

April 2016

## The Big Stink About Garbage: *State v. McMurray* and a Reasonable Expectation of Privacy

Brittany Campbell  
*Boston College Law School*, [brittany.campbell@bc.edu](mailto:brittany.campbell@bc.edu)

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### Recommended Citation

Brittany Campbell, *The Big Stink About Garbage: State v. McMurray and a Reasonable Expectation of Privacy*, 36 B.C.J.L. & Soc. Just. E. Supp. 14 (2016), <http://lawdigitalcommons.bc.edu/jlsj/vol36/iss3/3>

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# THE BIG STINK ABOUT GARBAGE: *STATE v. MCMURRAY* AND A REASONABLE EXPECTATION OF PRIVACY

BRITTANY CAMPBELL\*

**Abstract:** On March 11, 2015, the Supreme Court of Minnesota affirmed a lower court decision against David Ford McMurray, who was found guilty of third-degree possession of a controlled substance and sentenced to twenty-four months. McMurray was charged after Hutchinson, Minnesota police searched through his garbage and found evidence of methamphetamine. The majority held that a warrantless search of the defendant's garbage was reasonable under the federal and state constitutions because a person has no reasonable expectation of privacy in garbage set out for collection on the side of a public street because garbage is readily accessible to other members of the public. The dissenting judge persuasively opined that there is, in fact, a reasonable expectation of privacy when an individual places his or her garbage at the curb for collection because household waste contains personal information that most individuals expect will remain private. This Comment argues that the dissent's approach better understands the private nature of waste, the opinion's troubling repercussions for disadvantaged communities, and the potential for broader government intrusion.

## INTRODUCTION

On February 2, 2012, David Ford McMurray placed his garbage at the curb for collection outside of his Hutchinson, Minnesota home, unaware that this routine act would eventually lead to his conviction and two-year sentence.<sup>1</sup> Acting on a tip, but without obtaining a warrant, the Hutchinson police searched through McMurray's garbage and found evidence of methamphetamine.<sup>2</sup> This warrantless search then led the police to obtain a warrant and search McMurray's home, where they found more illegal narcotics.<sup>3</sup> Given these findings, McMurray was ultimately charged with third-degree possession of a controlled substance.<sup>4</sup>

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\* Staff Writer, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE, 2015–2016.

<sup>1</sup> See *State v. McMurray (McMurray II)*, 860 N.W. 2d 686, 688 (Minn. 2015).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *id.* During their search of the house Hutchinson police found “plastic bags containing a ‘crystal like substance,’” one of which tested positive for 3.3 grams of methamphetamine. See *id.*

At a bench trial, McMurray moved to suppress the evidence seized from his home, arguing that the warrant authorizing the search of his home was predicated upon an unconstitutional search of his garbage.<sup>5</sup> The district court denied McMurray's motion and found him guilty of possession of a controlled substance, imposing a two-year prison sentence.<sup>6</sup> McMurray appealed his conviction, arguing primarily that, because the warrantless search through his trash was unconstitutional, it did not yield the probable cause required to authorize the search of his home, but the Court of Appeals of Minnesota disagreed with him and affirmed the district court.<sup>7</sup>

Following another appeal by McMurray, the Supreme Court of Minnesota also affirmed the decisions below.<sup>8</sup> The principle issue presented was whether a citizen has a reasonable expectation of privacy in garbage set out for collection on the side of a public street.<sup>9</sup> The court held that a warrantless search of the defendant's garbage was reasonable under the federal and state constitutions because a person has no reasonable expectation of privacy in this situation because garbage is "readily accessible to scavengers and other members of the public."<sup>10</sup> In his dissenting opinion, Justice David Lillehaug disagreed with the majority and opined that, given the intimate nature of today's garbage, Minnesotans do "have a reasonable expectation of privacy when they put their household waste in opaque bags and do what the government requires . . . ."<sup>11</sup> The dissenting judge emphasized that Min-

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<sup>5</sup> State v. McMurray (*McMurray I*), No. A12-2266, 2013 WL 5021206, at \*1 (Minn. Ct. App. March 11, 2015), *aff'd*, 860 N.W.2d 686 (Minn. 2015).

<sup>6</sup> See *id.* The court imposed the "mandatory minimum sentence for a person previously convicted of a felony controlled substance crime." *McMurray II*, 860 N.W.2d at 688-89.

<sup>7</sup> See *McMurray I*, 2013 WL 5021206 at \*1.

<sup>8</sup> See *McMurray II*, 860 N.W.2d at 695.

