CONSTITUTIONAL LAW—SEARCH AND SEIZURE—WARRANTLESS SEIZURE OF TELEPHONE BILLING RECORDS VIOLATES NEW JERSEY CONSTITUTION—*State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982).

During an investigation into illegal gambling, the New Jersey State Police uncovered Merrell Hunt's and Ralph Pirillo's names,[1] along with two telephone numbers allegedly used by Hunt to conduct a gambling business.[2] A state police detective requested and received toll billing records[3] for these numbers from the telephone company.[4] The tolling records revealed that numerous calls had been made to Sports Phone, an organization which furnishes current sporting events results.[5]

Evidence later obtained from court authorized pen registers,[6] wiretaps,[7] and searches[8] led to Hunt's and Pirillo's indictments on

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[1] State v. Hunt, 91 N.J. 338, 341, 450 A.2d 952, 953 (1982). Hunt and known gambler Robert Notaro were overheard discussing betting during an authorized wiretap of Notaro's phone. *Id.* Hunt and Pirillo were also observed meeting with Notaro in Atlantic City. *Id.* Informants later told police that Hunt and Pirillo were bookmakers. *Id.*

[2] *Id.* An informant had given police the phone numbers, although one number had been uncovered during a prior investigation. *Id.*

[3] Telephone toll billing records contain itemized listings of long distance phone calls charged to a customer's phone. Reporters Comm. v. AT&T Co., 593 F.2d 1030, 1036 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979). The records list the numbers dialed, along with the time, date and length of the calls. *Id.* at 1036. Telephone subscribers receive copies of their tolling records monthly. *Id.*

[4] State v. Hunt, 91 N.J. 338, 341, 450 A.2d 952, 953 (1982). AT&T policy, supposedly adopted throughout the Bell System in 1974, prohibits disclosure of a customer's billing records "in the absence of a subpoena or summons . . . issued under the authority of a statute, court, or legislative body." Reporters Comm. v. AT&T Co., 593 F.2d 1030, 1038 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979). This policy does not appear to be consistently followed by the individual telephone companies. *Compare Hunt*, 91 N.J. at 341, 450 A.2d 953 (New Jersey Bell releases records on informal request) *with* Indiana Bell Tel. Co. v. State, Ind. , 409 N.E.2d 1089, 1090 (1980) (Indiana Bell contests a court order to produce a customer's billing records).

[5] State v. Hunt, 91 N.J. 338, 341, 450 A.2d 952, 953 (1982).

[6] *Id.* at 342, 450 A.2d at 953. A pen register is "a device that records the numbers dialed on a telephone." *Id.*; *see also* United States v. New York Tel. Co., 434 U.S. 159, 161 n.1 (1977) (discussing how a pen register operates). Police obtained a court order to install pen registers on Hunt's phones after a detective eavesdropped on phone conversations between a consenting informer and Hunt. State v. Hunt, 91 N.J. 338, 341-42, 450 A.2d 952, 953 (1982). The pen registers revealed numerous calls made from Hunt's to Pirillo's phones. *Id.* at 342, 450 A.2d at 953. Several calls to numbers of known gamblers were also disclosed. *Id.*

[7] State v. Hunt, 91 N.J. 338, 342, 450 A.2d 952, 953 (1982). The New Jersey Wiretapping and Electronic Surveillance Act governs the employment of wiretaps. *See* N.J. STAT. ANN. §§ 2A:156A-1 to -26 (West 1971 & Cum. Supp. 1982-1983). The wiretaps clearly evidenced gambling activities. 91 N.J. at 342, A.2d at 953.

[8] State v. Hunt, 91 N.J. 338, 342, 450 A.2d 952, 953-54 (1982). A search of Hunt's residence turned up gambling paraphernalia and a large amount of cash, while a search of Pirillo's home and car turned up no evidence. *See id.*

gambling charges.[9] The defendants moved to suppress the evidence seized in the searches, as well as the information derived from Hunt's toll billing records.[10] The motions to suppress this evidence were denied, and the defendants pled guilty to and were convicted of bookmaking and conspiracy.[11] The defendants appealed their convictions, alleging error in the denial of their suppression motions.[12] The New Jersey Superior Court, Appellate Division, summarily affirmed the convictions.[13] The New Jersey Supreme Court granted certification in order to review the constitutionality of the seizure of the toll billing records.[14]

The New Jersey Supreme Court held in *State v. Hunt*[15] that the warrantless search and seizure of Hunt's toll billing records violated article I, paragraph 7 of the New Jersey Constitution, even though the United States Supreme Court had impliedly excluded such records from fourth amendment search and seizure protection.[16]

The fourth amendment to the United States Constitution prohibits the unreasonable search and seizure of "persons, houses, papers, or effects."[17] Prior to 1967, the method for establishing that a police activity was a search and seizure involved determining whether a

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[9] *Id.* at 340-42, 450 A.2d at 952-54. Hunt and Pirillo were indicted under N.J. STAT. ANN. § 2A:112-3 (West 1971) (bookmaking and keeping premise for gambling), *id.* § 2A:98-1 (conspiracy), and *id.* § 2A:85-14 (aiding and abetting). *See* 91 N.J. at 340, 450 A.2d 952.

[10] State v. Hunt, 91 N.J. 338, 342, 450 A.2d 952, 954 (1982). The defendants also sought to exclude evidence derived from the pen registers and wiretaps. *Id.*

[11] *Id.* at 340, 450 A.2d at 952-53 (1982). The remaining charges were dropped in accordance with a plea bargain arrangement. *Id.* at 340, 450 A.2d at 953.

[12] *Id.* at 340, 450 A.2d at 953.

[13] *Id.* at 340, 450 A.2d at 940.

[14] *Id.* at 340-41, 450 A.2d at 953.

[15] 91 N.J. 338, 450 A.2d 952 (1982).

