 F. Supp. 949, 958-59 (E.D. Pa. 1974) (upholding a warrantless trash search, the court states that the curtilage doctrine applies only to dwellings and not businesses).

166. Hester v. United States, 265 U.S. 57, 59 (1924). This case is the basis of all the garbage search decisions applying the curtilage theory. *See* text & notes 125-134 *supra*.

167. Wakkuri v. United States, 67 F.2d 844, 845 (6th Cir. 1933); Temperani v. United States, 299 F. 365, 366-67 (9th Cir. 1924).

168. Open fields, curtilage, and other criticisms of those doctrines are also discussed at text & notes 125-134 *supra*.

169. 389 U.S. at 351.

170. *See* United States v. Freeman, 426 F.2d 1351, 1354 (9th Cir. 1970); Wattenburg v. United States, 388 F.2d 853, 857-58 (9th Cir. 1968); Ball v. State, 57 Wis. 2d 653, 661-62, 205 N.W.2d 353, 356-57 (1973); Mascolo, *supra* note 135, at 409-14.

171. *See* United States v. Wolfe, 375 F. Supp. 949, 958-59 (E.D. Pa. 1974).

172. Mascolo, *supra* note 135, at 409-14.

173. Purvis v. Wiseman, 298 F. Supp. 761, 763 (D. Or. 1969); State v. Purvis, 249 Or. 404, 410, 438 P.2d 1002, 1005 (1968), *habeas corpus hearing ordered*, 298 F. Supp. 761 (D. Or. 1969); Croker v. State, 477 P.2d 122, 125 (Wyo. 1970).

174. *See* cases cited in note 173 *supra*. *See also* United States v. Jimenez-Badilla, 434 F.2d 170, 173-74 (9th Cir. 1970) (upholding a warrantless trash search when the defendant expressly consented to the police search).

175. *See* cases cited in note 173 *supra*.

waiver of an expectation of privacy if such consent is freely and voluntarily given.[176] Since a person who sets out trash for collection generally does so freely and voluntarily,[177] thereis valid consent for authorized removers to take the trash away. Nevertheless, no free and voluntary consent is given to police to search without a warrant.[178] Therefore, the implied consent theory is not consistent with fourth amendment law. By holding that a person's privacy simply does not extend beyond his or her premises with respect to garbage, the implied consent theory courts have merely recast the curtilage theory, allowing police to seize garbage outside of the curtilage.[179] 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."[180]

Other traditional fourth amendment theories are consistent with *Katz*. One exception to the fourth amendment warrant requirement occurs when the police, legitimately being where they are, inadvertently come across evidence in plain view, and it is immediately apparent that the evidence is incriminating.[181] The "plain view" doctrine is consistent with the *Katz* rule that "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment Protection."[182]

The courts applying the plain view theory to warrantless garbage searches have held that when trash is lying in plain view and is spotted by police who have a legal right to be where they are, the police may seize that trash without a warrant.[183] These courts have not correctly applied the plain view exception to the fourth amendment, however, since they do not explicitly require the discovery of the evidence in plain view to be inadvertent and its incriminating nature to be immediately apparent.[184] Inadvertence is required to prevent warrantless and

176. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

177. *But see* text & notes 161-164 *supra*.

178. W. LAFAVE, *supra* note 113, § 2.6(c), at 379.

179. See text & notes 165-167 *supra*.

180. 389 U.S. at 351.

181. Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971).

182. 389 U.S. at 351.

183. United States v. Stroble, 431 F.2d 1273, 1276 (6th Cir. 1970) (dealing with an empty carton with an attached computer card lying next to defendant's garbage cans alongside the curb); State v. Austin, 584 P.2d 853, 856 (Utah 1978) (dealing with a wastebasket containing charred receipts from a robbery spotted when police arrested defendant in his hotel room); People v. Sirhan, 7 Cal. 3d 710, 742-43, 497 P.2d 1121, 1143, 102 Cal. Rptr. 385, 407 (1972) (dealing with an incriminating envelope lying on top of defendant's trash spotted when a police officer, guarding defendant's house after his arrest, threw away a paper cup), *cert. denied*, 410 U.S. 947 (1973).

184. The circumstances in each case using the plain view doctrine would support a finding of inadvertent discovery of immediately apparent incriminating evidence, however. *See* cases cited in note 183 *supra*.

unconstrained police action when the police anticipate finding evidence in a particular place.[185] The requirement that it be immediately apparent that the evidence is incriminating similarly prevents a warrantless "general exploratory search from one object to another until something incriminating at last emerges."[186]

The "exigent circumstances" doctrine sometimes used in garbage cases also conforms with *Katz*. When police have probable cause to believe evidence will be found in a certain place, and it appears the evidence will be moved or destroyed before the officers can obtain a warrant based on that probable cause, then the exigent circumstances justify a warrantless search.[187] Some courts have upheld a warrantless trash search arising in such a situation.[188] The probable cause requirement ensures that the police could have obtained a valid fourth amendment warrant if given the chance. The exigent circumstances bring the warrantless search within the *Katz* analysis because, when added to probable cause, they make the government intrusion reasonable.

C. *Application of* Katz

Although the United States Supreme Court has yet to rule in such a case, the correct analysis of a warrantless trash search undoubtedly requires the application of the *Katz* reasonable expectation of privacy test.[189] A number of courts considering fourth amendment objections to warrantless trash searches have used a *Katz* analysis.[190] The problem is that each of these courts restricts its analysis to a few circumstances rather than considering all seven relevant factors developed in Part I.

The most frequently cited case of this type is *People v. Krivda*.[191]

185. Coolidge v. New Hampshire, 403 U.S. 443, 469-70 (1971).

186. *Id.* at 466.

187. Chambers v. Maroney, 399 U.S. 42, 51 (1970).

188. United States v. Brown, 457 F.2d 731, 734 (1st Cir.) (although defendant was in custody, there was evidence lying in an open trash pile, it was getting dark, and the circumstances pointed to more than one perpetrator), *cert. denied*, 409 U.S. 843 (1972); People v. Cohen, 59 Cal. App. 3d 241, 245, 130 Cal. Rptr. 656, 659 (1976), *cert. denied*, 429 U.S. 1045 (1977); People v. Parker, 44 Cal. App. 3d 222, 229-30, 118 Cal. Rptr. 523, 529-30 (1975) (trash placed in a communal receptacle is especially likely to be tampered with before a warrant can be obtained and is as movable as a car); People v. Stewart, 34 Cal. App. 3d 695, 700-01, 110 Cal. Rptr. 227, 230 (1973); People v. Superior Court, 23 Cal. App. 3d 1004, 1011, 100 Cal. Rptr. 604, 608 (1972) (Fleming, J., concurring); State v. Chapman, 250 A.2d 203, 210-11 (Me. 1969).