<sup>9</sup> See *id.* 687, 694-95. McMurray also "concede[d] that the Fourth Amendment does not prohibit warrantless searches of garbage set out for collection," but asked the court to interpret Article I, Section 10 of the Minnesota Constitution, which is nearly identical to the Fourth Amendment to the U.S. Constitution, to provide more protection than the Fourth Amendment. *Id.* at 689. The court relied on *Kahn v. Griffin*, which sets forth the circumstances under which the Minnesota Constitution may provide greater protection than the U.S. Constitution. *Id.* at 690; see *Kahn v. Griffin*, 701 N.W.2d 815, 828-29 (Minn. 2005). The court held that, pursuant to *Kahn*, the federal precedent "was not a sharp or radical departure from U.S. Supreme Court precedent, did not trench on a Bill of Rights issue, and does not fail to adequately protect a unique, distinct, or peculiar issue of state and local concern." *McMurray II*, 860 N.W.2d at 693; see *Kahn*, 701 N.W.2d at 828-29. Therefore, there was no principled basis for interpreting the Minnesota Constitution as more protective than the U.S. Constitution here. See *McMurray II*, 860 N.W.2d at 693.

<sup>10</sup> See *McMurray II*, 860 N.W.2d at 695; see, e.g., *California v. Greenwood*, 486 U.S. 35, 40-41 (1988) (holding that an individual does not have a reasonable expectation of privacy in garbage left at the curb); *State v. Oquist*, 327 N.W.2d 587, 591 (Minn. 1982) ("defendant had no reasonable expectation of privacy with respect to the contents of the plastic bags placed in or near his open garbage can and . . . the examination of the garbage, which was procured without trespassing on the defendant's premises, was lawful").

<sup>11</sup> See *McMurray II*, 860 N.W.2d at 695, 697 (Lillehaug, J., dissenting).

nesotans' basic rights and liberties are vulnerable if the government can take garbage and search through it without a warrant.<sup>12</sup>

Part I of this Comment outlines the factual and procedural history of *McMurray*. Part II discusses the linear opinion of the majority of the Supreme Court of Minnesota and the dissent's reasoning as to why there is a reasonable expectation of privacy when placing one's garbage out for collection. Part III advocates for the dissent's perspective that the private nature of household waste should lead to a reasonable expectation of privacy over it, and that privacy is not abandoned at the curb. Further, the analysis argues that the majority's sweeping opinion entirely ignores the realities of disadvantaged communities and lays the foundation for the government to increasingly examine its citizens' most private information.

### I. MCMURRAY'S FIGHT TO THE MINNESOTA HIGH COURT

In January 2012, the Hutchinson police received a tip regarding David Ford McMurray's potentially illegal activity when a mandated reporter informed the department that McMurray's daughter saw her mother with what she believed was a pipe used for consuming drugs.<sup>13</sup> In response, an investigator with the Hutchinson Police Department, Officer Andrew Erlandson, reviewed police records and discovered that McMurray and his wife had been formerly arrested for controlled substance violations.<sup>14</sup>

With this information, the officer arranged for the waste management company that collected McMurray's garbage to veer from its normal routine of compacting the garbage with neighbors' bags and taking it to a landfill and instead to deliver McMurray's garbage directly to Officer Erlandson.<sup>15</sup> On February 2, 2012, after McMurray placed his garbage containers at the curb for pick-up, the driver did as instructed, and Officer Erlandson subsequently took the garbage to the police station for inspection.<sup>16</sup> During his search, he discovered "drug paraphernalia," "documents belonging to McMurray and his wife," and "several plastic bags containing white residue, which later tested positive as methamphetamine."<sup>17</sup>

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<sup>12</sup> See *id.* at 697.

<sup>13</sup> *State v. McMurray (McMurray II)*, 860 N.W.2d 686, 688 (Minn. 2015). A mandated reporter is someone who has "an ongoing responsibility for the health, education, or welfare of a child," and is required to report known or reasonably suspected child abuse and neglect. MINN. STAT. § 626.556; 17A Minn. Prac., Minnesota Employment Laws § 13.871 (2015 ed.). In Minnesota, mandated reporters include health practitioners, social workers, clergy members, law enforcement, teachers, and correctional supervisors. MINN. STAT. § 626.556.

<sup>14</sup> *McMurray II*, 860 N.W.2d at 688; see *State v. McMurray (McMurray I)*, No. A12-2266, 2013 WL 5021206, at \*1 (Minn. Ct. App. March 11, 2015), *aff'd*, 860 N.W.2d 686 (Minn. 2015).

<sup>15</sup> See *McMurray II*, 860 N.W.2d at 695-96 (Lillehaug, J., dissenting).

<sup>16</sup> See *id.* at 696.

<sup>17</sup> See *id.* at 688 (majority opinion).