[16] *Id.* at 343-44, 348, 450 A.2d at 954-55, 957. In Smith v. Maryland, 442 U.S. 735 (1979), the United States Supreme Court held that warrantless pen register use did not violate the fourth amendment. *Id.* at 745-46. For a discussion of *Smith*, see *infra* notes 36-47 and accompanying text.

The *Hunt* court concluded that law enforcement interests dictated that its decision here apply prospectively only. 91 N.J. at 348-49, 450 A.2d at 957. The fact that the decision was not retroactive, however, had no influence on appellants' situation because the court determined that the evidence leading to the conviction was obtained with so little aid from the tolling records that failure to suppress them was harmless error. The convictions, therefore, were affirmed. *Id.* at 349-50, 450 A.2d at 957-58; *cf.* Nardone v. United States, 308 U.S. 338, 341 (1939) (attenuated connection may allow admissibility of "tainted" evidence). *But cf.* Wong Sun v. United States, 371 U.S. 741, 784 (1963) (evidence derived from illegal search inadmissible unless also derived from independent source or extremely "attenuated").

[17] U.S. CONST. amend. IV. The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants

physical intrusion into a "constitutionally protected area" had occurred.[18] Property interests dictated the resolution of what these areas were.[19] In 1967, the United States Supreme Court in *Katz v. United States*[20] rejected the property-oriented search and seizure analysis, adopting instead an approach that examined the privacy interest involved and the reasonableness of the asserted expectation of privacy.[21]

The contested police activity in *Katz* was the warrantless recording of phone calls placed from public telephone booths.[22] Evidence derived from these recordings led to Katz's conviction on federal gambling charges.[23] The court of appeals, in affirming the conviction, rejected allegations of a fourth amendment violation in the use of evidence obtained from the recordings.[24] The appeals court based its decision on the absence of any physical intrusion into the phone booth.[25]

In reversing, the Supreme Court discounted the "constitutionally protected area" approach, noting that "the Fourth Amendment pro-

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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. Thus, for a search and seizure to be constitutional, it must be established that it was reasonable. *See* United States v. Chadwick, 433 U.S. 1, 9 (1977); United States v. Dionisio, 410 U.S. 1, 8-9 (1973). Generally, a search is considered reasonable if it is conducted pursuant to a valid warrant. *See Chadwick*, 433 U.S. at 7; United States v. United States Dist. Court, 407 U.S. 297, 315-18 (1972); *cf.* Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (limited, warrantless search of a suspect allowed when law enforcement officials believe the person is armed and dangerous). Evidence seized during a search that is violative of the fourth amendment will be excluded from trial. Weeks v. United States, 232 U.S. 383, 398 (1914) (exclusionary rule applies to federal courts); Mapp v. Ohio, 367 U.S. 643, 660 (1960) (exclusionary rule applies to state courts through the fourteenth amendment). *See generally* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

[18] *See, e.g.*, Silverman v. United States, 365 U.S. 505, 511-12 (1961).

[19] *See, e.g.*, Goldman v. United States, 316 U.S. 129, 134-35 (1942). *See generally* Note, *From Private Places to Personal Privacy: A Post-*Katz *Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 969-75 (1968) (historical background for the importance of property concepts in fourth amendment analysis and their relation to the idea of "constitutionally protected area").

[20] 389 U.S. 347 (1967).

[21] *Id.* at 352-53; *see* Smith v. Maryland, 442 U.S. 735, 739-40 (1979) (discussing *Katz*). For a general discussion of *Katz*, see Note, *A Reconsideration of the* Katz *Expectation of Privacy Test*, 76 MICH. L. REV. 154, 154-57, 171-75 (1977), and Note, *supra* note 19, at 975-78.

[22] 389 U.S. at 348. Katz had been observed using two phone booths at certain times daily. Katz v. United States, 369 F.2d 130, 131 (9th Cir. 1966), *rev'd*, 389 U.S. 347 (1967). F.B.I. agents placed microphones on top of the two booths and recorded Katz's end of his phone conversations. *Id.*

[23] *See* Katz v. United States, 369 F.2d 130, 131-33 (9th Cir. 1966), *rev'd*, 389 U.S. 347 (1967).

[24] *Id.* at 133.

[25] *Id.* at 133-34.

tects people—and not simply 'areas.' "[26] Writing for the majority, Justice Stewart concluded that because public telephones play a vital role in confidential communication, and because the normal assumption of a person using a phone booth is that his words will not be subject to public broadcast, a privacy interest upon which petitioner "justifiably relied" had been breached.[27] Justice Stewart therefore held that the recording of Katz's conversations constituted a search and seizure.[28]

In a concurring opinion, Justice Harlan elaborated on the decision by saying that in order for a person's "expectation of privacy" to be covered by the fourth amendment, it must pass a two fold test.[29] The person must display an actual, subjective privacy expectation, and additionally, that expectation must be one that society recognizes as reasonable.[30] Justice Harlan also noted that if a person left open his activities, statements, or objects to public exposure, there could be no reasonable expectation of privacy in the matter exposed.[31] Since Justice Harlan concluded that the recording of Katz's phone conversations comprised a search and seizure, he apparently believed that Katz displayed the required expectation of privacy when using the phone, and that the expectation was one which society recognized as reasonable.[32]

Although *Katz* explicitly extended fourth amendment protection to telephone conversations, confusion remained about whether this protection extended beyond the communication itself. Those lower federal courts which considered the issue unanimously excluded toll billing records from fourth amendment coverage.[33] Other cases, however, indicated conflict over the amendment's applicability to the similar subject of pen registers.[34] This confusion was relieved by the

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[26] 389 U.S. at 353.

[27] *See id.* at 352-53.

[28] *Id.* at 353. The Court concluded that the recording of Katz's conversations should have been conducted only with judicial authorization, and that therefore the activity was in violation of the fourth amendment. *See id.* at 359.

