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## Constitutional Law: Hey, That's My Trash! Warrantless Searches of Garbage Under the Minnesota Constitution—State v. McMurray

Lauren M. Hoglund

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**CONSTITUTIONAL LAW: HEY, THAT’S MY TRASH!  
WARRANTLESS SEARCHES OF GARBAGE UNDER THE  
MINNESOTA CONSTITUTION—STATE V. MCMURRAY**

Lauren M. Hoglund<sup>†</sup>

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## I. INTRODUCTION

The right of the people to be free from unreasonable governmental searches and seizures guaranteed by the Fourth Amendment remains one of the most relevant, and intensely contested, protections enumerated in the Bill of Rights. In the post-9/11 world, the difficulty of balancing governmental power with individual liberty has become more apparent than ever.<sup>1</sup> It has become the Supreme Court's duty to accommodate "these intensely clashing forces" by defining what constitutes an *unreasonable* search or seizure in a particular case, a decision that ultimately hinges on how the Court interprets the values inherent to the Fourth Amendment's protections.<sup>2</sup> However, if a state's supreme court deems a Fourth Amendment interpretation to be too restrictive, it is the state's prerogative to interpret its own constitution to provide *greater* individual protection than the Fourth Amendment.<sup>3</sup>

In *State v. McMurray*,<sup>4</sup> the Minnesota Supreme Court had the opportunity to make such a decision. However, by finding that there was "no reasonable expectation of privacy in garbage set out for collection on the side of a public street," the court held that the Minnesota Constitution does not provide greater protection than the Fourth Amendment in the context of warrantless searches of garbage.<sup>5</sup> The majority's decision ultimately means that police do not need a warrant, or even a reasonable suspicion of wrongdoing,

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1. For a detailed analysis of the liberty-security problem after 9/11 in relation to the Fourth Amendment, see Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CAL. L. REV. 301, 312–32 (2009). See generally PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 5–8 (2005).

2. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 354 (1974).

3. *Cooper v. California*, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.").

4. 860 N.W.2d 686 (Minn. 2015).

5. *Id.* at 694–95.

to search through Minnesotans' garbage left out publicly for pickup.<sup>6</sup>

This case note first explores the history, development, and construction of constitutional search and seizure law in the United States.<sup>7</sup> It will then discuss the facts of *McMurray* and examine the reasoning of the majority and dissenting opinions.<sup>8</sup> Next, it analyzes the court's decision, arguing that the court erred in accepting the reasoning of old precedent, which is laden with disturbing privacy and policy implications.<sup>9</sup> Finally, this note concludes that the decision in *State v. McMurray* will lead to unconstitutional arrests and invasions of personal autonomy by the State, as it fails to live up to the level of protection guaranteed by the Fourth Amendment.<sup>10</sup>

## II. HISTORY OF RELEVANT LAW

The tension between maintaining societal order and protecting individual liberty is so apparent in Fourth Amendment jurisprudence because the amendment sets the limits for governmental intrusion into people's private lives.<sup>11</sup> However, as is the case in much of constitutional interpretation, drawing a clear line between acceptable and unacceptable government action is always easier said than done. The tension between competing values and the difficulty in drawing the line between them is, to a large extent, the reason why search and seizure law lacks a certain amount of clarity.<sup>12</sup> At different times in its history, the Supreme Court has felt more pull towards either societal order or civil liberties. This tension is reflected in the evolution of Fourth Amendment case law.<sup>13</sup> Thus, in order to fully understand where

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6. *Id.*

7. *See infra* Part II.

8. *See infra* Part III.

9. *See infra* Part IV.

10. *See infra* Part V.

11. *See Silverman v. United States*, 365 U.S. 505, 511 (1961) ("The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.").

12. *See Amsterdam, supra* note 2, at 349–54 ("[T]he Fourth Amendment is not clear. The work of giving concrete and contemporary meaning to that brief, vague, general, unilluminating text written nearly two centuries ago is inescapably judgmental. In the pans of judgment sit imponderable weights.").

13. *See* JOHN WESLEY HALL JR., *SEARCH AND SEIZURE* 48–49 (4th ed. 2012)

the Fourth Amendment stands now, one must first understand the historical context that has so forcefully shaped the path of this particular constitutional protection.

This section will explain the origins of the Fourth Amendment and why the founders believed protecting against unreasonable searches and seizures was essential to guard against tyranny.<sup>14</sup> It will then trace the development of search and seizure law in the United States, focusing on how the Supreme Court has expanded and constricted the Amendment's scope under different contexts.<sup>15</sup> This section will discuss several alternatives for interpreting the Fourth Amendment.<sup>16</sup> Finally, it will explore Minnesota's place in all of this: how the Minnesota Supreme Court has treated warrantless searches of garbage in light of the Fourth Amendment.<sup>17</sup>

#### A. *Origins of the Fourth Amendment*

The Fourth Amendment's place in the United States Constitution can be traced directly back to specific abuses by the British government in the years leading up to the Revolutionary War.<sup>18</sup> In 1696, the British Parliament passed the Act of Frauds, which gave customs officers in the American colonies the power to "enter, and go into any House, Shop, Cellar, Warehouse or Room, or other Place, and in Case of Resistance, to break open Doors, Chests, Trunks and other Package, there to seize, and from thence to bring, any Kind of Goods or Merchandize whatsoever, prohibited and uncustomed."<sup>19</sup> This extensive search and seizure

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("The Supreme Court has said several times that the Fourth Amendment should be liberally construed to effect the basic rights it guarantees. It now is quite evident, however, that the opposite is true because the government all too often gets the benefit of the doubt rather than the citizen.").

14. See *infra* Part II.A.

15. See *infra* Part II.B.

16. See *infra* Part II.C.

17. See *infra* Part II.D.

18. JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 19 (1966) ("[T]he Fourth Amendment provides us with a rich historical background rooted in American, as well as English, experience; it is the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England.").

19. William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 404 (1995) (quoting Act of Frauds of 1662, 12 Car. 2 c.11 § 5(2) (Eng.)).

power was not exercised consistently until the 1750s, when war with France prompted England to begin enforcing customs laws even more strictly.<sup>20</sup> Around this time, colonial courts began to issue writs of assistance, which granted customs officials the very broad power to search buildings for smuggled goods and compel others to help them do so.<sup>21</sup>

One of the first demonstrations of the colonists' unhappiness with British rule concerned these writs of assistance.<sup>22</sup> Boston merchants challenged the writs in a case heard in front of the Superior Court of Boston in 1761.<sup>23</sup> Representing the merchants, James Otis famously argued that the writs themselves violated the law because they embodied "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book."<sup>24</sup> Otis ultimately lost the case—the writs were upheld—but his arguments became famous across America.<sup>25</sup> The principles at the core of Otis's argument—"privacy in the home coupled with a fear of unbridled official discretion"—are reflected in search and seizure law today.<sup>26</sup>

After declaring independence, Americans took steps to ensure that writs of assistance and other abusive search and seizure tactics would not become a component of their new society by including provisions in their state constitutions that prohibited unreasonable searches and seizures.<sup>27</sup> The Fourth Amendment of the United

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20. *Id.* at 404–05.

21. *See id.* at 405 (clarifying that the authority these writs confirmed was so broad because they permitted searches of any place based only on the suspicions of the customs officer, and they only expired with the death of the king who issued them).

22. *See* THOMAS N. MCINNIS, *THE EVOLUTION OF THE FOURTH AMENDMENT 18* (2009) ("The colonist's fear of continued abuse of writs of assistance was behind one of the first public demonstrations of the colonies' unhappiness with the mother country.").

23. *Id.*

24. James Otis, Address Before the Superior Court (Feb. 24, 1761), [http://www.constitution.org/bor/otis\\_against\\_writs.htm](http://www.constitution.org/bor/otis_against_writs.htm).

25. MCINNIS, *supra* note 22, at 19 ("Otis and Thatcher may have lost the day, but their arguments against writs of assistance reverberated across America and would shortly win the hearts of Americans.").