The next day, Officer Erlandson used the tip from the mandated reporter and the evidence of illegal narcotics found in McMurray's garbage to secure a warrant to conduct a search of McMurray's home.<sup>18</sup> Hutchinson police ultimately found 3.3 grams of methamphetamine and additional drug paraphernalia inside the home.<sup>19</sup> Pursuant to Minnesota statute, the state then charged McMurray with third-degree possession of a controlled substance.<sup>20</sup>

McMurray filed a motion to suppress the evidence that was taken from his home, arguing that the police violated Article I, Section 10 of the Minnesota Constitution, which prohibits unreasonable searches and seizures, when they searched his garbage without a warrant.<sup>21</sup> He claimed that, without the warrantless evidence found in his garbage, there was no probable cause to authorize the warrant to search his home, thus, the search of his home was unconstitutional.<sup>22</sup> The district court denied McMurray's motion, reasoning that Minnesota precedent establishes that warrantless searches of garbage are reasonable because individuals do not have a reasonable expectation of privacy in their garbage.<sup>23</sup>

After the district court convicted McMurray and imposed a statutorily required two-year prison sentence, McMurray appealed his conviction to the Minnesota Court of Appeals, arguing that the district court erred in denying his motion to suppress.<sup>24</sup> The Court of Appeals affirmed the district court's denial of McMurray's motion, holding that there is no expectation of privacy in garbage placed at the curb for collection.<sup>25</sup> Further, according to the court, it is well-settled in Minnesota that garbage left out for collection at the curb is "not within the curtilage of the home," thus, it is not protected by the warrant requirement of the Minnesota Constitution.<sup>26</sup>

McMurray then appealed the Court of Appeals decision, and the Minnesota Supreme Court granted review to decide whether the Minnesota Constitution affords its citizens a reasonable expectation of privacy "in the contents of bags containing household waste placed in a closed container set out at the curb for lawful collection."<sup>27</sup> Affirming the decisions below,

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<sup>18</sup> See *id.*

<sup>19</sup> See *McMurray I*, 2013 WL 5021206 at \*1.

<sup>20</sup> *McMurray II*, 860 N.W.2d at 688; see MINN. STAT. § 152.023.

<sup>21</sup> See MINN. CONST. art. I, § 10; *McMurray II*, 860 N.W.2d at 688.

<sup>22</sup> See *McMurray II*, 860 N.W.2d at 688.

<sup>23</sup> See *id.*; *State v. Oquist*, 327 N.W.2d 587, 591 (Minn. 1982) ("defendant had no reasonable expectation of privacy with respect to the contents of the plastic bags placed in or near his open garbage can and . . . the examination of the garbage, which was procured without trespassing on the defendant's premises, was lawful").

<sup>24</sup> See *McMurray II*, 860 N.W.2d at 688, 689.

<sup>25</sup> See *McMurray I*, 2013 WL 5021206 at \*1, \*2, \*3.

<sup>26</sup> *Id.* at \*2-\*3 (citing *State v. Goebel*, 654 N.W.2d 700, 701).

<sup>27</sup> *McMurray II*, 860 N.W.2d at 696 (Lillehaug, J., dissenting).

the Supreme Court determined that a person in McMurray's situation has no reasonable expectation of privacy because such garbage "is readily accessible to scavengers and other members of the public."<sup>28</sup> Thus, because a law enforcement officer could have taken McMurray's household waste directly from the curb, it was lawful for Hutchinson police to retrieve McMurray's garbage from the waste collector and search it without a warrant.<sup>29</sup> Because the search of McMurray's garbage was reasonable, the search warrant for his home was valid.<sup>30</sup>

## II. THE MINNESOTA SUPREME COURT'S DECISION ON GARBAGE PRIVACY

A majority of the Supreme Court of Minnesota affirmed the decisions of the lower courts that the warrantless search of McMurray's garbage was reasonable under federal and state constitutions.<sup>31</sup> In its two-step analysis, the court first determined that the Minnesota Constitution does not require greater protection of privacy for garbage searches beyond that offered by the U.S. Constitution.<sup>32</sup> The court then reviewed the search of McMurray's garbage pursuant to these federal and state constitutions.<sup>33</sup> Ultimately, it held that a Minnesotan has no reasonable expectation of privacy in household waste set out for collection because any member of the public could access it.<sup>34</sup>

In his dissent, Judge David L. Lillehaug argued that the majority failed to recognize that the basic right and liberty against unreasonable search and seizure of household waste necessitates heightened protection because waste includes information about one's most private traits and activities.<sup>35</sup> Specifically, the dissent attacked the majority's contention that, because people and animals have access to other citizens' waste, it carries no reasonable expectation of privacy.<sup>36</sup> Judge Lillehaug suggested that this opinion will further grant the government permission to become more intrusive in our trash and in our lives.<sup>37</sup>

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<sup>28</sup> *See id.* at 695 (majority opinion).