189. *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 740-41 (1979) (holding that the fourth amendment test of a reasonable warrantless search is whether claimant exhibited a subjective expectation of privacy that society will view as reasonable); Rakas v. Illinois, 439 U.S. 128, 143 (1978) (the crucial fourth amendment question is whether claimant has a *Katz* expectation of privacy with which the government unreasonably interfered); Katz v. United States, 389 U.S. 347, 351 (1967) (holding that application of the fourth amendment hinges on what the claimant "seeks to preserve as private.").

190. See text & notes 191, 201, 202, *infra*.

191. 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *vacated*, 409 U.S. 33 (1972), *reaff'd*, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521, *cert. denied*, 412 U.S. 919 (1973).

Krivda involved a usual trash search situation[192] in which the police suspected that the defendants were engaged in criminal activity.[193] The police had the garbage collectors segregate the defendants' garbage and turn it over to them.[194] A search of the garbage turned up incriminating evidence, and on that basis the police entered the defendants' premises to make an arrest and seize more evidence.[195] The defendants won a motion at trial to suppress all the evidence seized as the fruit of an illegal search, and the California Supreme Court affirmed that ruling.[196]

The California Supreme Court held that the defendants had a reasonable expectation that their trash would be commingled with other trash and would lose its identity.[197] By conducting a warrantless search of the defendants' garbage before the commingling process had been completed, the police unreasonably interfered with the defendant's privacy expectation.[198] The court held that it made no difference that the garbage had been legally removed from the defendants' premises before the search was made since "[t]he prohibition in the [fourth] amendment is against unreasonable searches and seizures, not trespasses."[199] Also, since the collection of trash was governed by a local ordinance requiring its removal in a specified manner by authorized persons, the court ruled that placing trash out for collection to comply with the law could not be viewed as an abandonment.[200] Further, although one may expect that vagrants, children, or animals will rummage through garbage set out for collection, the court reasoned that one does not expect the police to do so without a warrant.[201]

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192. See text & notes 139-145 *supra*.

193. 5 Cal. 3d at 360, 486 P.2d at 1263, 96 Cal. Rptr. at 63. The suspicion arose from an anonymous tip that the defendants were engaged in illegal drug activity, a tip the police investigated for 18 days. *Id.*

194. *Id.*

195. *Id.*, 486 P.2d at 1263-64, 96 Cal. Rptr. at 63-64.

196. *Id.* at 367, 486 P.2d at 1269, 96 Cal. Rptr. at 69.

197. *Id.* at 366-67, 486 P.2d at 1268, 96 Cal. Rptr. at 68. The three dissenters opined that while a person may hope trash will be commingled before being searched by the government, such a hope does not rise to a reasonable expectation of privacy. *Id.* at 368-69, 486 P.2d at 1270, 96 Cal. Rptr. at 70.

198. *Id.* at 366-67, 486 P.2d at 1268, 96 Cal. Rptr. at 68.

199. *Id.* at 365, 486 P.2d at 1267, 96 Cal. Rptr. at 67.

200. *Id.* at 366, 486 P.2d at 1268, 96 Cal. Rptr. at 68.

201. *Id.* at 367, 486 P.2d at 1269, 96 Cal. Rptr. at 69; *accord* State v. Schultz, 388 So. 2d 1326, 1330 (Fla. Dist. Ct. App. 1980) (Anstead, J., dissenting) (one does not expect police *or* privacy-respecting adults to rummage through one's trash).

Krivda relied explicitly on People v. Edwards, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969), an earlier California decision that has received less attention. The *Edwards* court suppressed evidence from a warrantless search and seizure of trash located in defendant's back yard. *Id.* at 1104, 458 P.2d at 718, 80 Cal. Rptr. at 638. The court analyzed the search on reasonable expectation of privacy grounds. *Id.* at 1110, 458 P.2d at 715, 80 Cal. Rptr. at 635. The defendant argued that he had a privacy expectation since the cans were within a few feet of his home, the seized evidence was not in plain view, there was no abandonment except as to authorized removers, and no one else used the cans. *Id.* at 1104, 458 P.2d at 718, 80 Cal. Rptr. at 638.

Although *Krivda* has been cited favorably by a few courts outside of California,[202] it generally has not been well-received.[203] Most of the courts rejecting *Krivda* conclude that any reasonable expectation of privacy is abandoned when trash is set out for collection.[204] The courts espousing *Krivda*, in contrast, conclude that a person's expectation remains with the garbage until it has lost its identity.[205] Although irreconcilable, both theories are derived from what the courts perceive society will recognize as a reasonable expectation of privacy. Of the two, *Krivda* represents the better position.[206]

But the *Krivda* theory goes too far in recognizing a reasonable expectation of privacy in garbage. None of the physical factors traditionally examined in a *Katz* analysis[207] are considered by *Krivda*. *Krivda* also fails to distinguish between trash that is easily commingled, for example, a bag of marijuana seeds, and trash that never loses its con-

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Voicing the concern that "[h]alf truths leading to rumor and gossip may readily flow from an attempt to 'read' the contents of another's trash," the court found defendant's expectation to be reasonable. *Id.*

LaFave says of *Edwards*:

> Nor will it do to suggest that the citizen who desires privacy as to his trash should arrange to dispose of it in a way other than did the defendant in *Edwards*. It would be a perversion of *Katz* to interpret it as extending protection only to those who resort to extraordinary means to keep information regarding their personal lives out of the hands of the police.

