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# LEARNING FROM ALL FIFTY STATES: HOW TO APPLY THE FOURTH AMENDMENT AND ITS STATE ANALOGS TO PROTECT THIRD PARTY INFORMATION FROM UNREASONABLE SEARCH

Stephen E. Henderson\*

## I. INTRODUCTION

The Fourth Amendment to the United States Constitution prohibits “unreasonable searches and seizures.”<sup>1</sup> Yet as interpreted by the United States Supreme Court, the Amendment places no restriction on police combing through your financial records;<sup>2</sup> your telephone, e-mail, and website transactional records;<sup>3</sup> and your garbage left for collection.<sup>4</sup> Instead “third party information,” meaning all information provided to third parties, receives no Fourth Amendment protection. Hence your very movements, be they tracked via a police transponder placed on your vehicle<sup>5</sup> or via your mobile phone,<sup>6</sup> are seemingly available to police without any Fourth Amendment limitation.

This state of affairs is not new and has withstood sustained and even bitter critiques by commentators.<sup>7</sup> But we are not solely dependent upon

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1. U.S. CONST. amend. IV. The Fourth Amendment provides:

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

*Id.*

2. See *United States v. Miller*, 425 U.S. 435, 437 (1976).

3. See *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979); *United States v. Hambrick*, No. 99-4793, 2000 U.S. App. LEXIS 18665, at \*13-14 (4th Cir. Aug. 3, 2000) (unpublished); *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000).

4. See *California v. Greenwood*, 486 U.S. 35, 37 (1988).

5. See *United States v. Karo*, 468 U.S. 705, 713 (1984); *United States v. Knotts*, 460 U.S. 276, 285 (1983).

6. See *infra* Part III.

7. See 1 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 2.7(b)-(c), at 736, 747 (4th ed. 2004). Wayne LaFave’s treatise terms the Court’s third-party doctrine “dead wrong” (in the context of bank records) and deems it “a crabbed interpretation” that “makes a mockery of the Fourth Amendment” (in the context of phone records). *Id.* Other

the Federal Constitution for protection of our constitutional rights. We are also citizens of states, each of which has its own constitution. And each of these constitutions includes, among other important provisions, a “cognate” or “analog” to the Federal Fourth Amendment.<sup>8</sup> As Justice Brennan urged in a famous 1977 article, those provisions can be—and with respect to third party information should be—interpreted to provide greater protection.<sup>9</sup> Some states have responded, restricting government access to information provided to third parties.<sup>10</sup>

But despite this positive development, there is little understanding of which states have diverged from the federal doctrine, what solution they offer in its place, and for what types of third party information. This Article is intended to fill that void, which accomplishes several goals. First, because the Fourth Amendment provides only a “constitutional floor,” this Article catalogs the constitutional jurisprudence of all fifty states to provide a more complete picture of existing protections. Second, while the “new federalism” in state constitutionalism<sup>11</sup> is no longer so “new,” many states have only recently expressed a willingness to diverge from Federal Fourth Amendment analysis. For defense counsel and others who consider the federal jurisprudence to be unacceptable, an analysis of “diverging” states can be used to encourage states to adopt more protective rules.

Finally, one can hope that analysis of state constitutional law will influence the United States Supreme Court. The Court has previously considered both state jurisprudence and trends therein. When deciding whether due process requires that states suppress illegally obtained evidence, the Court carefully considered state legislation and jurisprudence and relied on a trend of states adopting the exclusionary rule.<sup>12</sup> When deciding whether warrantless probable cause arrests in

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commentators have warned of the significant amounts of information in the hands of third parties. See, e.g., Orin S. Kerr, *Digital Evidence and the New Criminal Procedure*, 105 COLUM. L. REV. 279, 293-96 (2005); Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 822-26 (2005); Christopher Slobogin, *Transaction Surveillance by the Government*, 75 MISS. L.J. (forthcoming 2006); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1084-85 (2002).

8. For a complete listing of these analogs see *infra* Appendix.

9. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491, 496-97, 502-03 (1977).

10. See *infra* Part V, tbl. 2.

11. The term “new federalism” is commonly used to refer to the post-1970s resurgence in state constitutional analysis. See, e.g., 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.11(a), at 703 (2d ed. 1999); Shirley S. Abrahamson & Diane S. Gutmann, *The New Federalism: State Constitutions and State Courts*, 71 JUDICATURE 88, 90 (1987).

12. In 1949, when thirty-one states rejected the exclusionary rule and sixteen had adopted it, the Supreme Court made a careful analysis of state jurisprudence and held that

public were constitutional, the Court relied on virtual unanimity among the states allowing such arrests.<sup>13</sup> And when deciding whether warrantless entry into the home was constitutional, the Court not only relied upon a lack of such unanimity among the states, but especially upon a trend of states declaring such entry unconstitutional as a matter of state constitutional law.<sup>14</sup> According to the Court such decisions are “significant because by invoking a state constitutional provision, a state court immunizes its decision from review by this Court [, which] heightened degree of immutability underscores the depth of the principle underlying the result.”<sup>15</sup> For a Court that believes “reasonableness” to be the touchstone of Fourth Amendment constitutionality,<sup>16</sup> a relevant criterion should be what jurists in the fifty states consider reasonable.<sup>17</sup> Indeed many of the states that reject the federal third-party doctrine have done so using the federal “reasonable expectation of privacy” criterion.<sup>18</sup> If we are to convince the Supreme Court to abandon its strict

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the Due Process Clause of the Fourteenth Amendment did not require suppression of evidence obtained via an unconstitutional search or seizure. *Wolf v. Colorado*, 338 U.S. 25, 29-31, 33-38 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961). But of those states considering the doctrine between 1949 and 1961, over half adopted some form of exclusionary rule. *See Mapp*, 367 U.S. at 651. Although the *Mapp* Court, chided by the dissent, *see id.* at 680 (Harlan, J., dissenting), lamely asserted that state doctrines were “not basically relevant,” it clearly relied in part upon this trend in reversing *Wolf* and requiring that states exclude such constitutionally tainted evidence, *id.* at 651 (majority opinion). The Court’s motivation for allegedly giving less relevance to state doctrine seems to be that one half of the states still had no exclusionary rule, and that the Court was eager to reverse *Wolf*. *See id.* (documenting state positions); *id.* at 672-77 (Harlan, J., dissenting) (arguing persuasively that the Court rather lawlessly decided an issue not raised, briefed, or argued by the parties).

13. *United States v. Watson*, 423 U.S. 411, 421-22 (1976).

14. *Payton v. New York*, 445 U.S. 573, 598-600 (1980). The Court declared warrantless entry unconstitutional despite a majority of states permitting such entry. *Id.* at 598-601. For an analysis of the Court’s reliance on state law in interpreting the Fourth Amendment, see Kathryn R. Urbonya, *Fourth Amendment Federalism? The Court’s Vacillating Mistrust and Trust of State Search and Seizure Laws*, 35 SETON HALL L. REV. 911 (2005).

15. *Id.* at 600.

16. *See United States v. Knights*, 534 U.S. 112, 118-19 (2001).

17. The *Wolf*, *Mapp*, *Watson*, and *Payton* Courts looked not only to state constitutional decisions but also to state legislation. *See Payton*, 445 U.S. at 598 n.46, 599 nn. 47-48; *Watson*, 423 U.S. at 419-20; *Mapp*, 367 U.S. at 652 n.7; *Wolf*, 338 U.S. at 30 n.1. What state legislatures deem reasonable would indeed seem similarly relevant. In the words of the *Payton* Court, “when the constitutional standard is as amorphous as the word ‘reasonable,’ . . . custom and contemporary norms necessarily play . . . a large role in the constitutional analysis.” *Payton*, 445 U.S. at 600. This Article, however, considers only state constitutional law.

18. *See infra* Part V.

third-party doctrine, we must offer it a workable alternative, perhaps found among these state “laboratories.”<sup>19</sup>

After briefly describing the federal third-party doctrine, this Article describes two relatively new technologies that would appear to be unrestricted under current Fourth Amendment doctrine, mobile phone tracking and data mining,<sup>20</sup> and explains the risk to our privacy from these and other technological developments. This discussion includes three published opinions by federal magistrates in late 2005 that demonstrate an unease with the third-party doctrine in the context of location tracking. This Article then categorizes and explains the constitutional doctrine in each of the fifty states. This study reveals that eleven states reject the federal third-party doctrine and ten others have given some reason to believe they might reject it. When combined with the eleven other states that have diverged from the Fourth Amendment on some substantive issue, this is an impressive tally. As would be expected, the fifty-state survey provides many alternative solutions. The author favors a broad definition of “search” restricted by a totality-based consideration of reasonableness.<sup>21</sup> This model was used in a recent Indiana decision that provides a workable rule for the Fourth Amendment in modern times.<sup>22</sup> The author proposes that both state and federal courts apply such a totality approach to devise a spectrum of protections for different types of third party information. Without such a reanalysis, technology will allow the government to gather increasing amounts of information without constitutional restraint, leading both to an expectation and reality of no privacy.

## II. THE THIRD-PARTY DOCTRINE

At one time the Fourth Amendment’s protection of “persons, houses, papers, and effects”<sup>23</sup> was read narrowly, restricting only government

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19. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory.”).

20. This Article uses “data mining” loosely to refer to extracting any data from an aggregated database. See *infra* note 105.

21. Of course not all commentators agree. Two excellent “thrust and parry” articles concerning the “reasonableness” versus “warrant requirement” debate are Akhil Reed Amar, Terry and *Fourth Amendment First Principles*, 72 ST. JOHN’S L. REV. 1097 (1998), and Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN’S L. REV. 1133 (1998). See also Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383 (1988).

22. See *infra* note 131.

23. U.S. CONST. amend. IV.

access to tangible things. Thus in *Olmstead v. United States*,<sup>24</sup> the Court held the Amendment did not restrict government access to telephone conversations (human voice traveling as an analog electronic signal) unless government agents trespassed in order to obtain them.<sup>25</sup> Under this “property-based” or “trespass-based” conception of the Fourth Amendment, if there was no encroachment on a defendant’s property interest there was no search, and therefore could be no violation of the Amendment.<sup>26</sup>

In *Katz v. United States*,<sup>27</sup> the Court jettisoned the property-based conception, famously asserting that the “Fourth Amendment protects people, not places.”<sup>28</sup> That protection was infringed when agents warrantlessly monitored one end of a telephone conversation taking place inside a closed public telephone booth.<sup>29</sup>

But if we do not look to the law of trespass, then how are we to determine whether the Fourth Amendment is implicated? The Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”<sup>30</sup> Hence an obvious solution would be to adopt a commonplace, dictionary definition of “search,” recognizing that the Fourth Amendment only prohibits *unreasonable* searches and seizures. While the author favors this construction,<sup>31</sup> in order to maintain the fiction that warrantless searches are presumptively unconstitutional the Court instead adopted a two-part test first articulated by Justice Harlan: “[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>32</sup> Although the subjective prong still receives lip service,

24. 277 U.S. 438 (1928).

25. *Id.* at 464-66. For a more complete description of *Olmstead* and the development of the third-party doctrine see Stephen E. Henderson, *Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search*, 56 MERCER L. REV. 507, 511-21 (2005).

26. Thus government agents were free to eavesdrop from *their* side of a party wall. See *Goldman v. United States*, 316 U.S. 129, 134-36 (1942), *overruled by Katz v. United States*, 389 U.S. 347 (1967). But if the agents used a microphone which penetrated that wall, even by an inch, the Fourth Amendment would be implicated. See *Silverman v. United States*, 365 U.S. 505, 506-07, 512 (1961).

27. 389 U.S. 347 (1967).

28. *Id.* at 351.

29. *Id.* at 348, 351.

30. U.S. CONST. amend. IV.

31. See Henderson, *supra* note 25, at 544-46.

32. *Katz*, 389 U.S. at 361 (Harlan, J., concurring); see also *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

its questionable relevance and potential for government manipulation<sup>33</sup> have caused the second requirement to become solely determinative.<sup>34</sup>

So government conduct only constitutes a Fourth Amendment search if it invades a “reasonable expectation of privacy.” What does this mean for information we provide to others, including banking, telephone, and e-mail transactions? According to the Supreme Court, one retains no reasonable expectation of privacy in information revealed to a third party, “even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”<sup>35</sup> And this is true even if the government is responsible for the third party retaining that information.<sup>36</sup> Only in the contexts of a government-initiated medical test<sup>37</sup> and the home<sup>38</sup> has the Court deviated from this doctrine.

As the author has argued elsewhere, however, the best reading of this “third-party doctrine” is that it should apply only to information revealed *for that third party’s use*.<sup>39</sup> Thus, although we provide the content of our telephone conversations to the service provider just like we provide the digits we dial, only the latter is unprotected.<sup>40</sup> Hence even under the

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33. See *Smith*, 442 U.S. at 740 n.5 (considering the effect of a police announcement that all homes will hereafter be subject to random inspections).

34. See *id.*; *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978); 1 LAFAYETTE, *supra* note 7, § 2.1(c); Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974). At least one state that otherwise adopts *Katz* as a matter of state constitutional law has therefore explicitly jettisoned the subjective prong. See *State v. Hemepe*, 576 A.2d 793, 801-02 (N.J. 1990).

35. *United States v. Miller*, 425 U.S. 435, 443 (1976).

36. The documents in *Miller* were retained by the bank pursuant to the Bank Secrecy Act of 1970, which requires banks to preserve such information precisely because it is of value to government investigations. See *id.* at 442-43. Today telephone companies are similarly required to retain toll records for eighteen months. See 47 C.F.R. § 42.6 (2005).

37. See *Ferguson v. City of Charleston*, 532 U.S. 67, 84-86 (2001) (finding urine tests of pregnant mothers to constitute unreasonable searches in view of their law enforcement purpose).

38. See *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (finding thermal scan of home to constitute unreasonable search in light of the special protection for homes under the Fourth Amendment).

39. Henderson, *supra* note 25, at 524-28.

40. Compare *Berger v. New York*, 388 U.S. 41, 63-64 (1967) (protecting the contents of conversations), with *Smith*, 442 U.S. at 742 (finding no protection for telephone numbers dialed).

Another limitation might exist for information that is otherwise constitutionally protected. Medical records might be protected by a *Griswold/Whalen/Roe* right to privacy, in which case obtaining those records without legal process or justification might not only be an independent constitutional violation, but might also constitute an unreasonable search in violation of the Fourth Amendment. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (recognizing a constitutionally protected right of privacy); *Whalen v. Roe*, 429 U.S. 589, 598 n.23 (1977) (finding that right in the Fourteenth

Court's current test, one should retain a reasonable expectation of privacy in information provided to an uninterested conduit of information<sup>41</sup> and information not intentionally provided to any third party. As the following two examples demonstrate, however, in the modern world we provide extensive information to third parties for their use, and that information is being used in ways we probably never imagined.

### III. CELL PHONE LOCATION TRACKING

To those who still remember the sound of silence, it might seem quite sufficient that a mobile phone be capable of placing and receiving telephone calls. But current offerings defy this quaint notion—today's phones are capable of e-mail communication; videoconferencing; Web surfing; calendaring; gaming; digital photography and video; storing and playing music; and receiving content, including live television and, strangely enough, video produced exclusively for cell phone

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Amendment's "concept of personal liberty"); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (same); *Herring v. Keenan*, 218 F.3d 1171, 1175 (10th Cir. 2000) (holding *Whalen* created a right to privacy in the nondisclosure of medical records); *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1137 (3d Cir. 1995) (same); *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995) (same); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (same); *Doe v. Attorney Gen. of the U.S.*, 941 F.2d 780, 795-96 (9th Cir. 1991) (same); *see also* *Douglas v. Dobbs*, 419 F.3d 1097, 1102-03 (10th Cir. 2005) (recognizing potential Fourth Amendment claim based upon release of prescription records); *Murphy v. Townsend*, 187 F.3d 648, No. C97-0851 JCC, 1999 WL 439468, at \*2 (9th Cir. June 22, 1999) (unpublished table decision) (same); *State v. Russo*, 790 A.2d 1132, 1152 (Conn. 2002) (recognizing right of privacy but finding no Fourth Amendment violation in release upon law enforcement request); *King v. State*, 577 S.E.2d 764, 767 (Ga. 2003) (finding no violation when records are obtained via search warrant without notice); *King v. State*, 535 S.E.2d 492, 497 (Ga. 2000) (recognizing right of privacy and finding violation thereof when records are obtained via subpoena without notice); *Stone v. City of Stow*, 593 N.E.2d 294, 301 (Ohio 1992) (recognizing right of privacy but finding no Fourth Amendment violation in release upon law enforcement request); *State v. Welch*, 624 A.2d 1105, 1112 (Vt. 1992) (same). *But see* *Jarvis v. Wellman*, 52 F.3d 125, 126 (6th Cir. 1995) (holding there is no constitutional right to nondisclosure of medical information). Several cases have split on the right to privacy in blood tests. *See* *Tims v. State*, 711 So. 2d 1118, 1122 (Ala. Crim. App. 1997) (finding no reasonable expectation of privacy in hospital blood tests); *People v. Perlos*, 462 N.W.2d 310, 321 (Mich. 1990) (same); *Commonwealth v. Riedel*, 651 A.2d 135, 139 (Pa. 1994) (finding reasonable expectation of privacy in hospital blood tests); *Sam Kamin, The Private is Public: The Relevance of Private Actors in Defining the Fourth Amendment*, 46 B.C. L. REV. 83, 133-36 (2004) (describing the split of authority).

To this extent the third-party doctrine may not be absolute, but for purposes of this Article we are not interested in a limitation that will only protect that small category of information that is otherwise constitutionally protected.

41. Arguably, however, the Supreme Court deviated from this principle in finding no protection for garbage provided to garbage collectors. *See* *California v. Greenwood*, 486 U.S. 35 (1988). *But see* *Hempele*, 576 A.2d at 806 (disagreeing with the federal doctrine).



distribution.<sup>42</sup> You can even use your phone to remotely feed your pet, although this is going to require some extra hardware.<sup>43</sup> For our purposes we are interested in location-based services that take advantage of cell phone location tracking.

Some degree of location tracking is inherent in cellular telephony. In order to receive or transmit calls, a customer's cell phone must be able to communicate with a service provider's tower.<sup>44</sup> Even when not in use, a cell phone that is turned on periodically scans for the strongest signal and transmits a signal to the nearest tower in order to "check in."<sup>45</sup> Therefore, for every customer who has a phone turned on, the provider knows to which tower the customer is closest. If the signal is received by multiple towers, a provider can triangulate a more accurate location by comparing the strength and timing of the signal at the different towers.<sup>46</sup> In urban areas where towers are close together, this might allow pinpointing a customer's location to within a block or two, but in rural areas it will be much less accurate.<sup>47</sup> Municipalities are investigating the

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42. See James A. Martin, *Newest Cell Phone Features*, PC WORLD, Mar. 24, 2005, <http://www.pcworld.com/howto/article/0,aid,120017,00.asp>; Dan Tynan, *What's a Cell Phone, Anyway?*, PC WORLD, Mar. 23, 2005, <http://www.pcworld.com/news/article/0,aid,120149,00.asp> (asserting humorously that "[v]oice-only handsets have become as quaint as hand-crank telephones"). There is more to come, including the use of one-time passwords sent to a customer's mobile phone and the ability to pay for goods and services using a Bluetooth-enabled phone. See Martin, *supra*. Lest one should think proliferation of features is unique to cell phones, however, consider that there are refrigerators that can display television, transmit e-mail, and take photographs. See Nadine Brozan, *Greetings From SoFi, N.Y.C.*, N.Y. TIMES, July 10, 2005, § 11 (Real Estate), at 1 (describing luxury condos that include such a device).

43. Clive Thompson, *Remote Possibilities*, N.Y. TIMES, Nov. 16, 2003, § 6 (Magazine), at 80.

44. A great deal of information on how mobile phones work is available on the Internet. See, e.g., Julia Layton et al., *How Cell Phones Work*, <http://electronics.howstuffworks.com/cell-phone.htm> (last visited Feb. 20, 2006). A nice description is also contained in *In re Application for Pen Register and Trap/Trace*, 396 F. Supp. 2d 747, 750-51 (S.D. Tex. 2005).

45. *Application for Pen Register & Trap/Trace*, 396 F. Supp. 2d at 750; Kathryn Balint, *Track Down*, SAN DIEGO UNION-TRIB., July 22, 2002, at E1. Phones scan at least every seven seconds. *Application for Pen Register & Trap/Trace*, 396 F. Supp. 2d at 750.

46. See *911 Calls: More Trouble Ahead?*, CONSUMER REP., Feb. 2004, at 25, 25. If the customer is in a location such that the phone's signal is not received by any tower, there is of course no service and the phone might as well be turned off. For brief explanations of several methods of determining location see 911dispatch.com, *Angle of Arrival Location Determination*, <http://www.911dispatch.com/911/aoa.html> (last visited Feb. 20, 2006).