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *McMurray II*, 860 N.W.2d at 695.

<sup>32</sup> *Id.* at 693.

<sup>33</sup> *See id.* at 694.

<sup>34</sup> *Id.* at 695.

<sup>35</sup> *See id.* at 697 (Lillehaug, J., dissenting).

<sup>36</sup> *See id.* at 699.

<sup>37</sup> *See id.* at 702.

### A. The Majority's Rejection of Privacy Beyond the Curb

Judge Wright, writing for the majority, first considered McMurray's claim that, despite its nearly identical language, the Minnesota Constitution provides greater protection than the U.S. Constitution with respect to one's right against unreasonable searches and seizures of garbage left at the curb.<sup>38</sup> The U.S. Supreme Court in *California v. Greenwood* held that the Fourth Amendment does not prohibit "the warrantless search and seizure of garbage left for collection outside the curtilage of a home."<sup>39</sup> However, McMurray asked for heightened protection under the Minnesota Constitution, arguing that the reasoning in *Greenwood* is unpersuasive.<sup>40</sup>

The court considered the three factors laid out in *Kahn v. Griffin* for determining whether there is a principled basis to interpret the Minnesota Constitution to require greater protection than the U.S. Constitution.<sup>41</sup> The court ultimately decided that the individual liberty issue at hand does not successfully navigate one of the three avenues to amount to a principled basis, and thus, requires no further protection.<sup>42</sup> First, the court held that *Greenwood* did not mark a "sharp or radical departure" from U.S. Supreme Court precedent or from the decisions of other state courts, including the Minnesota Supreme Court decision in *State v. Oquist* that had previously considered the issue of privacy related to garbage.<sup>43</sup> Second, the court held

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<sup>38</sup> 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."); 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."); see *McMurray II*, 860 N.W.2d at 695 (majority opinion).

<sup>39</sup> *California v. Greenwood*, 486 U.S. 35, 37 (1988).

<sup>40</sup> See *McMurray II*, 860 N.W.2d at 689. McMurray relied on the *Greenwood* dissent and other state court decisions to support this assertion. *Id.*

<sup>41</sup> *Id.* at 693; see *Kahn v. Griffin*, 701 N.W.2d 815, 828–29 (Minn. 2005).

<sup>42</sup> See *McMurray II*, 860 N.W.2d at 693. When the U.S. Constitution has substantially similar language to the text of a state constitution and the U.S. Supreme Court has previously interpreted that language, the court will only afford greater protection for individual rights under the Minnesota Constitution when there is a "principled basis to do so." See *id.* at 690. The court will recognize a principled basis when: (1) the U.S. Supreme Court "has made a sharp or radical departure from its previous decisions or approach to the law and when [it] discern[s] no persuasive reason to follow such a departure"; (2) when the "Supreme Court has retrenched on Bill of Rights issues"; or (3) when the "federal precedent does not adequately protect our citizens' basic rights and liberties." *Kahn* 701 N.W.2d at 828.

<sup>43</sup> *McMurray II*, 860 N.W.2d at 691 (quoting *Kahn*, 701 N.W.2d at 828); see *State v. Oquist*, 327 N.W.2d 587, 591 (Minn. 1982) ("defendant had no reasonable expectation of privacy with respect to the contents of the plastic bags placed in or near his open garbage can and . . . the exam-

that *Greenwood* did not retrench on the Bill of Rights issue at hand, protection against warrantless searches, because *Greenwood* is consistent with many other state court decisions and because McMurray had not recognized an authority or commentator characterizing *Greenwood* as a “retrenchment.”<sup>44</sup> Lastly, the court held that *Greenwood* does not fail to protect a Minnesotan’s basic right or liberty because the privacy surrounding garbage at the curb is not a “‘unique, distinct or peculiar issue[ ] of state and local concern’ that requires protection.”<sup>45</sup>

Upon concluding that there is no principled basis for affording greater protection for individual rights under the Minnesota Constitution in this context, the court next examined whether the search of McMurray’s garbage was reasonable under *Greenwood* and *Oquist*, the federal and state authorities that interpreted this constitutional question.<sup>46</sup> Under both decisions, one “has no reasonable expectation of privacy in garbage set out for collection on the side of a public street because such garbage is readily accessible to scavengers and other members of the public.”<sup>47</sup> A warrant is not required for police to search items that are readily accessible to the general public; thus, the majority held that it was lawful for police to collect McMurray’s garbage from the waste management company and search it.<sup>48</sup> Because the warrantless search of McMurray’s garbage was reasonable under the U.S. Constitution and the Minnesota Constitution, the subsequent search of McMurray’s home was also valid and the drugs found there were properly admitted into evidence.<sup>49</sup>

### *B. The Dissent Prioritizes Privacy and Warns for the Future*

In his dissent, Judge Lillehaug disagreed with the majority’s decisions that Minnesotans have no expectation of privacy in their garbage set out for collection, that law enforcement may search and seize household waste without a warrant, and that “household privacy ends at the sidewalks.”<sup>50</sup> In his view, McMurray’s case implicates a principled basis for the court to construe that the Minnesota Constitution requires more protection against unreasonable searches and seizures than the U.S. Constitution, just as many

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ination of the garbage, which was procured without trespassing on the defendant’s premises, was lawful”).

