IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent on Review,
v.
TRACY LYNN LIEN,
Petitioner on Review.
(CC 14CR02030) (CA A158646) (Control)

STATE OF OREGON,
Respondent on Review,
v.
TRAVIS ALLEN WILVERDING,
Petitioner on Review.
(CC 14CR02034) (CA A158647)

(SC S064826)

On review from the Court of Appeals.*

Argued and submitted March 8, 2018, at University of Oregon School of Law, Eugene, Oregon.

Anne Fujita Munsey, Deputy Public Defender, Office of Public Defense Services, Salem, argued the cause and filed the briefs for petitioner on review. Also on the briefs was Ernest G. Lannet, Chief Defender.

Jamie K. Contreras, Assistant Attorney General, Salem, argued the cause and filed the brief for respondent on review. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Walters, Chief Justice, and Balmer, Nakamoto, Flynn, Duncan, Nelson, Justices, and Kistler, Senior Justice pro tempore.**

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* Appeal from Linn County Circuit Court, Daniel R. Murphy, Judge. 283 Or App 334, 387 P3d 489 (2017).

** Garrett, J., did not participate in the consideration or decision of this case.

NAKAMOTO, J.

The decision of the Court of Appeals is reversed. The judgments of the circuit court are reversed, and the cases are remanded to the circuit court for further proceedings.

Kistler, S. J., dissented and filed an opinion.

NAKAMOTO, J.

Article I, section 9, of the Oregon Constitution provides, in part, that "[n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure[.]" These consolidated cases concern whether the warrantless search of defendants' garbage bin violated a protected interest of defendants under Article I, section 9.

Police officers discovered incriminating drug-related evidence in defendants' garbage by having a sanitation company manager specially pick up defendants' garbage bin on trash pick-up day, transport it to the sanitation company's facilities, and turn it over to the officers, who then searched the bin. After the trial court denied their motions to suppress that evidence, defendants were convicted on drug-related charges. The Court of Appeals affirmed those convictions, concluding that, although defendants retained protected possessory and privacy interests in the garbage while their bin rested at the curb, the police did not violate their interests by taking possession of the bin and searching its contents, because defendants had lost their interests when the sanitation company picked up their garbage bin.

On review, we hold that defendants retained protected privacy interests in their garbage under Article I, section 9, which the police invaded when they searched defendants' garbage bin without a warrant. Accordingly, the trial court erred by denying defendants' motions to suppress evidence, and we reverse the decision of the Court of Appeals and the judgments of the circuit court and remand for further proceedings before the circuit court.

I. FACTS AND PROCEDURAL HISTORY

We begin with the facts concerning the retrieval and search of defendants' garbage bin, which are not disputed. While defendants lived together in Lebanon, Oregon, local police received information about possible drug activity at their house and decided to investigate. Lebanon Police Department Detective McCubbins contacted the sanitation company servicing the house, Republic Services. Republic is a private company that has a franchise agreement with the

City of Lebanon to pick up and haul garbage from private residences. Neither defendant had a separate written agreement with Republic.

McCubbins asked Republic to collect the contents of defendants' garbage bin separately from the other private residences that Republic served so that defendants' garbage could be searched by police officers. A manager for Republic agreed to cooperate, obtaining defendants' garbage for the police before the regular garbage truck arrived at the house:

> "On the day that defendants' garbage was usually picked up, the police parked down the street to observe Republic's collection of defendants' trash. The police arrived at 7:00 a.m. and noticed that defendants' garbage cart had already been placed by the sidewalk. On that morning, a manager for Republic drove to defendants' residence in a white pickup truck ahead of the larger mechanical sanitation truck that would normally collect defendants' garbage. The manager arrived outside defendants' residence around 8:00 or 9:00 a.m. The manager timed his drive to make sure that he showed up before the company's larger mechanical truck emptied the cart. The manager grabbed defendants' cart and placed it in his company pickup truck. The manager then provided defendants with an empty replacement cart from the back of his truck."

State v. Lien, 283 Or App 334, 337, 387 P3d 489 (2017).

Republic's manager then gave defendants' garbage bin to the police: "The manager drove defendants' bin and garbage to a Republic company lot where Republic stored its extra garbage carts. The manager then handed control of the cart to the police, who searched it and found, among other things, evidence of illegal drugs, including drug bindles." *Id*. Using that evidence, the police sought and obtained a warrant to search the home.

Defendants were both subsequently charged with a variety of drug-related offenses. Before trial, both moved to suppress the evidence discovered in their garbage bin, arguing that the warrantless search, not otherwise encompassed by any exception to the warrant requirement, had violated their rights against unreasonable search or seizure under Article I, section 9.

At the hearing on defendants' motions to suppress, McCubbins testified for the state and described how the police had obtained defendants' garbage bin and the chain of custody of the bin and its contents. McCubbins acknowledged that defendants' garbage bin was handled "not in the normal manner" but, rather, "in a special manner" at his request.

Defendants called defendant Lien and Republic's manager as witnesses. They testified concerning Republic's residential garbage service in Lebanon and the sanitation company's usual practices when picking up that garbage. Lien testified that she had lived at her residence for approximately five years and that Republic was the company that picked up her household garbage. She testified that some of that garbage was private in nature and that she had expected the garbage in defendants' bin "to be mixed with other people's garbage and go out to the landfill." She explained that, while she had no written agreement with Republic, she nevertheless had expected that the sanitation company would process defendants' garbage in the same way that it processed everyone else's garbage, that is, without anyone going through it before it was commingled and taken to the landfill.

Republic's manager described the usual process of residential garbage collection and disposal: The garbage bins have lids, and customers must place their bins near the street within reach of the mechanical arm on the garbage truck. The company uses a large, automated side-load garbage truck to grab the bins and dump their contents into the opening at the top of the truck. The driver typically does not have to get out of the truck and does not see the contents of the individual garbage bins. A truck can hold the garbage of 350 to 400 households, and, once the truck is full, the driver takes it directly to the landfill and dumps the load of garbage out.

Republic's manager also testified about agreements in place regarding Republic's residential services in Lebanon. He testified that Republic has a franchise agreement with the city to provide garbage service for city residents and that residents had no choice about which company collected their garbage. The sanitation company's franchise agreement did

not have a provision stating that it could provide a resident's garbage to law enforcement. Republic did not have a written agreement with its residential customers, nor did it tell customers that it may provide garbage to law enforcement officers at their request. The manager agreed that it was reasonable for Republic's customers to expect that their garbage would be picked up in the ordinary manner, that is, that the lid on the garbage bin would be closed and the bin then emptied into the mechanized garbage truck without the driver getting out and looking into the bin. He also testified that he collected defendants' garbage bin because the police asked him to do that, but he would not collect garbage from a customer for a private citizen because that would "violate the customer's privacy."

The trial court credited the witnesses' testimony. Its findings included the following: "Defendants placed the garbage can at the curb," and "they believed that some of its contents were personal or private in nature." "No one provided any notice to defendants that their garbage was subject to search or examination." "Republic [S]ervices will bring customer's garbage to the police when requested but will not deliver garbage collected from defendants to anyone else." "Ordinarily when the garbage is picked up by Republic Services it is dumped at the Coffin Butte landfill," and "a single garbage truck holds the refuse of 350-400 households." "Republic's trucks are highly mechanized. In most instances the driver never touches the garbage cans—a mechanical arm picks up the cans and empties them into the truck. No employee ordinarily sees the garbage content."

The trial court nevertheless denied defendants' motions to suppress. The trial court first concluded that Republic's manager, who had picked up and delivered defendant's garbage to the police, had "acted exclusively at the request and direction of the police" and "was acting as an agent for the state." It followed, the trial court continued, that the manager's seizure of defendants' garbage constituted state action. The trial court nevertheless concluded that defendants already had abandoned their garbage, along with any "reasonable expectation they would ever see their garbage again or have access to it," before the garbage had been picked up. The court concluded that, despite

defendants' subjective expectation of privacy, they retained no privacy interest in property that they had abandoned.

After the trial court denied defendants' motions to suppress, defendants agreed to enter conditional guilty or no-contest pleas to some of the charges. *See* ORS 135.335(3) (providing that criminal defendants may, with the court's consent, enter conditional pleas of guilty or no contest while reserving the right to appeal adverse determinations of specified pretrial motions; defendants who prevail on appeal may withdraw original pleas). Defendant Lien conditionally pleaded guilty to one count of unlawful delivery of heroin, ORS 475.850, and no contest to one count of unlawful delivery of methamphetamine, ORS 475.890. Defendant Wilverding conditionally pleaded guilty to one count of unlawful delivery of methamphetamine, ORS 475.890. The remaining charges against both defendants were dismissed.

Following the entry of judgments of conviction below, defendants appealed, arguing to the Court of Appeals that the trial court had erred in denying their motions to suppress evidence derived from the warrantless seizure and search of their garbage bin. Defendants asserted that

> "[b]y asking the garbage company manager to collect defendants' garbage ahead of the regularly scheduled time and keep it separate for searching, *the police enlisted the garbage company manager as a police agent. Thus, what occurred here is legally indistinguishable from the police themselves removing defendants' garbage from the curb, replacing it with an empty cart, and searching it*. That is impermissible."

(Emphasis added.) Defendants acknowledged that this court's decision in *State v. Howard/Dawson*, 342 Or 635, 157 P3d 1189 (2007) (where police went through the defendants' garbage after the sanitation company agreed to deliver it), appeared—at least on its face—to control the outcome of their appeal. Defendants nevertheless contended that *Howard/Dawson* should be reexamined as either distinguishable in this instance or wrongly decided, arguing in accordance with *Farmers Insurance v. Mowry,* 350 Or 686, 698, 261 P3d 1 (2011), that the factual context for the decision in *Howard/Dawson* regarding the relinquishment of

constitutionally protected interests in garbage was different than in this case.