[29] *See id.* at 360-61 (Harlan, J., concurring).

[30] *Id.*

[31] *Id.*

[32] *See id.* at 360-62 (Harlan, J., concurring).

[33] *See* Reporters Comm. v. AT&T, 593 F.2d 1030, 1043-44 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979); United States v. Baxter, 492 F.2d 150, 167 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974). *But cf.* People v. McKunes, 51 Cal. App. 3d 487, 490-91, 124 Cal. Rptr. 126, 127-28 (1975) (seizure of telephone billing records violated defendant's right to privacy).

[34] *See* Smith v. Maryland, 442 U.S. 735, 738 (1979). Pen registers are similar to tolling records in that both record only that the call took place, not the content of the call. *Hunt*, 91 N.J. at 343-44, 450 A.2d at 954; *cf.* People v. Blair, 25 Cal. 3d 640, 654, 602 P.2d 738, 747, 159 Cal.

United States Supreme Court decision in *Smith v. Maryland*,[35] which explicitly excluded the use of pen registers from fourth amendment coverage.[36]

Smith concerned a pen register which was installed on petitioner's phone at the request of the police.[37] The trial court denied Smith's fourth amendment-based motion to suppress evidence derived from the pen register, and he was convicted of robbery.[38] The Maryland Court of Appeals affirmed, concluding that Smith had no reasonable expectation of privacy in numbers dialed on his telephone.[39] The Supreme Court of the United States, applying Justice Harlan's two-fold analysis from *Katz*, affirmed the conviction.[40]

Writing for the majority, Justice Blackmun remarked that for several reasons, the public probably did not entertain a subjective expectation of privacy in the telephone numbers they dialed.[41] He noted that telephone users knew that the numbers they dial were conveyed to the phone company.[42] Additionally, the court commented that subscribers were aware of the capability of the phone company to make records of numbers dialed, since subscribers received monthly records of long distance charges,[43] and were told in telephone directories of the phone company's capacity, through use of pen registers, to identify the origin of obscene telephone calls.[44] Justice

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Rptr. 818, 827 (1979) (no constitutional distinction between tolling records and pen registers). *But cf.* Fishman, *Pen Registers and Privacy: Risks, Expectations, and the Nullification of Congressional Intent*, 29 CATH. U.L. REV. 557, 570-71 (1980) (warrantless seizure of tolling records invades a lesser privacy interest than unauthorized use of pen registers).

[35] 442 U.S. 735 (1979)

[36] *Id.* at 745-46. This holding has been extensively criticized. *See* Comment, *Pen Registers After* Smith v. Maryland, 15 HARV. C.R.-C.L. L. REV. 753, 765-67 (1980); Note, *Installation and Use of a Pen Register Does Not Constitute a Fourth Amendment "Search"*—Smith v. Maryland, 38 MD. L. REV. 767, 777-81 (1979).

[37] 442 U.S. at 737.

[38] *Id.* at 737-38.

[39] Smith v. State, 283 Md. 156, 173-74, 389 A.2d 858, 867-68 (1978), *aff'd*, 442 U.S. 739 (1979). The appellate court did not agree that Smith harbored any subjective expectation of privacy in the phone numbers he dialed, but decided that regardless of Smith's subjective thoughts, society would not recognize the expectation as reasonable. *See id.* at 174, 389 A.2d at 868.

[40] 442 U.S. at 745-46.

[41] *Id.* at 743. *But cf. id.* at 749 (Marshall, J., dissenting) (public has subjective expectation of privacy in local phone numbers dialed).

[42] *Id.* at 742.

[43] *Id.* The court refused to distinguish between local calls, for which no records are produced, and long distance calls, for which billing records are prepared. *See id.* at 745.

[44] *Id.* at 742-43. Justice Blackmun observed that pen registers are also used by the phone company for other business purposes, although he admitted that the general public probably was not aware of this fact. *Id.*

Blackmun concluded that under these circumstances, subscribers could not have a subjective expectation that records of numbers dialed would remain confidential.[45]

The *Smith* Court then decided that even if Smith had possessed a subjective expectation of privacy in the telephone numbers he dialed, that expectation was not one that society was prepared to recognize as reasonable.[46] Employing an assumption of the risk analysis, the Court determined that petitioner, by voluntarily exposing the phone numbers to the phone company, took the chance that the numbers would be given to law enforcement officials.[47] Therefore, the Court concluded that since Smith had no "legitimate" expectation of privacy in the numbers he dialed, the unauthorized use of a pen register did not violate the fourth amendment.[48]

Twice before *Hunt*,[49] the New Jersey Supreme Court used the state constitution to extend greater protection from unlawful search and seizure to the general public than is afforded by the fourth amendment to the Federal Constitution.[50] The first case, *State v. Johnson*,[51] involved a warrantless search of an apartment.[52] At trial, defendant made a fourth amendment-based motion to suppress evidence seized during the search on the ground that consent to the search had not been given.[53] The trial court granted the motion

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[45] *Id.* at 743.

[46] *Id.*

[47] *Id.* at 744. The inability of modern telephone switching equipment to "remember" local numbers dialed in the normal course of business—as opposed to human operators capable, theoretically, of unlimited memory—did not, in the Court's view, increase Smith's expectation of privacy. *Id.* at 744-45.

Justice Marshall found that the "assumption of the risk" analysis was inappropriate, since an individual has no other realistic option but to relay digital information to the phone company in the course of placing a call. *See id.* at 749-50 (Marshall, J., dissenting).

[48] *Id.* at 745-46. Although *Smith* involved pen registers, some state courts have held that the decision excludes telephone billing records from fourth amendment coverage as well. *See* Indiana Bell Tel. Co. v. State, 3 Ind.3 , 409 N.E. 2d 1089, 1090 (1980); People v. Blair, 25 Cal. 3d 640, 654, 602 P.2d 738, 747, 159 Cal. Rptr. 818, 827 (1979).