<sup>44</sup> *McMurray II*, 860 N.W.2d at 692; *Kahn*, 701 N.W.2d at 828.

<sup>45</sup> *McMurray II*, 860 N.W.2d at 692–93 (quoting *Kahn*, 701 N.W.2d at 829).

<sup>46</sup> *See id.* at 694.

<sup>47</sup> *Id.* at 695; *see Greenwood*, 486 U.S. at 40–41; *State v. Oquist*, 327 N.W.2d 587, 591 (Minn. 1982).

<sup>48</sup> *See McMurray II*, 860 N.W.2d at 695.

<sup>49</sup> *See id.*

<sup>50</sup> *See id.* at 695, 701 (Lillehaug, J., dissenting).



Minnesota courts have done before.<sup>51</sup> Specifically, Judge Lillehaug contended that *Greenwood*, the federal precedent for warrantless searches of garbage, does not sufficiently safeguard Minnesota citizens' basic rights and liberties.<sup>52</sup> Judge Lillehaug argued that these basic rights and liberties are at risk if the government can collect and search curbside garbage, an increasingly private window into a Minnesotan's life, without a search warrant.<sup>53</sup> He warned that the eventual ramifications of the majority's holding are also of grave concern.<sup>54</sup>

Judge Lillehaug argued that household waste necessitates greater protection because it often includes Minnesotans' most personal information and intimate tangibles.<sup>55</sup> He focused on the notion that humans manifest themselves in nearly everything they toss into the trash, including prescriptions, printed emails, photographs, hygiene products, human DNA, the literature they read, and the food they consume.<sup>56</sup> According to Judge Lillehaug, what they do not throw away is the expectation and desire that this information will remain private.<sup>57</sup> Until one's household waste has "lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere," that person has every reason to not want his or her "telltale refuse and trash to be examined by neighbors or others."<sup>58</sup>

Moreover, the dissent argued that the *Greenwood* and *Oquist* decisions from the 1980s no longer account for the transitioning character of household waste, which now consists of discarded technology and digital devices such as old computers, cellular devices, routers, flash drives, servers and disks—all of which may contain, reveal, and "hold for many Americans 'the privacies of life.'"<sup>59</sup> Judge Lillehaug warned that this trend will only progress as the objects in our world continue to transform into electronic devices.<sup>60</sup>

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<sup>51</sup> See *id.* at 696; see, e.g., *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004) (holding that the Minnesota Constitution demands greater protection than the Fourth Amendment by requiring a reasonableness limitation for searches and seizures even during minor traffic stops); *In re Welfare of B.R.K.*, 658 N.W.2d 565, 578 (Minn. 2003) (recognizing a legitimate expectation of privacy under Minnesota Constitution for short-term social guests even if not recognized under the Fourth Amendment).

<sup>52</sup> See *McMurray II*, 860 N.W.2d at 697 (Lillehaug, J., dissenting).

<sup>53</sup> *Id.* at 697, 701.

<sup>54</sup> See *id.* at 702.

<sup>55</sup> See *id.* at 697; *State v. Hempele*, 576 A.2d 793, 802 (N.J. 1990) ("Clues to people's most private traits and affairs can be found in their garbage.").

<sup>56</sup> See *McMurray II*, 860 N.W.2d at 697, 698.

<sup>57</sup> See *id.* at 697.

<sup>58</sup> *Id.* (quoting *People v. Krivda*, 486 P.2d 1262, 1268 (Cal. 1971)).

<sup>59</sup> See *id.* at 697–98 (quoting *Riley v. California*, 134 S.Ct. 2473, 2494–95 (2014)). "This is not your grandfather's garbage." *Id.* at 697.

<sup>60</sup> See *id.* at 698.