47. Balint, *supra* note 45. For location tracking aimed at protective pet-owners and parents, see *Wherify, Potential Applications & Services*, <http://www.wherifywireless.com/html/solutions.asp?pageId=47> (last visited Feb. 28, 2006). But even those willing to be tracked for one purpose (e.g., for the safety of a child or peace of mind of a spouse) likely do not want that information generally available to the government.

use of such location information to monitor traffic flow.<sup>48</sup>

Refined location tracking is thought desirable for several reasons. First, it is of significant utility to emergency services. In February 2001, Karla Gutierrez skidded off the Florida Turnpike and her BMW plunged into a canal.<sup>49</sup> She called 911 from her cell phone, but because she was unsure of her location rescue workers were unable to locate her despite the three and a half minutes she conversed with an operator.<sup>50</sup> Had she been calling from a landline phone the operator would have been able to pinpoint her location. In order to provide similar emergency service to wireless customers, federal law requires that wireless providers develop and provide "Enhanced 911" or "E911" service.<sup>51</sup>

E911 requires that providers be able to identify the location from which a customer is placing a 911 call.<sup>52</sup> While at first it was sufficient that a carrier identify the location of the cell tower receiving the call, today many providers must be able to pinpoint a customer's location to within fifty meters.<sup>53</sup> While compliance has apparently been less than ideal,<sup>54</sup> for our purposes what is important is that location technology will become ubiquitous. If providers can locate a customer dialing 911, that same technology can locate any customer with an active phone. Having

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48. Matt Richtel, *Enlisting Cellphone Signals To Fight Road Gridlock*, N.Y. TIMES, Nov. 11, 2005, at C1.

49. Robert Davis, *New Tools Will Make Crash Victims Easier To Find*, USA TODAY, Mar. 7, 2001, at 8D; Carolyn Said & Carrie Kirby, *GPS Cell Phones May Cost Privacy*, S.F. CHRON., Mar. 19, 2001, at C4.

50. Davis, *supra* note 49; Said & Kirby, *supra* note 49. Rescuers later found tire tracks twelve miles from where Gutierrez had thought she was located. Davis, *supra* note 49. Had the service provider been contacted and had sufficient time, it could have determined her approximate location using the tracking inherent in cell phone telephony. Such tracking has been used to rescue lost hikers. See Balint, *supra* note 45.

51. 47 C.F.R. § 20.18(d)-(m) (2005).

52. *Id.* § 20.18(d).

53. *Id.* § 20.18(d)(1), (e), (h). To be more precise, providers utilizing handset-based location technology (e.g., a GPS-equipped phone) must be able to locate sixty-seven percent of 911 callers within fifty meters and ninety-five percent of callers within 150 meters. *Id.* § 20.18(h)(2). As of February 2004, Verizon, Sprint, and Nextel offered handset-based technology. *911 Calls: More Trouble Ahead?*, *supra* note 46, at 25. Providers instead utilizing network-based technology (e.g., triangulating position by calculating signal strength and timing at multiple towers) must be able to locate sixty-seven percent of callers within 100 meters and ninety-five percent of callers within 300 meters. 47 C.F.R. § 20.18(h)(1). As of February 2004, AT&T, Cingular, and T-Mobile were using network-based technology. *911 Calls: More Trouble Ahead?*, *supra* note 46, at 25. While providers have been able to phase-in this capability over time, unfortunately neither technology works under all circumstances. See 47 C.F.R. § 20.18(f); *911 Calls: More Trouble Ahead?*, *supra* note 46, at 26.

54. See Michael K. Kurtis, *Deploying E-911 Phase II in Rural America*, RURAL TELECOMM., Jan. 1, 2004, at 44, 44; *911 Calls: More Trouble Ahead?*, *supra* note 46, at 25.

paid to develop and provide this capability, providers are now seeking to make it profitable.<sup>55</sup>

Knowing a customer's location allows providers to offer additional fee-based services. AT&T launched the first such service in the United States in 2002, dubbed "Find Friends."<sup>56</sup> For an extra fee, a customer was able to track the location of other willing customers via his or her phone.<sup>57</sup> "Find Friends" took advantage of the location tracking inherent in cellular telephony.<sup>58</sup>

MapQuest, well known for its online maps, recently launched its "Find Me" service.<sup>59</sup> Unlike "Find Friends," this service takes advantage of a global positioning system (GPS) receiver located within the customer's phone.<sup>60</sup> It allows a customer to see where he or she is located, to obtain a listing of nearby businesses and other destinations of potential interest, to obtain directions from the current location, and to share his or her location with family and friends via text messaging or via a private website.<sup>61</sup> Depending upon conditions, a GPS-enabled phone can

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55. One court has referred to this as an "inexorable combination of market and regulatory stimuli." *In re Application for Pen Register and Trap/Trace*, 396 F. Supp. 2d 747, 755 (S.D. Tex. 2005). Were the government's E911 requirements the sole reason cell phone providers sought and obtained location information, the Fourth Amendment might restrict government access. Although the Supreme Court has held that one retains no reasonable expectation of privacy in information *retained* by a third party solely to satisfy government requirements, *see* discussion of *Miller supra* Part II, the result should be different if the government is solely responsible for their *obtaining* that information, *see* *Ferguson v. City of Charleston*, 532 U.S. 67, 90 (2001) (Kennedy, J., concurring) (distinguishing mandatory *reporting* of information that would already be obtained from the government requiring that a private party *obtain* information). Because location information is of significant commercial value, the E911 requirements are unlikely to remain a motivating factor.

56. Balint, *supra* note 45.

57. *Id.*

58. *Id.*

59. Yardena Arar, *Mapping Mania at CTIA*, PC WORLD, Mar. 15, 2005, <http://www.pcworld.com/news/article/0,aid,120057,00.asp>.

60. *Id.* GPS stands for Global Positioning System, a set of twenty-seven satellites (twenty-four active and three alternates) and corresponding ground stations that enable a portable receiver "visible" to three satellites to determine the receiver's location (latitude and longitude). *See* Marshall Brain & Tom Harris, *How GPS Receivers Work*, <http://electronics.howstuffworks.com/gps.htm> (last visited Feb. 20, 2006); Webopedia.com, GPS, <http://www.webopedia.com/TERM/G/GPS.html> (last visited Feb. 20, 2006). With a fourth satellite altitude can also be computed. *See* Webopedia.com, *supra*. Brain and Harris include a very nice explanation of how the satellites enable computation of location. *See* Brain & Harris, *supra*.

61. *See* MapQuest Find Me Frequently Asked Questions, <http://findme.mapquest.com/includes/faq.jsp> (last visited Feb. 20, 2006). A more annoying implementation would allow nearby businesses to send unsolicited advertisements. *See* Said & Kirby, *supra* note 49.

pinpoint a customer's location to within a few feet.<sup>62</sup>

While MapQuest's e-promotion touts the tracking ability as furthering "peace of mind,"<sup>63</sup> the service is less attractive when one realizes that the customer thereby shares that information with the service provider and hence, via the third-party doctrine, makes it available to the government without Fourth Amendment restraint.<sup>64</sup> Nonetheless, this "mobile commerce" ("m-commerce") or "location-based commerce" is expected to thrive. According to one market research firm, location-based commercial services will be a \$40 billion market within a few years.<sup>65</sup>

Marketing potential will encourage a further development, providers maintaining location data for some period of time. Although it is too early to know which location-based services will prove profitable, it seems clear location data has value. Unless prohibited by law, a business would probably like to know that customers spend an average of fifteen

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62. Tynan, *supra* note 42; MapQuest Find Me Frequently Asked Questions, *supra* note 61 (citing a range of 5 to 100 meters). A phone that is not GPS-enabled can be used for such services if it is Bluetooth-enabled, allowing it to communicate with an independent Bluetooth GPS module. See Grace Aquino, *Phones Use GPS To Show You the Way*, PC WORLD, Aug. 2005, <http://www.pcworld.com/news/article/0,aid,121417,00.asp>.

The United Arab Emirates is investing in similar GPS technology that will allow the government to track the location, and hence the speed, of all equipped vehicles driving within the country. See *The Policeman on Your Dashboard*, ECONOMIST (TECH. Q.), Sept. 17, 2005, at 12, 12. The technology is expected to be ready for installation within four years. *Id.*

63. See MapQuest Find Me, <http://findme.mapquest.com> (follow "Watch a Demo" hyperlink) (last visited Feb. 20, 2006). If knowing that many drivers are chatting on their cell phones does not contribute to your "peace of mind," see Steve Chapman, *No Simple Way To End the Threat Posed by Drivers with Cell Phones*, BALTIMORE SUN, July 20, 2005, at 13A (noting *British Medical Journal* study finding drivers using phones are four times more likely to get into serious crashes), you probably won't like to learn that now drivers can also peruse maps of potential traffic problems sent to their phone, see MapQuest Traffic, [http://www.mapquest.com/features/main.adp?page=slashmobile\\_traffic](http://www.mapquest.com/features/main.adp?page=slashmobile_traffic) (last visited Feb. 20, 2006). There are, however, automated implementations that might not distract drivers. See Henry J. Holcomb, *Will Smart Phones and GPS Accelerate Commuters Toward . . . Rush Hour's End?*, PHILA. INQUIRER, July 24, 2005, at E1.

64. It is quite possible the Supreme Court would deem customer location to be knowingly shared regardless of whether a customer subscribes to such a service. Because such precise location information is not otherwise necessary to provide the requested (telephone) service, however, it could also be a crucial distinction to a court accepting a more limited third-party doctrine. See *supra* Part II. Moreover use of such a service is optional as opposed to government mandated. See *supra* note 55.

65. Tynan, *supra* note 42. Allied Business Intelligence estimates a \$40 billion market by 2007. *Id.*; see also Allied Business Intelligence Home Page, <http://www.abiresearch.com> (last visited Feb. 22, 2006). For descriptions of several existing services see Grace Aquino, *GPS Cell Phones*, PC WORLD, Mar. 22, 2004, <http://www.pcworld.com/reviews/article/0,aid,115273,00.asp>, Aquino, *supra* note 62, and Arar, *supra* note 59.

minutes in the store, or that those who patronize it in the morning often do so after stopping into a coffee shop when one is nearby.<sup>66</sup>

Location information is also useful for apprehending suspects and solving crimes. The most famous example of the former might be the use of cell phone location tracking to find and apprehend infamous hacker Kevin Mitnick in 1995.<sup>67</sup> Location information is also useful in solving crimes *ex post*. In a 2004 murder trial prosecutors submitted evidence that a prepaid cell phone purchased by the defendant had been used to place calls in the vicinity of the killing.<sup>68</sup> More recently, cell phone location information was introduced in the trial of Scott Peterson for the murder of his wife.<sup>69</sup> Such use is dependent upon providers retaining location information. The government requires that banks retain account information and that telephone companies retain toll records for precisely this reason.<sup>70</sup> Although there is no general requirement that Internet Service Providers (ISPs) retain information, law enforcement can require that online records be preserved for individual accounts,<sup>71</sup> and there are allegations that the Department of Justice may push to require general retention.<sup>72</sup> Hence it would not be surprising if the

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66. There are statutory restrictions on marketing personally identifiable location information. See 47 U.S.C. § 222(c), (h)(1) (2000).

67. Balint, *supra* note 45. Mitnick has the dubious distinction of being the only hacker to make the FBI's most-wanted list. See *Hacker Gets Prison Term*, N.Y. TIMES, Aug. 10, 1999, at A15; Rene Sanchez, *Hacker Goes Underground*, CONTRA COSTA TIMES, Dec. 11, 1998, at B11. He is, naturally, now making money as a security consultant. See Mitnick Security Consulting, LLC Home Page, <http://www.mitnicksecurity.com> (last visited Feb. 20, 2006). For other examples of police catching crooks via cell phone location tracking see Recent Development, *Who Knows Where You've Been? Privacy Concerns Regarding the Use of Cellular Phones as Personal Locators*, 18 HARV. J.L. & TECH. 307, 310-11 (2004).

68. Laura Maggi, *Last 2 of 5 Killings Are Linked to Lee*, NEW ORLEANS TIMES-PICAYUNE, Oct. 11, 2004, at A1; Keith O'Brien, *Lee is Found Guilty in Second Murder*, NEW ORLEANS TIMES-PICAYUNE, Oct. 13, 2004, at A1. The evidence is an example of the location tracking inherent in cell phone telephony: the defendant's calls were transmitted via a cell tower in that location. *Id.*

69. Diana Walsh & Stacy Finz, *The Peterson Trial: Defendant Lied Often, Recorded Calls Show, Supporters Mislead About Whereabouts*, S.F. CHRON., Aug. 26, 2004, at B1.

70. See *supra* note 36.

71. 18 U.S.C. § 2703(f) (2000) (providing for record retention for a renewable ninety-day period).

72. See Declan McCullagh, *Your ISP as Net Watchdog*, CNET NEWS.COM, June 16, 2005, [http://news.com.com/2102-1028\\_3-5748649.html](http://news.com.com/2102-1028_3-5748649.html) (claiming the Department of Justice (DOJ) is shopping the idea of requiring that ISPs retain records of customer online activity). Even apart from privacy concerns is a practical concern, however. If significant data is retained for every user, the data would not only be expensive to retain but would be too large to search with existing technology. *Id.*

government similarly required or requested retention of cell phone location records.<sup>73</sup>

Thus cell phone location tracking is partly inherent in the technology, was encouraged by the desire for effective emergency service, and is likely to become ubiquitous on account of commercial opportunity. So we see that if we choose to carry an active cellular phone—and more than one-half of Americans do at times<sup>74</sup>—we voluntarily provide our location to our service provider. This is itself a great danger to privacy. An itinerary of every location to which one travels, combined with readily available mapping and satellite imaging technology, is quite invasive.<sup>75</sup> Not only is there no constitutional limitation on what the provider may do with this information, but there is no constitutional limitation on the provider voluntarily conveying the information to the government.<sup>76</sup> Here we are dependent upon legislation, and Congress

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73. One article reports that the FBI began pressuring carriers to maintain such records as early as 2001. *See* Said & Kirby, *supra* note 49.

74. *See* Press Release, U.S. Census Bureau, U.S. Census Bureau Daily Feature for June 15: Cell Phones (June 15, 2005), <http://press.arrivenet.com/politics/article.php/668485.html>; CTIA—The Wireless Association, Background on CTIA’s Semi-Annual Wireless Industry Survey, [http://www.ctia.org/research\\_statistics/index.cfm/AID/10030](http://www.ctia.org/research_statistics/index.cfm/AID/10030) (last visited Feb. 20, 2006) (estimating over 182 million subscribers at the end of 2004).

75. Google now provides both mapping and satellite photographs gratis via Google Maps. *See* Google Maps, <http://www.maps.google.com> (last visited Feb. 20, 2006). If you have yet to peruse satellite images of your home, favorite bookstore, and general vicinity, it is worth doing. For an even more impressive experience, see Google Earth, <http://earth.google.com> (last visited Feb. 20, 2006). Cell phones are not the only manner in which we disclose our location. For example, some travel in GPS-equipped vehicles, *see* OnStar Home Page, <http://www.onstar.com> (last visited Feb. 20, 2006), and others take advantage of electronic toll collection systems, *see* E-ZPass Home Page, <http://www.ezpass.com> (last visited Feb. 20, 2006).

76. The Fourth Amendment places no restriction on private actors. *See* *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (“This Court has . . . consistently construed [the Fourth Amendment] protection as proscribing only governmental action; it is wholly inapplicable ‘to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.’” (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting))). Other than a short-lived jurisprudence in Montana that excluded evidence obtained via invasive private searches, *see* *State v. Hyem*, 630 P.2d 202, 206-07, 210 (Mont. 1981), *overruled by* *State v. Long*, 700 P.2d 153 (Mont. 1985), the author is not aware of any state that has ever deviated from the Fourth Amendment in this regard. Although this is unfortunate from the perspective of meaningfully protecting privacy in the modern world, it is perhaps sensible as the exclusion of evidence from a trial is unlikely to have any effect on would-be private searchers. Even if such searches were amenable to civil suit based on a “violation,” private parties are less likely to know this jurisprudence than police. If so, exclusion of evidence would prevent convictions but would not protect privacy. Private action can of course be made explicitly criminal or tortious, and such liability is important today when so much information is in the hands of, or available to, third parties.

has sometimes responded.<sup>77</sup>

While Congress can limit the disclosure or use of location information, it can just as easily repeal any such limitation. The focus of this Article is on constitutional constraints. When the government *requests* information from a service provider, one would hope it would be constitutionally restrained. But according to the third-party doctrine, that the information was conveyed to the service provider (at least if for its use) means the government can access that information without any Fourth Amendment constraint.<sup>78</sup>

The close of 2005, however, brought a ray of light. In the course of published opinions interpreting statutory restrictions on government access to cell phone location information,<sup>79</sup> four federal magistrates addressed the application of the third-party doctrine.<sup>80</sup> In three of the opinions the discussion was dicta given the statutory holding,<sup>81</sup> and none of them presents more than a cursory constitutional analysis. Nevertheless the opinions demonstrate a hesitancy to apply the doctrine to this technology.

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77. See, e.g., 18 U.S.C. § 2702 (2000 & Supp. 2002) (restricting voluntary disclosure of information by an entity providing the public an electronic communications service (e.g., e-mail)), amended by 18 U.S.C.A. § 2702 (West Supp. 2005).

78. The recipient of information could have a reasonable expectation of privacy in that information (e.g. the recipient of a personal letter), but likely not when the information is routine business data. Moreover, a service provider has no interest in asserting any such legal interest.

79. Because Congress has never addressed this matter directly, the analysis requires a Herculean attempt to interpret the interstices of at least three complicated statutes, the Wiretap Act (or "Title III"), 18 U.S.C. §§ 2510-2522, the Stored Communications Act, 18 U.S.C. §§ 2701-2712, and the Pen Trap Statute, 18 U.S.C. §§ 3121-3127. There is also 18 U.S.C. § 3117(a), which concerns orders for "mobile tracking device[s]," and a potentially critical provision of the Communications Assistance for Law Enforcement Act, 47 U.S.C. § 1002. Given the complexity of the analysis there is no clear winner, but the Southern District of New York provides an impressive textualist analysis that ably presents the issues. See *In re Application for an Order for Disclosure*, 405 F. Supp. 2d 435, 437-49 (S.D.N.Y. 2005).

80. See *Application for an Order for Disclosure*, 405 F. Supp. 2d 435; *In re Application for Order of a Pen Register*, 402 F. Supp. 2d 597 (D. Md. 2005); *In re Application of the U.S. for an Order*, 396 F. Supp. 2d 294 (E.D.N.Y. 2005); *In re Application for Pen Register & Trap/Trace*, 396 F. Supp. 2d 747 (S.D. Tex. 2005).

81. The courts in the Southern District of Texas, the Eastern District of New York, and the District of Maryland held that as a statutory matter a court could not authorize the acquisition of cell phone location information absent a warrant supported by probable cause. See *Application for Order of a Pen Register*, 402 F. Supp. 2d at 598; *Application of the U.S. for an Order*, 396 F. Supp. 2d at 295; *Application for Pen Register & Trap/Trace*, 396 F. Supp. 2d at 765. The court in the Southern District of New York permitted acquisition via a more lenient court order provision of the Stored Communications Act. See *Application for an Order for Disclosure*, 405 F. Supp. 2d, at 449-50.

As the only judge to allow the government's request as a statutory matter, Magistrate Judge Gabriel Gorenstein of the Southern District of New York had to determine whether the Fourth Amendment restricted the requested access. In a straightforward application of the third-party doctrine, Judge Gorenstein noted that people choose to carry cell phones, and therefore held that pursuant to *Smith v. Maryland* there is no constitutional restraint.<sup>82</sup> His holding is not as broad as it might have been, however, because of the limited government request. Rather than request prospective real-time location information whenever the suspect's phone was activated, the government only requested the location of the nearest cell phone tower at the initiation and termination of every call.<sup>83</sup> Judge Gorenstein therefore did not address the constitutionality of continual real-time tracking.<sup>84</sup>

The other three magistrates opined in dicta that cell phone location might not be subject to the third-party doctrine,<sup>85</sup> relying in part on a 2004 opinion in the Sixth Circuit, *United States v. Forest*.<sup>86</sup> In *Forest* the court held that agents' supplementing visual surveillance of suspects traveling on public roadways with cell phone location tracking is not restricted by the Fourth Amendment.<sup>87</sup> The agents played an active role in generating the information, relying on data obtained by the suspect's service provider when agents dialed his phone but terminated the call before it would ring.<sup>88</sup> The Sixth Circuit hypothesized that this active role "might" remove the case from the typical third-party doctrine, but concluded that the suspect "had no legitimate expectation of privacy in his movements along public highways," however that information might be obtained.<sup>89</sup>

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82. *Application for an Order for Disclosure*, 405 F. Supp. 2d, at 449.

83. *Id.* at 436-37.

84. *Id.* at 449.

85. See *Application for Order of a Pen Register*, 402 F. Supp. 2d at 605 n.12; *Application of the U.S. for an Order*, 396 F. Supp. 2d at 323-24; *Application for Pen Register & Trap/Trace*, 396 F. Supp. 2d at 757.

86. 335 F.3d 942 (6th Cir. 2004), *vacated and remanded on other grounds sub nom. Garner v. United States*, 125 S. Ct. 1050 (2005).

87. *Id.* at 951-52.

88. *Id.* at 947-48.

89. *Id.* at 951. The Supreme Court has been inconsistent in articulating whether the manner or means of obtaining information is relevant if that information could be obtained constitutionally. See *Kyllo v. United States*, 533 U.S. 27, 35 n.2 (2001) (implying manner *is* determinative where viewing snow melt is permissible but thermal imaging is not, and expressly stating that "[t]he fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment"); *Florida v. Riley*, 488 U.S. 445, 451 (1989) (plurality opinion) (implying manner *is* determinative where helicopter surveillance is permissible at 400 feet but airplane surveillance would not be); *Oliver v. United States*, 466 U.S. 170, 179 (1984)



The agents' active role in *Forest* might be suspect as a matter of Fourth Amendment law, but the government was not requesting similar authority in 2005. Instead the four magistrates were presented with a traditional assertion of the third-party doctrine: a request to obtain information that is independently provided to a third party, for its use, irrespective of government conduct. In the District of Maryland the government requested prospective real-time location tracking of a suspect's cell phone whenever the phone was turned on.<sup>90</sup> In a footnote, Magistrate Judge James Bredar rejected the government's attempt to analogize the case to *Smith v. Maryland*:

Cell site information is not affirmatively and actively conveyed by the phone's possessor; the cell phone transmits the information automatically without the possessor's awareness and possibly without his knowledge. . . .