[49] *See* State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975).

[50] State courts can protect individual rights under state constitutions to a greater degree than the rights are protected at the federal level. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); Cooper v. California, 386 U.S. 58, 62 (1967). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Comment, *The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

[51] 68 N.J. 349, 346 A.2d 66 (1975).

[52] *See id.* at 351, 346 A.2d at 66-67. Narcotics allegedly belonging to defendant Johnson were found in his fiancee's apartment. *See id.* at 357, 346 A.2d at 70 (Pashman, J., dissenting).

[53] *See id.* at 351-52, 346 A.2d at 66-67. The issue was whether Johnson's fiancee had consented to the search of her apartment. *See id.* at 357-58, 346 A.2d at 70 (Pashman, J., dissenting).

because the state was unable to prove that consent had been "knowingly, intelligently, voluntarily, and unequivocally given."[54] The appellate division reversed, concluding that the trial court had used an improper standard in determining the validity of the asserted consent.[55] Relying on the United States Supreme Court decision *Schneckloth v. Bustamonte*,[56] the appellate court determined that while the fourth amendment required consent in a noncustodial situation to be voluntary,[57] it does not require that the searched party have knowledge of his right to refuse to consent to a search.[58] The New Jersey Supreme Court, relying on the state constitution, modified the appellate decision, holding that such knowledge was a necessary requirement.[59]

Initially, Justice Sullivan noted that a state may interpret its own constitution to impose more stringent search and seizure standards than are required under federal law.[60] After acknowledging the *Schneckloth* federal requirements, the court reasoned that article I, paragraph 7 of the New Jersey Constitution also required that the prosecution prove that consent was voluntarily given.[61] Justice Sullivan concluded, however, that "even in a noncustodial situation," knowledge of the right to refuse consent was a necessary element of a "voluntary" search,[62] therefore imposing a higher standard under state law than under federal law.[63]

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[54] *Id.* at 351-52, 346 A.2d at 67.

[55] *Id.* at 351-53, 346 A.2d at 67.

[56] 412 U.S. 218 (1973).

[57] *See* 68 N.J. at 352-53, 346 A.2d at 67. The Court held in *Schneckloth* that

> when the subject of a search is not in custody and the State attempts to justify a search on the basis of consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

412 U.S. at 248-49.

[58] 68 N.J. at 352-53, 346 A.2d at 67.

[59] *Id.* at 353-54, 346 A.2d at 68. The motion to suppress was remanded to the trial judge for a ruling consistent with the state supreme court's decision. *Id.* at 354, 346 A.2d at 68.

[60] *Id.* at 353, 346 A.2d at 67. This obtains irrespective of the virtually identical language contained in the fourth amendment and in article I, paragraph 7 of the New Jersey Constitution. *Id.* at 353 n.2, 346 A.2d at 68 n.2.

[61] *Id.* at 352-53, 346 A.2d at 68.

[62] *Id.* at 353-54, 346 A.2d at 68.

[63] Under the federal standards, the consenting party's knowledge of his right to refuse to consent to a search is not a required element of consent. *See supra* note 57. Justice Pashman,

State v. Alston,[64] the second case, concerned evidence obtained during a warrantless search of an automobile.[65] The state supreme court noted that recent federal Supreme Court decisions had abolished the standing of automobile passengers to make fourth amendment challenges to the admissibility of evidence seized during automobile searches, even where the passenger owned the property.[66] The New Jersey court, however, elected to protect the standing rights of car passengers by invoking the state constitution.[67]

Justice Clifford began by noting that federal case law governing a defendant's standing to challenge the validity of a search, based upon legitimate expectations of privacy,[68] resulted in "inadequate protection against unreasonable searches and seizures."[69] He found that the federal standard was too vague since it led to inconsistent results that could conflict with a person's property interests.[70] Justice Clifford decided that the state constitution protected the right of defendants to challenge warrantless searches and seizures beyond federal guarantees in two ways: 1) It required that proprietary or possessory interests

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dissenting in *Johnson*, argued that the court should have imposed an even higher standard that would require police to warn individuals of their right to refuse consent before a search could be conducted. *See* 68 N.J. at 367-68, 346 A.2d at 76 (Pashman, J., dissenting).

[64] 88 N.J. 211, 440 A.2d 1311 (1981).

[65] 88 N.J. at 216-17, 440 A.2d at 1313-14. After stopping the car for speeding, police discovered shotgun shells in the car's open glove compartment and a covered shotgun protruding from underneath the seat. *Id.* at 216, 440 A.2d at 1313-14. At that point, the defendants were placed under arrest and a further search of the passenger compartment produced two handguns. *Id.* at 217, 440 A.2d at 1314. The driver and his three passengers were charged with weapons violations but the trial court granted a motion to suppress the weapons from evidence. *Id.* The appellate court reversed with respect to the handguns on the ground that once the defendants had been taken into custody, no "exigent circumstances" existed which could justify any supplemental search of the car without a warrant. *Id.* at 218, 440 A.2d at 1314. The appeal to the supreme court involved only the seizure of the handguns. *Id.* at 218-19, 440 A.2d at 1314.

[66] *Id.* at 224, 440 A.2d at 1317-18. The state court based this conclusion on the United States Supreme Court decisions in Rakas v. Illinois, 439 U.S. 128, 128-29, 148-49 (1978) (passengers lacked standing to challenge unauthorized search of automobile when evidence seized aided in their conviction and passengers had asserted neither ownership nor possession of the evidence), United States v. Salvucci, 448 U.S. 83, 84-85 (1980) (no automatic standing for respondent charged with possession of stolen mail to challenge warrantless search), and Rawlings v. Kentucky, 448 U.S. 98, 104-06 (1980) (disallowing standing even when ownership asserted). 88 N.J. at 224, 440 A.2d at 1317.