The Court of Appeals, however, was not persuaded that *Howard/Dawson* was meaningfully different from this case, either factually or in the applicable legal analysis. The court concluded that defendants' possessory rights in their garbage—like those of the defendants in *Howard/Dawson*—were deemed to have been lost once the garbage was retrieved by the sanitation company on its regularly-scheduled pick-up day. *Lien*, 283 Or App at 340-42. With respect to defendants' privacy interests, the Court of Appeals noted that the *Howard/Dawson* defendants had raised similar privacy-based concerns before this court, which the court had rejected based on the rationale articulated in *State v. Purvis*, 249 Or 404, 410-11, 438 P2d 1002 (1968), that a person retains no constitutionally protected privacy interest in abandoned property. *Lien*, 283 Or App at 343. The Court of Appeals held that the trial court had properly denied defendants' motions to suppress and affirmed the judgments below. *Id.* In reaching that conclusion, however, the Court of Appeals did not discuss defendants' agency-related arguments concerning the role of Republic's manager as a police agent. We subsequently allowed and consolidated defendants' requests for review.

II. ANALYSIS

A. *The Issue on Review*

Defendants argue that they had protected possessory and privacy interests in their garbage while their closed garbage bin sat at the curb. *Cf. State v. Galloway*, 198 Or App 585, 109 P3d 383 (2005) (holding that the defendants retained possessory interests in contents of their closed garbage bins at curbside for collection and that they had not abandoned protected interests in garbage that the police had collected). The state does not engage with that argument and assumes, *arguendo*, that defendants had such interests.[1] The state then proceeds directly to the pivot point

[1] We therefore need not address whether the trial court correctly concluded, in derogation of *Galloway*, that defendants had abandoned all constitutionally protected interests in their garbage upon taking out and leaving their garbage bin at the curb before the sanitation company manager arrived.

for the parties: whether defendants retained either their possessory or privacy interests once the sanitation company manager—acting at the behest of, and as an agent for, the police—specially picked up the bin and transferred it to the waiting police officers for their inspection.

On that issue, the parties respectively take "all" or "nothing" positions. Defendants argue that they retained both possessory and privacy interests in their garbage bin and its contents, and that those interests were violated when Republic's manager, acting in his role as an agent of the police, picked up their garbage bin and delivered it to the police. Thus, they argue, the police controlled the taking and delivery of their garbage bin, as well as the ensuing search of their garbage, all without a warrant and in violation of their rights under Article I, section 9.

In contrast, the state contends that, although Republic's manager was in fact an agent of the police, this court's decisions in *Purvis* and *Howard/Dawson* stand for the proposition that individuals effectively abandon possessory and privacy interests in their curbside garbage once a sanitation company takes possession of it. Accordingly, in the state's view, by the time Republic's manager delivered defendants' garbage bin to the police, defendants had no constitutionally protected interests in their garbage. Thus, the state argues, the police were free to inspect defendants' garbage and did not violate Article I, section 9.

In keeping with their respective legal positions, the parties initially address whether the police, acting through the sanitation company manager, seized defendants' garbage from the curb in violation of their protected possessory interests in that property. We choose not to decide that issue.

Instead, we decide the other issue that the parties present: whether, after Republic's manager delivered defendants' garbage bin to the police, the police invaded defendants' privacy interests by searching defendants' garbage without a warrant, in violation of Article I, section 9. On that issue, the state bears the burden of establishing that the search "did *not* violate a protected interest of the defendant." *State v. Tucker*, 330 Or 85, 89, 997 P2d 182 (2000)

(emphasis in original); *accord* ORS 133.693(4) ("Where the motion to suppress challenges evidence seized as the result of a warrantless search, the burden of proving by a preponderance of the evidence the validity of the search is on the prosecution.").

Ultimately, whether the police searched defendants' garbage bin and their garbage without a warrant in violation of their rights under Article I, section 9, turns on whether defendants had constitutionally protected privacy interests in the property. *See State v. Owens*, 302 Or 196, 206, 729 P2d 524 (1986) ("Article I, section 9, protects privacy and possessory interests."). We first address, and agree with, defendants' contention that they had privacy interests in their curbside garbage, before Republic's manager arrived. We then discuss the legal underpinnings of the conclusion that the trial court, the Court of Appeals, and the parties all reached: The sanitation company manager was a police agent when he took and delivered defendants' garbage bin to the police. Finally, we address whether—as defendants assert—the role of the manager as a police agent is determinative of whether defendants retained their privacy interests in their garbage when the police searched it, or whether—as the state asserts—this court's conclusions on abandonment of privacy interests in *Purvis* and *Howard/Dawson* are applicable to, and retain their viability in, the circumstances that this case presents.

B. *Privacy Rights*

Among other rights, Article I, section 9, grants "the people" the right to be "secure * * * against unreasonable search" of their "effects." Thus, Article I, section 9, protects people by forbidding "certain *acts* of the government." *State v. Campbell*, 306 Or 157, 166, 759 P2d 1040 (1988) (emphasis in original). For purposes of Article I, section 9, a "search" occurs when "governmental action invades 'a protected privacy interest.'" *State v. Newcomb*, 359 Or 756, 764, 375 P3d 434 (2016) (quoting *State v. Wacker*, 317 Or 419, 426, 856 P2d 1029 (1993)).

In Oregon, the right to privacy—the individual freedom from government scrutiny—protected by Article I, section 9, is not defined by private property or contractual

rights, although such rights may inform the analysis in a given case. Rather, this court has repeatedly explained that the right to privacy protected by Article I, section 9, "is the freedom from scrutiny as '*determined by social and legal norms of behavior*, such as trespass laws and conventions against eavesdropping.'" *Newcomb*, 359 Or at 764 (quoting *Campbell*, 306 Or at 170) (emphasis added); *see also State v. Smith*, 327 Or 366, 372, 963 P2d 642 (1998) (reaffirming the court's "traditional construction of Article I, section 9, as protecting privacy *interests*, *i.e.*, the individual's interest in freedom from certain forms of governmental scrutiny") (emphasis in original).[2] This court also has stated that the fundamental question underlying an Article I, section 9, search case is whether the government's conduct, "if engaged in wholly at the discretion of the government, will significantly impair 'the people's' freedom from scrutiny, for the protection of that freedom is the principle that underlies the prohibition on 'unreasonable searches' set forth in Article I, section 9." *Campbell*, 306 Or at 171. In other words, this court has recognized, first, that privacy—freedom from government scrutiny—is a fundamental principle and value protected by Article I, section 9 and, second, that privacy is grounded in particular social contexts.

Accordingly, we determine whether defendants in this case had a protected privacy interest by first considering general social norms of behavior. Here, the relevant actors are the sanitation company manager, who, as a police agent, procured defendants' garbage bin and gave it to the police; defendants, who put out their opaque and closed garbage bin for trash collection, expecting that the sanitation company with an exclusive franchise in the city,[3] would pick up their garbage, commingle it with the garbage of hundreds of other households on the garbage truck route, and take it to the landfill; and police officers, who arranged for the taking of the garbage and who searched it. In our view,

[2] Relying on *Howard/Dawson*, the dissent contends that whether defendants had a privacy interest in the garbage that the police officers obtained should turn instead on whether defendants had possessory interests in the garbage. *State v. Lien*, 364 Or 750, 782, 786, 787, ___ P3d ___ (2019) (Kistler, J. dissenting). But as our precedents reflect, a person's possessory interest in property is not the touchstone of whether a person has a privacy interest protected by Article I, section 9.

[3] *See* Lebanon Code of Ordinances § 8.16.040.

under those circumstances, most Oregonians would consider their garbage to be private and deem it highly improper for others—curious neighbors, ex-spouses, employers, opponents in a lawsuit, journalists, and government officials, to name a few—to take away their garbage bin and scrutinize its contents. In this case, the sanitation company's manager acknowledged that norm: He would not collect garbage from a customer at the request of a private citizen because that would "violate the customer's privacy."

Indeed, defendants make exactly that point, suggesting that most Oregonians would be outraged were their garbage subject to such examination and citing as support an article first published on December 23, 2002, in the Portland publication *Willamette Week*. The article catalogued items that its reporters had found by collecting the curbside garbage or recycling of three government officials in Portland then serving in law enforcement roles: the city's police chief, the mayor and commissioner of police, and the Multnomah County District Attorney. The reporters described what they had done as a "frontal assault" on privacy and reported some of the officials' angry reactions to having their personal refuse removed from curbside and publicly examined, including the mayor's statement that she considered "*Willamette Week's* actions in this matter to be potentially illegal and absolutely unscrupulous and reprehensible." *See* Chris Lydgate & Nick Budnick, *Rubbish!*, Willamette Week (December 11, 2017), http://www.wweek.com/portland/article-1616-rubbish.html-2 (last accessed May 1, 2019).

It is not hard to understand why people would want to keep their garbage private and would respond with outrage to such an invasion. As the New Jersey Supreme Court explained, "[c]lues to people's most private traits and affairs can be found in their garbage," and so it is common knowledge that most people are interested in keeping their garbage private. *State v. Hempele*, 120 NJ 182, 201 576 A2d 793 (1990). In his dissenting opinion in *California v. Greenwood*, 486 US 35, 50, 108 S Ct 1625, 100 L Ed 2d 30 (1988), Justice Brennan wrote:

> "A single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it. A search of trash, like a search of the bedroom,

> can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests."

That description aptly illustrates the kinds of items routinely placed in garbage containers that people would consider to be private and why. Moreover, it supports the existence of a social norm of privacy concerning residential garbage placed in closed bins and put out at the curb for collection by the sanitation company. *See also* Jonathan Simon, *Katz at Forty*: *A Sociological Jurisprudence Whose Time Has Come*, 41 UC Davis L Rev 935, 962 (2007) (describing development of opaque plastic garbage bags in the 1960s and their residential use for household waste beginning in the 1970s as suggesting "the extraordinarily high value middle class Americans placed on hygiene and privacy").

In addition to that social norm of privacy concerning residential garbage, legal norms concerning personal privacy support recognition of a protected privacy interest in the contents of closed, opaque residential garbage bins placed at curbside for collection. The common law, as well as other sources, such as statutes, administrative rules, and local ordinances, are informative concerning existing legal norms of behavior. The common law is most relevant in this case.