. . . Contrary to the government's suggestion, I do not believe most cell phone possessors realize they can be located within 100-300 meters any time their phone is turned on.<sup>91</sup>

Judge Bredar's empirical claim seems unlikely to withstand critical analysis. Even putting aside the significant publicity surrounding cell phone location tracking for emergency services, traffic monitoring, and location-based technologies, it seems unlikely that one could realize he or she is able to receive cell phone calls wherever located without recognizing that the service provider must know his or her location. More importantly, a "knowing" standard would not well serve the Fourth Amendment. Although under an empirical interpretation of "reasonable expectation of privacy" knowledge could be deemed controlling, that would mean that the better educated we become as to how technologies function, the fewer rights we would enjoy. It may be said that "ignorance is bliss," but it does not commend itself as a constitutional standard. If Judge Bredar's claim is that the third-party doctrine should only apply to information we *want* transmitted to third parties, even if other information *must* be transmitted to those same parties in order for them to provide the desired service, it is without legal support and seems an unhelpful distinction. Most of us probably no more want the phone numbers we dial going to our service provider than our location. It has never been necessary that one *desire* information be known by a third party in any meaningful sense, but rather merely that one recognize a

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(implying manner is *not* determinative where ground-based intrusion into open fields is permissible because same information could be obtained via flyover); *Katz v. United States*, 389 U.S. 347, 352 (1967) (implying manner *is* determinative where lip reader could potentially have obtained same information through phone booth glass).

90. *Application for Order of a Pen Register*, 402 F. Supp. 2d at 598.

91. *Id.* at 605 n.12.

third party is provided the information and, perhaps, that it must be utilized to complete the requested service. Perhaps recognizing the weakness of these arguments, Judge Bredar concluded with a decidedly normative, if question-begging, claim: “Moreover, cell phone possessors’ expectation of privacy, at least when they are in a non-public place, seems altogether reasonable. Those who choose to carry a cell phone, which has been turned on, cannot reasonably be deemed to have consented to the tracking of their movement by the government.”<sup>92</sup>

In the Eastern District of New York and the Southern District of Texas the government only requested location information at call origination and termination and, if reasonably available, during calls.<sup>93</sup> Both courts addressed the constitutionality of such access in dicta, the Eastern District of New York adopting the analysis of Magistrate Judge Stephen Smith of the Southern District of Texas.<sup>94</sup> After making an argument similar to that just addressed, Judge Smith noted that the United States Code restricts the disclosure of customer location information.<sup>95</sup> Therefore,

location information is a special class of customer information, which can only be used or disclosed in an emergency situation, absent express prior consent by the customer. Based on this statute, a cell phone user may very well have an objectively reasonable expectation of privacy in his call location information.<sup>96</sup>

While this has an intuitive appeal, neither court addressed significant Supreme Court precedent to the contrary. There is no Fourth Amendment protection for garbage left for collection despite typical municipal laws forbidding inspection of that garbage.<sup>97</sup> There is no Fourth Amendment protection for bank records despite laws restricting their disclosure.<sup>98</sup> And there is no Fourth Amendment protection for open fields despite the law of criminal trespass.<sup>99</sup> The Supreme Court has consistently applied the third-party doctrine as a “trump” over other legal restrictions.

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92. *Id.* Perhaps it is difficult *not* to beg the question when opining on what is “reasonable.”

93. *In re* Application of the U.S. for an Order, 396 F. Supp. 2d 294, 295 (E.D.N.Y. 2005); *In re* Application for Pen Register & Trap/Trace, 396 F. Supp. 2d 747, 748-49 (S.D. Tex. 2005).

94. *Application of the U.S. for an Order*, 396 F. Supp. 2d at 322-23.

95. *Application for Pen Register & Trap/Trace*, 396 F. Supp. 2d at 757.

96. *Id.*

97. *See* California v. Greenwood, 486 U.S. 35, 52 (1988) (Brennan, J., dissenting).

98. *See* United States v. Miller, 425 U.S. 435, 443 (1976).

99. *See* Oliver v. United States, 466 U.S. 170, 183-84 (1984); *id.* at 190-91 (Marshall, J., dissenting).

While their constitutional analysis is therefore inadequate, the decisions demonstrate judges are struggling to find a limitation to the third-party doctrine given its implications for modern technologies. This may be important, because presumably they (and hopefully their colleagues) will seriously consider more developed arguments for limiting the doctrine when those arguments reach their courtrooms. Any small fracture in the monolithic federal third-party doctrine is welcome, and underscores the need for commentators and litigants to articulate and advocate limitations to the doctrine like that described in later sections of this Article.

#### IV. DATA AGGREGATION AND MINING

Cell phone location data is merely one example of the myriad of information we provide to others. The motor vehicle department knows our basic physical characteristics and those of the vehicles we drive, and via traffic cameras or electronic toll tags it may know characteristics of our travel. Our grocery store coaxes us into providing a database of every purchase we make via “discount cards,” and our airline and hotel chain of choice know where we visit. For those of us who have abandoned cash in favor of “plastic,” our credit and debit cards provide a virtual dossier of our daily activities.<sup>100</sup> Our health care provider, insurer, and pharmacy know what drugs we take; our telephone companies know who we call, when we call, and from where; and our Internet service provider knows what websites we visit, what files we download, and who we interact with via e-mail or instant messaging. Our television provider may know the content we watch, and other content subscribers such as magazine distributors and libraries know what we like to read. Local governments compile data on our homes and our interactions with the law, including any arrests, convictions, or court judgments. And our employers, lenders, and schools gather information relevant to their purposes.

Although the federal third-party doctrine provides no constitutional restraint on law enforcement accessing this potpourri of information, the cost of tracking down significant amounts of information from many different parties provides a disincentive that naturally limits that access. It is a significant concern, then, when data from disparate sources is gathered in one place.

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100. One enterprising author has written a book chronicling her daily activities based on more than a decade of credit card statements. The book, by Amy Borkowsky, is entitled *Statements: True Tales of Life, Love, and Credit Card Bills*. See Susanna Schrobsdorff, *Of Love and Money*, NEWSWEEK, Aug. 10, 2005, <http://www.msnbc.msn.com/id/8890396/site/newsweek>.

Certainly the most ambitious, if not infamous, data aggregation and mining project was the Pentagon's Total Information Awareness (TIA) program. The goal was to amalgamate a mammoth database of existing commercial and governmental information and to develop computing capability sufficient to analyze that immense amount of data in order to spot suspicious behavior.<sup>101</sup> Although the project was cancelled after drawing sustained critique for its privacy implications,<sup>102</sup> various arms of the federal government continue to engage in data aggregation and mining.<sup>103</sup>

States have also demonstrated an interest in such projects, although privacy concerns and general budget shortfalls have also slowed their development. At one time the federal government had pledged to support, and sixteen states had signed onto, a project named the Multistate Anti-Terrorism Information Exchange (MATRIX).<sup>104</sup> The aim was similar to that of TIA, this time combining commercial and state databases and using data mining software written by Seisint, now owned by LexisNexis.<sup>105</sup> Although only a handful of states remain in the program, its custom-designed software continues to be used to sort through the billions of records in its database.<sup>106</sup>

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101. John Markoff, *Pentagon Plans a Computer System that Would Peek at Personal Data of Americans*, N.Y. TIMES, Nov. 9, 2002, at A12; John Markoff & John Schwartz, *Many Tools of Big Brother Are Now Up and Running*, N.Y. TIMES, Dec. 23, 2002, at C1; Robert O'Harrow, Jr., *U.S. Hopes To Check Computers Globally*, WASH. POST, Nov. 12, 2002, at A4.

102. Carl Hulse, *Congress Shuts Pentagon Unit Over Privacy*, N.Y. TIMES, Sept. 26, 2003, at A20.

103. U.S. GEN. ACCOUNTING OFFICE, GAO-04-548, DATA MINING: FEDERAL EFFORTS COVER A WIDE RANGE OF USES (2004), available at <http://www.gao.gov/new.items/d04548.pdf>; Audrey Hudson, *Government's Pursuit of Personal Data Lives On*, WASH. TIMES, Mar. 1, 2004, at A1; Eric Lichtblau, *Behind-the-Scenes Battle on Tracking Data Mining*, N.Y. TIMES, July 24, 2005, at A16; *Sampling Finds Federal Data Mining Fails To Assure Privacy Protections*, SAN JOSE MERCURY NEWS, Aug. 29, 2005, 2005 WLNR 13583359.

104. See John Schwartz, *Privacy Fears Erode Support For a Network To Fight Crime*, N.Y. TIMES, Mar. 15, 2004, at C1.

105. *Id.*; Heather Timmons, *Security Breach at LexisNexis Now Appears Larger*, N.Y. TIMES, Apr. 13, 2005, at C7; see also LexisNexis Home Page, <http://www.lexisnexis.com> (last visited Feb. 22, 2006); Seisint Home Page, <http://www.seisint.com> (last visited Feb. 22, 2006). Data mining, also known as knowledge discovery in databases, is technically the extraction of *previously unknown* information from existing data, but the term is often used to refer to products that merely present existing data in a useable form. See Webopedia.com, *Data Mining*, [http://www.webopedia.com/TERM/d/data\\_mining.html](http://www.webopedia.com/TERM/d/data_mining.html) (last visited Feb. 20, 2006). For reasons of readability this Article sometimes uses this common, though technically incorrect, usage.

106. See Schwartz, *supra* note 104. The program was also designed to identify potential terrorists based on that data, but is currently not being used in that manner. *Database Tagged 120,000 as Possible Terrorist Suspects*, N.Y. TIMES, May 21, 2004, at A16.

Whether or not such government projects ultimately attain their envisioned scope, private data aggregators (sometimes also termed “data brokers” or “information brokers”) provide similar services.<sup>107</sup> Companies like ChoicePoint<sup>108</sup> and LexisNexis have aggregated billions of pieces of public and nonpublic data in order to provide information to law enforcement, employers, or other interested parties.<sup>109</sup> And smaller, more limited services are also becoming increasingly common. One such service, MyPublicInfo, is available online and, for a modest fee, claims to search through over ten billion public records to produce what it terms a “public information profile,” or “PIP.”<sup>110</sup> A PIP includes information ranging from address history and real estate holdings to criminal records and professional licenses.<sup>111</sup>

Such extensive databases represent the apex of the third-party doctrine. Not only can the government access information provided to another, but it can almost instantaneously access vast sources of information provided to unrelated third parties over long periods of time. Each bit of information once given for a singular purpose is now obtained for an unrelated, unexpected, and typically undesired purpose. In the somewhat dystopian, yet humorous, words of a justice of the Montana supreme court:

I know that the notes from the visit to my doctor’s office may be transcribed in some overseas country under an out-sourcing contract by a person who couldn’t care less about my privacy. I

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107. See Tom Zeller Jr., *U.P.S. Loses a Shipment of Citigroup Client Data*, N.Y. TIMES, June 7, 2005 at C1 [hereinafter Zeller, *U.P.S. Loses Shipment*]. Several highly publicized data breaches at such aggregators and banks have spurred congressional hearings that may lead to further regulation of this industry. See Tom Zeller Jr., *Investigators Argue for Access to Private Data*, N.Y. TIMES, Mar. 21, 2005, at C1.

108. Choice Point Home Page, <http://www.choicepoint.com> (last visited Feb. 20, 2006).

109. Tom Zeller Jr., *How Billions of Pieces of Information are Bought and Sold*, N.Y. TIMES, Mar. 17, 2005, at C8; Zeller, *U.P.S. Loses Shipment*, *supra* note 107.

110. MyPublicInfo Home Page, <http://www.mypublicinfo.com> (follow “Learn More” hyperlink) (last visited Feb. 20, 2006); see also *Identity Theft: A PIP of Progress*, ECONOMIST, July 16, 2005, at 59, 59.

111. MyPublicInfo Home Page, *supra* note 110. Although MyPublicInfo naturally encourages the purchase of one’s \$79.95 PIP with customer testimonials, the author’s admirably lengthy 210-page PIP was even more boring than his actual life—there was no “felony on my records,” “early id theft” was not “nipped in the bud,” and I am not “forever indebted to [their] service.” See MyPublicInfo Home Page, PIP Testimonials, <http://www.mypublicinfo.com> (last visited Feb. 20, 2006). Of course this is, like not having a cavity, a good thing. It is also worth noting that companies providing an extensive range of services, such as Google, themselves gather an enormous amount of disparate data. See Anick Jesdanun, *As Google Grows, So Does Privacy Fear*, CONTRA COSTA TIMES, July 20, 2005, at F4. For an interesting article describing what a group of graduate students were able to aggregate for just fifty dollars, see Tom Zeller Jr., *Personal Data for the Taking*, N.Y. TIMES, May 18, 2005, at C1.

know that there are all sorts of businesses that have records of what medications I take and why. I know that information taken from my blood sample may wind up in databases and be put to uses that the boilerplate on the sheaf of papers I sign to get medical treatment doesn't even begin to disclose. I know that my insurance companies and employer know more about me than does my mother. I know that many aspects of my life are available on the Internet. Even a black box in my car—or event data recorder as they are called—is ready and willing to spill the beans on my driving habits, if I have an event—and I really trusted that car, too.

....

In short, I know that my personal information is recorded in databases, servers, hard drives and file cabinets all over the world. I know that these portals to the most intimate details of my life are restricted only by the degree of sophistication and goodwill or malevolence of the person, institution, corporation or government that wants access to my data.

....

I don't like living in Orwell's 1984; but I do. And, absent the next extinction event or civil libertarians taking charge of the government (the former being more likely than the latter), the best we can do is try to keep [Uncle] Sam and the sub-Sams on a short leash.<sup>112</sup>

Unfortunately the federal doctrine, unlike that of some of the states, provides no leash at all.

## V. STATE CONSTITUTIONAL JURISPRUDENCE

Each state has a constitutional analog to the Federal Fourth Amendment, and some have an explicit privacy provision that has no federal counterpart.<sup>113</sup> It wasn't until the 1930s, however, that state constitutional provisions began to play any significant role in American constitutional jurisprudence, and they didn't play a prominent role until the 1970s.<sup>114</sup> Since that time a number of states have chosen to diverge from the Supreme Court's interpretation of the Fourth Amendment.

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112. *State v. 1993 Chevrolet Pickup*, 2005 MT 180, ¶¶ 31, 33, 35, 328 Mont. 10, ¶¶ 31, 33, 35, 116 P.3d 800, ¶¶ 31, 33, 35 (Nelson, J., concurring). This case is described in more detail in Part VI of this Article.

113. See *infra* Appendix. Although it can be instructive to compare the texts of the various provisions, it is not worth breaking up the flow of the Article to accommodate the lengthy list, and the individual explanatory footnotes are themselves already rather lengthy.

114. See 1 LAFAVE ET AL., *supra* note 11, § 2.11(a).

The following tables indicate the position of each state with respect to the federal third-party doctrine. Table one includes all fifty states, but without any supporting documentation. Tables two through five include supporting footnotes directing the reader to the state's most relevant decisions.<sup>115</sup> While it is sometimes obvious that a state rejects or adopts the federal doctrine, in other instances there is little caselaw from which to make an assessment.<sup>116</sup> Hence the tables include some measure of uncertainty. Moreover, there is ambiguity within the doctrine itself. A state that has diverged with respect to canine sniffs or garbage pulls will not necessarily diverge with respect to more traditional information in the hands of third parties. The footnotes allow the reader to parse each state's jurisprudence and appreciate the gaps therein.

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115. Although the references for each state vary according to what caselaw is available, the author looked for state responses to, inter alia, *Smith v. Maryland*, 442 U.S. 735 (1979) (finding no reasonable expectation of privacy (REP) in telephone numbers dialed); *United States v. Miller*, 425 U.S. 435 (1976) (finding no REP in bank records); *California v. Greenwood*, 486 U.S. 35 (1988) (finding no REP in garbage left for collection); *United States v. Knotts*, 460 U.S. 276 (1983) (finding no REP in vehicle location); and *United States v. Place*, 462 U.S. 696 (1983) (holding that a canine sniff is not a search).

116. A number of factors might contribute to this lack of caselaw. First, defense counsel might do an inadequate job of independently arguing the state constitutional ground. Although ideally this would not happen, arguing state grounds can be a substantial task. See, e.g., *State v. Johnson*, 909 P.2d 293, 301 (Wash. 1996) (potentially requiring briefing on six complex factors); *State v. Jackson*, 76 P.3d 217, 222 (Wash. 2003) (no longer requiring such briefing once it became "settled" that the state analog is more protective). Second, some states have traditionally interpreted their state analog in lockstep with the Fourth Amendment with little to no analysis, leaving one to search in vain for independent analysis or even a statement that the state constitution will be interpreted in conformity with the Fourth Amendment. Third, some issues might not arise as constitutional issues either because the state strictly governs the relevant conduct by statute, because the police consistently utilize a protective procedure as a matter of custom or good policy, or because the police simply have not used a given method of investigation (or at least have not relied upon it at trial).

TABLE 1 50 STATE OVERVIEW	
<i>States That Reject the Federal Third-Party Doctrine</i>	
California	Colorado
Florida	Hawaii
Idaho	Illinois
Montana	New Jersey
Pennsylvania	Utah
Washington	
<i>States That Might Reject the Federal Third-Party Doctrine</i>	
Alaska	Arkansas
Indiana	Massachusetts
Minnesota	New Hampshire
Oregon	South Dakota
Texas	Vermont
<i>States That Provide No Reason To Believe They Will Reject the Federal Third-Party Doctrine, but That Sometimes Diverge from the Fourth Amendment</i>	
Arizona	Connecticut
Delaware	Louisiana
Michigan	Nevada
New Mexico	New York
Ohio	Tennessee
Wyoming	
<i>States That Have Not Diverged from the Substantive Fourth Amendment<sup>117</sup></i>	
Alabama	Georgia
Iowa	Kansas
Kentucky	Maine
Maryland	Mississippi
Missouri	Nebraska
North Carolina	North Dakota
Oklahoma	Rhode Island
South Carolina	Virginia
West Virginia	Wisconsin

117. This category includes states that diverge only as to remedy. See *infra* note 150.



TABLE 2
STATES THAT REJECT THE FEDERAL THIRD-PARTY DOCTRINE
California <sup>118</sup>
Colorado <sup>119</sup>

118. California has adopted *Katz's* REP criterion, *see* *People v. Chapman*, 679 P.2d 62, 66 (Cal. 1984), but was a leader in rejecting the federal third-party doctrine. The pre-*Miller* decision of *Burrows v. Superior Court*, 529 P.2d 590, 593 (Cal. 1974) (holding one retains a REP in bank records), was adopted by Justice Brennan in dissent in *Miller* and continues to be one of the most persuasive opinions in jurisdictions deciding to reject *Miller*. *See Miller*, 425 U.S. at 447-48 (Brennan, J., dissenting). California likewise diverges by finding a REP in telephone numbers dialed and garbage left for collection. *See People v. Blair*, 602 P.2d 738, 746 (Cal. 1979) (en banc) (telephone); *People v. Krivda*, 486 P.2d 1262, 1268 (Cal. 1971) (en banc) (garbage), *vacated*, 409 U.S. 33 (1972); *People v. Edwards*, 458 P.2d 713, 718 (Cal. 1969) (en banc) (garbage); *People v. Larkin*, 239 Cal. Rptr. 760, 761-62 (Ct. App. 1987) (telephone).

A 1982 constitutional amendment eliminated suppression of evidence as a remedy for state constitutional violations. *See* CAL. CONST. art. I, § 28(d). Thus evidence will not be suppressed unless mandated by the Federal Fourth Amendment. *See People v. Lance*, 694 P.2d 744, 749 (Cal. 1985) (en banc). The amendment did not, however, alter substantive California constitutional law, and civil remedies are available for violations thereof. *Id.* at 755-56; CAL. CIV. CODE § 52.1 (West Supp. 2005).

119. Colorado has adopted *Katz's* REP criterion, *Charnes v. DiGiacomo*, 612 P.2d 1117, 1120 (Colo. 1980) (en banc); *People v. Dunkin*, 888 P.2d 305, 307 (Colo. Ct. App. 1994), but rejects the federal third-party doctrine as it applies to electronic tracking, *People v. Oates*, 698 P.2d 811, 815-18 (Colo. 1985) (en banc), telephone numbers dialed and toll records, *People v. Timmons*, 690 P.2d 213, 215 (Colo. 1984) (en banc); *People v. Corr*, 682 P.2d 20, 26-27 (Colo. 1984) (en banc); *People v. Sporleder*, 666 P.2d 135, 144 (Colo. 1983) (en banc), and bank records, *People v. Lamb*, 732 P.2d 1216, 1220-21 (Colo. 1987) (en banc); *Benson v. People*, 703 P.2d 1274, 1278 (Colo. 1985); *Charnes*, 612 P.2d at 1121. The court agrees, however, that one retains no REP in garbage left for collection because, unlike telephone and bank records, people know *members of the public* might snoop in their garbage. *People v. Hillman*, 834 P.2d 1271, 1276-77 (Colo. 1992) (en banc). There is also no protection for power consumption records because they do not reveal any discrete information about, or intimate details of, a customer's activities. *Dunkin*, 888 P.2d at 308. Unlike the federal doctrine, a canine sniff of objects is sometimes a search requiring reasonable suspicion. *See People v. Ortega*, 34 P.3d 986, 991 (Colo. 2001) (en banc) (discussing sniff of luggage); *People v. May*, 886 P.2d 280, 282 (Colo. 1994) (holding sniff of mail requires reasonable suspicion); *People v. Boylan*, 854 P.2d 807, 812 (Colo. 1993) (en banc) (same); *People v. Wieser*, 796 P.2d 982, 985 (Colo. 1990) (en banc) (holding sniff of exterior of storage locker from public walkway does not constitute a search); *People v. Unruh*, 713 P.2d 370, 377-79 (Colo. 1986) (en banc) (holding sniff of safe taken from home by burglar requires reasonable suspicion). Thus in Colorado one retains a REP in bodily information not discernable by ordinary human senses. *See People v. Santistevan*, 715 P.2d 792, 794-95 (Colo. 1986) (en banc) (subjecting hands to an ultraviolet lamp constitutes a search).