[67] 88 N.J. at 226, 440 A.2d at 1318-19.

[68] *See, e.g.*, United States v. Salvucci, 448 U.S. 83, 95 (1980).

[69] 88 N.J. at 226, 440 A.2d at 1318-19.

[70] *Id.* at 226-27, 440 A.2d at 1319. Justice Clifford agreed with Justice Marshall's dissent in Rawlings v. Kentucky, 448 U.S. 98 (1980),which argued that fourth amendment protection extended to a person's "effects" as well as to his house or body. 88 N.J. at 227, 440 A.2d at 1319 (citing 448 U.S. at 117 (Marshall, J., dissenting)).

determine standing[71] and 2) it guaranteed "automatic standing"[72] to defendants who challenged the validity of a search and seizure of evidence used to prove any possessory offense.[73]

In *State v. Hunt*, the New Jersey Supreme Court again extended protection against warrantless searches beyond that found in the fourth amendment by relying on the state constitution. The *Hunt* court initially observed that *Smith* excluded toll billing records from fourth amendment protection.[74] Justice Schreiber remarked, however, that the inquiry did not end there, as the seizure of those records also must be examined with reference to the state charter.[75] He acknowledged that, from the public's perspective, uniform rules controlling search and seizure were desirable unless strong policy reasons "justify a departure."[76] Noting New Jersey's historical commitment to safeguarding the privacy of telephone conversations,[77] the court decided that more protection should be given for telephone billing records than federal law furnished and held that the warrantless seizure of the records violated article I, paragraph 7 of the state constitution.[78]

The court stated that, in general, telephone conversations "by people in their homes or offices" are shielded from government intrusion.[79] It acknowledged, however, that if either party made the conversation available to others, the parties' privacy interest was altered.[80] Justice Schreiber focused on the question whether absent such disclosure, the phone company's role in transmitting a call destroyed the privacy interests of the parties involved, thereby allowing the government access to both the conversation and the record of the call's

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[71] 88 N.J. at 228, 440 A.3d at 1319.

[72] Automatic standing is the right of defendants charged with possessory offenses to "challenge the legality of the search which produced evidence against them, without regard to whether they had an expectation of privacy in the premises searched." United States v. Salvucci, 448 U.S. 83, 84-85 (1980).

[73] 88 N.J. at 228-29, 440 A.2d at 1320. After ruling on the standing issue, the court held that the search was justified. 88 N.J. at 235, 440 A.2d at 1323.

[74] 91 N.J. at 344, 450 A.2d at 954-55.

[75] *Id.* at 344, 450 A.2d at 955.

[76] *See id.* at 344-45, 450 A.2d at 955.

[77] *See id.* at 345, 450 A.2d at 955. The court mentioned the state legislature's statutory bans on wiretapping, N.J. STAT ANN. §§ 2A:156A-1 to -26 (West 1971 & Cum. Supp. 1982-1983), as well as the state judiciary's narrow interpretation of wiretap laws, *e.g.*, *In re* Wire Communication, 76 N.J. 255, 386 A.2d 1295 (1978). 91 N.J. at 345, 450 A.2d at 955.

[78] *See* 91 N.J. at 342-46, 450 A.2d at 954-55.

[79] *Id.* at 346, 450 A.2d at 956.

[80] *Id.*

destination.[81] The court concluded that in such a situation, the caller would be entitled to assume a privacy interest in the numbers he dials, just as he may assume, under the *Katz* rationale, that his telephone conversations will not be publicly disseminated.[82]

Justice Schreiber stated that, from a customer's viewpoint, all information conveyed during telephone use was private, including the digits dialed.[83] Since it is a matter of necessity for the phone company's instruments to transmit the calls and to make records for accounting purposes, Justice Schreiber thought it unrealistic to assume a person's privacy interests dissipate simply because the phone company was aware of the calls.[84] He reasoned that because the disclosure was for a defined business purpose and not intended to be known to third parties, billing records like the conversations themselves deserved protection.[85] The court therefore held that the state police wrongfully seized Hunt's records.[86]

In a concurring opinion, Justice Handler enunciated his views concerning state courts' application of state constitutions "as a fountainhead of individual rights."[87] He recognized that some state independence was a symbol of healthy federalism,[88] but worried that states would abuse the practice.[89] Justice Handler said that federal

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[81] *See id.* The court stated that the issue was whether the "company's participation destroy[ed] the sanctity of the call, which comprise[d] data as to both who was contacted and what message was conveyed, so as to permit unauthorized governmental intrusion." *Id.*

[82] *See id.* at 346-47, 450 A.2d at 956.

[83] *Id.* at 347, 450 A.2d at 956. The court apparently felt that a person harbors a subjective expectation of privacy in the numbers dialed. *See id. Contra Smith*, 442 U.S. at 743.

[84] *See* 91 N.J. at 347, 450 A.2d at 956.

[85] *See id.* The court was also concerned that allowing the unlawful seizure of telephone billing records could lead to a loss of political liberty. *Id.*

[86] *Id.* at 345-48, 450 A.2d at 955-57. The court noted that two states have followed the federal standard enunciated in *Smith*. *Id.* at 348, 450 A.2d at 956. One of the decisions cited, however, State v. Fredette, 411 A.2d 65 (Me. 1979), concerned bank records, not telephone billing records, and followed the United States Supreme Court decision of United States v. Miller, 425 U.S. 435, 442 (1976), not *Smith*. *See* 411 A.2d at 67.

[87] *Id.*

[88] *Id.* at 362, 450 A.2d at 964 (Handler, J., concurring). He did recognize, however, that state and federal cooperation leading to an orderly legal system was also a sign of healthy federalism. *See id.* at 363, 450 A.2d at 964 (Handler, J., concurring).