26. Stuntz, *supra* note 19, at 406–07.

27. *See* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 70–71 ("In the second half of the eighteenth century, a series of widely publicized abuses by King George III and his officials led the colonists in

States Constitution, ratified in 1791, became the national protection against unreasonable searches and seizures.<sup>28</sup> The amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>29</sup>

In light of the events leading up to ratification, and the fear of oppressive and arbitrary police power as articulated by James Otis, the language of the Fourth Amendment reflects the desire of the American people to preserve their own autonomy and power over their government.<sup>30</sup>

#### B. *Development of Search and Seizure Law in the United States*

One of the most important cases in early Fourth Amendment interpretation is an eighteenth century English common law case, *Entick v. Carrington*.<sup>31</sup> John Entick was subjected to a warrant based on charges that he published criticisms of the Crown.<sup>32</sup> The warrant did not specifically name the subject matter of the search, resulting in government messengers seizing all of his papers.<sup>33</sup> Entick sued the messengers for trespass and won.<sup>34</sup> Upholding the verdict, Lord Camden grounded his decision in property law, asserting that

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the New World to consider a right against unreasonable searches and seizures to be one of the important rights held against government. That right was articulated in several state constitutions . . .”).

28. See MCINNIS, *supra* note 22, at 19–20 (explaining that the lack of a protection against unreasonable searches and seizures was one of the major concerns in ratifying the Federal Constitution).

29. U.S. CONST. amend. IV.

30. As Justice Jackson has noted, “[O]urs is a government of laws, not of men, and . . . we submit ourselves to rulers only if under rules.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

31. *Entick v. Carrington* [1765] 95 Eng. Rep. 807; see also LANDYNSKI, *supra* note 18, at 29–30 (explaining *Entick*’s considerable influence on the course of U.S. Fourth Amendment doctrine).

32. See Thomas K. Clancy, *What Does the Fourth Amendment Protect? Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 310–12 (1998) (summarizing *Entick* and explaining its role in American Fourth Amendment jurisprudence).

33. See *id.* at 311.

34. See *id.*

property rights were sacred and could only be suppressed by laws passed for the public good:

[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.<sup>35</sup>

The Supreme Court relied heavily on Camden's analysis in early search and seizure cases, as "[t]he teachings of that great case were cherished by our statesmen when the Constitution was adopted."<sup>36</sup> *Boyd v. United States*<sup>37</sup> was the first U.S. case by which the Supreme Court began formulating the constitutional law of search and seizure.<sup>38</sup> Using Camden's analysis, the Supreme Court defined the protections secured by the Fourth Amendment in terms of property rights, distinguishing searching and seizing stolen or concealed goods from searching a man's private books or papers to use as evidence against him.<sup>39</sup> "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property."<sup>40</sup> This marked the beginning of a period characterized by a liberal interpretation of the Fourth Amendment, where the Court, for the most part, adhered to its principle that "constitutional provisions for the security of person and property should be liberally construed" and refused to sanction any search of certain objects, so long as the owner had a protected property interest in them.<sup>41</sup>

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35. *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (quoting *Entick*, 95 Eng. Rep. at 817).

36. *United States v. Lefkowitz*, 285 U.S. 452, 466 (1932), *abrogated by* *Harris v. United States*, 331 U.S. 145 (1947).

37. 116 U.S. 616 (1886).

38. LANDYNSKI, *supra* note 18, at 49.

39. *See Boyd*, 116 U.S. at 623. *See generally* Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 576–79 (1996) (discussing *Boyd* as an example of early formalism by the Supreme Court in Fourth Amendment jurisprudence).

40. *Boyd*, 116 U.S. at 630.

41. *Id.* at 635; *see also* *Gouled v. United States*, 255 U.S. 298, 304 (1921) ("It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers."), *abrogated by* *Warden v. Hayden*, 387 U.S. 294, 308 (1967).

In the 1920s, however, the Court began narrowing the scope of the Fourth Amendment, due in part to the increased pressure to aid law enforcement in apprehending and convicting criminals during prohibition, while still conceptualizing search and seizure rights in terms of common law trespass.<sup>42</sup> For example, in *Hester v. United States*, the Court ruled that the Fourth Amendment did not cover “open fields” around a person’s home.<sup>43</sup> In *Hester*, the Court was asked to decide whether illegal moonshine bottles, discovered without a warrant on Hester’s land, were admissible evidence.<sup>44</sup> Relying on the common law distinction between a home and open fields, the Court held that the evidence was admissible by asserting that the Fourth Amendment did not extend to the area around a home.<sup>45</sup> This literal interpretation of the Fourth Amendment’s text significantly limited its scope.<sup>46</sup>

*Olmstead v. United States*—another prohibition case—further narrowed the amendment’s scope when the Court held that wiretapping “did not amount to a search or seizure within the meaning of the Fourth Amendment.”<sup>47</sup> *Olmstead* had been convicted of “conspiracy to violate the National Prohibition Act.”<sup>48</sup> The critical evidence against him was gleaned from wiretapping his office phone line.<sup>49</sup> Because the wiretapping did not involve a physical trespass or search of tangible effects, the Court again interpreted the Fourth Amendment literally.<sup>50</sup> After *Olmstead*, Fourth Amendment protection involved a two-step inquiry to determine if a trespass had occurred: (1) did the government intrude on an area protected by the amendment; and (2) if so, did the intrusion involve a physical invasion that was constitutionally impermissible?<sup>51</sup> In his now famous *Olmstead* dissent, Justice

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42. See MCINNIS, *supra* note 22, at 263.

43. 265 U.S. 57, 59 (1924).

44. *Id.* at 57–59.

45. *Id.* at 59.

46. See MCINNIS, *supra* note 22, at 27–28 (explaining *Hester* as the first narrowing of the Fourth Amendment by the Supreme Court as a part of the greater context of prohibition).

47. 277 U.S. 438, 466 (1928).

48. *Id.* at 455.

49. See *id.* at 456–57.

50. See *id.* at 465–66.

51. See THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 85–86 (2d ed. 2014) (explaining how *Olmstead*’s literal interpretation of the Fourth Amendment fundamentally differed from *Boyd* and

Brandeis sought to shift the Fourth Amendment's focus from the property interest to the right to personal privacy:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.<sup>52</sup>

However, the Court's "property-based literalism" dominated Fourth Amendment jurisprudence until the Court faced another wire-tapping case nearly forty years later.<sup>53</sup>

In 1967, the Court abandoned the property-based approach to search and seizure issues in *Katz v. United States*<sup>54</sup> by declaring, "[T]he Fourth Amendment protects people, not places."<sup>55</sup> Charles Katz was convicted of transmitting wagering information in violation of a federal statute based on evidence of his conversation overheard by FBI agents who had placed a recording device on the outside of a telephone booth.<sup>56</sup> Declining to decide whether the phone booth was a protected area under *Olmstead*, the Court instead shifted its focus to whether Katz sought to preserve the privacy of his conversation.<sup>57</sup> Finding that Katz clearly had attempted to maintain his privacy, as demonstrated by entering the booth and closing the door, the Court reversed Katz's conviction.<sup>58</sup>

The legacy of *Katz* lies primarily in Justice Harlan's concurrence, where he proposed a two-part test to determine when a Fourth Amendment search has occurred.<sup>59</sup> First, the individual

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limited the Amendment).

52. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

53. CLANCY, *supra* note 51, at 87–89 ("The property-based theories of *Boyd* and *Olmstead* succumbed within months of each other in 1967.").

54. 389 U.S. 347 (1967).

55. *Id.* at 351–52.

56. *See id.* at 348.

57. *See id.* at 352.

58. *Id.* at 358.

59. *See id.* at 360–62 (Harlan, J., concurring); *see also* CLANCY, *supra* note 51,

must have an expectation of privacy for the area or items searched and, second, the expectation must be one that society recognizes as reasonable.<sup>60</sup> Generally, what a person “knowingly exposes to the public” is not protected by the Fourth Amendment.<sup>61</sup> This test—and the accompanying privacy-centered focus—continues to be the standard for determining the scope of Fourth Amendment issues.<sup>62</sup>

Fourth Amendment scholars generally agree that *Katz* was intended to expand the amendment’s scope by reframing the issue around individual privacy; however, there is also the sense that *Katz* has failed to live up to this expectation.<sup>63</sup> “For what ultimately emerged was an Amendment that was privacy-bound, rising or falling in both scope and protection based upon how the notion of privacy fared in the Court and within society as a whole.”<sup>64</sup> Under Harlan’s conceptualization, to successfully invoke the protections of the Fourth Amendment, a person must not only have a personal expectation of privacy, but society must also be prepared to respect that expectation.<sup>65</sup> Later courts, faced with technological advances that allowed less invasive intrusions by the police and increased pressure to fight crime, have been less inclined to find an

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at 92 (“It was Justice Harlan’s concurring opinion in *Katz* that endured.”).

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

61. *Id.* at 351 (majority opinion).