The dissent further recognized that there is a “long-standing presumption that a search warrant is required to search a Minnesotan’s container.”<sup>61</sup> Accordingly, a Minnesotan’s basic right and liberty against unreasonable search and seizure is not adequately protected if *Greenwood* is controlling and any expectation of privacy ends at the curb.<sup>62</sup>

Judge Lillehaug attacked the majority’s reasoning that, because garbage bags left on the side of the curb are readily accessible to scavengers and members of the public, there is no reasonable expectation of privacy.<sup>63</sup> The dissent asserted that the animals and persons that sometimes successfully get into household waste containers should not determine a Minnesotan’s reasonable expectation of privacy.<sup>64</sup> In Minnesota, the lone fact that a garbage container itself is in “plain view provides no basis for a warrantless seizure and search of it, even assuming probable cause as to the contents.”<sup>65</sup> Even the government acknowledges that tenants and homeowners have a reasonable expectation that their garbage will be directly collected.<sup>66</sup> Judge Lillehaug argued that a reasonable expectation of privacy in one’s garbage is further supported by local ordinances regulating garbage disposal.<sup>67</sup>

Lastly, Judge Lillehaug claimed that the ultimate consequences of the majority’s decision are vexing and extend far beyond the text of the opinion.<sup>68</sup> Given this holding, nothing would stop the government from confiscating the household waste from every Minnesotan and performing a forensic analysis of it.<sup>69</sup> It also would not be unconstitutional for the government to seize the digital devices Minnesotans recycle and copy their data.<sup>70</sup> The dissent reasoned that, in this day and age in which the government can collect almost all calls and emails, it would not be unrealistic for the government to use this ruling to its utmost advantage and push the boundaries of

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<sup>61</sup> *Id.*

<sup>62</sup> *See id.* (citing *Greenwood*, 486 U.S. at 40).

<sup>63</sup> *See id.* at 699.

<sup>64</sup> *See id.*

<sup>65</sup> *Id.* at 698 (quoting *Matter of Welfare of G.M.*, 560 N.W.2d 687, 694 (Minn. 1997)).

<sup>66</sup> *See id.* at 699.

<sup>67</sup> *See id.* at 699–700 (citing *State v. Crane*, 329 P.3d 689, 696–97 (N.M. 2014)). Many Minnesota localities prohibit “scavenging of recyclable materials” or “upsetting the contents of any waste container.” *Id.* at 699; *see, e.g.*, DULUTH, MINN., LEGIS. CODE § 24–3(a) (2014); ST. PAUL, MINN., CODE OF ORDINANCES § 357.11 (2014). Additionally, a Minneapolis ordinance prohibits any unauthorized person from removing waste from containers set out for collection without consent of the owner or occupant of the property. MINNEAPOLIS, MINN. CODE OF ORDINANCES § 225.590 (2014). Judge Lillehaug believes that the very fact that these ordinances exist and that Minnesotans must comply with them bolsters one’s expectation that household waste will also remain private from government intrusion. *See McMurray II*, 860 N.W.2d at 700 (citing *Crane*, 329 P.3d at 696–97).

<sup>68</sup> *See McMurray II*, 860 N.W.2d at 702.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

invasion of privacy.<sup>71</sup> Judge Lillehaug criticized the majority for failing to clarify that the “government does not have a green light to broaden and deepen its efforts to acquire our most intimate information.”<sup>72</sup>

### III. THE MAJORITY’S TROUBLING OPINION AND WHY A REASONABLE EXPECTATION OF PRIVACY IN HOUSEHOLD WASTE SHOULD EXIST

The majority’s opinion presents many reasons for the citizens of Minnesota to be gravely concerned.<sup>73</sup> The decision largely, and incorrectly, relied upon *Greenwood* and *Oquist*, two decisions that interpret the federal constitution with respect to unreasonable searches and seizures of household waste.<sup>74</sup> Not only is the majority’s decision procedurally unsound, it is also substantively troubling.<sup>75</sup> It fails to adequately consider the factors weighed in determining whether there is a principled basis for interpreting the Minnesota Constitution to provide greater protection than the U.S. Constitution, particularly the vital policy considerations.<sup>76</sup>

Until *McMurray*, a Minnesota court had never decided whether an individual has a reasonable expectation of privacy in this context under the Minnesota Constitution.<sup>77</sup> In the 1980s, the U.S. Supreme Court in *Greenwood* and the Minnesota Supreme Court in *Oquist* independently held that the Fourth Amendment does not provide a citizen with a reasonable expectation of privacy in garbage left in a public space outside of a residence.<sup>78</sup> Both courts interpreted the U.S. Constitution, and once again, the Fourth Amendment was the basis for interpretation in *McMurray*, but this time inappropriately.<sup>79</sup> The majority improperly utilized the federal court’s interpretation of the U.S. Constitution as the sole basis for a state court’s interpretation of its state constitution, which turns federalism on its head.<sup>80</sup>

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<sup>71</sup> See *id.*

<sup>72</sup> *Id.*

<sup>73</sup> See *id.* at 702; Appellant’s Brief at 26, *State v. McMurray*, 860 N.W.2d 686 (Minn. 2015) (No. A12–2266) [hereinafter Appellant’s Brief].