Oregon courts have long recognized that the people of this state have a freestanding right of privacy. As this court explained over 75 years ago with regard to that right,

> "we deem it unnecessary to search for a right of property, or a contract, or a relation of confidence. The question is whether a right of privacy, distinct and of itself and not incidental to some other long recognized right, is to be accepted by the courts and a violation of the right held actionable."

Hinish v. Meier & Frank Co., 166 Or 482, 502-03, 113 P2d 438 (1941).

The court in *Hinish* concluded that "the needs of the society in which we live" counseled in favor of recognizing a cause of action grounded in a right of privacy for

the defendants' appropriation of the plaintiff's name. *Id.* at 503. The court reasoned that (1) advances in technology—including the leading media of the day, such as photographs, radio, and movies—would increase the potential for invasions of privacy and (2) a "decision against the right of privacy would be nothing less than an invitation to those so inclined who control these instrumentalities * * * to put them to base uses, with complete immunity, and without regard to the hurt done to the sensibilities of individuals whose private affairs might be exploited, whether out of malice or for selfish purposes." *Id.* at 503-04.

Oregonians may vindicate their legally protected interests in privacy by bringing a common law cause of action against the tortfeasor who invades those interests. In *McLain v. Boise Cascade Corp.*, 271 Or 549, 554, 533 P2d 343 (1975), the court described the general rule permitting recovery for invading someone's seclusion—a species of tortious violation of privacy—by reference to the *Restatement (Second) of Torts* section 652B (1961), which provided:

> "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable man."[4]

This court later explained that the tort protecting one's seclusion and private affairs "protects the right of a plaintiff to be let alone." *Mauri v. Smith*, 324 Or 476, 482, 929 P2d 307 (1996) (internal quotation marks omitted). And, "[i]t is now well established in Oregon that damages may be recovered for violation of privacy." *McLain*, 271 Or at 554. Tortious invasion of privacy is one of the limited number of torts in Oregon in which a plaintiff may be awarded damages consisting solely of mental suffering caused by the violation. *Hinish*, 166 Or at 506.

Based on social and legal norms, discussed above, we conclude that, for purposes of Article I, section 9, defendants in this case had privacy interests in their garbage that

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[4] Section 652B of the current *Restatement* is identical, except that the phrase "a reasonable man" has been changed to "a reasonable person."

had been placed within a closed, opaque container and put out at curbside for collection by the sanitation company. Like the court in *Hinish* over three quarters of a century ago, we recognize, given the realities of living in modern society, which is experiencing its own significant social and technological changes, that privacy norms exist notwithstanding some limited public exposure of information, in this case, putting out garbage in a closed bin for pickup by the sanitation company at curbside, an area accessible to members of the public other than the sanitation company.

Nothing about the relationship among the actors in this case or the respective obligations of defendants and Republic with respect to the garbage at issue here suggests that defendants had left their garbage for police or other government officials to search. There is no evidence that defendants had interacted at all with the Lebanon police concerning their garbage, and so no words or conduct on their part expressed that they were abandoning their garbage to the police or allowing them to search it when they placed the garbage at curbside for pickup. Rather, defendants were obligated by city ordinance to remove waste from their home on at least a weekly basis. Under section 8.16.140(B) of the Lebanon Code of Ordinances, "[e]very person who generates or produces solid waste or wastes shall remove or have removed all putrescible wastes at least every seven days." The required frequency of removal was "to prevent health hazards, nuisances, or pollution." *Id.* Thus, as mandated, defendants had weekly garbage collection through Republic, in the customary way for Lebanon residents. For its part, Republic was required by section 8.16.070(a) of the Lebanon Code of Ordinances to "[d]ispose of solid waste collected at a DEQ approved site or recover resources from the solid waste, both in compliance with Chapters 459 and 459A, Oregon Revised Statutes, together with rules and regulations promulgated thereunder." The city's Code of Ordinances, however, did not authorize Republic to transfer collected garbage to third parties for searches. At bottom, defendants, Republic, and the police all understood that, had Republic's manager not taken the garbage to the police at their request, defendants' garbage would have been commingled with the garbage of hundreds of other households

and dumped in a landfill, obscuring, as a practical matter, that defendants' garbage in particular contained evidence of drug possession.

We acknowledge that the United States Supreme Court has come to a different conclusion in applying the Fourth Amendment of the United States Constitution. *See Greenwood*, 486 US at 41 (holding that there is no reasonable "expectation of privacy in trash left for collection in an area accessible to the public"). In *Greenwood*, the police had requested on multiple occasions that a sanitation hauler specially collect the defendants' plastic garbage bags, left for curbside collection in front of their house, and give them to the police, who then searched the bags. The majority concluded that those defendants had no reasonable expectation of privacy because they had "exposed their garbage to the public" and had left the garbage "for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through" it. *Id.* at 40. However, the Court's rationale for that holding is subject to criticism, as the dissent in that case and a variety of courts and commentators have well explained.

For example, the dissenters in *Greenwood* noted, in response to the rationale that the garbage had been left exposed in an area to which the public had access, that the defendants had only exposed "the exteriors of several opaque, sealed containers," and, "[u]ntil the bags were opened by police, they hid their contents from the public's view[.]" *Id.* at 53. As for the rationale that it was possible for the sanitation company worker or others to have opened the bags, the dissent wrote:

> "The mere *possibility* that unwelcome meddlers might open and rummage through the containers does not negate the expectation of privacy in their contents any more than the possibility of a burglary negates an expectation of privacy in the home; or the possibility of a private intrusion negates an expectation of privacy in an unopened package; or the possibility that an operator will listen in on a telephone conversation negates an expectation of privacy in the words spoken on the telephone. 'What a person . . .

> seeks to preserve as private, *even in an area accessible to the public,* may be constitutionally protected.'"

Id. at 54 (quoting *Katz v. United States,* 389 US 347, 351-52, 88 S Ct 507, 19 L Ed 2d 576 (1967)). Similarly, the New Jersey Supreme Court in *Hempele* responded to the majority's statement in *Greenwood* that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," *id.* at 41, by observing that Greenwood had not exposed evidence to a third party but rather had conveyed an opaque bag containing the evidence, thereby preserving his privacy interest in the contents of the bags. 120 NJ at 208, 576 A2d at 806. *See also* Wayne R. LaFave, 1 *Search and Seizure* § 2.6(c) 897-98 (5th ed 2012) (concluding that "people intend that their refuse, though placed outside their dwelling for collection, remain private" and "a society in which all our citizens' trash cans could be made the subject of police inspection for evidence of the more intimate aspects of their personal life upon nothing more than a whim is not free and open") (quotations and footnotes omitted); *Hempele*, 120 NJ at 204-10, 576 A2d at 804-07 (rejecting the state's reliance on the rationale in *Greenwood*).

But whatever one's view of the Court's decision in *Greenwood*, the Court correctly observed that "[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution." *Id.* at 43. We are not the first such court to conclude that our state constitution imposes more stringent constraints than the federal constitution, as our references to *Hempele* make clear. Other courts, although a minority nationally, have reached the same conclusion under their state constitutions. *See State v. Crane*, 2014-NMSC-026, 329 P3d 689 (2014); *State v. Goss*, 150 NH 46, 834 A2d 316 (2003); *State v. Morris*, 165 Vt 111, 680 A2d 90 (1996); *State v. Boland*, 115 Wash 2d 571, 800 P2d 1112 (1990); *State v. Tanaka*, 67 Haw 658, 701 P2d 1274 (1985); *People v. Krivda*, 5 Cal 3d 357, 96 Cal Rptr 62, 486 P2d 1262 (1971), *vacated and remanded*, 409 US 33, 93 S Ct 32, 34 L Ed 2d 45 (1972), *reaff'd*, 8 Cal 3d 623, 105 Cal Rptr 521, 504 P2d 457 (1973), *cert den*, 412 US 919 (1973). We agree with those state courts that people do not voluntarily expose their private effects to government officials

when they place their garbage in opaque, closed garbage bins at curbside for collection by their community's garbage hauler.

C. *The Sanitation Company Manager as Police Agent*

Although the parties agree that the trial court correctly concluded that the sanitation company manager had acted as an agent of the police when he picked up defendants' garbage bin and delivered it to the police for a search, they disagree regarding the significance of that conclusion. Because it will inform our subsequent discussion, we examine the legal grounding for that conclusion before addressing whether defendants still retained their privacy interests in their garbage when the police went through it.

It is axiomatic, we noted in *State v. Sines*, 359 Or 41, 50, 379 P3d 502 (2016), that Article I, section 9, applies only to government-conducted or -directed searches and seizures, not those of private citizens. *Accord State v. Tanner*, 304 Or 312, 321, 745 P2d 757 (1987) ("A section 9 privacy interest is an interest against the state; it is not an interest against private parties.").We also recognized in *Sines* that

> "situations can and do arise in which a private citizen's conduct in pursuing his or her own search and seizure may become so intertwined with the conduct of a state actor that the private citizen's actions are essentially those of the state and should be subject to constitutional restrictions on state searches and seizures."

359 Or at 50.

At issue in *Sines*, a child sex abuse case, was whether a private citizen acting on her own volition—the defendant's housekeeper—had nevertheless served as a police agent when she gave local police an unwashed pair of underwear belonging to the defendant's young adopted daughter. In formulating a rule and to guide the analysis, we opined that "common-law agency principles can provide substantial assistance in determining when a private citizen's search or seizure should be considered state action for purposes of Article I, section 9." *Id.* at 55. Turning to those principles, and relying on a section of the *Restatement (Third) of Agency*, we concluded that

> "[c]ommon-law agency exists where a principal 'manifests assent to another person'—the agent—that the agent 'shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.' *Restatement (Third) of Agency* § 1.01 (2006)."

Id. See also Vaughn v. First Transit, Inc., 346 Or 128, 135, 206 P3d 181 (2009) (holding that an agency relationship "'results from the manifestation of consent by one person to another that the other shall act on behalf and subject to his control, and consent by the other so to act'" (quoting *Hampton Tree Farms v. Jewett*, 320 Or 599, 617, 892 P2d 683 (1995)).