62. See, e.g., *Soldal v. Cook Cty.*, 506 U.S. 56, 64 (1992) (“[P]roperty rights are not the sole measure of Fourth Amendment violations.”); *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (“[T]his Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy’ that has been invaded by government action.”); *Cardwell v. Lewis*, 417 U.S. 583, 591 (1974) (“[I]t is the right to privacy that is the touchstone of our inquiry.”); *United States v. Dionisio*, 410 U.S. 1, 8 (1973) (“Any Fourth Amendment violation in the present setting must rest on a lawless governmental intrusion upon the privacy of ‘persons’ rather than on interference with ‘property relationships or private papers.’”).

63. See, e.g., *Amsterdam*, *supra* note 2, at 385 (“[T]he effect of *Katz* is to expand rather than generally to reconstruct the boundaries of fourth amendment protection.”); John B. Mitchell, *What Went Wrong with the Warren Court’s Conception of the Fourth Amendment?*, 27 *NEW ENG. L. REV.* 35, 39 (1992) (“The majority in *Katz* appeared bent on establishing an expansive view of the Fourth Amendment. The Amendment was not to be exclusively tied to such property-bound notions as ‘protected areas’ and ‘trespass.’”).

64. Scott E. Sundby, *“Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 *COLUM. L. REV.* 1751, 1758 (1994).

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

individual's expectation of privacy to be reasonable.<sup>66</sup> Instances where someone knowingly exposed their words or activities to others, or to the public, have generally been outside the scope of the amendment's protections.<sup>67</sup> The reasoning being that those individuals essentially "assume the risk" of their conversations or activities being overheard or observed by anyone, including the police.<sup>68</sup>

For example, in *California v. Ciraolo*,<sup>69</sup> the Court held that police using a plane to see into a man's fenced backyard, without a warrant, was not unreasonable under the Fourth Amendment.<sup>70</sup> Chief Justice Burger admitted the area was within the curtilage of the home and that Ciraolo expected it to remain private—two fences shielded the entire yard.<sup>71</sup> However, Chief Justice Burger justified his opinion by focusing on *Katz's* holding that what a person exposes to the public, even in his own home, is not

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66. See Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 665 (1988) ("The *Katz* promise had sowed its own seeds of destruction. It was no great surprise that a Court increasingly concerned with law and order would soon begin, under the *Katz* umbrella, to severely limit the ambit of fourth amendment privacy."); see also Raymond Shih Ray Ku, *Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1346 (2002) ("By failing to provide any real guidance or substance to the privacy value, the opinion did not shut the door to examining means, and subsequent decisions have taken advantage of this opening . . ."). See generally MCINNIS, *supra* note 22, at 230–33 (exploring the assumption-of-risk doctrine, separate from the *Katz* precedent, which suggests that when individuals undertake the risk that their information will be exposed to others, they have no legitimate expectation of privacy).

67. See *Smith v. Maryland*, 442 U.S. 735, 742–44 (1979) (holding that a defendant's expectation of privacy in dialed phone numbers was not reasonable because people generally know that phone companies have access to, and often keep records of, dialed phone numbers); *United States v. Miller*, 425 U.S. 435, 442–43 (1976) (holding that people have no reasonable expectation of privacy in bank records because they are a part of a transaction where information is voluntarily given to the bank employees); *United States v. White*, 401 U.S. 745, 752–53 (1971) (holding that the evidence of a police informant who was electronically "bugged" was admissible because the defendant, by participating in crime, assumed the risk that one of his partners was an informant).

68. See, e.g., *White*, 401 U.S. at 752 ("Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police.").

69. 476 U.S. 207 (1986).

70. See *id.* at 213–14.

71. See *id.* at 213.

protected by the Fourth Amendment, ignoring the other component of *Katz*: what a person seeks to preserve as private, even in an area accessible to the public, might be constitutionally protected.<sup>72</sup>

In *California v. Greenwood*, the Supreme Court came to a similar conclusion when it was asked to decide the question of whether the Fourth Amendment prohibits the warrantless search of garbage left outside for collection.<sup>73</sup> Billy Greenwood was convicted on felony narcotics charges based on evidence of controlled substances found during a search of his home.<sup>74</sup> The police obtained the warrant to search Greenwood's house by first searching his garbage left out on the curb, which provided enough evidence of narcotics use to get a warrant for the house.<sup>75</sup>

Under *Katz*, the Fourth Amendment would only be violated if Greenwood had a subjective expectation of privacy for his garbage that was objectively reasonable.<sup>76</sup> Building off previous decisions, like *Ciraolo*, which limited the protections of the Fourth Amendment if the defendant had exposed her activities to the public or to third parties, the Court found that no reasonable expectation of privacy exists in garbage left out for pickup because anyone can go through the garbage once it is left out on the curb.<sup>77</sup> *Greenwood* set the precedent that a warrantless search of garbage does not violate the Fourth Amendment of the United States Constitution.<sup>78</sup>

### C. *Scholarly Alternatives for Interpreting the Fourth Amendment*

Fourth Amendment scholars are, for the most part, impressively united in their criticism of the Supreme Court's search and seizure jurisprudence; the restrictions on individual privacy imposed by the third party doctrine, and the subsequently expanded police power, have been met with much frustration and disapproval, if the variety of scornful law review articles are any

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72. *See id.* at 214–15.

73. 486 U.S. 35, 39 (1988).

74. *See id.* at 37–38.

75. *See id.*

76. *Id.* at 39.

77. *See id.* at 40 (“It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.”).

78. *Id.* at 37.

indication.<sup>79</sup> However, those scholars also vary widely in their proposed alternatives for Fourth Amendment interpretation.<sup>80</sup> For the sake of time and clarity, this section will explore only three of the many different proposed alternatives for Fourth Amendment interpretation that are out there.<sup>81</sup> This process is intended to illuminate some of the problems inherent in the Supreme Court's approach, but it will also expose the difficulty that accompanies devising a coherent and practical method for interpreting and applying a constitutional provision like the Fourth Amendment. This section will conclude with a discussion of the underlying interests and values that are inherent to the protections afforded under the Fourth Amendment.<sup>82</sup>

### 1. *The Political Fourth Amendment*

Professor Thomas Crocker argues that the two dominant narratives of Fourth Amendment interpretation—protecting privacy interests and regulating police conduct—overlook the

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79. See generally Bruce G. Berner, *The Supreme Court and the Fall of the Fourth Amendment*, 25 VAL. U. L. REV. 383, 384 (1991) (“The fourth-amendment ‘reach’ cases are today in wild disarray and the subject of widespread attack.”); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 474–75 (1991) (“Current search and seizure doctrine is inconsistent and incoherent. No one, including the police who are to abide by it, judges who apply it, or the people who are protected by it, has any meaningful sense of what the law is.”); Daniel J. Capra, *Prisoners of Their Own Jurisprudence: Fourth and Fifth Amendment Cases in the Supreme Court*, 36 VILL. L. REV. 1267, 1269 (1991) (“[T]he Court has abdicated its responsibility to do more than apply fact to unquestioned law.”); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993) (“While questioning the merit of the Court’s current model, I hope to show that the Court has ignored or distorted the history of the Fourth Amendment.”); Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 584 (1989) (“In the last decade . . . the Court’s means of promoting law enforcement interests has tipped the balance unnecessarily further and further away from individual freedom, significantly diminishing the realm of personal privacy.”).

80. Compare BRUCE A. NEWMAN, AGAINST THAT “POWERFUL ENGINE OF DESPOTISM” 104–06 (2007) (arguing for a return to the framers’ conception of the Fourth Amendment, which required warrants to search property and allowed for warrantless searches in public areas), with STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 177 (proposing an “adaptive originalism” approach).

81. See *infra* Parts II.C.1–.3.

82. See *infra* Part II.C.4.

political purpose of the Fourth Amendment.<sup>83</sup> By only reading the Fourth Amendment to protect privacy, many aspects of a person's everyday social life will not be protected by the Constitution because they have been exposed to the public, and the Court is unwilling to find an expectation of privacy in them.<sup>84</sup> Combining these privacy considerations with rules that emphasize effective law enforcement practices results in a Fourth Amendment doctrine that “lurches from one consideration to the other, with no overarching guidance.”<sup>85</sup> The solution, Professor Crocker argues, is to widen the scope of the Fourth Amendment so that it fits in with a broader reading of the Constitution.<sup>86</sup> This wider frame allows us to see the connections between the First and Fourth Amendments and “provides a basis for reorienting the Fourth Amendment narrative around a broader political purpose aimed at protecting liberty.”<sup>87</sup> Focusing on securing people's rights to political liberty is essential in this modern era where social media allows us to share more and more personal information about ourselves, and we increasingly live and operate surrounded by other people.<sup>88</sup> Under the narrowed *Katz* framework, the Supreme Court is finding fewer reasonable expectations of privacy to protect in a society where information is shared so easily.<sup>89</sup> Crocker asserts that *Katz* was right to consider the social aspects of life but wrong to “focus solely on what social expectations thought about personal privacy as a way of regulating police practice.”<sup>90</sup> The solution of using a broader scope—by viewing the Fourth Amendment as a part of the Constitution that protects individual's political liberty—would

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83. Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 306–08 (2010) (“We face a constitutional dilemma. Either we accept the existing limited, and increasingly irrelevant, Fourth Amendment protections for privacy, or we must seek to reinvigorate the Fourth Amendment by seeing how it functions within a more comprehensive constitutional framework. This Article argues that the Fourth Amendment makes a distinctive contribution to a broader constitutional framework aimed at protecting political liberty.” (footnote omitted)).