Despite the many positive developments in Colorado there is one bit of troubling dicta:

Given the rapid advances in computer and telecommunications technology, a person's reasonable expectations of privacy in telephone and bank records may have changed since we decided *Sporleder* and *DiGiacomo*, so that the decisions

Florida <sup>120</sup>
Hawaii <sup>121</sup>

may be subject to challenge. However, in the narrow context of this case, that question is not properly before the court.

People v. Mason, 989 P.2d 757, 759 n.2 (Colo. 1999).

120. Historically Florida interpreted its state analog to provide greater protection than the Federal Fourth Amendment, but a 1982 constitutional amendment requires that the state provision “shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.” FLA. CONST. art. I, § 12. However, via a prior 1980 amendment, Floridians have an explicit constitutional right of privacy, *id.* § 23, and the courts have used this provision to recognize and protect an expectation of privacy in bank and telephone records, *Shaktman v. State*, 553 So. 2d 148, 151-52 (Fla. 1989) (recognizing a REP in telephone numbers dialed and requiring reasonable suspicion for installation of a pen register); *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985) (recognizing a REP in bank records but allowing access via subpoena without notice).

The Florida jurisprudence is certainly not a model of clarity, however. Courts sometimes imply that the privacy amendment should be “trumped” where the later-in-time conformity amendment is applicable, *State v. Hume*, 512 So. 2d 185, 187-88 (Fla. 1987); *Limbaugh v. State*, 887 So. 2d 387, 391-93 (Fla. Dist. Ct. App. 2004), *review denied*, 903 So. 2d 189 (Fla. 2005), and the state supreme court has given short shrift to the relationship between the sections, *Shaktman*, 553 So. 2d at 151 n.8; *see also* Thomas C. Marks, Jr., *Now You See It, Now You Don't, Privacy and Search and Seizure in the Florida Constitution: Trying To Make Sense Out of a Tangled Mess*, 67 ALB. L. REV. 691, 692 (2004). In several instances the appellate courts have followed the conformity amendment without considering whether the privacy provision would grant greater protection. *See State v. Rabb*, No. 4D02-5139, 2005 WL 2218980, at \*3 (Fla. Dist. Ct. App. Sept. 14, 2005) (canine sniff); *State v. Fisher*, 591 So. 2d 1049, 1050 (Fla. Dist. Ct. App. 1991) (garbage left for collection); *Johnson v. State*, 492 So. 2d 693, 693 (Fla. Dist. Ct. App. 1986) (electronic tracking); *Stone v. State*, 402 So. 2d 1330, 1333 (Fla. Dist. Ct. App. 1981) (garbage left for collection).

121. Hawaii has adopted *Katz*'s REP criterion, *State v. Tau'a*, 49 P.3d 1227, 1237 (Haw. 2002), but has diverged from the federal doctrine by finding a REP in telephone numbers dialed, *State v. Rothman*, 779 P.2d 1, 7-8 (Haw. 1989). The opinion contains little analysis, however, and a year later the same court found no REP in bank records without even mentioning this divergence. *State v. Klattenhoff*, 801 P.2d 548, 552 (Haw. 1990). Neither opinion cites *State v. Tanaka*, 701 P.2d 1274, 1276 (Haw. 1985), an earlier decision finding a REP in garbage left for collection. Hawaii's jurisprudence regarding canine sniffs is also rather unique, holding that canine sniffs generally are not searches for purposes of the Hawaii Constitution but nonetheless requiring they satisfy a reasonableness balance. *State v. Snitkin*, 681 P.2d 980, 983-84 (Haw. 1984); *State v. Groves*, 649 P.2d 366, 371-73 (Haw. 1982). Despite this lack of clarity, the court has at times used strong language to advocate privacy:

Our willingness to afford greater protection of individual privacy rights than is provided on the federal level arises from “our view [that] the right to be free of ‘unreasonable’ searches and seizures under article I, section 5 of the Hawai[i] Constitution is enforceable by a rule of reason which *requires that governmental intrusions into the personal privacy of citizens of this State be no greater in intensity than absolutely necessary.*”

Idaho <sup>122</sup>
Illinois <sup>123</sup>
Montana <sup>124</sup>

State v. Lopez, 896 P.2d 889, 901-02 (Haw. 1995) (alteration in original) (footnote omitted) (quoting State v. Kaluna, 520 P.2d 51, 58-59 (Haw. 1974)) (rejecting federal doctrine of apparent authority).

122. Idaho has adopted *Katz*'s REP criterion, but has diverged from federal doctrine by finding a REP in telephone numbers dialed. State v. Thompson, 760 P.2d 1162, 1163-65 (Idaho 1988). However, Idaho provides no protection for garbage left for collection. State v. McCall, 26 P.3d 1222, 1224 (Idaho 2001); State v. Donato, 20 P.3d 5, 10 (Idaho 2001). The state does not appear to have decided whether a customer retains a REP in bank records. See State v. Patterson, 87 P.3d 967, 973 (Idaho Ct. App. 2003) (assuming there is a REP based on party stipulation). In the course of denying protection for power consumption records, however, an appellate court tipped its hand by noting that such records, "unlike telephone or bank records, do not reveal discrete information about [the defendant's] activities." State v. Kluss, 867 P.2d 247, 254 (Idaho Ct. App. 1993).

123. Illinois has adopted *Katz*'s REP criterion, but diverges from federal doctrine by finding a REP in telephone and bank records. People v. DeLaire, 610 N.E.2d 1277, 1282 (Ill. App. Ct. 1993) (telephone records); People v. Jackson, 452 N.E.2d 85, 88-89 (Ill. App. Ct. 1983) (bank records). However, there is no REP in garbage left for collection. People v. Stage, 785 N.E.2d 550, 552 (Ill. App. Ct. 2003). In 2000 an appellate court held that a canine sniff was a search requiring reasonable suspicion under the Illinois Constitution, but the Supreme Court affirmed on other grounds. People v. Cox, 739 N.E.2d 1066, 1073 (Ill. App. Ct. 2000), *aff'd*, 782 N.E.2d 275 (Ill. 2002). In 2003 the Supreme Court of Illinois did consider a canine sniff, holding that a sniff of the exterior of a vehicle during a routine traffic stop violates the Fourth Amendment. See People v. Caballes, 802 N.E.2d 202, 203, 205 (Ill. 2003), *vacated*, 125 S. Ct. 834 (2005). Given that the United States Supreme Court has vacated this holding via *Illinois v. Caballes*, 125 S. Ct. 834, 838 (2005), perhaps the Illinois courts will take this opportunity to decide the issue under the state constitution.

124. Montana has adopted *Katz*'s REP criterion, State v. Scheetz, 950 P.2d 722, 724-25 (Mont. 1997), and agrees with federal doctrine that one has no REP in telephone numbers dialed, Hastetter v. Behan, 639 P.2d 510, 511-12 (Mont. 1982). The state diverges, however, with respect to information deemed more private, such as medical records, State v. Nelson, 941 P.2d 441, 448-50 (Mont. 1997) (medical records), and employment records, Missoulain v. Bd. of Regents of Higher Educ., 675 P.2d 962, 970 (Mont. 1984) (employment records); Mont. Human Rights Div. v. City of Billings, 649 P.2d 1283, 1287-88 (Mont. 1982) (same). Moreover, in Montana the state analog restricts police even when there is no REP. Thus although a Montanan retains no REP in garbage left for collection, police still must have reasonable suspicion before they can search such garbage. State v. 1993 Chevrolet Pickup, 2005 MT 180, ¶¶ 18-19, 328 Mont. 10, ¶¶ 18-19, 116 P.3d 800, ¶¶ 18-19. A canine sniff of checked luggage is not a search under the state analog, but a sniff of a vehicle exterior or of any other container still in a suspect's control is permissible only if supported by reasonable suspicion. State v. Tackitt, 2003 MT 81, ¶ 31, 315 Mont. 59, ¶ 31, 67 P.3d 295, ¶ 31 (vehicle exterior); *Scheetz*, 950 P.2d at 727 (checked luggage). Swabbing a hand to obtain a blood sample is a search for purposes of the Montana Constitution, and the state high court has implied that shining an ultraviolet light on a hand is likewise a search. See State v. Hardaway, 2001 MT 252, ¶¶ 22-23, 307 Mont. 139, ¶¶ 22-23, 36 P.3d 900, ¶¶ 22-23.

New Jersey <sup>125</sup>
Pennsylvania <sup>126</sup>
Utah <sup>127</sup>
Washington <sup>128</sup>

125. New Jersey has adopted a modified version of *Katz*'s REP criterion, *State v. Hemepele*, 576 A.2d 793, 801-02 (N.J. 1990), but diverges from federal doctrine by finding a REP in telephone numbers dialed, *see State v. Mollica*, 554 A.2d 1315, 1322 (N.J. 1989) (telephone numbers dialed from motel room); *State v. Hunt*, 450 A.2d 952, 955-56 (N.J. 1982) (telephone numbers dialed), bank records, *see State v. McAllister*, 875 A.2d 866, 875 (N.J. 2005) (bank records), and garbage left for collection, *see Hemepele*, 576 A.2d at 810 (garbage). *Hemepele* is an articulate and well-reasoned opinion that has become the standard for those states diverging from the federal rule for garbage. A New Jersey appellate court recently held that a utility customer has a REP in power consumption records. *State v. Domicz*, 873 A.2d 630, 644 (N.J. Super. Ct. App. Div. 2005). The opinion in *Domicz* provides a nice summary of New Jersey's relatively frequent departures from the Fourth Amendment. *Id.* at 642-43. An appellate court has also, however, agreed with federal doctrine that a canine sniff of luggage does not constitute a search. *See State v. Cancel*, 607 A.2d 199, 203 (N.J. Super. Ct. App. Div. 1992).

126. Pennsylvania has adopted *Katz*'s REP criterion, *Commonwealth v. Rekasie*, 778 A.2d 624, 628-29 (Pa. 2001), but diverges from federal doctrine by finding a REP in telephone numbers dialed and bank records, *Commonwealth v. Melilli*, 555 A.2d 1254, 1258-59 (Pa. 1989) (telephone numbers); *Commonwealth v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979) (bank records); *see also Rekasie*, 778 A.2d at 629-30 (explaining this divergence). According to the Pennsylvania supreme court a bank customer does not, however, have a REP in his or her name and address because it is impossible to live in modern times "without repeated disclosure of [this information], both privately and publicly." *Commonwealth v. Duncan*, 817 A.2d 455, 465-66 (Pa. 2003). Likewise, an insured does not have a REP in information provided to his or her insurance company pursuant to an arson investigation because the relationship is adversarial. *Commonwealth v. Efaw*, 774 A.2d 735, 738-39 (Pa. 2001). The state constitution forbids warrantless one-party consensual monitoring of a face-to-face conversation taking place in a suspect's home, but not of telephone conversations or of face-to-face conversations in other locations. *See Rekasie*, 778 A.2d at 631-32 (allowing such monitoring of telephone conversation); *Commonwealth v. Alexander*, 708 A.2d 1251, 1257-58 (Pa. 1998) (plurality opinion) (allowing such monitoring of face-to-face conversation taking place in defendant-physician's medical office); *Commonwealth v. Brion*, 652 A.2d 287, 289 (Pa. 1994) (forbidding such monitoring of face-to-face conversation in home); *Commonwealth v. Bender*, 811 A.2d 1016, 1023 (Pa. Super. Ct. 2002) (allowing such monitoring of face-to-face conversation in vehicle). Pennsylvania diverges from federal doctrine with respect to canine sniffs, requiring reasonable suspicion for a sniff of an object or location and probable cause for a sniff of a person. *Commonwealth v. Rogers*, 849 A.2d 1185, 1190-91 (Pa. 2004).

127. Utah has adopted *Katz*'s REP criterion, but, in its only definite departure from the Fourth Amendment, has found a REP in bank records. *State v. Thompson*, 810 P.2d 415, 416 n.2, 418 (Utah 1991). Utahans retain no REP in garbage left for collection, and Utah is hesitant to depart from settled Federal Supreme Court jurisprudence. *State v. Jackson*, 937 P.2d 545, 546, 549 (Utah Ct. App. 1997); *see also State v. Poole*, 871 P.2d 531, 536 (Utah 1994) (Stewart, J., concurring).

128. Washington's analog differs markedly from the Fourth Amendment, and therefore the courts don't apply *Katz*'s REP criterion. *See State v. Myrick*, 688 P.2d 151,

<p>TABLE 3</p> <p>STATES THAT MIGHT REJECT THE FEDERAL THIRD-PARTY DOCTRINE</p>
Alaska <sup>129</sup>
Arkansas <sup>130</sup>

153-54 (Wash. 1984) (en banc). Instead Washington evaluates whether challenged government conduct constitutes an unreasonable intrusion into a defendant's "private affairs." *Id.* Washington diverges from federal doctrine on a number of issues, restricting government access to garbage placed for collection, *see* *State v. Boland*, 800 P.2d 1112, 1116-17 (Wash. 1990) (en banc) (garbage), vehicle location information, *see* *State v. Jackson*, 76 P.3d 217, 224 (Wash. 2003) (en banc) (location information via GPS tracking device on vehicle), and telephone records, *see* *State v. Gunwall*, 720 P.2d 808, 813 (Wash. 1986) (en banc) (telephone records); *State v. Butterworth*, 737 P.2d 1297, 1301 (Wash. Ct. App. 1987) (unlisted telephone number). However, canine sniffs of certain objects, including packages at a post office or bus terminal, are not restricted. *State v. Stanphill*, 769 P.2d 861, 865 (Wash. Ct. App. 1989) (post office); *State v. Wolohan*, 598 P.2d 421, 424-25 (Wash Ct. App. 1979) (bus terminal). Four justices would restrict access to power consumption records, but a majority (five) would not. *In re Maxfield*, 945 P.2d 196, 202, 205, 207 (Wash. 1997) (en banc). There is no protection for one's name, *see* *State v. Faydo*, 846 P.2d 539, 541 (Wash. Ct. App. 1993) (name from telephone company records), or for information in driver's license records, *see* *State v. McKinney*, 60 P.3d 46, 52 (Wash. 2002) (en banc) (suspicionless searches of driver's license records).

129. Alaska has adopted *Katz's* REP criterion. *State v. Chryst*, 793 P.2d 538, 539-40 (Alaska Ct. App. 1990). Although Alaska courts commonly state they might provide greater protection than the Fourth Amendment, there is little caselaw granting such protection with respect to the third-party doctrine. Its courts have rejected the federal doctrine of canine sniffs, holding that a canine sniff is a minimally intrusive search that must be supported by reasonable suspicion. *Pooley v. State*, 705 P.2d 1293, 1311 (Alaska Ct. App. 1985). And although an apartment owner has no REP in the contents of opaque trash bags placed in an apartment dumpster, the court insinuated the rule would be different for garbage placed for collection outside a single family home. *See* *Smith v. State*, 510 P.2d 793, 795, 797-98 (Alaska 1973). Alaska also diverges from federal doctrine by forbidding warrantless one-party consensual recording of a conversation taking place in a suspect's home. *State v. Glass*, 583 P.2d 872, 875, 881 (Alaska 1978). Alaska courts have found no REP in power consumption records and basic information (e.g., name and address) required to subscribe to a service. *Samson v. State*, 919 P.2d 171, 173 (Alaska Ct. App. 1996) (power consumption records); *D'Antorio v. State*, 837 P.2d 727, 734-35 (Alaska Ct. App. 1992) (name and basic account information from mail service records), *petition granted* by 882 P.2d 1270 (Alaska 1994), *remanded*, 926 P.2d 1158 (Alaska 1996); *Chryst*, 793 P.2d at 542 (name and address from utility company records). The tenor of these opinions, however, makes Alaska a probable rejecter: "Like my colleagues, I conclude that [power consumption] records do not command the same privacy protection as bank records." *Samson*, 919 P.2d at 173 (Mannheimer, J., concurring).

130. Until recently Arkansas had not diverged from the Fourth Amendment. *See* *Stout v. State*, 898 S.W.2d 457, 460 (Ark. 1995) (recognizing no divergence); *see also* *Rikard v. State*, 123 S.W.3d 114, 118-19 (Ark. 2003) (noting two divergences in 2002). Arkansas has found no REP in garbage left for collection, *id.* at 119-20, and has not otherwise departed from the federal third-party doctrine. Given its increasingly aggressive state constitutional jurisprudence, however, and given that it appears never to have considered whether it would follow the federal doctrine, Arkansas might diverge. *See*

Indiana <sup>131</sup>
Massachusetts <sup>132</sup>

Burks v. State, No. CR 03-1276, 2005 WL 1358366 (Ark. June 9, 2005) (finding it unnecessary to address whether a canine sniff constitutes a search); State v. Brown, 156 S.W.3d 722, 731 (Ark. 2004) (holding four to three that the state constitution, presumably, unlike the Fourth Amendment, requires police to appraise a homeowner of his or her right to refuse consent before performing a “knock and talk” consent search, even though doing so required overruling the precedent of *King v. State*, 557 S.W.2d 386 (Ark. 1977)); State v. Hamzy, 709 S.W.2d 397, 399 (Ark. 1986) (addressing Fourth Amendment protection of telephone records). Arkansas jurisprudence is considered in more detail in Part VI of this Article.

131. Indiana doesn't follow *Katz*'s REP criterion. Rather than deciding whether government conduct constitutes a search, Indiana moves right to deciding whether the conduct was reasonable. See *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005). In 1980 the Indiana supreme court unanimously adopted the reasoning and holding of *Smith v. Maryland*, finding no REP in telephone records. *In re Order for Ind. Bell Tel. to Disclose Records*, 409 N.E.2d 1089, 1090 (Ind. 1980). Despite the court's adoption of *Smith*, however, it is not clear whether even the Fourth Amendment was asserted, let alone the state analog. See *id.* Lower courts in Indiana and courts in sister states have nonetheless interpreted the holding as articulating Indiana constitutional law. See, e.g., *Bell v. State*, 626 N.E.2d 570, 572 (Ind. Ct. App. 1993); *State v. Hunt*, 450 A.2d 952, 956 (N.J. 1982). In 1979 an Indiana appellate court likewise adopted *United States v. Miller*, finding no REP in bank records. *Cox v. State*, 392 N.E.2d 496, 497 (Ind. Ct. App. 1979). Although the defendant raised his state constitutional rights, there is no independent analysis of those rights in the court's brief and conclusory opinion. See *id.* at 496. Lastly, Indiana courts have, with little analysis, allowed a canine sniff under the state constitution. See, e.g., *Rios v. State*, 762 N.E.2d 153, 160-61 (Ind. Ct. App. 2002). If this were the only relevant caselaw, despite its conclusory nature, one would not think Indiana a good candidate for rejecting the federal third-party doctrine. But in the recent case of *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005), the Indiana supreme court unanimously held that a search of garbage left for collection is reasonable, and hence constitutional, only if police have articulable reasonable suspicion that the subjects of the search have engaged in violations of law that might reasonably lead to evidence in the trash. *Id.* at 364. The court's analysis makes it unlikely the court will continue to adhere to the conclusory and rigid applications found in *In re Order* and *Cox*. *Litchfield* is considered in more detail in Part VI of this Article.

132. Massachusetts has adopted *Katz*'s REP criterion, *Commonwealth v. Cote*, 556 N.E.2d 45, 49 (Mass. 1990), and has found no REP in garbage left for collection, see *Commonwealth v. Krisco Corp.*, 653 N.E.2d 579, 584 (Mass. 1995) (finding REP in garbage physically available only to garbage collector on the disposer's terms); *Commonwealth v. Pratt*, 555 N.E.2d 559, 567-68 (Mass. 1990) (holding there is typically no REP in garbage left for collection), and business telephone records, see *Commonwealth v. Vinnie*, 698 N.E.2d 896, 909-10 (Mass. 1998) (finding no REP in business telephone records); *Dist. Attorney for Plymouth Dist. v. New Eng. Tel. & Tel. Co.*, 399 N.E.2d 866, 868 (Mass. 1980) (declining to decide whether state constitution restricts trap and trace device); *Commonwealth v. Feodoroff*, 686 N.E.2d 479, 482-83 (Mass. App. Ct. 1997) (holding it is constitutional to access telephone records upon reasonable suspicion). An appellate court has also held that a canine sniff of the exterior of a vehicle is not a search for purposes of the state constitution. *Commonwealth v. Feyenord*, 815 N.E.2d 628, 633-34 (Mass. App. Ct. 2004), *aff'd*, 833 N.E.2d 590 (Mass. 2005). However, in *Cote*, the Massachusetts Supreme Judicial Court indicated that it might diverge from the federal

Minnesota<sup>133</sup>New Hampshire<sup>134</sup>

third-party doctrine despite finding no REP in messages left under another entity's account with a third party answering service. *Cote*, 556 N.E.2d at 50; *see also* *Commonwealth v. Buccella*, 751 N.E.2d 373, 383 n.9 (Mass. 2001) (recognizing potential divergence again). Massachusetts has diverged from federal doctrine by forbidding warrantless one-party consensual monitoring of conversations taking place in a suspect's home, but it allows such monitoring of telephone conversations. *See* *Commonwealth v. Eason*, 694 N.E.2d 1264, 1268 (Mass. 1998) (telephone); *Commonwealth v. Blood*, 507 N.E.2d 1029, 1034 (Mass. 1987) (home). One should be wary of making too much of this particular divergence, however, because even the United States Supreme Court has provided special protection to the home that is arguably contrary to its third-party doctrine. *See* *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (forbidding warrantless thermal imaging of a home's exterior).