[89] *Id.* at 361, 450 A.2d at 963-64 (Handler, J., concurring). Justice Handler noted the public backlash in California against a perceived overuse of the state constitution by the California Supreme Court. *Id.* at 361 n.1, 450 A.2d at 964 n.1 (Handler, J., concurring). As a result of the backlash, a referendum was passed requiring California courts to give provisions of the state constitution the same meaning as parallel provisions of the Federal Constitution. *See id.*

precedents should be given substantial consideration, and went on to articulate criteria for determining when the court should resort to the New Jersey Constitution as an independent source of protection for individual rights.[90] Relying on one of these criteria, that of state tradition, he explained that New Jersey's established legislative and judicial policy protecting phone conversations was proper justification for broadening state constitutional protection to include telephone billing records.[91]

Justice Pashman also wrote a concurring opinion in which he agreed with the majority's result,[92] but he believed that the other opinions failed to stress adequately the potential dangers to political liberty should tolling records be subject to warrantless police seizure.[93] Further, he was concerned by the efforts of the majority and Justice Handler to place limits on the circumstances in which state courts should independently construe their own constitution to afford greater protection for the general public.[94] Justice Pashman pointed out that previous Supreme Court decisions had merely acknowledged the existence of the court's power to follow a different path under state law without setting forth any rules as to when that power should be used.[95] He was of the impression that, subject to *Hunt*, the majority would follow federal law in the absence of strong policy reasons for departing from it,[96] and that Justice Handler would follow the federal rule unless one of his articulated criteria were met.[97] To the contrary,

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[90] *Id.* at 363-67, 450 A.2d at 965-67 (Handler, J., concurring). The seven criteria discussed were the following: textual language, legislative history of the state constitutional provision, preexisting state law suggesting separate state constitutional protection, structural differences between the state and Federal constitutions, the extent that the matter is of local or of state interest, state tradition, and public attitudes. *Id.* at 364-67, 450 A.2d at 965-67 (Handler, J., concurring). Similar criteria have previously been set forth. *E.g.*, State v. Simpson, 95 Wash. 2d 170, 200-02, 622 P.2d 1199, 1217 (1980) (Horowitz, J., dissenting); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 935-42 (1976).

[91] *See* 91 N.J. at 372, 450 A.2d at 969 (Handler, J., concurring). Justice Handler reasoned that while revelation of telephone numbers dialed does not disclose the transpired conversation, telephone numbers dialed and the resulting conversations are "inextricably related." *Id.* at 371-72, 450 A.2d at 969 (Handler, J., concurring) (quoting *In re* Wire Communication, 76 N.J. 255, 271, 386 A.2d 1295, 1303 (1978) (Handler, J., dissenting)).

[92] *Id.* at 350, 450 A.2d at 958 (Pashman, J., concurring).

[93] *Id.* at 350-52, 450 A.2d at 958-59 (Pashman, J., concurring). The majority had briefly considered this threat. *See id.* at 347, 405 A.2d at 956.

[94] *Id.* at 350, 450 A.2d at 958 (Pashman, J., concurring).

[95] *Id.* at 354, 450 A.2d at 960 (Pashman, J., concurring); *see Alston*, 88 N.J. at 255-26, 440 A.2d at 1318-19; *Johnson*, 68 N.J. at 353, 346 A.2d at 67-68.

[96] 91 N.J. at 354-55, 450 A.2d at 960 (Pashman, J., concurring).

[97] *Id.* at 354, 450 A.2d at 960 (Pashman, J., concurring).

Justice Pashman stated that the state should construe independently its constitution absent a specific reason to conform to the Federal Constitution.[98] He presented several reasons for this view.[99]

First, Justice Pashman found that the state court has an obligation under the New Jersey Constitution to protect individual liberties when it concludes that these rights are not properly protected under federal law.[100] Second, he claimed that a diversity of analysis is good for federalism since states act as "laborator[ies]" for new ideas.[101] Third, he noted that state courts do not share the limitations of federalism burdening the United States Supreme Court, since active federal court protection of individual liberties may interfere with basic federalist concepts.[102] For these reasons, Justice Pashman concluded that the New Jersey Supreme Court should not hesitate to protect state citizens through reliance on the state constitution even when parallel provisions of the Federal Constitution have been interpreted in a contrary manner.[103]

In *Hunt*, the New Jersey Supreme Court correctly determined that, in the absence of federal constitutional protection, telephone billing records deserved state constitutional shielding from warrantless search and seizure.[104] As the court recognized, the public has a legitimate expectation of privacy in telephone records.[105] The court realized that the information is relayed for a limited, necessary business purpose, and that people do not expect it to be given to third par-

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[98] *Id.* at 355, 450 A.2d at 960 (Pashman, J., concurring). Justice Pashman felt that consistency alone was not a strong enough reason to refrain from invoking the state charter. *Id.* This view diverges from that expressed by the majority and in Justice Handler's concurrence. *See id.* at 345, 450 A.2d at 955; *id.* at 362-63, 450 A.2d at 964 (Handler, J., concurring).

[99] *Id.* at 355-58, 450 A.2d at 60-62 (Pashman, J., concurring).

[100] *Id.* at 355, 450 A.2d at 960 (Pashman, J., concurring).

[101] *Id.* at 356, 450 A.2d at 960 (Pashman, J., concurring) (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting)).

[102] 91 N.J. at 357, 450 A.2d at 961 (Pashman, J., concurring). Justice Pashman noted that too active a United States Supreme Court would infringe on decision making responsibilities normally reserved for state governments. *See id.* Brennan, *supra* note 50, at 503. He opined also that state courts would be better acclimated to local conditions and concerns. 91 N.J. at 358, 450 A.2d at 962 (Pashman, J., concurring).

[103] *See* 91 N.J. at 358, 450 A.2d at 962 (Pashman, J., concurring).