84. *See id.* at 315.

85. *Id.* at 340.

86. *Id.*

87. *Id.*

88. *Id.* at 341.

89. *See id.*

90. *Id.* at 372.

protect the people in their everyday social practices, something necessary for the functioning of any democracy.<sup>91</sup>

A potential problem with this conceptualization is that while reframing the scope of the Fourth Amendment to protect political liberty is a worthwhile objective, Professor Crocker's proposal lacks a clear method for differentiating between cases. Similar to the manipulation of the Supreme Court's privacy approach, courts could manipulate the political liberty rhetoric, absent a hard-line test applied to every case.

## 2. *The Fourth Amendment's Right to Exclude*

Instead of broadening the Fourth Amendment's scope to more adequately protect individual liberty, Professor Thomas Clancy proposes an analytical structure for the Fourth Amendment that is predicated on an individual's right to be secure.<sup>92</sup> Explaining that of the three options available for defining the scope of the Fourth Amendment—property, privacy, or security—the first two have proven to be inadequate; the best alternative is to invigorate the concept of security and the right to exclude to properly conceptualize the values protected by the Fourth Amendment.<sup>93</sup> Professor Clancy explains that the privacy approach has largely been eviscerated; despite the *Katz* Court's vision for the test to protect individual interests, later courts have “used privacy analysis not to expand protected individual interests, but to reduce the scope of the amendment's protections.”<sup>94</sup> The flaws of this

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91. *See id.* at 378–79.

92. Clancy, *supra* note 32, at 307–08 (“This article explores the proper analytical structure by which to measure the meaning of the right to be ‘secure.’ Only by understanding the meaning of the term ‘secure’ is it possible to determine the scope of the Fourth Amendment's protections for individuals and, correlatively, the amount of unregulated governmental power the amendment allows.”).

93. *See id.* at 308.

94. *Id.* at 330–31 (“Reminiscent of the hierarchical approach of property law theory—where some types of property interests completely barred a search, or the absence of such an interest barred raising an objection to a search—the Court created a hierarchy of privacy interests. Expectations of privacy that ‘society is ‘prepared to recognize as legitimate’” have, at least in theory, the greatest protection; diminished expectations of privacy are more easily invaded; and subjective expectations of privacy that society is not prepared to recognize as legitimate have no protection. The Court's cases rejecting any legitimate expectation of privacy now comprise a long list of situations.”).

approach lie in that it has no textual support in the amendment, and that, because the concept of privacy is so fluid, it is left at the mercy of the shifting court majorities to decide what privacy means and protects.<sup>95</sup>

Professor Clancy's solution then is to refer back to the actual language of the Fourth Amendment and focus on the right of the people to be "secure."<sup>96</sup> He asserts that to the framers, this security was from unreasonable government intrusion, specifically granting individuals the right to exclude the government from interfering with one's papers, houses, or effects.<sup>97</sup> This right to exclude is critical; with it, people have the tool to protect themselves against non-justified government intrusions.<sup>98</sup> Of course, with this view, people only have a right to be secure in what the amendment specifies: their person, houses, papers, or effects.<sup>99</sup> Professor Clancy explains that this approach will bring considerable clarity to a murky search and seizure doctrine; if we refer back to the framer's focus on security, we can allow individuals the ability to exclude the government from their person, houses, papers, and effects, thereby fulfilling the purpose of the Fourth Amendment and simplifying an important component of American society.<sup>100</sup>

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95. *See id.* at 339–40 (“Thus, while a liberal Court substituted privacy in lieu of property analysis to expand protected interests, a conservative Court has employed privacy analysis as a vehicle to restrict Fourth Amendment protections.”).

96. *Id.* at 357–58 (“Privacy analysis purported to abandon reliance on the principle of constitutionally protected areas, with Katz asserting that the amendment protects people, not places. Such a claim simply ignores the language and structure of the amendment: People have the right to be secure only as to their persons, houses, papers, and effects.”).

97. *Id.*

98. *See id.* at 356 (“In other words, the Fourth Amendment gives the right to say no to the government’s attempts to search and seize. Privacy, human dignity, a dislike for the government, and other states of mind may be motivations for exercising the right to exclude, but they are not synonymous with that right or with aspects of the right. The right to exclude is the sum and essence of the right protected. Of course, the right is not absolute. It extends only to protect against unreasonable searches and seizures.”).

99. *Id.* at 357.

100. *See id.* at 368–69 (“This returns the structure of Fourth Amendment analysis to comport with the intent of the Framers: The people have the right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. By affording citizens the ability to exclude, their security is assured. That right to be secure is clear and pristine—it is the right to exclude the government.”).

One issue this approach generates is that, although focusing on the Fourth Amendment's actual language—a person's right to be secure in their person, houses, papers, and effects—does provide a more clear methodology in defining what exactly individuals have the right to exclude the government from, in the twenty-first century, things like electronically stored information do not fit neatly within the Fourth Amendment's eighteenth century language.

### 3. *Calling for a New Metaphor: Government-Citizen Trust*

Similarly—finding the Fourth Amendment's focus on privacy wanting—Professor Scott Sundby argues for a new metaphor to conceptualize the search and seizure framework—one centered around the need to restore government-citizen trust rather than simply the “right to be let alone.”<sup>101</sup> Professor Sundby explains that the “right to be let alone” no longer fulfills the values of the Fourth Amendment for several reasons, one of them being that in the modern world, the idea of being left alone seems outdated, at the very least.<sup>102</sup> “Technological and communication advances mean that much of everyday life is now recorded by someone somewhere . . . . We may want to be left alone, but we realistically do not expect it to happen in any complete sense.”<sup>103</sup> Professor Sundby does not have a problem with the concept of privacy being involved in Fourth Amendment doctrine, but asserts that it should be thought of as a “cherished principle” rather than how the Court currently uses it—as a quantifiable fact that helps decide whether there has been a Fourth Amendment intrusion.<sup>104</sup>

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101. Sundby, *supra* note 64, at 1754–55 (“This Article makes an initial effort to reframe the Fourth Amendment debate by exploring how the Court’s current metaphor for conceptualizing Fourth Amendment values, Justice Brandeis’s famous image of ‘the right to be let alone,’ no longer fully captures the values that are at stake . . . . Drawing upon the values underlying the Constitution and the Bill of Rights, I suggest that the animating principle which has been ignored in the current Fourth Amendment debate is the idea of reciprocal government-citizen trust.”).

102. *Id.* at 1758–59 (“Perhaps most fundamentally, a Fourth Amendment based upon expectations of privacy must contend with the changing nature of modern society. The very notion of a right to be left alone seems a bit tattered once placed in the context of contemporary life.”).

103. *Id.*

104. *Id.* at 1760.

To rectify this problematic framework, Professor Sundby proposes reimagining the Fourth Amendment's value in terms of trust between the government and its citizens.<sup>105</sup> The logic is that the government draws its legitimacy from the trust of the citizens in electing representatives to govern for them, while the government must also trust the citizenry to act in accord with laws and societal standards.<sup>106</sup> The "trust that the citizenry will exercise its liberties responsibly—that implicates the Fourth Amendment and is jeopardized when the government is allowed to intrude into the citizenry's lives without a finding that the citizenry has forfeited society's trust to exercise its freedoms responsibly."<sup>107</sup> Professor Sundby argues that this view will improve Fourth Amendment doctrine because it will transfer the focus from choosing between the governmental law enforcement needs and the individual's privacy to the "larger context that finds mutual benefits from the Amendment for both the government and the citizen."<sup>108</sup>

Encouraging the use of a government-citizen trust metaphor might be a more enlightened way to think about the Fourth Amendment, but when faced with people who have committed crimes, or the possibility of preventing crime, it is difficult to imagine a court always having the inclination to step back and consider the philosophical nature of the relationship between a government and its citizens.