133. Although Minnesota has statutory restrictions on pen registers, location tracking, and obtaining bank records, it does not appear to have decided whether the state constitution restricts these activities. MINN. STAT. ANN. § 626A.37 (West 2003) (pen registers and location tracking); MINN. STAT. ANN. § 13A.02 (West 2005) (bank records); *State v. Smith*, 367 N.W.2d 497, 505 & n.2 (Minn. 1985) (noting Wayne LaFave's criticism of *United States v. Miller* in the course of holding, without mentioning the state constitution, that a welfare recipient has no REP in an address given to welfare officials); *State v. Milliman*, 346 N.W.2d 128, 130 (Minn. 1984) (applying *United States v. Miller* to find no REP in bank records but without mentioning state constitution); *State v. Benson*, 484 N.W.2d 46, 50 & n.3 (Minn. Ct. App. 1992) (noting Justice Marshall's dissent in *Smith v. Maryland* and decisions in sister states rejecting the federal doctrine, but not deciding the issue because it was not raised). Because the court has diverged from the Fourth Amendment several times in recent years, and based on its recent divergence with respect to canine sniffs, there is nonetheless reason to believe Minnesota will reject the federal third-party doctrine. *See* *State v. Carter*, 697 N.W.2d 199, 210 n.7, 212 (Minn. 2005) (chronicling state divergence from Fourth Amendment and requiring reasonable suspicion for canine sniff). Although there is some caselaw regarding garbage searches, *see* *State v. Dreyer*, 345 N.W.2d 249, 250 (Minn. 1984) (finding no REP based on *State v. Oquist*); *State v. Oquist*, 327 N.W.2d 587, 591 (Minn. 1982) (finding no REP but conceding a householder may sometimes have such an expectation without differentiating state constitution); *State v. Goebel*, 654 N.W.2d 700, 703 (Minn. Ct. App. 2002) (finding no REP when trash is set on a curbside but without differentiating state constitution), only an unpublished opinion clearly addresses the state constitution, *see* *State v. Birdsall*, No. C9-02-1222, 2003 WL 21321419, at \*5 (Minn. Ct. App. June 10, 2003) (unpublished) (finding no REP in garbage left for collection under state constitution).

134. New Hampshire has adopted *Katz's* REP criterion, *State v. Goss*, 834 A.2d 316, 318-19 (N.H. 2003), but it is fair to say the state burns both hot and cold with respect to the federal third-party doctrine. One could therefore make an argument for placing it in an altogether separate category (with Oregon), but with this caveat it sits well enough as a "possible rejecter." New Hampshire has diverged from federal doctrine by finding a REP in garbage left for collection, *id.* at 319, and by holding a canine sniff is a search, though one that is constitutional if supported by reasonable suspicion, *State v. Pellicci*, 580 A.2d 710, 716, 718-19, 726 (N.H. 1990) (issuing four separate opinions for the four justices; now that New Hampshire has explicitly adopted *Katz's* REP criterion all four would agree a canine sniff is a search, but only two justices held reasonable suspicion was adequate); *see also* *State v. Gonzalez*, 738 A.2d 1247, 1252 (N.H. 1999) (declining to decide whether a dog sniff of a package constitutes a search).

Oregon <sup>135</sup>
South Dakota <sup>136</sup>

On the other hand, the state supreme court has also held there is no constitutional restriction on the installation and use of pen registers. *State v. Valenzuela*, 536 A.2d 1252, 1262 (N.H. 1987). And in *State v. Summers*, 702 A.2d 819 (N.H. 1997), the court relied on *Valenzuela* to quickly dismiss the argument that an officer obtaining medical information from doctors constituted a search. *Id.* at 821; *see also State v. Richter*, 765 A.2d 687, 688 (N.H. 2000) (holding perusal of driver's license records does not constitute a search). New Hampshire does not seem to have considered whether its state analog restricts government access to bank records, presumably at least in part because access is restricted by statute. Bank records can be obtained via administrative or judicial subpoena only if advance notice is provided to the customer. *See* N.H. REV. STAT. ANN. § 359-C:8, C:10(I) (1995). Bank records can be obtained without notice via search warrant or grand jury subpoena. *Id.* § 359-C:9, :10(II).

135. Like New Hampshire, *see supra* note 134, Oregon burns both hot and cold with respect to the federal third-party doctrine. Oregon rejects *Katz's* REP criterion; government action is a search for purposes of the Oregon Constitution if it invades a "privacy interest." *State v. Campbell*, 759 P.2d 1040, 1043-44 (Or. 1988). There does not appear to be any caselaw regarding whether the state constitution restricts government access to telephone or bank records, perhaps because they are both protected by statute. *See* OR. REV. STAT. § 165.663 (2003) (requiring probable cause for installation of pen register); *Id.* § 192.565 (requiring either customer notice or reasonable suspicion for access to bank records); *see also State v. Mituniewicz*, 62 P.3d 417, 424 (Or. Ct. App. 2003) (noting but not deciding whether installation of a pen register without probable cause violated the state constitution). Oregon offers some protection for garbage left for collection, but that protection is likely very weak. It seems that police must merely receive the garbage of interest from the garbage collector rather than picking it up themselves. *Compare State v. Purvis*, 438 P.2d 1002, 1004-05 (Or. 1968) (en banc) (police obtaining trash from hotel maids did not constitute search), *with State v. Galloway*, 109 P.3d 383, 387-89 (Or. Ct. App. 2005) (police taking trash bags from curbside was unconstitutional seizure). Consistent with federal doctrine, a canine sniff conducted in a public place is not a search, although more directed technologically-enhanced "sniffs" might constitute a search. *State v. Smith*, 963 P.2d 642, 646-47 (Or. 1998). Oregon does offer significant protection for location information, typically requiring a warrant to electronically track a vehicle. *Campbell*, 759 P.2d at 1041. However, in a 1993 en banc appellate opinion the court held, over a dissent, that there is no state constitutional protection for medical records. *State v. Gonzalez*, 852 P.2d 851, 853, 855 (Or. Ct. App. 1993) (en banc). The court's language insinuates that there is no protection for any information voluntarily conveyed to a third party. *See id.* at 855; *State v. Binner*, 886 P.2d 1056, 1058 n.1 (Or. Ct. App. 1994) (interpreting *Gonzalez* broadly). *But see Gonzalez*, 858 P.2d at 858-59 (Warren, J., dissenting). Thus while there is some precedent indicating Oregon would reject the federal third-party doctrine, the state high court would need to reject or limit *Gonzalez*.

136. South Dakota rarely diverges from the Fourth Amendment, but there are signs this may change. In *State v. Schwartz*, 2004 SD 123, 689 N.W.2d 430, a two-justice plurality held a warrantless trash pull violated neither the Fourth Amendment nor its state analog. *Id.* ¶ 19, 689 N.W.2d at 436 (plurality opinion). Justice Konenkamp authored a concurrence arguing that a decision on the merits was premature because the court had yet to develop a jurisprudence of how to consider the state constitution independently of the Fourth Amendment. *See id.* ¶¶ 31-56, 689 N.W.2d at 437-45 (Konenkamp, J., concurring in the result). Justice Zinter, one of the two justices in the plurality, agreed



Texas<sup>137</sup>

with this call to develop an interpretive methodology. *See id.* ¶ 27, 689 N.W.2d at 437 (Zinter, J., concurring). And two justices dissented, arguing the state constitution did recognize a REP in garbage left for collection and that a garbage pull typically requires a warrant. *See id.* ¶¶ 58, 69, 689 N.W.2d at 445, 449 (Sabers, J., dissenting). Moreover, even the plurality opinion stressed that the officer at issue “had articulable reasons for focusing on the [defendants’] trash” and that “[t]his was not some police action on caprice or whim or a random check of an entire neighborhood’s garbage.” *Id.* ¶ 19, 689 N.W.2d at 436 (plurality opinion). Because these concerns would be logically irrelevant if garbage searches were completely unrestricted by the state constitution, even these two justices might agree to a restriction on garbage searches like that adopted in Indiana. *See supra* note 131. Thus the plurality did *not* hold that South Dakotans have no REP in garbage left for collection, but rather only that “under these facts” the warrantless trash pulls were “not unreasonable.” *Schwartz*, 2003 SD 105, ¶ 19, 689 N.W.2d at 436 (plurality opinion). Therefore, of the five justices on the South Dakota Supreme Court, two might agree police need some reason for selecting the target of a garbage pull, one has taken no position on the merits, and two believe a garbage pull typically requires a warrant. Given this recent decision it is possible that South Dakota will develop an independent state constitutional jurisprudence and begin to utilize its state analog more aggressively.

137. Although it is going on fifteen years since Texas declared that its analog might not identically track the Fourth Amendment, *see Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991), its only divergence remains dicta. In *Richardson v. State*, 865 S.W.2d 944, 953 (Tex. Crim. App. 1993) (en banc), the court rejected a lower court holding that use of a pen register could *never* constitute a search, declaring that “the use of a pen register may well constitute a ‘search’ under Article I, § 9 of the Texas Constitution.” *Id.* at 953. Because the calls at issue were made from a county jail while the defendant was in pretrial detention, however, and because it was unclear how police had obtained certain information, the court remanded for a determination of whether *this* defendant had a REP. *Id.* at 953-54. On remand the lower court disposed of the case without addressing whether one generally retains a REP in telephone numbers dialed. *Richardson v. State*, 902 S.W.2d 689, 692 (Tex. Ct. App. 1995). The Texas Court of Criminal Appeals’ language makes clear, however, that it *would* reject the federal doctrine with respect to telephone numbers, and it has since reiterated this position. *See Crittenden v. State*, 899 S.W.2d 668, 673 n.8 (Tex. Crim. App. 1995) (en banc); *Richardson*, 865 S.W.2d at 951-53. Even those declarations, however, are at least ten years old, and appellate courts have adopted federal doctrine in two other contexts and questioned the vitality of *Richardson* given ubiquitous Caller-ID. *See Uresti v. State*, 98 S.W.3d 321, 332 & n.6 (Tex. App. 2003) (questioning *Richardson* and holding that the defendant failed to demonstrate an *actual* expectation of privacy in the telephone numbers dialed); *Josey v. State*, 981 S.W.2d 831, 845 (Tex. App. 1998) (holding canine sniff is not a search); *State v. Hardy*, 963 S.W.2d 516, 527 (Tex. Crim. App. 1997) (en banc) (finding no REP in results of blood-alcohol tests taken after traffic accident); *Hill v. State*, 951 S.W.2d 244, 250 (Tex. App. 1997) (holding canine sniff is not a search); *Aitch v. State*, 879 S.W.2d 167, 171-72 (Tex. App. 1994) (questioning *Richardson*).

It is therefore unclear whether Texas’s highest criminal court would still reject *Smith*. Given this tenuous jurisprudence, a few other cases are worth noting. In *Levario v. State*, 964 S.W.2d 290, 296 (Tex. App. 1997) and *Nilson v. State*, 106 S.W.3d 869, 872-74 (Tex. App. 2003), the courts found no REP in garbage left for collection, but without citing the Texas Constitution. In *Avelar v. State*, No. 05-96-01550-CR, 1998 WL 169985 (Tex. App. Apr. 14, 1998) (unpublished), the defendant raised the Texas Constitution but also claimed the garbage at issue was not his, hence failing to demonstrate a REP. *Id.* at \*1. In *Nored v. State*, 875 S.W.2d 392 (Tex. App. 1994), a Texas court applied federal doctrine to

Vermont<sup>138</sup>

TABLE 4  
STATES THAT PROVIDE NO REASON TO BELIEVE THEY WILL  
REJECT THE FEDERAL THIRD-PARTY DOCTRINE, BUT THAT  
SOMETIMES DIVERGE FROM THE FOURTH AMENDMENT

Arizona<sup>139</sup>

the warrantless monitoring of a beeper attached to a bicycle, but again without addressing the state constitution. *Id.* at 395-96. Such opinions are common in states in which there is no divergence from the federal third-party doctrine. Lastly, in *Autran v. State*, 887 S.W.2d 31 (Tex. Crim. App. 1994) (en banc), a three judge plurality held the Texas Constitution gives greater protection to closed containers in vehicles. *Id.* at 41-42 (plurality opinion). But that opinion has been criticized and abandoned, demonstrating that at least in that context, Texas jurists have no overwhelming desire to diverge from federal doctrine. See *Trujillo v. State*, 952 S.W.2d 879, 880-81 (Tex. App. 1997) (declining to follow *Autran*); *Madison v. State*, 922 S.W.2d 610, 613 (Tex. App. 1996) (declining to follow *Autran*); *Johnson v. State*, 912 S.W.2d 227, 233 (Tex. Crim. App. 1995) (criticizing analysis of *Autran*).

138. Vermont diverges from the Fourth Amendment on a number of issues, and is not shy about doing so. See *State v. Geraw*, 795 A.2d 1219, 1220 (Vt. 2002) (extending the prohibition against electronic monitoring in the home to situations where the participant is known to be a police officer); *State v. Morris*, 680 A.2d 90, 101-02 (Vt. 1996) (expressing willingness to diverge); *State v. Kirchoff*, 587 A.2d 988, 993-94 (Vt. 1991) (rejecting federal open fields doctrine); *State v. Oakes*, 598 A.2d 119, 120 (Vt. 1991) (rejecting federal “good-faith” exception to exclusionary rule); *State v. Savva*, 616 A.2d 774, 779 (Vt. 1991) (rejecting federal automobile doctrine); *State v. Blow*, 602 A.2d 552, 555-56 (Vt. 1991) (forbidding warrantless electronic monitoring in the home by conversation participants); *State v. Wood*, 536 A.2d 902, 905-07 (Vt. 1987) (rejecting federal standing doctrine). The court has found a REP in garbage left for collection, *Morris*, 680 A.2d at 100, but has not decided whether warrantless canine sniffs are permissible, *State v. Cooper*, 652 A.2d 995, 1001 (Vt. 1994) (holding defendant failed to properly raise state constitutionality of dog sniff). Interestingly, Vermont courts do not appear to have ever cited *Smith v. Maryland* or *United States v. Miller*, but given Vermont’s strong emphasis on privacy and numerous departures from the Fourth Amendment, it is a good candidate for rejecting the federal third-party doctrine. Vermont has permitted warrantless access to prescription records, but only because the pharmaceutical industry is pervasively regulated. *State v. Welsh*, 624 A.2d 1105, 1111-12 (Vt. 1992).

139. While there is essentially no caselaw concerning the third-party doctrine under Arizona’s Constitution, Arizona’s only potential departure from the Fourth Amendment seems to be in the context of warrantless entry to a home. See *Petersen v. City of Mesa*, 63 P.3d 309, 312 (Ariz. Ct. App. 2003) (discussing sole divergence), *vacated on other grounds*, 83 P.3d 35, 37 n.3 (Ariz. 2004) (en banc). One appellate court has held that neither the state analog nor the Fourth Amendment prohibits an officer from squeezing luggage and smelling the air that emanates therefrom. See *State v. Millan*, 916 P.2d 1114, 1118 (Ariz. Ct. App. 1995). It is not uncommon for states that have not diverged to have very little relevant caselaw, because even when their courts consider relevant issues the state constitution will not be raised or considered. See, e.g., *State v. Peters*, 941 P.2d 228, 232 (Ariz. 1997) (en banc) (holding canine sniff of luggage is not an unreasonable search

Connecticut <sup>140</sup>
Delaware <sup>141</sup>
Louisiana <sup>142</sup>

without considering state constitution); *State v. Fassler*, 503 P.2d 807, 813-14 (Ariz. 1972) (en banc) (finding no REP in garbage without considering state constitution); *State v. Cramer*, 851 P.2d 147, 150 (Ariz. Ct. App. 1992) (finding no REP in heat emitted from home without considering state constitution). For the sake of brevity, this Article will not always include such references. Hopefully defense counsel will begin to raise state analogs in more cases in order to develop a more complete jurisprudence.

140. Connecticut typically interprets its analog to track the Fourth Amendment, and despite several opportunities its courts have not diverged from the federal third-party doctrine. In *State v. DeFusco*, 620 A.2d 746 (Conn. 1993), the court held one retains no REP in garbage left for collection. *Id.* at 753. In several cases Connecticut courts have followed *Miller* in finding no REP in bank records, see *Morgan v. Brown*, 592 A.2d 925, 929 (Conn. 1991) (finding no REP in bank records without mentioning state constitution); *In re Petition of State's Attorney*, 425 A.2d 588, 590 (Conn. 1979) (same), but only one unreported decision addresses the state constitution, see *Blue Cross & Blue Shield of Conn., Inc. v. Reuter*, No. 26 10 11, 1990 WL 283861, at \*1 (Conn. Super. Ct. July 11, 1990) (unreported) (finding no REP in bank records under both state and federal constitutions). In *State v. Mordowanec*, 788 A.2d 48 (Conn. 2002), the defendant asserted a REP in power consumption records under the Fourth Amendment and the state constitution. *Id.* at 51. Despite the issue having been raised for the first time on appeal, the court quickly dismissed the issue on the merits. *Id.* at 56 n.11. Without differentiating the federal and state provisions, it held that the defendant failed to demonstrate that he had a REP in such records. *Id.* In *State v. Russo*, 790 A.2d 1132 (Conn. 2002), the court held a customer has no reasonable expectation that a pharmacy will not disclose records upon law enforcement request. *Id.* at 1152. Although the defendant asserted a violation of the state analog, he articulated no reason why it would provide greater protection and therefore the court declined to consider the matter. *Id.* at 1136 n.6. Finally, in *State v. Waz*, 692 A.2d 1217 (Conn. 1997), the court opted not to decide whether a canine sniff of mail is a search for purposes of the state constitution because the existing reasonable suspicion would be adequate even if it were. *Id.* at 1220; see also *State v. Torres*, 645 A.2d 529, 533 (Conn. 1994) (declining to decide whether a canine sniff of a vehicle constitutes a search where it was supported by reasonable suspicion).

141. It appears that Delaware first diverged from the Fourth Amendment in 1999, and has given no indication it will do so with respect to the federal third-party doctrine. See *Jones v. State*, 745 A.2d 856, 863-64 (Del. 1999) (rejecting federal *Hodari D.* standard for seizure); *Rickards v. State*, 77 A.2d 199, 204 (Del. 1950) (terming the state analog and the Fourth Amendment "substantively identical"); *State v. Phillips*, 366 A.2d 1203, 1207 (Del. Super. Ct. 1976) (same). In *Mack v. State*, 567 A.2d 34, No. 386, 1988, 1989 WL 90727 (Del. July 31, 1989) (unpublished table decision), the court adopted federal doctrine in finding no REP in garbage placed in a public dumpster. *Id.* at \*2.

142. Despite a state analog that includes explicit protection against unreasonable "invasions of privacy," see LA. CONST. art. I, § 5, Louisiana has interpreted its analog to provide protection equivalent to that of the federal third-party doctrine. Thus Louisiana courts have found no REP in garbage left for collection, see *State v. Strickland*, 94-0025, p. 21 (La. 11/1/96); 683 So. 2d 218, 228-29; *State v. Rando*, 2003-0073, p. 8 n.3 (La. App. 4 Cir. 4/9/03); 848 So. 2d 19, 23 n.3, telephone numbers dialed, see *State v. Pennison*, 99-0466, pp. 9-10 (La. App. 1 Cir. 12/28/99); 763 So. 2d 671, 677; *State v. Cain*, 95-0054, pp. 9-10 (La. App. 4 Cir. 2/27/96); 670 So. 2d 515, 520, or utility records, see *State v. Niel*, 93-1510, pp. 8-9 (La. App. 3 Cir. 5/4/94); 640 So. 2d 588, 594. Likewise canine sniffs of luggage, see *State*

Michigan <sup>143</sup>
Nevada <sup>144</sup>
New Mexico <sup>145</sup>
New York <sup>146</sup>

v. Alsay, 37,013, p. 8 (La. App. 2 Cir. 5/14/03); 847 So. 2d 144, 149, and vehicle exteriors, *see* State v. Barlow, 2000-1657, pp. 2-3 (La. App. 3 Cir. 6/27/01); 792 So. 2d 63, 64-65, are not searches for purposes of the state constitution. A court has, however, noted in dicta that the state constitution *might* prohibit warrantless electronic tracking of vehicles. *See* State v. Peters, 546 So. 2d 829, 834 (La. Ct. App. 1989). Taken in context, this single assertion, appealing though it is, seems too little to justify thinking Louisiana is likely to diverge.