W. LAFAVE, *supra* note 113, § 2.6(c), at 376.

202. United States v. Haruff, 352 F. Supp. 224, 226 (E.D. Mich. 1972) (upholding warrantless search of an apartment complex's trash barrel, the court stated that *Krivda* establishes that one does not necessarily abandon what one places in a private garbage can); United States v. Kahan, 350 F. Supp. 784, 796 (S.D.N.Y. 1972) (striking down more than eight months of warrantless surveillance of a worker's office wastebasket where only two seizures were made, the court compared the search of a private office wastebasket to the searches of a private trash can near a home in *Krivda* and *Edwards*), *modified on other grounds*, 479 F.2d 290 (2d Cir. 1973), *rev'd with instructions to reinstate dist. ct.'s judgment*, 415 U.S. 239 (1974); Smith v. State, 510 P.2d 793, 801 (Alaska) (Rabinowitz, C.J., dissenting, argued that the California cases apply the correct analysis), *cert. denied*, 414 U.S. 1086 (1973).

203. *See* United States v. Crowell, 586 F.2d 1020, 1025 (4th Cir. 1978) (while it recognized *Krivda*, the court said the federal courts of appeal espouse the better view), *cert. denied*, 440 U.S. 959 (1979). See text & notes 146-148 *supra*); United States v. Shelby, 573 F.2d 971, 973-74 (7th Cir.) (responding to *Krivda's* expectation of commingling, the court states, "In 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"), *cert. denied*, 439 U.S. 841 (1978); Magda v. Benson, 536 F.2d 111, 113 (6th Cir. 1976) (holding that California's rulings are not binding on federal courts and that no "legitimate expectation of privacy exists as to abandoned property"); United States v. Mustone, 469 F.2d 970, 972 (1st Cir. 1972) (unpersuaded by *Krivda*, the court stated, "Implicit in the concept of abandonment is a renunciation of any 'reasonable' expectation of privacy in the property abandoned. The contrary suggestion strikes us as anomalous."); State v. Fassler, 108 Ariz. 586, 592-93, 503 P.2d 807, 813-14 (1972); State v. Schultz, 388 So. 2d 1326, 1328 (Fla. Dist. Ct. App. 1980); People v. Huddleston, 38 Ill. App. 3d 277, 279, 347 N.E.2d 76, 79 (1976); Everhart v. State, 20 Md. App. 71, 96, 315 A.2d 80, 96 (1974) (the court acknowledges *Krivda*, "but [is] not persuaded that any valuable Fourth Amendment interest would be served by extending the coverage of the Amendment to trash and garbage which has been patently discarded.").

204. These courts tend to be the courts applying the abandonment theory. For an explanation of that theory, see text & notes 146-147 *supra*.

205. *See* text & note 197 *supra*.

206. See text & notes 221-236 *infra* for an explanation of why people should have a reasonable expectation of privacy in trash.

207. *See* text & notes 27-117 *supra*.

nection to its owner until it is physically destroyed, for example, a letter and signature in some particular person's handwriting addressed to the disposer. The latter type of evidence can always be traced even if it is discovered at the dump. But since the disposer can easily destroy the identity of such evidence, it is doubtful that society would extend fourth amendment protection to such evidence at the dump. The *Krivda* theory does, however, recognize that people have a reason to expect privacy in their trash[208] and prevents unconstrained police invasion of that privacy.

Krivda dealt with the search of a garbage can belonging to a private homeowner.[209] The *Krivda* commingling rule extends fourth amendment protection to trash until it has lost its connection to the disposer.[210] On equal protection grounds, an apartment dweller using a communal trash receptacle should have the same expectation as a single-family residence owner using a private garbage can.[211] At least one post-*Krivda* California court has so held.[212] Two other post-*Krivda* California courts, however, imply that the apartment dweller has a lesser expectation of privacy since a communal trash receptacle is less private than a single family garbage can.[213] The California Supreme Court has not decided the issue applying the commingling expectation, but a proper *Katz* analysis would take into consideration the physical differences between a private and a communal receptacle.[214]

Other courts have analyzed warrantless trash searches under *Katz* without relying on *Krivda*. One group of these cases looks at the totality of the circumstances to determine if the claimant had a reasonable expectation of privacy in garbage with which the government unreasonably interfered.[215] The other group focuses on particular factors.

208. *See* text & notes 221-236 *infra*.

209. 5 Cal. 3d at 360, 486 P.2d at 1263, 96 Cal. Rptr. at 63.

210. *See* text & notes 197-201 *supra*.

211. W. LAFAVE, *supra* note 113, § 2.6(c), at 380-81. When residents of multiple unit dwellings use the only trash receptacles available, the seized evidence cannot be discovered without rummaging, and the evidence has not yet been commingled, the apartment dweller should have the same right to dispose of garbage without surrendering privacy rights as the single unit dweller. *Id.*

212. *See* People v. Smith, 125 Cal. Rptr. 192, 197 n.5 (1975), *rev'd on other grounds*, 17 Cal. 3d 845, 553 P.2d 557, 132 Cal. Rptr. 397 (1976) (holding that although apartment tenants may have a lesser expectation of privacy in their trash than home dwellers have, both groups may reasonably expect that the police will not search their trash without a warrant).

213. People v. Stewart, 34 Cal. App. 3d 695, 700, 110 Cal. Rptr. 227, 230 (1973) (stating in dictum, "Logically an apartment house tenant, using trash barrels in common with other tenants, has less reason to believe what he deposits in the trash will remain private than does the home dweller who provides and uses his own individual trash cans."); People v. Gray, 63 Cal. App. 3d 282, 290, 133 Cal. Rptr. 698, 702-03 (1976) (adopting, in dictum, *Stewart's* view).

214. *See* text & notes 297-301 *infra*.

215. Smith v. State, 510 P.2d 793, 798 (Alaska 1973) (in upholding a warrantless seizure of evidence from a communal trash receptacle, the court said the relevant factors are the location of the trash, whether the dwelling is a single or multiple family unit, who removed the trash, and the location of the warrantless search), *cert. denied*, 414 U.S. 1086 (1973); People v. Stein, 51 Ill. App.

For example, a private citizen who discovers a garbage can left behind in an apparently abandoned motel room[216] or who seizes trash from any garbage can[217] defeats any fourth amendment objection to the seizure. The disposal of evidence in a public wastebasket inside a public bathroom also defeats any reasonable expectation of privacy in the evidence.[218] The problem with the analysis in these cases, however, is the failure to enumerate specific factors to be examined in subsequent cases with different fact situations.[219] But whatever the actual factors examined, the proper analysis remains whether the claimant had a reasonable expectation of privacy with which the government unreasonably interfered.[220]

III. APPLYING THE KATZ TEST TO WARRANTLESS TRASH SEARCHES

As the preceding section demonstrates, the post-*Katz* courts dealing with warrantless trash searches have not applied the complete fourth amendment test developed by *Katz* and its progeny, discussed in Part I. Therefore, after briefly examining the need for privacy in garbage, an analysis of warrantless garbage searches based on the *Katz* privacy test will be suggested.