In *Sines*, we ultimately concluded that, under common-law agency principles, an agency relationship had not existed due to a lack of "affirmative encouragement, initiation, or instigation" from the police seeking action from the housekeeper on their behalf. 359 Or at 60. That, however, is not the factual posture present here.

In this case, it is undisputed that the police solicited the sanitation company manager to specially pick up and bring defendants' garbage to them and the sanitation company manager obliged that request. There is no question, then, that there was mutual assent to the agency relationship. Under the common-law agency principles discussed in *Sines*, therefore, the police—the principals—and the sanitation company manager—their agent—entered into an agency relationship, the goal of which was to procure defendants' garbage bin for the police to conduct a search of its contents.

The trial court found that Republic's manager had "acted exclusively at the request and direction of the police," and we are bound by that finding. *See State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993) (holding that, in reviewing denial of motion to suppress evidence, court is bound by trial court findings of historical fact "if there is constitutionally sufficient evidence in the record to support those findings"). Thus, it cannot be said that the sanitation company discovered suspicious evidence in the course of its regular operations and volunteered to give that evidence to the police, as was the case in *Sines*. Nor can it be said that the police happened

upon evidence lying in plain view or that the police obtained the sanitation company's consent to go through defendants' garbage once the sanitation company, as usual, had picked it up with its mechanized garbage truck. What can be said is that the police procured defendants' garbage bin, with its contents segregated from the garbage of hundreds of other households, by engaging the services of Republic's manager to act as its agent.

D. *Did the Police Violate Defendants' Rights under Article I, Section 9?*

We are left with the key controversy at hand: whether defendants retained, and the police invaded, privacy interests in the contents of their garbage bin after the police received the bin from Republic's manager and went through its contents. There is no question that defendants did not know that the police would take their garbage bin away with the help of an agent and search it, nor did they agree to such a search. And there is no question that defendants did not tell the police or the sanitation company that, by leaving their garbage bin at the curb for Republic's mechanized garbage truck to empty it and haul away the garbage, commingled with garbage from other households, they were intentionally relinquishing their privacy in the contents of their garbage bin.

Having never agreed to nor authorized the transfer of their garbage to the police, defendants argue that they retained protected privacy interests in their garbage, which the police invaded when they searched it without a warrant. For its part, the state implicitly contends that it did not interfere with defendants' privacy interests when the police went through the garbage. In the state's view, defendants "lost" those interests when the sanitation company manager picked up defendants' garbage bin. For that proposition, the state relies on *Purvis* and *Howard/Dawson*. Defendants, however, argue that those cases are distinguishable and, alternatively, that we should overrule them.

In light of the parties' arguments, we first examine *Purvis* and *Howard/Dawson* in detail. We acknowledge that it is possible to read those cases as broadly holding that, once a private actor takes possession of a person's garbage, that

person loses any privacy interests in the garbage. However, given our recent decision in *Sines*, and an earlier case involving police use of private actors, *Tucker*, 330 Or 85, we explicitly renounce such a broad reading. Indeed, as explained in greater detail below, we conclude that Oregonians do not "lose" privacy interests in their garbage when the police direct a private actor to facilitate the government's search by picking up garbage bins left at curbside for regular trash pick-up day. And, to the extent that *Purvis* and *Howard/Dawson* hold otherwise, we disavow those holdings.

1. *Purvis and Howard/Dawson*

In *Purvis*, decided in 1968, Eugene police had received a tip from employees at a local hotel who believed that one of the hotel's guests was using "narcotics" in his room, the suspected drug in question being marijuana. *Purvis*, 249 Or at 405. A police detective was dispatched to the establishment, where he enlisted the help of two women who were hotel employees and who were cleaning the rooms on the defendant's floor. The detective told the workers to keep any trash that they removed from the defendant's room separate from other trash collected in their cleaning rounds so that the detective could examine it. *Id.* The detective also told the workers to look for "homemade cigarettes." *Id.* After entering the defendant's room, emptying ash trays and waste baskets into a cardboard box, and taking the box to the detective as he waited down the hall, the workers returned to the room to complete their cleaning and discovered on the floor a cigarette remnant of the type described by the detective. *Id.* at 406. Once the workers brought that to him, the detective sought out and arrested the defendant for illegal possession of narcotics. *Id.*

The defendant unsuccessfully sought to suppress the evidence gathered in the hotel room as a warrantless search; he was subsequently convicted on a single count of possession and sentenced to probation. In rendering that judgment, the trial court did not find that the hotel workers had acted on the state's behalf or for its benefit in cleaning the defendant's room. Instead, as set out in the abstract of record on review, the trial court expressly found that "at all times while the maids were cleaning Room 705, they were

operating and acting in the ordinary course of their business as maids and conducted no unusual search or discovery procedure[.]" Appellant's Opening Brief at 3, *State v. Purvis*, 249 Or 404, 438 P 2d 1002 (1968).

On appeal from his conviction, the defendant took issue with that finding. At the time, the parties did not have the benefit of the agency analysis that this court articulated in *Sines* to determine whether actions taken by a private actor constitute a search conducted by a government agent. Instead, the applicable rule at the time—cited by both parties among their primary points of law—focused on whether a private party search had either been conducted in collusion with police officers or had been marked by actual officer involvement:

> "Private persons may search the premises of another without constitutional restraint unless *there is police collusion or the police participate in the search in any manner*."

See Appellant's Opening Brief at 14, *State v. Purvis*, 249 Or 404, 438 P 2d 1002 (1968) (setting out controlling propositions of law); Respondent's Brief at 2, *State v. Purvis*, 249 Or 404, 438 P 2d 1002 (1968) (same).

Drawing upon that rule, the defendant asserted that

> "[t]he hotel maids were not performing their duties alone but were acting as agents of, and in concert with, the officer who did not immunize himself from the constitutional safeguard [of a warrant] by lying in wait 30 feet down the hallway from the room. Since the search of the hotel room was warrantless and not as an incident to any lawful arrest it was illegal."

Appellant's Opening Brief at 20-21, *State v. Purvis*, 249 Or 404, 438 P 2d 1002 (1968). A majority of this court, however, disagreed with the defendant's position that the hotel workers had acted "as agents of and in concert with" the investigating detective.

While acknowledging that the hotel workers had, in fact, been recruited by the police to carry out a "form of search" in the defendant's room, *Purvis*, 249 Or at 410, the majority nevertheless held that, based on its reading of the testimony, the trial court had been entitled to regard the

detective's request of the workers as limiting the retrieval of evidence from the defendant's hotel room to "items which would otherwise be removed in the normal process of cleaning the room," *id.* at 409. After observing that the items collected had all been destined for the trash and implicitly authorized to be taken out of the room by the hotel workers, the majority opined that the items

> "eventually would be available to the police for inspection even if no instructions had been given. Although the cooperation of the maids in keeping the objects from room 705 separate from the objects taken from the other rooms was helpful to the police and, in fact, could be regarded as a part of the process of search, we do not think that the recruitment of the maids by the police for this purpose constituted an invasion of defendant's constitutional right of privacy."

Id. at 410-11.

The analytical core of the majority's decision in *Purvis* contained two parts. Under the first part, personal refuse in a hotel room—or even items that *presented* as such by being left in receptacles or on the floor—could be construed as abandoned property when hotel workers with the job of regularly collecting that refuse saw the items and collected and removed them while cleaning the room. Under the second part, when the same workers performed the same collections—albeit now at the request of a police officer conducting a criminal investigation—the workers' recruitment for that purpose could not be viewed as collusion with the state because the workers were performing a task that they were otherwise licensed or privileged to perform as part of their job. Under the *Purvis* rationale, the hotel workers were private actors who had picked up an abandoned marijuana cigarette in the defendant's hotel room as part of their regular duties and then given it to the police, and the police involvement did not constitute collusion or participation in a warrantless search of the defendant's hotel room.

A lone dissenter in *Purvis*, however, advanced a contrary view, opining that the governmental intrusion permitted by the majority would one day require nullification as "too vicious" to endure. *Purvis*, 249 Or at 417 (Sloan, J.,

dissenting). That was so, the dissent wrote, because the majority's rule

> "would necessarily apply to any other person who can, at the insistence of government agents, permissively enter an office or a home or any other place. It is rather shocking to realize that any unfaithful or naive employee or trusted neighbor can ransack a business office or home and bring to the waiting police whatever the searcher may choose to believe is debris. The majority imposes no other test. That, in itself, is bad enough, but the majority permit the police to instruct and direct the employee as to what he should look for. Even in the heyday of the silver platter rule[5], the Supreme Court would not tolerate the participation of federal agents in a search like that permitted by the majority today."

Id. at 411-12 (Sloan, J., dissenting).

Nearly 40 years later, *Purvis* would become the cornerstone of this court's decision in *Howard/Dawson*, a case nearly identical in its facts to the matter now before us. In *Howard/Dawson*, authorities had learned that one of the defendants had made substantial purchases of a precursor chemical used to manufacture methamphetamine. Armed with that information—but no warrant—police officers asked the sanitation company that collected the defendants' household garbage to pick it up at their home and convey it directly to them for inspection. The company complied with that request and, during two regularly scheduled pick-ups at the defendants' residence, collected their garbage container and its contents, replaced it with an empty container, and immediately turned the full container over to a police officer. Based on evidence gleaned from those searches, the police obtained a warrant to search the defendants' residence,

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[5] Before 1960, the "silver platter doctrine" had permitted federal courts to receive evidence from searches conducted by state-level police officers that would have violated the Fourth Amendment if conducted by federal officers. *See State v. Davis*, 313 Or 246, 252, 834 P2d 1008 (1992) (so stating). The doctrine was based on the rationale that the Due Process Clause did not incorporate the Fourth Amendment into its framework, thus excluding state police action from Fourth Amendment scrutiny or sanction. In 1960, however, the United States Supreme Court decided *Elkins v. United States*, 364 US 206, 80 S Ct 1437, 4 L Ed 2d 1669 (1960), and held that evidence obtained in violation of the Fourth Amendment "is not admissible in state or federal court, regardless of where or by whom it was obtained." *Davis*, 313 Or at 252.

where they uncovered additional evidence of methamphetamine manufacture and use. The defendants were charged with various drug crimes and, after an unsuccessful attempt to suppress the evidence taken from the garbage containers, were convicted of the charges against them. *Howard/Dawson*, 342 Or at 638-39.