143. Michigan diverges from the Fourth Amendment only if there is “compelling reason to do so,” *People v. Collins*, 475 N.W.2d 684, 693 (Mich. 1991) (emphasis omitted) (quoting *People v. Nash*, 341 N.W.2d 439, 446 (Mich. 1983)), and there is no indication it will diverge in the third party context. Indeed, although Michigan at one time diverged from federal doctrine regarding one-party consensual monitoring in the home, it has since changed its constitutional rule to match the federal counterpart. *See id.* at 698, *overruling* *People v. Beavers*, 227 N.W.2d 511 (Mich. 1975). Michigan courts have found no REP in garbage left for collection, *see People v. Thivierge*, 435 N.W.2d 446, 447 (Mich. Ct. App. 1988) (adopting federal doctrine for garbage), no REP in the results of blood-alcohol tests taken for medical purposes following an automobile accident, *see People v. Perlos*, 462 N.W.2d 310, 313, 316 (Mich. 1990) (finding no REP in blood-alcohol tests), and no REP in utility records, *People v. McPhail*, No. 192699, 1998 WL 1990357, at \*1 (Mich. Ct. App. Aug. 28, 1998) (unreported) (finding no REP in utility records).

144. Although Nevada recently diverged from the Fourth Amendment with respect to arrests for minor traffic violations, *see State v. Bayard*, 71 P.3d 498, 502-03 (Nev. 2003), the state generally follows the Fourth Amendment and there is no reason to believe it will diverge with respect to the third-party doctrine. Nevada courts have found no REP in location information, *see Osburn v. State*, 44 P.3d 523, 526 (Nev. 2002) (permitting the warrantless installation of a tracking device to an automobile), and have held a canine sniff of the exterior of a vehicle is not a search, *see Gama v. State*, 920 P.2d 1010, 1014 n.4 (Nev. 1996) (permitting dog sniff of vehicle exterior).

145. Although New Mexico diverges from the Fourth Amendment on a number of issues, there is no indication it will do so with respect to the third-party doctrine. In *State v. Reynolds*, 890 P.2d 1315 (N.M. 1995), the court found no REP in a driver’s license, vehicle registration, and proof of insurance. *Id.* at 1318. In *State v. Villanueva*, 796 P.2d 252 (N.M. Ct. App. 1990), the court held a canine sniff taking place at a border checkpoint is not a search for purposes of the state analog. *Id.* at 256. Last but not least, an appellate court took an extreme view of the federal third-party doctrine in *State v. Barry*, 617 P.2d 873, 876 (N.M. Ct. App. 1980), *abrogated in part on other grounds*, *State v. Wagoner*, 2001-NMCA-014, ¶¶ 35-36, 130 N.M. 274, 24 P.3d 306. According to *Barry*, by giving his garage door opener to another person the defendant forfeited his REP in the contents of that garage. *Id.* The opinion does not address the state constitution.

146. New York has followed the federal third-party doctrine as a matter of state constitutional law, finding no REP in telephone and bank records. *See People v. Guerra*, 478 N.E.2d 1319, 1321 (N.Y. 1985) (no REP in telephone numbers dialed); *People v. Di Raffaele*, 433 N.E.2d 513, 516 (N.Y. 1982) (no REP in telephone toll records); *Norkin v. Hoey*, 586 N.Y.S. 2d 926, 931 (App. Div. 1992) (no REP in bank records). In New York a canine sniff of the exterior of a home is a search requiring reasonable suspicion, *see People v. Dunn*, 564 N.E.2d 1054, 1058 (N.Y. 1990), and a canine sniff of a person can constitute a

Ohio <sup>147</sup>
Tennessee <sup>148</sup>
Wyoming <sup>149</sup>

search, *see* *People v. Brama*, 655 N.Y.S. 2d 280, 281 (Dist. Ct. 1997). Neither decision is necessarily contrary to federal doctrine. *See* *United States v. Garcia-Garcia*, 319 F.3d 726, 730 (5th Cir. 2003) (assuming a dog sniff of a person was a search); *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985) (holding a canine sniff of apartment door was a search). New York's highest court has stated a canine sniff of a package might constitute a search, which would deviate from federal doctrine. *See* *People v. Offen*, 585 N.E.2d 370, 371-72 (N.Y. 1991).

147. Ohio diverged from the Fourth Amendment only when the Supreme Court's decision in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), forced it to either diverge or overrule its own existing precedent. *See* *State v. Brown*, 99 Ohio St. 3d 323, 2003-Ohio-3931, 792 N.E.2d 175, at ¶¶ 5-7. Ohio is very hesitant to diverge, and there is no indication it will do so with respect to the third-party doctrine. Courts interpreting the state constitution have held one retains no REP in garbage left for collection, *see* *State v. Payne*, 662 N.E.2d 60, 61-62 (Ohio Ct. App. 1995) (garbage), and that a canine sniff of a vehicle exterior is not a search, *see* *State v. Waldroup*, 654 N.E.2d 390, 394 (Ohio Ct. App. 1995) (canine sniff). In considering telephone numbers dialed, the Ohio Supreme Court stated that the state analog is "virtually identical to the Fourth Amendment to the federal Constitution and [we] refuse to impose greater restrictions under it." *Ohio Domestic Violence Network v. Pub. Utils. Comm.*, 638 N.E.2d 1012, 1019 n.3 (Ohio 1994).

148. Tennessee has diverged from the Fourth Amendment a few times, but there is no indication it will do so with respect to the third-party doctrine. *See* *State v. England*, 19 S.W.3d 762, 766-67, 769 (Tenn. 2000) (holding, over a dissent, that canine sniff of vehicle is not a search); *State v. Pendergrass*, No. 01C01-9306-CR-00169, 1995 WL 108248, at \*4 (Tenn. Crim. App. Mar. 9, 1995) (unpublished) (finding no reason to diverge from federal doctrine with respect to telephone surveillance), *rev'd on other grounds*, 937 S.W.2d 834 (Tenn. 1996), *substantive opinion adopted*, No. 01C01-9708-CR-00359, 1998 WL 846588 (Tenn. Crim. App. Dec. 8, 1998) (unpublished); *State v. Bell*, 832 S.W.2d 583, 589-91 (Tenn. Crim. App. 1991) (adopting federal doctrine with respect to contents of a dumpster outside a business establishment); *State v. Fears*, 659 S.W.2d 370, 376-77 (Tenn. Crim. App. 1983) (finding no Fourth Amendment REP in medical records without addressing state constitution).

149. Apart from a longstanding divergence based on the unique text of its analog, *see* *Smith v. State*, 557 P.2d 130 (Wyo. 1976), Wyoming has interpreted that analog to mirror the Fourth Amendment. *See id.* at 132. It has, however, recently become more willing to undertake an independent state constitutional analysis. *See* *Mogard v. City of Laramie*, 32 P.3d 313, 315-17 (Wyo. 2001) (describing this transformation). This increased willingness makes it tempting to place Wyoming in the "might reject" list, but because Wyoming has yet to diverge, or even to imply that it likely will, the author has placed it here. A willingness to *hear argument* is not a willingness to diverge. *See, e.g., Almada v. State*, 994 P.2d 299, 308-11 (Wyo. 1999) (undertaking independent state analysis but holding that, like the Fourth Amendment, the state analog doesn't prohibit warrantless participant monitoring); *Vasquez v. State*, 990 P.2d 476, 483 (Wyo. 1999) (undertaking independent state analysis but holding that, like the Fourth Amendment, the state analog doesn't prohibit the search of an automobile incident to arrest). In *Saldana v. State*, 846 P.2d 604 (Wyo. 1993), the court, over a lengthy impassioned dissent, held that one has no REP in telephone numbers dialed. *Id.* at 611-12. The court has yet to consider whether a bank customer retains a REP in bank records or whether a canine sniff constitutes a search because when those arguments were raised they were not adequately briefed. *See* *Morgan*

TABLE 5 STATES THAT HAVE NOT DIVERGED FROM THE SUBSTANTIVE FOURTH AMENDMENT <sup>150</sup>
Alabama <sup>151</sup>
Georgia <sup>152</sup>
Iowa <sup>153</sup>

v. State, 2004 WY 95, ¶ 26, 95 P.3d 802, 26 (Wyo. 2004) (canine sniff); *Lafond v. State*, 2004 WY 51, ¶¶ 56-58, 89 P.3d 324, 56-58 (Wyo. 2004) (bank records).

150. This category includes states that only diverge as to remedy. Several states reject the federal “good-faith” exception to the exclusionary rule. *See, e.g.*, *Gary v. State*, 422 S.E.2d 426, 427-29 (Ga. 1992) (rejecting the exclusionary rule as a matter of statutory interpretation); *State v. Prior*, 617 N.W.2d 260, 268 (Iowa 2000). Perhaps it is also worth giving the caveat that while the author is fairly confident these states have not diverged from the Fourth Amendment, the focus of the research was the third-party doctrine.

151. The Alabama supreme court recognizes that it has the authority to interpret its state analog more expansively than the Fourth Amendment, but does not appear to have done so. *See, e.g.*, *State v. Hill*, 690 So. 2d 1201, 1207 n.3 (Ala. 1996). Alabama courts commonly decide third party issues without mentioning the state constitution. *See, e.g.*, *Tims v. State*, 711 So. 2d 1118, 1122-24 (Ala. Crim. App. 1997) (results of blood-alcohol test); *Ex Parte Clark*, 630 So. 2d 493, 498 (Ala. Crim. App. 1993) (bank records); *Henderson v. State*, 583 So. 2d 276, 291-92 (Ala. Crim. App. 1990) (telephone records), *aff’d sub nom. Ex Parte Henderson*, 583 So. 2d 305 (Ala. 1991); *Walls v. State*, 536 So. 2d 137, 139 (Ala. Crim. App. 1988) (garbage); *Gamble v. State*, 473 So. 2d 1188, 1191 (Ala. Crim. App. 1985) (canine sniff).

152. Georgia does not appear to have diverged from the substantive Fourth Amendment, although it does reject the federal “good-faith” exception to the exclusionary rule as a matter of statutory interpretation. *See State v. Gallup*, 512 S.E.2d 66, 70 (Ga. Ct. App. 1999); *Fox v. State*, 509 S.E.2d 75, 78 (Ga. Ct. App. 1998) (citing *Gary v. State*, 422 S.E.2d 426 (Ga. 1992)), *rev’d on other grounds*, 527 S.E.2d 847 (Ga. 2000); *Galbreath v. State*, 443 S.E.2d 664, 666 (Ga. Ct. App. 1994). Georgia courts commonly decide third party issues without mentioning the state constitution. *See Kesler v. State*, 291 S.E.2d 497, 504 (Ga. 1982) (telephone records); *Scott v. State*, 606 S.E.2d 312, 314 (Ga. Ct. App. 2004) (garbage); *Lirousa v. State*, 408 S.E.2d 436, 437 (Ga. Ct. App. 1991) (same); *Perkins v. State*, 398 S.E.2d 702, 703-04 (Ga. Ct. App. 1990) (same); *Culpepper v. State*, 274 S.E.2d 616, 617 (Ga. Ct. App. 1980) (bank records). Georgia courts have specifically adopted the federal doctrine of canine sniffs. *See Cole v. State*, 562 S.E.2d 720, 722 (Ga. Ct. App. 2002) (canine sniff of vehicle exterior); *O’Keefe v. State*, 376 S.E.2d 406, 412 (Ga. Ct. App. 1988) (canine sniff of container).

153. Although Iowa rejects the federal “good-faith” exception to the exclusionary rule, it has not diverged from the substantive Fourth Amendment. *See State v. Carter*, 696 N.W.2d 31, 36-37 (Iowa 2005) (recognizing authority to diverge but finding no basis to do so); *Prior*, 617 N.W.2d at 268 (rejecting good-faith exception); *State v. Kern*, 690 N.W.2d 698, No. 03-1615, 2004 WL 1836220, at \*2 (Iowa Ct. App. July 28, 2004) (unpublished table opinion) (recognizing identical protections); *State v. Buchanan*, 683 N.W.2d 126, No. 03-0395, 2004 WL 893956, at \*3 n.3 (Iowa Ct. App. Apr. 28, 2004) (unpublished table opinion) (same); *State v. Sefcik*, No. 02-1801, 2004 WL 149958, at \*2 n.2 (Iowa Ct. App. Jan. 28, 2004) (same). The courts have explicitly adopted federal doctrine for garbage searches. *See State v. Skola*, 634 N.W.2d 687, 690-91 (Iowa Ct. App. 2001).

Kansas <sup>154</sup>
Kentucky <sup>155</sup>
Maine <sup>156</sup>
Maryland <sup>157</sup>
Mississippi <sup>158</sup>
Missouri <sup>159</sup>
Nebraska <sup>160</sup>

154. Kansas has not diverged from the Fourth Amendment. *See* *State v. Schultz*, 850 P.2d 818, 823-24 (Kan. 1993). It has explicitly adopted federal doctrine as to garbage searches, *see* *State v. Alexander*, 981 P.2d 761, 766 (Kan. Ct. App. 1999), telephone numbers and bank records, *see* *State ex rel. Brant v. Bank of Am.*, 31 P.3d 952, 954, 960 (Kan. 2001) (bank records); *Schultz*, 850 P.2d at 823-24 (telephone and bank records), and canine sniffs, *see* *State v. McMillin*, 927 P.2d 949, 953 (Kan. Ct. App. 1996) (canine sniff of vehicle exterior); *State v. Daly*, 789 P.2d 1203, 1209-11 (Kan. Ct. App. 1990) (canine sniff of luggage).

155. Kentucky interprets its state analog to mirror the Fourth Amendment. *See* *Commonwealth v. Mobley*, 160 S.W.3d 783, 784 (Ky. 2005); *LaFollette v. Commonwealth*, 915 S.W.2d 747, 748 (Ky. 1996).

156. Maine interprets its state analog to mirror the Fourth Amendment. *See* *State v. Patterson*, 2005 ME 26, ¶ 10, 868 A.2d 188, 191; *State v. Gulick*, 2000 ME 170, ¶ 9 n.3, 759 A.2d 1085, 1087 n.3.

157. Maryland's state analog currently lacks an exclusionary remedy, which presumably discourages litigants from raising it as an alternative ground. *See* *Fitzgerald v. State*, 837 A.2d 989, 1035 n.4 (Md. Ct. Spec. App. 2003), *aff'd*, 864 A.2d 1006 (Md. 2004). There are, however, signs that this might change. *See* *Fitzgerald*, 864 A.2d at 1019-20. To date the state analog has been interpreted to mirror the Fourth Amendment. *See* *Gadson v. State*, 668 A.2d 22, 26 n.3 (Md. 1995); *Gahan v. State*, 430 A.2d 49, 54 (Md. 1981); *Henderson v. State*, 597 A.2d 486, 488 (Md. Ct. Spec. App. 1991). The state's highest court recently chose not to consider whether a canine sniff of a home's exterior constitutes a search for purposes of the state analog. *See* *Fitzgerald*, 864 A.2d at 1020-21. Although the opinion gives reason to believe Maryland might reconsider its current lockstep approach, its courts do not appear to have done so to date. *See id.* at 1019-21. Lastly, although the case only concerns federal doctrine, it is worth noting that the Supreme Court's seminal decision in *Smith v. Maryland* affirmed the Maryland decision of *Smith v. State*, 389 A.2d 858 (Md. 1978), *aff'd*, 442 U.S. 735 (1979).

158. Mississippi has interpreted its state analog to mirror the Fourth Amendment. *See* *Sasser v. City of Richland*, 2002-KM-01641-COA (¶ 7) (Miss. Ct. App. 2003).

159. Missouri interprets its state analog to mirror the Fourth Amendment. *See* *State v. Pike*, 162 S.W.3d 464, 472 (Mo. 2005) (en banc).

160. Nebraska interprets its state analog to mirror the Fourth Amendment. *See* *State v. Vermuele*, 453 N.W.2d 441, 446 (Neb. 1990). Thus its supreme court has held one retains no REP in garbage left for collection. *State v. Trahan*, 428 N.W.2d 619, 622-23 (Neb. 1988). The court has also held that a canine sniff of a home's exterior is a search requiring reasonable suspicion, but held this was so both under the Fourth Amendment and the state constitution. *State v. Ortiz*, 600 N.W.2d 805, 817 (Neb. 1999). This is not necessarily incorrect as a matter of federal law. *See* discussion *supra* note 146.

North Carolina <sup>161</sup>
North Dakota <sup>162</sup>
Oklahoma <sup>163</sup>
Rhode Island <sup>164</sup>

161. North Carolina has rejected the federal “good-faith” exception to the exclusionary rule, *State v. Carter*, 370 S.E.2d 553, 554 (N.C. 1988), but interprets its state analog to substantively mirror the Fourth Amendment, *see State v. Garner*, 417 S.E.2d 502, 510 (N.C. 1992); *In re Murray*, 525 S.E.2d 496, 500 (N.C. Ct. App. 2000). In *State v. Melvin*, 357 N.E.2d 379 (N.C. Ct. App. 1987), the court held a bank customer has no REP in bank records under the state analog. *See id.* at 381-82.

162. North Dakota’s supreme court recognizes it could diverge from the Fourth Amendment, *State v. Ringquist*, 433 N.W.2d 207, 212 (N.D. 1988); *State v. Stockert*, 245 N.W.2d 266, 271 (N.D. 1976), but does not appear to have done so, *see, e.g., State v. Dodson*, 2003 ND 187, ¶¶ 20-21, 671 N.W.2d 825, 832-33 (applying “good-faith” exception to exclusionary rule). Typically the court fails to mention the potential for any divergence, or merely applies the Fourth Amendment without mentioning the state analog. *See, e.g., State v. Kesler*, 396 N.W.2d 729, 735 (N.D. 1986) (holding canine sniff is not a search without mentioning state constitution); *State v. Lind*, 322 N.W.2d 826, 836-37 (N.D. 1982) (holding one has no REP in telephone records without explicitly mentioning either provision but citing decisions relying on Fourth Amendment); *State v. Union State Bank*, 267 N.W.2d 777, 779-81 (N.D. 1978) (holding bank customer has no REP in bank records without considering state constitution until offhand reference at end of opinion). The court has explicitly adopted federal doctrine with respect to searches of garbage left for collection. *State v. Carriere*, 545 N.W.2d 773, 776 (N.D. 1996); *State v. Rydberg*, 519 N.W.2d 306, 310 (N.D. 1994).

163. Oklahoma does not appear to have diverged from the substantive Fourth Amendment. *See Sloan v. Sprouse*, 1998 OK CR 56, ¶ 16, 968 P.2d 1254, 1258; *Long v. State*, 706 P.2d 915, 916-17 (Okla. Crim. App. 1985). The courts have held garbage left for collection is not protected by the state constitution, *Cooks v. State*, 699 P.2d 653, 656 (Okla. Crim. App. 1985), but have not decided whether a canine sniff is a search under the state analog, *State v. McNeal*, 2000 OK CR 13, ¶ 11 n.1, 6 P.3d 1055, 1058 n.1.; *Scott v. State*, 927 P.2d 1066, 1068 (Okla. Crim. App. 1996). Although Oklahoma courts have applied federal doctrine regarding bank records without mentioning the state constitution, *McAlpine v. State*, 634 P.2d 747, 749 (Okla. Crim. App. 1981), one justice in a special concurrence has alleged, this time without mentioning the federal doctrine, that the state analog should protect bank records, *Alva State Bank & Trust Co. v. Dayton*, 755 P.2d 635, 637-38 (Okla. 1988) (Kauger, J., concurring).

164. Rhode Island will only consider whether its state analog might provide greater protection than the Fourth Amendment if doing so is “strict[ly] necess[ary].” *See State v. McGoff*, 517 A.2d 232, 235 (R.I. 1986). Currently the state interprets its analog to mirror the Fourth Amendment; indeed it has abrogated previous deviations in order to conform to federal doctrine. *See In re Advisory Opinion to the Governor*, 666 A.2d 813, 816-17 (R.I. 1995) (explaining state constitutional jurisprudence); *State v. Werner*, 615 A.2d 1010, 1013-14 (R.I. 1992) (abrogating a previous deviation); Thomas R. Bender, *For a More Vigorous State Constitutionalism*, 10 ROGER WILLIAMS U. L. REV. 621, 670-73 (2005) (same). The supreme court has declined to consider whether the state constitution provides greater protection to either telephone or bank records. *See McGoff*, 517 A.2d at 235 (telephone records and telephone numbers dialed); *Pontbriand v. Sundlun*, 699 A.2d



South Carolina <sup>165</sup>
Virginia <sup>166</sup>
West Virginia <sup>167</sup>
Wisconsin <sup>168</sup>

## VI. A "REASONABLE" PROPOSAL

Technologies like cell phone location tracking and data mining demonstrate the breadth of the federal third-party doctrine. Given modern technology, if we retain no reasonable expectation of privacy in what we give to others—even if limited to what we give to others for their use—the Fourth Amendment provides little meaningful protection from overzealous (or even merely curious) government officials. This danger has not gone unnoticed. When the United States Supreme Court found no constitutional protection for bank records,<sup>169</sup> Congress

856, 870 (R.I. 1997) (bank records). Although other potentially relevant decisions fail to raise the state constitution, one court has held the state analog does not restrict government access to prescription records. *State v. Underwood*, No. K2/98-0485A, 1999 WL 47159, at \*4 (R.I. Super. Ct. Jan. 20, 1999) (unpublished).

165. South Carolina's analog explicitly forbids "*unreasonable invasions of privacy*," and the state supreme court has recognized it could grant greater protection than the Fourth Amendment. *See State v. Forrester*, 541 S.E.2d 837, 840-41 (S.C. 2001) (quoting S.C. CONST. art. I, § 10). To date, however, it does not appear to have diverged. The state has adopted the federal doctrine that one has no REP in telephone numbers dialed. *See S. Bell Tel. & Tel. Co. v. Hamm*, 409 S.E.2d 775, 779-80 (S.C. 1991).