#### 4. *Conceptualizing the Fourth: Is There a "Right" Approach?*

Analyzing three different alternatives for conceptualizing the Fourth Amendment law demonstrates the difficulty of approaching the people's right to be free from unreasonable searches and seizures. Three different legal scholars approach the issue three different ways, with all of them making astute arguments involving historical intent, legal and political theory, and social policy. What these proposed alternatives have in common is that they reflect their authors' views on what the Fourth Amendment is really about, just as any other theory would. Legal principles and authority only get you so far when the subject of your analysis strikes as close to home as the Fourth Amendment does; when the government's

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105. *See id.* at 1777.

106. *See id.*

107. *Id.*

108. *See id.* at 1784–85.

ability to intrude into peoples' lives is at stake, the conversation becomes more about what type of society we *want* to live in, and less about the one we *actually* live in. Professor Amsterdam said it best:

The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society. That, in outright terms, is the judgment lurking underneath the Supreme Court's decision in *Katz*, and it seems to me the judgment that the fourth amendment inexorably requires the Court to make. But it is a devastating question to put to a committee.<sup>109</sup>

The right approach to conceptualizing the Fourth Amendment involves making a value judgment about what is necessary for our American idea of a free society. The underlying value of the Fourth Amendment must be characterized as one of individual autonomy rather than privacy. The language of the amendment guarantees an individual's right to be secure in their person, houses, papers, or effects from unreasonable searches and seizures.<sup>110</sup> This implies a level of independent protection where American citizens exist outside of the government's authority or influence.<sup>111</sup> The difference between autonomy and privacy may be considered by some to be "splitting hairs," but using the concept of privacy is problematic, as it comes with connotations of shielding information and secrecy.<sup>112</sup> Such connotations are not appropriate in the context of the Fourth Amendment; they imply placing blame on individuals for seeking to conceal information. Such connotations also too easily lead to the idea that the Fourth

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109. Amsterdam, *supra* note 2, at 403.

110. U.S. CONST. amend. IV.

111. See *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("[The ideas presented in *Entick v. Carrington*] reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life.").

112. See William Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1025–26 (1995) ("In other words, though privacy means many things and though Fourth and Fifth Amendment law protect many interests, one fairly well-defined and fairly narrow interest, the interest in secrecy, seems predominant.").

Amendment should not extend to what people willingly expose to the public, or third parties; after all, if you want protection for it, you should have kept it “secret.”<sup>113</sup>

A Fourth Amendment centered around safeguarding personal autonomy would impart a greater level of power and control for American citizens over the government: power to limit the government’s access to information about us and control over when and to whom we share the information, ideas, and projects that characterize our independent lives. The Fourth Amendment guarantees a *right* of the people because it is individual autonomy that is necessary for any free and democratic society to flourish. As Justice Robert Jackson noted, in his now famous and oft-quoted *Brinegar v. United States* dissent:

These, I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.<sup>114</sup>

It is the “dignity” and “self-reliance” of the people that is protected by the Fourth Amendment; so long as the Court uses such a narrow conceptualization of privacy as its basis for determining when a search is reasonable, it will continue to fall short of the amendment’s purpose.<sup>115</sup>

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113. See *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (“[W]hatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.”).

114. *Brinegar v. United States*, 338 U.S. 160, 180–81 (1949).

115. See *id.*

*D. Interpreting the Minnesota Constitution*

Although warrantless searches of garbage left out on the curb have been deemed acceptable under the U.S. Constitution, individual states can interpret their own constitutions to provide greater protections than the Federal Constitution.<sup>116</sup> Historically, the Minnesota Supreme Court has favored uniformity with the Federal Constitution and will not construe the Minnesota Constitution as providing more protection than the Federal Constitution, unless there is a “principled basis” to do so.<sup>117</sup> The Minnesota Supreme Court exercises particular restraint when the text of the Minnesota Constitution and Federal Constitution are textually identical.<sup>118</sup>

“Article 1, Section 10 of the Minnesota Constitution [is] textually identical to the Fourth Amendment of the U.S. Constitution.”<sup>119</sup> The Minnesota Supreme Court has interpreted the Minnesota Constitution as awarding greater protections against unreasonable searches and seizures in certain situations.<sup>120</sup>

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116. See *State v. McMurray*, 860 N.W.2d 686, 690 (Minn. 2015).

117. See *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005) (“[W]e traditionally approach this task with restraint and some delicacy. Moreover, we will not, on some slight implication and vague conjecture, depart from federal precedent or the general principle that favors uniformity with the federal constitution. But, when we reach a clear and strong conviction that there is a principled basis for greater protection of the individual civil and political rights of our citizens under the Minnesota Constitution, we will not hesitate to interpret the constitution to independently safeguard those rights.”).

118. See *State v. Harris*, 590 N.W.2d 90, 97 (Minn. 1999) (“A decision of the Supreme Court interpreting a provision of the U.S. Constitution that is identical to a provision of the Minnesota Constitution is of persuasive authority to this court.”).

119. *State v. Carter*, 697 N.W.2d 199, 209 (Minn. 2005).

120. See *State v. Davis*, 732 N.W.2d 173, 181 (Minn. 2007) (holding police dog sniffing in hallway outside apartment requires reasonable articulate suspicion of criminal activity); *Ascher v. Comm’r of Pub. Safety*, 519 N.W.2d 183, 186 (Minn. 1994) (holding that the Supreme Court allowing roadblocks to investigate driving under the influence was a radical departure from the previous rule, and that police need a reasonable articulate suspicion of wrongdoing before making investigative stops in Minnesota); *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993) (rejecting the approach taken by the U.S. Supreme Court concerning when a seizure occurs because the approach was a departure from precedent and the court saw no reason to follow the departure).

However, it has also consistently held that garbage set out for collection can be searched without a warrant.<sup>121</sup>

### III. CASE DESCRIPTION

#### A. *Facts and Procedure*

On January 25, 2012, a mandated reporter informed the Hutchinson Police Department about the possible use of controlled substances at David McMurray's house in Hutchinson, Minnesota.<sup>122</sup> McMurray's daughter saw her mother with something that was believed to be a pipe used for drugs.<sup>123</sup>

Upon finding that McMurray and his wife had previously been arrested for drug violations, Officer Erlandson contacted the commercial truck driver responsible for picking up McMurray's garbage and requested that McMurray's garbage be put aside for a police inspection.<sup>124</sup> When searched, the officer found evidence of illegal narcotics in the garbage and used this evidence as probable cause to obtain a warrant to search McMurray's house.<sup>125</sup> Police executed the warrant and found 3.3 grams of methamphetamine.<sup>126</sup>

The state charged McMurray with a third-degree controlled substance violation.<sup>127</sup> McMurray moved the district court to suppress the evidence recovered from his home, contending that the warrantless search of his garbage was unconstitutional under Article 1, Section 10, of the Minnesota Constitution.<sup>128</sup> The court denied the motion, finding that McMurray had no expectation of privacy for the garbage container he set out on the curb for pickup.<sup>129</sup> At trial, the court found McMurray guilty as charged and sentenced him to twenty-four months in prison.<sup>130</sup>

McMurray appealed, arguing that the district court committed reversible error by denying his motion to suppress the evidence

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121. See *State v. Dreyer*, 345 N.W.2d 249, 250 (Minn. 1984); *State v. Oquist*, 327 N.W.2d 587, 591 (Minn. 1982).

122. *State v. McMurray*, 860 N.W.2d 686, 688 (Minn. 2015).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

recovered from his home, and the Minnesota Court of Appeals affirmed.<sup>131</sup> Finding that the expectation of privacy in a person's garbage is "eroded" when placed outside for pickup, the court of appeals adhered to the Supreme Court's holding in *California v. Greenwood*, as well as its previous decisions, which hold the Minnesota Constitution does not provide people with a reasonable expectation of privacy in their garbage left out for pickup.<sup>132</sup>

The Minnesota Supreme Court granted review to decide whether Article 1, Section 10, of the Minnesota Constitution offers greater protection than the Fourth Amendment of the United States Constitution in the context of warrantless searches of garbage set out publicly for collection.<sup>133</sup>

McMurray argued that the Minnesota Constitution provides citizens with an expectation of privacy in the contents of their garbage because historically, the state constitutional provision has protected broader expectations of privacy than the Fourth Amendment.<sup>134</sup> McMurray also argued that the significant personal items that can be found in a person's garbage indicate that Minnesotans have a reasonable expectation of privacy in the contents of their garbage left out for collection.<sup>135</sup>

The State countered that, because the Minnesota Supreme Court favors uniformity with the Supreme Court's interpretation of the Federal Constitution, it should follow the Supreme Court's decision in *California v. Greenwood*, where the Court held that there is no expectation of privacy in discarded garbage left for collection in an area accessible to the public.<sup>136</sup>

The Minnesota Supreme Court affirmed, holding that there is no principled basis to interpret Article 1, Section 10, of the Minnesota Constitution to afford greater protection against warrantless searches of garbage set out for collection than the Fourth Amendment of the U.S. Constitution.<sup>137</sup>

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131. *Id.* at 689.