<sup>74</sup> See Appellant’s Brief, *supra* note 73, at 6–7; Appellant’s Reply Brief at 5, *State v. McMurray*, 860 N.W.2d 686 (Minn. 2015) (No. A12–2266) [hereinafter Appellant’s Reply Brief] (citing *California v. Greenwood*, 486 U.S. 35, 41 (1988); *State v. Oquist*, 327 N.W.2d 587, 591 (Minn. 1982)).

<sup>75</sup> See Appellant’s Brief, *supra* note 73, at 6–7.

<sup>76</sup> See *McMurray II*, 860 N.W.2d at 694 (recognizing that the nature of garbage has changed but holding that Minnesotans can respond accordingly); Appellant’s Brief, *supra* note 73, at 8.

<sup>77</sup> See Appellant’s Brief, *supra* note 73, at 7.

<sup>78</sup> See *California v. Greenwood*, 486 U.S. 35, 40–41 (1988); *State v. Oquist*, 327 N.W.2d 587, 591 (Minn. 1982).

<sup>79</sup> See *Greenwood*, 486 U.S. at 40–41; *Oquist*, 327 N.W.2d at 589; Appellant’s Reply Brief, *supra* note 74, at 5.

<sup>80</sup> See *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); Appellant’s Reply Brief, *supra* note 74, at 5.

When similarly-constructed rights are at stake, a state supreme court can use a U.S. Supreme Court decision to interpret its own state constitution, but it is not required to.<sup>81</sup> *McMurray* raised no Fourth Amendment claim, and accordingly, the court should not have given such great deference to a federal interpretation of the issue at hand.<sup>82</sup>

Ultimately, the majority did not sufficiently consider whether the basic right and liberty against unreasonable search and seizure is sufficiently protected in Minnesota.<sup>83</sup> Instead, it overly focused on whether *Greenwood* marked a sharp or radical departure from U.S. Supreme Court precedent or from the decisions of other state courts.<sup>84</sup> In response to the dissent's policy considerations, the court merely mentioned briefly that "Minnesotans are well aware of potential threats to their privacy and security" and are able to adjust their behavior in response.<sup>85</sup> Had the court considered more policy considerations instead of narrowing its focus to the sharp-departure standard, it would have served principles of federalism and realized that this case falls under the third *Kahn* factor for providing greater protection than the U.S. Constitution because the federal precedent does not "adequately protect[] Minnesotans' basic rights and liberties."<sup>86</sup>

What is most troubling about the *McMurray* holding is that it neglects the opinion's potential effect on disadvantaged communities.<sup>87</sup> The majority argues that Minnesotans recognize the threat posed to their privacy and security and are capable of changing their behavior as needed.<sup>88</sup> That assumption is far too expansive, and it cannot be said that disadvantaged communities, such as the elderly or uneducated, are aware of these dangers or even have the means to adjust their behavior.<sup>89</sup> It is unlikely that someone living in low-income housing has the finances to afford "shredders and trash compactors and computer 'burn' programs and sink grinders and attics and burn boxes and private landfills that would be necessary" to manually, and with finality, dispose of both their garbage and any possibility for intrusion into it.<sup>90</sup> Additionally, in an age where the government often requires citizens to segregate and recycle personal electronics, it would be inconceivable to

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<sup>81</sup> See *Wilson v. Comm'r of Revenue*, 656 N.W.2d 547, 552 (Minn. 2003).

<sup>82</sup> See Appellant's Brief, *supra* note 73, at 7; Appellant's Reply Brief, *supra* note 74, at 5.

<sup>83</sup> See *McMurray II*, 860 N.W.2d at 697 (Lillehaug, J., dissenting).

<sup>84</sup> See *Greenwood*, 486 U.S. at 40–41; *McMurray II*, 860 N.W.2d at 691 (majority opinion).

<sup>85</sup> See *McMurray II*, 860 N.W.2d at 694.

<sup>86</sup> See *id.* at 697 (Lillehaug, J., dissenting) (citing *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005)); Appellant's Reply Brief, *supra* note 74, at 5.

<sup>87</sup> See *McMurray II*, 860 N.W.2d at 694 (majority opinion); Appellant's Brief, *supra* note 73, at 11 (citing *United States v. Redmon*, 138 F.3d 1109, 1131 (7th Cir. 1998) (Posner, J. dissenting)).

<sup>88</sup> See *McMurray II*, 860 N.W.2d at 694.

<sup>89</sup> See Appellant's Brief, *supra* note 73, at 11 (citing *Redmon*, 138 F.3d at 1131).