166. Virginia interprets its state analog to mirror the Fourth Amendment. *See El-Amin v. Commonwealth*, 607 S.E.2d 115, 116 n.3 (Va. 2005); *Lowe v. Commonwealth*, 337 S.E.2d 273, 274 n.1 (Va. 1985); *Henry v. Commonwealth*, 529 S.E.2d 796, 798 (Va. Ct. App. 2000).

167. West Virginia interprets its state analog to mirror the Fourth Amendment. *See Rogers v. Albert*, 541 S.E.2d 563, 569 (W. Va. 2000); *State v. Duvernoy*, 195 S.E.2d 631, 634 (W. Va. 1973); *State v. Bruner*, 105 S.E.2d 140, 146 (W. Va. 1958); *State v. Andrews*, 114 S.E. 257, 260 (W. Va. 1922). It has, however, expressed a willingness to diverge if necessary in the context of interpreting what it deems to be ambiguous Fourth Amendment rules. *State v. Perry*, 324 S.E.2d 354, 357 (W. Va. 1984).

168. The Wisconsin supreme court has cautioned that it will not act as a "rubber stamp" in interpreting its own constitution vis-à-vis the Fourth Amendment, but it does not appear to have diverged from federal doctrine. *See State v. Ward*, 2000 WI 3, ¶¶ 59-60, 231 Wis. 2d 723, ¶¶ 59-60, 604 N.W.2d 517, ¶¶ 59-60; *State v. Guy*, 492 N.W.2d 311, 313 (Wis. 1992). Wisconsin has adopted federal doctrine with respect to garbage searches, *see State v. Stevens*, 367 N.W.2d 788, 794-97 (Wis. 1985); *State v. Sigarroat*, 2004 WI App 16, ¶¶ 13-19, 269 Wis. 2d 234, ¶¶ 13-19, 674 N.W.2d 894, ¶¶ 13-19, and bank records, *see State v. Swift*, 496 N.W.2d 713, 718 (Wis. Ct. App. 1993). An appellate judge has encouraged the high court to interpret the state analog to provide greater protection from canine sniffs. *See State v. Miller*, 2002 WI App 150, ¶ 26, 256 Wis. 2d 80, ¶ 26, 647 N.W.2d 348, ¶ 26 (Dykman, J., concurring), *review denied*, 2002 WI 121, 257 Wis. 2d 118, 653 N.W.2d 890.

169. *See United States v. Miller*, 425 U.S. 435, 437 (1976).

responded with statutory protection.<sup>170</sup> When the Court subsequently found no protection for telephone numbers dialed,<sup>171</sup> Congress again responded with statutory protection.<sup>172</sup> More recently, one of the most controversial provisions of the USA Patriot Act<sup>173</sup> has been section 215, which establishes a procedure by which government agents can obtain library and other records.<sup>174</sup> Despite required judicial oversight and a limitation to national security investigations, the provision has many detractors and it appears that Congress will further restrict its use.<sup>175</sup> Some critics might be surprised to learn that as a matter of federal law we are solely dependent upon statutory protection for all third party information.<sup>176</sup>

But this rather bleak picture is brightened somewhat by the survey of state doctrine. By the author's count eleven states reject the federal third-party doctrine and ten others have given some reason to believe they might reject it, for a total of twenty-one states. When considering warrantless entry to the home, the Supreme Court deemed it significant that fifteen states prohibited such entry, and three of those did so solely on perceived federal constitutional grounds.<sup>177</sup> Moreover another eleven

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170. See Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (2000), amended by 12 U.S.C.A. §§ 3401-3422 (West Supp. 2005).

171. See *Smith v. Maryland*, 442 U.S. 735, 745 (1979).

172. See 18 U.S.C. §§ 3121-3127 (2000 & Supp. 2002).

173. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 12, 15, 18, 21, 22, 28, 31, 42, 49, and 50 U.S.C.).

174. See USA PATRIOT Act § 215, 50 U.S.C. § 1861 (Supp. 2002). The section governs access to "any tangible thing," but library records have become the public focus. See, e.g., Jason Krause, *Out From the Stacks: Librarians Lead Legal Battles Over the Patriot Act, Copyright, Tech Issues*, A.B.A.J., Aug. 2005, at 14, 14; Shannon McCaffrey, *Librarians Angered Anew by Patriot Act*, PHILA. INQUIRER, Aug. 8, 2005, at A2; Michelle Wallar, *Library Tells Feds: Butt Out*, DENVER POST, July 27, 2005, at 4B; Am. Civil Liberties Union, Reform the Patriot Act: Section 215, <http://action.aclu.org/reformthe/patriotact/215.html> (last visited Feb. 21, 2006); News Release, Am. Library Assoc., American Library Association (ALA) Announces Preliminary Findings of Study Measuring Law Enforcement Activity in Libraries: Data Shows Law Enforcement Interest in Library Records (June 20, 2005), <http://www.ala.org/PrinterTemplate.cfm?Section=News&template=/ContentManagement/ContentDisplay.cfm&ContentID=96943>.

175. See McCaffrey, *supra* note 174.

176. See 50 U.S.C. § 1861(a)-(d). Section 215 does go beyond the absence of any Fourth Amendment restriction by forbidding the recipient of an order from notifying the target. *Id.* § 1861(d). But absent a law requiring such notification, recipients of third party requests typically have no motivation to notify the true party in interest (apparently things may be different when the government contacts an irate librarian, however). See McCaffrey, *supra* note 174.

177. *Payton v. New York*, 445 U.S. 573, 598-99 (1980); see also *supra* note 14.

states have diverged from the Fourth Amendment on some substantive issue, indicating a willingness to critically consider federal doctrine.

Each diverging state has a unique jurisprudence. Those of Arkansas and Indiana are worth describing in more detail. In 1995, Arkansas rejected the invitation to diverge from the Fourth Amendment with a mere paragraph:

Of course, we could hold that the Arkansas Constitution provides greater protection against unreasonable searches than does the Constitution of the United States, but we see no reason to do so. The wording of each document is comparable, and through the years, in construing this part of the Arkansas Constitution, we have followed the Supreme Court cases. . . . [W]e choose to continue to interpret “unreasonable search” in [our state analog] in the same manner the Supreme Court interprets the Fourth Amendment to the Constitution of the United States.<sup>178</sup>

The court reiterated this lockstep approach in December 1999.<sup>179</sup>

But a mere two months later the court stumbled into a disagreement with federal doctrine over the admissibility of drugs found in a vehicle driven by Kenneth Sullivan.<sup>180</sup> When Sullivan pulled into a service station an officer followed, allegedly because Sullivan had been traveling forty miles an hour in a thirty-five mile-per-hour zone.<sup>181</sup> The officer had been assigned to the narcotics section, and upon seeing Sullivan’s license, suspected he was involved with illegal drugs.<sup>182</sup> When the officer requested vehicle registration and proof of insurance, Sullivan opened his vehicle’s driver’s-side door, revealing a rusting roofing hatchet on the floorboard.<sup>183</sup> The officer arrested Sullivan for speeding, lacking registration and proof of insurance, carrying a weapon (the rusting hatchet), and “having an improper tint on his windshield.”<sup>184</sup> An

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178. *Stout v. State*, 898 S.W.2d 457, 460 (Ark. 1995) (citation omitted). The court deemed it “especially appropriate” to follow the federal doctrine regarding automobile searches incident to arrest because that doctrine had proved workable for fourteen years. *See id.*

179. *See Rainey v. Hartness*, 5 S.W.3d 410, 415 (Ark. 1999) (“Article 2, § 15, of the Arkansas Constitution is virtually identical to the Fourth Amendment, and we interpret it in the same manner as the United States Supreme Court interprets the Fourth Amendment.”).

180. *State v. Sullivan*, 11 S.W.3d 526, 526-27 (Ark. 2000), *rev’d*, 532 U.S. 769 (2001).

181. *Id.* at 526.

182. *Id.* at 527.

183. *Id.* at 526.

184. *Id.*

inventory search of the vehicle located a black bag under the armrest that contained drugs and drug paraphernalia.<sup>185</sup>

As evidenced by its description of Sullivan, a “now-disabled, previously self-employed roofer,” the Supreme Court of Arkansas sympathized with the defendant.<sup>186</sup> The court unanimously suppressed the drug evidence, relying on a 1932 United States Supreme Court decision stating that “an arrest may not be used as a pretext to search for evidence.”<sup>187</sup> Because the court believed its decision was dictated by the Fourth Amendment, there was no mention of the state constitution.

Only upon the state’s petition for rehearing was the court asked to consider the much more recent precedent of *Whren v. United States*,<sup>188</sup> in which the United States Supreme Court rejected just such a doctrine of pretextual arrests.<sup>189</sup> But the Arkansas supreme court had taken a stance, and four of its justices would not so easily be deterred. In an opinion penned by Chief Justice W.H. “Dub” Arnold, a majority of four justices characterized much of *Whren* as dicta and asserted that *Whren*’s limited holding was not contrary to the court’s own decision.<sup>190</sup> It is the court’s rather remarkable next step, however, which most of us will remember. The court inexplicably asserted that “even if we were to interpret *Whren* to give full rein to law enforcement to effect pretextual arrests for traffic violations, there is nothing that prevents this court from interpreting the U.S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights.”<sup>191</sup> Having disposed of the case on Fourth Amendment grounds (albeit on a unique Arkansas interpretation thereof), the court again made no mention of the state constitution.

The United States Supreme Court reversed in a per curiam opinion both granting certiorari and rejecting the creative interpretation of

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185. *Id.* at 527.

186. *Id.* at 526. The trial court empathized with the defendant in a very personal way: “I’ve got a hammer under the seat of my car today. Am I subject to being arrested and taken physically into custody because I have a hammer?” *State v. Sullivan*, 16 S.W.3d 551, 554 (Ark. 2000) (Glaze, J., dissenting).

187. *Sullivan*, 11 S.W.3d at 527 (quoting *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932)).

188. 517 U.S. 806 (1996).

189. *See id.* at 812-13; *Sullivan*, 16 S.W.3d at 551 (supplemental opinion on denial of rehearing).

190. *Sullivan*, 16 S.W.3d at 551-53. Three justices dissented. *See id.* at 553, 555 (Glaze, J., dissenting).

191. *Id.* at 552 (majority opinion).

*Whren*.<sup>192</sup> Naturally it also rejected Arkansas's "alternative holding" that a state is free to interpret the Fourth Amendment differently than the United States Supreme Court.<sup>193</sup>

It was in this context that the Arkansas supreme court first diverged from the Fourth Amendment as a matter of state constitutional law. Less than a year after the court's embarrassing reversal, and while it was considering the case on remand, the court interpreted its state analog to provide greater protection against nighttime warrantless incursions upon private property.<sup>194</sup> Two and a half months later the court issued its opinion in *Sullivan*,<sup>195</sup> this time rejecting pretextual arrests under the state constitution.<sup>196</sup> And in *State v. Brown*,<sup>197</sup> the court diverged again, limiting "knock and talk" consensual home searches.<sup>198</sup>

*Brown* demonstrates just how far the pendulum has swung. Not only were four justices willing to again diverge from the Fourth Amendment, but they were willing to overrule their own precedent to the contrary.<sup>199</sup> In the words of Justice Brown, writing for the court, "[we have] made it abundantly clear that though the search-and-seizure language of [our state analog] is very similar to the words of the Fourth Amendment, we are not bound by the federal interpretation of the Fourth Amendment when interpreting our own law."<sup>200</sup> His court has indeed "embrac[ed] the

192. *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001). The Court quite appropriately deemed Arkansas's holding to be "flatly contrary to this Court's controlling precedent." *Id.*

193. *Id.* at 772.

194. *Griffin v. State*, 67 S.W.3d 582, 584 (Ark. 2002). The split was tentative, because the court felt "the late-night intrusion upon [defendant's] property may have also violated the provisions of federal constitutional law." *Id.* This means the court's decision to diverge was unnecessary, and therefore all the more noteworthy. Despite this seeming desire to avoid even the potential for another reversal, the court was admirably forthright with respect to its former error in constitutional interpretation. *See id.* at 585. While presumably unrelated, Chief Justice Arnold resigned shortly thereafter to resume private practice. *See* Steve Barnes, *National Briefing South: Arkansas: Chief Justice Quits*, N.Y. TIMES, Dec. 2, 2003, at A29.

195. *State v. Sullivan*, 74 S.W.3d 215 (Ark. 2002).

196. *Id.* at 216.

197. 156 S.W.3d 722 (Ark. 2004).

198. *Id.* at 732 (requiring a homeowner be informed of his or her right to refuse consent).

199. *See id.* (Glaze, J., dissenting), *overruling King v. State*, 557 S.W.2d 386 (Ark. 1977).

200. *Id.* at 727 (majority opinion). The Arkansas court of appeals recently decided five to four not to diverge from federal search incident to arrest doctrine in the context of automobiles. *See McDonald v. State*, No. CACR 03-957, 2005 WL 1473656 (Ark. Ct. App. June 22, 2005). One dissenter chided the majority for failing to recognize "the fact that our supreme court tends to interpret [the state analog] in a manner that provides greater protection to the people of this state than the United States Supreme Court's interpretation of the Fourth Amendment." *Id.* (Hart, J., dissenting).

new judicial federalism with a commitment and panache not previously seen in Arkansas jurisprudence.”<sup>201</sup>

This bumpy (and even bumbling) jurisprudence probably contains many lessons, among them the well-known mantra that “good facts” can make all the difference, especially when encouraging a court to depart from the Fourth Amendment for the first time. Obviously a bit of luck won’t hurt either—if members of the Arkansas court had not already entrenched themselves, they almost certainly would have been less willing to diverge.<sup>202</sup> For those cheering the demise of the federal third-party doctrine, however, it is encouraging to see a state move from a “lockstep” jurisprudence to one of potentially considerable independence in just a few years.

Of course merely deciding to diverge leaves an entire jurisprudence to develop. Perhaps in part for reasons of judicial restraint, states rejecting federal doctrine have tended to be haphazard in developing an alternate jurisprudence. Thus Arkansas’ first foray into departing from federal doctrine gave little indication of when such departures should be expected; its second focused on whether the state had traditionally viewed an issue differently than its federal counterparts.<sup>203</sup> For those diverging from the federal third-party doctrine, is *all* information in the hands of third parties protected? Must police have the same quantum of suspicion and undertake the same legal process to obtain all types of information? A recent decision by a potential rejecter, Indiana, offers a jurisprudence that does not provide all the answers, but at least asks the right question.<sup>204</sup>

As part of its perennial efforts to stem the cultivation and use of illegal drugs, the Drug Enforcement Administration (DEA) peruses *High Times*, a publication for marijuana growers.<sup>205</sup> Although the articles are undoubtedly stimulating, the DEA reads for information on advertisers,

201. Robert L. Brown, *Expanded Rights Through State Law: The United States Supreme Court Shows State Courts the Way*, 4 J. APP. PRAC. & PROCESS 499, 499 (2002). Of course not everyone is fond of this newfound panache; three justices issued a vigorous dissent in *Brown*. See *Brown*, 156 S.W.3d at 732 (Glaze, J., dissenting).

202. Two of the three justices that dissented before *Sullivan* went to the United States Supreme Court also dissented from granting greater protection under the state analog. See *State v. Sullivan*, 74 S.W.3d 215, 222 (2002) (Glaze, J., dissenting); *State v. Sullivan*, 16 S.W.3d 551, 553 (Ark. 2000) (Glaze, J., dissenting). The third was no longer on the court as his temporary appointment had expired. See *Ascending the Bench, Under the Radar*, ARK. TIMES, July 6, 2001, at 8 (discussing Justice Smith).

203. See *Sullivan*, 74 S.W.3d at 218.

204. See *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005).

205. *Id.* at 357. The reader can peruse *High Times*’ website at <http://www.hightimes.com> (last visited Feb. 23, 2006). In the spirit of this Article, however, one should keep in mind that the Fourth Amendment provides no restraint on law enforcement obtaining a list of websites you visit from your ISP. See *supra* note 71 and accompanying text.

which it subpoenas in order to obtain their customer lists.<sup>206</sup> These lists are then turned over to state and local law enforcement.<sup>207</sup> In this manner the Indiana State Police were provided the name and address of Patrick Litchfield, who had purchased items from Worm's Way.<sup>208</sup>

Based on this tip the state police performed two garbage pulls at the Litchfield residence, removing several opaque bags that had been left for collection.<sup>209</sup> When a search of these bags revealed, inter alia, marijuana stems, seeds, and leaves, police obtained a warrant to search the home.<sup>210</sup> The resulting search located fifty-one marijuana plants growing on the back deck.<sup>211</sup>

According to the federal third-party doctrine, a homeowner retains no reasonable expectation of privacy in garbage left for collection, and therefore trash pulls are not "searches" restricted by the Fourth Amendment.<sup>212</sup> The Litchfields therefore did not challenge the garbage pulls under the Fourth Amendment, but instead relied upon Indiana's analog.<sup>213</sup> The Indiana Supreme Court had previously deemed warrantless garbage pulls to be constitutional, but it was over a dissent.<sup>214</sup> And, presumably even more encouraging to the Litchfields, the Chief Justice had recused himself from those proceedings based on his own experience as the target of a garbage pull seeking evidence of marijuana use.<sup>215</sup>

Textually Indiana's analog is virtually identical to the Fourth Amendment,<sup>216</sup> but the state rejects the federal reasonable expectation of privacy criterion. Instead, true to the text of both the Fourth

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206. *Litchfield*, 824 N.E.2d at 357.

207. *Id.* A customer provides this information for the company's use, so it definitely receives no Fourth Amendment protection. Remarkably, a customer would therefore have no Fourth Amendment claim even if the DEA stole this information from the advertisers. See *United States v. Payner*, 447 U.S. 727, 731-33 (1980).

208. *Litchfield*, 824 N.E.2d at 357. Worm's Way is available at <http://www.wormsway.com> (last visited Feb. 23, 2006).

209. *Litchfield*, 824 N.E.2d at 358.

210. *Id.*

211. *Id.*

212. *California v. Greenwood*, 486 U.S. 35, 40-41 (1988).

213. *Litchfield*, 824 N.E.2d at 359.

214. *Moran v. State*, 644 N.E.2d 536, 541, 543 (Ind. 1994).

215. See *id.* at 543 (indicating that Chief Justice Shepard did not participate); *Judge Checks Out Colleague's Trash*, NAT'L L.J., Dec. 5, 1994, at A10. Chief Justice Shepard has been credited with triggering the "modern era in Indiana constitutional law" via his 1989 law review article. Jon Laramore, *Indiana Constitutional Developments: The Wind Shifts*, 36 IND. L. REV. 961, 961 (2003). This claim is, of course, somewhat self-serving as it appears in a later volume of that same journal. See *id.* (citing Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989)).

216. See *infra* Appendix.

Amendment and its state analog, Indiana moves immediately to whether the challenged action was reasonable.<sup>217</sup> And, true to the contextual nature of that term,<sup>218</sup> the court evaluates the reasonableness of the challenged police conduct under the totality of the circumstances.<sup>219</sup>

One of those circumstances is “the basis upon which the [police] selected the subject of the search or seizure.”<sup>220</sup> This is sensible, and the United States Supreme Court has also considered this circumstance under the Fourth Amendment.<sup>221</sup> Because of its stubborn insistence that one retains no reasonable expectation of privacy in garbage, however, and that rifling through garbage is therefore not a “search,” the United States Supreme Court leaves police free to trample all over this limitation.<sup>222</sup> Not so in Indiana, where a unanimous *Litchfield* court held that reasonable police conduct requires satisfying the *Terry* standard.<sup>223</sup> In Indiana, an officer wishing to search garbage left for collection must have an articulable basis justifying reasonable suspicion that (1) the subjects of the search (meaning the source of the garbage) have engaged in violations of law and that (2) those violations might reasonably lead to evidence being located in that trash.<sup>224</sup>

Because the record did not specify whether *Litchfield* had responded to an advertisement in *High Times*, or was merely an independent customer of Worm’s Way, the Indiana supreme court remanded for a determination whether this standard was satisfied.<sup>225</sup> But even if police had reasonably suspected *Litchfield*, could they race to his home with lights ablaze and sirens wailing and pick through his garbage while his nosy neighbors looked on with glee? Once again the federal third-party

217. See *Litchfield*, 824 N.E.2d at 359. “Because we read this section of our constitution as having in its first clause a primary and overarching mandate for protections from unreasonable searches and seizures, the reasonableness of the official behavior must always be the focus of our state constitutional analysis.” *Id.* at 361 (quoting *Moran*, 644 N.E.2d at 539).

218. The first definition of “reasonable” in one dictionary is “agreeable to reason or sound judgment; logical.” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1197 (1989).

219. *Litchfield*, 824 N.E.2d at 359 (citing *Moran*, 644 N.E.2d at 539).

220. *Id.* at 360.

221. See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 454 (1990) (citing *Delaware v. Prouse*, 440 U.S. 648 (1979)) (contrasting unacceptable discretionary stops and constitutional roadblocks).

222. See *California v. Greenwood*, 486 U.S. 35, 39-41 (1988).

223. *Litchfield*, 824 N.E.2d at 364.

224. *Id.* Although Indiana courts always consider the constraints upon the government actor, this does not mean there must *always* be individualized suspicion. The supreme court has permitted random drug testing of middle and high school students. See *id.* at 360 (discussing *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 985 (Ind. 2002)).