132. *State v. McMurray*, No. A12-2266, 2013 WL 5021206, at \*3 (Minn. Ct. App. Sept. 16, 2013).

133. *McMurray*, 860 N.W.2d at 689.

134. Brief for Appellant at 6, *McMurray*, 860 N.W.2d 686 (No. A12-2266).

135. *Id.* at 8.

136. Brief for Respondent at 4, *McMurray*, 860 N.W.2d 686 (No. A12-2266) (citing *California v. Greenwood*, 486 U.S. 35, 41 (1988)).

137. *See McMurray*, 860 N.W.2d at 694.

B. *The Rationale of the Minnesota Supreme Court Decision and Dissent*

The majority first asserted that the Minnesota Supreme Court will not construe the Minnesota Constitution to afford greater rights than the U.S. Constitution, unless there is a “principled basis to do so.”<sup>138</sup> When the text of the Minnesota Constitution is “materially identical” to the Federal Constitution, the court will only construe the state constitution to provide greater protection if one of three conditions exist.<sup>139</sup> Because Article 1, Section 10, is materially identical to the Fourth Amendment, the majority went through those conditions to analyze whether there was a principled basis to find greater rights in the state constitution.<sup>140</sup>

First, the majority found that the Supreme Court’s decision in *Greenwood* was not a radical departure from its Fourth Amendment precedent.<sup>141</sup> It was in line with the principles first articulated in *Katz*.<sup>142</sup> The majority accepted *Greenwood*’s reasoning that because anyone can rummage through garbage on the curb, there is no reasonable expectation of privacy in such garbage.<sup>143</sup>

Second, the majority found that *Greenwood* did not retrench on the Bill of Rights issue of protection against warrantless searches because it was consistent with the decisions of most of the state courts.<sup>144</sup>

Third, the majority found that the *Greenwood* holding did not fail to adequately protect basic rights or liberties of Minnesotans because Minnesota does not have a long tradition of protecting garbage set out for collection from a warrantless search.<sup>145</sup> Instead, the Minnesota Supreme Court has repeatedly held that garbage set out for collection is not protected by the Fourth Amendment and may be searched without a warrant.<sup>146</sup>

Writing the dissenting opinion, Justice Lillehaug asserted that Minnesotans do have an expectation of privacy when they put their

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138. *Id.* at 690 (citing *State v. Harris*, 560 N.W.2d 90, 97–98 (Minn. 1999)).

139. *Id.* (citing *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005)).

140. *See id.* at 691–93.

141. *See id.*

142. *Id.* (citing *Katz v. United States*, 389 U.S. 347, 360 (1967)).

143. *Id.* (citing *California v. Greenwood*, 486 U.S. 35, 40 (1988)).

144. *Id.*

145. *Id.* at 692.

146. *See id.* (citing *State v. Dreyer*, 345 N.W.2d 249, 250 (Minn. 1984); *State v. Oquist*, 327 N.W.2d 587, 591 (Minn. 1982)).

household waste in containers out on the curb for collection.<sup>147</sup> Justice Lillehaug argued that the *Greenwood* decision did not adequately protect the rights and liberties of citizens of Minnesota.<sup>148</sup> Household waste contains an enormous amount of personal information that—thanks to the digital era—contains even more personal information than it used to.<sup>149</sup> The dissent warned that allowing police to search these containers without a warrant, or even a reasonable articulable suspicion, gives the government a green light to broaden and deepen its efforts to acquire our most intimate information.<sup>150</sup>

#### IV. ANALYSIS

In his dissent, Justice Lillehaug asserted that of the three conditions allowing for the Minnesota Supreme Court to depart from U.S. Supreme Court precedent, this case implicates the third—whether the U.S. Supreme Court holding (here, in *California v. Greenwood*) adequately protects the rights and liberties of Minnesotans.<sup>151</sup> This argument is persuasive but incomplete. This note will argue that the first condition is implicated here as well—whether the U.S. Supreme Court made a sharp or radical departure from its precedent in deciding *Greenwood*.<sup>152</sup> The fact that two out of three possible factors are raised by this issue, demonstrates an even stronger principled basis for the Minnesota Supreme Court to deviate from federal precedent, and by failing to do so, the Minnesota Supreme Court failed in its duty as “the first line of defense for individual liberties within the federalist system.”<sup>153</sup>

This section argues that *California v. Greenwood* was a radical departure from precedent, warranting the Minnesota Supreme Court to deviate from the Supreme Court’s *Greenwood* holding.<sup>154</sup> It will discuss *McMurray*’s implications for privacy in light of twenty-first century technological and public policy changes.<sup>155</sup> Finally, it

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147. See *McMurray*, 860 N.W.2d at 695 (Lillehaug, J., dissenting).

148. See *id.* at 697.

149. *Id.*

150. *Id.* at 702.

151. See *id.* at 697.

152. See *id.* at 691 (majority opinion); see *infra* Part IV. A.

153. *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985).

154. See *infra* Part IV.A.

155. See *infra* Part IV.B.

will propose that a better holding would have been to require a reasonable suspicion of wrongdoing for police to search garbage.<sup>156</sup>

A. *The Greenwood Decision and Departing from Precedent*

The majority in *State v. McMurray* quickly accepted the reasoning of *California v. Greenwood*, foregoing an in-depth analysis of the previous search and seizure precedent.<sup>157</sup> However, upon a closer analysis, *Greenwood* was a departure from precedent, indicating a principled basis for interpreting the Minnesota Constitution differently than the Fourth Amendment.<sup>158</sup> The majority erred by dismissing this factor and deciding *McMurray* based on the reasoning of *California v. Greenwood*.<sup>159</sup>

The majority asserted that *Greenwood* was in-line with the principles established by *Katz*: (1) that a person can invoke the protections of the Fourth Amendment if she has a reasonable expectation of privacy in the area or items searched; and (2) what a person knowingly exposes to the public is not subject to Fourth Amendment protection.<sup>160</sup> The majority fell back on the reasoning that because all sorts of people and animals can rummage through garbage once it is set out on the curb, society does not reasonably expect the contents of garbage to remain private.<sup>161</sup> The majority failed to further analyze the reasoning behind the *Greenwood* holding.<sup>162</sup>

However, just as the U.S. Supreme Court has conveniently managed to do repeatedly, the majority in *McMurray* ignored the other essential principle established in *Katz v. United States*.<sup>163</sup> It is true that what a person knowingly exposes to the public is not a subject of Fourth Amendment protection, “[b]ut what he seeks to

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156. See *infra* Part IV.C.

157. See *McMurray*, 860 N.W.2d at 691.

158. Compare *California v. Greenwood*, 486 U.S. 35, 40 (1988) (holding that by the defendant exposing his garbage to the public, he relinquished his rights to Fourth Amendment protection), with *Katz v. United States*, 389 U.S. 347, 351 (1967) (maintaining that what a person exposes to the public is not protected by the Fourth Amendment, “[b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”).

159. See *McMurray*, 860 N.W.2d at 697–98 (Lillehaug, J., dissenting).

160. *Id.* at 691 (majority opinion).