A. *The Need for Privacy in Garbage*

As previously discussed,[221] courts have come to differing conclusions regarding whether the Constitution should protect expectations of privacy in garbage. *People v. Edwards*[222] is representative of the view that such expectations are legitimate. The fear articulated in *Edwards* is that "[h]alf truths leading to rumor and gossip may readily flow from an attempt to 'read' the contents of another's trash."[223] There is at least some evidence justifying this concern.

3d 421, 431-32, 366 N.E.2d 629, 637 (1977) (upholding the warrantless seizure of evidence from a garbage can in defendant's back yard since the evidence was lying on top of the trash in an uncovered can located five to six feet from a public alley and separated therefrom only by a cyclone fence); People v. Popely, 36 Ill. App. 3d 828, 834, 345 N.E.2d 125, 129 (1976) (upholding the warrantless seizure of evidence from an office wastebasket since defendant's office was not private, the evidence was visible from outside the office, and it was seized from a wastebasket sitting in an aisle between desks); Ball v. State, 57 Wis. 2d 653, 664, 205 N.W.2d 353, 358 (1973) (striking down a warrantless search of defendant's garbage can located within the curtilage of his house, hidden from public view, and not regularly emptied by garbage collectors).

216. State v. Abram, 353 So. 2d 1019, 1023 (La. 1977).

217. People v. Gray, 63 Cal. App. 3d 282, 290, 133 Cal. Rptr. 698, 703 (1976).

218. *See* Robinson v. State, 13 Md. App. 439, 443, 283 A.2d 637, 639 (1971).

219. *But see* note 134 *supra*.

220. *See* note 189 *supra*.

221. See text and notes 204-206 *supra*.

222. 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969).

223. *Id.* at 1104, 458 P.2d at 718, 80 Cal. Rptr. at 638. Another judge has said that it is obvious that a person who saw a neighbor rummaging through that person's trash would be incensed; the same outrage should extend to police who perform warrantless trash searches. State v. Schultz, 388 So. 2d 1326, 1331 (Fla. Dist. Ct. App. 1980) (Anstead, J., dissenting).

For example, some of the results of an attempt to read the contents of people's garbage appeared in a magazine article written by A.J. Weberman.[224] Weberman surreptitiously snatched trash from the garbage cans of various celebrities[225] and published pictures of some of the material seized coupled with interpretive comments.[226] Weberman suggested that Bob Dylan's trash belied his claim that he did not read fan magazines.[227] Weberman also provided a brief description of Neil Simon's finances,[228] and discussed Abbie Hoffman's and Muhammad Ali's social lives.[229]

Garbage searches have been put to other unscrupulous uses. An industrial spy has admitted that his tools include wastebasket refuse purchases against which paper shredders and plant security forces provide the only defense.[230] A social scientist has related how a political campaign manager discovered the plans of an opponent by seizing copies of letters and memos found in his opponent's trash.[231] Similarly, a spokeswoman for one of the bidders for a cable television franchise in a hotly contested market said, "As the deadline approaches there's a lot of paranoia. We're being careful about our trash, just in case somebody might want to go through it looking for secrets."[232]

Therefore, although *Edwards* cites no authority for its conclusion regarding the need for privacy in discarded materials, people do have privacy expectations in garbage that society should recognize and protect.[233] "[A]lmost every human activity ultimately manifests itself in

224. A. J. WEBERMAN, *The Art of Garbage Analysis: You Are What You Throw Away*, 76 ESQUIRE 113 (1971).

225. *Id.*

226. *Id.* at 114-17.

227. *Id.* at 114.

228. *Id.* at 115.

229. *Id.* at 116-17.

230. Advertising Age, Nov. 2, 1964, at 74, col. 4.

231. E. WEBB, D. CAMPBELL, R. SCHWARTZ & L. SECHREST, UNOBTRUSIVE MEASURES: NONREACTIVE RESEARCH IN THE SOCIAL SCIENCES 177-78 (1966) (citing S. SHADEGG, HOW TO WIN AN ELECTION (1964)). The trash also gave the campaign manager a means of interpreting his opponent's public acts. *Id.* at 178. Webb gives three other examples of evidence of an owner's sensitivity in trash: 1) The practice of diplomatic embassies burning refuse under guard; 2) the purchase of discarded trash by industrial spies; and 3) the development of paper shredders. *Id.*

232. Huff, *Cable Firms Clam Up As Proposal Deadline Nears*, Tucson Citizen, Feb. 16, 1981, at 1, col. 6.

233. At least one legitimate user of garbage searches outside the criminal context seems to recognize the need for privacy in garbage. William L. Rathje, Associate Professor of Anthropology, University of Arizona, directs Le Projet du Garbage in Tucson, Arizona. Since 1971, Le Projet has conducted a scientific examination of garbage for social science research. *See generally Archaeology Reconstructs the Present*, MOSAIC 30 (Jan./Feb. 1979). Apparently recognizing the privacy problem in trash, Le Projet members only search garbage marked by general census tract and not by individual residence; no personal data is ever examined, recorded, or saved. *See* W. RATHJE & W. HUGHES, *The Garbage Project as a Nonreactive Approach: Garbage In. . . Garbage Out?*, in PERSPECTIVES ON ATTITUDE ASSESSMENT: SURVEYS AND THEIR ALTERNATIVES 151, 155-56, 160 (1975). The University of Arizona's Human Subjects Committee has approved this time consuming procedure which protects the subject's privacy. *Id.* Moreover, there has been no adverse public response. *Id.*

waste products and . . . any individual may understandably wish to maintain the confidentiality of his refuse."[234] Although the government presumably uses the fruits of a warrantless garbage search only for legitimate purposes, the potential for unscrupulous use of seized garbage has been demonstrated, and some protection is required for the disposer of the garbage.[235] The personal expectation of privacy associated with trash, however, need not necessarily be coextensive with the personal privacy expectations associated with a home and, therefore, may not produce precisely the same protections as the privacy expectations in a home.[236]

B. *A Proposed Analysis for Warrantless Trash Searches*

The fourth amendment proscribes "unreasonable searches and seizures."[237] Thus, a constitutional analysis of an alleged fourth amendment violation must first address the issue of whether there was a search or seizure. If the response is affirmative, then the reasonableness of the government action must be examined.[238] This is the framework in which the warrantless trash searches will be examined.[239]

Katz and its progeny stand for the proposition that when a person has a reasonable expectation of privacy in garbage, governmental examination of it constitutes a search.[240] A *Katz* analysis should include an examination of the defendant's own privacy enhancing conduct, the strength of physical barriers, the number of persons with legitimate access to the closure, the number of persons outside the closure, social inhibitions, and the defendant's control of the closure.[241]

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234. Smith v. State, 510 P.2d 793, 798 (Alaska), *cert. denied*, 414 U.S. 1086 (1973).