[104] This holding accords with the views of most commentators, who have been critical of the lack of fourth amendment protection for the telephone numbers which a person dials. *See* Comment, *supra* note 36, at 765-66; Note, *supra* note 36, at 780-81. *But cf.* Fishman, *supra* note 34, at 574 & n.91 (lack of fourth amendment protection for long distance telephone billing records is justified).

[105] *See* 91 N.J. at 348, 450 A.2d at 951 (adopting the view from 1 W. LAFAVE, SEARCH AND SEIZURE § 2.7, at 67-69 (Supp. 1982)).

ties.[106] Phone numbers that a person dials reveal information about the dialer,[107] and thus the records' warrantless procurement presents a danger to civil liberties.[108] Law enforcement officials may be inconvenienced by a requirement to obtain court authorization before seizing telephone billing records,[109] but this difficulty does not justify affording police unlimited access to materials considered by the public to be private information.[110]

The Burger Court's failure to provide adequate safeguards for individual rights has prompted state courts to interpret state constitutions in a manner which affords citizens additional protection.[111] There is controversy, however, regarding the degree of importance that state courts should give to United States Supreme Court interpretations of parallel federal constitutional provisions when they do this.[112] The majority and concurring opinions in *Hunt* illustrate this disagreement. The majority would depart from federal fourth amendment guidelines only when justified by strong policy reasons,[113] while

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[106] *See* 91 N.J. at 347, 450 A.2d at 956.

[107] The phone numbers a person dials may reveal travel patterns and associations and yield insight into the nature of the conversation. *See* Comment, *supra* note 36, at 781; *see also* 91 N.J. at 371, 450 A.2d at 769 (Handler, J., concurring) (discussing phone numbers' ability to disclose private information). *But cf.* Reporters Comm. v. AT&T Co., 593 F.2d 1030, 1036 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979) (tolling records reveal limited information).

[108] *See* 91 N.J. at 347, 450 A.2d at 956; *id.* at 351-52, 450 A.2d at 958 (Pashman, J., concurring).

[109] The acquisition of tolling records by police is a common investigatory practice. Reporters Comm. v. AT&T Co., 593 F.2d 1030, 1037 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979); *see* 91 N.J. at 349, 450 A.2d at 957.

[110] The effect of the *Hunt* decision on police procurement of numbers dialed from a public phone is unclear. In his opinion, Justice Schreiber emphasized the fact that the telephone calls under consideration were placed from a person's home or office, and he made no mention of numbers dialed from public phones. *See* 91 N.J. at 347, 450 A.2d at 955-56. Since the court equated a person's privacy interest in telephone conversations with that in the numbers dialed, *see id.* at 346-47, 450 A.2d at 955-56, it should have indicated clearly that numbers dialed from all phones would be afforded protection.

[111] *See* Brennan, *supra* note 50, at 495-97; Comment, *supra* note 50, at 1368-69.

[112] *Compare* Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 989-96 (1979) (absent the presence of suggested "neutral criteria," state courts should follow federal constitutional guidelines when interpreting provisions of state constitutions) *with* Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q., 1, 16-18 (1981) (state courts should downplay the importance of federal constitutional decisions when conducting state constitutional analysis).

[113] *See* 91 N.J. at 345, 450 A.2d at 955. Although the concurring opinions discussed in a general fashion the importance federal constitutional decisions should be given when a state court analyzes the state constitution, *see id.* at 350, 450 A.2d at 958 (Pashman, J., concurring), *id.* at 363, 450 A.2d at 964 (Handler, J., concurring), the majority confined its discussion of the issue to the search and seizure area. *See id.* at 344-45, 450 A.2d at 955.

Justice Handler would follow them unless certain criteria are met.[114] In contrast, Justice Pashman would give little weight to federal standards in the absence of strong policy reasons for adopting them.[115]

The interpretational limitations imposed by the majority and Justice Handler are new. In both *Alston* and *Johnson*, the court merely acknowledged its power to interpret the search and seizure section of the New Jersey Constitution differently than the federal fourth amendment without indicating under what circumstances it would embrace or reject the federal rules.[116] In *Hunt*, however, both the majority and Justice Handler display a predisposition to adhere to federal fourth amendment standards, indicating that departure should occur only when properly justified.[117] This restriction on the court's power to interpret independently the state search and seizure provision[118] could result in an obstacle to protecting the public from some types of unjust police intrusions. Such a case may arise if the court is faced with the issue of the constitutionality of a warrantless seizure of bank records.[119]

In *United States v. Miller*,[120] the United States Supreme Court held that the warrantless seizure of banking records did not violate the fourth amendment;[121] thus far, the New Jersey Supreme Court has not considered the constitutionality of such a seizure with reference to the

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[114] *See id.* at 363, 450 A.2d at 964 (Handler, J., concurring).

[115] *See id.* at 355, 450 A.2d at 960 (Pashman, J., concurring).

[116] *See Alston*, 88 N.J. at 225, 440 A.2d at 1318; *Johnson*, 68 N.J. at 353, 346 A.2d at 67.

[117] While the court's decision in *Hunt* suggesting a new deference to United States Supreme Court search and seizure decisions could be viewed as a retreat from judicial activism, *Hunt* is more progressive in at least one aspect than either *Johnson* or *Alston*. In those cases, United States Supreme Court decisions had invalidated fourth amendment interpretations which were already entrenched in New Jersey. *Alston*, 88 N.J. at 227-28, 440 A.2d at 1319-20; *see Johnson*, 68 N.J. at 352, 346 A.2d at 67. The New Jersey Supreme Court upheld the previous standards by abandoning the fourth amendment and using the state constitution instead to support the decisions. *See Alston*, 88 N.J. at 228, 440 A.2d at 1319; *Johnson*, 68 N.J. at 252-54, 346 A.2d at 67-68. In *Hunt*, the court was not simply preserving a discredited interpretation of federal law which theretofore had been followed by the state, but instead was extending to the general public protection which it had never before received.