161. *Id.*

162. See *id.*

163. See *id.*; see also *Katz*, 389 U.S. at 351.

preserve as private, even in an area accessible to the public, may be constitutionally protected.”<sup>164</sup> Of course people expose their garbage to the public to conform with basic sanitation norms and ordinances, but most people also put their household waste in opaque bags, and then put those bags in containers with closed lids.<sup>165</sup> These efforts demonstrate that people, knowing the vast amounts of personal information contained in garbage, actually do seek to preserve the privacy of their garbage.<sup>166</sup>

The Supreme Court of Vermont came to this same conclusion in *State v. Morris*,<sup>167</sup> where it refused to follow the *Greenwood* precedent and held that there is a privacy expectation in garbage left out for collection.<sup>168</sup> The court reasoned that the possibility of animals or humans scavenging through garbage does not negate the expectation of privacy in such garbage “any more than the possibility of a burglary or break-ins negates an expectation of privacy in one’s home . . . .”<sup>169</sup> The California, Hawaii, New Jersey, and Washington state supreme courts have also refused to accept *Greenwood*’s reasoning, finding warrantless searches of garbage unconstitutional.<sup>170</sup>

In doing so, these courts have recognized what the Minnesota Supreme Court has refused to: that since *Katz*, the Supreme Court has applied an unnecessarily formalistic approach to privacy—which is neither in line with the spirit of *Katz*, nor with the spirit of the Fourth Amendment—where people forfeit their rights to be protected from government intrusion simply because they “choose” to expose themselves or their property to others.<sup>171</sup> As our

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

165. *See McMurray*, 860 N.W.2d at 699 (Lillehaug, J., dissenting) (“Not only is household waste different than it was when *Greenwood* was decided, so are the bags and special containers into which the waste is placed for pickup or recycling. Like the City of Hutchinson, many municipalities now require closed, vermin-proof containers.”).

166. *See id.* at 697.

167. 680 A.2d 90 (Vt. 1996).

168. *See id.* at 93.

169. *Id.* at 99.

170. *See People v. Krivda*, 486 P.2d 1262, 1264 (Cal. 1971); *State v. Tanaka*, 701 P.2d 1274, 1276 (Haw. 1985); *State v. Hempele*, 576 A.2d 793, 803 (N.J. 1990); *State v. Boland*, 800 P.2d 1112, 1117 (Wash. 1990).

171. *See California v. Ciraolo*, 476 U.S. 207, 216 (1986) (Powell, J., dissenting) (“[T]he Court today . . . departs significantly from the standard developed in *Katz* for deciding when a Fourth Amendment violation has occurred . . . .”); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (“The overriding function of the Fourth

world grows smaller, with technology facilitating an unprecedented ease of communication, this third-party doctrine will prove to be increasingly irrelevant and unsustainable. Even in the smallest towns across America, people typically have no choice but to communicate and interact with third-party intermediaries, which then leaves aspects of their private lives unprotected by the Fourth Amendment.<sup>172</sup>

*California v. Greenwood's* departure from the principles embodied in *Katz* should have induced the court in *State v. McMurray* to deviate from Supreme Court precedent.<sup>173</sup> Instead, the Minnesota Supreme Court accepted an unpersuasive decision that succumbed to the pressure of enhancing law enforcement capabilities over protecting the right of the people to live free from unreasonable government interference.<sup>174</sup>

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Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”); *see also* *State v. Morris*, 680 A.2d 90, 116 (Vt. 1996) (“[U]nconstrained government inspection of people’s trash is not consistent with a free and open society.”).

172. *See* SCHULHOFER, *supra* note 80, at 130 (“Only a hermit can lay claim to complete secrecy. For anyone who wishes to inhabit the world, daily life inevitably involves personal associations and the information we exchange within them . . . . To insist that information is private only when it remains completely secret is preposterous.”).

173. *See* *State v. McMurray*, 860 N.W.2d 686, 690 (Minn. 2015).

174. *See* *California v. Greenwood*, 486 U.S. 35, 55 (1988) (Brennan, J., dissenting) (“In holding that the warrantless search of Greenwood’s trash was consistent with the Fourth Amendment, the Court paints a grim picture of our society. It depicts a society in which local authorities may command their citizens to dispose of their personal effects in the manner least protective of the ‘sanctity of [the] home and the privacies of life,’ and then monitor them arbitrarily and without judicial oversight . . . .” (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)); *see also* *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) (“Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases . . . and the Red scare and McCarthy-era internal subversion cases . . . are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.”).

B. McMurray's *Implications for Privacy and Policy*

1. *Technological Implications for Privacy*

As Justice Lillehaug states in his *McMurray* dissent, since the *Greenwood* decision, the nature of household waste has changed: “this is not your grandfather’s garbage.”<sup>175</sup> The *State v. McMurray* holding presents significant public policy concerns; one of them being the effects new technology will have for disposing of, and searching through, people’s garbage. This concern has two components: (1) there is increased probability of people disposing of technological devices that contain vast amounts of personal information, and (2) law enforcement has greater access to technology that allows increasingly thorough forensic analysis.<sup>176</sup>

Although most people are encouraged by their local governments to dispose of electronic devices like TV’s and computers at specified recycling sites, small digital devices like flash-drives or computer disks often find themselves in the trash. Even if a privacy-aware homeowner takes care not to throw away any digital devices, electronic sensors and data-collectors are now present in a wide variety of consumer products that someone might not even be aware of the need to recycle or data-destroy.<sup>177</sup> For example, sales of personal fitness monitoring devices, such as Fitbit™ and the Nike+FuelBand™, have exploded over the past two years and track personal information such as the number of steps its user has taken, the amount of calories its user has burned, and the distance its user has travelled.<sup>178</sup> The average person is likely savvy enough to know not to throw away a computer, tablet, or smartphone, understanding the personal information contained on the hard drive, but in this new “internet of things,” many people might not realize how much information seemingly simple products can collect about their owners, or how to properly dispose of such products. Local governments typically post information on how to recycle electronics, but it is an individual’s responsibility to

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175. *McMurray*, 860 N.W.2d at 697 (Lillehaug, J., dissenting).

176. *See id.*

177. *See generally* Scott R. Peppet, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security, and Consent*, 93 TEX. L. REV. 85, 87–92 (2014) (explaining the proliferation of data-collecting consumer devices and the implications for privacy).

178. *See id.* at 101.

wipe data from such items.<sup>179</sup> Moreover, not having fully caught up with the growth of data collecting products, community recycling guides generally do not inform community members of the need to wipe data from products such as fitness monitoring bands or bio-tracking clothing.<sup>180</sup> In deciding that Minnesotans have no reasonable expectation of privacy in garbage left on the curb, the Minnesota Supreme Court is opening the door for not only police but also third-parties to collect personal data from these types of products that unsuspecting Minnesotans might throw away.

In addition to people owning, and consequently disposing of, a wider range of devices holding personal data, in the years since *Greenwood*, significant technological advances have been made in law enforcement's ability to test and analyze biological waste. The people who are cognizant of the personal data contained on their various devices know not to throw any of them away without at least wiping their data. Those same people are still producing biological waste in the course of their everyday lives, which invariably ends up in the trash. If one thing has not changed since *Greenwood*, it is that "almost every human activity ultimately manifests itself in waste products."<sup>181</sup> And as Justice Lillehaug notes, "[i]nvestigative tools are much more sophisticated and their probing capacity now extends well beyond the curtilage. For example, law enforcement now has the ability to test—easily and economically—the DNA that can be gleaned from all manner of waste."<sup>182</sup> Although there are limitations imposed by Congress and state legislatures for collecting DNA and DNA databanking, "[i]n general, Congress has taken a supportive attitude toward DNA databanking and incentivized the development, expansion, and integration of DNA databases."<sup>183</sup> Allowing police to examine people's garbage without a warrant comes with the dangerous possibility that DNA may be collected

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179. See *Data Privacy Information*, RAMSEY CTY., <https://ramseyatoz.co.ramsey.mn.us/Pages/ItemDetails.aspx?ItemID=159&ItemTitle=Data%20Privacy%20Information> (last updated Aug. 30, 2013).

180. See *What Is Electronic Waste or E-Waste*, RAMSEY CTY., <https://ramseyatoz.co.ramsey.mn.us/Pages/Electronics.aspx?Category=Electronics&CategoryID=2> (last visited Feb. 4, 2016).

181. *Smith v. State*, 510 P.2d 793, 798 (Alaska 1973) (holding warrantless searches of garbage constitutional).

182. *State v. McMurray*, 860 N.W.2d 686, 698 (Minn. 2015) (Lillehaug, J., dissenting).

183. EMILY C. BARBOUR, *THE FOURTH AMENDMENT: IMPLICATIONS OF TECHNOLOGICAL SHIFTS AND SELECTED TRENDS* 80 (Lucille E. Huff ed., 2014).

and stored, constituting a truly astonishing level of governmental interference with the personal autonomy of private citizens that is altogether unheard of.