On appeal, unlike the defendant in *Purvis*, the defendants in *Howard/Dawson* did not argue to the Court of Appeals that the police officers had violated the Oregon Constitution's warrant requirement by recruiting the sanitation company to act as a police agent.[6] Instead, the defendants sought to distinguish the facts of their case from those in *Purvis* by emphasizing both the possessory and privacy interests that lay in the garbage container removed from their residence at the behest of the police. The defendants argued that, because their household garbage had been deposited in a closed container unavailable for public observation and the container then placed outside the residence for exclusive pick-up by the sanitation company, the defendants' property and privacy interests in that refuse could not be construed as having been abandoned.

Sitting *en banc*, a divided Court of Appeals disagreed, ultimately concluding that the warrantless searches of the defendants' garbage were not unreasonable under Article I, section 9, of the Oregon Constitution. *State v. Howard/Dawson*, 204 Or App 438, 449, 129 P3d 792 (2006), *aff'd,* 342 Or 635, 157 P3d 1189 (2007). According to the majority, the defendants had maintained a protected possessory interest in their garbage only until its collection by the sanitation company. At that point, the majority opined, "[f]rom a possessory standpoint, the garbage belongs to the sanitation company." *Howard/Dawson*, 204 Or App at 443. Citing *Purvis*, the majority then concluded that the police

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[6] Recognizing that fact, the dissent in the Court of Appeals in *Howard/Dawson* observed:

> "Defendants do not argue that police are also prohibited from circumventing that constitutional limitation on their authority by recruiting private citizens to conduct the seizure for them. That remains an open question under the Oregon Constitution."

State v. Howard/Dawson, 204 Or App 438, 450 n 1, 129 P3d 792 (2006), *aff'd,* 342 Or 635, 157 P3d 1189 (2007) (*en banc*) (Schuman, J., dissenting).

had not conducted a search of the garbage under Article I, section 9, because the defendants had lost their privacy interests:

> "Once that garbage was in the collection company's physical possession and control, defendants' privacy interests in the contents of their garbage can were extinguished, as *Purvis* instructs. *A fortiori*, the ensuing police examination of the garbage and confiscation of evidence of defendants' drug activities did not invade a privacy interest protected by Article I, section 9."

Howard/Dawson, 204 Or App at 444.

Three dissenters, however, took issue with the majority's rationale, framing the question before the Court of Appeals as this: "Did the police do something that, if they could do it in similar circumstances whenever they wanted, would diminish the freedom from unwanted government scrutiny to which an Oregonian is entitled?" *Id.* at 452 (Schuman, J., dissenting). Answering that question in the affirmative, the dissent took particular aim at the secret use of the sanitation company as an extension of the police officers in that case, indicating that it was

> "unwilling to endorse a rule under which government authorities—for good reason, bad reason, or no reason at all—are free, through the expedient of recruited civilians, surreptitiously to arrange for the seizure and subsequent inspection and analysis of the contents of garbage containers that people leave at curbside for pickup and delivery to the dump or recycling facility. Such a rule would result in an unwarranted and significant reduction in the people's freedom from unwanted scrutiny."

Id. at 456.

This court allowed review to examine the constitutional issue that had divided the Court of Appeals. *Howard/Dawson*, 342 Or at 639. On review, the defendants again omitted any argument that the sanitation company had acted as a police agent in securing and delivering the defendants' garbage to the police. That caused this court, in turn, to narrow its focus to the defendants' possessory and privacy rights with respect to the garbage, but seemingly by treating the defendants' garbage bin as if the sanitation company

had obtained it in the regular course of business and could do whatever it wanted with it, including giving it and its contents to the police.

Echoing the Court of Appeals holding below, this court explained that the sanitation company lawfully possessed the defendants' garbage. *Id*. at 640. This court further concluded that, if anyone had "a constitutionally protected possessory interest, it was the sanitation company, but that company voluntarily turned the property over to the police." *Id*. (internal citations omitted). Citing *Purvis*, this court then concluded that the defendants had no privacy interests in the garbage, likening their conduct to abandonment:

> "On this record, defendants retained no more right to control the disposition of the garbage once they turned it over to the sanitation company than they would had they abandoned it. As this court consistently has recognized, a person retains no constitutionally protected privacy interest in abandoned property. Indeed, we do not see a material distinction between the facts in this case and the facts in *Purvis*."

Howard/Dawson, 342 Or at 641 (internal citations omitted). Consequently, this court affirmed both the appellate decision and circuit court judgments rendered below. *Id*. at 643.

As that decisional history indicates, both *Purvis* and *Howard/Dawson* could be understood as holding that, whenever a private actor with authority to take possession of a defendant's garbage does in fact obtain possession, then (1) the defendant has lost possessory rights in the garbage and (2) the defendant no longer has privacy rights with respect to the garbage. The two cases differ in their rationales for concluding that, once the private actor obtained possession, the defendant lost privacy rights in the garbage, but in neither case did this court consider the implications of the relationship between the private actors and the police in light of principles of agency law.

2. *Applicable principles of agency law*

Here, however, the significance of police involvement in light of principles of agency law is squarely before us. The trial court concluded that the sanitation manager at

Republic Services—who had picked up and delivered defendants' garbage bin to police officers at their request—had acted as a state agent in an undertaking that amounted to state action. And, with respect to whether the police invaded their protected interests by going through their garbage, defendants explicitly argue that, under this court's case law in *Sines* and *Tucker*, the manager's role as an agent of the police matters in considering whether they retained privacy interests in their garbage after the manager took their garbage bin and delivered it to the police.

In *Sines*, as noted earlier, this court concluded that "common-law agency principles can provide substantial assistance in determining when a private citizen's search or seizure should be considered state action for purposes of Article I, section 9." 359 Or at 55. The court looked to "objective manifestations" by the government authorities—affirmative conduct such as "encouragement, initiation, or instigation"—to determine whether the state had "vicarious responsibility" for the housekeeper's private search in *Sines*. *Id.* at 60.

In *Tucker*, this court held that, "if a state officer requests a private person to search a particular place or thing, and *if that private person acts because of and within the scope of the state officer's request*, then Article I, section 9, will govern the search." 330 Or at 90 (emphasis added). In *Tucker*, a state trooper had investigated a single-vehicle rollover accident in which both the driver and passenger had been taken to the hospital and the vehicle towed from the crash site. *Id.* at 87. The trooper, however, developed reason to believe that the passenger had falsely identified himself and called the tow truck driver, asking him to search the towed vehicle for items that might help determine the passenger's identity. In the warrantless search of the vehicle that followed, the tow truck driver found a gun in a camera case, the discovery of which—along with the passenger's identity and his status as a convicted felon—led to the passenger's conviction as a felon in possession of a firearm. *Id.* at 87-88.

On review, this court concluded in *Tucker* that, because the tow truck driver had acted within the scope of

the trooper's request when he looked into the camera case, he was acting as the trooper's agent. *Id.* at 90. Consequently, this court held that the trial court should have excluded the evidence that the tow truck driver had discovered, as the product of a warrantless search prohibited by Article I, section 9, and reversed the conviction. *Id.* at 91.

In this case, applying *Sines* and *Tucker*, it is apparent that it was the state's decision—not the independent decision of a private actor—to procure defendants' garbage bin for police inspection. Defendants had privacy interests in their garbage as their bin sat at the curb for regular collection by the sanitation company. The sanitation company manager then acted as a police agent when he picked up defendants' garbage bin before the mechanized garbage truck arrived, replaced that bin with an empty one, and transported their garbage bin to the waiting police officers for a search. Because the police directed that private actor, Republic's manager, to segregate and then to bring their private information in their garbage to the police for exposure in a search, the police bear responsibility for invading defendants' privacy interests in their garbage.

The reasoning in *Purvis* does not remain viable in light of *Sines* and *Tucker*. It is important to understand that the defendant in *Purvis* had argued that his privacy right had been invaded through a warrantless search of his hotel room. That is, the defendant contended that police had engaged in a search by asking the hotel workers to look for homemade cigarettes while cleaning the room and segregating its trash. *Purvis*, 249 Or at 411. The *Purvis* majority determined that, because the hotel workers had been authorized to clean the defendant's room and had performed that task as they normally did, they had simply given the police access to the trash that they would have, in any event, taken out of the room as part of their duties. *See id.* at 408 (explaining that the cigarette "would be removed in the usual course of cleaning the room"); *id.* at 410 (explaining that the workers were authorized to clean the room and to remove trash, including the cigarette). In doing so, however, the court acknowledged that, while the contraband had remained in the hotel room, "the police were not entitled to seize it * * *

because the right to the privacy of the room itself would be invaded by such a seizure." *Id.* at 411.

Thus, the majority in *Purvis* expressly recognized the defendant's right to privacy in his room, while at the same time recognizing that the hotel workers had been recruited by a police officer to perform an act that, had the police officer performed it, would have violated that privacy right. The majority did not attempt to reconcile those competing ideas by reference to any tenet of Oregon agency law, opting instead to summarily state: "[W]e do not think that the recruitment of the maids by the police for this purpose constituted an invasion of defendant's constitutional right of privacy." *Id.* at 411.

But as both *Sines* and *Tucker* reflect, in the ensuing 50 years since *Purvis* was decided, this court has had time to reflect and to recognize that it is the state that must be viewed as the culpable actor when (1) police officers expressly solicit private parties to serve as police agents; (2) those agents subsequently act upon, and within the scope of, the officers' requests; and (3) the agents' actions are aimed at procuring evidence for the state's use in criminal investigations or prosecutions. As we summarized in *Sines*,

> "our cases make clear that Article I, section 9, is a restriction on government searches and seizures, not private ones. Government generally acts, of course, through government employees, but it may also act through nonemployee agents, and searches or seizures by those agents are subject to constitutional protections."