235. *Cf.* United States v. Kahan, 350 F. Supp. 784, 793-94 (S.D.N.Y. 1972) ("In a real sense, if courts begrudge the scope of privacy expectations of the populace, not 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."), *modified on other grounds*, 479 F.2d 290 (2d Cir. 1973), *rev'd with instructions to reinstate dist. ct.'s judgment*, 415 U.S. 239 (1974).

236. *See* W. LAFAVE, *supra* note 113, § 2.6(c), at 385.

237. U.S. CONST. amend. IV.

238. Warrantless searches are prima facie unreasonable. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Katz v. United States, 389 U.S. 347, 357 (1967); *See* Note, *Murder Scene Warrantless Searches: A Proposal*, 21 ARIZ. L. REV. 777, 778-80 (1979).

239. This analysis seems straightforward from the language of the amendment, but courts often merge the questions. *See* note 25 *supra*. For a discussion of the distinct questions and the reasons for keeping them separate, *see* Rawlings v. Kentucky, 448 U.S. 98, 112-13 (1980) (Blackmun, J., concurring).

240. *See* Katz v. United States, 389 U.S. 347, 353 (1967).

241. *See* text & notes 27-117 *supra*. Although relevant in other fourth amendment areas, sensory enhancing devices, see text & notes 102-114 *supra*, have played no part in garbage searches and, therefore, are not considered here. Such devices may become important in the future to the extent that garbage reconstruction devices may be developed.

Dogs present another possibility for the future use of sensory enhancing devices. For example, using trained dogs to sniff out drugs, police could walk down a public alley along which garbage had been set out for collection. If the dogs reacted positively to the presence of drugs in a

One group of factors developed in the *Katz* privacy analysis in Part I deals with the degree of possible human interaction with the trash. For example, the number of people with legitimate access to the closure where the garbage is located is relevant.[242] This factor weighs in favor of an expectation of privacy in a single-family residence's garbage container since only the owner's family and invitees reside within the closure.[243] Garbage collectors may have legitimate access to the trash too, but this does not necessarily preclude a privacy expectation.[244] More people are legitimately within a multi-family closure or a business office, so a user of a communal trash can has a correspondingly decreased expectation of privacy,[245] although some privacy does exist since only a limited number of people are inside the closure. Users of a purely public wastebasket[246] have no expectation under this privacy consideration because there is unlimited access to it. Of course, trash rummagers and children may also be illegitimately within the closure. But unless these people are within the closure so often that the owner has impliedly accepted their presence,[247] the owner's expectation of privacy cannot be defeated by these unlawful activities.

An examination of access to the closure by investigative officials[248] adds weight to a reasonable degree of privacy in the single-family residence or communal trash receptacle. The authorities may only be legitimately within the closure in limited circumstances. But such

particular garbage can, the police could then obtain a search warrant. The initial use of the dogs without a warrant would probably be upheld since the use of dogs has consistently been held not to constitute a search. *See* text & notes 106-108 *supra*. Whether the police could use such a technique when they have no suspicion of illicit activity is an open question. *See* note 108 *supra*.

242. See text & notes 70-74 *supra*.

243. The majority of warrantless search decisions deal with single-family residences. *E.g.*, United States v. Shelby, 573 F.2d 971 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978); People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *vacated*, 409 U.S. 33 (1972), *reaff'd*, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521, *cert. denied*, 412 U.S. 919 (1973); Croker v. State, 477 P.2d 122 (Wyo. 1970).

244. See note 75 *supra*. The mere fact that garbage collectors have access to the closure does not per se destroy whatever expectation of privacy the owner may have. Just as one expects a mail carrier to remove a letter from the mailbox without searching it, one expects a trash collector merely to dump the garbage into a truck for ultimate disposal. But of course, the disposer runs the risk that the collector may be an agent of the police. People v. Krivda, 5 Cal. 3d 357, 368-69, 486 P.2d 1262, 1270, 96 Cal. Rptr. 62, 70 (1971) (Wright, C.J., concurring & dissenting). Chief Justice Wright cites United States v. White, 401 U.S. 745 (1971), and Hoffa v. United States, 385 U.S. 293 (1966), both of which hold that what one knowingly exposes to another is not constitutionally protected if the other turns out to be a government agent. 401 U.S. at 749-52; 385 U.S. at 302.

Those municipalities where residents take their own trash to the dump have even fewer people with legitimate access to the closure.

245. The two types of communal trash containers found in the cases are: (1) garbage receptacles for apartment complexes, see Smith v. State, 510 P.2d 793 (Alaska), *cert. denied*, 414 U.S. 1086 (1973); and (2) common wastebaskets in an office, see People v. Popely, 36 Ill. App. 3d 828, 345 N.E.2d 125 (1976).

246. *See* Robinson v. State, 13 Md. App. 439, 283 A.2d 637 (1971).

247. *Cf.* RESTATEMENT OF PROPERTY § 457 (1944) (a prescriptive right to use land is created when it is used adversely and continuously for the time prescribed by law).

248. See text & notes 70-74 *supra*.

officials have unlimited access to a public area, so a disposer of trash in a public container lacks a privacy interest with respect to this element of the *Katz* analysis.

Katz also requires a consideration of the number of people outside the closure,[249] since the likelihood of the closure being broken increases as the number of people outside the closure increases. Users of garbage cans on private property in sparsely populated rural areas[250] can reasonably expect more privacy[251] than disposers in an urban area.[252] This element fails to distinguish between private and communal receptacles as such because the number of users inside the closure does not determine the number of people outside. Further, the examination of the number of people outside the closure is entitled to little weight if a trash container is closed since there is no direct connection between the number of people likely to stray into the closure and the number of people likely to peer into a closed garbage can. But the weight of this factor increases when the trash is exposed to anyone who walks by or strays into the closure.