[118] This restriction was unnecessary, since the state high court, as the final arbiter of the state constitution, need not justify the fact that interpretations of state charter provisions may differ from United States Supreme Court interpretations of parallel federal constitutional clauses. *See* Collins, *supra* note 112.

[119] Bank records include photocopies of "checks, drafts, or similar instruments." *See* 12 U.S.C. § 1829b(d) (1976).

[120] 425 U.S. 435 (1976).

[121] *Id.* at 437. The *Miller* court reached its decision after noting that a "depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." *Id.* at 443 (citing United States v. White, 401 U.S. 745, 751-52 (1971)); *cf. Smith*, 442 U.S. at 743-44 (applying assumption of the risk approach to telephone numbers).

state constitution.[122] As with toll billing records, people have a strong privacy interest in their banking records. The information is conveyed to the bank for a limited business purpose, and people do not expect it to be revealed to third parties.[123] Given this similarity between telephone and banking records, and the wide latitude Justice Pashman would allow in the interpretation of the state constitution,[124] a court adopting his approach would find that the warrantless seizure of a person's banking records violates the search and seizure provision of the New Jersey Constitution.[125] An opposite result might be reached, however, by applying Justice Handler's approach.

Justice Handler grounded his concurrence in *Hunt* in New Jersey's long-standing policy of protecting telephone communications.[126] Since there is no parallel historic policy toward the privacy of banking transactions, and because none of his other criteria apparently is met,[127] a court applying Justice Handler's rationale would probably hold that banking records are not entitled to state constitutional protection from warrantless search and seizure.

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[122] Some state courts have held that the warrantless seizure of bank records is unlawful under their state constitutions. *E.g.*, Charnes v. DiGiacomo, 200 Colo. 194, 201, 612 P.2d 1117, 1120-21 (1980); Commonwealth v. DeJohn, 486 Pa. 32, 44-47, 403 A.2d 1283, 1288-89 (1979), *cert. denied*, 444 U.S. 704 (1980). *Contra* State v. Fredette, 411 A.2d 65, 67 (Me. 1979); Fitzgerald v. State, 599 P.2d 572, 577 (Wyo. 1979).

[123] Burrons v. Superior Court of San Bernadino County, 13 Cal. 3d 238, 243, 529 P.2d 590, 593, 118 Cal. Rptr. 166, 169 (1974). *But cf. Miller*, 425 U.S. at 443 (even if party assumes bank records will be used only for limited business purpose, the fourth amendment does not afford protection against warrantless seizure).

[124] *See supra* note 104 and accompanying text.

[125] One problem with Justice Pashman's approach of minimizing the importance of federal law is that there are very few cases dealing with the search and seizure provision of the New Jersey Constitution and, therefore, little guidance for conducting a state constitutional search and seizure analysis. New Jersey courts would inevitably be influenced to some degree by the federal decisions. *See* Kelman, *Forward: Rediscovering the State Constitutional Bill of Rights*, 27 WAYNE L. REV. 413, 431 (1981) (discussing why state constitutional issues are often phrased in terms derived from federal constitutional analysis). Should the United States Supreme Court, however, continue its trend toward restricting fourth amendment rights, and the New Jersey Supreme Court continue to fill the void by resorting to the state constitution, a larger volume of case law interpreting the state's search and seizure provision will develop, and the less protective federal decisions will necessarily become less important.

[126] *See supra* note 91 and accompanying text.

[127] *See* 91 N.J. at 364-67, 451 A.2d at 965-67 (Handler, J., concurring). One of Justice Handler's stated criteria, "[d]istinctive attitudes of a state's citizenry," has never been applied by the New Jersey Supreme Court to justify departure from federal fourth amendment parameters, and he gave no indication as to how "public attitudes" is measured. *See id.* at 367, 450 A.2d at 966-67 (Handler, J., concurring). He did cite two decisions by non-New Jersey courts, however, that in his opinion utilized public attitudes to justify greater protection for individual rights under their state constitutions than was afforded federally, *id.* (Handler, J., concurring) (citing

While the *Hunt* majority recognized that the privacy interest present in bank and toll billing records is virtually the same,[128] it is not clear whether it would hold that the warrantless seizure of the former is unlawful under the state constitution. The majority stated that it would not depart from federal search and seizure standards absent "strong policy reasons," and it appeared to find such reasons for protecting toll billing records in the state's traditional protection of telephone communications.[129] Since, as previously noted, there exists no similar state policy relating to banking records, a court holding consistently with the *Hunt* majority would have to find a different justification for departing from federal standards. Although the court could find that identical privacy interests should be treated identically, it is still an open question.

Since the general public's privacy interest in banking records is equally strong as that in telephone records, the former unquestionably merit protection from warrantless seizure. Although the *Hunt* court's decision to protect toll billing records extends to the public a deserved constitutional protection, the language of the majority's and Justice Handler's opinions which limits when such protection will be afforded unnecessarily hinders the court's ability to interpret the search and seizure provision of the state constitution. Both should have followed Justice Pashman's advice and avoided placing restrictions on the court's rightful power.

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District Attorney v. Watson, 411 N.E. 2d 1274, 1282 (1980), and Ravin v. State, 537 P.2d 494, 503-04 (Alaska 1975)), but neither opinion discussed how a "public attitude" should be determined. *See Watson*, 411 N.E.2d at 1282, and *Ravin*, 537 P.2d at 503-04. Because of the vagueness of the application of this criterion, it is difficult to predict when, if ever, it will be invoked.

[128] *See* 91 N.J. at 348, 451 A.2d at 957. The court noted with approval the reasoning of other state courts which found that the public has a legitimate expectation of privacy in bank records. *Id.*

[129] *See id.* at 344-45, 451 A.2d at 955.