359 Or at 53. Now, in employing *Sines* and *Tucker* as the lenses through which we must examine the police recruitment of the hotel workers in *Purvis*, the conclusion that those workers did not facilitate an invasion of the defendant's privacy rights as police agents in the search is no longer supportable. Accordingly, we overrule that holding in *Purvis* as inconsistent with this court's decisions in *Sines* and *Tucker*. *See Horton v. Oregon Health and Science University*, 359 Or 168, 186-87, 376 P3d 998 (2016) (discussing considerations for overruling prior case, including that the prior case was wrongly decided based on (1) an inadequate legal analysis or

(2) because the legal or factual context for the prior decision has changed in a way that seriously undermines the reasoning or the result of the earlier decision).

We reach the same conclusion with regard to *Howard/Dawson*. This court's decision in that case was premised largely on the notion that *Howard/Dawson* and *Purvis* were factually the same and, by extension, required the same outcome. *See Howard/Dawson*, 342 Or at 641 ("[W]e do not see a material distinction between the facts in this case and the facts in *Purvis*."). Indeed, in *Howard/Dawson*, the court cited *Purvis* for the proposition that the defendants in *Howard/Dawson* "retained no more right to control the disposition of the garbage once they turned it over to the sanitation company than they would had they abandoned it." *Id.* That observation, however, like similar observations in *Purvis*, was premised on the unsupported notion that the government action implicating the protections of Article I, section 9—the agency relationship between the police and the garbage company—was somehow abrogated by the garbage company's preexisting authorization to pick up the defendant's garbage, police request or not. In *Howard/Dawson*, this court assumed that, once the sanitation company manager—the private actor—took possession of the garbage, the defendants no longer had any "right to control the disposition of the garbage" and then assumed that, like people who had "abandoned" their property, the defendants had no rights with respect to the garbage whatsoever. This court then assumed that the private actor who had possession of the garbage could choose to do what he wanted with the defendants' garbage, including exposing the garbage to third parties, even the police.[7]

But as explained above, common law agency principles now require us to view the police officers in *Howard/Dawson* as the principals who, through use of their agent, were vicariously responsible for segregating and procuring the contents of defendants' garbage bin for exposure to police search, thereby invading defendants' privacy rights without a warrant. Thus, our previous holding in *Howard/*

[7] In light of our decision below, we need not address whether the assumptions that the court made were correct.

Dawson that the defendants in that case had no privacy rights in their garbage because the sanitation company had collected it under a privilege to do so can no longer be viewed as correct. Consequently, we overrule that part of *Howard*/*Dawson* for the same reasons that we have overruled *Purvis*.[8]

Having overruled those two cases, we reject the state's contention that the police officers in the case now before us did not "search" defendants' garbage under Article I, section 9. The state itself—not a private actor acting independently of the police—took defendants' garbage bin and then went through its contents. For reasons we have discussed above, including social norms reflected in cases from this and other courts and common law tort principles reflecting legal norms, that conduct plainly invaded defendants' constitutionally protected privacy interests.[9]

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[8] The dissent would preserve the holding in *Howard*/*Dawson*. It argues that *Sines* did not give the court an opportunity to explain how a "private actor's status as an agent would affect the analysis of whether her actions constituted a search or seizure" and that the sanitation company manager, though a police agent, did not violate any possessory or privacy interest of defendants. *Lien*/*Wilverding*, 364 Or at 789-90 (Kistler, J. dissenting). But the dissent fails to acknowledge that *Sines* explained that agency principles inform the analysis not of whether *a private actor* violated interests protected by Article I, section 9, but whether *the government* violated those interests. Agency law (and *Sines*) clarifies that, in the principal-agent relationship that existed between the police officers and the sanitation company manager in this case, the police officers in their role as the principals had legal responsibility for the police agent's action in obtaining defendants' garbage for the search:

> "When one employs a servant or agent to do his work, the employer is, in the eyes of the law, the actor. The damages caused by the activity are the master's responsibility, so long as it is the master's business that is being done."

Gossett v. Simonson, 243 Or 16, 23, 411 P2d 277 (1966). Contrary to the dissent's view, *Lien*/*Wilverding*, 364 Or at ___ (Kistler, J. dissenting), the police agent took actions on behalf of the police officers outside of Republic's usual or ordinary course of hauling residential garbage to the dump to help the police investigate defendants, as he acknowledged in his testimony. To reach its ultimate conclusion, the dissent downplays the fact that the police—not the sanitation company—instigated and controlled the search of defendants' garbage, having orchestrated that search by initially procuring an agent from the sanitation company to segregate the garbage and deliver it to them.

[9] The dissent questions how the privacy interest recognized in this case and the role of a private party acting as a government agent will factor into future cases, intimating that, ultimately, law enforcement may lose the ability to investigate criminal activity through a variety of means, such as police-controlled drug buys, confidential informants, or cooperating witnesses. *Lien*/*Wilverding*, 364 Or at 794, 795 (Kistler, J. dissenting). It is apparent that cases involving those kinds of investigations can involve a myriad of contexts, and the mere fact

"Subject to certain limited exceptions, a search or seizure is unreasonable and, therefore, unlawful under Article I, section 9, unless it is supported by probable cause and a warrant." *State v. Barnthouse*, 360 Or 403, 413-14, 380 P3d 952 (2016). The state lacked a warrant when its agent, having taken defendants' garbage bin, turned it over to the police, who then searched its contents. Accordingly, the state bears the burden of proving the validity of the warrantless search. ORS 133.693(4); *Tucker*, 330 Or at 89. In this case, the state has failed to meet its burden. Because the state violated defendants' Article I, section 9, rights, the trial court erred in denying their motions to suppress the evidence obtained as a result of the unlawful search of their garbage.[10]

The decision of the Court of Appeals is reversed. The judgments of the circuit court are reversed, and the cases are remanded to the circuit court for further proceedings.

KISTLER, S. J., dissenting.

In this case, defendants put out their garbage for collection and disposal, as they ordinarily did. A garbage company employee, at the request of the police, picked up defendants' garbage bin separately and turned the closed bin over to the police, who opened and examined it. In an earlier case, *State v. Howard/Dawson*, 342 Or 635, 642-43, 157 P3d 1189 (2007), we recognized that "when a person gives up all rights to control the disposition of property, that person also gives up his or her privacy interest in the property in the same way that he or she would if the property had been abandoned." *Id.* at 642-43. In so holding, we did no more than extend our earlier decision in *State v. Purvis*, 249 Or 404, 438 P2d 1002 (1968). This court held that an examination of the defendants' garbage in both *Purvis* and *Howard/Dawson* did not violate any privacy interests

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that the police have used an agent does not necessarily translate into an invasion of privacy interests protected by Article I, section 9, or any other constitutional violation.

[10] The state conducted a search of the house after obtaining a warrant, but the probable cause for that warrant was dependent on the evidence that the police found in the warrantless search of defendants' garbage. Defendants also moved to suppress evidence obtained from the search of the house.

protected by Article I, section 9. Today, the majority overrules *Purvis*, and *Howard/Dawson* to the extent it relied on *Purvis*, and it adopts a position that is at odds with that of most courts across the country. I respectfully dissent.

Ordinarily, a person who gives up all possessory interests in property retains no privacy interest in it. The majority, however, seeks to avoid that established principle in one of two ways. First the majority focuses on the privacy interest that defendants had in their garbage *before* it was collected. *State v. Lien/Wilverding*, 364 Or 750, 766-67, ___ P3d ___ (2019). This case, however, involves the examination of garbage *after* it was collected—a quite different issue. On that issue, the majority does not appear to call into question or overrule *Howard/Dawson*'s holding that the lack of any possessory interest in property necessarily defeats a privacy interest in it. Second, the majority emphasizes that the garbage collector was acting as a police agent when he collected defendants' garbage. 364 Or at 780. In considering the latter point, the majority's reasoning conflates two questions that should be kept separate. The first is whether a private individual was acting as a government agent, which determines whether the restrictions of Article I, section 9, apply to a private individual's actions at all. The second question is whether the garbage collector's status as a police agent prevented defendants' possessory and ownership interests, along with any privacy interests, from being extinguished when their garbage was collected.

On the question of defendants' privacy interests in their curbside garbage, the majority travels from Portland to Salem by way of Maine. Largely absent from that analysis are this court's two prior cases on privacy interests in garbage, *Howard/Dawson* and *Purvis*, 249 Or at 411, and the concept of abandoned property, upon which both turned. Instead, the majority focuses on a right to privacy derived from the cluster of torts that are often referred to as invasion of privacy. 364 Or at 762. But that conception of privacy is inapposite to that protected by Article I, section 9.

We have recognized that

> "[f]our separate theories comprise the 'umbrella' tort referred to as invasion of privacy: (1) intrusion upon

> seclusion; (2) appropriation of another's name or likeness; (3) false light; and (4) publication of private facts."

Mauri v. Smith, 324 Or 476, 482, 929 P2d 307 (1996). The latter three theories speak to different interests than those protected by Article I, section 9. All concern publicity and disclosure—but whether something is a search under Article I, section 9, never depends on who the government tells about what it finds. And the torts of false light and publication of private facts provide protections regarding certain types of private or embarrassing *information,* yet "[t]he constitutional provisions against unreasonable searches and seizures do not protect a right to keep any information, no matter how hidden or 'private,' secret from the government." *State v. Campbell*, 306 Or 157, 166, 759 P2d 1040 (1988).

The tort of intrusion upon seclusion is focused more on private places than private information and thus applies in more conventional search contexts. *See Mauri*, 324 Or at 485; *McLain v. Boise Cascade Corp.*, 271 Or 549, 533 P2d 343 (1975). But if that tort started from similar premises, it has developed differently enough from our Article I, section 9, jurisprudence that it is not much help in articulating the latter. The tort requires intrusion into "private areas or concerns" and that

> "the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object."