## 2. *Public Policy Implications*

Technological innovations since *California v. Greenwood* have increased the depth of information that can be found in, and extracted from, one's garbage. However, societal changes have occurred in the United States as well; the year 2015 has witnessed re-invigorated conversations about issues such as racism, crime, and imprisonment in the United States—issues which, as it has become increasingly apparent, have yet to be resolved.<sup>184</sup> It has become increasingly obvious, particularly as we have observed the long-term effects of the “war on drugs,” that some of our previous approaches to crime and law enforcement have not lived up to expectations. Consequently, there are serious policy implications to consider when accepting the reasoning of a case decided in 1988.

The holding in *Greenwood* was published at the height of America's war on drugs, when drug abuse was deemed “public enemy number one,” and prosecuting individuals involved in the drug trade was pursued at almost any cost.<sup>185</sup> As a result, arresting drug users and dealers became the motive behind most of the warrantless searches of garbage executed by police across the United States and had a significant impact on American search and seizure jurisprudence.<sup>186</sup> Lower courts in the eighties and nineties

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184. See generally Ben Collins, *The War on Drugs Is Over (If You Want It)*, DAILY BEAST (May 8, 2015, 5:08 AM), <http://www.thedailybeast.com/articles/2015/05/08/the-war-on-drugs-is-over-if-you-want-it.html>; Lindsey Cook, *No, Justice is Not Colorblind*, U.S. NEWS (Dec. 11, 2014, 10:15 AM), <http://www.usnews.com/news/blogs/data-mine/2014/12/11/no-justice-is-not-colorblind>; Steven W. Hawkins, *The Conversation on U.S. Prisons We Should Be Having*, HUFFINGTON POST (July 18, 2015, 11:59 AM), [http://www.huffingtonpost.com/steven-w-hawkins/criminal-injustice-the-co\\_b\\_7824086.html](http://www.huffingtonpost.com/steven-w-hawkins/criminal-injustice-the-co_b_7824086.html).

185. See Claire Suddath, *The War on Drugs*, TIME (Mar. 25, 2009), <http://content.time.com/time/world/article/0,8599,1887488,00.html>; see also Charles Patrick Garcia, Note, *The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception*, 93 COLUM. L. REV. 685, 712 (1993) (“When the civil rights of citizens suspected of drug dealing are involved, society has a strong tendency to abandon cherished liberties enumerated in the Bill of Rights in its effort to win the ‘War on Drugs.’”).

186. See Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1410 (1993) (“[T]he war on drugs has led to new

made frequent, and often scathing, references to the war on drugs, which the Supreme Court usually failed to reciprocate.<sup>187</sup> As John Wesley Hall Jr. astutely noted, “the politics of the ‘war on drugs’ has stretched the Fourth Amendment to its limits.”<sup>188</sup> This is more than slightly reminiscent of the early twentieth century holdings from *Olmstead* and *Hester*, where prohibition created a justification for enlarging the police power in the name of stamping out alcohol abuse, and the Fourth Amendment suffered its first blow.<sup>189</sup>

However, it is now 2015, and public policy has largely shifted away from the war on drugs, with more people questioning its effectiveness than ever before.<sup>190</sup> Numerous critics now frequently point to the United States’ overflowing prison population—the result of harsh and indefensible criminal penalties for drug offenses—as one of the most unfortunate and unintended consequences of the war on drugs, although the criticisms range much further than that.<sup>191</sup> Allowing police to search through

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interpretations of the Fourth Amendment and the rules for search and seizure. Zealous law enforcement officials are inclined to stretch the limits of the Constitution in their desire to win the war they are fighting.”).

187. Compare *United States v. Lewis*, 728 F. Supp. 784, 789 (D.D.C. 1990) (“In this ‘anything goes’ war on drugs, random knocks on the doors of our citizens’ homes seeking ‘consent’ to search for drugs cannot be far away. This is not America.”), with *Florida v. Bostick*, 501 U.S. 429, 440–44 (1991) (Marshall, J., dissenting) (“Our Nation, we are told, is engaged in a ‘war on drugs.’ No one disputes that it is the job of law-enforcement officials to devise effective weapons for fighting this war. But the effectiveness of a law-enforcement technique is not proof of its constitutionality. . . . The majority suggests that this latest tactic in the drug war is perfectly compatible with the Constitution. I disagree.”).

188. HALL, *supra* note 13, at 33–34.

189. Sundby, *supra* note 64, at 1755 (“In 1928, at a time when the courts were facing a wave of Prohibition Act cases not unlike the current flood of cases resulting from the war on drugs, the Court confronted a situation where federal prohibition officers had placed wiretaps on the phones of a suspected bootlegging ring without any pretense of obtaining a warrant. Adhering to a very literal reading of the Fourth Amendment, the Court in *Olmstead v. United States* held that the Amendment’s protections did not apply because the placing of the wiretaps had not required the officers to physically trespass upon the defendants’ premises.”).

190. See Maia Szalavitz, *Viewpoint: How Marijuana Decision Could Signal Turning Point in the U.S. War on Drugs*, TIME (Aug. 29, 2013), <http://healthland.time.com/2013/08/29/viewpoint-how-marijuana-decision-could-signal-turning-point-in-the-u-s-war-on-drugs> (tracing how the recent voter referendums in Colorado and Washington indicate a turning point in the war on drugs).

191. See generally Mathew A. Christiansen, *A Great Schism: Social Norms and*

garbage for evidence of drug use may have been deemed a reasonable display of police power in 1988, when the war on drugs was considered worthy of aggressive pursuit. However, after almost thirty years, it is clear the war is lost and we need to start looking back at some of the restrictions placed on the Fourth Amendment in the name of the doomed and destructive war on drugs. Is intruding upon an individual's personal autonomy really worth it just to put another drug user in prison? With *State v. McMurray*, the Minnesota Supreme Court had an opportunity to revisit these policy considerations and steer Minnesota in the direction that the public is already headed; instead, the court fell in line with a dying policy that has failed to live up to the spirit of the Fourth Amendment and the values of this country.

*C. An Alternative: Requiring a Reasonable Articulable Suspicion*

Instead of broadly holding that Minnesotans have no reasonable expectation of privacy in garbage left on the curb, the majority should have held that a warrantless search of garbage is unlawful without at least a reasonably articulable suspicion that the garbage contains evidence of a crime. The supreme courts of Alaska, Indiana, and Montana have adopted this standard, which recognizes that people have some expectation of privacy in their garbage that prevents random searches but allows police to search without probable cause.<sup>192</sup> This standard finds a middle ground between protecting individual liberties, and allowing the police to effectively do their job.<sup>193</sup>

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*Marijuana Prohibition*, 4 HARV. L. & POL'Y REV. 229, 230 (2010) (arguing that prohibitions against marijuana use have not fulfilled their goals and it would be economically productive to fall in line with the social norm of marijuana use); Andrew D. Black, Note, "The War on People": Reframing "The War on Drugs" by Addressing Racism within American Drug Policy Through Restorative Justice and Community Collaboration, 46 U. LOUISVILLE L. REV. 177, 178-79 (2007); Ben Wallace-Wells, *How America Lost the War on Drugs*, ROLLING STONE (Mar. 24, 2011), <http://www.rollingstone.com/politics/news/how-america-lost-the-war-on-drugs-20110324>.

192. See *Beltz v. State*, 221 P.3d 328, 336 (Alaska 2009); *Litchfield v. State*, 824 N.E.2d 356, 364 (Ind. 2005); *State v. 1993 Chevrolet Pickup*, 116 P.3d 800, 805 (Mont. 2005).

193. *Litchfield*, 824 N.E.2d at 364 ("[A] requirement of articulable individualized suspicion . . . imposes the appropriate balance between the privacy interests of citizens and the needs of law enforcement.").

## V. CONCLUSION

In *State v. McMurray*, the Minnesota Supreme Court was asked to interpret the Minnesota Constitution to provide greater protection than the Fourth Amendment in the context of warrantless searches of garbage left out for collection.<sup>194</sup> The court adhered to Supreme Court precedent and found that there is no reasonable expectation of privacy in garbage left on the curb; therefore, there is no constitutional protection for it.<sup>195</sup> The majority failed to fully analyze the extent to which *California v. Greenwood* was a radical departure from the values expressed in past precedent, missing a valid opportunity to deviate from case law that fails to protect, or even articulate, a clear and legitimate interest underlying the principles of the Fourth Amendment.<sup>196</sup> Without even requiring a reasonably articulable suspicion of wrongdoing, *McMurray* potentially allows continued, significant government invasion on individual autonomy.

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194. *State v. McMurray*, 860 N.W.2d 686, 687 (Minn. 2015).

195. *Id.* at 694–95 (citing *California v. Greenwood*, 486 U.S. 35, 40 (1988)).

196. *Id.* at 693.