Another group of factors under the *Katz* analysis concerns the location of the trash container and its physical characteristics. Garbage still on the disposer's property has a greater expectation of privacy associated with it than does garbage in the collector's truck because, until the garbage is collected, the disposer can exercise control over the garbage.[253] The disposer's control decreases as a trash container gets closer to the public and farther from the home. Therefore, trash voluntarily placed near the curb[254] creates a lesser expectation than that set near the house.[255] The expectation associated with trash in an "open field" depends upon the location of the field in relation to the public. The owner of a secluded open field surrounded by a fence has more control over trash placed there than if the field is unfenced and adjacent to a public highway.

A user of a communal trash container has less control over the receptacle than does an owner of a private garbage container, and hence, has a correspondingly lesser privacy expectation. Someone who

249. See text & notes 75-86 *supra*.

250. *See* Everhart v. State, 20 Md. App. 71, 315 A.2d 80 (1974).

251. See text & note 86 *supra*.

252. *See* United States v. Shelby, 573 F.2d 971 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978).

253. *See* text & notes 118-124 *supra*.

254. The law may require garbage to be set near the curb for collection. *See* text & note 163 *supra*. Under such circumstances, the disposer cannot be said to have set the trash at the curb voluntarily. The *Katz* analysis would have to examine the garbage before it is set curbside or after it is collected to prevent the state from controlling constitutional rights by the creation of artificial fact situations.

255. *See* People v. Edwards, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969).

throws refuse into a public wastebasket relinquishes all control over it and therefore has no privacy expectation in it.

The physical attributes of the container are also relevant to the analysis. Since removing the lid or opening the bag eliminates any barrier, most trash receptacles do not present a substantial obstacle to observation.[256] Therefore, few garbage containers add to an expectation of privacy on an absolute scale. The nature of the barrier, however, determines relative degrees of privacy among different types of garbage receptacles. For example, a covered metal garbage can[257] is a more protective barrier than a plastic garbage bag[258] because it is stronger and not as easily broken. Trash in the open[259] presents no barrier at all.

The physical nature of the container also demonstrates the disposer's efforts to preserve privacy.[260] Use of a covered metal can evinces a greater attempt to preserve privacy than does disposal in a plastic bag. If the disposer uses no container at all,[261] no claim can be made that there was an attempt to preserve privacy.

Social inhibitions in searching trash constitute the final component of the *Katz* analysis.[262] Garbage containers themselves do not evoke the sense of privacy found in a safety deposit box,[263] for example.[264] Social inhibitions, however, do enter into the warrantless garbage search in the context of trespass. There are strong social inhibitions against warrantless intrusions into the home[265] and, therefore, a great expectation of privacy is associated with trash still inside a house.[266]

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256. See text & notes 47-69 *supra*.

257. *See* United States v. Shelby, 573 F.2d 971 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978).

258. *See* Everhart v. State, 20 Md. App. 71, 315 A.2d 80 (1974).

259. *See* United States v. Alden, 576 F.2d 772, 777 (8th Cir.), *cert. denied*, 439 U.S. 855 (1978) (open trash pile).

260. See text & notes 27-44 *supra*. Communal receptacles present special problems. To the extent that the trash involved is not obviously connected to the disposer, for example, a letter addressed to the disposer, privacy expectations in a communal receptacle are arguably greater when the trash is wrapped in its own paper or plastic bag. The additional covering prevents discovery by casually glancing into the container. But to the extent that the trash involved is not obviously connected to the disposer, for example, marijuana seeds, privacy expectations are arguably greater when the trash is commingled with the other garbage in the communal receptacle because of the loss of identity that occurs. Segregation of the latter type of trash would ensure that it will be connected with the disposer if any of the former type of trash is found with it.

261. See United States v. Stroble, 431 F.2d 1273 (6th Cir. 1970) (police seized an empty carton with an attached IBM card lying next to defendant's garbage cans).

262. See text & notes 87-101 *supra*.

263. United States v. Shelby, 573 F.2d 971, 973 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978). "The garbage cans cannot be equated to a safety deposit box. The contents of the cans could not reasonably be expected by defendant to be secure, nor entitled to respectful, confidential and careful handling on the way to the dump. Trash generally is not so highly regarded." *Id.*

264. *But see* State v. Schultz, 388 So. 2d 1326, 1331 (Fla. Dist. Ct. App. 1980) (Anstead, J., dissenting) (normal person would be incensed at finding someone else going through his or her trash).

265. Payton v. New York, 445 U.S. 573, 585-86 (1980).

266. So the court reached the correct conclusion in striking down a warrantless trash search

The social inhibitions connected to the home extend to parts of the surrounding yard.[267] At some point, though, when the garbage is removed from the disposer's property, it ceases to enjoy the protection of the social inhibitions enveloping the home.[268] Arguments can be made that the line should be drawn at the edge of the property and that any trespass onto residential property[269] impinges upon the social inhibitions connected with the home. A trespass *vel non* provides a bright line[270] for determining how far the privacy of the home will extend. Such a test insures more privacy for the home and yard by keeping officialdom farther away.[271] This standard allows the disposer to retain control over anything within his or her property lines.[272] Moreover, requiring the police to wait until garbage is legitimately removed from the property involves only a minor inconvenience and insures compliance with the law. Thus, in the garbage context, there is an interference with social inhibitions any time the police trespass onto a residential lot to perform the warrantless search.[273]

All of the factors in the *Katz* analysis must be weighed to decide whether a governmental action constitutes a search or seizure.[274] As will be discussed below,[275] sometimes the examination of a warrantless garbage search will end in the conclusion that there is a search on the basis that the defendant has established a reasonable expectation of privacy. Once a search is found, the courts must balance society's need for the search against the intrusiveness of the government's conduct to determine whether the search was reasonable within the meaning of the fourth amendment.[276]

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inside the home in State v. Chapman, 250 A.2d 203 (Me. 1969), even though the *Katz* analysis was not used.

267. *See* People v. Edwards, 71 Cal. 2d 1096, 1104, 458 P.2d 713, 719, 80 Cal. Rptr. 633, 638 (1969) (holding that the fact that the searched garbage cans were within a few feet of defendant's home is relevant to a finding of reasonable expectation of privacy in the trash).