Restatement (Second) of Torts § 652B comment d (1977). That suggests the adoption of a "reasonable expectation of privacy" standard—albeit a fairly stringent one. Yet we have expressly rejected using a reasonable expectation of privacy test to determine the privacy protected by Article I, section 9. As we explained in *Campbell*:

> "The phrase becomes a formula for expressing a conclusion rather than a starting point for analysis, masking the various substantive considerations that are the real bases on which Fourth Amendment searches are defined. *** Moreover, the privacy protected by Article I, section 9, is

> not the privacy that one reasonably *expects* but the privacy to which one has a *right*."

306 Or at 164. Although the reasonable expectation of privacy test remains popular in other jurisdictions, the grass looks no greener on the other side than it did at the time of *Campbell*.

In any event, intrusion upon seclusion case law is unlikely to be much aid. In *McLain*, 271 Or 549, this court held that trespassing onto the plaintiff's property in order to photograph him was not sufficient to make out a tort claim in part because the plaintiff had made a workers compensation claim and thereby "waive[d] his right of privacy to the extent of a reasonable investigation," *id.* at 555, the surveillance was "done in such an unobtrusive manner that plaintiff was not aware that he was being watched and filmed," *id.* at 556, and "there was no evidence of intent to harm, harass or annoy the plaintiff," *id.* at 557. As that reasoning highlights, our limited intrusion upon seclusion jurisprudence does not draw a distinction between the question of whether a search occurred and whether that search was reasonable—both are collapsed into a single step and analyzed in a balancing inquiry. Factors such as whether the plaintiff was aware that he was being watched and the intent of the individual performing the search, properly irrelevant in the Article I, section 9, context, are given substantial weight. In other words, it does not seem that we can learn much from our invasion of privacy law, unless we wish radically to rethink our Article I, section 9, jurisprudence.

Fortunately, the majority does not take that approach; its reliance on the privacy torts seems largely figurative.[1] But not much is left in its place. Some cursory testimony by witnesses in this case and a single newspaper article are taken to suggest social norms for the whole state. An analysis of whether defendants expected or expressly

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[1] If the question in this case were whether the police committed the tort of intrusion upon seclusion, it would surely be relevant that the examination of defendants' garbage was unobtrusive (indeed, that the police took steps to ensure that defendants would remain unaware of their involvement); that the police conducted the search to enforce the law, not to harass or to annoy; and that defendants no doubt invited some degree of scrutiny, and thereby waived their right to privacy, by engaging in the unlawful delivery of heroin.

authorized examination of their trash by law enforcement suffices to establish a legal norm against examination of trash by law enforcement. The decision is driven more by judicial intuition than precedent or objective indicia.

In any event, to the extent that the question in this case is whether there is a privacy interest in garbage placed for collection at the curb, which is the only question that the majority expressly answers, then that question could be resolved on much more straightforward grounds. We recognized in *Howard/Dawson* that, in this context, privacy interests are largely coextensive with ownership and possessory interests. As we held in that case, "when defendants turned the garbage over to the sanitation company without any restriction on its disposition, they effectively abandoned that property * * *." *Howard/Dawson*, 342 Or at 642. This case is decided on the assumption that defendants maintained possessory interests in their garbage until it was picked up by the garbage collector—as long as the garbage was still on the curb, it was not abandoned. 364 Or at ___. In *State v. Smith*, while not limiting searches to physical trespasses, this court held that "the privacy interests that are protected by Article I, section 9, commonly are circumscribed by the space in which they exist and, more particularly, by the barriers to public entry (physical and sensory) that define that private space." 327 Or at 373. Defendants' garbage was contained within a cart, and within that most of it was contained in opaque bags. Nor is there any other factor that would diminish that interest, such as the placement of that property in a communal or public place. The cart was either on or directly adjacent to defendants' property. Given that defendants held a possessory right to their garbage, that it was placed next to their property, and that any examination would require penetration of the "barriers to public entry" surrounding the garbage, I have no difficulty concluding that defendants possessed a privacy interest in the garbage that they placed at the curb.

Of course, that is not the question in this case. No search occurred while defendants' garbage was placed at the curb. Instead, the garbage was collected by Republic Services, which then turned the garbage over to the police,

who then opened the bin and bags. The appropriate question, therefore, is whether defendants retained a privacy interest in garbage once it was collected—that is, once they forever gave up any right to control its disposition. That is the question that we answered in the negative in *Howard/Dawson*. Defendants may have expected, however reasonably, that once their garbage was collected it would be quickly mixed with other garbage and taken forthwith to a landfill. But, as they completely and forever gave up control of that property, none of those expectations translated into the "privacy to which one has a *right*," *Campbell*, 306 Or at 164, protected by Article I, section 9.[2] *See Howard/Dawson*, 342 Or at 643. The garbage collection company, at that point the rightful owner of the garbage, could, at will, decline to mix it, unmix it, have its own employees comb it for contraband, or hand the garbage over to the police. Investing such totally abandoned property with constitutional privacy rights would amount to a restriction upon the new owner—a denial of his right to authorize searches by the state. It should not be doubted that that right is valuable to many. The ability to consent to a search can, in some contexts, be a tool to prove one's innocence. And individuals often have reasonable desires to use their property to help the police conduct investigations. Republic understandably may be opposed to the use of its collection system to hide evidence of drug activity.

To be sure, we have recognized, in two cases involving bailments, *State v. Barnthouse*, 360 Or 403, 380 P3d 952 (2016), and *State v. Sholedice/Smith*, 364 Or 146, 163, 431 P3d 386 (2018), *adh'd to as modified on recons*, 364 Or 575, 437 P3d 1142 (2019), that giving away immediate possession of an object does not trigger the loss of Article I, section 9, protections entirely. But in those cases, the defendants retained some possessory and ownership interests in the objects in question—defined by contractual rights that bound the bailee—and those retained interests were interfered with. In that regard, they are of a piece with *Howard/Dawson*'s holding that "the legal relationship between defendants and the sanitation company

[2] Assuming, that is, that the transfer is unconditional. It would be otherwise, of course, if defendants retained some right to control the disposition of their garbage. But they do not argue that they did and there is no evidence that they did.

effectively controls the question whether defendants retained a constitutionally protected privacy interest in the garbage." *Howard/Dawson*, 342 Or at 642. Overruling that holding, and expanding Article I, section 9, protections to abandoned property controlled without restriction by third parties, would raise complex questions of competing rights that the majority does not purport to resolve.

As a result, I do not understand the majority to take issue with the general proposition that once garbage is picked up, the garbage collection company, at that point the rightful owner of the garbage, can decline to mix it with other garbage, can gift it to the police, and can consent to any search of the contents. There would be no constitutional violation, that is, were police officers to approach the garbage collector, immediately after the trash was picked up but before it was mixed in with the rest, and at that point to conduct an examination of the garbage with the permission of its new owner.

That is where the second branch of the majority's analysis comes into play. The majority reasons that

> "common law agency principles now require us to view the police officers in *Howard/Dawson* as the principals who, through use of their agent, were vicariously responsible for segregating and procuring the contents of defendants' garbage bin for exposure to police search, thereby invading defendants' privacy rights without a warrant."

364 Or at ___. In effect, the majority concludes that our decision in *State v. Sines*, 359 Or 41, 379 P3d 502 (2016), requires the court to view this fact pattern as though the police themselves had collected defendants' garbage.

I agree that the garbage collector was acting as a police agent when he collected defendants' garbage, but I do not believe that that conclusion holds much significance for this case. The majority suggests that the garbage collector's status as a government agent turned his otherwise-permitted removal and transfer of defendants' trash into a search, but does not spell out how. The majority reasons that it cannot be said

> "that the police obtained the sanitation company's consent to go through defendants' garbage once the sanitation company, as usual, had picked it up with its mechanized garbage truck."

364 Or at ___. But most of that can and must be said—Republic did, as usual, pick up defendant's garbage, and then gave the police permission to search it. True, the collection was not accomplished through use of a mechanized ruck, but the majority offers no reason why that fact has constitutional significance. The majority does not contend that there is general constitutional privacy interest in the type of truck in which garbage is collected or in having one's garbage mixed. And Republic was not contractually obligated to mix defendants' garbage or to collect it in a specific type of vehicle. The record reveals that Republic used a large, mechanized truck for reasons of efficiency, not because that was how it agreed to provide collection services to its customers.[3]

The majority's point, as I understand it, is that the police officers' use of the garbage collector as an agent effectively negated defendants' agreement with the collector, at least for constitutional purposes. The majority errs by relying on *Sines* to reach that conclusion. In *Sines*, looking to common law agency principles, we set out a test governing when a private individual acts as a government agent, for the purpose of determining whether Article I, section 9, applies to the private actor's actions at all. *Id.* at 55. In *Sines*, that threshold question proved dispositive; we ultimately concluded that the private actor in question was not acting as a government agent, and consequently that none of her actions could implicate Article I, section 9. 359 Or at 62. Thus, *Sines* never considered the question of how the private actor's status as an agent would affect the subsequent analysis of whether her actions violated a possessory

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[3] In fact, the framework for the City of Lebanon's agreement with Republic appears to contemplate that Republic may collect garbage with a pickup truck:

> "If a franchisee uses a specially designed, motorized local collection vehicle for transporting solid waste * * * the container portion of such vehicle should be equipped with a cover, adequate to prevent scattering of the load. If any pickup truck or open bed truck is used by a franchisee, the load shall be covered with an adequate cover to prevent scattering of the load"

See Lebanon Municipal Code § 8.16.070.

or privacy interest and thereby constituted a seizure or a search.[4]

Sines therefore offers no reason to conclude that the garbage collector's status as a government agent should affect the analysis of whether his actions interfered with defendants' possessory or privacy interests. There can be no dispute that if the garbage collector had not been acting as a government agent, he would have violated no possessory or ownership interest in collecting defendants' garbage. And, once he did so, any possessory, ownership, or privacy interests that defendants once had in their garbage were abandoned. The majority suggests, though, that the garbage collector's status as a police agent made the fact that defendants had left their property to him irrelevant to the evaluation of whether defendants' possessory or privacy interests were violated. More important, the majority suggests, is the fact that the police would have committed a seizure had they taken the garbage directly. 364 Or at ___. The common law agency principles that this court relied upon in *Sines* do not point in that direction. If the garbage collector *had* violated any possessory or privacy interest of defendants, while acting as a police agent, then that violation would appropriately be attributed to the state. But here, the state's agent obtained defendants' trash *without* any violation of possessory or privacy interests (or fraud, or trespass, or damages caused, or any other illegality) so there is no wrong to attribute to the state. Put another way, an agent does not forfeit her own rights merely because she acts on behalf of a principal. Many agency relationships arise precisely because the agent can do something that the principal cannot—and that the principal may be legally prohibited from doing. A lawyer is not forbidden from practicing law because his client is not a member of the bar; a trucker is not prohibited from driving a

[4] In *Tucker*, we held that a tow truck driver acted as a government agent when he looked through the defendant's car (which was lawfully in his possession) at the request of a state trooper. *State v. Tucker*, 330 Or 85, 90, 997 P2d 182 (2000). We subsequently held that the state had not met "its burden of proving the validity of a warrantless search." *Id.* at 91. In that case, though, the state did not argue that the tow truck driver was permitted to search the interior of defendant's car, so we did not weigh in on that issue.

semi-trailer because her employer lacks a commercial driver's license.