<sup>90</sup> See *id.*

suggest as an alternative that elderly and low-income individuals travel directly to a recycling center to dispose of these items.<sup>91</sup>

The sanctity and privacy of personal items that may be located in household waste is the ultimate reason for adequately protecting the basic right and liberty against unreasonable search and seizure of garbage placed on a curb for routine collection.<sup>92</sup> As the dissent suggests, it is the very private nature of garbage that grants one a reasonable expectation of privacy in that garbage.<sup>93</sup> Household waste today reflects nearly every human activity.<sup>94</sup> Objects and information commonly found in garbage include “[b]usiness records, bills, correspondence, magazines, tax records, and other telltale refuse [that] can reveal much about a person’s activities, associations, and beliefs.”<sup>95</sup> Leaving this information at the curb for a garbage collector does not abandon one’s reasonable expectation of privacy in that garbage any more than relinquishing other items to other types of carrier services, such as leaving a package out for pickup by the U.S. Postal Service.<sup>96</sup>

Surely citizens’ reasonable expectations of privacy in their homes are greater than that in their household waste, but it does not follow that a lesser expectation of privacy renders any reasonable expectation of privacy nonexistent.<sup>97</sup> For example, the expectation of privacy in one’s car is less than one’s home, but a reasonable expectation of privacy in that car still exists.<sup>98</sup> Accordingly, a warrant predicated upon probable cause is still required for police to search a car.<sup>99</sup> A lesser expectation of privacy in garbage also does not defeat the probable-cause requirement.<sup>100</sup> Moreover, as the dissent rightly indicated, the possibility of others scavenging through one’s trash does not defeat the reasonable expectation of privacy in it.<sup>101</sup>

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<sup>91</sup> See *McMurray II*, 860 N.W.2d at 697–98 (Lillehaug, J., dissenting); Appellant’s Brief, *supra* note 73, at 11 (citing *Redmon*, 138 F.3d at 1131).

<sup>92</sup> See *McMurray II*, 860 N.W.2d at 697.

<sup>93</sup> See *id.*

<sup>94</sup> Appellant’s Brief, *supra* note 73, at 10.

<sup>95</sup> *Id.*

<sup>96</sup> See *id.* at 12–13.

<sup>97</sup> *Id.* at 20.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* Search-and-seizure law questions whether the defendant has, in disposing of the property, abandoned his expectation of privacy with respect to the property as well. *Id.* at 12 (citing *Oquist*, 327 N.W.2d at 590).

<sup>101</sup> *McMurray II*, 860 N.W.2d at 699 (Lillehaug, J., dissenting). It would be absurd to conclude that the potential of private intrusion eliminates the expectation of privacy. See *Greenwood*, 486 U.S. at 54. The potential for theft does not eliminate the expectation of privacy in the home, nor does the possibility of illegal wiretapping eliminate the expectation of privacy in a telephone conversation. See *id.* The same is true with garbage. See *id.*

Most people do not regularly fear someone digging through their garbage.<sup>102</sup> This is not to say, however, one would not be shocked and disturbed upon learning that a neighborhood snoop reconstructed and published a detailed, intimate biography of this person's life.<sup>103</sup> Tort law and copyright law could provide this person with remedies for respective harms from this violation.<sup>104</sup> Clearly, there are legally protected interests in household waste even once it is left at the curb, interests that the Minnesota Constitution should protect.<sup>105</sup>

#### CONCLUSION

Privacy. It's one of our most cherished inalienable rights. One of our most basic rights and liberties, yet seemingly one of our most fragile rights. The Supreme Court of Minnesota tainted this right when it held that a Minnesota citizen has no reasonable expectation of privacy in household waste set out for routine collection simply because any scavenger or member of the public can access such waste.

The consequences of tossing this expectation of privacy in the trash are unnerving and abundant. Until one's garbage has lost its identity by becoming part of an indecipherable pile, there are many reasons why residents would not expect their curbside trash to be examined by others, particularly law enforcement officers without a valid warrant to do so. The dissent correctly recognized that household waste includes a halo of privacy above it because it often contains one's most intimate information, particularly given technological advances within the past thirty years. Above all, the majority's decision entirely ignores disadvantaged individuals who cannot otherwise protect themselves, and dangerously permits overreaching government intrusion into Minnesotans' lives. Additionally, the *McMurray* opinion creates the potential for further abuse of more than just disadvantaged communities, with ramifications beyond drug convictions. It could lead the government to continue pushing the boundaries of what areas of life many citizens deem as private are now acceptable to snoop in.

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<sup>102</sup> Appellant's Brief, *supra* note 73, at 11 (citing *Redmon*, 138 F.3d at 1131).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *See id.*