268. Distance from the public may alone be a barrier. See text & note 51 *supra*.

269. A large tract of rural property is fundamentally different from a residential lot. A rural property may contain several acres with the outermost area too distant from the home to enjoy its privacy envelope. Contrarily, the boundaries of an average size residential lot may be within 50 feet of the front door.

270. Although a trespass alone should never be dispositive of a *Katz* analysis, *see* text & notes 120-123, *supra*, it can be an easily discerned guide for the police and courts in the garbage search context.

271. Recall that a requirement of the plain view doctrine is that the police be legitimately where they are when they spot whatever they seize. See text & notes 181-182 *supra*. Allowing a trespass permits the government to legitimately stray into the yard and closer to the house.

272. *See* State v. Schultz, 388 So. 2d 1326, 1330-31 (Fla. Dist. Ct. App. 1980) (Anstead, J., dissenting) (police who trespassed onto defendant's property had no right to be where they were when they searched and seized his garbage; disposer has right to retrieve trash until authorized collectors remove it from the disposer's property).

273. *Id.*

274. *See* text following note 25 *supra*.

275. See text & notes 288-299 *infra*.

276. Terry v. Ohio, 392 U.S. 1, 21 (1968); *see* v. City of Seattle, 387 U.S. 541, 545 (1967); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

Garbage searches may be the only investigative tool available to law enforcement agencies in certain situations,[277] and a warrantless search prevents premature disclosure of a criminal investigation. Since society has an interest in detecting crime, the government may need this valuable reconnaissance technique when no conventional investigative technique is practical.

Given the need for warrantless garbage searches, there nevertheless remains the issue of the reasonableness of such a search. Under what circumstances will even a single search be unreasonable? And when will multiple garbage searches be reasonable? With respect to both of these questions, one should keep in mind the words of the Supreme Court in *Terry v. Ohio*: "[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope."[278]

Most warrantless trash searches involve a single search where a limited amount of personal information about the disposer is gathered, but there are exceptions.[279] What justification is required for even a one-time trash search? A "probable cause" standard is too stringent since it thwarts the purpose of allowing this valuable warrantless technique to be used under proper circumstances. If the police had probable cause, they could obtain a warrant.[280] The necessity for privacy in garbage,[281] however, requires some reasonable basis for the search. The only alternative presently available is to require a legitimate suspicion[282] on which to base the warrantless search. The legitimate suspi-

277. For instance, when a wiretap cannot be used or the police lack probable cause for a warrant, a garbage search may be the only effective means of gathering evidence against a criminal suspect. Interview with A. Bates Butler III, Assistant United States Attorney for Arizona (March 27, 1980).

278. Terry v. Ohio, 392 U.S. 1, 18 (1968). The duration of a search has seldom been an issue. Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968), is an exception. There, the combination of the length of the search (six and one half hours) and a number of other factors—the number of offenses involved, the late hour at which the search was conducted, use of artificial lighting, creation of a certain amount of noise, and the proximity to defendant's residence—made the search unreasonable. *See id.* at 858. The length of the surveillance was a factor in Commonwealth v. Williams, 262 Pa. Super. Ct. 508, 517, 396 A.2d 1286, 1291 (1978), and there is dictum on the issue in State v. Stachler, 58 Hawaii 412, 418, 570 P.2d 1323, 1328 (1977).

279. United States v. Crowell, 586 F.2d 1020 (4th Cir. 1978) (two searches), *cert. denied*, 440 U.S. 959 (1979); United States v. Dzialak, 441 F.2d 212 (2d Cir.) (two seizures), *cert. denied*, 404 U.S. 883 (1971); United States v. Bonanno, No. CR-79-170-WAI(SJ) (N.D. Cal., filed Nov. 14, 1979) (an approximately five year search); United States v. Kahan, 350 F. Supp. 784 (S.D.N.Y. 1972) (approximately eight months), *modified on other grounds*, 479 F.2d 290 (2d Cir. 1973), *rev'd with instructions to reinstate dist. ct.'s judgment*, 415 U.S. 239 (1974); Smith v. State, 510 P.2d 793 (Alaska) (three searches), *cert. denied*, 414 U.S. 1086 (1973); People v. Stewart, 34 Cal. App. 3d 695, 110 Cal. Rptr. 227 (1973) (two searches); Croker v. State, 477 P.2d 122 (Wyo. 1970) (four searches, three seizures).

280. Exigent circumstances may make it impossible to get a warrant. An exigent circumstances exception to warrantless trash searches, however, is already recognized. See text & notes 187-88 *supra*.

281. See text & notes 221-236 *supra*.

282. Terry v. Ohio, 392 U.S. 1, 21 (1968). "[T]he police officer must be able to point to specific

cion standard is less strict than the probable cause needed for a warrant, but it also requires something more than an unfounded hunch. Thus, use of the legitimate suspicion standard permits recognition of society's need for the warrantless garbage search, but prevents untrammeled incursion into the disposer's property.

As the number of searches increases, the amount of intrusion increases because more personal information about the disposer is gathered. What justification is required for longer trash surveillance? Two conceivable reasons may explain a continued warrantless surveillance of garbage. The police may be determined to find something incriminating no matter how long it takes,[283] but this clearly reeks of harassment.[284] At the other extreme, the first search may yield incriminating evidence sufficient for probable cause; the police then desire to gather more evidence without the hindrance of a warrant. Such a practice violates the constitutional rule that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure."[285] Therefore, any long term warrantless trash surveillance is unreasonable and, hence, unconstitutional because of its intrusiveness and lack of constitutional justification.

Assuming that a one-time search based on a legitimate suspicion may be reasonable under some circumstances, when does a trash cover become too intrusive because of its duration? If the police had a legitimate suspicion to justify the 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. At that point, the warrantless action must cease because the police must either obtain a warrant[286] based on the probable cause uncovered or give up a search

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and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.*

283. *See* United States v. Kahan, 350 F. Supp. 784 (S.D.N.Y. 1972) (during an eight month warrantless search of defendant's office wastebasket, the investigators made only two seizures), *modified on other grounds*, 479 F.2d 290 (2d Cir. 1973), *rev'd with instructions to reinstate dist. ct.'s judgment*, 415 U.S. 239 (1974).

284. *Id.* Terry v. Ohio, 392 U.S. 1, 15 (1968). Such conduct could not be sanctioned by a court:

> Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the constitution requires.