Establishing that an agent is bound by her own limitations, not her principal's, is a long way from holding that the state can use private agents to evade the strictures of Article I, section 9. As in all cases, the appropriate course is to examine whether the agent's actions violated a privacy or possessory interest. In general, that will not occur if the agent takes property or accesses places in a manner that the suspect has authorized, but typically will occur if the scope of that permission is exceeded.

> "A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials; * * *."

Lewis v. United States, 385 US 206, 211, 87 S Ct 424, 17 L Ed 2d 312 (1966). Similarly, a maid may enter a hotel room and perform her ordinary cleaning tasks without violating any privacy or possessory interests, even if she does so at the behest of the police, but "[i]f the officer had requested the maids to search for a cigarette without regard to whether it would be removed in the usual course of cleaning the room, a different problem would be presented." *Purvis*, 249 Or at 408.[5] And to hold that Republic violated no possessory or privacy interests by collecting defendants' garbage at the usual time, in compliance with its agreement with defendants, would not suggest that Republic could disregard that agreement at the government's behest without committing a seizure.

That approach is in harmony with our recent decisions in *State v. Sholedice/Smith* and in *Barnthouse*. In those cases, we examined situations where the defendants mailed packages using the United States Postal Service, and evaluated whether various actions by postal inspectors—

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[5] I read *Purvis* to have announced essentially the rule that I would analyze this case under. The majority reads *Purvis* to have rejected the argument that the maids were acting as agents altogether.

who were government employees—constituted seizures. We answered those questions by examining the scope of the defendants' possessory rights with respect to the packages, and whether the inspectors took actions inconsistent with those rights. *See Sholedice/Smith*, 364 Or at 160-61; *Barnthouse*, 360 Or at 416-19. In doing so, we necessarily recognized that the postal inspectors had special privileges, including possessory rights, with respect to those packages. For example, in *Sholedice/Smith* we noted that, under the terms of the bailment as articulated in the Domestic Mail Manual, the postal service's authority to possess the package—while not unlimited—included the right to move the package out of the mail hamper for a quick screening. 364 Or at 160-61. Thus, when analyzing fact patterns involving actual government actors—not merely private individuals acting as government agents—we have taken into account the authorizations and privileges held by those actors when evaluating whether the defendants' possessory rights were violated.

Put simply, *Sholedice/Smith* and *Barnthouse* teach that a state actor does not violate Article I, section 9, if it acts within the course and scope of its authority in dealing with another's property. That being so, it is difficult to see why we should not take the same course in evaluating whether actions by private actors acting as government agents constitute searches or seizures. There is no clear reason why the analysis of a fact pattern involving a package shipped through FedEx should be very different from one involving the United States Postal Service. To be sure, in any case involving private mail carriers we would first need to answer whether the employees in question were acting as government agents. But, assuming that they were, and that Article I, section 9, applied at all, we should then, as with USPS, examine whether the private carrier's actions violated any of the defendant's possessory or privacy rights, by looking at the term of the contract and other social expectations. In this case, Republic did nothing different than it was authorized to do when it collected defendants' trash and, having collected it, divested defendants of their possessory and privacy interests in their garbage.

Government interference with private contractual arrangements may raise concerns of encroaching state power in ways that the government's direct operation of a postal service may not. But our ordinary approach to determining whether a search or seizure occurred, examining the privacy rights and possessory interests involved and whether they were violated, handily deals with that concern, because we have recognized the centrality of contractual rights to both of those inquiries. *Howard/Dawson*, 342 Or at 640-42. For that reason, actual violations of contractual rights at the government's behest will generally constitute searches or seizures. It is overly prophylactic, however, to hold unconstitutional all government involvement in private contractual arrangements, even where no actual interference occurs.

Still, this is not a question that lends itself to absolutes in either direction. The fact that a private person is acting as a government agent, and is therefore acting according to a different set of motives, will in some circumstances be relevant to the analysis of whether a possessory or privacy interest was violated. But whether and when that action is a violation depends, as usual, on the nature of the privacy or possessory interest at issue. For example, a government mail carrier may be permitted to open and to inspect packages for some purposes, such as the safety of the carrier's employees, but not for the purposes of criminal investigation. In such cases, the purpose of the search would matter a great deal to whether a possessory or privacy interest was invaded. *See Sholedice/Smith*, 364 Or 146, 159 (recognizing such a distinction); *United States v. Souza*, 223 F3d 1197, 1202 (10th Cir 2000) ("While companies such as UPS have legitimate reasons to search packages independent of any motivation to assist police, * * * there is no evidence that in this instance Denning had a legitimate, independent motivation to open the package, despite her practice of randomly opening packages on other occasions").[6] Further, private

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[6] Such a distinction was also recognized in *Corngold v. United States*, 367 F2d 1, 5 (9th Cir 1966), in the context of a search by an airline entrusted with a package:

> "It would be difficult to justify any conclusion other than that the TWA employee participated in the search solely to serve the purposes of the government. No doubt both the customs agents and the TWA transportation agent relied upon the inspection clause in TWA's tariff and the act of TWA's

parties in certain roles linked to privacy or confidentiality, such as lawyers and doctors, probably would commit violations of privacy or possessory interests merely by performing their usual tasks while secretly acting as an agent of the police. Professional standards and privacy laws may be pertinent in determining when it would violate the constitution for the government to invade those relationships.

But most contractual relationships are not of that sort, and in the majority of cases it will be appropriate to recognize the necessary limitations on one's privacy and possessory interests that come with allowing another person to have access to one's possessions or space. In many cases, including this one, the possessory and privacy interests at issue will not be interfered with by the fact that the actor involved is also working for the police—defendants can point to no respect in which Republic failed to comply with its agreement with them, and they do not argue that they ordinarily retain any rights at all in their garbage after it is collected. It should not be overlooked that this case involves garbage—items characterized by the fact that defendants wanted Republic to take them away permanently. Most possessory and ownership interests are more robust.

How these agency questions are approached will have significance beyond this case. Use of agents to gather information that a police officer could not obtain directly is routine. One common example is a controlled drug buy, where an officer furthers an investigation by recruiting a confidential informant and directing that informant to purchase drugs from a suspected drug dealer. Quite often, that practice involves selecting a prior customer of the dealer as an informant—that prior customer, unlike the officer, may be known to or trusted by the dealer and may therefore be able to obtain an invitation into the dealer's house, or another private space, necessary to complete the transaction.[7] In

agent in cutting open the outside package to furnish technical legal justification for the search. But as we have noted, the TWA employee himself testified that he opened appellant's package only because the government agents asked him to, and there is nothing else in the record which would indicate that the package was in fact opened for any purpose of the carrier * * *."

[7] Cases with that fact pattern—where the informant is a prior customer and the drug transaction takes place in the dealer's residence or another building not open to the general public—are common, although the resulting controlled buy

Lewis, the Supreme Court held that "[a] government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant," 385 US at 211, a statement that we endorsed in *State v. Leppanen*, 253 Or 51, 53, 453 P2d 172 (1969). "You have to tell me if you're a cop" is the demand of a criminal about to slip up, not a principle of constitutional law. Yet if a garbage collector's status as a police agent invalidated defendants' unrestricted transfer of their garbage to the garbage collector, it remains to be seen how controlled buys, and other appropriate uses of police agents, can be distinguished.

With respect to garbage—and any other property that an individual has asked a third party to take away forever without imposing conditions on its use—our constitution's protections will, appropriately, be at a low ebb. For reasons both logical and practical, that conclusion will be difficult to escape, regardless of how this court approaches the government's use of private agents. The majority's approach, however, raises more questions than it answers, both about the nature of privacy interests involved and the implications of an individual's status as a government agent. I fear that this case's most significant consequences will lie elsewhere, in cases involving third-party consent, confidential informants, or cooperating witnesses. As to this case, in the final analysis it is no different from *Howard/Dawson*. Defendants' garbage was collected as usual, by the company that defendants had authorized to take it, in full compliance with the procedures that they were entitled to expect. Once the garbage had been so collected, defendants gave up any privacy rights that they had. No interest of defendants' was substantially interfered with, so no search or seizure occurred. Therefore, the subsequent examination of the garbage by the police officers did not violate Article I, section 9. I respectfully dissent.

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has not always been held sufficient on its own to support a subsequent search warrant. *See, e.g.*, *State v. Spicer*, 254 Or 68, 69-70, 456 P2d 965 (1969); *State v. Van Osdol*, 290 Or App 902, 904, 417 P3d 488 (2018); *State v. Marsing*, 244 Or App 556, 560-61, 260 P3d 739 (2011); *State v. Chase*, 219 Or App 387, 389-90, 182 P3d 274 (2008); *State v. Wilson/Helms*, 83 Or App 616, 622, 733 P2d 54 (1987).