225. *Id.* at 364.



doctrine dictates that the Fourth Amendment likely has nothing to say—the action is neither a search nor a seizure, so police are unrestrained.<sup>226</sup> Not so in Indiana, where reasonable police conduct requires that police retrieve the garbage in substantially the same manner as the trash collector would take it.<sup>227</sup>

So not only should states reject the federal third-party doctrine, but they should reject its underlying construct as well, the reasonable expectation of privacy. As articulated by a unanimous United States Supreme Court in 2001:

The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined “by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”<sup>228</sup>

Or, in the words of the Indiana supreme court, “a court should ‘weigh the nature of the privacy interest upon which the search intrudes, the character of the intrusion that is complained of, and the nature and immediacy of the governmental concern.’”<sup>229</sup>

One might counter that the Indiana result could just as well have been reached under the reasonable expectation of privacy (REP) framework. A court first determines that, contrary to the holding of the United States Supreme Court, one *does* retain a REP in garbage left for collection. This would not be a strange result, especially if a court adopted a REP definition like that proposed by Professor Amsterdam:

The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the

226. Moreover it is not clear whether the United States Supreme Court would consider this factor relevant even were the conduct deemed a Fourth Amendment search. The Court has, however, sometimes considered the manner of acquisition. *See* *Illinois v. Caballes*, 125 S. Ct. 834, 844-45 (2005) (Ginsburg, J., dissenting) (collecting cases and arguing that a canine sniff of an automobile should be restricted by the Fourth Amendment because it is intimidating and adversarial, changing the entire character of the encounter).

227. *See Litchfield*, 824 N.E.2d at 363-64 (“The police need not go to the lengths elaborated in [a previous appellate opinion], where police rode in the trash pickup and searched [the garbage] only after it was taken by its usual collectors. But police do need to ensure that they do not cause a disturbance or create the appearance of a police raid of the residence.”).

228. *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). The Court went on to explain that “[a]lthough the Fourth Amendment ordinarily requires the degree of probability embodied in the term ‘probable cause,’ a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable.” *Id.* at 121.

229. *Litchfield*, 824 N.E.2d at 360 (quoting *Nw. Sch. Corp.*, 763 N.E.2d at 979).

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.<sup>230</sup>

The court would then go on to apply the reasonableness criterion required by the state analog. Although this would be preferable to the actual federal holding, and some states have so held,<sup>231</sup> the redundant use of “reasonable” is unnecessary and even confusing.

Consider the recent decision by the Supreme Court of Montana in *State v. 1993 Chevrolet Pickup*.<sup>232</sup> As in *Litchfield*, the issue was whether the state analog restricts garbage pulls.<sup>233</sup> Montana has adopted the federal REP criterion, so the court first considered whether the defendant exhibited a subjective expectation of privacy in his trash, and, if so, whether it was one society was willing to consider reasonable.<sup>234</sup> In Montana, as in federal law, “where no reasonable expectation of privacy exists, there is neither a ‘search’ nor a ‘seizure’ within the contemplation of [the constitutional provision].”<sup>235</sup>

The court held that the defendant had abandoned his garbage, and therefore retained no subjective expectation of privacy in its contents.<sup>236</sup> Moreover, even if he had retained a subjective expectation, it was an expectation that society would not consider reasonable.<sup>237</sup> Hence the garbage pull was neither a search nor a seizure for purposes of the Montana Constitution.<sup>238</sup> That should, of course, end the matter—there is no constitutional restriction on garbage pulls in Montana.

In an illogical twist (though not, alas, one without precedent elsewhere),<sup>239</sup> the Montana supreme court nonetheless went on to adopt

230. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974); see also *People v. Oates*, 698 P.2d 811, 816 (Colo. 1985) (en banc) (adopting Amsterdam’s formulation); *State v. Hempele*, 576 A.2d 793, 802 (N.J. 1990) (same); *State v. Nagel*, 880 P.2d 451, 454 (Or. 1994) (in banc) (same); *State v. Morris*, 680 A.2d 90, 93-94 (Vt. 1996) (same); 1 LAFAYE, *supra* note 7, § 2.1(d) (same).

231. See, e.g., *People v. Krivda*, 486 P.2d 1262, 1268 (Cal. 1971) (in banc) (finding a REP in garbage left for collection), *vacated*, 409 U.S. 33 (1972); *State v. Tanaka*, 701 P.2d 1274, 1276-77 (Haw. 1985) (same); *Hempele*, 576 A.2d at 810 (same).

232. 2005 MT 180, 328 Mont. 10, 116 P.3d 800.

233. *Id.* ¶ 2.

234. *Id.* ¶¶ 9-10.

235. *Id.* ¶ 9.

236. *Id.* ¶ 15.

237. *Id.* ¶ 16.

238. *Id.* ¶ 17.

239. Hawaii has a similar jurisprudence for canine sniffs. See *State v. Snitkin*, 681 P.2d 980, 983-84 (Haw. 1984) (holding a canine sniff is not a search but nonetheless subjecting it to a reasonableness inquiry); *State v. Groves*, 649 P.2d 366, 371-73 (Haw. 1982) (same).

the requirements of *Litchfield*.<sup>240</sup> In attempting to justify these requirements the court seemed to take great pains to avoid the constitutional requirement that searches be “reasonable,” presumably because the court had just finished explaining why a garbage pull was, despite all common sense to the contrary, *not* a search. According to the Montana supreme court, “the public would [not] be entirely comfortable with,” nor “embrace the idea of,” unrestrained garbage pulls.<sup>241</sup> Thus, given the “unique” nature of garbage, it “seems only fair” that garbage pulls be constrained, and therefore the court “deem[ed] it appropriate” to adopt the *Litchfield* criteria.<sup>242</sup>

If Montana’s rather unique jurisprudence is representative of the clarity to be gained by avoiding complete reliance on the term “reasonable,” it does not highly commend itself.<sup>243</sup> Instead, it is the Indiana model that openly allows for the nuanced, context-specific determinations that are essential in the modern world. Garbage pulls are an important and legitimate source of evidence, but they are also quite invasive. Hence in Indiana their use is restricted. But requiring a warrant supported by probable cause would typically be prohibitive, because it is often the garbage pull that provides probable cause to believe a crime has been committed.<sup>244</sup> Moreover, a warrant can authorize police to search the home itself, a location that should receive greater protection than the garbage one leaves for collection. In short, it seems the Indiana supreme court got this one exactly right.

The same spectrum of protection is necessary in more typical third party contexts. Just as with garbage, it would be unreasonable for police to arbitrarily look through the names of those you telephone. And police certainly should be prohibited from arbitrarily listening in on telephone conversations. But it would defy logic to require police to have the same quantum of suspicion before engaging in these very different activities. By statute telephone activity receives multi-tiered, though perhaps inadequate, protection.<sup>245</sup> On account of the federal

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240. *1993 Chevrolet Pickup*, 2005 MT 180, ¶ 18, 328 Mont. 10, ¶ 18, 116 P.3d 800, ¶ 18.

241. *Id.*

242. *Id.* The court only gives in and reverts to the term “reasonable” when it begins describing the *Litchfield* decision. *See id.* ¶ 19.

243. Two justices in dissent inveighed against the majority’s “internally incoherent” opinion. *Id.* ¶ 39 (Leaphart, J., dissenting).

244. This was true in *Litchfield* and *1993 Chevrolet Pickup*. *Litchfield v. State*, 824 N.E.2d 356, 358 (Ind. 2005); *1993 Chevrolet Pickup*, 2005 MT 180, ¶¶ 3-4, 328 Mont. 10, ¶¶ 3-4, 116 P.3d 800, ¶¶ 3-4.

245. Federal law allows access to dialing information upon a mere certification “that the information likely to be obtained is relevant to an ongoing criminal investigation.” 18 U.S.C. § 3122 (2000). Perhaps the applicant should at least have to articulate the reasons

third-party doctrine, telephone activity receives only binary constitutional protection: no protection for dialing information,<sup>246</sup> but significant protection for content information.<sup>247</sup>

Obtaining different types of information from different types of third parties should require different quanta of suspicion and different processes. Although administrability might favor a constitutional provision that provides either bright-line or no protection in every circumstance, that can only be achieved at the significant cost of illogical, or extremely limited, application. A requirement of a subpoena or reasonable suspicion for all third party information gives little protection to medical records or location tracking. A requirement of probable cause for all third party information is unacceptable to legitimate law enforcement. But this does not mean every case will unpredictably depend upon its own particular facts. Just as the Supreme Court and the fifty states have managed to develop a jurisprudence that entrance to the home is typically forbidden absent a warrant supported by probable cause, so courts unshackled from the third-party doctrine can develop a jurisprudence regulating both traditional access to third party information (including garbage, medical records, telephone records, utility records, and bank records) and technologically enhanced access to third party information (including canine and mechanical sniffs of containers, vehicles, homes, and persons).

There is an entire spectrum of protections from which a court can select. These protections range along at least two axes, quantum of suspicion and process, and courts will have to select at least one set of coordinates for each relevantly different type of information. For the first a court might choose among no suspicion,<sup>248</sup> a “likely to be relevant” standard, reasonable suspicion, “probable cause” defined as fair probability, “probable cause” defined as likely, or even some higher standard. For the second a court might choose among requiring no process, requiring internal approval from specified personnel, requiring a subpoena, requiring a subpoena with grand jury pre-clearance, requiring delayed notice to the true party in interest, requiring advanced notice to the true party in interest, requiring a certification to a court, or requiring a substantive showing to a court. Perhaps it is reasonable to obtain power consumption records and a DNA fingerprint based only on reasonable suspicion, and to obtain garbage and telephone dialing

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for that belief. The content of telephone conversations receives significant protection under the Federal Wiretap Act. 18 U.S.C. § 2511 (2000 & Supp. 2002).

246. *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979).

247. *Berger v. New York*, 388 U.S. 41, 62-63 (1967).

248. Even no suspicion might be reasonable for information as commonplace as name and address. *See Commonwealth v. Duncan*, 817 A.2d 455, 465-66 (Pa. 2003).

records on reasonable suspicion and administrative approval, but to obtain medical records or location tracking would require a substantive showing of probable cause. For certain types of information it might be reasonable to permit law enforcement an option. Perhaps it is reasonable for police to access bank records on reasonable suspicion so long as they provide advanced notice to the customer, but also reasonable to obtain such records without notice if police are willing to make an advanced showing of probable cause.<sup>249</sup> Perhaps delayed notice is reasonable upon reasonable suspicion of criminality and reasonable suspicion of obstruction of justice.

This Article will not attempt to articulate a matrix of such requirements, and perhaps such a matrix is best composed over time as actual constitutional controversies are presented to the courts. In those states having diverged from the federal third-party doctrine this process is already underway. For given information, say telephone numbers dialed, some courts merely require reasonable suspicion<sup>250</sup> while others require only a minimal process.<sup>251</sup> Other courts require some judicial or grand jury proceeding,<sup>252</sup> and still others require a traditional warrant supported by probable cause.<sup>253</sup> Nor have courts limited themselves to

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249. Several states provide such an option by statute. *See, e.g.*, CAL. GOV'T CODE §§ 7475, 7476(b)(1) (West 1995 & Supp. 2005); CONN. GEN. STAT. ANN. § 36a-43(a) (West 2004); N.H. REV. STAT. ANN. §§ 359-C:8 to -C:10 (1995). While New Jersey recently held its constitution permits access to bank records via grand jury subpoena without customer notice, the court exercised its supervisory authority over grand juries to charge a committee to investigate whether notice should be required. *See State v. McAllister*, 875 A.2d 866, 878 (N.J. 2005). Federal legislation enacted in response to the Supreme Court's decision in *Miller* sometimes requires customer notice, but it can be omitted for cause and grand jury subpoenas never require notice. 12 U.S.C. §§ 3407, 3409, 3413(i) (2000). Florida has a similar scheme for access to medical records, allowing law enforcement access via warrant without notice or via subpoena with notice. *See Limbaugh v. State*, 887 So. 2d 387, 393-95 (Fla. Dist. Ct. App. 2004). The Federal Stored Communications Act offers a similar choice for obtaining certain content information. *See* 18 U.S.C. § 2703(b) (2000 & Supp. 2002).

250. *See, e.g.*, *Shaktman v. State*, 553 So. 2d 148, 151-52 (Fla. 1989) (requiring reasonable suspicion for pen registers). Several states also require reasonable suspicion for canine sniffs. *See, e.g.*, *Pooley v. State*, 705 P.2d 1293, 1311 (Alaska Ct. App. 1985); *People v. Unruh*, 713 P.2d 370, 379 (Colo. 1986) (en banc); *State v. Carter*, 697 N.W.2d 199, 212 (Minn. 2005); *State v. Pellicci*, 580 A.2d 710, 717-18 (N.H. 1990).

251. *See, e.g.*, *Greer v. N.J. Bureau of Sec.*, 671 A.2d 1080, 1086 (N.J. Super. Ct. App. Div. 1996) (permitting access via administrative subpoena).

252. *See, e.g.*, *People v. Blair*, 602 P.2d 738, 746-47 (Cal. 1979) (in banc) (requiring judicial approval); *People v. Larkin*, 239 Cal. Rptr. 760, 762 (Dist. Ct. App. 1987) (same); *People v. DeLaire*, 610 N.E.2d 1277, 1282-83 (Ill. App. Ct. 1993) (allowing grand jury subpoena); *People v. Jackson*, 452 N.E.2d 85, 89 (Ill. App. Ct. 1983) (same).

253. *See, e.g.*, *State v. Rothman*, 779 P.2d 1, 7-8 (Haw. 1989); *State v. Thompson*, 760 P.2d 1162, 1167 (Idaho 1988); *Commonwealth v. Melilli*, 555 A.2d 1254, 1258-59 (Pa. 1989). Several states also typically require a warrant supported by probable cause for

such traditional offerings. In Colorado, for example, bank records can be obtained via a prosecutor's subpoena, but only if that subpoena is supported by probable cause.<sup>254</sup>

These rather fine distinctions may seem to require a lot of the Fourth Amendment and its state analogs, thereby leaving considerable discretion and hard work to the courts. It would be a grave error to minimize the difficulty of crafting a useable matrix, or the discomfort some may have with "finding" such a detailed requirement in a constitutional provision. The multipronged *Miranda* warning seems simple in comparison. The author shares this concern, and is open to further thought and scholarship on the issue. One saving grace may be that such decisions can be made without requiring discretion and hard work on the part of police officers in the field. Once a court requires a given quantum of suspicion and/or a given procedure to obtain a certain type of information, officers (and attorneys) will have clear guidance. Ultimately, given modern technology and social norms, the author is not aware of any acceptable substitute for nuanced constitutional privacy protections. Not only does modern society make it impossible to limit personal information to the home, but modern technology can peer into that home. Any meaningful protection will include information in the hands of, or available to, third parties. While legislative determinations are certainly relevant to what is reasonable, and may be good policy where the constitutional restraints are deemed minimal, it is, to borrow a phrase, the courts' "duty . . . to say what the law is."<sup>255</sup> In a world in which we give so much information to third parties, piecemeal statutory protection is insufficient.

It is encouraging that many states have parted course with the United States Supreme Court with respect to the third-party doctrine, and that others seem inclined to follow. There is, however, work left to do, and

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location tracking via government transmitter or for garbage pulls. See *People v. Oates*, 698 P.2d 811, 818 (Colo. 1985) (en banc) (transfer of goods containing electronic beeper); *State v. Tanaka*, 701 P.2d 1274, 1277 (Haw. 1985) (garbage); *State v. Hempel*, 576 A.2d 793, 813 (N.J. 1990) (garbage); *State v. Campbell*, 759 P.2d 1040, 1049 (Or. 1988) (location tracking via radio transmitter on vehicle); *State v. Jackson*, 76 P.3d 217, 220 (Wash. 2003) (en banc) (location tracking via GPS device on vehicle).

254. See *People v. Mason*, 989 P.2d 757, 759-60 (Colo. 1999). Colorado's requirements are less stringent, however, for grand jury and administrative subpoenas. See *id.* at 761-62; *People v. Lamb*, 732 P.2d 1216, 1220-21 (Colo. 1987) (en banc); *Charnes v. DiGiacomo*, 612 P.2d 1117, 1122, 1123 n.12 (Colo. 1980) (en banc); see also *State v. McAllister*, 875 A.2d 866, 867-68 (N.J. 2005) (allowing access to bank records via grand jury subpoena). Montana permits access to medical records via subpoena but similarly requires probable cause. See *State v. Nelson*, 941 P.2d 441, 448-50 (Mont. 1997). Illinois requires probable cause if the information sought is deemed to be intimately personal. See *In re May 1991 Will County Grand Jury*, 604 N.E.2d 929, 937-38 (Ill. 1992) (pubic hair).

255. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

hopefully this Article will encourage and assist practicing attorneys, courts, and commentators as we seek to both preserve liberties and encourage effective law enforcement.

APPENDIX  
FOURTH AMENDMENT AND STATE ANALOGS

FOURTH AMENDMENT

U.S. CONST. amend. IV: "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."

ALABAMA

ALA. CONST. art. I, § 5: "That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation."

ALASKA

ALASKA CONST. art. I, § 14 (analog): "The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. 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."

ALASKA CONST. art. I, § 22 (no federal counterpart): "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."

ARIZONA

ARIZ. CONST. art. II, § 8: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

ARKANSAS

ARK. CONST. art. II, § 15: "The right of the people of this State to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."



## CALIFORNIA

CAL. CONST. art. I, § 13: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

## COLORADO

COLO. CONST. art. II, § 7: "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing."

## CONNECTICUT

CONN. CONST. art. I, § 7: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

## DELAWARE

DEL. CONST. art. I, § 6: "The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation."

## FLORIDA

FLA. CONST. art. I, § 12 (analog): "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States

Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.”

FLA. CONST. art. I, § 23 (no federal counterpart): “Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.”

#### GEORGIA

GA. CONST. art. I, § I, ¶ XIII: “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 warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the persons or things to be seized.”

#### HAWAII

HAW. CONST. art. I, § 7 (analog): “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy 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 or the communications sought to be intercepted.”

HAW. CONST. art. I, § 6 (no federal counterpart): “The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.”

#### IDAHO

IDAHO CONST. art. I, § 17: “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 warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.”

## ILLINOIS

ILL. CONST. art. I, § 6: “The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.”

## INDIANA

IND. CONST. art. I, § 11: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.”

## IOWA

IOWA CONST. art. I, § 8: “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.”

## KANSAS

KAN. CONST. Bill of Rights § 15: “The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or property to be seized.”

## KENTUCKY

KY. CONST. § 10: “The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.”

## LOUISIANA

LA. CONST. art. I, § 5: “Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.”

## MAINE

ME. CONST. art. I, § 5: “The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause—supported by oath or affirmation.”

## MARYLAND

MD. CONST. Declaration of Rights art. 26: “That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.”

## MASSACHUSETTS

MASS. CONST. Declaration of Rights pt. 1, art. XIV: “Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.”

## MICHIGAN

MICH. CONST. art. I, § 11: "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state."

## MINNESOTA

MINN. CONST. art. I, § 10: "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 warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

## MISSISSIPPI

MISS. CONST. art. III, § 23: "The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized."

## MISSOURI

MO. CONST. art. I, § 15: "That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation."

## MONTANA

MONT. CONST. art. II, § 11 (analog): "The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing."

MONT. CONST. art. II, § 10 (no federal counterpart): “The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”

#### NEBRASKA

NEB. CONST. art. I, § 7: “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 warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.”

#### NEVADA

NEV. CONST. art I, § 18: “The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by Oath or Affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things to be seized.”

#### NEW HAMPSHIRE

N.H. CONST. pt. 1, art. 19: “Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places, or arrest a person for examination or trial in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued; but in cases, and with the formalities, prescribed by law.”

#### NEW JERSEY

N.J. CONST. art. I, ¶ 7: “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 warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.”

## NEW MEXICO

N.M. CONST. art. II, § 10: “The people shall be secure in their persons, papers, homes, and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the papers or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.”

## NEW YORK

N.Y. CONST. art. I, § 12 : “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.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.”

## NORTH CAROLINA

N.C. CONST. art. I, § 20: “General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.”

## NORTH DAKOTA

N.D. CONST. art. I, § 8: “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 warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.”

## OHIO

OHIO CONST. art. I, § 14: “The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.”

## OKLAHOMA

OKLA. CONST. art. II, § 30: “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized.”

## OREGON

OR. CONST. art. I, § 9: “No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.”

## PENNSYLVANIA

PA. CONST. art. I, § 8: “The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.”

## RHODE ISLAND

R.I. CONST. art. I, § 6: “The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched and the persons or things to be seized.”



## SOUTH CAROLINA

S.C. CONST. art. I, § 10: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy 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, the person or thing to be seized, and the information to be obtained."

## SOUTH DAKOTA

S.D. CONST. art. VI, § 11: "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 warrant shall issue but upon probable cause supported by affidavit, particularly describing the place to be searched and the person or thing to be seized."

## TENNESSEE

TENN. CONST. art. I, § 7: "That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted."

## TEXAS

TEX. CONST. art. I, § 9: "The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

## UTAH

UTAH CONST. art. I, § 14: "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 warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized."

## VERMONT

VT. CONST. ch. 1, art. 11: "That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted."

## VIRGINIA

VA. CONST. art. I, § 10: "That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

## WASHINGTON

WASH. CONST. art. I, § 7: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

## WEST VIRGINIA

W. VA. CONST. art. III, § 6: "The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized."

## WISCONSIN

WIS. CONST. art. I, § 11: "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 warrant 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."

## WYOMING

WYO. CONST. art. I, § 4: “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 warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.”