285. *Id.* at 20.

286. *See id.* at 20. In order to prevent premature disclosure of the criminal investigation, a usual fourth amendment warrant should not be required. What is needed is legislative authorization of a warrant similar to that provided for federal wiretaps in 18 U.S.C. § 2518 (1976 & Supp.

based on inarticulable hunches.[287]

That point may depend on the nature of the evidence sought. If the police suspect someone of engaging in a continuing course of criminal conduct, for example, drug peddling, counterfeiting, or bookmaking, one might expect to find evidence of such conduct in the suspect's garbage nearly every week. The suspicion should be borne out, if at all, in a few searches. But if the police suspect someone of engaging in a one time criminal act, for example, a robbery, arson, or murder, one might expect that evidence of the crime will be disposed of only once. More searches may be needed to discover the one batch containing the evidence.

Hence, if a one-time warrantless trash search is reasonable, the government should have the burden in any subsequent search of proving that its original legitimate suspicion has not evolved in such a way as to make any further warrantless searches unreasonable. The nature of the evidence sought should be relevant to the issue of reasonableness.

A few examples demonstrate how the *Katz* analysis applies to warrantless garbage searches. A one time seizure of garbage lying on top of an uncovered, well-used, public wastebasket is the paradigm example of a valid warrantless action. There is no reasoable expectation of privacy, so there is no fourth amendment search. At the opposite extreme, an ongoing reconnaissance of a covered, private garbage can located next to a single-family home with a fenced-in yard in a rural area would clearly be a search violative of the protections of the fourth amendment. Unfortunately, neither of these obvious examples typically occur in practice.

The situation in the great majority of cases is a one time warrantless search and seizure of garbage from a single-family home's container in a residential neighborhood after the garbage collectors have picked it up. If the police are prompted by a legitimate suspicion that incriminating evidence will be found in the trash, the search should be found constitutional.[288] Even though a limited number of

III 1979). An investigation authorized under this statute need not be disclosed until after denial of a warrant application or termination of the approved warrant. *Id.* § 2518(8)(d). To obtain a warrant, the judge must find that there is probable cause for the warrant, and that normal investigative procedures are inefficacious. *Id.* § 2518(3). The order granting the warrant must set an upper time limit on the duration of the search, *id.* § 2518(4)(e), and that limit may not exceed the shorter of thirty days or the time necessary to achieve the objective of the warrant, *id.* § 2518(5). Extensions may be granted when necessary. *Id.* The warrant must be executed in such a way as to minimize interception of materials not within the authorization of the warrant. *Id.*

287. *See* Terry v. Ohio, 392 U.S. 1, 21 (1968).

288. This is essentially the situation presented in United States v. Shelby, 573 F.2d 971 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978). Although it did not use the *Katz* analysis, the court correctly concluded that the search was reasonable. *Id.* at 974.

people use the receptacle,[289] garbage collectors have access to it,[290] it is not located in a secluded area,[291] the disposer has manifested an intent to have the trash taken away, no trespass has occurred,[292] and the duration of the search does not render it unreasonably intrusive. If the police trespass onto the disposer's property to seize the contents of the can, any seizure is arguably invalid since the government unreasonably and unexpectedly broke the closure.[293] The trash surveillance would also be unconstitutional if it became too intrusive because of a large number of warrantless searches.[294]

Another common one-time warrantless garbage search takes place at a communal receptacle.[295] If the garbage collectors legitimately remove the trash from the premises before it is searched, any one-time search and seizure is constitutional for the same reasons as the one-time search off the property of garbage from a single-family container.[296] But in this situation, a trespass may also be permitted. As the number of users of the receptacle increases, the reasonable expectation of privacy any one user has in the container decreases.[297] While no specific number is suggested, when there are many users of a communal trash receptacle it is more like the public wastebasket with no expectation of privacy.[298] Perhaps a user of a communal trash receptacle might be able to establish a claim of privacy by commingling the garbage in question to the extent it would be reasonable to protect the disposer's manifest efforts to preserve privacy.[299] Because of the intrusiveness involved, a trash cover of long duration is also unconstitutional in the communal receptacle case.

CONCLUSION

Seven factors relevant to expectation of privacy analysis can be gleaned from the post-*Katz* cases. A court applying *Katz* should consider the defendant's own privacy enhancing conduct, the strength of physical barriers of the place searched, the number of persons with le-

289. See text & notes 242-243 *supra*.
290. See text & note 244 *supra*.
291. See text & notes 249-252 *supra*.
292. See text & notes 262-269 *supra*.
293. See text following note 269, *supra*. Therefore, United States v. Vahalik, 606 F.2d 99 (5th Cir. 1979), which dealt with such a case, incorrectly concluded that the search was valid. *See id.* at 101.
294. See text & notes 278-287 *supra*. Hence, an almost five year warrantless search should have invalidated the seizures upheld in United States v. Bonnano, No. CR-79-170-WAI(SJ) (N.D. Cal., filed Nov. 14, 1979).
295. *See* Smith v. State, 510 P.2d 793 (Alaska), *cert. denied*, 414 U.S. 1086 (1973).
296. See text & notes 288-292 *supra*. *Smith*, *supra* note 377, upheld the warrantless search after applying *Katz*. 510 P.2d at 798.
297. See text & note 245 *supra*.
298. See text & note 246 *supra*.
299. See text & notes 27-44 *supra*.

gitimate access to the closure where the search took place, the number of persons outside the closure, social inhibitions associated with the place searched, sensory enhancing devices used, and the defendant's control of the closure.

Warrantless trash searches in the post-*Katz* era have not used such a detailed analysis. One theory applied simply concludes that all trash thrown away is abandoned and may be warrantlessly searched in all cases. Another theory holds that no trash may be warrantlessly searched until it has been commingled and has lost its identity.

Although the seven-factor *Katz* analysis is more subjective and difficult to use than the abandonment or commingling theories, it yields a result attuned to the practicalities of modern day life. Given the need for privacy in garbage, the abandonment theory permits too much governmental intrusion. The commingling courts go too far in the opposite direction by severely restricting the use of a valuable and often reasonable surveillance technique. As the examples discussed show, *Katz* allows the government to utilize warrantless trash searches as an investigative technique but prevents intolerable intrusion into personal privacy. It thus accomplishes the fourth amendment purpose of sanctioning only "reasonable" searches and seizures.